Introduction to Criminal Law

Sources and Aspects of Law

Schmalleger
Reiman

Introduction

Start with *mea culpa*: I certainly am no expert here and would appreciate any one with experience to sound out. (The opposite of the teacup – collective intelligence.)

Laws form the basis for crime. An act is not criminal if there is not a law prohibiting it. For example, did you know that using marijuana, cocaine, and opiates (heroin) was not illegal prior to 1914? Did you know that while it remains illegal in most states, marijuana is now legal for recreational use in some states? Did you know that using alcohol was illegal during “prohibition” (from 1920 to 1933)? You all certainly know that it is not illegal now. Using kawa or awa is not currently illegal, but may be one day. What makes something illegal is a law that prohibits it.

In this lecture, we will look at some of the basics of law (focusing upon criminal law) and then critically examine the whole concept of “crime.”

**Laws are a fundamental part of society**

Having laws [and being able to enforce them] has been credited with creating order in modern societies. Certainly, all societies have rules (be they formal or informal) and consequences for breaking them. The law is really an extension of that idea, albeit in formal and institutional form. In fact, despite some popular myths to the contrary, our “free market” economic system is absolutely
based upon the government being able to enforce laws. (This refers primarily to civil, rather than criminal, law.)

“Laws regulate relationships between people and parties (businesses, government agencies etc)” (Schmalleger, 2001: 119). Laws are generally written down and formed by legislative mandates, but not always. Some are written down, but others are interpreted from existing laws or past judicial decisions.

Laws are socially constructed! Legislative statutes are formed by a bunch of people, not necessarily smarter than you and I, getting together in a room and deciding that that something is legal or illegal. Judges, who are human beings not necessarily smarter than you and I, also interpret laws. So the creation of law is absolutely a social process.

A Few Types of Law

Statutory law

Statutory law is “written or codified law; the “law on the books, “ as enacted by a government body or agency having the power to make laws” (Schmalleger, 2001: 119).

Case law=

This is the body of law that has been created, over time, by judges interpreting statutory laws. Recall that in the US system, the legislative branch (Congress) writes the laws and the judicial branch (courts) interprets them and/or decides whether they are consistent with ideals in the US Constitution.

Case law is “The body of judicial precedent, historically built upon legal reasoning and past interpretations of statutory laws, that serves as a guide to decision making, especially in the courts” (Schmalleger, 2001: 119 sidebar). For example, the US Constitution bans “cruel and unusual” punishment. The courts have had to decide whether the death penalty is “cruel and unusual,” and
have done so differently over time. The Supreme Court eventually ruled in the 1950’s and 1960’s that the Jim Crow “separate but equal” laws popular in the South after the Civil War were unconstitutional. For example, in the mid 1950’s the Supreme Court ruled that having separate school systems for black and white children was not consistent with the ideals of the US Constitution. Therefore, since this decision (I believe it was Brown v. Board of Education in 1954), all judges in the US have had to “strike down” any similar laws. So many lawyers have successfully argued that separate but equal” public policies are unconstitutional as they are consistent with the legal reasoning contained in the Brown v. Board of Education Supreme Court decision.

The Development of American Law

Certainly our law is the result of historical evolution from earlier versions of law in Western Europe. There are a few historical documents worth mentioning:

**Code of Hammurabi**

This is one of the earliest known written forms of laws in the West. King Hammurabi who ruled the ancient city of Babylon around 1700 BC had some laws on stone tablets that regulated property rights, and other behaviors. However, it is thought that one of the Code’s primary purposes was to keep Babylon as a center of commerce. In our terms it is important because it made punishments for crimes regular or consistent and predictable

**Roman Law**

Roman law also came from some stone tables “the twelve tables” and regulated family, religious, and economic life. The main improvement here was that they distinguished between public and private law. Public laws related to the Roman State and private law related to business, property (including humans!), etc. It is said that these are the foundations of civil law.
Common Law

Common laws came from England. Common law refers to laws that come from tradition rather than written statutes. These common laws developed from a series of unwritten judicial precedents developed by English courts. “based upon non-statutory customs, traditions, and precedents that help guide judicial decision making” (Schmalleger, 2001: 120 sidebar). Eventually these sets of rules became sort of a set of national laws. Previously, many of these crimes were private rather than public disputes.

While common law has largely been replaced by statutory [or written law], common law still plays a part in judicial interpretation.

The Magna Carta

Literally “the great charter” it is said to be the foundation of many of our present liberties. When it was written it was primarily a statement of concessions from a King to British Barons, it was later interpreted by a judge to guarantee all Brits certain basic liberties. Sort of like the Bill of Rights. It also provided a provision that unjust laws passed by legislatures could be made void [some say it it's the basis of our Supreme Court]. It also provided prohibitions of prosecution with out just cause, which has been said to be the foundation of the “due process” tradition.

The US Constitution

The Constitution is the foundation of all law in the US. It is the “final authority in all questions pertaining to the rights of individuals, the power of the federal government and the states to create laws and prosecute offenders, and the limits of punishments which can be imposed for law violations. Although the Constitution does not itself contain many specific prohibition on behavior, it is the final authority in deciding whether new and existing laws are acceptable according to the ideals upon which our country was founded” (Schmalleger, 2001: 121).

Natural Law

The idea that criminal laws are based upon unassailable, absolute moral principles that are said to be a part of the “natural order” of things [thus the name]. For example, it is simply wrong to steal something that is not yours and everyone knows that. These laws are said, “to be knowable via some form of revelation, intuition, reason, or prophecy”(Schmalleger, 2001: 122). As one might imagine, natural law is tremendously intertwined with religious concepts (institutionalized and other).
Mala in Se and Mala Prohibita

*Mala in Se* is the idea that some things are simply wrong in and of themselves – they are crimes against humanity if you will – such as murder, rape, assault and some forms of sexual “deviance.” These form “natural law” violations. Violations that are wrongs only because there is a law against them are termed *Mala prohibita*. These might include "moral offenses" such as prostitution, gambling, illicit drug use, etc. Making this distinction played a big part in the sentences handed out under English common law.

The “Rule of Law”

This concept is credited with providing social, economic, and political stability to a country. The idea is that “an orderly society must be governed by a set of established principles and known codes, which are applied uniformly and fairly to all of its members” (Schmalleger, 2001: sidebar 123). Central to the Rule of Law is the idea that “no one is above the law.”

The Rule of Law is important for many things, but especially a stable, sustainable, business environment. For example, you may have heard about Chinese and Russian rich people buying real estate in London, Canada and driving up home prices and real estate. In Vancouver on the West Coast of Canada, real estate prices have gone crazy whack job expensive. So one of the primary reasons for this is these rich people do not trust their government if they had their money is liquid investments like a bank, stocks, bonds, etc. Their autocratic governments could literally just take their money away. So they buy real estate for a cool vacation home and also because a house is an “illiquid asset” which means it is not something their government can take away from them. Why? Because the US and Canada and England have strong “rule of law” and the courts would not allow it. Conversely, that is why “Western” businesses are reluctant to invest in places like Russia. They do not trust that business is run by a set of laws and know that the law can always be overridden by the whims of the politically powerful.
In this course we will focus on criminal law, but it is good to know just a little bit about the other types of law. Sometimes, we confuse them or think there is only one kind. First we will look at some of the “non-criminal” types of law, then criminal law, then some of the areas of the law that are applicable to all types of law.

**Criminal Law**

“The branch of modern law which concerns itself with offenses committed against society, its members, their property, and the social order” (Schmalleger, 2001: 127 sidebar).

One of the main ideas here is that criminal acts do not just injure or hurt the victim – they are “fabric of society.” As such the state, not the individual victim becomes the plaintiff (prosecutor). There are punishments to express society’s displeasure with offensive behavior and to hold the perpetrator accountable (Schmalleger, 2001).

**Substantive Criminal Law**

This is the part of written criminal law that describes the exact behavior that is a crime and the punishment for it.

**Procedural Criminal Law**

This is the body of rules that regulate the processing of a defendant through the criminal justice system. This is really the “rules of engagement” for the adjudication of an offense all the way through the criminal justice system from policing to sentencing – including appeals. Miranda Rights are an example of procedural rules for making a legal arrest. There are also many rules for conducting a criminal court trial.
Civil Law

These are laws that deal with disputes between private parties [and thus are not “crimes against society”]. Some times called tort law because a civil violation is called a tort, which is not a criminal act. The parties can be persons, businesses, government agencies, and other organizations. Civil suits typically seek monetary damages or some other form of compensation instead of punishment. They are not interested in “intent” but rather “liability.” This is how OJ got off on the murder charge, yet had to pay civil damages for a “wrongful death” to the family of Nicole.

Administrative Law

These are the laws that are designed to administer the activities of industry, business, and individuals. Tax laws, health codes, pollution laws, vehicle registration, etc...

Case Law (can be related to all types of law)

This is the type of law that is the study of judicial precedent. This is a body of wisdom built upon past judicial interpretations of statutory (written down) law. This body of law serves as a guide for judicial decision-making.

Stare Decisis

This is one of the most important aspects of our legal system. Stare Decisis which literally means “standing by decided matters” (Schmalleger, 2001: 133 sidebar) is the notion that courts must be consistent with their past decisions and those of higher courts over time. This is what creates consistency or predictability in the law.

Horizontal and Vertical Stare Decisis

There are two ideas here: one is that courts on one level must be bound by their own decisions of the past (horizontal) and that there must be agreement down the hierarchy of the court system. For example, everything is under the authority of the Supreme Court.

An Inherent Conflict Between the Legal System and the Social Sciences

Stare Decisis actually creates a conflict between the social sciences and the legal system. In the legal system they are bound by tradition, by authority, by the past. There is resistance to change in
this sense. The actors of the legal system must think and argue within a body of already decided matters. How do you fit your argument within what has already occurred. Social scientists however, are encouraged to do the opposite -- to be creative outside of the box, to think of things that have never been “invented” - to press the envelope if you will. This is one of the reasons why it is difficult to integrate the social science and the legal system. It is an inherent conflict. Actors in each system are rewarded for different things. (Taken from Craig Haney, Ph.D. J.D. UCSC)

QUESTION: The tobacco companies were sued under civil law for hiding the fact that cigarettes were addictive. When Ford Pinto’s had a faulty gas tank that exploded and the company made a conscious business decision to pay for the lawsuits instead of spending more money for a recall, they were sued under civil law. They harmed many many people in this sense but how come these are not “crimes against society?” This is a very good example of how the conflict perspective is “true” in some cases.

Listen to slide where I explain how stare decisis of Rice v. Cayetano affected Kamehameha Schools admission process.

Types of Criminal Violations

Recall the concepts of *mala in se* and *mala prohibita* from English Common Law. You will see how these are somewhat related to the idea of felonies and misdemeanors.
**Offense**

This is the least serious type of offense. It is generally called a *ticketable* offense or an *infraction*. People are typically released with the promise to appear in court. Court appearances can be waived with the payment of a small fine. Traffic violations, jay walking, spitting on the sidewalk are good examples of this type of “crime.”

**Misdemeanor**

These are relatively minor criminal offenses that cannot result in arrest, unless the police officer catches the person in the act. [An arrest warrant can result in a subsequent arrest.] Examples would be petty theft, simple assault, disturbing the peace, possession of small amounts of marijuana in some states, drinking under age, etc. The maximum punishment is usually less than 6 months or a year in a local jail and many times can be dealt with via fines, community service, or probation. Generally, the maximum penalty for a misdemeanor is up to one year in a local jail, but not state prison.

**Felony**

Felonies are serious crimes that are punishable with prison time, generally for more than a year [a long term facility]. Felonies in one jurisdiction can be misdemeanors in others, but most of the “major” ones are consistent: rape, murder, robbery, arson, aggravated assault, etc. So generally speaking, a felony is the most serious type of criminal offense and it carries the punishment of at least one year in a state prison. Of course, being convicted of a felony does not automatically mean that one will spend at least a year in prison. Many first time felons are put on probation.

**Treason**

Treason is generally defined as conspiring or attempting to injure, make war against, or overthrow a government. The death penalty is applicable for some crimes in some countries. *Espionage* is the gathering or transmitting information that is vital to a countries national defense. This is sort of like trading or collecting state secrets to enemies.

**Inchoate Offense**

These are offenses that are not yet carried out or incomplete. Think of the mafia conspiracy type of crimes or conspiracy to commit murder.
Let us assume there is a criminal law prohibiting some sort of behavior. In the legalistic sense, a “crime” requires a few things to happen. In the most instances there needs to be an illegal act committed by a person that knew they were doing something wrong (a culpable mental state). To provide a very simplistic example, we all know it is wrong to hit someone with a stick and hurt them badly and if you and I did this we might be put in jail. However, if a two-year-old child hits someone with a stick and hurt him or her badly, we might say the kid cannot comprehend the “wrongness” of his or her action. So, very simplistically, we need someone to do something wrong and know it was wrong while they were doing it.

**Actus Reus: “A Guilty Act”**

For a crime to have been committed there needs to be a “guilty act” completed by a person. So someone must have been beat up, or a car must have been stolen, or a person must have been killed. Threatening an act can also be a crime and so can attempting a criminal act. Perhaps you’ve heard of “terroristic threatening” or “attempted murder.”

**Mens Rea: “A Guilty Mind”**

This refers to the mental state of the person at the time the criminal act was completed. The most serious is the intentional completion of a criminal act. For example, Murder in the First Degree requires both actus reus and premeditation. Mens rea is not the same thing as a motive. A motive is a person’s reason for committing a crime. Mens rea is generally inferred from the actions and circumstances surrounding the criminal event. It is quite complex and not simplistic. There are four levels, but we do not need to cover them for an Introduction to Criminology course.

**Purposeful or Intentional**

This is the most obvious. You kill someone and you meant to do it.
Knowing

“Knowing behavior is action undertaking with awareness” (Schmalleger, 2001: 137). If you drive the get a way car. The book says is an airline pilot allows a flight attendant to carry cocaine in return for sexual favors. The example of the guy in Duster (1997) who drove the guy across town to buy cocaine for $5 in gas money.

Reckless

Reckless behavior is an “activity which increases the risk of harm” (Schmalleger, 2001: 137). Schmalleger gives the example of driving a car in such a way that increases the risk of harm. Reckless driving. Reckless endangerment [what is that?]

Negligent

Criminal negligence is the notion that “you should have known better.” It is used when a crime is committed even though it was not intended. Negligence only occurs when the standard of care falls below that of a “reasonable person.” Can the class think of some examples?

Strict Liability and Mens Rea

Some offenses have “strict liability” and do not require mens rea. The idea is that some offenses cause harm regardless of your state of mind. Statutory rape and traffic offenses are good examples.

Concurrence

The concurrence of an unlawful act and a culpable mental state: required for a criminal act to have taken place. Gives the example of a person driving over to someone’s house to murder him and then accidentally runs him over in the street along the way. A murder has not taken place because the two don’t occur together at the same time.

A Critical Examination of Criminal Law

In their classic piece, Sutherland and Cressey define criminal law,
Criminal behavior is behavior in violation of criminal law. No matter what the degree of immorality, reprehensibility, or indecency of an act, it is not a crime unless it is prohibited by the criminal law. The criminal law, in turn, is defined conventionally as a body of specific rules regarding human conduct which have been promulgated by political authority, which apply uniformly to all members of the classes to which the rules refer, and which are enforced by punishment administered by the state. The characteristics which distinguish the body of rules regarding human conduct from other rules are, therefore, politicality, specificity, uniformity, and penal sanction. However, these are characteristics of an ideal, completely rational system of criminal law; in practice the differences between the criminal law and other bodies of rules for human conduct are not clear-cut. Also, the ideal characteristics of the criminal law are only rarely features of the criminal law in action. [Sutherland, 1999 #75: 11]

So Sutherland and Cressey define the criminal law, but wisely suggest that the law does not always live up to its ideals. Also, the written law is only one part of the law in action. The law must be enforced and interpreted by human actors in the system. For example, many laws “are never enforced; some are enforced only on rare occasions; others are enforced with a striking disregard for uniformity. Enforcement and administration agencies are affected by shifts in public opinion, budget allocations, and in power. As a consequence, the law often changes while the statutes remain constant [Sutherland, 1999 #75:11].

Anyone who does not believe that the criminal law is different in practice than in theory need only consider the following examples: Many states have laws prohibiting various sexual behaviors such as homosexuality, oral sex, and sodomy. There is an unwritten convention that police officers do not give other police officers traffic tickets. Hawaii has laws against chicken fights that are only sporadically enforced.

Reiman’s More Critical View

In “A Crime by Any Other Name…” Jeffrey Reiman uses a combines critical criminology and labeling theory (from my theoretical lens) to demonstrate that our definitions of “crime” are socially constructed and this social process is influenced by social power. I think his basic premise is unassailable. His initial paragraph(s) is a bit too dramatic, but informative,
He then provides evidence that industrial deaths, even those that could have and should have been prevented, do not receive nearly the attention nor the punishment that a street murder does. He asks, “Why not?” as one was clearly preventable and yet the company was negligent. One is characterized as an “accident” or “tragedy” and the other “mass murder.” The company is fined, and someone might serve a small amount of time, but no one is tried for murder. Why not?

**Question:** get into groups and discuss this premise. Can you think of any other examples? Do you agree with Reiman? Why or why not? I can think of the stock swindle or other white-collar crime that costs our society far more than does street crime, yet we do not treat these the same. Recall the Ford Pinto example. One is deviant or “evil” and the other was basically a good person who just got a bit greedy – we can all understand that person right? S/he’s not a criminal right? We don’t have many theories that attempt to explain white-collar crime now do we?

**The Carnival Mirror**

What does Reiman mean to communicate by his carnival mirror analogy?

He takes exemption to the idea that the criminal justice system does not create crime but merely mirrors society. He states that the power of the state and the criminal justice system to define and then enforce criminal acts legitimizes the view that the things we label and punish as criminal are in fact the greatest dangers and threatens our society faces. Objectively this is not true – see the white-collar crime for money and the industrial accident thing for death and maiming examples.
The criminal justice system also creates our view of the “typical criminal.” He (and it is a he) is poor, young, urban, and disproportionately black. The statistics on this are clear – imprisonment rates, arrest rates, etc all show this. However, what we sometimes forget is the fact that we create the

typical criminal by the real decisions made by human actors.

The reality of crime as the target of our criminal justice system and as perceived by the general populace is not a simple objective threat to which the system reacts: It is a reality that takes shape as it is filtered through a series of human decisions running the full gamut of the criminal justice system – from the lawmakers who determine what behavior shall be in the province of criminal justice to the law enforcers who decide which individuals will be brought within that province.

Note that by emphasizing the role of “human decisions,” I do not mean to suggest that the reality of crime is voluntarily and intentionally “created by individual decision makers”…In other words, these decisions are a part of the social phenomena to be explained – they are not the explanation [Reiman, 1999 #76: 28, italics in original].

The picture we see of crime is distorted as we come to believe that the crimes that our criminal justice system handles are the greatest threat we face, when this is not objectively true. We get a distorted

The acts of the Typical Criminal are not the only acts that endanger us, nor are they the acts that endanger us the most. As I shall show in this chapter, we have as great or sometimes even greater chance of being killed or disabled by an occupational injury or disease, by unnecessary surgery, or by shoddy emergency medical services than by my aggravated assault or even homicide! Yet even though these threats to our well-being are graver than that posed by our poor young criminals, they do not show up in the FBI’s Index of serious crimes. The individuals responsible for them do not turn up in arrests records or prison statistics. They never become part of the reality reflected in the criminal justice mirror, although the danger they pose is at least as great and often greater than the danger posed by those who do!

Similarly, the general public loses more by far … from price-fixing and monopolistic practices and from consumer deception and embezzlement than from all the property crime in the FBI’s Index combined [Reiman, 1999 #76: 29, italics in original].

view of our greatest threats,

He goes on to say that these sorts of acts are rarely criminalized and or prosecuted and they rarely show up in our official picture of crime. “The inescapable conclusion is that criminal justice system does not simply reflect the reality of crime; it has a hand in creating the reality we see” [Reiman, 1999 #76:29, italics in original]. He states that, because of this distorted mirror, we are led to believe that the criminal justice system is protecting us from the gravest dangers we face, when it really only protects against some and those are not necessarily that gravest ones at that!
Well what do you think about his proposal? Do we see a distorted picture of crime for these reasons? Is he right? Wrong? Partially right or wrong? How?

He attempts to explain why this situation can happen and says we only view “crime” as a one-on-one direct act – and this is in great part perpetuated by the news and crime show dramas. Any indirect harms we face, no matter how intentional or negligent, are not viewed as criminal. Great quote about the different ways we view the mine owner in the left hand column of page 31. Because of this leaves us unprotected against much greater danger to our lives and well-being than those threatened by the Typical Criminal…

We are left with the conclusion that there is no moral basis for treating one-on-one harm as criminal and indirect harm as merely a regulatory affair [Reiman, 1999 #76: 31].

we accept as legitimate a criminal justice system that

“There is no moral basis” is a strong statement! What do you think of that? He says that our vision of crime, our definitions of it, systematically exclude those harmful and dangerous acts of the well to do.