Introduction to Criminal Law

Sources and Aspects of Law

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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 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 sidebar).

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’s the basis of our Supreme Court]. It also provided prohibitions of prosecution without 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.”

Types of Law

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.

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 country’s 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.

Features of Criminal Offenses (Crimes)

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.