

Introduction to Criminal Law



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Criminal Law

Although there is no commonly accepted definition of law, it is possible to identify probably the two primary features of American criminal law. Firstly, the respected English philosopher H. L. A. Hart once observed, “The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but are in some sense obligatory.”¹ Secondly, as Henry M. Hart famously noted,² convicted persons are formally branded as deserving of societal contempt. The consequences of being stigmatized as an “ex-con” often last a lifetime. This stigma works best when the public agrees with and strongly supports laws which declare specified conduct as criminal. This is certainly the case with laws that punish those who harm others such as murderers, rapists, robbers, and sexual predators. But the stigma can backfire if government attaches the criminal label to conduct prohibited by laws that are widely viewed as unjust. Martin Luther King, Rosa Parks, Representative John Lewis, and countless others were arrested during the 1950s and 1960s for protesting racial segregation in this country. Certainly no ex-con stigma has attached to these civil rights heroes in part because of the “justness” of their cause, but also because they responded non-violently to even brutal attacks by the “law enforcers.”³

Sometimes it has been politically advantageous to be arrested. During the week of Thanksgiving in 1984, some three dozen people participated in well-choreographed and orchestrated “celebrity arrests of the day” for illegally protesting against apartheid outside the South African Embassy in Washington, D.C. Some of those arrested were politicians who found it helpful in their campaigns to be able to claim that their misdemeanor convictions proved the depth of their commitment to changing the South African government’s racist policies.

Approximately 14 states have concluded (to varying degrees) that criminalizing the possession of small amounts of marijuana is not good public policy and have reclassified such possession as a civil rather than a criminal offense. The significance of this decriminalization is that it makes offenders only subject to a civil fine and eliminates the risk of imprisonment and a criminal record, at least for a first offense. States have great flexibility in defining what conduct to criminalize so long as those decisions conform to basic state and federal constitutional requirements.



Lawmaking in America

The process of deciding what conduct is criminalized and which governmental apparatus is responsible for enacting criminal laws in America is heavily influenced

by structural and cultural considerations that require special attention in an introductory criminal law course.

One of the most important structural influences on lawmaking was the founder's decision that the country would feature the federal form of government. The most important cultural influence on American lawmaking was the acceptance in most of the country of the **common law** tradition. For some, the following discussion will simply be a review of topics that have been previously mastered. For others, it will introduce important concepts that are essential to an understanding of substantive criminal law.



The Federal Form of Government

The decision that this country would have a federal form of government was pivotal to our future. Under **federalism**, governmental power is disbursed and not concentrated in one all-powerful national government. The national and state governments are sovereign and complete with executive, legislative, and judicial branches. In the United States, some power is delegated to the national government, but in theory the remaining power is either retained by the states or by the people. The founder's decision to adopt federalism was certainly influenced by the serious problems encountered between 1781 and 1788 when our country experimented with the Articles of Confederation. The confederation model featured an extremely weak national government and powerful states that wouldn't collaborate with one another and often refused to comply with treaties negotiated by the national government. Some of the biggest problems confronting the national government under the Articles were its inability to regulate commerce, impose and collect taxes, enact national laws, and operate national courts. These failures were the catalyst for replacing the Articles with a new constitution.

The Police Power of the States

It is important to remember at the outset of this discussion that the original colonies (which became American states in 1781 upon adoption of the Articles of Confederation) were fully functioning governmental units under the British monarchs prior to the Revolutionary War and sovereign governments prior to the ratification of our Constitution in 1788. Among the most important powers exercised by the original colonies was what is called the **police power**. This term refers to the right of the sovereign states to exercise broad legislative powers for the purpose of protecting the public health, safety, welfare, and morals. The original colonies never relinquished the police power to the national government and thus

retained the right to continue exercising this power after the colonies became states.⁴ That is why each of the state governments today has the constitutional right to enact and enforce criminal laws (subject to limitations contained in the U.S. Constitution).

The Source of the Federal Government's Lawmaking Power

The sole source of the national government's powers is the U.S. Constitution. The Constitution expressly grants specific legislative powers to the federal government in **Article I, Section 8** of the Constitution (as supplemented by the 13th, 14th, 15th, 23rd, 24th, and 26th Amendments).⁵ When Congress wants to enact a criminal statute based on an implicit grant of power (i.e., a power not expressly authorized in Article 1) it often seeks shelter in the Constitution's Commerce and Necessary and Proper Clauses (see Article I, Section 8, Clauses 3 and 18). Congress first claims that the statute it has created is necessary to remedy some specified problem. It then claims that the problem identified is substantially harmful to interstate commerce. A good example of this scenario is a famous 1964 case, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). In that case, Congress wanted to stamp out racial discrimination in public accommodations in this country. It included a provision to that affect in the Civil Rights Act of 1964. The motel, which only accepted bookings from whites, said that Congress had no constitutional right to require it to accept bookings from non-whites. The U.S. Supreme Court sided with Congress, asserting that only permitting whites to stay at the motel could "substantially" and "adversely" affect interstate commerce. (Students can read this case on Loislaw and online by searching for *Heart of Atlanta Motel v. United States*). Later on in this chapter readers will learn more about the federal government's right to criminalize conduct that directly and indirectly affect matters of federal concern.

Federal and State Jurisdiction Can Overlap

It is common for a single criminal act to simultaneously violate federal and state criminal laws. Thus each sovereign can declare in its **statutes** that it is a crime to rob a bank. The federal government will provide in the **U.S. Code** that it is a crime to rob a federally insured bank. The states will prohibit bank robbery in their state statutes. And if state law permits, it will be constitutionally permissible for a person who robs one federally insured bank to be prosecuted twice for this robbery. There would be no double jeopardy problem because each sovereign is prosecuting the offender once. The state is acting pursuant to the police power, and the federal government is proceeding pursuant to its Article 1 powers in the

federal Constitution. There will be more discussion about this later on in the textbook.

The distribution of power between the state and federal governments, while theoretically distinct, often turns out to be ambiguous in practice. This ambiguity can create friction between the federal and state government as to who had jurisdiction. One source of friction is when Congress attempts to legislate in an area that arguably is beyond the scope of its Article 1, Section 8 powers. When turf disputes like this arise, the U.S. Supreme Court is sometimes called upon to decide whether Congress was “out of bounds.” Beginning in 1937 during the Great Depression and lasting for almost 60 years, the Court had a policy of deferring to the Congress in jurisdictional disputes if its legislation targeted a problem that, although only minimally impacting interstate commerce on main street in small towns, could have a substantial impact on commerce when viewed from the broader, national perspective (i.e., like in *Heart of Atlanta Motel*).

That changed, however, in 1995 when the Supreme Court decided *United States v. Lopez*, (514 U.S. 549 (1995)). Congress, said the Court, was not constitutionally permitted to enact a criminal statute making it a federal crime for a person to possess a firearm in a school zone. The Court rejected the government’s claim that the statute and commerce were sufficiently connected to permit federal jurisdiction.



Internet Tip

Additional materials for each chapter that augment the textual discussion can be found on the textbook’s website. The Chapter 1 portion of the website, for example, contains the Gun-Free School Zone statute from the U.S. Code, as well as additional text relating to federalism and the police power.

The Chapter 1 materials also include a more detailed discussion of federalism, the historical evolution of the Commerce Clause, and an edited version of *United States v. Lopez*.

Ten years later, however, in the case of *Gonzales v. Raich*, 545 U.S. 1 (2005), the U.S. Supreme Court ruled that Congress did have the right under the **Commerce Clause** to prohibit California and eight other states from statutorily permitting the in-state cultivation and use of marijuana for medicinal purposes. Justice O’Connor wrote a dissenting opinion in which she explained why she believed that the states had the right to enact such statutes. (Students can read the majority and dissenting