Determinate sentencing systems vary, but have one feature in common: The offender's sentence is determined, once and for all, at the time of sentencing. Corrections officials lack authority to reduce the sentence based on evidence of rehabilitation in prison. In a determinate system, either the legislature or a sentencing commission sets a specific punishment for a defined offense (e.g., armed robbery receives ten years imprisonment, no more and no less) or, more often, it sets a range of incarcerative penalties for that offense and the judge (or jury) may impose a specific sentence within that range. In setting the sentence within a range, the sentencing authority is sometimes called upon to consider specific factors set out in sentencing guidelines.[60]

[60] As a result of a line of complicated and controversial Sixth Amendment trial-by-jury decisions rendered by the Supreme Court beginning in 2000, jury involvement in sentencing is now more common than before. As a very general matter, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The term "statutory maximum" in the *Apprendi* rule is the maximum sentence a judge "may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* [in a guilty plea]." Blakely v. Washington, 542 U.S. 296, 303 (2004). Thus, if there are additional facts, post-verdict, that might be considered for the first time to increase the sentence, those additional facts must be proved beyond a reasonable doubt to a jury in a sentencing proceeding. The so-called *Apprendi* doctrine is more fully explained in 2 Dressler & Michaels, Note 53, *supra*, at § 15.04.

Joshua Dressler, Criminal Law, 5th ed.

Chapter 3

SOURCES OF THE CRIMINAL LAW

§ 3.01 ORIGINS OF THE CRIMINAL LAW[1]

[A] Common Law

American criminal law is primarily English in its heritage and judicial in its origin. In large measure, the original thirteen American states and most later states adopted English law as their own.[2]

Originally, English criminal law was "common law" in nature. That is, it was judge-made law: The definitions of crimes and the rules of criminal responsibility were promulgated by courts rather than by the Parliament. When American courts and criminal lawyers use the term "common law," therefore, they are describing the law developed over the centuries by English judges and imported to this country. However, the common law of England was reworked by American courts to meet local needs and mores, so that by the turn of the twentieth century this country's common law diverged in significant respects from its British progenitor.

[B] Criminal Statutes

Inspired by the Enlightenment, there was a movement in eighteenth and nineteenth century Europe and United States to shift the locus of lawmaking from the courts to legislative bodies. In part, the effort to enhance legislative authority was based on the belief that crimes should be defined by an institution more representative of those being governed than the judiciary.[3] The "romance with reason" also inspired reformers of different philosophical stripes (both utilitarians and believers in natural law) to try to codify the criminal law in order to produce "a legislated body of reordered, reformed, and reconceived law" in accordance with their respective principles.[4]

[1] See generally Markus Dirk Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49 (1999); Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 *Vand. L. Rev.* 791 (1951); Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521 (1988); Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098 (1978).

[2] See Hall, Note 1, *supra*, at 798–805.

[3] See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985).

[4] Kadish, *The Model Penal Code's Historical Antecedents*, Note 1, *supra*, at 521–22.

In general, early codification efforts failed. Over time, however, legislatures asserted themselves and enacted penal statutes, initially to supplement, but ultimately to replace, the common law. Today, the change-over is virtually complete. The legislature is the pre-eminent lawmaking body in the realm of criminal law.

§ 3.02 MODERN ROLE OF THE COMMON LAW

Although the legislative branch of government now has primary lawmaking authority, the common law of crimes remains important to modern lawyers.

[A] "Reception" Statutes

Most states, often by statute, have abolished common law crimes.[5] In these jurisdictions, a person may only be convicted and punished for conduct defined as criminal by statute or other legislative enactment.

A few states, however, expressly recognize common law offenses. These states have enacted "reception" statutes, which essentially provide that "[e]very act and omission which is an offense at common law and for which no punishment is prescribed by the [state penal code] may be prosecuted and punished as an offense at common law."[6] In effect, such a statute "receives" the common law offenses in place at the time of the statute's enactment; these crimes become an unwritten part of the state's criminal law, and are defined as they existed at the time of their reception.

As a practical matter, prosecutions of common law offenses in jurisdictions that retain the common law are rare. Common law crimes, although not abolished in such states, are superseded by statutes prohibiting similar conduct.[7] A common law prosecution is not possible, therefore, unless there is a true gap in the statutory system, and today there are few lacunae. Nearly all legislatures have enacted statutes encompassing the common law felonies and most of the misdemeanors.

A lingering issue in the few states recognizing common law offenses is whether a court may assert its traditional authority to devise *new* crimes. The authors of early twentieth century treatises assumed that this judicial power remained intact, and a few courts have exercised such authority,[8] but it is now

[5] E.g., Cal. Penal Code § 6 (Deering 2005) ("No act or omission . . . is criminal or punishable, except as prescribed or authorized by this code . . . ."); Model Penal Code § 1.05(1) ("No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of the State.").

[6] R.I. Gen Laws § 11-1-1 (2008); see also Mich. Comp. Laws § 750.505 (2005).

[7] E.g., State v. Palendrano, 293 A.2d 747 (N.J. Super. Ct. Law Div.1972) (holding that the common law offense of "being a common scold"—a woman who habitually acts in a quarrelsome manner—was no longer a crime, in part because the non-gender-biased elements of the offense were encompassed by New Jersey's Disorderly Persons Act).

[8] E.g., Commonwealth v. Donoghue, 63 S.W.2d 3 (Ky. 1933) (upholding an indictment for participation in "a nefarious plan for the habitual exaction of gross usury," although no such offense had previously existed). An example of judicial crime-creation in England is *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220, in which the House of Lords affirmed a conviction for conspiracy to corrupt public morals, for the publication of a telephone directory of prostitutes. Viscount Simonds stated that he "entertain[ed] no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve . . . the moral welfare of the State" against "novel and unprepared for" attacks. *Id.* at 268.

commonly accepted that "[j]udicial crime creation [in the United States] is a thing of the past."[9] In contrast, at least a few modern courts believe that they are empowered by reception statutes to *abolish* common law offenses that they consider no longer "compatible with . . . local circumstances and situation."[10]

[B] Statutory Interpretation

Even in states without reception statutes, the common law retains significance. Almost without exception, these jurisdictions have codified the common law felonies and most common law misdemeanors. These statutory offenses are usually defined, at least in part, in common law terms.[11] A familiar maxim of statutory interpretation is that when a statute contains a common law term, the presumption is that such a term retains its common law meaning, absent a statutory definition to the contrary.[12] Therefore, lawyers need to be familiar with the common law.

For example, in *Keeler v. Superior Court*,[13] *K* learned that his ex-wife was pregnant by another man. He intentionally struck her in the abdomen in order to kill the fetus. The fetus was delivered stillborn. *K* was prosecuted for murder, which was defined by statute, as at common law, as the "unlawful killing of a human being, with malice aforethought."

K sought to bar his prosecution. He claimed that a fetus born dead was not a "human being" within the meaning of the state's murder statute. Because the statute did not define this critical term, the court sought to identify legislative intent by looking to the common law of 1850, the year the murder statute was enacted and the same year the state legislature abolished common law offenses. In short, absent evidence to the contrary, the court assumed that the 1850 legislature defined "human being" in common law terms. The court ruled that a fetus born dead was not a "human being" for purposes of homicide law

[9] Jeffries, Note 3, *supra*, at 195. However, some courts have maintained that they have authority to expand the definition of *existing* crimes, including statutory offenses. See Note 14, *infra*.

[10] Pope v. State, 396 A.2d 1054, 1078 (Md. 1979) (concluding that the common law offense of "misprision of felony" should be abolished because "its origin, the impractical and indiscriminate width of its scope, its other obvious deficiencies, and its long non-use" rendered it incompatible with that state's "general code of laws and jurisprudence"); see also State v. Palendrano, 293 A.2d 747 (N.J. Super. Ct. Law. Div. 1972) (holding that the common law offense of "being a common scold" was no longer an offense, in part because the crime had been ignored by the state legislature and had been mentioned only twice in the reports of judicial proceedings during almost two centuries of statehood).

[11] At times, a state will enact a common law offense but not define it, in which case the common law definition applies. E.g., Mich. Comp. Laws § 750.321 (2008) (prohibiting, but not defining, manslaughter).

[12] Taylor v. United States, 495 U.S. 575, 592 (1990); State v. Coria, 48 P.3d 980, 987 (Wash. 2002) (dissenting opinion) (citing this Text).

[13] 470 P.2d 617 (Cal. 1970).

under the common law and, therefore, could not be the basis for a modern-day prosecution, in the absence of legislative action.[14]

The common law may also be used to fill in gaps in a penal code. For example, a common law principle is that a person may not be charged with murder if the victim did not die within a year and a day of the assault.[15] Federal law defines murder in common law terms,[16] but is silent regarding the year-and-a-day rule. In the absence of legislative history suggesting that Congress intended to eliminate the rule's requirements, a court may interpret this silence as evidence that the common law rule still applies.[17]

§ 3.03 MODEL PENAL CODE[18]

Although criminal code drafting by legislatures was a major project in the United States through the first half of the nineteenth century, subsequent codification and reform efforts stalled. One result of this long neglect of penal reform was "a substantive criminal law that was often archaic, inconsistent, unfair, and unprincipled."[19] Therefore, in 1952 the American Law Institute, an organization composed of judges, lawyers, and law professors, began to draft a penal code intended to inspire a new reformative spirit among state legislatures. In 1962, after completion of thirteen tentative drafts and accompanying explanatory commentaries, the American Law Institute approved and published its Proposed Official Draft of the Model Penal Code, a carefully drafted code containing general principles of criminal responsibility, definitions of specific offenses, and sentencing provisions.

[14] Accord, Vo v. Superior Court, 836 P.2d 408 (Ariz. Ct. App. 1992); Meadows v. State, 722 S.W.2d 584 (Ark. 1987); People v. Greer, 402 N.E.2d 203 (Ill. 1980); State v. Gyles, 313 So.2d 799 (La. 1975); State v. Beale, 376 S.E.2d 1 (N.C. 1989); State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984).

In jurisdictions in which the judiciary retains residual common law authority, a few courts have expanded the definition of "human being" to include viable fetuses born dead. Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984); Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994); State v. Horne, 319 S.E.2d 703 (S.C. 1984). Such changes, however, should only apply prospectively. See § 5.01, *infra*.

[15] See § 31.01[C], *infra*.

[16] 18 U.S.C. § 1111(a) (2008).

[17] E.g., United States v. Chase, 18 F.3d 1166 (4th Cir. 1994); Ex Parte Key, 890 So.2d 1056 (Ala. 2003) (in the absence of express evidence, the state legislature's enactment of a new criminal code did not abolish the common law year-and-a-day rule); *but see* State v. Rogers, 992 S.W.2d 393 (Tenn. 1999), *affirmed*, Rogers v. Tennessee, 532 U.S. 451 (2002) (finding that the common law year-and-a-day rule was inconsistent with modern public policy, and judicially abolishing it).

[18] See generally Commentary Symposium, *Model Penal Code Second: Good or Bad Idea?*, 1 OHIO ST. J. CRIM. L. 157-244 (2003); Symposium, *The 25th Anniversary of the Model Penal Code*, 19 RUTGERS L.J. 519-954 (1988); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319 (2007).

[19] Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 947 (1999).

The impact of the Model Penal Code on American criminal law has been "stunning."[20] Although the Code is not the law, in whole, in any jurisdiction—it is, after all, a *model* penal code—it heavily influenced adoption of revised penal codes in thirty-four states.[21] And, "[t]housands of court opinions have cited the Model Penal Code as persuasive authority for the interpretation of an existing [non-MPC] statute or in the exercise of a court's occasional power to formulate a criminal law doctrine."[22] As Professor Sanford Kadish has aptly put it, the Model Penal Code "has become a standard part of the furniture of the criminal law."[23]

Many criminal law professors treat the Model Penal Code as "the principal text in criminal law teaching,"[24] because its influence on the law has been so dramatic. As a consequence, this Text considers in detail both the common law and Model Penal Code, the primary sources of modern statutory law.

[20] Kadish, *The Model Penal Code's Historical Antecedents*, Note 1, *supra*, at 538.

[21] Robinson & Dubber, Note 18, *supra*, at 326.

[22] *Id.* at 327.

[23] Kadish, *The Model Penal Code's Historical Antecedents*, Note 1, *supra*, at 521.

[24] *Id.*

determination? Rules are needed to instruct it on how to weigh the ...ing evidence.

The rules establish ...e "burden of persuasi... ...ermine who is obligated to con... jury of the accuracy of t... ...icular factual claim in question. Th... ...e party who has the bu... ...persuasion bears the risk of failing ...vince the jury that her factual ...

[B] Who Has the Burden?

[1] The Presumption of Innocence: The *Winship* Doctrine (In General)

The Fifth and Fourteenth Amendments to the United States Constitute provide that a person may not be deprived of her life, liberty, or property without due process of law. Pursuant to the Due Process Clause, a person charged with a crime is presumed innocent and, to enforce this presumption, the Supreme Court held in *In re Winship*[9] that the prosecution must persuade the factfinder beyond a reasonable doubt of "every fact necessary to constitute the crime charged." This rule has come to be known as "the *Winship* doctrine."

According to *Winship*, the presumption of innocence "lies at the foundation of the administration of our criminal law." Although this presumption increases the risk that a guilty person will go free, the *Winship* Court determined that "a society that values the good name and freedom of every individual" does "not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty." Indeed, the law's commitment to protecting the innocent is so great that, according to Blackstone, "the law holds that it is better that ten guilty persons escape, than that one innocent suffer."[10]

Winship teaches that the prosecutor must prove (beyond a reasonable doubt) every fact necessary to constitute the crime charged, but what precisely *are* the "facts" for which the government must constitutionally carry the burden of persuasion? The Supreme Court has had considerable difficulty answering this question.

[a] *Mullaney v. Wilbur*[11]

W was charg... ...murder by a Maine prosecutor. E... ...ce presented at his trial tend... ...show that *W* intentionally killed t... ...l, but that he may have do... ...in the heat of passion on sudd... ...ocation." The trial court

[9] 397 U.S. 358 (1970).

[10] 4 Blackstone, Commentaries on t... ...aws of England *352 (1769). Not ev... ...grees with Blackstone. For a thoughtful dial... ...on this matter, see Jeffrey Reiman & ... ...van den Haag, *On the Common Saying that ... Better that Ten Guilty Persons Esca... ...that One Innocent Suffer: Pro and Con*, 7 S... ...HIL. & POL'Y, Spring 1990, at 226; see als... ...Halvorsen, *Is it Better that Ten Guilty Pe... ...s Go Free Than that One Innocent Person be Convicted?*, 23 CRIM. JUSTICE ETHICS, Summe... ...all 2004, at 3.

[11] 421 U.S. 684 (1975).

instructed the ju... that Maine recognized two f... of criminal homicide, murder and ...ughter, and that the comp... ...ements of both offenses were that ... homicide be: (1) "unlaw... *i.e.*, neither justifiable nor excusab... and (2) that it be committe... ...ntionally. The jury was further instr... that the prosecution was ...ed to prove both of these elements (b... a reasonable doubt), and ... if it met this burden was the ... to co...der the distinction betwe... ...rder and manslaughter.

On the distinction be... murder and manslaughter, ...rial court further informed the j... ...hat if the prosecution proved ... *W* killed the victim unlawfully a... ...ntentionally, then the killing w... ...urder, unless *W* persuaded the ju... a preponderance of the evide... ...at the killing was "in the heat of p... ...on sudden provocation," in ... case it constituted the lesser offe... manslaughter. That is, the ...ecution had the burden of persuad... ...he jury beyond a reasonab... ...oubt that *W* unlawfully and inte... ...ly killed the victim; if it did, t... ...den of persuasion shifted to *W* to p... ...hat he was provoked into killi... ...e victim. If *W* failed in *this* proof, he ... guilty of murder; if he succe... ...he was guilty of manslaughter.

W appealed his convicti... ...n the ground that the preceding ... instructions, which placed ...im the burden of persuasion that ...lling occurred "in the heat of ...on on sudden provocation," violate... *Winship* doctrine. The State o... ...e responded, however, that the ...uctions were constitutional—the... ...ecution only had the responsibili... prove (beyond a reasonable doub... ...t *W* was guilty of some form of ...al homicide. Under the instructio... ...ven, the State of Maine did ...equire *W* to prove his innocence; ...ly had the burden of persua... ...egarding his level of guilt (murder ...s manslaughter). In such cir... ...ances, the State argued, "the defen... critical interests in liberty ... reputation are no longer of paramount concern since, irrespectiv... . . . the heat of passion on sudden provocation, he is likely to lose his ...ty and certain to be stigmatize...

The Supreme Court disag... In an opinion written by J... Lewis Powell, the Court summa... the historical roots of ho... law, and concluded that the prese... absence of heat of passion ... one single most important factor in d... ...ining the degree of culp... attaching to an unlawful homicide." ... observed that "the clea... ...d has been toward requiring the pro... ...on to bear the ultimate ... of proving this fact."

The Court ...ized Maine's argument a... ...ly formalistic. It pointed out:

> [If the *Winship* doctrine] were ...d to those facts that constitute a crime as defined by state law, ...ate could undermine many of the interests that [the Due Pro... Clause] sought to protect with... effecting any substantive ...e in its law. It would only be nec... ...y to redefine the element... ...t constitute different crimes, ch...acterizing them as factors ...bear solely on the extent of pun...ment.

In contrast to su... ...malism, the Supreme Court held ...at the Due Process Clause required the prosecution not only to prove that ... was guilty of criminal homicide, but also to persuade the jury regardi... facts relating to *W*'s "degree of criminal culpability."