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 officers lack authority to increase 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 incapacitative 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.

Chapter 3

SOURCES OF THE CRIMINAL LAW

§ 3.01 ORIGINS OF THE CRIMINAL LAW

[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


2 See Hall, Note 1, supra, at 798-806.


§ 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. 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 "every 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." 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 superceded by statutes prohibiting similar conduct. 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, but it is now commonly accepted that "[j]udicial crime creation [in the United States] is a thing of the past." 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."

[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. 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. Therefore, lawyers need to be familiar with the common law.

For example, in Keeler v. Superior Court, 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.

Public Prosecutions, (1962) 25 Cal. 2d 250, 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 258.

Jeffries, Note 3, supra, at 196. However, some courts have maintained that they have authority to expand the definition of existing crimes, including statutory offenses. See Note 14, infra.

Pope v. State, 396 A.2d 100 (Md. 1978) (concluding that the common law offense of "misprision of felony" should be abolished because "... its origin, the impractical and pollexordinate 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, 258 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).

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).


under the common law and, therefore, could not be the basis for a modern-day prosecution, in the absence of legislative action.\textsuperscript{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.\textsuperscript{15} Federal law defines murder in common law terms, \textsuperscript{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.\textsuperscript{17}

\textbf{§ 3.03 MODEL PENAL CODE}\textsuperscript{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.”\textsuperscript{19} Therefore, in 1962 the American Law Institute, an organization composed of judges, lawyers, and law professors, began to draft a penal code intended to inspire a new reformatory 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.


\textsuperscript{15} 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 1224 (Mass. 1984); Hughes v. State, 698 P.2d 790 (Oklahoma Crim. App. 1984); State v. Horne, 319 S.E.2d 703 (SC 1984). Such changes, however, should only apply prospectively. See § 5.01, infra.

\textsuperscript{16} See § 31.01[1][C], infra.

\textsuperscript{17} 18 U.S.C. § 1111(a) (2008).

\textsuperscript{18} E.g., United States v. Chase, 18 F.3d 1166 (4th Cir. 1994); Ex Parte Key, 890 So.2d 1065 (Ala. 2005) (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 338 (Tenn. 1999), affirmed, Rogers v. Tennessee, 532 U.S. 481 (2001) (finding that the common law year-and-a-day rule was inconsistent with modern public policy, and judicially abolishing it).


\textsuperscript{21} Kadish, The Model Penal Code’s Historical Antecedents, Note 1, supra, at 536.

\textsuperscript{22} Robinson & Dubber, Note 18, supra, at 326.

\textsuperscript{23} Id. at 327.

\textsuperscript{24} Kadish, The Model Penal Code’s Historical Antecedents, Note 1, supra, at 521.

\textsuperscript{25} Id.
determination? Rules are needed to instruct it on how to weigh the compelling evidence.

The rules establish the "burden of persuasion" as the party who is obligated to convince the factfinder of the truth of the particular factual claim in question. The party who has the burden of persuasion bears the risk of failure since the jury may find the fact that her factual claim is true.

[B] Who Has the Burden?


The Fifth and Fourteenth Amendments to the United States Constitution 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* 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 desirability of convicting an innocent man as equivalent to the desirability 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."

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.

W was charged with murder by a Maine prosecutor. Evidence presented at his trial tended to show that W intentionally killed the victim, but that he may have done so in the heat of passion on sudden provocation." The trial court instructed the jury that Maine recognized two forms of criminal homicide, murder and manslaughter, and that the components of both offenses were that the homicide be: (1) "unlawful, i.e., neither justifiable nor excusable; and (2) that it be committed intentionally. The jury was further instructed that the prosecution was required to prove both of these elements (beyond a reasonable doubt), and if it met this burden was then to consider the distinction between murder and manslaughter.

On the distinction between murder and manslaughter, the trial court further informed the jury that if the prosecution proved that W killed the victim unlawfully and intentionally, then the killing was murder, unless W persuaded the jury beyond a reasonable doubt that the killing was "in the heat of passion on sudden provocation," in which case it constituted the lesser offense of manslaughter. That is, the prosecution had the burden of persuasion, the jury beyond a reasonable doubt, that W unlawfully and intentionally killed the victim; if it did, the burden of persuasion shifted to W to persuade that he was provoked into killing the victim. If W failed in this proof, he was guilty of murder, if he succeeded, he was guilty of manslaughter.

W appealed his conviction on the ground that the preceding instructions, which placed the burden of persuasion that the killing occurred "in the heat of passion on sudden provocation," violated the Winship doctrine. The State, in response, however, that the instructions were constitutional—the prosecution only had the responsibility to prove (beyond a reasonable doubt) that W was guilty of some form of criminal homicide. Under the instructions as given, the State of Maine did not require W to prove his innocence but only had the burden of persuading the jury of his level of guilt (murder or manslaughter). In such circumstances, the State argued, "the defendant's critical interests in liberty and reputation are no longer of paramount concern since, irrespective of . . . the heat of passion on sudden provocation, he is likely to lose his liberty and certain to be stigmatized."

The Supreme Court disagreed. In an opinion written by Justice Lewis Powell, the Court summarized the historical roots of habeas law, and concluded that the presence or absence of heat of passion was the single most important factor in determining the degree of culpability attaching to an unlawful homicide. It observed that "the element has been toward requiring the prosecution to bear the ultimate burden of proving this fact."

The Court rejected Maine's argument as overly formalistic. It pointed out:

[If the Winship doctrine] were limited to those facts that constitute a crime as defined by state law, the state could undermine many of the interests that [the Due Process Clause] sought to protect without affecting any substantive feature in its law. It would only be necessary to redefine the elements to constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

In contrast to such formalism, the Supreme Court held that the Due Process Clause required the prosecution not only to prove that W was guilty of criminal homicide, but also to persuade the jury regarding those facts relating to W's "degree of criminal culpability."