SEVENTH EDITION

CRIMINAL LAW TODAY

FRANK SCHMALLEGER

Criminal Law Today

SEVENTH EDITION

FRANK SCHMALLEGER, PH.D.

Distinguished Professor Emeritus,
The University of North Carolina at Pembroke

Pearson

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Cover Image by lazyllama/Shutterstock and R.classen/Shutterstock

Library of Congress Cataloging-in-Publication Data
Names: Schmalleger, Frank, author.
Title: Criminal Law today / Frank Schmalleger, Distinguished Professor Emeritus,The University of North Carolina at Pembroke.
Description: Seventh edition. | Hoboken, NJ : Pearson Education, Inc., [2022] | Includes bibliographical references and index.
Identifiers: LCCN 2020018599 | ISBN 9780135970386 (paperback) | ISBN 0135970385 | ISBN 9780135729731 (epub)
Subjects: LCSH: Criminal law—United States.
Classification: LCC KF9219 .S36 2021 | DDC 345.73—dc23
LC record available at https://lccn.loc.gov/2020018599

ScoutAutomatedPrintCode

ISBN 10: 0-13-597038-5
ISBN 13: 978-0-13-597038-6

For Michelle Lallos

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Preface

My purpose in writing this textbook has been to provide students with an appreciation for the fundamental nature of law, an overview of general legal principles, and a special understanding of the historical development of criminal law and its contemporary form and function in American society today. Stories from real life, engaging graphics, up-to-date examples and issues, and interactive media bring the law to life in this comprehensive, timely, and user-friendly introduction to criminal law. Key features include the following.

Capstone Cases in each chapter provide excerpts from actual court opinions illustrating important themes in the law. The cases offer significant insights into the everyday workings of American jurisprudence and demonstrate the logic behind appellate decisions. Court opinions, statutes, and other quoted materials have occasionally been redacted and edited slightly for clarity. Many case citations and references have been removed without the use of ellipses or other omission signifiers in order to keep the flow of reading uninterrupted.

Graphics such as full-color diagrams, illustrations, and other figures throughout the text reinforce key points and illustrate important, complex, and challenging concepts for easier understanding.

Criminal Law in the News boxes in each chapter highlight recent news stories/issues that illustrate the variety of legal perspectives found at federal, state, and local levels and make students aware of jurisdictional differences in the law.

My approach has been strongly influenced by our belief that the law has always been, and remains, a vital policymaking tool. As a topic for study and discussion, the nature and life of the law is more important today than ever before. The law faces challenges as it continues to adapt to the needs of a complex and rapidly changing society. These challenges are highlighted in this text and serve to emphasize for readers the contemporary relevance of our ever-evolving American criminal law.

Frank Schmalleger
Distinguished Professor Emeritus, University of North Carolina at Pembroke

New to the Seventh Edition

Chapter-Specific Changes

- In Chapter 1, stories and data were updated and additional information was provided in the box on the rule of law.
- In Chapter 2, sleep medications that may lead to complex behaviors while not being fully awake are discussed in the section on voluntary acts. A discussion of a case in which religious faith kept parents form contacting medical authorities for their sick child is now included. Likewise, the case of 18-year-old Michelle Carter is discussed. Carter was convicted in Massachusetts Juvenile Court of involuntary manslaughter for encouraging her boyfriend to commit suicide through texting. In a related discussion, the idea that a person can be virtually present during the commission of a crime is considered. Federal criminal justice reform with regard to *mens rea* is now described, and a new Criminal Law in the News box about *mens rea* and brain science has been added.
- In Chapter 3, a new Capstone Case, *State* v. *Brelo*, has been added. It deals with *concurrent causation*, where multiple "causes" might be to blame for a given result, and it is impossible to tell which one of them produced it. A discussion of the dual-sovereignty doctrine has been added. The dual-sovereignty doctrine is a legal principle that holds that more than one sovereign government may prosecute an individual without violating the prohibition against double jeopardy if that individual engaged in action that would be a crime under the laws of both sovereignties.
- In Chapter 4, the story of British Petroleum's Deepwater Horizon disaster is used to illustrate the criminal liability of corporations. A similar discussion has been added to describe Volkswagen's conviction on charges of conspiracy to defraud the United States.
- In Chapter 5, of affirmative consent has been added, to include a form used by the State of California on its campuses that students are told to complete before engaging in sexual behavior. The concepts of perfect defense and imperfect defense have been defined. The issue of consent with unconscious partners is now discussed, as is the concept of affirmative consent. Factual and legal defenses have been further distinguished.
- In Chapter 6, the learning objectives have been reduced and are now more clearly focused; a new chapter-opening story begins the chapter; the discussion of excuse defenses has been expanded to include gay panic and tans panic defenses; and the chapter summary section has been clarified. The capital punishment section of the chapter now contains a map showing which states use what type of insanity defense.
- In Chapter 7, new material (including a Florida case) on the Uniform Determination of Death Act has been added; the discussion of felony murder has been updated; and a change has been made in Florida statutes that adds death that results from the unlawful distribution of certain controlled substances to that state's homicide law. Gross negligence is now defined, and the discussion of malice aforethought has been expanded. A new map has been added showing assisted suicide states, and a Criminal Law in the News box has been added to describe the case of Michelle Carter, the young Massachusetts woman convicted of manslaughter for texting encouragement to her boyfriend as he contemplated suicide.
- In Chapter 8, updated stories and descriptions of stalking have been incorporated into the chapter; gender-neutral rape laws are discussed; and the former comedian, and Bill Cosby, is used in an example of aggravated indecent assault. Female-on-female sexual assault is mentioned, and sex tourism is now a key term. A discussion of parental kidnapping has been added. The end-of-chapter section has been updated to include mayhem, and its definition.
- In Chapter 9, the number of start-of-chapter learning objectives has been significantly reduced, the definition of real property has been expanded and clarified, and the discussion of constructive entry has been expanded.

- In Chapter 10, the number of start-of-chapter learning objectives have been substantially reduced; the discussion of DUI laws has been updated; the concept of "lynching" has been expanded; and a new discussion of squatting and criminal trespass has been added.
- In Chapter 11, revenge porn is now defined and discussed, and new statutes have been added to Figure 11–3 ("Federal Drug Legislation Timeline") including the 2000 Kingpin Act, the 2014 & 2018 Rohrabacher-Farr Amendment to the Consolidated Appropriates Act, the 1996 Comprehensive Methamphetamine Control Act, the 2016 21st Century Cures Act, the 1984 Analogue Act, the 1938 Food, Drug, and Cosmetic Act, the 1973 Heroin Trafficking Act, and the 1906 Food and Drug Act. A new section on today's opioid epidemic has been added to the chapter.
- In Chapter 12, start-of-chapter learning objectives have been shortened and clarified; the table containing Acts of Terrorism against the United States has been updated; a United Nations Model Law on Human Trafficking has been added to the chapter; a new Criminal Law in the News box has been added; a new figure showing main forms of human trafficking by world subregion has been added; and the 2019 Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act is now discussed.
- In Chapter 13, a sample victim impact statement form used by the state of Texas is now included in the chapter; all NCVS and UCR data have been updated throughout; and the FBI's newly changed gender-neutral definition of rape is presented.
- In Chapter 14, capital punishment data were updated to 2018, and a new discussion of DNA profiling has been added to the chapter. Also, various updates and corrections have been made throughout the chapter.

Highlighted Features

Additional Case Applications

Additional Applications follow all of the Capstone Cases. Provided by Dr. John Forren of Miami University in Hamilton, Ohio, each Additional Application consists of a brief summary and holding of a case that relates to—and builds on—the issues addressed in the Capstone Case. Additional Applications appear where an important distinction in the application of the law will enhance students' understanding of the concept. The Additional Applications (1) delve deeply into the subject matter represented by Capstone Case opinions through the use of lower court cases and (2) attempt to grapple with issues and questions left unanswered by previous court decisions.

Additional Applications

Can courts retroactively apply a common law rule that defines a crime?

Rogers v. Tennessee, 532 U.S. 451 (2001)

The Case: During an altercation on May 6, 1994, Wilbert K. Rogers stabbed James Bowdery in the chest with a butcher knife, necessitating an emergency surgical procedure to repair Bowdery's heart. The stabbing victim survived the heart surgery; as a direct result of these events, though, Bowdery developed a condition known as cerebral hypoxia—which results from a loss of oxygen to the brain—and fell into a coma where he remained until his death 15 months later from a related kidney infection. Following Bowdery's death, Rogers was convicted by a Shelby County, Tennessee, trial court on second-degree murder charges. Rogers contested the charges on appeal, arguing that Tennessee's courts had long recognized a judicially created common law "year-and-a-day rule," which provided that no defendant could be convicted of murder unless the victim had died by the defendant's act within 366 days of that act. the law which had been expressed prior to the conduct at issue." In this context, O'Connor reasoned, Rogers should have reasonably anticipated that the courts would rule Tennessee's one-year-and-a-day rule to be "an outdated relic" inappropriate for adherence in modern times.

In a spirited dissent, Justice Antonin Scalia (joined by three other members of the Court) voiced strong disagreement with the majority's conclusion that Rogers had "fair warning" that the common law rule in Tennessee was subject to retroactive rescission in his case. More fundamentally, Scalia attacked O'Connor's weighing of the relative fairness concerns in drawing a basic distinction between legislative and judicial changes in applicable criminal law principles. "Today's opinion," Scalia wrote, "produces… a curious constitution that only a judge could love. One in which [by virtue of the *ex post facto clause*] the elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but in which unelected judges can do precisely that. One in which the predictability of parliamentary lawmaking cannot validate the retroactive creation of crimes, but the predictability of judicial lawmaking can do so."

CRITICAL THINKING AND APPLICATION PROBLEMS

The value of metals has been on the rise. Consequently, theft of metals, particularly copper and brass, has increased significantly. Thieves, who steal metals from homes, businesses, and automobiles, commonly sell their contraband to scrap metal dealers. Concerned about the growing metal theft business, the state legislature, with the governor's endorsement, enacts the following:

> ***Section 1: Receiving Stolen Metals:*** Any person (or persons) who owns, operates, or is employed by a metal recycling business shall (1) make an inquiry into the source of all metals received, (2) photograph prospective sellers and the metals they offer for sale, (3) demand a copy of a photograph identification from the prospective seller, and (4) check the state stolen metals report to determine if the specific metals sold are registered as stolen and to determine if the prospective seller is a registered metals thief. If the metals appear on the report or the seller appears as a registered metals thief, the owner, operator, or employee shall not purchase the metals and shall report the offer of sale, and provide the photographs and other information collected under this section, to the appropriate local law enforcement agency within one hour. Violation of this section is a misdemeanor of the first degree. This section shall apply retroactively, to one year prior to its enactment.
>
> ***Section 2: Registration as Metal Thief:*** To reduce theft and to prevent the sale of stolen metals, a state registry of metal thieves and stolen metals shall be established. Any person who is convicted in the state of stealing or receiving stolen metals or who is convicted of violating the Receiving Stolen Metals section above shall register with the Secretary of State. The Secretary of State shall establish and maintain a report of metal thieves, as well as a report of missing metals, which shall be made available to the

Critical Thinking and Application Problems

At the end of each chapter, these problems based on real-life scenarios challenge students to think critically and apply their knowledge of the chapter material to real-life, contemporary legal problems.

Capstone Cases

The cases throughout the chapters have been updated and shortened. New cases include *Illinois* v. *Lara* and *People* v. *LaRosa* in Chapter 3, *Burrage* v. *United States* in Chapter 8, *United States* v. *Alvarez* in Chapter 10. Links to Legal Resources, a Guide to Reading Legal Citations, and topical learning modules can be accessed at **https://crimlaw.justiceprograms.com/.**

APPLYING THE CONCEPT

CAPSTONE CASE

Does the Eighth Amendment Bar the Admission of Victim Impact Evidence During the Penalty Phase of a Capital Trial?

Payne v. Tennessee, 501 U.S. 808 (1991)

CHIEF JUSTICE REHNQUIST delivered the opinion of the court.

In this case we reconsider our holdings in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial.

THE CASE The petitioner, Pervis Tyrone Payne, was convicted by a jury on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. He was sentenced to death for each of the murders, and to 30 years in prison for the assault.

The victims of Payne's offenses were 28-year-old Charisse Christopher, her 2-year-old daughter Lacie, and her 3-year-old son Nicholas. The three lived together in an apartment in Millington, Tennessee, across the hall from Payne's girlfriend, Bobbie Thomas. On Saturday, June 27, 1987, Payne visited Thomas' apartment several times in expectation of her return from her mother's house in Arkansas, but found no one at home. On one visit, he left his overnight bag, containing clothes and other items for his weekend stay, in the hallway outside Thomas'

When the first police officer arrived at the scene, he immediately encountered Payne, who was leaving the apartment building, so covered with blood that he appeared to be "sweating blood." The officer confronted Payne, who responded, "I'm the complainant." When the officer asked, "What's going on up there?" Payne struck the officer with the overnight bag, dropped his tennis shoes, and fled.

Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1,700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.

OBJECTIVES

After reading this chapter, you should be able to

- Define crime and criminal law.
- Summarize the origins and development of criminal law.
- Describe the role of common law in modern criminal law, and explain the differences between procedural and substantive criminal law.
- Describe the various ways in which crimes can be classified, and list the four traditional types of crimes.
- Identify the purposes served by criminal law.
- Identify the various sources of criminal law, including the principle of *stare decisis*.
- Describe the structure of the U.S. legal system, including jurisdiction.
- Describe the adversarial and accusatorial qualities of the U.S. system of criminal justice.
- Expound upon the "rule of law" and explain why due process is an integral part of the rule of law.

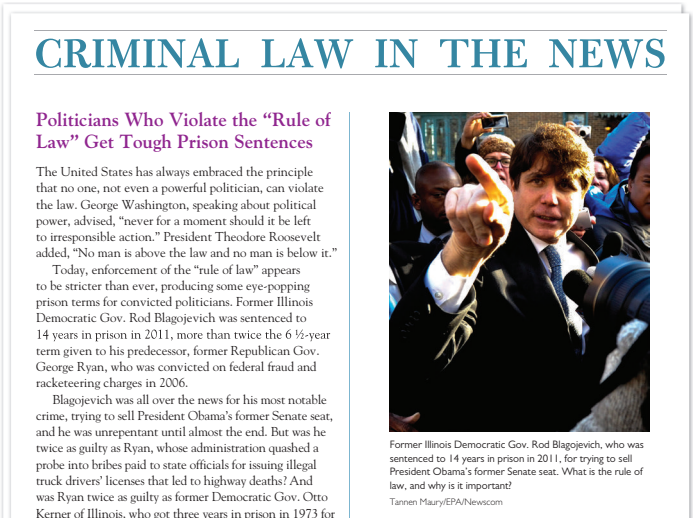
Learning Objectives

The Learning Objectives at the beginning of each chapter have been shortened and rewritten in plain language to provide readers with a concise overview of what they can expect to learn from each chapter.

Criminal Law in the News

All Criminal Law in the News boxes have been replaced with entirely new stories drawn from today's media. New story topics include the following:

- The corporate criminal liability of British Petroleum for the 2010 Gulf oil spill
- The activities of Westboro Baptist Church members who protest at military funerals
- A honeymooner who may have been tried twice for the death of his new wife
- Gun rights in the wake of infamous mass shootings
- The use of the defense of addiction in cases of shoplifting
- Abortion doctors who were charged with murder under Maryland law
- Faith-healing parents who were convicted in the death of their son after refusing medical treatment
- Online piracy charges against New Zealand multimillionaire Kim Dotcom (aka Megaupload)
- A federal appellate court's action in overturning California's Proposition 8, which banned same-sex marriages
- The story of Colleen LaRose ("Jihad Jane")
- The role of DNA testing in identifying wrongful convictions
- The political scandal involving former Illinois Democratic Governor Rod Blagojevich



CRIMINAL LAW IN THE NEWS

Politicians Who Violate the "Rule of Law" Get Tough Prison Sentences

The United States has always embraced the principle that no one, not even a powerful politician, can violate the law. George Washington, speaking about political power, advised, "never for a moment should it be left to irresponsible action." President Theodore Roosevelt added, "No man is above the law and no man is below it."

Today, enforcement of the "rule of law" appears to be stricter than ever, producing some eye-popping prison terms for convicted politicians. Former Illinois Democratic Gov. Rod Blagojevich was sentenced to 14 years in prison in 2011, more than twice the 6 ½-year term given to his predecessor, former Republican Gov. George Ryan, who was convicted on federal fraud and racketeering charges in 2006.

Blagojevich was all over the news for his most notable crime, trying to sell President Obama's former Senate seat, and he was unrepentant until almost the end. But was he twice as guilty as Ryan, whose administration quashed a probe into bribes paid to state officials for issuing illegal truck drivers' licenses that led to highway deaths? And was Ryan twice as guilty as former Democratic Gov. Otto Kerner of Illinois, who got three years in prison in 1973 for

Former Illinois Democratic Gov. Rod Blagojevich, who was sentenced to 14 years in prison in 2011, for trying to sell President Obama's former Senate seat. What is the rule of law, and why is it important?

Tannen Maury/EPA/Newscom

Instructor Supplements

The following supplementary materials are available to support instructors' use of the main text:

- ***Instructor's Manual with Test Bank.*** Includes content outlines for classroom discussion, teaching suggestions, and answers to selected end-of-chapter questions from the text. This also contains a Word document version of the test bank. TestGen. This computerized test generation system gives you maximum flexibility in creating and administering tests on paper, electronically, or online. It provides state-of-the-art features for viewing and editing test bank questions, dragging a selected question into a test you are creating, and printing sleek, formatted tests in a variety of layouts. Select test items from test banks included with TestGen for quick test creation, or write your own questions from scratch. TestGen's random generator provides the option to display different text or calculated number values each time questions are used.
- ***Full text of Capstone Case Opinions Available Online.*** The text's Capstone Cases, which are central to issues discussed in each chapter, are available in full text at https://crimlaw.justiceprograms.com. These full-text opinions facilitate student discussion and provide insight into the legal reasoning that led to the court's decision.
- ***PowerPoint Presentations.*** Our presentations offer clear, straightforward outlines and notes to use for class lectures or study materials. Photos, illustrations, charts, and tables from the book are included in the presentations when applicable. To access supplementary materials online, instructors need to request an instructor access code. Go to www.pearsonhighered.com/irc, where you can register for an instructor access code. Within 48 hours after registering, you will receive a confirming email, including an instructor access code. Once you have received your code, go to the site and log on for full instructions on downloading the materials you wish to use.
- ***Alternate Versions eBooks.*** This text is also available in multiple eBook formats. These are an exciting new choice for students looking to save money. As an alternative to purchasing the printed textbook, students can purchase an electronic version of the same content. With an eTextbook, students can search the text, make notes online, print out reading assignments that incorporate lecture notes, and bookmark important passages for later review. For more information, visit your favorite online eBook reseller or visit www.mypearsonstore.com.
- ***Also available via REVEL™.*** REVEL™ is Pearson's newest way of delivering our respected content. Fully digital and highly engaging, REVEL replaces the textbook and gives students everything they need for the course. Seamlessly blending text narrative, media, and assessment, REVEL enables students to read, practice, and study in one continuous experience—for less than the cost of a traditional textbook. Learn more at pearsonhighered.com/revel.

Revel *Criminal Law Today*, Seventh Edition by Frank Schmalleger

Designed for how you want to teach – and how your students want to learn

Revel is an interactive learning environment that engages students and helps them prepare for your class. Reimagining their content, our authors integrate media and assessment throughout the narrative so students can read, explore, and practice, all at the same time. Thanks to this dynamic reading experience, students come to class prepared to discuss, apply, and learn about criminal justice — from you and from each other.

Revel seamlessly combines the full content of Pearson's bestselling criminal justice titles with multimedia learning tools. You assign the topics your students cover. Author Explanatory Videos, application exercises, survey questions, interactive CJ data maps, and short quizzes engage students and enhance their understanding of core topics as they progress through the content. Through its engaging learning experience, Revel helps students better understand course material while preparing them to meaningfully participate in class.

Author Explanatory Videos
Short 2-3 minute Author Explanatory Videos, embedded in the narrative, provide students with a verbal explanation of an important topic or concept and illuminating the concept with additional examples.

Point/CounterPoint Videos
Instead of simply reading about criminal justice, students are empowered to think critically about key topics through Point/Counterpoint videos that explore different views on controversial issues such as the effectiveness of the fourth amendment, privacy, search and seizure, Miranda, prisoner rights, death penalty and many other topics.

Current Events Bulletin
Bring currency into your classroom with author-written articles that are updated each semester to help connect core concepts with real-life current events. Society changes quickly, and Current Events Bulletins are one way to avoid a narrative that seems dated. Students can follow the trajectory of policing, courts, and corrections issues in the context of the criminal justice field.

Track time-on-task throughout the course
The Performance Dashboard allows you to see how much time the class or individual students have spent reading a section or doing an assignment, as well as points earned per assignment. This data helps correlate study time with performance and provides a window into where students may be having difficulty with the material.

Learning Management System Integration
Pearson provides Blackboard Learn™, Canvas™, Brightspace by D2L, and Moodle integration, giving institutions, instructors, and students easy access to Revel. Our Revel integration delivers streamlined access to everything your students need for the course in these learning management system (LMS) environments.

The Revel App
The Revel mobile app lets students read, practice, and study—anywhere, anytime, on any device. Content is available both online and offline, and the app syncs work across all registered devices automatically, giving students great flexibility to toggle between phone, tablet, and laptop as they move through their day. The app also lets students set assignment notifications to stay on top of all due dates. Available for download from the App Store or Google Play. Visit www.pearson.com/revel to learn more.

Acknowledgments

Criminal Law Today owes much to the efforts of many people. Members of the Advisory Panel, who reviewed drafts of this text as it developed and showered us with comments and suggestions, deserve special thanks. Advisory Panel members are listed on page iv.

Others who have contributed to this text and to whom we are very grateful are Keiser University's John J. Dolotowski, Miami University's John Forren for providing the Additional Applications features, Lance Parr of California's Grossmont College, and Mike Gray at Maryland's Eastern Shore Criminal Justice Academy. Thanks also to Morgan Peterson at California's Palomar College for assistance in tracking down thorny permissions issues. David Graff at Kent State University did an excellent job of Web content development, and we are in his debt.

This edition has benefited substantially from the suggestions and ideas provided by these reviewers: Mark Brown, University of South Carolina-Columbia; Lisa Clayton, College of Southern Nevada; Daniel Hebert, Springfield Technical Community College; David Jones, University of Wisconsin-Oshkosh; John Padgett, Capella University; Patrick Webb, Saint Augustine's University/Southern University-New Orleans.

Thanks also to Nina Amster at the American Law Institute for help in working through the process necessary to obtain permission to reprint selected portions of the Model Penal Code.

I am especially indebted to the fine folks at the Legal Information Institute at Cornell Law School (including codirectors Thomas R. Bruce and Peter W. Martin), which offers U.S. Supreme Court opinions under the auspices of the Court's electronic-dissemination Project Hermes.

Special thanks go to Gowthaman Sadhanandham, Senior Project Manager at Integra Software Services Pvt. Ltd. for guiding this project from manuscript to book. Last but not least, we wish to thank the staff at Pearson who have made this book the quality product that it is. Many thanks to Holly Shufeldt, Jenell Forschler, Faye Gemmellaro, Mike Lackey, and many other staffers who have brought this text to fruition. Thank you, each and every one!

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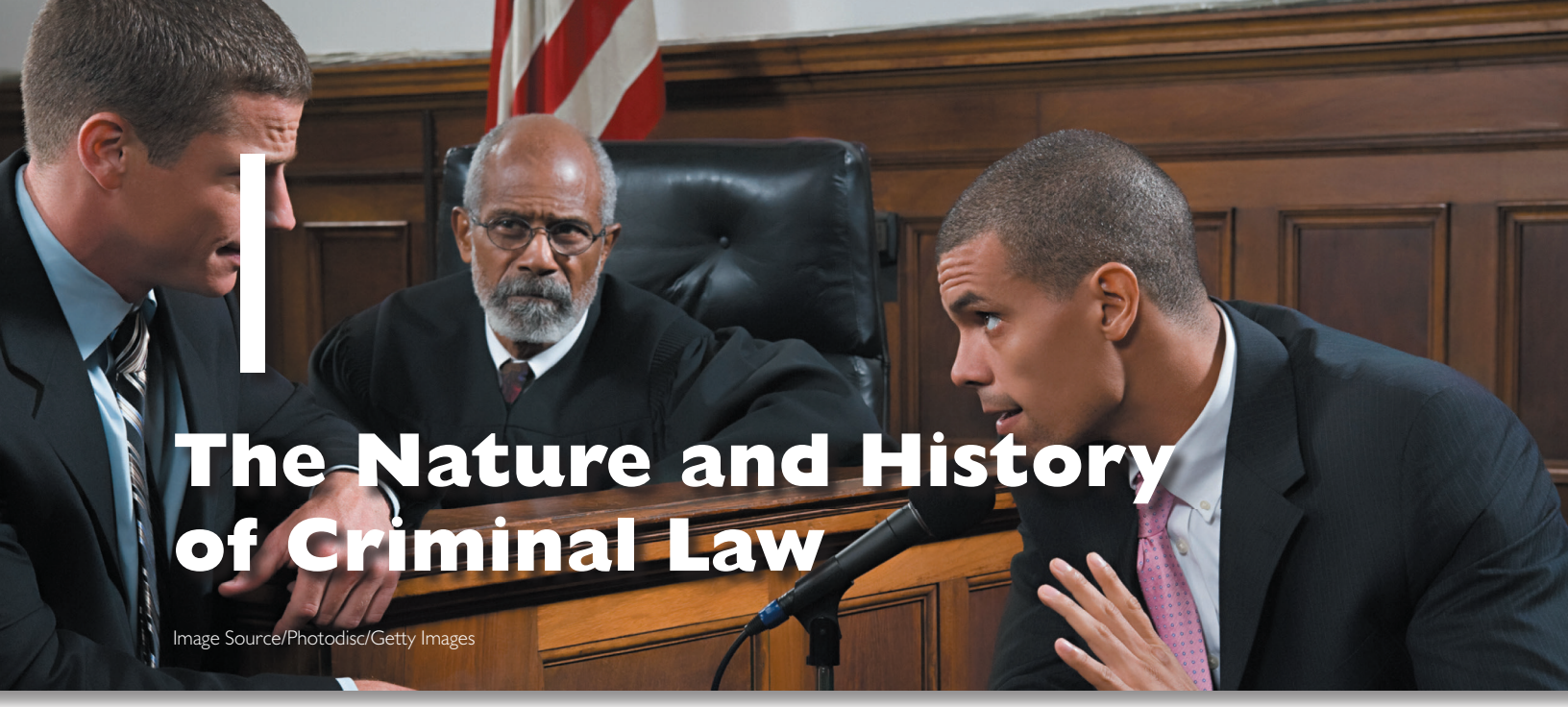
About the Author

Frank Schmalleger, Ph.D., is Distinguished Professor Emeritus at the University of North Carolina at Pembroke. Dr. Schmalleger holds degrees from the University of Notre Dame and Ohio State University, having earned both a master's and doctorate from Ohio State University, with a special emphasis in criminology. From 1976 to 1994, he taught criminal justice courses at the University of North Carolina at Pembroke. For the last 16 of those years, he chaired the university's Department of Sociology, Social Work, and Criminal Justice. He was named Professor Emeritus in 2001. As an adjunct professor with Webster University in St. Louis, Missouri, Schmalleger helped develop the university's graduate program in security administration and loss prevention. He taught courses in that curriculum for more than a decade. Schmalleger has also taught in the New School for Social Research's online graduate program, helping to build the world's first electronic classrooms in support of distance learning through computer telecommunications. An avid Internet user, Schmalleger is also the creator of a number of award-winning websites, including one that supports this textbook.

Frank Schmalleger is the author of numerous articles and many books, including the widely used *Criminal Justice Today* (Pearson, 2021), *Criminology Today* (Pearson, 2021), and *Criminal Justice: A Brief Introduction* (Pearson, 2020). See his Amazon author page at amazon.com/author/frankschmalleger.

Let reverence for the laws,
be breathed by every American mother,
to the lisping babe, that prattles on her lap;
let it be taught in schools, in seminaries, and in colleges;
let it be written in Primers, spelling books, and in Almanacs;
let it be preached from the pulpit, proclaimed in legislative halls,
and enforced in courts of justice.
And, in short, let it become the political religion of the nation;
and let the old and the young, the rich and the poor, the grave and the gay,
of all sexes and tongues, and colors and conditions,
sacrifice unceasingly upon its altars.

—ABRAHAM LINCOLN (1838)



1 The Nature and History of Criminal Law

Image Source/Photodisc/Getty Images

CHAPTER OUTLINE

OBJECTIVES

After reading this chapter, you should be able to

- Define crime and criminal law.
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- Identify the various sources of criminal law, including the principle of *stare decisis*.
- Describe the structure of the U.S. legal system, including jurisdiction.
- Describe the adversarial and accusatorial qualities of the U.S. system of criminal justice.
- Expound upon the "rule of law" and explain why due process is an integral part of the rule of law.

Law is the art of the good and the fair.

—Ulpian, Roman judge (circa AD 200)

[D]ue process . . . embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just.

—Justice Hugo Black (1886–1971)[1]

The law is that which protects everybody who can afford a good lawyer.

—Anonymous

alexshyrjpa/123RF

Crystal meth, also known as methamphetamine. Did Douglas Kelly, the person described in the opening story of this chapter, really think that the police would help him? If so, why?

Introduction

In 2018, 49-year-old Douglas Peter Kelly called the Putnam County (Florida) Sheriff's Department to complain about the quality of the drugs he had purchased.[2] Officers in the drug enforcement unit of the department invited him to come to their office where they could test the substances that he had in his possession. Kelly drove to the sheriff's office and handed over some aluminum foil containing what detectives later described as "a crystal-like substance." Tests showed that it was methamphetamine—and, needless to say, Kelly was arrested for possession of a controlled substance. Following Kelly's arrest, the sheriff's department began running Facebook posts reading: "Public Notice: If you believe you were sold bad drugs, we are offering a free service to test them for you."

What Is Criminal Law?

Although most people would likely agree that it is not very smart for users of illicit drugs to ask police departments to test their quality, it is not a crime to be stupid. The possession of controlled substances, of course, is another matter, and possession of methamphetamines, unless legally prescribed to the person who has them, violates the law. *Black's Law Dictionary*, an authoritative source on legal terminology, defines the word **law** as follows: "that which is laid down, ordained, or established . . . a body of rules of action or conduct prescribed by controlling authority, and having binding *legal* force."[3]

law
"That which is laid down, ordained, or established . . . a body of rules of action or conduct prescribed by controlling authority, and having binding *legal* force."[i]

norms
Unwritten rules that underlie and are inherent in the fabric of society.

mores
Unwritten, but generally known, rules that govern serious violations of the social code.

morals
Ethical principles, or principles meant to guide human conduct and behavior; principles or standards of right and wrong.

crime
Any act or omission in violation of penal law, committed without defense or justification, and made punishable by the state in a judicial proceeding.

However, not all rules are laws, fewer still are criminal laws, and not all have "binding legal force." Sociologists, for example, distinguish between **norms** and **mores**, while philosophers and ethicists talk of **morals** and morality. Morals are ethical principles, and moral behavior is behavior that conforms to some ethical principle or moral code. Norms are rules that underlie and are inherent in the fabric of society. For example, it is regarded as inappropriate to belch in public. Anyone who intentionally violates a social norm may be seen as inadequately socialized (others might say "uncivilized"), offensive, and even dangerous (if the violation is a serious one) to an accepted way of life. When social norms are *unintentionally* violated (as may be the case with a belch at the dinner table), a mere request to be excused generally allows social interaction to proceed with little or no interruption. Mores, on the other hand, are rules that govern serious violations of the social code, including what social scientists call "taboos." Violations of both mores and norms are forms of deviance and can properly be called "deviant behavior." Even so, few violations of social norms are illegal, and fewer still are **crimes** (Figure 1–1). Because laws have not been enacted against quite a large number of generally recognized taboos, it is possible for behavior to be contrary to accepted principles of social interaction and perhaps even immoral—but still legal. As you read through this book, it is important to remember that only human conduct that violates the criminal law can properly be called "criminal." Although other forms of nonconformist behavior may be undesirable or even reprehensible, they are not crimes.[4] Accordingly, the distinguishing characteristic between a crime and other deviance is the presence of a public prohibition and the authority of the government to enforce the prohibition.

"Law" is a solemn expression of the will of the supreme power of the state.

—Montana Code Annotated, Section 1–1–101

criminal law
The body of rules and regulations that defines and specifies punishments for offenses of a public nature or for wrongs committed against the state or society. Also called *penal law*.

Criminal law can be understood, then, as the body of rules and regulations that defines and specifies punishments for offenses of a public nature or for wrongs committed against the state or society. Criminal law is also called *penal law* and is usually embodied in the penal codes of various jurisdictions. In short, criminal law defines what conduct

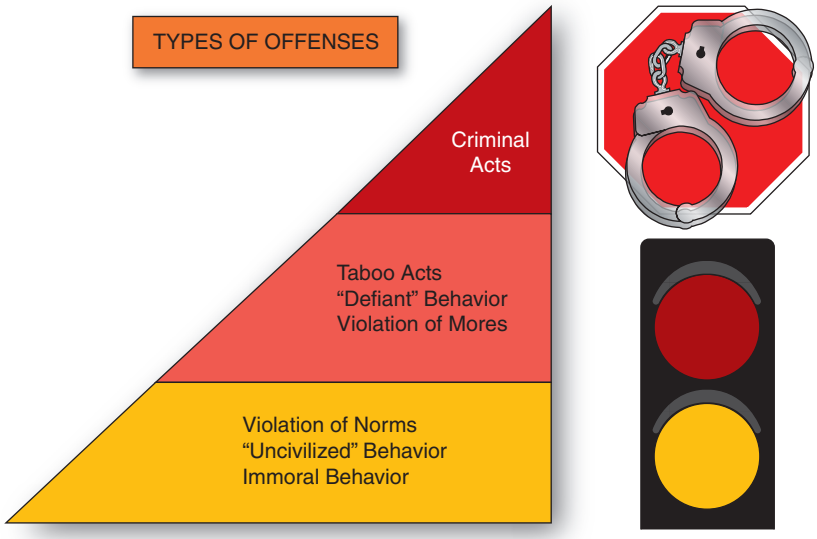

FIGURE 1–1

Crime, Deviance, and Norm Violation.

Note: Although there are many ways rules can be violated, only a select few offenses are actually "criminal" acts.

is criminal, and violations of the criminal law are referred to as *crimes*. As an academic field, criminal law also includes the study of defenses to criminal accusations, as well as punishments.

Historical and Philosophical Perspectives

Laws in the United States have been shaped by a number of historical developments and philosophical perspectives. Criminal law, in particular, has been greatly influenced by natural law theories.

Natural and Positive Law

Natural law dates back to the Greek philosopher Aristotle. Adherents believe that some laws are fundamental to human nature and discoverable by human reason, intuition, or inspiration, without the need to refer to man-made laws. Such people believe that an intuitive and rational basis for many of our criminal laws can be found in immutable moral principles or some identifiable aspects of the natural order.

natural law
The rules of conduct inherent in human nature and in the natural order, which are thought to be knowable through intuition, inspiration, and the exercise of reason without the need to refer to man-made laws.

One authoritative source has this to say about natural law:

> This expression, "natural law," or *jus naturale*, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his *nature*, meaning by that word his whole mental, moral, and physical constitution.[5]

Ideally, say natural law advocates, man-made laws should conform to principles inherent in natural law. The great theologian Thomas Aquinas (1225–1274), for example, wrote in his *Summa Theologica* that any man-made law that contradicts natural law is corrupt in the eyes of God.[6] A philosophical outgrowth of natural law is natural rights theory. This theory holds that individuals naturally possess certain freedoms that may not be encroached upon by other individuals or governments.

CRIMINAL LAW IN THE NEWS

Politicians Who Violate the "Rule of Law" Get Tough Prison Sentences

The United States has always embraced the principle that no one, not even a powerful politician, can violate the law. George Washington, speaking about political power, advised, "never for a moment should it be left to irresponsible action." President Theodore Roosevelt added, "No man is above the law and no man is below it."

Today, enforcement of the "rule of law" appears to be stricter than ever, producing some eye-popping prison terms for convicted politicians. In 2014, for example, former New Orleans Mayor Ray Nagin was sentenced to 10 years in federal prison after being found guilty on 20 counts of bribery. In 2011, former Illinois Democratic Gov. Rod Blagojevich (who was later pardoned by President Donald Trump) was sentenced to 14 years in prison, more than twice the 6 ½-year term given to his predecessor, former Republican Gov. George Ryan, who was convicted on federal fraud and racketeering charges in 2006.

Blagojevich was all over the news for his most notable crime, trying to sell President Obama's former Senate seat, and he was unrepentant until almost the end. But was he twice as guilty as Ryan, whose administration quashed a probe into bribes paid to state officials for issuing illegal truck drivers' licenses that led to highway deaths? And was Ryan twice as guilty as former Democratic Gov. Otto Kerner of Illinois, who got three years in prison in 1973 for accepting bribes from a racetrack owner?

Sentencing is a matter for individual judges to decide, but the overall trend for convicted politicians is upward. In 2014, former New Orleans Mayor Ray Nagin was convicted of participating in a half-million-dollar bribery and conspiracy scheme that ran through most of his time in office. He was sentenced to 10 years in federal prison. In 2009, former Rep. William J. Jefferson (D-La.), who famously stored bribe money in his freezer, was given 13 years in prison. It was the longest sentence ever given to a former congressman, easily topping the eight years and four months in prison given in 2006 to former Rep. Randy Cunningham (R-Calif.), who accepted bribes for tens of millions of dollars in defense contracts.

Pleas for mercy now seem to fall on deaf ears. In the 1970s, Kerner was released early due to terminal cancer, but in 2011 a judge refused former Governor Ryan's request for a leave to visit his wife who was dying of cancer. The only way Ryan got to see her at all was through the mercy of his prison warden.

Some judges compare the destruction of citizens' trust in the political system to violent crimes. According to

Former Illinois Democratic Gov. Rod Blagojevich, who was sentenced to 14 years in prison in 2011, for trying to sell President Obama's former Senate seat. He was later pardoned by President Trump. What is the rule of law, and why is it important?

Tannen Maury/EPA/Newscom

former U.S. Attorney Patrick Collins, who prosecuted Ryan, "judges are now looking at these corruption cases like guns and drug cases." As U.S. District Judge James Zagel put it in sentencing Blagojevich: "When it is the governor who goes bad, the fabric of Illinois is torn and disfigured and not easily or quickly repaired."

Some errant politicians still get relatively short sentences but are hammered if convicted again. In 2008, for example, former Democratic Mayor Kwame Kilpatrick of Detroit was sentenced to four months in prison for covering up an affair with his chief of staff and assaulting a police officer. But when he violated parole, the judge lambasted him for his "lack of contriteness and lack of humility," and he received 18 months to 5 years in prison in 2010. He was again found guilty in 2013 on federal charges of using his office as mayor to execute a wide-ranging racketeering conspiracy and was sentenced to another 28 years in prison.

Politicians embrace high standards for their enemies, but not so much for themselves. When President Bill Clinton was impeached in 1998, Rep. Tom Delay (D-Texas), the House majority whip at the time, advocated "the higher road of the rule of law." He continued: "Sometimes hard, sometimes unpleasant, this path relies

on truth, justice and the rigorous application of the principle that no man is above the law."

Then in 2011, Delay was convicted of money laundering and sentenced to three years in prison. He has never accepted blame for what he did, arguing that he was the victim of his own political enemies in Texas. "The criminalization of politics undermines our very system and I'm very disappointed in the outcome," he said.

Finally, in 2020, President Donald Trump was impeached in the U.S. House of Representatives, but the charges against him were determined to be unfounded by the Senate.

Resources

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"'Sorry' Blagojevich Gets 14-Year Prison Sentence," *Chicago Sun-Times*, December 7, 2011, **http://www.suntimes.com/news/metro/blagojevich/9300810-452/sorry-blagojevich-gets-14-year-prison-sentence.html.**

"Tom DeLay Gets 3 Years in Prison for Money Laundering," Fox News, January 10, 2011, **http://www.foxnews.com/politics/2011/01/10/tom-delay-gets-years-prison-money-laundering.**

"Former Rep. William Jefferson sentenced to 13 years in prison," *Christian Science Monitor*, November 13, 2009, **http://www.csmonitor.com/USA/Politics/2009/1113/former-rep-william-jefferson-sentenced-to-13-years-inprison.**

A contrasting construct is **positive law**, which is simply the law that is enforced by the government. Natural law and natural rights philosophers don't deny the authority of governments to establish positive law, but instead they believe such authority is bounded by the natural rights of individuals. Some positivists also contend that for law to be legitimate, it must be created and implemented in ways that are acceptable to most people (democratic or contractualist positivism).

positive law
Law that is legitimately created and enforced by governments.

Law is born from despair of human nature.

—José Ortega y Gasset, Spanish philosopher (1883–1955)

Natural law principles continue to be influential in many spheres. The modern debate over abortion, for example, relies on the use of natural law arguments to support both sides in the dispute. Before the 1973 U.S. Supreme Court decision of *Roe* v. *Wade*,[7] abortion was a crime in most states (although abortions were sometimes permitted in cases of rape or incest or when the mother's life was in danger). In *Roe*, the justices held, "State criminal abortion laws . . . that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the due process clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy." The Court set limits on the availability of abortion, however, when it said that, although "the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests, grows and reaches a 'compelling' point at various stages of the woman's approach to term." Natural law supporters of the *Roe* standard argue that abortion must remain a "right" of any woman because she is naturally entitled to be in control of her own body. They claim that the legal system must continue to protect this "natural right" of women.

This law of nature, being . . . dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, and all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their force, and all their authority immediately, or immediately from this original.

—Sir William Blackstone, 1 Cooley's Blackstone 41

In contrast, antiabortion forces—sometimes called "pro-lifers"—claim that the unborn fetus is a person and that he or she is entitled to all the protections that can reasonably and ethically be given to any living human being. Such protection, they suggest, is basic and humane and lies in the natural relationship of one human being to another. If antiabortion forces have their way, abortion will one day again be outlawed.

Natural law provides a basis in human dignity by which we can judge whether human beings are just or unjust, noble or ignoble.

—Justice Clarence Thomas (1987)

Natural law became an issue in confirmation hearings conducted for the U.S. Supreme Court justice nominee Clarence Thomas in 1991. Because Thomas had mentioned natural law and natural rights in speeches given before his nomination to the Court, Senate

Judiciary Committee Chairman Joseph Biden (and others) grilled him about the concept. Biden suggested that natural law was a defunct philosophical perspective, no longer worthy of serious consideration, and that the duty of a U.S. Supreme Court justice was to follow the Constitution. Thomas responded by pointing out that natural law concepts contributed greatly to the principles underlying the Constitution. It was the natural law writing of John Locke, Thomas suggested, that inspired the Framers to declare: "All men are created equal."

Law is whatever is boldly asserted and plausibly maintained.

—Aaron Burr, former vice president of the United States (1756–1836)

History of Western Law

Just as philosophical perspectives have contributed to the modern legal system in the United States, so have many ancient forms of law. Consequently, our laws today reflect many of the principles developed by legal thinkers throughout history.

Ancient Laws

The development of criminal codes can be traced back several thousand years. Although references to older codes of law have been discovered, the oldest written law that has been found, although only in part, is the Code of Ur-Nammu from Mesopotamia. It is dated to approximately 2100 BC. Similar to contemporary U.S. law, it distinguished between compensation and punishment—or in contemporary terms, civil law and criminal law. For example, the code provided monetary compensation for personal injuries and punishment (death) for murder, rape, and other "crimes."

Another ancient law that was found in more complete condition is the Code of Hammurabi. This code was inscribed on a stone pillar near the ancient city of Susa around the year 1750 BC. The Hammurabi Code, named after the Babylonian king Hammurabi (1792–1750 BC), specified a number of property rights, crimes, and associated punishments. Hammurabi's laws spoke to issues of ownership, theft, sexual relationships, and interpersonal violence. Although the Hammurabi Code specified a variety of corporal punishments, and even death, for named offenses, its major contribution was that it routinized the practice of justice in Babylonian society by lending predictability to punishments. Before the Hammurabi Code, captured offenders often faced the most barbarous and capricious of punishments, frequently at the hands of revenge-seeking victims, no matter how minor their offenses had been. As Marvin Wolfgang has observed, "In its day, . . . the Hammurabi Code, with its emphasis on retribution, amounted to a brilliant advance in penal philosophy mainly because it represented an attempt to keep cruelty within bounds."[8] Although it is of considerable archeological importance, the Code of Hammurabi probably had little impact on the development of Western legal traditions. Even though they had little direct impact on the development of Western law, we learn from these ancient codes that some legal principles (e.g., distinguishing compensation from punishment, and the idea of proportionality of punishment) are innate, meaning that they have held significance for people for a long time.

Civil and Common Law Traditions

In contrast to the Hammurabi Code, Roman law influenced our own legal tradition in many ways. Roman law derived from the Twelve Tables, which were written about 450 BC. The Tables, a collection of basic rules related to family, religious, and economic life, appear to have been based on common and fair practices generally accepted among early tribes that existed before the establishment of the Roman republic. Roman law was codified by order of Emperor Justinian I, who ruled the Byzantine Empire between AD 527 and 565. In its complete form, the Justinian Code, or *Corpus Juris Civilis* (CJC), consisted of three

lengthy legal documents: (1) the Institutes, (2) the Digest, and (3) the Code itself. Justinian's code distinguished between two major legal categories: public laws and private laws. Public laws dealt with the organization of the Roman state, its senate, and governmental offices. Private law concerned itself with contracts, personal possessions, the legal status of various types of persons (citizens, free persons, slaves, freedmen, guardians, husbands and wives, and so on), and injuries to citizens. Emperor Claudius conquered England in the middle of the first century, and Roman authority over "Britannia" was consolidated by later rulers who built walls and fortifications to keep out the still-hostile Scots. Roman customs, law, and language were forced on the English population during the succeeding three centuries under the *Pax Romana*—a peace imposed by the military might of Rome.[9] The CJC was abandoned and lost for several centuries. But it was rediscovered in the eleventh century and thereafter influenced the development of civil codes throughout Europe, including the Napoleonic and German codes. Indeed, Napoleon transplanted his code throughout the territories he conquered. Today, many nations fall into the civil law tradition, including France, Italy, Spain, Germany, French Africa, French South America, and French Central America. The law of the Catholic Church, canon law, was influential in the development of the civil law tradition. Although the civil law tradition spread throughout continental Europe and much of the rest of the world, it was not transplanted to England, where a separate legal tradition developed.

The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong.

—Justice Oliver Wendell Holmes, Jr.
(The Common Law, 1881)

The criminal law . . . is an expression of the moral sense of the community.

—United States v. Freeman, 357 F.2d 606 (2d Cir. 1966)

Common Law Tradition

Before the Norman conquest of 1066, most law in England was local. It was created by lords and applied within their realms. Accordingly, law was decentralized and varying. When William the Conqueror invaded England in 1066, he declared Saxon law absolute and announced that he was "the guardian of the laws of Edward," his English predecessor. William, however, in seeking to add uniformity to the law, planted legal seeds that would grow and eventually merge into one **common law**. He established courts that would be hierarchical and have national jurisdiction. The decisions of the highest court, Kings Court, were binding all across England. Over time, these courts developed their own processes and rules. One such development was the doctrine of *stare decisis*.

common law
Law originating from use and custom rather than from written statutes. The term refers to non-statutory customs, traditions, and precedents that help guide judicial decision making.

Stare decisis, Latin for "let the decision stand," embodies the idea that cases with similar facts should have the same law applied. The earlier case is commonly known as *precedent*. Add to judge-made law another element in the equation: the absence of a legislature. Unlike the civil law tradition, which is legislative in nature, courts developed common law, case by case. However, the diversity of the law that characterized the feudal era was reduced by having a hierarchical system of courts, with higher court decisions binding on lower courts. But it was the courts, with the occasional fiat from the monarch, that made the law.

The fusion of these developments effectively resulted in the creation of new laws, through courts, that applied throughout England. For the first time, England had a unified set of laws that were common to all the English; hence, this legal tradition is known as the *common law tradition*. As Clarence Ray Jeffery, a sociologist of law, observes, "It was during the reign of Henry II (1154–1189) that the old tribal-feudal system of law disappeared and a new system of common law emerged in England."[10] By the year 1200, common

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.

—Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829)

law was firmly entrenched in England. As noted author Howard Abadinsky observes, "Common law involved the transformation of community rules into a national legal system. The controlling element [was] precedent."[11] The common law tradition is evolutionary in nature. Its change came incrementally, as courts adapted the law to different facts or societal changes. The civil law tradition, on the other hand, is planned and statutory. Civil law is conceived of by some authority, is established, and then changes abruptly when the legislative authority revises the code.

The common law tradition was carried to the United States by the early English immigrants, and today it forms the basis of much statutory and case law in this country. The influence of common law on contemporary criminal law is so great that it is often regarded as *the* major source of modern criminal law. The American frontier provided an especially fertile ground for the acceptance of common law principles. The scarcity of churches and infrequent visits by traveling ministers prompted many territories to recognize common law marriages. Similarly, the lack of formal legal agencies led to informal recognition that a meeting of minds (and a person's "word") constituted a valid contract in most areas of human endeavor.

The strength of the common law tradition in early America was highlighted in 1811, when the famous English prison reformer and jurist Jeremy Bentham wrote to President James Madison offering to codify the law of the United States in its entirety. Bentham told Madison that the case-by-case approach of the common law, based solely on precedent, was too "fragmented, flexible, and uncertain" to support the continued economic and social development of the country. Madison, however, rejected the offer and directed John Quincy Adams to reply to Bentham, telling him "[either] I greatly overrate or [Bentham] greatly underrates the task . . . not only of digesting our Statutes into a concise and clear system, but [of reducing] our unwritten to a text law." A short time later, Madison also rejected federal use of the written legal code developed by Edward Livingston, an American follower of Bentham.[12]

By the late 1800s, however, common law was giving way across America to the authority of courts to declare the law, and to written civil and penal codes. The Married Women's Property Act of 1875, for example, which provided a model for state legislatures of the period, gave married women control over wages earned independently of their husbands. The act effectively dissolved the older common law doctrine of unity of husband and wife, a principle that had given husbands control over their wives' wages and property. About the same time, the nineteenth-century jurist David Dudley Field drafted what came to be known as the Field Code—a set of proposed standardized criminal and civil procedures and uniform criminal statutes that were adopted by the state of New York and served as a model for other states that sought to codify their laws.

Common Law Today

Even though legislatures have replaced courts as the creators of new criminal law, the common law continues to be important for many reasons. First, while modern American substantive and procedural criminal law is largely codified, some states still explicitly acknowledge the common law roots of contemporary penal legislation. For example, the Florida Criminal Code states, "The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject."[13] With regard to "punishment of common law offenses," the Florida Code says, "When there exists no such provision by statute, the court shall proceed to punish such offense by fine or imprisonment, but the fine shall not exceed $500, nor the imprisonment 12 months."[14] Arizona Revised Statutes contain a similar provision, which reads, "The common law only so far as it is consistent with and adapted

to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state."[15]

Occasionally individuals are arrested and tried under common law when appropriate statutory provisions are not in place. In 1996, for example, euthanasia advocate Dr. Jack Kevorkian was arrested and tried in Michigan on charges of violating the state's common law against suicide. After Kevorkian was acquitted, jury foreman Dean Gauthier told reporters, "We felt there was a lack of evidence regarding the interpretation of the common law."[16] In 1999, however, after Michigan enacted statutory legislation outlawing physician-assisted suicide, Kevorkian was convicted of a number of crimes and sentenced to 10 to 25 years in prison. Evidence against Kevorkian came largely from a videotape aired on CBS's *60 Minutes*, showing the doctor giving a lethal injection to 52-year-old Thomas Youk, who suffered from amyotrophic lateral sclerosis, also known as ALS, or Lou Gehrig's disease. After spending more than eight years in prison, Kevorkian was paroled for good behavior in 2007. He died in 2011 from pneumonia at the age of 83.[17]

No one, sir, is above the law. No one.

—Judge Jessica Cooper, ruling in the trial of Jack Kevorkian

Although Florida and a few other states have passed legislation officially institutionalizing common law principles, all states today, with the exception of Louisiana, which employs a modified civil law system because it was once a territory of France, remain **common law states**. Even though today's primary lawmakers are legislatures in all U.S. states, both the common law and judges continue to play a significant role in the development of the law. Statutes are often broadly drafted, and interpretation and "gap filling" are necessary. The responsibility of interpreting and applying the law belongs to judges, who, through their interpretation of both statutes and precedent, continue to develop the existing body of common law. The common law continues to be significant in this way and others. Often, statutes are simply codifications of the common law. For example, to understand what a legislature meant when it referred to "malice aforethought," a court will determine if the legislature intended to codify the common law definition, and if so, apply it. If so, then the judge would turn to common law decisions to understand the meaning of the term. It is important to realize, however, that the common law, except interpretations of state and federal constitutions, is a lower form of law than statutes. As such, statutes prevail when in conflict with the common law.

common law state
A jurisdiction in which the principles and precedents of common law continue to hold sway.

Regardless of whether a state more closely affiliates with a common law or civil law tradition, there is considerable uniformity of law, particularly criminal law and even more—criminal procedure. There are several causes of the similarities. First, the U.S. Constitution applies equally and identically to all states. For reasons you will learn later, the Constitution has had considerable impact on both substantive and procedural criminal law in recent decades.

Second, there has been a convergence of all legal traditions, not just within the United States but around the world (Figure 1–2). As people from different legal traditions interact, through war, conquest, business transactions, and travel, legal convergence occurs. Today, all common law nations have legislative bodies that are the primary lawmakers. England has its Parliament, the United States has its Congress, and the states have their state legislatures. Conversely, judges play a larger role in interpreting the law in civil law nations than in the past. The emergence of legislative authority is a significant change to the common law tradition. Its impact has been significant in criminal law, where the doctrine of *nullum crimen sine lege*, also known as the *principle of legality*, has taken hold. The Latin phrase translates to "there is no crime if there is no statute." Today, the idea that crimes must be declared by statute in advance of the criminal act is embodied in the due-process clauses of the Constitution. Indeed, although exceptions can be found, in both legislation and judicial decisions, for very well-defined and recognized common law crimes, the rule is widely adhered to today.

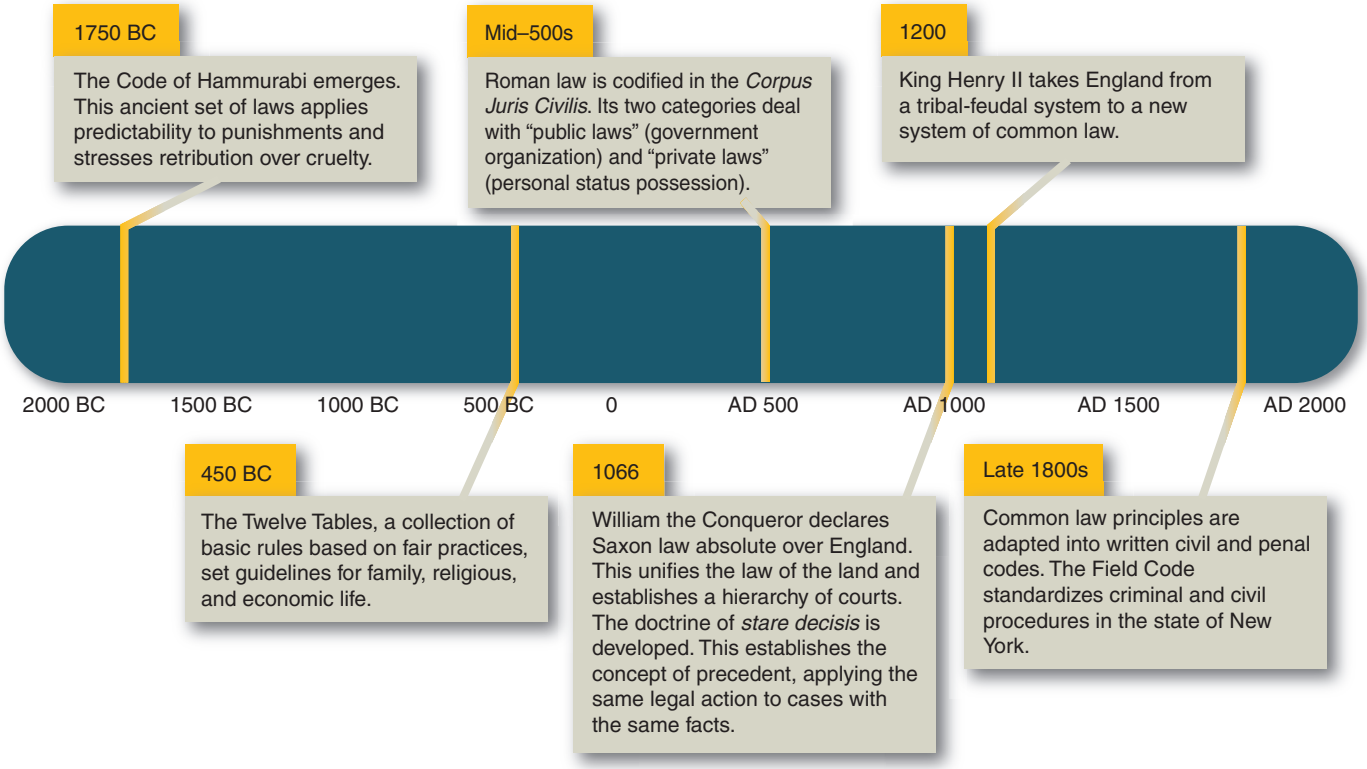

FIGURE 1–2

A Timeline of Developments in the Law.

Additionally, civil law nations are increasingly adopting accusatorial processes, which were founded in common law systems, and common law nations are adopting a few inquisitorial practices, which have their origin in civil law nations. Finally, other factors influencing the uniformity of law are the increasing similarity of values among all citizens and the ever-increasing national and international nature of business and social life. Table 1–1 compares and summarizes the two legal traditions.

Civil Law Distinguished

civil law
The form of the law that governs relationships between parties.

tort
A private or civil wrong or injury; "the unlawful violation of a private legal right other than a mere breach of contract, express or implied."[ii]

At this point, criminal law should be distinguished from civil law. Whereas criminal law concerns the government's decision to prohibit and punish conduct, **civil law** (not to be confused with the Civil Law legal tradition) governs relationships between private parties. Civil codes regulate private relationships of all sorts, including marriages, divorces, inheritance, adoption, and many other forms of personal and business relationships. Civil actions come in many varieties, including breach of contract, domestic, and tort. A **tort** is "the unlawful violation of a private legal right other than a

TABLE 1–1 Civil and Common Law Legal Traditions Compared

The Civil Law Legal Tradition	The Common Law Legal Tradition
Where: France, Italy, Portugal, Spain, Franco-Africa, Latin America, Louisiana (limited)	Where: England, United States, Australia, New Zealand, Belize, Canada, Anglo-Africa
Judges play minimal role in development of law	Judges play major role in development of law
Periodic, sometimes abrupt, legislative change	More evolutionary change through judicial decisions with occasional legislative change
Rational and forward thinking	More likely to change in response to current conditions

mere breach of contract, express or implied. A tort may also be the violation of a public duty if, as a result of the violation, some special damage accrues to the individual."[18] An individual, business, or other legally recognized entity that commits a tort is called a **tortfeasor**.

tortfeasor
An individual, business, or other legally recognized entity that commits a tort.

There are three forms of tort. The first, negligence, occurs when a tortfeasor injures another through unintentional but careless behavior. Car accidents and slips and falls are examples. Intentional behavior that harms another is the second form of tort. Many crimes are also intentional torts such as assault, battery, and destruction of property. The third form of tort is strict liability. In these cases, which are rare, defendants are liable if they are the cause of harm, even if they are not negligent, because they engage in ultrahazardous activities. No degree of care shields an individual from liability for injuries and damages when engaging in these activities. The storage and use of explosives, for example, may lead to strict liability claims in some instances. Strict liability encourages potential defendants to take every possible precaution to guard against harm to others.

Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many.

—Justice Louis D. Brandeis, dissenting in Washington v. W.C. Dawson & Co., 264 U.S. 219, 238 (1924)

A tort may give rise to civil liability, under which the injured party may sue the person or entity that caused the injury and ask that the offending party be ordered to pay damages. Civil law is more concerned with compensating injuries than it is with punishment.

Parties to a civil suit are referred to as the *plaintiff* and the *defendant*, and the names of civil suits take the form the name of the plaintiff v. the name of the defendant, for example, *Grace Yang* v. *Eva Ping*. Unlike criminal cases, in which the state prosecutes wrongdoers, most civil suits are brought by individuals. On occasion, however, one or more of the parties may be a government. For example, the state may bring a suit to protect the public welfare, such as to condemn a dangerous building, to stop the sale of a dangerous product, or to revoke an attorney's right to practice law or a doctor's right to practice medicine. A government may also sue in the same manner and for the same reasons as private individuals, such as when someone breaches a contract with the government or harms the government through negligence.

The primary intention of civil actions is to provide compensation for losses, known as **damages**. In some cases, declaratory and injunctive relief may be sought. That is, the plaintiff may want the court to make a declaration of law (e.g., the statute is unconstitutional) or may want the court to order someone to do something or not to do something (e.g., remove a fence that crossed onto the plaintiff's property). A second financial remedy represents an area of overlap with criminal law. In instances of extremely negligent or intentional behavior, civil suit plaintiffs may be awarded **punitive damages**. Punitive damages are monies beyond compensation; they are intended to punish or to deter, two objectives of criminal law. Punitive damages have been challenged as unconstitutional because defendants in civil actions are not protected by all the rights of criminal defendants. The Supreme Court has upheld the constitutionality of civil punitive damages with limitations as to amount and how they are calculated.[19]

damages (actual)
A financial award in a civil suit intended to compensate for injuries to person or property.

punitive damages
A financial award in a civil suit that is intended to punish the defendant and/or to deter similar future misconduct. Punitive damages are monies beyond the actual damages suffered by the plaintiff.

For example, in 1989 the *Exxon Valdez*, an oil tanker, struck ground in Alaskan waters. The injury to the ship resulted in hundreds of thousands of barrels of oil spilling into the ocean, the largest spill by a tanker in U.S. history and the second largest spill of any kind next to the Deepwater Horizon spill of 2010. Subsequently, a jury awarded plaintiffs $5 billion in punitive damages. That award was reduced on a couple of occasions by appellate courts, and the Supreme Court later reduced the amount equal to the actual damages awarded by the jury (approximately $500 million), because the spill was caused by negligence. Punitive damages may exceed the 1:1 ratio in cases of intentional torts.[20]

While Justice Cardozo pointed out with great accuracy that the power of the precedent is only "the power of the beaten track"; still the mere fact that a path is a beaten one is a persuasive reason for following it.

—Justice Robert H. Jackson (1945)

Of course, violations of the criminal law can also lead to civil actions—even though the defendant may not be convicted of the criminal charges. In 1996, for example, Bernhard Goetz, also known as the "subway vigilante," was ordered to pay $43 million in damages to Darrell Cabey, one of four young black men he shot on a New York City subway train in 1984. Goetz did not deny that he shot the men but claimed that they were trying to rob him. After the shooting, Goetz was acquitted of attempted murder and assault charges at a criminal trial but served eight months in prison on weapons charges. Immediately after the civil award, Goetz filed for bankruptcy, listing $17,000 in assets and $60 million in liabilities.

A famous example of such an instance, however, was the 1995 wrongful death suit filed against O. J. Simpson by the family of murder victim Ronald Goldman. The suit demanded monetary damages for what the plaintiffs claimed was Simpson's role in the wrongful death of Ronald Goldman, and it alleged that Simpson (and possibly other unknown defendants) caused Goldman's death. In 1997, Simpson was ordered to pay $33.5 million to the family of Ron Goldman and to Nicole Simpson's estate, after a California civil jury found that he was responsible for their deaths. By 2017, the amount of money that Simpson owed had ballooned to $70 million with accumulated interest.[21] California Superior Court Judge Hiroshi Fujisaki, who had also presided over the trial, denied Simpson's request for a new trial.[22] In 2008, Simpson was convicted by a Las Vegas jury on 12 felony counts stemming from a confrontation in a hotel room in 2007. The convictions came 13 years to the day after his 1995 acquittal.[23] Simpson was ordered to serve 33 years in prison, with the possibility of parole in nine years. He served most of his prison time at the Lovelock Correctional Center in Lovelock, Nevada, from where he was paroled in 2013.[24]

Because criminal law and civil law are conceptually distinct, both in function and in process, a person can be held accountable under both types of law for the same instance of misbehavior without violating constitutional prohibitions against double jeopardy.

Criminal Procedure Distinguished

substantive criminal law
The part of the law that defines crimes and specifies punishments.

Whereas **substantive criminal law** defines what conduct is criminal, criminal procedure defines the processes that may be used by law enforcement, prosecutors, victims, and courts to investigate and adjudicate criminal cases. As an academic field, criminal procedure also includes the study of the Constitution's role in the process. For example, the Fourth Amendment's privilege against unreasonable searches and seizures, the Fifth Amendment's privilege against self-incrimination, and the Sixth Amendment's right to counsel, to a speedy and public trial, and to confront one's accusers are all criminal procedure topics. This text does not explore criminal procedure. Instead, it provides a comprehensive survey of criminal law.

Types of Crimes

felony
A serious crime, generally one punishable by death or by incarceration in a state or federal prison facility as opposed to a jail.

misdemeanor
A minor crime; an offense punishable by incarceration, usually in a local confinement facility, for a period of which the upper limit is prescribed by statute in a given jurisdiction, typically one year or less.

There are many different ways to classify crimes. One way is to distinguish crimes by their seriousness. It is common, for example, to distinguish among felonies, misdemeanors, and infractions.[25] A crucial feature that distinguishes one type of crime from another is the degree of punishment. Hence **felonies** are thought of as serious crimes that are punishable by at least a year in prison. To the founders of the United States, the highest crime an individual could commit, and the only crime mentioned in the Constitution, is treason (which is defined and discussed in more detail in Chapter 11). **Misdemeanors** are less serious offenses, generally thought of as punishable by less than a year's incarceration (Figure 1–3). The Texas Penal

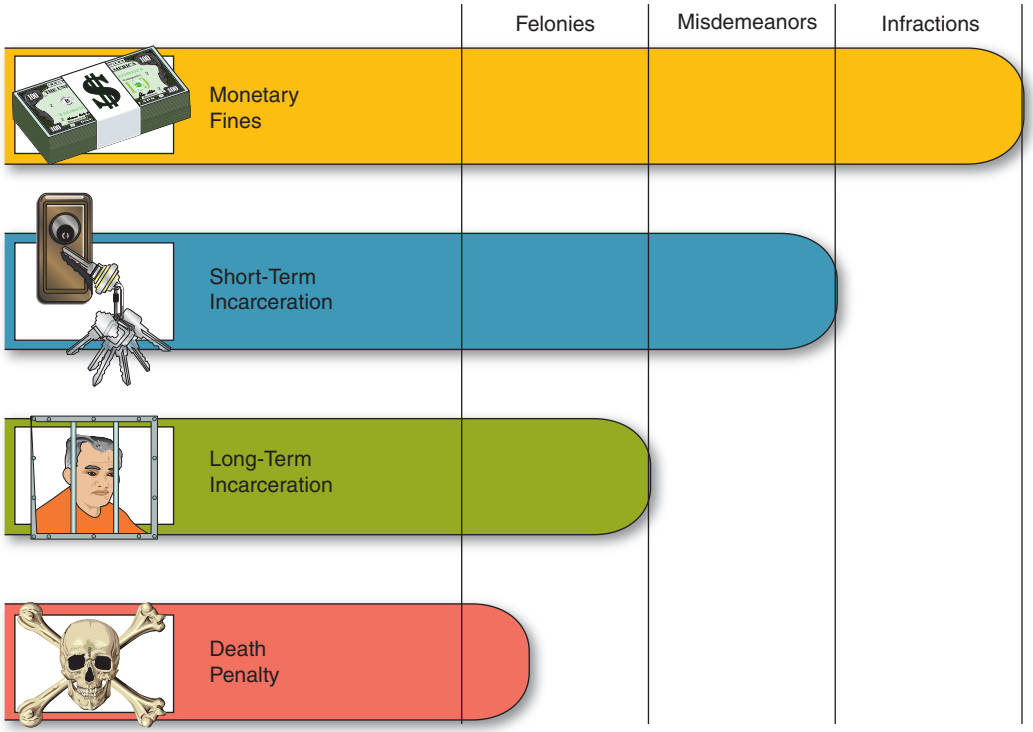

FIGURE 1–3

Common Punishments for Criminal Acts.

Code, for example, defines a felony as "an offense so designated by law or punishable by death or confinement in a penitentiary." A misdemeanor, according to the Texas Code, "means an offense so designated by law or punishable by fine, by confinement in jail, or by both fine and confinement in jail."

Other states use similar definitions. The California Penal Code describes a felony as "a crime which is punishable with death or by imprisonment in the state prison." The code continues, "Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions." Consistent with its emphasis on degree of punishment as a distinguishing feature between felonies and misdemeanors, California law states, "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both." In California, "[a]n infraction is not punishable by imprisonment." Some jurisdictions refer to **infractions** as *ticketable offenses*, to indicate that such minor crimes usually result in the issuance of citations, which can often be paid through the mail.

Another important distinction can be drawn between crimes that are completed and those that are attempted or are still in the planning stage. The term *inchoate*, which means "partial" or "unfinished," is applied to crimes such as conspiracy to commit a criminal act, solicitation of others to engage in criminal acts, and attempts to commit crimes. Inchoate crimes are discussed in greater detail later in this book.

Crimes can also be classified as either ***mala in se*** or ***mala prohibita***. *Mala in se* crimes are those that are regarded, by tradition and convention, as wrong in themselves. Such acts are said to be inherently evil and immoral and are sometimes called *acts against conscience*. *Mala in se* crimes, such as murder, rape, and other serious offenses, are almost universally condemned and probably would be so even if strictures against such behaviors were not specified in the criminal law.[26] Jeffery says that just as there is a natural law, there are

infraction
A violation of a state statute or local ordinance punishable by a fine or other penalty, but not by incarceration. Also called *summary offense*.

mala in se
Acts that are regarded, by tradition and convention, as wrong in themselves.

mala prohibita
Acts that are considered "wrongs" only because there is a law against them.

The purpose of all law, and the criminal law in particular, is to conform conduct to the norms expressed in that law.

—United States v. Granada, 565 F.2d 922, 926 (5th Cir. 1978)

also "natural crimes." "The notion of natural crime," he says, "as a crime against a law of nature rather than against a legal law, was present in the criminal law at its inception. This led to the definition of crimes as *mala in se*, acts bad in themselves, and *mala prohibita*, acts which are crimes mainly because they are prohibited by positive law."[27]

As Jeffery observed, *mala prohibita* crimes (*malum prohibitum* is the singular term that refers to one such crime) are considered "wrongs" only because there is a law against them. Without a statute specifically proscribing them, *mala prohibita* offenses might *not* be regarded as "wrong" by a large number of people. *Mala prohibita* offenses often include the category of "victimless crimes," such as prostitution, drug use, and gambling, in which a clear-cut victim is difficult to identify and whose commission rarely leads to complaints from the parties directly involved in the offense.

Many other distinctions can be drawn between types of crimes, but space does not permit discussion of them all. One final division should be mentioned, however—the traditional classification of offenses into four types: (1) **property crimes,** (2) **personal crimes,** (3) **public-order offenses,** and (4) **morals offenses**. The distinction between property and personal crimes is of special importance in most state penal codes. Official reports on the incidence of crime, such as the FBI's Uniform Crime Reports (UCR), are structured along such a division. Crimes against property include burglary, larceny, arson, criminal mischief (vandalism), property damage, motor vehicle theft, passing bad checks, commission of fraud or forgery, and so on (see Chapter 9). Personal crimes, or offenses against persons, include criminal homicide, kidnapping and false imprisonment, various forms of assault, and rape (see Chapters 7 and 8). Personal crimes are also called *violent crimes*. Public-order offenses, or crimes against the public order, include offenses such as fighting, breach of peace, disorderly conduct, vagrancy, loitering, unlawful assembly, public intoxication, obstructing public passage, and (illegally) carrying weapons (see Chapter 10). Finally, morals offenses denote a category of unlawful conduct that was criminalized originally to protect the family and related social institutions (see Chapter 12). This category includes lewdness, indecency, sodomy, and other sex-related offenses, such as seduction, fornication, adultery, bigamy, pornography, obscenity, cohabitation, and prostitution.

property crime
A crime committed against property, including (according to the FBI's UCR Program) burglary, larceny, motor vehicle theft, and arson.

personal crime
A crime committed against a person, including (according to the FBI's UCR Program) murder, rape, aggravated assault, and robbery. Also called *violent crime*.

public-order offense
An act that is willfully committed and that disturbs public peace or tranquility. Included are offenses such as fighting, breach of peace, disorderly conduct, vagrancy, loitering, unlawful assembly, public intoxication, obstructing public passage, and (illegally) carrying weapons.

morals offense
An offense that was originally defined to protect the family and related social institutions. Included in this category are crimes such as lewdness, indecency, sodomy, and other sex-related offenses, including seduction, fornication, adultery, bigamy, pornography, obscenity, cohabitation, and prostitution.

The Purposes of Criminal Law

Max Weber (1864–1920), an eminent sociologist of the early twentieth century, said that the primary purpose of law is to regulate the flow of human interaction.[28] Without laws of some sort, modern society probably could not exist, and social organization would be unable to rise above the level found in primitive societies, where mores and norms were the primary regulatory forces. Laws make for predictability in human events by using the authority of government to ensure that socially agreed-on standards of behavior will be followed and enforced. They allow people to plan their lives by guaranteeing a relative degree of safety to well-intentioned individuals, while constraining the behavior of those who would unfairly victimize others. Laws provide a stable foundation for individuals wishing to join together in a legitimate undertaking by enforcing rights over the control and ownership of property. They also provide for individual freedoms and personal safety by sanctioning the conduct of anyone who violates the legitimate expectations of others. Hence the first and most significant purpose of the law can be simply stated: Laws support social order.

To many people, a society without laws is unthinkable. Were such a society to exist, however, it would doubtless be ruled by individuals and groups powerful enough to usurp

A protestor in support of anarchy. What would a society without laws be like? What purposes does the criminal law serve?
BRIAN KERSEY/UPI/Newscom

control over others. The personal whims of the powerful would rule, and the less powerful would live in constant fear of attack. The closest we have come in modern times to lawlessness can be seen in war-torn regions of the world. The genocidal activities of warring parties in Bosnia and Herzegovina, Croatia, and Rwanda and the wholesale looting and the frequent sexual attacks on Kuwaiti women by Iraqi troops during the Gulf War provide a glimpse of what can happen when the rule of law breaks down.

Crime is a technical word. It is the law's name for certain acts which it is pleased to define and punish with a penalty.

— Saturday Evening Post writer Melville D. Post (1897)

As is true of law generally, the criminal law has a variety of purposes. Some say that the primary purpose of the criminal law is to "make society safe for its members, and to punish and rehabilitate those who commit offenses."[29] Others contend that the basic purpose of the criminal law is "to declare public disapproval of an offender's conduct by means of public trial and conviction and to punish the offender by imposing a penal sanction."[30]

The criminal law also serves to restrain those whom society considers dangerous, often through imprisonment, home confinement, or other means. It deters potential offenders through examples of punishments applied to those found guilty of crimes, and it protects honest and innocent citizens by removing society's most threatening members. In short, criminal law protects law-abiding individuals while maintaining social order through the conviction and sentencing of criminals. A more complete list shows that criminal law functions to

- Protect members of the public from harm
- Preserve and maintain social order
- Support fundamental social values
- Distinguish criminal wrongs from civil wrongs[31]
- Express communal condemnation of criminal behavior
- Deter people from criminal activity
- Stipulate the degree of seriousness of criminal conduct
- Establish criteria for the clear determination of guilt or innocence at trial
- Punish those who commit crimes and restore them as productive members of the community
- Rehabilitate offenders
- Assuage and compensate victims of crime

Sources of Criminal Law

Today's laws can be found in a number of sources, each of which is briefly discussed in the pages that follow. These "living" sources of the law can be distinguished from historical underpinnings of the law, such as ancient codes.

Constitutions

police power
The authority of a state to enact and enforce a criminal statute.[iii]

Bill of Rights
The first 10 amendments to the U.S. Constitution, which were made part of the Constitution in 1791.

The highest form of law in the United States is the Constitution of the United States. The Constitution, however, is not a source of specific laws or criminal prohibitions (although it does define treason as a crime). Instead it serves as a constraint on the **police power** of the government. The Constitution sets limits on the nature and extent of criminal law that the government can enact. It guards personal liberties by restricting undue government interference in the lives of individuals and by *implicitly* ensuring personal privacy. The **Bill of Rights** contains most of the Constitution's limits on the authority of the government to regulate people.

The Constitution can be seen as the sole piece of legislation by which all other laws and legislation are judged acceptable or unacceptable. For example, the Constitution enshrines the notion that people should only be held accountable for that which they do (actions) or do not do (omissions), rather than for what they think or believe. Hence if a state legislature were to enact a law prohibiting thoughts of a seditious or carnal nature, the law would likely be overturned if it ever came before the U.S. Supreme Court, which serves as our nation's constitutional interpreter.

criminalize
To make criminal; to declare an act or omission to be criminal or in violation of a law making it so.

Constitutional provisions determine the nature of criminal law by setting limits on just what can be **criminalized,** or made illegal. Generally speaking, constitutional requirements hold that criminal laws can only be enacted where there is a compelling public need to regulate conduct. The U.S. Supreme Court has held that "to justify the exercise of police power the public interest must require the interference, and the measures adopted must be reasonably necessary for the accomplishment of the purpose."[32]

As mentioned earlier in this chapter, the Constitution also demands that anyone accused of criminal activity be accorded due process. Similarly, the Constitution helps ensure that the accused are provided with the opportunity to offer a well-crafted defense.

The Constitution imposes a number of specific requirements and restrictions on both the state and federal governments, and it protects individual rights in the area of criminal law. Most of the restrictions, requirements, protections, and rights inherent in the Constitution, as they relate to criminal law, are discussed elsewhere in this textbook. For now, we should recognize that they include

- Limits on the government's police power
- Limits on strict liability crimes
- Protection against *ex post facto* laws
- Protection against laws that are vague and unclear
- Protection of free thought and free speech
- Protection of the right to keep and bear arms
- Freedom of religion
- Freedom of the press
- Freedom to assemble peaceably
- Freedom from unfair deprivation of life, liberty, and property
- Prohibitions against unreasonable searches and seizures

- Protection against warrants issued without probable cause
- Protection against double jeopardy in criminal proceedings
- Protection against self-incrimination
- Right to a speedy and public trial before an impartial jury
- Right to be informed of the nature of the charges
- Right to confront witnesses
- Right to the assistance of defense counsel
- Prohibition against excessive bail
- Prohibition against excessive fines
- Prohibition against cruel and unusual punishments
- Guarantees of equal protection of the laws

Even though the rights found in the Constitution were originally intended to limit only the federal government, the U.S. Supreme Court has determined that the addition of the Fourteenth Amendment's due-process and equal protection clauses immediately following the Civil War were intended to extend (incorporate) most of the rights found in the Constitution to the states. As such, most of the rights just listed apply to state law enforcement officers and in state courts.

In addition to the federal Constitution, each state has its own constitution. Although states may not reduce the rights found in the U.S. Constitution, some expand on them, either through their state constitutions or by statute. Here are a few examples of state constitutional provisions that go beyond the U.S. Constitution in the protection of individual liberties:

- Many states—including Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington—expressly protect privacy, whereas the federal constitution does so implicitly. A federal right to privacy was only recently declared by the Supreme Court (as a *penumbra*, or implied protection), and it is controversial because of the absence of express language in the Constitution establishing the right.
- Many states provide for education through their constitutions, although the federal Constitution does not contain a right to education.
- In addition to protecting freedom of religion, as the First Amendment of the federal Constitution does, Georgia's constitution protects freedom of "conscience."

Statutes, Ordinances, and Regulations

As you have already learned, the source of most criminal statutes, as well as most criminal procedure today, is the legislature. In addition to the Congress of the United States, the legislature of each state has the authority to define crimes. The laws of a legislature are known as *public laws* or *statutes*. Statutes are commonly organized by topic, such as the Code of Criminal Laws. The vast majority of crimes are defined by state legislatures, most investigations by law enforcement are for state crimes, and more than 90 percent of felonies and serious misdemeanors are prosecuted in state courts.

Courts of law follow precedent, on the general theory that experience is more than just individual decision. Precedent, however, tends to carry forward the ignorance and injustice of the past. Mankind is constantly learning, getting new views of truth, seeing new values in social justice. Precedent clogs this advance.

—Frank Crane, noted author (1919)

In addition to state and federal crimes, municipalities are often empowered by state law to define and punish crimes, usually misdemeanors and infractions. Local laws are commonly known as *ordinances*. Another source of law is administrative regulations. Legitimately promulgated regulations have the full authority of legislation. Administrative regulations can be penal and can result in incarceration, fines, and other punishments.[33]

Common Law

For reasons discussed earlier, the common law, both historical and newly developed, continues to be important. Specifically, courts mold the law and contribute to the uniformity and predictability of the law through interpretation. As you read earlier, the doctrine of *stare decisis* has played a major role. The extent to which a court should follow precedent is a perennial question. Should a lower court follow a higher court's decision if it is over 100 years old and was premised on social or economic circumstances that have changed? Should the Supreme Court be bound by its own precedent if the composition of the Court has changed significantly?

The U.S. Supreme Court has ruled, "*Stare decisis* is of fundamental importance to the rule of law."[34] **Case law** and **statutory law** make for predictability in the law. Criminal defendants and their attorneys entering a modern courtroom can generally gauge with a fair degree of accuracy what the law will expect of them. In the words of the Court: "[A]cknowledgments of precedent serve the principal purposes of ***stare decisis***, which are to protect reliance interests and to foster stability in the law."[35] In a strongly worded acknowledgment of the importance of *stare decisis*, the majority opinion of the U.S. Supreme Court in the 1986 case of *Vasquez* v. *Hillary* says that *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."[36] Even so, a number of justices have, in various cases, recognized that *stare decisis* "is not an imprisonment of reason."[37] In other words, although *stare decisis* is a central guiding principle in Western law, it does not dictate blind obedience to precedent.

case law
The body of previous decisions, or precedents, that has accumulated over time and to which attorneys refer when arguing cases and that judges use in deciding the merits of new cases.

statutory law
Law in the form of statutes or formal written codes made by a legislature or governing body with the power to make law.

stare decisis
The legal principle that requires that courts be bound by their own earlier decisions and by those of higher courts having jurisdiction over them regarding subsequent cases on similar issues of law and fact. The term literally means "standing by decided matters."

Although lower courts are bound by the decisions of higher courts, any court is free to set aside its own previous decisions, assuming that a higher court has not ruled on the subject. Although the rationale undergirding the doctrine of *stare decisis* applies to courts when reviewing their own decisions, the willingness of the highest court of any jurisdiction to set aside its own decisions is more important than for other courts because there is no higher court to correct errors. Indeed, Justice Robert Jackson said it best in *Brown* v. *Allen*, "We are not right because we are infallible, but we are infallible only because we are final."[38] In *Payne* v. *Tennessee*,[39] the Supreme Court discussed the doctrine of *stare decisis* in the context of deciding to reverse itself for the second time on the same issue.

Many cases, of course, are not subject to *stare decisis* because they are unlike previous cases. They may deal with new subject matter or novel situations, raise unusual legal questions, or fall outside the principles established by earlier decisions. A case is precedential only if the facts are similar to those of the case that is being heard. If it is possible to **distinguish** the facts of a new case from the facts of earlier ones, then the law of the precedential case will not be applied, or only applied in part, to the case under review.

distinguish
To argue or to find that a rule established by an earlier appellate court decision does not apply to a case currently under consideration even though an apparent similarity exists between the cases.

There is a hierarchy in American law that should not be forgotten. The Constitution of the United States is the highest form of law. All other laws, including state constitutions, must be consistent with it. After the U.S. Constitution, the U.S. Code is the highest form of federal law, with administrative regulations following. At the state level, state constitutions fall below the federal constitution, with state codes and then administrative regulations following, in that order. The common law, except interpretations of state and federal constitutions, is a lower form of law than statutes. As such, statutes prevail when in conflict with the common law.

APPLYING THE CONCEPT

CAPSTONE CASE

Does the Eighth Amendment Bar the Admission of Victim Impact Evidence during the Penalty Phase of a Capital Trial?

Read the Court's full opinion at: https://crimlaw.justiceprograms.com

Payne v. *Tennessee*,
501 U.S. 808 (1991)

> CHIEF JUSTICE REHNQUIST delivered the opinion of the court.
>
> In this case we reconsider our holdings in *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial.

THE CASE: The petitioner, Pervis Tyrone Payne, was convicted by a jury on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. He was sentenced to death for each of the murders and to 30 years in prison for the assault.

The victims of Payne's offenses were 28-year-old Charisse Christopher, her 2-year-old daughter Lacie, and her 3-year-old son Nicholas. The three lived together in an apartment in Millington, Tennessee, across the hall from Payne's girlfriend, Bobbie Thomas. On Saturday, June 27, 1987, Payne visited Thomas' apartment several times in expectation of her return from her mother's house in Arkansas, but found no one at home. On one visit, he left his overnight bag, containing clothes and other items for his weekend stay, in the hallway outside Thomas' apartment. With the bag were three cans of malt liquor.

Payne passed the morning and early afternoon injecting cocaine and drinking beer. Later, he drove around the town with a friend in the friend's car, each of them taking turns reading a pornographic magazine. Sometime around 3 p.m., Payne returned to the apartment complex, entered the Christophers' apartment, and began making sexual advances towards Charisse. Charisse resisted and Payne became violent. A neighbor who resided in the apartment directly beneath the Christophers heard Charisse screaming, "'Get out, get out,' as if she were telling the children to leave." The noise briefly subsided and then began, "horribly loud." The neighbor called the police after she heard a "blood-curdling scream" from the Christophers' apartment.

When the first police officer arrived at the scene, he immediately encountered Payne, who was leaving the apartment building, so covered with blood that he appeared to be "sweating blood." The officer confronted Payne, who responded, "I'm the complainant." When the officer asked, "What's going on up there?" Payne struck the officer with the overnight bag, dropped his tennis shoes, and fled.

Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1,700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.

Lacie's body was on the kitchen floor near her mother. She had suffered stab wounds to the chest, abdomen, back, and head. The murder weapon, a butcher knife, was found at her feet. Payne's baseball cap was snapped on her arm near her elbow. Three cans of malt liquor bearing Payne's fingerprints were found on a table near her body, and a fourth empty one was on the landing outside the apartment door.

Payne was apprehended later that day hiding in the attic of the home of a former girlfriend. As he descended the stairs of the attic, he stated to the arresting officers, "Man, I ain't killed no woman." According to one of the officers, Payne had "a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva.

(*continued*)

He appeared to be very nervous. He was breathing real rapid. He had blood on his body and clothes and several scratches across his chest. It was later determined that the blood stains matched the victims' blood types. A search of his pockets revealed a packet containing cocaine residue, a hypodermic syringe wrapper, and a cap from a hypodermic syringe. His overnight bag, containing a bloody white shirt, was found in a nearby dumpster.

At trial, Payne took the stand and, despite the overwhelming and relatively uncontroverted evidence against him, testified that he had not harmed any of the Christophers. Rather, he asserted that another man had raced by him as he was walking up the stairs to the floor where the Christophers lived. He stated that he had gotten blood on himself when, after hearing moans from the Christophers' apartment, he had tried to help the victims. According to his testimony, he panicked and fled when he heard police sirens and noticed the blood on his clothes. The jury returned guilty verdicts against Payne on all counts.

THE FINDING: During the sentencing phase of the trial, Payne presented the testimony of four witnesses: his mother and father, Bobbie Thomas, and Dr. John T. Huston, a clinical psychologist specializing in criminal court evaluation work. Bobbie Thomas testified that she met Payne at church, during a time when she was being abused by her husband. She stated that Payne was a very caring person, and that he devoted much time and attention to her three children, who were being affected by her marital difficulties. She said that the children had come to love him very much and would miss him, and that he "behaved just like a father that loved his kids." She asserted that he did not drink, nor did he use drugs, and that it was generally inconsistent with Payne's character to have committed these crimes.

Dr. Huston testified that based on Payne's low score on an IQ test, Payne was "mentally handicapped." Huston also said that Payne was neither psychotic nor schizophrenic, and that Payne was the most polite prisoner he had ever met. Payne's parents testified that their son had no prior criminal record and had never been arrested. They also stated that Payne had no history of alcohol or drug abuse, he worked with his father as a painter, he was good with children, and he was a good son.

The State presented the testimony of Charisse's mother, Mary Zvolanek. When asked how Nicholas had been affected by the murders of his mother and sister, she responded:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister, Lacie. He comes to me many times during the week and asks me, "Grandmama, do you miss my Lacie?" And I tell him yes. He says, "I'm worried about my Lacie."

In arguing for the death penalty during closing argument, the prosecutor commented on the continuing effects of Nicholas's experience, stating:

> But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.
>
> There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer. . . .

The jury sentenced Payne to death on each of the murder counts.

The Supreme Court of Tennessee affirmed the conviction and sentence. The court rejected Payne's contention that the admission of the grandmother's testimony and the State's closing argument constituted prejudicial violations of his rights under the Eighth Amendment as applied in *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989). The court characterized the grandmother's testimony as "technically irrelevant," but concluded that it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt." The court determined that the prosecutor's comments during closing argument were "relevant to [Payne's] personal responsibility and moral guilt."

> . . . We granted certiorari, 498 U.S. (1991), to reconsider our holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family.

> This Court held by a 5-to-4 vote [in *Booth*] that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial.

The Court made clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was per se inadmissible in the sentencing phase of a capital case except to the extent that it "related directly to the circumstances of the crime." In *Gathers*, decided two years later, the Court extended the rule announced in *Booth* to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

The *Booth* Court began its analysis with the observation that the capital defendant must be treated as a "uniquely individual human being, and therefore the Constitution requires the jury to make an individualized determination as to whether the defendant should be executed based on the 'character of the individual and the circumstances of the crime.'" The Court concluded that while no prior decision of this Court had mandated that only the defendant's character and immediate characteristics of the crime may constitutionally be considered, other factors are irrelevant to the capital sentencing decision unless they have "some bearing on the defendant's 'personal responsibility and moral guilt.'" To the extent that victim impact evidence presents "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," the Court concluded, it has nothing to do with the "blameworthiness of a particular defendant." Evidence of the victim's character, the Court observed, "could well distract the sentencing jury from its constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."

> …*Booth* and *Gathers* were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do[es] not in general reflect on the defendant's "blameworthiness," and that only evidence relating to "blameworthiness" is relevant to the capital sentencing decision. However, the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater."…
>
> Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion….
>
> Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material….
>
> The Maryland statute involved in *Booth* required that the presentence report in all felony cases include a "victim impact statement" which would describe the effect of the crime on the victim and his family. Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. The evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect was much the same as if it had been. While the admission of this particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional….
>
> "We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death."…But it was never held or even suggested in any of our cases preceding *Booth* that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed….*Booth* reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a "'mini-trial' on the victim's character."
>
> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be.
>
> Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States. The state laws respecting crimes, punishments,

(*continued*)

and criminal procedure are of course subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process.

"First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." But, as we noted in *California* v. *Ramos*, 463 U.S. 992, 1001 (1983), "beyond these limitations . . . the Court has deferred to the State's choice of substantive factors relevant to the penalty determination."

"Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished." *Blystone* v. *Pennsylvania*, 494 U.S. 299, 309 (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

The present case is an example of the potential for such unfairness. The capital sentencing jury heard testimony from Payne's girlfriend that they met at church; that he was affectionate, caring, kind to her children; that he was not an abuser of drugs or alcohol; and that it was inconsistent with his character to have committed the murders. Payne's parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ. None of this testimony was related to the circumstances of Payne's brutal crimes. In contrast, the only evidence of the impact of Payne's offenses during the sentencing phase was Nicholas's grandmother's description—in response to a single question—that the child misses his mother and baby sister. Payne argues that the Eighth Amendment commands that the jury's death sentence must be set aside because the jury heard this testimony. But the testimony illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant. The Supreme Court of Tennessee in this case obviously felt the unfairness of the rule pronounced by *Booth* when it said, "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."...

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar.

Payne and his amicus argue that despite these numerous infirmities in the rule created by *Booth* and *Gathers*, we should adhere to the doctrine of *stare decisis* and stop short of overruling those cases. *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to

follow precedent."... This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved....

[T]he opposite is true in cases such as the present one involving procedural and evidentiary rules.

Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions. *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions....

Reconsidering these decisions now, we conclude for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled. We accordingly affirm the judgment of the Supreme Court of Tennessee.

What Do *You* Think?

1. What does the Court mean when it says, "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'"?
2. What would it mean for the American system of criminal justice if *stare decisis* actually were an "inexorable command" or "a mechanical formula of adherence to the latest decision"?
3. Should the doctrine of *stare decisis* apply differently in the highest court of a jurisdiction than in its lower courts?
4. What principles should guide the U.S. Supreme Court in deciding whether to adhere to one of its precedents?

Additional Applications

Who counts as a "victim"?

United States v. *Whitten et al.*, 610 F.3d 168 (2nd Cir. 2010)

The Case: In December 2006, a federal court in New York convicted a Staten Island gang member on five capital counts in connection with the robbery and shooting deaths of two undercover police detectives who had been investigating illegal gun trafficking. At the penalty phase of the trial, federal prosecutors rested their argument for the death penalty in part on evidence of the defendant's future dangerousness. They also relied on courtroom testimony about victim impact from 10 people—including three police officers who recounted to the jury how the murders had caused them great personal anguish and had also profoundly affected others who had worked alongside the slain detectives. The jury sentenced the defendant to death on all five capital counts. On appeal, the defendant argued, among other things, that *Payne* v. *Tennessee* permitted only family members to testify at trial about the impact of a violent crime.

The Finding: In a unanimous ruling, a three-judge panel of the U.S. Court of Appeals for the Second Circuit rejected the defendant's narrow "family-only" interpretation of *Payne*. The 1991 *Payne* ruling itself, the appeals court conceded, had indeed focused specifically on victim impact testimony given by a family member. Yet since *Payne*, at least three other federal appeals courts have interpreted the Supreme Court's ruling to allow evidence from non-relatives "about their own grief and about the loss felt by other non-family members." What's more, the appeals panel noted, "nothing in the Court's reasoning" suggests that the ruling was intended to have a narrow application. To the contrary, *Payne* suggests, "a fact-finder should be allowed to measure the 'specific harm' the defendant caused by committing the murder, a phrase broad enough to embrace the loss felt by friends or co-workers who were close to the victim. The opinion refers repeatedly to the specific harm caused as encompassing loss felt by 'community' or 'society.'" Consequently, the Second Circuit concluded, the trial court in New York did not commit error when admitting evidence that the detectives' shootings had adversely affected the victims' former police department colleagues.

How much victim impact testimony is allowed in the sentencing phase?

United States v. *McVeigh*, 153 F. 3d 1166 (3rd Cir. 1998)

The Case: On the morning of April 19, 1995, a bomb destroyed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people. Two years later, Timothy J. McVeigh was convicted on 11 criminal counts and sentenced to death for his part in the bombing. During the penalty phase of his trial, federal prosecutors presented victim impact testimony from 38 witnesses, including 26 relatives of deceased victims, three injured survivors, one employee of the Murrah Building day-care center, and eight rescue and medical workers. McVeigh challenged the use of victim impact testimony in his sentencing, arguing,

(*continued*)

among other things, that the cumulative effect of this testimony from 38 separate witnesses unfairly influenced the jury's deliberations by inviting jurors to use emotion rather than reason as required in *Payne* v. *Tennessee*.

The Finding: In upholding the death penalty, the Third Circuit held that *Payne* provides no bright-line rule for determining how much victim impact testimony is permissible in sentencing. Instead, trial courts may allow even a "substantial amount" of "poignant and emotional" impact testimony whenever that testimony aids the jury in making a "reasoned moral response" to a capital defendant's crime. In this case, the appeals court noted, the "sheer number of actual victims and the horrific things done to them" necessarily allowed for a broader showing of harm during sentencing so that jurors could fully understand the consequences of the crime. At the same time, the trial judge and federal prosecutors carefully limited the scope of impact testimony presented to the jury, "saying nothing about the vast majority of the 168 people who died in the blast." Viewed in its entirety, the appeals court held, the victim impact testimony at trial—although unusual in terms of numbers of witnesses—did not move the jury to impose a sentence based on passion and thus preserved fundamental fairness as required by the U.S. Constitution.

Doubts about Payne in the lower courts?

Humphries v. *Ozmint*, 397 F.3d 206 (3rd Cir. 2005)

The Case: In August 2004, a Greenville County, South Carolina, court sentenced a local man to death after finding that he had murdered a convenience store operator during a botched New Year's Day robbery attempt. During the sentencing phase of the trial, the state prosecutor spoke to the jury at length about the victim's childhood, his family—including his newly orphaned six-year-old daughter—and his various contributions to the local community. The prosecutor then urged the jury to "look at the character" of the defendant in light of his victim's exemplary life and then determine whether it would be "profane to give this man a gift of life under these circumstances." In petitioning for federal review, the defendant argued that the prosecutor had violated the strictures of *Payne* v. *Tennessee* by effectively inviting the jury to compare his relative worth as an individual to that of his victim.

The Finding: In affirming the state court judgment, a Fourth Circuit panel found *Payne* v. *Tennessee* to be directly controlling. *Payne*, the panel noted, prohibited comparisons between the victim and other members of the community generally—but it did not specifically prohibit implicit victim-to-defendant comparisons during closing arguments. Indeed, *Payne* "[u]nquestionably" permitted the prosecutor to argue both that the victim was "unique" as an individual and that the jury at sentencing should consider the consequences of his death. As such, the defendant's sentencing proceedings met the fundamental fairness requirements articulated by the Supreme Court in *Payne*.

Even while adhering to *Payne*, though, the appellate panel questioned the fairness of the Supreme Court's victim impact approach:

> We note that a consequence of *Payne* is that a defendant can be put to death for the murder of a person more "unique" than another, even though the defendant is, in fact, unaware of the victim's uniqueness. This does give us some pause for concern, as does the notion that, under *Payne*, a sentence of death can turn on the severity of the harm caused to the victim's family and society, even though the defendant did not know the victim or the victim's family.

Nonetheless, the panel concluded, "these are the inevitable consequences of *Payne*'s comparative framework; a framework that we, as judges of an inferior court, are without liberty to change."

Is stare decisis stronger with older precedents?

Lawrence v. *Texas*, 539 U.S. 558 (2003)

The Case: In *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), a closely divided U.S. Supreme Court upheld a Georgia criminal law that declared the act of sodomy—even when engaged in by consenting adults in the privacy of their own homes—a felony offense punishable by up to 20 years in state prison. Distinguishing its own earlier rulings that had limited state authority over contraception and abortion, the *Bowers* Court held that state criminal prohibitions on homosexual sodomy were unrelated to "family, marriage or procreation"—values that, according to *Bowers*, had animated the Court's earlier development of a limited constitutional right to privacy. State criminal sodomy laws, the *Bowers* court concluded, have "ancient roots" and fall clearly with the state's traditional police powers.

Twelve years after *Bowers* was decided, police in Houston, Texas, charged two adult men with violating Texas Penal Code Ann. Sec. 21.06(a), which made it a crime to engage in "deviate sexual intercourse with another individual of the same sex." Police officers had witnessed the intimate acts in question while responding to reports that an armed man was "going crazy" in

Lawrence's private residence. After being held in custody overnight, the two men were convicted before a justice of the peace and fined $200 each. On appeal, both men challenged the validity of the state's criminal statute under the federal and Texas constitutions. State courts, following *Bowers*, rejected the men's federal constitutional claims.

The Finding:

In a 6–3 ruling, the U.S. Supreme Court reversed the convictions and explicitly overruled the 17-year-old precedent in *Bowers*. Texas state courts, the *Lawrence* majority ruled, had acted appropriately in following *Bowers* because the "facts in *Bowers* had some similarities to the instant case" and *Bowers* was an "authoritative" federal precedent at the time of their decisions. Nonetheless, Justice Anthony Kennedy wrote in *Lawrence*, "the [doctrinal] foundations of *Bowers*" had sustained "serious erosion" in recent years due to the Supreme Court's rulings in other areas such as abortion rights and state civil rights laws. Meanwhile, criticism of *Bowers* within the legal community had been "substantial and continuing" and "disapproving of its reasoning in all respects." What's more, the historical analysis at the heart of *Bowers*—suggesting that criminal prohibitions against sodomy had existed for centuries—had been overstated "at the very least." At the same time, Kennedy noted, the *Bowers* Court's narrow conception of the rights of consenting homosexual adults stood sharply at odds with broader declaration of rights on the same basic questions by the European Court of Human Rights.

The doctrine of *stare decisis*, the *Lawrence* Court concluded, "is essential to the respect accorded to the judgments of the Court and to the stability of the law." Yet in this case, there had been "no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding. The rationale of *Bowers* does not withstand careful analysis. . . . *Bowers* was not correct when it was decided, and it is not correct today." ■

The Model Penal Code

The **Model Penal Code (MPC)** deserves special mention. The MPC is not law but a proposed model, which states can use in developing or revising their statutory codes. The MPC was published as a "Proposed Official Draft" by the American Law Institute (ALI) in 1962. It had undergone 13 previous revisions and represented the culmination of efforts that had been ongoing since the ALI's inception.

Model Penal Code (MPC)
A model code of criminal laws intended to standardize general provisions of criminal liability, sentencing, defenses, and the definitions of specific crimes between and among the states. The MPC was developed by the American Law Institute.

The American Law Institute was organized in 1923, after a study was conducted by a group of prominent American judges, lawyers, and teachers who formed the Committee on the Establishment of a Permanent Organization for the Improvement of the Law.[40] A report of the committee highlighted two chief defects in American law—uncertainty and complexity—that had combined to produce a "general dissatisfaction with the administration of justice" throughout the country.

The committee recommended that a lawyers' organization be formed to improve the law and its administration. That recommendation led to the creation of the ALI. The institute's charter declared its purpose to be "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

The Model Penal Code is the most influential work in American substantive criminal law.

—James B. Jacobs, the Warren E. Burger Professor of Law at New York University

The MPC serves today as a suggested model for the creation and revision of state criminal laws. It is divided into four parts: general provisions, definitions of specific crimes, treatment and correction, and the organization of correction. A fundamental standard underlying the MPC is "the principle that the sole purpose of the criminal law [is] the control of harmful conduct" instead of punishment, as many had previously believed. Because the code's authors believed that "faultless conduct should be shielded from punishment,"[41] the MPC limited criminal liability for a number of law violators, especially those who served merely as accomplices or who acted without an accompanying culpable mental state.

Although no state has adopted the MPC in its entirety, aspects of the MPC have been incorporated into the penal codes of nearly all the states. Moreover, in 1966, the U.S. Congress established the National Commission on Reform of Federal Criminal Laws. The commission eventually produced a recommended revision of Title 18 of the U.S. Code (which contains the bulk of federal criminal laws), in part based on MPC provisions. Some of the recommended revisions have since been enacted into law. As the great legal scholar Sanford Kadish once said, the MPC has "permeated and transformed" the body of American criminal law.[42]

The MPC is an important document, not only because it attempts to achieve standardization in American criminal law and has served as a model for many state criminal statutes but also because it contains legal formulations created by some of the most cogent thinkers in American jurisprudence. As a consequence, we frequently contrast MPC provisions with existing state statutes throughout this book. One area in which such a contrast is not possible, however, is the area of high-technology and computer crimes. The MPC, originally drafted more than 45 years ago, makes no specific mention of crimes committed with the use of computers and other crimes involving advanced technology. For your reference, the MPC is excerpted in Appendix C.

The Modern U.S. Legal System

The U.S. Constitution establishes the basic architecture of American government. To avoid the centralization of power, the Framers designed a federal system of government. Unfortunately, however, when federalism is discussed, confusion frequently arises over the use of the term *federal government*.

Federalism

Federalism refers to a system of government that has both local and national elements. This is contrasted with unitary systems, which have only one national or centralized government, although regional or local subunits may exist.

"A federal system of government is one in which two governments have jurisdiction over the inhabitants."[43] Under federalism, a central government coexists with various state and local governments. Each governing body has control over activities that occur within its legal sphere of influence. In the United States, the federal government and the governments of the states are co-sovereigns. The Constitution gives our national government jurisdiction over activities such as interstate and international commerce, foreign relations, warfare, immigration, bankruptcy, civil rights, and certain crimes committed on the high seas and against the "law of nations" (international law). Individual states are prohibited from entering into treaties with foreign governments, from printing their own money, from granting titles of nobility (as is the national government), and various other things.

States retain the power, however, to make laws regulating or criminalizing activity within their boundaries. The general authority of the states to regulate for the health, safety, and welfare of their citizens is the police power. There are policy areas and individuals over which both the federal government and one or more states may have concurrent jurisdiction. For example, it is a violation of both federal and state law to assassinate a federal official, to rob a federally insured bank, or to commit acts of terrorism. In such cases, individuals may be prosecuted and punished by multiple jurisdictions. In cases where concurrent jurisdiction exists and there is a conflict between federal and state laws, federal law prevails under the supremacy clause of Article VI of the U.S. Constitution.