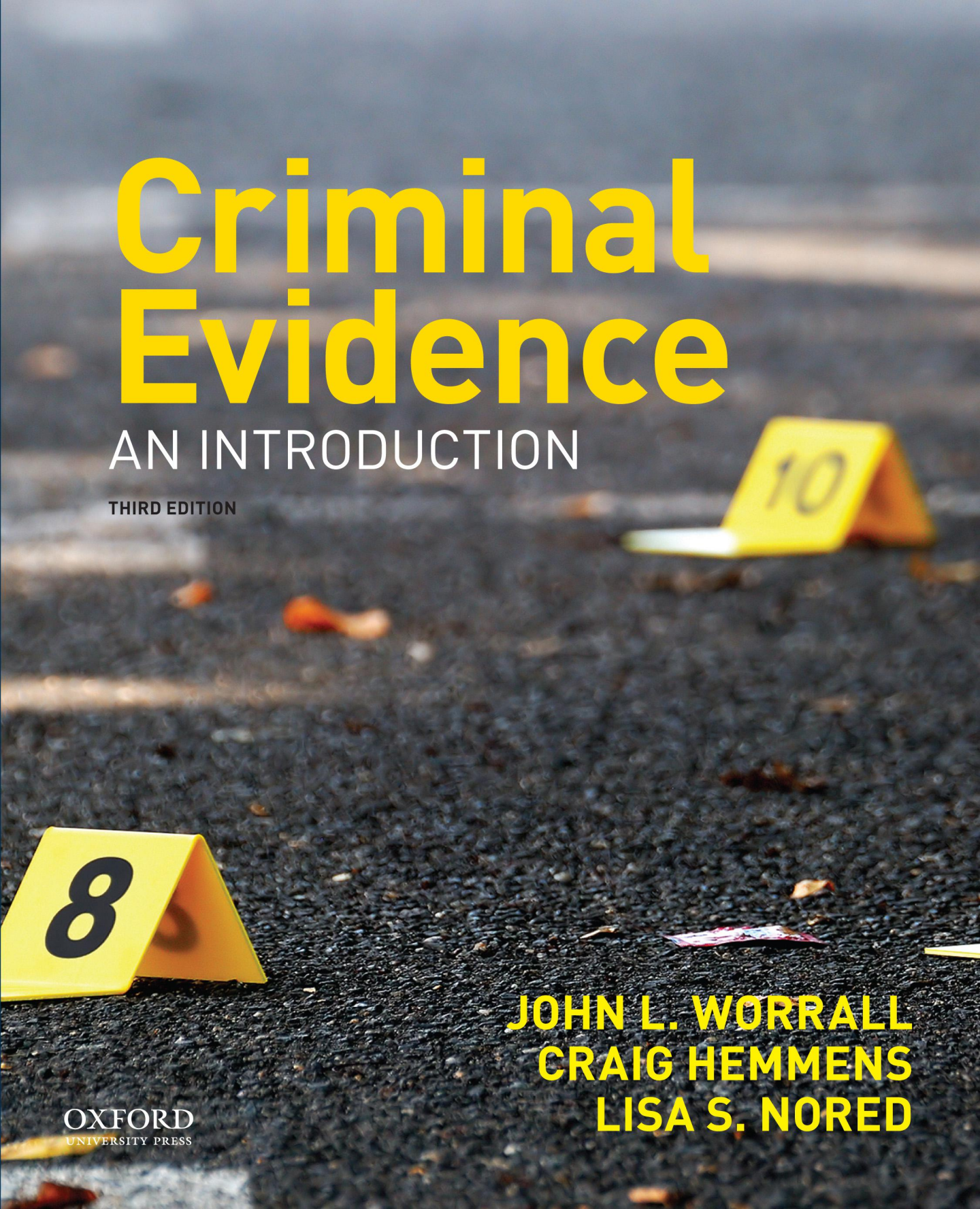
Criminal Evidence
AN INTRODUCTION
THIRD EDITION
JOHN L. WORRALL
CRAIG HEMMENS
LISA S. NORED
OXFORD
UNIVERSITY PRESS

CRIMINAL EVIDENCE

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AN INTRODUCTION

THIRD EDITION

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John L. Worrall dedicates this book to his father, Don W. Worrall.

Craig Hemmens dedicates this book to Rolando del Carmen, who showed him how to mix the law and social science, and to Mary, Emily, and Amber, who showed him what to do when he got home.

Lisa S. Nored dedicates this book to Jeffrey Jackson who never allowed me to forget the importance of primary colors, and to my guys, Deron, Hunter, Holden, Hayden and Hayes—who always keep me smiling and make my journey worthwhile.

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PREFACE

The first edition of this work attempted to merge criminal procedure and evidence into one book. Although that approach proved to be useful, attempting to include both topics in one work in a concise and student-friendly manner proved to be difficult. Because many colleges and universities have separate courses in criminal procedure and evidence, we have responded accordingly and focus primarily on the law of evidence in this edition. We hope this approach is useful for both teachers and their students.

Evidence law and the various federal and state rules that govern the procedures for the admission of proof in legal proceedings are expressions of our foundational belief that the legal process must be fair to each and every individual, whether their cause is popular or infamous. This book primarily focuses on the use of evidence in criminal trials. However, evidence law also applies to civil proceedings and therefore a general understanding of the law of evidence; we hope to enable students to appreciate evidence law when applied in either the criminal or civil context. Moreover, we hope to offer students an understanding of the often unusual and confusing restrictions that we call evidence law.

In Section One, we begin with four chapters that are designed to introduce the student to certain foundational concepts. Chapter 1 provides a discussion about the evolution of law and the variety of sources and influences that inform its development. In Chapter 2, we visit the American criminal court system. Understanding the structure of the system, its various dimensions, and the professionals who carry out the objectives of that system will give students a systemic understanding and an important perspective. Chapter 3 continues with an examination of such key concepts as the burdens of proof and production, the exclusionary rule, and the use of defenses in criminal cases. Chapter 4 introduces students to the various types of evidence, as well as an examination of judicial notice and the presumptions that enable our system to recognize facts that are commonly understood or properly inferred.

Section Two allows us to explore the ways in which we obtain and preserve evidence in a legal system that expects fair play and due process. Chapter 5 examines the Fourth Amendment and the various considerations that attend the use of arrest and search warrants.

Obtaining evidence in a constitutional and ethical manner is critical to the successful introduction of evidence in all legal proceedings. However, what would the law be without exceptions? Chapter 6 is devoted to the various exceptions to the "warrant requirement," as well as other special considerations. We then turn to the Fifth Amendment and protections against self-incrimination, confessions, and identification procedures in Chapter 7.

Section Three focuses on the various concepts that serve as the heart of the "law of evidence." In Chapter 8, we examine witness competency, credibility, and the use of impeachment to challenge witnesses. How we examine witnesses during legal proceedings through the use of direct and cross-examination is addressed in Chapter 9. Successful examination of witnesses and finesse in the courtroom are more art than science, however, and are difficult to capture in a textbook. Of course, students soon realize this once they enter the "real world" and begin their own professional careers in the legal system. The use of expert witnesses and the opinions of lay witnesses are also addressed in Chapter 9. The increased demands and expectations for scientific testimony in criminal cases place unique burdens on the prosecution in this day and age. Our culture, through its exposure to *CSI* and other television dramas, expects that all cases should be resolved in short order through the application of forensic science. As such, an appreciation for the different types of witnesses is important for students.

Chapter 10 is devoted to the various types of testimonial privileges and seeks to provide students with an understanding of the relationships and information that are privileged. Chapters 11 and 12 delve into the concept of hearsay. Chapter 11 examines our collective reluctance to rely on hearsay evidence in legal proceedings. Having appropriately condemned the use of hearsay and supported this with much robust and convincing evidence, we then turn to Chapter 12, which diligently supplies the student with a multitude of exceptions to the hearsay rule. In Chapter 13, we examine the mechanics of evidence. How does one actually introduce evidence in a legal proceeding? Although we do address the examination of witnesses in Chapter 9, we use Chapter 13 to examine how we authenticate and introduce various forms of evidence.

Lastly, in Section Four, we examine our increasing awareness of wrongful convictions. Whether through the introduction of flawed evidence or despite an utter lack of credible evidence, allegations of wrongful conviction are no longer dismissed as meritless claims by guilty prisoners. This chapter is designed to examine the issues that are presented in cases involving wrongful convictions and how we address those who are aggrieved. We hope this chapter serves to remind the student that, in our justice system, it is far better to risk an acquittal of the guilty than to wrongfully deprive an innocent person of liberty. We hope the inclusion of this chapter underscores the need to follow established rules of procedure and evidence, with the ultimate goal of protecting the rights of the accused.

NEW TO THIS EDITION

- Reorganized structure that shifts the book's focus from a blend of criminal procedure and evidence to a more intensive examination of the role of evidence in the American criminal justice system

- Complete update with important cases and developments in evidence law
- Excerpts from the Federal Rules of Evidence are now included to assist student understanding
- Updated case decision exercises in each chapter that serve as important class discussion tools
- Chapter 14: a unique chapter on the issue of wrongful convictions in the American criminal justice system. It explores the most common causes of wrongful conviction and the remedies available to exonerees. This chapter underscores the importance of the appropriate use of evidence in criminal trials.

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SECTION

1

PRELIMINARY MATTERS/ SETTING THE STAGE

CHAPTER 1

THE AMERICAN CRIMINAL COURT SYSTEM

CHAPTER OUTLINE

Learning Objectives

Key Terms

Introduction

Rules of Evidence

- The Purpose of Evidence Law
- The Development of Evidence Law

Sources of Law

Sources of Individual Rights

- The Constitution
- The Bill of Rights
- Incorporation of the Bill of Rights
- Judicial Review

Jurisdiction

The Federal Courts

- District Courts
- Courts of Appeals
- The Supreme Court

The State Courts

Court Actors

- Judges
  Judicial Selection Methods
- Prosecutors
- Defense Attorneys

Overview of the Criminal Process

- Pretrial Proceedings
- Pretrial Motions
- Jury Selection
  J.E.B. v. Alabama (1994)
- The Trial

- Sentencing
- Appeals

Summary
Discussion Questions
References

LEARNING OBJECTIVES

LO1 Explain the purpose of evidence law.
LO2 Discuss the sources of law and individual rights.
LO3 Explain the different types of jurisdiction.
LO4 Describe the federal and state court systems.
LO5 Explain the roles of the major court actors.
LO6 Describe the stages of the criminal process.

KEY TERMS

Administrative Regulations
Affidavit
Appellate Jurisdiction
Appointed Counsel
Arraignment
Arrest
Article III Court
Attorney General
Bail
Booking
Case-in-Chief
Challenge for Cause
Closing Argument
Common Law
Competent Evidence
Complaint
Constitution
Court of Appeals
Courts of Limited Jurisdiction
Cross Examination
Defense Attorneys
Direct Appeal
Direct Examination
Diversity of Citizenship
En Banc
Evidence Code
Evidence Law
General Jurisdiction
Geographic Jurisdiction
Grand Jury
Habeas Corpus
Harmless Error
Hierarchical Jurisdiction
Incorporation
Indictment
Information
Initial Appearance
Judicial Review
Judiciary Act of 1789
Judge
Jurisdiction
Jury Instruction
Legislation
Limited Jurisdiction
Magistrates
Merit System
Missouri Plan
No bill
Nolo contendre
Objection
Opening Statements
Original Jurisdiction
Penal Code
Peremptory Challenge
Personal Jurisdiction
Plea
Preliminary Examination
Preliminary Hearing

Probable Cause
Prosecutorial Discretion
Prosecutors
Public Defenders
Relevant Evidence
Re-direct Examination
Retained Counsel
Reversible Error
Rule of Four
Statute
Subject Matter Jurisdiction
Supreme Court
Trial by Battle
Trial de Novo
True Bill
United States District Court
Voir Dire
Writ of Certiorari

INTRODUCTION

The law exists in large part because people need a mechanism for enforcing order and resolving disputes peacefully. All societies have developed methods for resolving disputes. Laws provide rules to guide conduct, as well as a means of resolving disputes and maintaining order. The modern legal system serves as a venue to resolve conflicts among citizens or between citizens and government. Laws are created by legislatures and enforced by the executive branch. The judiciary is the mechanism whereby laws are applied and disputes are resolved.

In this text, we focus on evidence law. **Evidence law** is the law (or set of rules) that determines what forms of proof may be admitted into trials or other legal proceedings, as well as the manner in which evidence may be admitted. Evidence law applies to both civil and criminal proceedings, although there are some significant and important differences between civil and criminal law. This book focuses on the application of evidence law to criminal trials. Evidence law is (or at least should be) an exciting subject of study. Evidence law governs the conduct of trials and other legal proceedings, and plays a major role in the criminal justice process. Although much of evidence law may seem peculiar at first, there are very good reasons for virtually every rule of evidence. It is our hope that this book will help you, the student, understand the significance of this important subject.

In this chapter, we also examine the structure of the American court system. It is a bit misleading to think of America as having just one court system—actually there are fifty state court systems and the federal court system. The court systems of the various states and the federal system share a number of characteristics, but can also be quite different. First, we review some key concepts that all of the court systems share. Next, we examine the federal and state court systems. After our discussion of court structure, we discuss the trial process, focusing on the criminal trial and the appeals process.

RULES OF EVIDENCE

Evidence law is the set of rules that governs what the jury can hear (and see) during a trial or other legal proceeding. These rules place limits on the types of testimony that may be presented, as well as the forms of physical evidence that may be admitted. Evidence law may be confusing to a person who does not understand the rationale for a particular evidentiary rule. Evidence law has a long history, built in large part on past experience.

Generally speaking, evidence is the information presented to the jury during a trial that allows the jury to render a verdict. Jurors are not supposed to consider any information they obtain outside the courtroom, such as news reports or gossip from friends. Rather, jurors are supposed to base their verdicts solely on the information that is presented in the courtroom during the course of the trial.

THE PURPOSE OF EVIDENCE LAW

Persons not familiar with evidence law are often shocked to discover that information that appears to be relevant to the case may not be admitted to trial. The variety of objections to the types and forms of evidence is at first glance bewildering. Evidence law developed over a long period of time and was created by judges, as well as through the passage of statutes. It is not always clear why a particular evidence rule exists today; in some instances, this is because the rule has an ancient origin and purpose that may not apply to modern situations.

Evidence law is intended to ensure that jurors hear and see only information that is both relevant and competent. **Relevant evidence** is evidence that relates or pertains to the matter at hand and has some bearing on the trial. For example, evidence about a defendant's feelings for the murder victim might be useful in explaining why a defendant killed (or did not kill) a victim. **Competent evidence** is evidence that is in a form the jury is permitted to hear or see. In contrast, for example, hearsay evidence is sometimes deemed incompetent, because it lacks reliability. Evidence must be both relevant and competent for it to be deemed admissible at trial. It is evidence law that helps the court sort out what evidence the jury will be allowed to see and hear.

How do the rules of evidence promote a fair trial?

THE DEVELOPMENT OF EVIDENCE LAW

In medieval times, trials as we now know them did not exist. Different societies used a variety of methods for determining the "truth." For instance, in eleventh-century England, guilt was often determined through a **trial by battle**. In a trial by battle, an accused would fight his accuser; if the accused won, he was determined to be innocent. Other societies appealed to God to reveal guilt or innocence. An accused person might be tied to a heavy stone and placed in a lake. If the person did not drown, it was seen as evidence that the person was corrupted by the devil. If the person drowned, it was assumed that they were innocent. Obviously, this determination was of little use to the drowned person, at least in this life.

Beginning in the thirteenth century in England, there was a movement toward trial by jury. A person accused of a crime gathered people who would swear to his or her innocence. These persons were known as "oath helpers." Over time, oath helpers began to swear not just to the innocence of the accused, but also to facts that were provided and purportedly relevant to the person's guilt or innocence. This was the beginning of the use of witnesses at trials. In 1215, the Magna Carta was adopted, which provided for criminal jury trials.

There are several different legal systems in existence today. The United States follows what is often referred to as the **common law** system. This system was brought over to the colonies from England, where it began.

During the common law period, evidence rules developed sporadically, on a case-by-case basis. Today, evidence law in virtually every state is governed by statutes, or codes. The **evidence code** is a compilation of the common law evidence rules, written down (or codified) by the legislature. The best-known example is the Federal Rules of Evidence (FRE). The FRE apply in all federal courts, and more than forty states have adopted the FRE in whole or in part. See Table 1-1.

TABLE 1-1 CATEGORIES INCLUDED IN THE FEDERAL RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS
ARTICLE II. JUDICIAL NOTICE
ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS
ARTICLE IV. RELEVANCY AND ITS LIMITS
ARTICLE V. PRIVILEGES
ARTICLE VI. WITNESSES
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY
ARTICLE VIII. HEARSAY
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS
ARTICLE XI. MISCELLANEOUS RULES

For more information, go online: http://www.law.cornell.edu/rules/fre/overview.html.

The FRE were enacted by Congress in 1975. Although the FRE have been in existence for fewer than thirty years, they are the product of many years of discussion, research, and deliberation by lawyers, judges, scholars, and legislators. Additionally, there were earlier attempts at evidence codes, such as the Model Code of Evidence, created by the American Law Institute (ALI) in 1942 (the ALI is the same body that developed the Model Penal Code, which is still in use today). While many states have adopted the FRE, others have not. It is crucial that the student know whether his or her state follows the FRE or has its own evidence law. The rules of evidence may vary widely among the states.

SOURCES OF LAW

There are several primary sources of law. These include judge-made law (the common law discussed above) and legislative law (this includes the Constitution, statutes, ordinances, and administrative regulations).

Legislation is enacted by the legislature, under the authority granted it by a state or federal constitution. A **constitution** creates a government—it literally constitutes the government and establishes the powers of the government as well as the rights of citizens. Legislatures are given the authority to act in certain areas in which they may enact laws. Legislative enactments, or bills, are often referred to as **statutes**, and statutes are collected in codes. Statutory law includes civil and criminal law. The criminal law is sometimes referred to as the **penal code**.

Legislators are sometimes referred to as lawmakers because they, quite literally, make laws. Acts of the legislature are not, however, per se lawful. Acts of the legislature may not limit the constitution under which the legislature was created. The Constitution may be changed, or amended, only by a constitutional amendment.

Administrative regulations may, under certain circumstances, have the force of law. Administrative regulations are issued either by agencies of the executive branch, who derive their authority from a delegation of power by the executive branch, or by independent agencies, created through a delegation of power from the legislature. Examples include regulations affecting food, drugs, and occupational safety requirements. Both the federal and state governments and agencies have administrative regulations.

Why, then, are statutes frequently written broadly or ambiguously? Why doesn't the legislature write more clearly and explain exactly what they mean? There are several reasons. First, it is difficult to define, in a few sentences, something involving human conduct—there is an almost infinite range of possible actions by individuals. Second, legislators are politicians, and politics involves compromise. Thus, a statute may be written so that it appeals to the greatest possible number of legislators, but in doing this, the language of the statute may be watered down and made less precise rather than more precise. This is particularly likely to happen when dealing with controversial issues.

SOURCES OF INDIVIDUAL RIGHTS

There are several sources of individual rights in the United States. These include the federal and state constitutions, case law, court rules, and legislation. Individual rights are those that

are possessed by the individual and that protect him or her from other individuals, as well as from the government. Examples include freedom of speech, freedom of religion, and the right to counsel. The Constitution, particularly the Bill of Rights, is the primary source of individual rights. Although states are free to provide more individual rights than the United States Constitution does, neither Congress nor a state may enact a law that abridges a federal constitutional right. This is because the Constitution is paramount—it is the supreme law of the United States.

THE CONSTITUTION

In 1787, delegates from twelve of the thirteen original states met in Philadelphia, at the request of the Continental Congress, to write a new Constitution. The Continental Congress was hampered by lack of power vis-à-vis the states, so the delegates realized that a new nation would need a strong central government. The result of the convention in Philadelphia was the creation of the United States Constitution. The Constitution is different from ordinary legislation in that it is primarily concerned with establishing the powers and limitations of the government, both between the branches of government and between the government and individual citizens. The Constitution itself contains few protections of individual rights.

When the Constitution was submitted to the states for ratification, several states were reluctant to ratify it without more specific protections of individual rights. In response to these concerns, the Bill of Rights was added. These consisted of ten amendments.

THE BILL OF RIGHTS

In the first eight amendments, there are twenty-three individual rights set out. These rights include protections against government action of all kinds. It should be noted, however, that these rights were originally intended to apply only to actions by the federal government. It was not until the twentieth century that the provisions of the Bill of Rights were applied to actions of state governments, through a process referred to as **incorporation**. Table 1-2 sets forth the most significant rights in the Bill of Rights, by amendment.

RECENT DEVELOPMENTS

In two recent cases, the United States Supreme Court addressed the Second Amendment. In *District of Columbia v. Heller* (2008), the Supreme Court struck down a handgun ban. In *Heller*, the Court held that the Second Amendment protects an individual's right to possess and use a firearm in a lawful manner, such as for the purpose of self-defense. The *Heller* case is important because it clarifies that the Second Amendment protects the rights of individuals, unconnected to a militia, to possess firearms. In *McDonald v. Chicago* (2010), the Court revisited the Second Amendment following a challenge to a municipal handgun ban. In *McDonald*, the Court held that the right to keep and bear arms is a fundamental right necessary to the concept of ordered liberty and that it does apply to the states by virtue of the Fourteenth Amendment.

CASE DECISION EXERCISE 1–1

Luke John, a Native American, pled guilty in tribal court for assaulting a federal officer who was in the process of removing him from the reservation because of ongoing domestic issues with his wife. Mr. John served ninety days in jail for that offense. Following his release, he was charged in federal court for the assault based on a violation of the federal statute. John raised a claim of double jeopardy, as the charges were identical and arose out of the same action. Can the federal authorities pursue these charges? You be the judge. (See *United States v. Lara*, 2004.)

TABLE 1-2 THE BILL OF RIGHTS

First Amendment

The First Amendment covers freedom of religion, freedom of speech, freedom of the press, and freedom of assembly.

Second Amendment

The Second Amendment provides citizens with the right to "keep and bear arms" and states that this right shall not be "infringed."

Third Amendment

The Third Amendment expressly forbids the quartering of soldiers in private homes against the wishes of the owner at any time.

Fourth Amendment

The Fourth Amendment forbids "unreasonable" searches and seizures, and requires the existence of "probable cause" before warrants may be issued or a search or seizure may take place. Additionally, warrants are required to describe their subject with "particularity."

Fifth Amendment

The Fifth Amendment provides a number of protections for individual citizens. These include the right to an indictment by a grand jury, freedom from double jeopardy, the right to due process and just compensation, and the privilege against self-incrimination.

Sixth Amendment

The Sixth Amendment includes the right to a speedy trial, the right to a public trial, the right to a trial by an impartial jury, the right to notice of the charges against oneself, the right to representation by counsel, and the right to confront the witnesses against oneself.

Seventh Amendment

The Seventh Amendment provides for the right to a trial by jury in federal civil trials.

Eighth Amendment

The Eighth Amendment prohibits several things, including excessive bail, and cruel and unusual punishment.

Ninth Amendment

The Ninth Amendment simply states that the listing of some rights in the Constitution should not be construed as a listing of all the rights retained by individual citizens. In other words, the rights provided in the Bill of Rights should not be taken as the only rights that citizens have—they are merely some of the rights retained by the people.

Tenth Amendment

The Tenth Amendment simply states that the rights not delegated to the federal government by the Constitution are reserved for the states or individual citizens. This is simply the principle of **federalism**—the federal government is a government of enumerated powers. This means it has no authority unless so granted by the Constitution, and where the federal government has no authority, the states and individual citizens retain such authority.

INCORPORATION OF THE BILL OF RIGHTS

Originally, the Bill of Rights applied only to the federal government. State and local governments were not bound by the various provisions of the Bill of Rights. This was because there was, at the time of the adoption of the Constitution, a fear of a strong centralized government. State governments were viewed much more favorably, and many state constitutions contained protections of individual rights similar to those in the Bill of Rights. In 1833, the Supreme Court, in *Barron v. Baltimore*, expressly held that the Bill of Rights applied only to the federal government.

After the Civil War and the failed attempt by the southern states to secede from the Union, federal legislators felt it was necessary to amend the Constitution to provide greater protections for individuals from the actions of state and local governments. There was, in particular, a fear that the southern states would attempt to limit the ability of the recently freed slaves to become equal citizens. The result was the passage, in 1868, of the Fourteenth Amendment. The Fourteenth Amendment forbids states from denying citizens due process of law or equal protection under the law. These two clauses have dramatically altered the way that states deal with citizens.

The equal protection clause has been interpreted to preclude states from making unequal, arbitrary distinctions between people. It does not ban reasonable classifications, but it does prohibit classifications that are either without reason or are based on race or gender. These are sometimes referred to as *suspect classifications*.

Beginning in the late 1930s, the Supreme Court incorporated most of the provisions of the Bill of Rights into the Fourteenth Amendment's due process clause and applied them to the states. Many of the criminal law provisions were applied to the states during the 1960s by the Supreme Court under the leadership of Chief Justice Earl Warren.

By "incorporation," we simply mean that the justices interpreted the due process clause of the Fourteenth Amendment, which says that no state shall deprive a person of life, liberty, or property without "due process of law," as prohibiting states from abridging certain individual rights. Many of these rights were included in the Bill of Rights (which originally applied only to the federal government), and hence these rights were included (or incorporated) in the definition of "due process."

JUDICIAL REVIEW

Given the varied sources of law and the ambiguous language of many statutes and constitutional provisions, it is inevitable that laws will come into conflict, or interpretations of statutes will differ. When this happens, who decides which law is paramount? In the United States, the answer to that question is the courts, through the power of **judicial review**.

Judicial review simply means the power of the court, specifically judges, to examine a law and determine whether it is constitutional. If a judge determines the law to be constitutional, he or she upholds it. If a judge determines the law to be not constitutional, he or she declares it unconstitutional and therefore void. In order to make this determination, judges must examine the law and compare it with the Constitution. This requires them to interpret the language of both the statute and the Constitution.

Judicial review is not specifically provided for in the Constitution. Rather, judicial review is judge-made law. *Marbury v. Madison* (1803) established the authority of the United States Supreme Court to engage in judicial review of the acts of the other branches of government. The Supreme Court stated in *Marbury* that it was the duty of the judiciary to interpret the Constitution and to apply it to particular fact situations. The Court also said that it was the job of the courts to decide when other laws (acts of Congress or state laws) were in violation of the Constitution, and to declare these laws null and void. This is the doctrine of judicial review.

JURISDICTION

In order to appreciate how and why court systems are set up the way they are, it is important to understand the concept of jurisdiction. **Jurisdiction** involves the legal authority of a court to hear a case. Jurisdiction is conferred by statutory or constitutional law. There are four primary types of jurisdiction: personal, subject matter, geographic, and hierarchical.

Personal jurisdiction involves the authority of the court over the person. A court may acquire personal jurisdiction over a person if that person comes in contact with the court, either by being a citizen of the state or by committing an act (criminal or non-criminal) or series of acts within the state.

Subject matter jurisdiction involves the authority conferred on a court to hear a particular type of case. Some courts may hear only a specified type of case, such as a juvenile court or probate court. Other courts are given broad subject matter jurisdiction and may hear both civil and criminal proceedings of all kinds.

Geographic jurisdiction refers to the authority of courts to hear cases that arise within specified boundaries, such as a city, county, state, or country. This is also sometimes referred to as *venue*. For a court to have jurisdiction over an event, that event must have taken place, in whole or part, within the geographic jurisdiction of the court. Thus, a person who kills someone in Washington could not be prosecuted in North Carolina for that killing. The proper forum would be in Washington. Furthermore, the proper court within, say, Idaho would be the county in which the killing occurred.

Precisely where a crime occurs is not always clear-cut. For instance, a person may be kidnapped in California and taken to Texas. In this case, the kidnapping is a continuing offense—that is, each state into which the victim is taken could charge the kidnapper with a crime. Furthermore, both California and Texas may prosecute without violating the prohibition on double jeopardy, as they are each separate sovereign governments. This means that each state derives its authority from a different source—their own state constitution. Although two states can prosecute a person for the same offense, a state and a county in that same state cannot do so, as the county and the state derive jurisdiction from the same sovereign.

Within each state, there are jurisdictions, usually defined by county boundaries. A state crime must be tried both within the proper state and within the proper district in the state. Occasionally, a defendant in a criminal case may request a change of venue. Such a request must be based on evidence that it is impossible for the defendant to get a fair trial in the original court, perhaps because of substantial adverse publicity.

Hierarchical jurisdiction involves the division of responsibilities and functions among the various courts. There is original and appellate jurisdiction, as well as limited and general jurisdiction. These are explained next.

General jurisdiction means that a court has the authority to hear a variety of cases; it is not limited to hearing only a particular type of case. Rather, a court of general jurisdiction may hear any case that has not been specifically assigned by law to another court. An example is the state trial court, which often has the authority to hear all manner of civil and criminal cases. Civil cases involve a dispute between two private parties, such as contract or property law. Criminal law involves prosecution of an individual by the state for violating state criminal law.

Limited jurisdiction means that a court has authority to hear particular types of cases. Examples include traffic court, juvenile court, and probate court. Thus, a juvenile court would hear only matters involving juveniles. Smaller jurisdictions often do not have such courts, but rather combine all the specialized courts into one court because of limited resources.

Original jurisdiction refers to the power of the court to hear the case initially. For example, in federal court, all felony-level cases begin in the district court, whereas a suit between two states would start at the Supreme Court level. The court of original jurisdiction is where the original trial takes place.

Appellate jurisdiction refers to the power of the court to review a decision of a lower court. Appellate courts may affirm (uphold) or reverse (overturn) lower court judgments, and either enter a new judgment or send the case back down to the lower court for reconsideration in light of its decision (remand). In rare cases, appellate courts will reverse and render a case. When this occurs, the appellate court reverses the trial court decision and substitutes its own judgment for that of a lower court and/or jury. Because of the profound respect for the work of trial courts and juries, it is rare for an appellate court to reverse and render. Typically, the case will be remanded.

Appellate courts do not conduct retrials; rather, they are generally limited to a review of the trial record and legal briefs filed by attorneys to determine if there were any major legal errors. In some cases, the appellate court will agree to hear oral arguments by the attorneys, but the court is not required to do so. In some states, appellate court rules and procedures require oral arguments in certain matters, such as death penalty cases.

It is important to note that the mere existence of errors in the trial will not result in the reversal of a case. Appellate courts recognize that trials are not perfect and court actors and witnesses make mistakes. As such, in order to require reversal of a case, the error must be serious. A **reversible error** is one that is serious enough to require reversal. In other words, due to the nature of the error, the defendant was deprived of a fair trial or the outcome of the trial was affected. Harmless error will not result in the reversal of a case. A **harmless error** is one that did not deprive the defendant of a fair trial or affect the outcome of the case.

THE FEDERAL COURTS

There are essentially two court systems in the United States: (1) the court systems of the fifty states, and (2) the federal court system. However, tribal courts are also important to our

Why are appeals permitted in criminal cases?

system of justice. Jurisdiction of tribal courts must be considered when evaluating a case. The jurisdictions of the federal and state courts frequently overlap, as crimes may be punishable under both state and federal laws.

The Constitution, drawn up at the Constitutional Convention in 1787, created a federal government with three distinct branches—the legislative, the executive, and the judicial. The duties of each branch were set forth in a separate article of the Constitution. The duties of the judicial branch were listed in Article Three. This article established the Supreme Court and authorized "such inferior courts as Congress" chose to create. Neither the number of members of the Supreme Court nor the form of any potential "inferior" (meaning lower) courts was described.

At first, the idea of creating inferior federal courts was met with much resistance from supporters of states' rights, who were afraid that federal courts would infringe on the jurisdiction and authority of state courts. Several contributors to the Federalist Papers argued for a strong federal court system, as a bulwark against the actions of a democratically elected legislature. These writers saw the Constitution as fundamental, paramount law and believed the role of the judiciary was to interpret the Constitution and prevent the legislature from passing laws that infringed upon fundamental rights.

One of the first acts of the newly elected Congress was to pass the **Judiciary Act of 1789**. This act established Supreme Court membership at six justices and created three federal circuit courts and thirteen district courts, one in each state. From this, an entire federal system has grown, today encompassing some thirteen federal circuit courts and ninety-four federal districts throughout the United States and its territories. See Table 1-3 for a description of the tiers of the federal court system. The first set of intermediate-level appellate courts with purely appellate jurisdiction was established over one hundred years later, in 1891. Courts created under the authority of Article Three of the Constitution are sometimes referred to as **Article III courts**.

TABLE 1-3 THE THREE TIERS OF THE FEDERAL COURT SYSTEM AND THEIR PURPOSES

District Courts	Trial court, court of original jurisdiction.
Courts of Appeals or Circuit Courts	Federal circuit: Appeals from several administrative agencies, patent claims, and decisions of the Claims Court and the Court of International Trade. District of Columbia, and the fifty states: Appeals from lower courts.
Supreme Court	Original jurisdiction: Suits between states, suits between the United States and a state, and suits between a state and a foreign citizen. Appellate: Almost entirely discretionary.

The federal court system today consists of three primary tiers: district courts, intermediate appellate courts, and the Supreme Court. Each of these courts has different functions, which are discussed next.

DISTRICT COURTS

The district court is the trial court, or court of original jurisdiction, for the federal court system. There are currently ninety-four federal judicial districts. Each state has at least one district court; some, such as California and Texas, have as many as four. With minor exceptions, no judicial district crosses state lines.

In each district, there is a **United States District Court**. Each of these courts has at least two judges, whereas the larger ones have more than twenty-five. Although each district has more than one judge, only one judge presides over a particular trial. There are approximately 650 federal district judges, all of whom are appointed for life. The number of judges ranges from two to twenty-eight, depending on the population of the individual district.

It should be noted that, within each district court, there are subordinate judicial officers, referred to as **magistrates**. These judicial officers conduct preliminary proceedings in cases before the district court and issue warrants. Judgments entered by magistrates are considered judgments of the district court. Federal magistrate courts are similar to courts of limited jurisdiction in state courts.

Federal district courts have original jurisdiction over both civil matters and criminal cases involving federal statutes. Their jurisdiction is defined by both the Constitution and federal statute. District courts conduct trials for all federal criminal offenses and have jurisdiction to hear civil cases in which there is diversity of citizenship between the parties. **Diversity of citizenship** refers to the situation where the opposing parties are from different states. Until recently, much of the federal court docket was comprised of civil cases, but this balance has begun to shift. Congress in recent years has greatly increased the number of federal crimes, especially drug-related offenses. Consequently, although the number of civil cases filed in federal district court still far outnumbers criminal cases, criminal trials take up a significant portion of the district court's time. Some jurisdictions have been forced to postpone all civil proceedings in order to deal with the backlog of criminal cases. Because the Constitution requires a "speedy trial," criminal cases take precedence, and civil cases are often delayed.

Federal district courts are not courts of general jurisdiction. Rather, they have jurisdiction to hear only those types of cases specified by acts of Congress, and Congress may authorize

the district court to hear only those cases and controversies specified in Article Three. The majority of cases in federal court deal with claims arising out of federal law, either civil or criminal. These may be based on federal statutes or the Constitution. The other major category of cases in federal courts includes civil cases arising out of the court's diversity jurisdiction. District courts are authorized to hear any civil matter, even if it involves state law, if the amount in question exceeds $75,000 and the parties are diverse (i.e., if they are citizens of different states). Federal courts were given diversity jurisdiction originally because the founding fathers feared that state courts would be biased in favor of their residents when presented with a suit between a resident and a non-resident. Allowing the non-resident to shift the case to federal court was seen as a means of ensuring a fair trial.

Federal judges are appointed for life. Furthermore, their salaries cannot be reduced during their terms of office. This protects the independence of the federal judiciary and sets it apart from state court judges, most of whom are appointed or elected to a defined term of years.

COURTS OF APPEALS

The next level in the federal system consists of the **Courts of Appeals**. These courts are also occasionally referred to as circuit courts. Today, there are thirteen courts of appeals: eleven for the fifty states, one for the District of Columbia, and one for the federal circuit.

The jurisdiction of the Court of Appeals for the Federal Circuit is defined by statute to include appeals from several federal administrative agencies, patent claims, and decisions of the Claims Court and the Court of International Trade (two specialized federal trial courts). The District of Columbia has its own appeals court, in part because of the large volume of cases filed in it. The eleven remaining courts of appeals are organized on a territorial basis, with each covering several states. For instance, the Eleventh Circuit encompasses the states of Florida, Georgia, and Alabama; while the Ninth Circuit, the largest of the courts of appeals, includes the states of Alaska, Hawaii, California, Nevada, Arizona, Idaho, Oregon, Washington, and Montana, as well as Guam and the Northern Marianas Islands.

The number of judges on each of the courts of appeals varies from six in the First Circuit to twenty-eight in the Ninth Circuit. Appeals are heard by three-judge panels. The makeup of these panels is constantly changing, so that judge A does not repeatedly sit with judge B. If there are conflicting decisions involving the same legal issue between two panels, the entire circuit may sit *en banc* (meaning as an entire group) and rehear the case. This can obviously be a bit unwieldy in those circuits that have a large number of judges; consequently, federal law permits courts of appeals with more than fifteen active judges to sit ***en banc*** with fewer than all of its members. The Ninth Circuit may hold *en banc* hearings with as few as eleven of its twenty-eight judges. As with district court judges, courts of appeals judges are appointed for life.

THE SUPREME COURT

The third and final tier in the federal court system is the **Supreme Court**. This is the "court of last resort" for all cases arising in the federal system, as well as all cases in state courts that involve a federal constitutional issue. The Supreme Court has original jurisdiction over a very small number of situations, including suits between states, suits between the United

States and an individual state, and suits between a state and a foreign citizen. These rarely occur. The bulk of the Court's docket is comprised of cases taken on appeal from either the federal courts of appeal or state supreme courts.

The Court's appellate docket is almost entirely discretionary—that is, the Court may choose which cases it takes and which cases it refuses to hear. When a party asks the Court to accept a case, it submits a petition for a **writ of certiorari**. A writ of certiorari is an order issued by the Supreme Court to the lower court to send the record of the case up to the Supreme Court. The justices vote whether to accept a case. If four or more justices vote to accept a case, it is placed on the Court's docket. This is known as the **rule of four**. If four votes to accept are not obtained, the petition for a writ of certiorari is denied, and the decision of the lower court is left undisturbed. Refusal to accept an appeal is not considered a decision on the merits, and it has no binding precedential value. It simply means that the Court has chosen not to hear the case, for whatever reason.

The Supreme Court has three main purposes: (1) to resolve disputes between states, (2) to resolve conflicting opinions of lower federal and state courts, and (3) to resolve constitutional questions. The Court uses its discretionary docket to take only those cases that fit into these categories. Thus, the Court may refuse to grant certiorari in a case because there is no difference of opinion on the issue among the circuit courts or because no federal constitutional issue is raised. The mere existence of error in the lower courts will not necessarily guarantee that the Supreme Court will hear the case.

The Court is currently composed of nine justices, one of whom is designated the Chief Justice. Congress has the authority to either enlarge or reduce the number of justices on the Supreme Court and has, at times in the past, done so. Congress has not changed the number of justices in over one hundred years, and it seems unlikely Congress would try to do so now, in the face of a longstanding tradition of having nine justices on the Court.

Although it was created as a third branch of the federal government, the Supreme Court did not immediately establish a significant presence in the affairs of the country. In fact, there was so little for the Court to do that the first chief justice, John Jay, resigned to take a position as an ambassador. It was not until the term of John Marshall that the Supreme Court was able to establish its role in the government. Today, the Supreme Court plays a significant role in public affairs, through its exercise of the power of judicial review.

THE STATE COURTS

Although it is the federal courts, particularly the Supreme Court, that capture much of the attention of the media and the general public, the reality is that state courts (approximately 2,500 in number) are the workhorses of the American judicial system. State courts process in excess of 100 million cases a year, far outnumbering those heard by federal courts. These range from the most serious criminal cases, to complex civil litigation, to run-of-the-mill divorces or traffic tickets.

The structure of state courts is much more varied than the structure of the federal court system. The fifty states have created a multiplicity of court structures. Some court systems are unified and clearly organized, whereas others are a jumble of overlapping jurisdictions

and confusion. In this section, we present a "typical" state court system, but the individual student should note that their state's court structure may differ.

The most common state court system is comprised of four levels, or tiers, of courts. There are courts of limited jurisdiction, courts of general jurisdiction, intermediate appellate courts, and a final appellate court, or court of last resort.

Courts of limited jurisdiction are courts that deal with less serious criminal offenses and civil cases. These courts are referred to by a variety of names, including justice of the peace court, magistrate's court, municipal court, and county court. These lower courts handle a wide variety of matters, including minor criminal cases, traffic offenses, violations of municipal ordinances, and civil disputes under a certain financial amount. On the criminal side, these courts may also be responsible for issuing search and arrest warrants and conducting the preliminary stages of felony cases, such as the preliminary hearing and **arraignment**. On the civil side, these courts may handle a variety of matters, including juvenile delinquency, family law, and probate.

Proceedings in lower courts are often more informal in nature than in appellate courts or trial courts. There is generally no right to a jury trial in these courts; if a losing party wishes to appeal an adverse decision, they must do so through a **trial de novo** in the court of original jurisdiction. A trial de novo is not like a standard appeal, where the higher court concerns itself only with a review of the trial record and consideration of any possible legal errors. Instead, a trial de novo is an entirely new trial that is conducted as if the previous proceedings had not occurred.

Although courts of limited jurisdiction receive very little attention, they are important for several reasons. First, for many citizens, they are the only experience that person will have with the court system. Second, these courts, and there are many of them, process a tremendous amount of cases. The National Center for State Courts reports that there are almost 14 thousand lower courts, and these courts process some 80 million cases each year. Third, these courts are often involved in the crucial, early stages of criminal cases, in the issuance of warrants, and in the determination whether to set bail and hold a suspect over for trial.

The next level in a typical state court system includes the courts of general jurisdiction. These are the trial courts for civil and criminal matters. They are also courts of original jurisdiction; it is here that trials for felonies are held. They are generally authorized to hear any matters not exclusively designated for courts of limited jurisdiction; in some states, they may even have concurrent jurisdiction with lower courts on some matters, such as misdemeanors. They may also hear appeals, in the form of trials de novo, from lower courts.

Trial courts are usually referred to as the district court, circuit court, or superior court, but at least one state, New York, refers to its trial courts as the Supreme Court and its court of last resort as the Court of Appeals. Although there is no hard evidence that New York did this with the express purpose of confusing students, the authors have their suspicions.

The precise workload of the trial courts varies by jurisdiction. In less populous areas, the trial court may hear all manner of cases, including civil and criminal. In other, more populated areas, there may be greater specialization, with one court handling only felony trials and another court handling only civil matters.

Currently, at least thirty-nine states have two levels of appellate courts, consisting of an intermediate appellate court and a court of last resort. Intermediate appellate courts are largely a creation of the twentieth century. As jurisdictions became more crowded and court dockets increased, legislatures acknowledged the need to relieve the state supreme court of the burden of hearing all appeals of right. The states that have not created an intermediate court tend to be either very small or sparsely populated.

The intermediate appellate courts are referred to by a variety of names, but by far the most common is court of appeals. The primary purpose of the intermediate court of appeals is to hear criminal and civil appeals. A significant number of cases that are heard by the intermediate appellate courts involve direct appeals in criminal cases and domestic relations cases. A direct appeal is also referred to as "an appeal as a matter of right." In other words, the appellant is guaranteed the right to appeal their case. This applies to the first appeal. Unlike appeals that are secured when an appellate court, within its discretion, grants a petition for writ of certiorari, the direct appeal is guaranteed as a matter of law.

The number of judges on intermediate courts varies. Additionally, many states have more than one intermediate appellate court. The court of last resort in most states is called the state supreme court. Forty-eight states have one court of last resort, and two states (Oklahoma and Texas) have two. These states have one court of last resort for all civil cases and another court of last resort for all criminal cases. The number of judges on the court of last resort varies from three to nine.

The court of last resort usually hears the majority of appeals on a discretionary basis, similar to the United States Supreme Court. The petition for writ of certiorari is filed to request that the appellate court hear the case. However, the appellate court may or may not grant the request. This allows them to control their docket and focus on cases involving significant legal issues. The exceptions are those states that do not have an intermediate appellate court, and, in other states, death penalty cases. In states without an intermediate appellate court (usually the smaller, less populous states), the state supreme court is the only appellate court and is mandated by law to hear all appeals as a matter of right. Most states also require that their supreme courts hear all appeals in cases involving the death penalty. This is provided as an extra safeguard, as the punishment in these cases is obviously the most severe, and the states want to be absolutely positive that the defendant has received a fair trial.

For most cases, the state supreme court is the end of the line, the final arbiter of the dispute. The only option for a losing party in a state supreme court is to appeal directly to the United States Supreme Court and, to do so, the party must be able to identify a federal question. In other words, a federal question is a legal issue that involves the United States Constitution or federal law. Once all state avenues of appeal are exhausted, those convicted of crimes may begin to file post-conviction proceedings in state trial courts or file a petition for writ of habeas corpus in federal district court. From those procedures, further appeals are allowed that can make for decades-long litigation in some cases.

COURT ACTORS

There are three key actors in court: judges, prosecutors, and defense attorneys. Each of these actors is an attorney, trained in the law, but each performs a different task. The duties of each court actor are discussed next.

JUDGES

The **judge** serves as a referee who is responsible for enforcing court rules, instructing the jury on the law, and determining the law. Judges are expected to be completely impartial. Trial judges have tremendous power to control a case. As a whole, judges are not representative of American society. They are mostly white, male, and upper middle class. Women and minorities continue to be underrepresented in the legal community. Some commentators have argued that this results in bias, either intentional or unintentional. Others have suggested that, even if bias does not in fact exist, there is a perception among many segments of the population that justice is not obtainable because minorities and women are underrepresented on the bench. However, the underrepresentation of women and minorities in the legal system is changing, albeit slowly. For example, with the most recent appointment of Justices Sotomayor and Kagan, the United States Supreme Court now has three female justices. In other words, one third of the membership of the highest court of the land is female.

Judicial Selection Methods

There are three common methods of selecting judges. These include appointment, election, and the merit system. Different jurisdictions use different methods for selecting judges. Some jurisdictions use more than one method, whereas others, such as the federal system, use only one method.

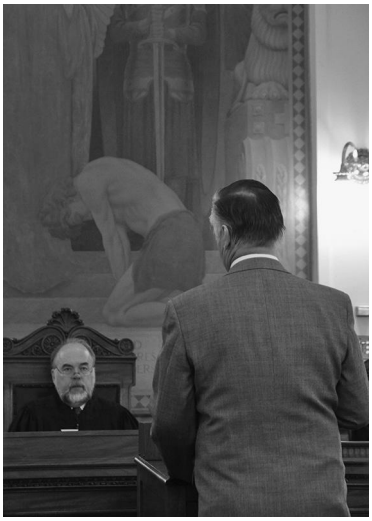
Appointment by the chief executive of the jurisdiction (the president of the United States or the governor of an individual state) is the oldest method of selecting judges. All thirteen of the original colonies used it, and it is used today in the federal system and approximately twenty states.

Election of judges became popular during the 1830s, when Democrats under the leadership of Andrew Jackson gained control of Congress from the Federalists. Jackson and his supporters believed wholeheartedly in popular democracy and thought the appointment of judges was undemocratic. Georgia (1824) was the first state to implement judicial elections. Currently, twenty-nine states use popular elections to select judges.

These elections take one of two forms. Some states have partisan (meaning aligned with a particular party) elections, in which candidates for judicial office run in the party primary, and their political affiliation is listed on ballot. Thirteen states use this method. In sixteen other states, judges are selected in nonpartisan elections, in which no political affiliation is listed.

A third method of selecting judges is the **merit system**, which is based on a system originally developed by the American Judicature Society in 1909 and endorsed by the American Bar Association in 1937. It was first adopted by Missouri in 1940 and is consequently sometimes referred to as the **Missouri plan**.

The merit system has become increasingly popular in recent years. In 1960, only four states used this system, but now more than half of the states use this method of selection.



Is it better to elect or appoint judges?

Currently, twenty-seven states (and the District of Columbia) use merit selection for supreme court justices, twenty states use this method for intermediate appellate court judges, sixteen states use merit selection for all state trial court judges, with three states using this method for some state trial court judges.

The merit system has three parts: First, a nonpartisan nominating commission selects a list of potential candidates, based on the candidates' legal qualifications. Second, the governor makes a selection from this list. Finally, the person selected as a judge stands for election (this is referred to as retention) within a short time after they are selected, usually within one year.

PROSECUTORS

Under the early common law, there were no public **prosecutors**. Instead, private citizens were responsible for litigating their criminal cases. Private prosecution gave way to public prosecution as society came to view crime as an offense not just against a person, but against society as well. Today, private prosecution is no longer permitted in any state. In its place are public prosecutors who represent the government. There are over 25 thousand prosecutors today, although about half of them work on a part-time basis (primarily in small jurisdictions).

The 1789 Judiciary Act provided for a United States attorney for each court district, appointed by the president. In 1870, Congress authorized the creation of the Department of Justice, with an attorney general and assistants. The **Attorney General**, a political appointee, is an administrator who sets prosecution priorities for deputy attorney generals. Deputy attorney generals are appointed by the president and confirmed by the Senate, and serve at the pleasure of the president. Assistant United States Attorneys are not political appointments.

State prosecutors are called by various names, such as district attorney, solicitor, county attorney, state's attorney, and commonwealth attorney. State prosecutors are usually elected officials, with appointed assistants who do most of the trial work. Only four states (Alaska, Connecticut, Delaware, and New Jersey) do not have an elected district attorney. The district attorney's duty is to prosecute cases in the name of the people, but also to do justice by pursuing only those who have, in fact, committed crimes. District attorneys have tremendous power to decide whether or not to prosecute. This power is typically referred to as **prosecutorial discretion** and is largely unreviewable. State systems, like the federal system, also have attorneys general. State attorneys general do not generally prosecute crimes at the trial level. Rather, they typically handle appeals of cases in criminal matters. However, the purview of state attorneys general reaches far and includes criminal cases, as well as a host of other matters. These may include consumer protection, civil litigation, prosecutor training, victim's services, and compensation, among others.

DEFENSE ATTORNEYS

Defense attorneys are expected to represent their clients as effectively as possible, while acting within the rules of court. The right to counsel existed at common law and in state constitutions. The Sixth Amendment codified this right. The Supreme Court has interpreted the Sixth Amendment as requiring the right to counsel to apply to any "critical stage" of the prosecution, not just at trial. Thus, a defendant has been held to have the right to counsel at a lineup that takes place after indictment, at the preliminary hearing, and during pretrial discovery.

The role of defense counsel is primarily: (1) to ensure that the defendant's rights are not violated (intentionally or in error), (2) to make sure that the defendant knows all their options before making a decision, (3) to provide the defendant with the best possible defense, without violating ethical and legal obligations, (4) to investigate and prepare the defense, and (5) to argue for the least possible sentence or best possible plea bargain.

There are several types of defense counsel. These include private, retained counsel, public defenders, and appointed counsel. **Retained counsel** are attorneys selected and paid by the defendant. **Public defenders** are hired by the state or county, but work for defendants who cannot afford to hire their own lawyer. **Appointed counsel** are private attorneys who are paid by the state on a case-by-case basis to represent indigent defendants. Before a public defender is assigned or the court will appoint counsel, most jurisdictions require the defendant to prove that they are indigent. The defendant may be required to submit a financial statement that identifies all their assets and liabilities. This statement is reviewed by the court to determine whether the defendant is, in fact, indigent. In many jurisdictions, if a defendant is able to secure or make bail, they are no longer eligible for free legal services and therefore must retain their own lawyer.

Although the Supreme Court has held that there is a right to counsel, the Court has not held that this means a right to the counsel of your choice in all cases. A person who can afford to hire a lawyer may do so; those who cannot afford a lawyer will be provided with one, but there are limits on when the appointment will occur, and the defendant has little or no say in who is selected to represent them.

OVERVIEW OF THE CRIMINAL PROCESS

In this section, we provide a brief overview of the major stages in a typical criminal trial. The process begins with the arrest of a suspect and ends with the verdict at trial or, potentially, an appeal. Evidentiary issues may arise at any point during the proceeding and, in fact, many battles are fought in courtrooms during pre-trial proceedings regarding the admissibility of evidence. However, the majority of evidence law addresses the actual conduct of the trial.

PRETRIAL PROCEEDINGS

The criminal process begins either with the filing of a **complaint** or with an **arrest**. A complaint may be filled out by a police officer, a prosecutor, or a private citizen. If an arrest is made first, a complaint will be sworn out afterward, usually by the arresting officer. The complaint serves as the charging document for the preliminary hearing.

Search and arrest warrants are obtained by police officers who first must fill out an **affidavit** stating the facts relied upon to create what is called probable cause. There must be probable cause to arrest or search. **Probable cause** is a legal concept referring to the amount of proof a police officer must have in order to search or arrest someone. This is discussed further in Chapter 5.

After a person is arrested, he or she is booked. **Booking** is an administrative procedure involving the entry into the police blotter of the suspect's name, arrest time, offense charged, and the taking of fingerprints and photographs.

The first court appearance is referred to as the **initial appearance**. Once a person is arrested, he or she must be brought before a magistrate "without unnecessary delay." It is here that bail is set. **Bail** is an amount of money that is established for the sole purpose of ensuring the presence of the defendant at trial. Bail is not designed to punish the defendant or unreasonably restrict his or her liberty.

Moreover, recall that the Eighth Amendment requires that bail must not be "excessive," but also remember that the Eighth Amendment is one of the two provisions that relate to the criminal process that have not been incorporated and applied to the states. What is "excessive" bail? Although there is much debate, guidance can be found in *Stack v. Boyle* (1951), where the Supreme Court held that excessive bail is an amount that exceeds the sum necessary to ensure the presence of the defendant at trial. Despite the fact that the Eighth Amendment does not apply to the states, most state constitutions, legislation, and rules of procedure embrace the notion that bail should not be punitive, but rather is to be used only as a measure to ensure the attendance of the defendant in court.

Once bail is set, the defendant may challenge the amount and file a motion for a reduction. A bail hearing is then set where the court can hear evidence regarding the amount of bail. Factors such as the nature of the offense, history of the defendant, risk of flight, danger to others or self, and financial ability of the defendant may be considered by the court. In capital cases or cases where defendants pose danger to witnesses or are a flight risk, bail is often not allowed, and the defendant must therefore remain in jail until trial.

The next stage in the proceedings is the **preliminary examination**, sometimes referred to as the **preliminary hearing**. Here, the magistrate determines if there is probable cause

to believe that an offense was committed and that it was the defendant who committed the crime. If probable cause is established, the defendant is "bound over" for trial. Because they are considered to be a preliminary matter, preliminary hearings are usually conducted in lower courts rather than general trial courts; yet, the importance of the preliminary hearing should not be discounted. The Supreme Court has defined the preliminary hearing as a "critical stage" of the prosecution, which means that the defendant has a right to have his or her lawyer present.

In many jurisdictions, the preliminary hearing may be waived by the defendant, and often is. Each case is unique, and as such, attorneys and their clients must make informed decisions regarding the waiver of a preliminary hearing. Preliminary hearings do provide the defense with an insight into what evidence the state may offer at trial; however, because these hearings occur very early in the process, they are usually very limited in scope and may not reveal all of the proof the state will introduce later.

There are two ways that charges may be filed against a defendant—either by an **information** filed by the prosecutor or by an **indictment** issued by a grand jury. The information is prepared and signed by the prosecutor. It is adequate if it informs the defendant of the facts and the elements of the offense charged. It is a substitute for a grand jury indictment and is a more efficient way to proceed, as it eliminates the need to organize a grand jury and present evidence.

The Fifth Amendment requires the federal government to proceed to trial by means of an indictment, handed down by a grand jury in capital and infamous cases. This clause of the Fifth Amendment is one of the few that has not been applied to the states; however, states may use an information instead. A little fewer than half of the states require an indictment. Twelve states require indictment by a grand jury only for felonies, while three states require indictment by a grand jury only for capital offenses. Four states require indictment by a grand jury for all felonies and misdemeanors.

The typical **grand jury** is comprised of twenty-three people, and proceedings are not open to the public. The only persons present, aside from the members of the grand jury, are the district attorney and any witnesses he or she calls. The rationale behind requiring indictment by a grand jury is that this body can act as a check on an overzealous prosecutor, preventing him or her from prosecuting cases for which there is not sufficient evidence. Because the grand jury hears only the evidence presented by the prosecutor, they are more likely to rule in favor of the state, because the proof presented by the prosecution is not challenged by the defense. This does not necessarily mean that the grand jury is failing to achieve its purpose of preventing improper prosecutions; its very existence may prevent prosecutors from taking weaker cases before it. In this way, the grand jury does check the prosecutor's power. But the grand jury also possesses subpoena power and therefore may elect to require other witnesses to appear. If the grand jury returns an indictment, it is referred to as a **true bill**. If the grand jury refuses to indict the defendant, it is referred to as a **no bill**.

At the *arraignment*, the defendant enters a **plea**. Possible pleas include guilty, not guilty, no contest, and standing mute. Standing mute means refusing to plead—in these instances, the court enters a not guilty plea for the defendant, thus preserving the defendant's constitutional right to trial. A no contest plea, also referred to as **nolo contendre**, means that the defendant accepts whatever punishment the court would impose on a guilty defendant,

but refuses to admit liability. This is frequently used by defendants who fear being exposed to civil liability for their criminal misdeeds.

PRETRIAL MOTIONS

Prior to trial, both the prosecution and the defense may file motions with the court. These motions may cover a variety of issues. Common pretrial motions in criminal cases include a motion to compel discovery, motion to suppress evidence, motion for change of venue, and a motion for omnibus hearing. These motions are usually made by the defense. The judge will rule on these motions before the trial begins.

The period of time between arraignment and trial is often referred to as the discovery period, as this is the time when both sides may seek to investigate (discover) what evidence the other side has retained. This is typically done by filing a pretrial motion. The defendant has a constitutional right to any *exculpatory evidence* (evidence that tends to suggest the defendant is innocent) in the possession of the prosecution. In *Brady v. Maryland* (1963), the United States Supreme Court held that due process was violated when the prosecution withheld a confession by a co-defendant in a murder case. In *Brady*, the co-defendant confessed to the actual homicide. Prosecutors did not disclose the existence of this statement to Brady prior to or during his trial for capital murder. Following review, the Supreme Court held that ". . . the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." As such, prosecutors have a duty to turn over all evidence that may be material to either guilt of or punishment to defendants. However, defendants must request this evidence prior to trial.

JURY SELECTION

The next step in the process is the trial. Once a trial date is set, jury selection begins. The jury is selected at random from the eligible members of the community, usually from voting records or automobile registration records. These records are used to obtain as complete a list as possible of all the residents in a community. Prospective jurors are examined by the judge and/or the attorneys to determine whether there is any bias, prejudice, or interest that would prevent the potential juror from being impartial. This process of questioning the jurors is referred to as the **voir dire**.

It should be noted that, although the purpose of the voir dire is to obtain an unbiased jury, in reality, each side seeks not only to excuse potential jurors who are biased against their side, but also to keep individuals on the jury who are biased toward their side. Attorneys sometimes employ the services of professional jury consultants to help them determine what type of person is more likely to favor the prosecution or defense. Jury consultants are paid professionals who review juror questionnaires and observe juror responses to voir dire. These consultants are paid to ensure that jurors who are favorable are seated on the jury. Jury consultants typically possess backgrounds in psychology, human behavior, and law. Although most individuals do not have the resources to hire jury consultants, wealthier parties are able to do so.

Jurors may be **challenged for cause** or removed through the use of a peremptory challenge. Challenges for cause can be based on many different grounds. For example, a prospective juror who is related to or in some way connected to a party in the case (the judge, an attorney, or a potential witness) may be challenged for cause. In order to challenge a juror for cause, the cause must be articulated and established to the court.

A ***peremptory challenge*** is one for which no reason need be given. Although challenges for cause are unlimited, peremptory challenges are usually limited to a certain number. Historically, peremptory challenges could be exercised for any reason whatsoever. For example, jurors could be excused on the basis of hair color, skin color, religious beliefs, or simply making a bad impression. The use of peremptory challenges, however, is no longer unrestrained. The Supreme Court has recently held that peremptory challenges may not be used to exclude potential jurors on the basis of race (*Batson v. Kentucky*, 1986) or gender (*J.E.B. v. Alabama*, 1994). In these cases, the Court concluded that the purposeful exclusion of potential jurors on the basis of race or gender as a proxy for bias harms the legal system, the litigants, and the community.

J.E.B. v. Alabama (1994)

In a trial upon a complaint to establish paternity and child support, the prosecutor utilized peremptory challenges to exclude male jurors from the jury. In response, the defendant challenged the practice on the basis of the Supreme Court's holding in *Batson v. Kentucky* (1986) regarding the unconstitutional use of peremptory challenges to exclude African-American jurors. Following review, the Court held as follows:

> Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.
>
> When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked" in favor of one side. (See *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994).)

The Supreme Court has also held that the jury need not be composed of the traditional twelve members. Juries as small as six members have been approved for both civil and

criminal trials (*Williams v. Florida*, 1970). Furthermore, there is no constitutional requirement that the jury verdict be unanimous, even in criminal cases. The Supreme Court has approved both 9–3 and 10–2 verdicts (*Johnson v. Louisiana*, 1972; and *Apodaca v. Oregon*, 1972). However, a six-person jury must be unanimous. Finally, the requirement of a "jury of one's peers" has been interpreted simply to mean that the jury should be selected from the community where the crime takes place. It does *not* mean that the jury must share any other similarities with the defendant. To hold otherwise would be next to impossible. A perfect example is the O. J. Simpson case. If the jury should have been comprised of people with similar attributes, how would we have defined them? As black men, rich people, ex-football players, or bad actors? Instead, they simply had to be Los Angeles county residents.

THE TRIAL

Once the jury is selected and sworn in, the trial can begin. The first step is making **opening statements**—first by the prosecution and then by the defense. During opening statements, lawyers for each side present an overview of the theory of the case, what they intend to prove, and what witnesses they will call. Opening statements are very helpful to jurors. Think of an opening statement as an introductory paragraph to a book or article where the author sets forth what he or she will be discussing throughout the chapter. The overview or introduction can set the tone for the jury and give them a framework for listening to the evidence at trial. For these reasons, it is important that lawyers do not mislead the jury during opening statements. For example, lawyers should not claim to have certain proof if they will not be able to produce the same at trial. Such behavior undermines the lawyer's credibility; this may have a negative impact on his or her client.

The defense may choose to reserve its opening statement until after the prosecution has presented its evidence. This is referred to as the prosecution's **case-in-chief**. During this phase, the prosecution must establish each element of crime charged beyond a reasonable doubt.

Once the prosecution has presented its evidence and called its witnesses, the defense has an opportunity to present its case-in-chief. The defense is not required to put on a defense, but if it chooses to, it may raise several types of defenses. For example, defenses may include an alibi, insanity, self-defense, or mistaken identity, among others. Other defendants may not raise a specific defense but rather may simply attack the prosecution's case.

Witnesses may be called to testify by both the prosecution and the defense. The side that calls the witness to testify conducts what is called the **direct examination**. The other side conducts what is referred to as **cross-examination**. **Re-direct** allows the original calling party to revisit the witness and rehabilitate his or her testimony if necessary.

There are many limitations on what a witness may testify about, such as whether a witness can give an opinion or whether the witness may mention what someone told them. If an attorney believes a witness is asked an improper question or the witness answers inappropriately, the attorney may make an **objection**. There are many different types of objections. Common objections raise challenges to relevancy, whether a question has been asked and answered, the use of leading questions, whether a question is beyond

the scope of the witness's knowledge, and hearsay statements. Once an objection is raised, the judge will hear arguments from both attorneys and thereafter make a decision. If an objection is sustained, the judge has agreed with the side that objected, and the evidence or testimony may not be admitted. If an objection is overruled, the judge has agreed with the non-objecting side, and the evidence or testimony may be admitted. Attorneys must always be in tune with the proceedings and prepared to raise a timely objection. Failure to raise an objection at trial can result in a waiver of very important legal rights. Appellate courts are not sympathetic when issues are raised for the first time on appeal and no objection was made at trial. It is not uncommon for appellate courts to consider issues "procedurally barred" due to the failure of counsel to raise an objection during proceedings in the trial court. In those cases, the appellate court will refuse to address the suggested error on appeal because it was not raised first in the trial court. This reflects an attempt to have important legal issues litigated first in the trial court and allow trial judges an opportunity to cure the error.

Next are **closing arguments**, in which each side has the opportunity to summarize its case. Here, the prosecution gets to go last, because it has the burden of proof. There are some states, such as Florida, where the defense gets to argue first and last if no evidence is offered by the defense except for the defendant's testimony. Like opening statements, closing arguments are an important component of the trial process and may be very helpful to jurors. Closing arguments give each side an opportunity to summarize their case and call attention to any deficiencies in the proof offered by the other side. Again, lawyers must be careful not to overstate their case or mislead the jury.

After closing arguments or, in some jurisdictions, before them, the judge will give the **jury instructions** on the applicable law. These include instructions on the elements of the crime charged, the presumption of innocence, and the burden of proof—which in criminal trials is proof beyond a reasonable doubt. Each side of the case has the opportunity to review jury instructions before these are given or read to the jury. Lawyers for each side of the case and the judge work to come to some agreement regarding the language contained in the jury instructions. The ultimate goals for jury instructions should be that they are both an accurate statement of the law and easy to understand.

Once the jury has received its instructions, it retires to the jury room to deliberate. It remains there until a verdict is reached. In most jurisdictions, criminal verdicts must be unanimous. Failure to achieve a unanimous jury means that the case is declared a mistrial.

CASE DECISION EXERCISE 1–2

In September 2009, Sam Smith was charged with the federal crime of kidnapping, was convicted, and was subsequently sentenced to life in prison. In January 2010, Smith was indicted in Baldwin County, Alabama, for capital murder, with the underlying felony of kidnapping. Both kidnapping charges originated from the same set of facts and circumstances. After a trial in Baldwin County, Smith was found guilty of all counts and sentenced to death. Can Smith successfully argue that the Fifth Amendment prohibition against double jeopardy bars inclusion of the kidnapping charge used as a predicate of felony murder under Alabama state law? You be the judge. (See *Evans v. State*, 725 So. 2d 613 (Miss. 1997).)

If this occurs, the defendant may be retried without violating the prohibition against double jeopardy.

SENTENCING

If a jury returns a verdict of "not guilty," the defendant is set free. The constitutional prohibition on double jeopardy prevents the state from prosecuting the defendant again for the same crime. If the verdict is "guilty," then a sentence must be imposed. In most instances, the judge imposes the sentence. However, some states do have exceptions and provide for sentencing by juries. The most common exception is in death penalty cases, in which the jury traditionally imposes or, at the very least, recommends the sentence. Other states allow juries to recommend sentences in certain felonies that are not punishable by death, such as rape and robbery.

The sentence is usually not handed down immediately after the verdict. Instead, the judge typically orders a pre-sentence investigation and sentencing recommendation, to be conducted by officers in a probation department. A pre-sentence investigation and report can be helpful to the court before it imposes sentence. These investigations focus on the social, health, family, employment, and criminal history of the defendant. Such reports provide the court with information that is useful in determining special treatment or health needs, the likelihood of recidivism, and previous treatment efforts. Factors influencing sentencing include the information contained in the pre-sentence report, the attitude of the defendant, and the defendant's prior criminal and personal history. In recent years, there has been a move to increase sentence length and require incarceration. The result has been a tremendous increase in the number of persons incarcerated.

A number of different sentencing alternatives exist in the American legal system. These range from probation, to mandatory minimum sentences, to suspended sentences, and/or fines, to name just a few.

There has been a disturbing trend in the United States toward a greater reliance on incarceration of criminal offenders. As such, legislatures have focused on enacting laws that require mandatory minimum sentences and sentencing alternatives, such as habitual offender and three strikes laws. The use of these sentencing strategies has grown out of a frustration with the perceived escalation in violent crimes, judicial discretion, and repeat offenders. Public perceptions and the expectation that legislatures should be tough on crime have resulted in a greater use of incarceration, longer sentences for offenders, and less judicial discretion in criminal sentencing.

An example of the move to limit judicial direction has been the creation of sentencing guidelines in many jurisdictions, as well as the federal system. In 1984, Congress enacted the Sentencing Reform Act, which created federal sentencing guidelines. These guidelines were developed in an effort to increase sentencing uniformity and reduce disparity, and they have been the subject of much attention (see *U.S. v. Booker*, 543 U.S. 220, 2005; and *Blakely v. Washington*, 542 U.S. 296, 2004). For example, the use of the guidelines ensures that defendant A sentenced in federal district K by Judge Smith receives a comparable sentence to defendant B sentenced in federal district J by Judge Jones. Sentences are not required to

RECENT DEVELOPMENTS: *Ewing v. California* (2003)

In *Ewing*, the defendant argued that California's "three strikes law," allowing individuals who commit three felonies to be sentenced to an indeterminate life sentence in prison, was "grossly disproportionate" under the Eighth Amendment's "cruel and unusual punishment" provision. Here, Ewing stole three golf clubs worth $399 each, which constituted a felony crime in the state. In the past, Ewing served nine separate prison terms. His offenses included a variety of violent crimes, such as robbery and residential burglary. Many of his crimes were committed while on parole or probation. Therefore, the Supreme Court held that the law was not disproportionate and instead, particularity in this case, furthered the state's interest in deterring and incarcerating repeat offenders.

be, and will rarely be, identical due to factors associated with each defendant's background; however, the guidelines function to reduce the opportunity for vastly different sentences for offenders convicted of similar offenses.

Habitual offender laws, also often referred to as "three strikes laws," are examples of sentencing alternatives that have grown out of the public's frustration with chronic offenders. These laws target individuals with multiple felony convictions. Once the offender has committed the "magic number" of offenses, a mandatory sentence is imposed. In many jurisdictions, the offender is sentenced to life in prison, often without parole. Although many critics contend that these laws are too harsh and are not conducive to rehabilitation, society is generally supportive of them. Notably, the United States Supreme Court addressed and upheld the application of these laws in *Ewing v. California* (2003) and *Lockyer v. Andrade* (2003).

APPEALS

Once a person has been convicted and sentenced, there are two ways to challenge the trial outcome. A defendant may file either a **direct appeal** or an indirect appeal, also known as a writ of habeas corpus. **Habeas corpus** literally means "you have the body," and the writ requires the person to whom it is directed to either produce the person named in the writ or release that person from custody. There is no federal constitutional right to an appeal, but every state allows a direct appeal, either by statute or by state constitutional provision.

The writ of habeas corpus is considered an indirect appeal because it does not directly challenge the defendant's conviction, but instead challenges the authority of the state to incarcerate the defendant. The defendant or petitioner, in essence, is claiming that he or she is being wrongfully or unjustly incarcerated. The state defense to a habeas writ is based on the conviction; however, that is why the defendant has been incarcerated. Habeas corpus is an ancient legal remedy, dating back (at least) to the Magna Carta. It is often referred to as the "Great Writ."

Congress has established a one-year time limit to file a federal habeas petition. Direct appeals to state courts must usually be filed in a much shorter time frame, usually thirty to one hundred twenty days. Congress has also recently restricted the use of habeas corpus, by imposing time limits on federal habeas petitions if there is evidence of intentional delay by the defendant that does injury to the prosecution's case. Additionally,

Congress and the Supreme Court have recently restricted habeas corpus by imposing limits on how such appeals are filed and pursued, such as requiring that inmates include all their appealable issues in one writ, rather than doing separate, consecutive writs for each issue.

SUMMARY

LO1 Explain the purpose of evidence law.

- Evidence law governs what information is presented to the jury, and how that information is presented.
- Evidence law is most prominently displayed during trial, but evidentiary issues may also arise and be dealt with in pretrial proceedings.
- Although each state writes its own evidence code, the Federal Rules of Evidence have had a profound influence on evidence law.

LO2 Discuss the sources of law and individual rights.

- The law has developed over history, from ancient sources and the common law. Individual rights have also been developed over time.
- The incorporation of the individual rights contained in the Bill of Rights into the due process clause of the Fourteenth Amendment is vitally important, for without it, many individual rights would not be protected from infringement by state agencies. In criminal justice, this applies to the actions of the police, courts, and corrections systems.

LO3 Explain the different types of jurisdiction.

- There are many different types of courts, and they are allowed by law to hear certain types of cases.
- Courts serve as a forum for settling disputes between private parties, as a means of prosecuting individuals who break the law, and as a place where public policy is sometimes made. The common refrains "I'll sue you" and "I'll take it all the way to the Supreme Court" are evidence that courts are a popular forum.
- A court's jurisdiction limits which cases can be brought before it and what sort of sanctions it may impose.

LO4 Describe the federal and state court systems.

- Both the federal and state court systems typically have three levels—the trial court, an intermediate appellate court, and a supreme court. The United States Supreme Court is the court of last resort, the final arbiter of legal disputes.
- Evidence law is very important in the appeals process, as appeals courts are primarily concerned with reviewing whether the trial was fair, based on the proper (or improper) admission of evidence.

LO5 Explain the roles of the major court actors.

- The courtroom is populated with a number of different actors, all of whom are crucial to its operation.
- The three most important courtroom actors are the judge, the prosecutor, and the defense attorney. These are the individuals who will organize the presentation of evidence and conduct the examination of witnesses.
- The jury hears the evidence and makes a determination as to whether the defendant is guilty as charged or not guilty.

LO6 Describe the stages of the criminal process.

- There are a number of steps in the trial process, which begins with an arrest or the filing of a complaint and/or the issuance of an arrest warrant and ends with the appeals process.
- Evidence law has an impact on virtually every stage of the criminal process.

DISCUSSION QUESTIONS

1. Explain relevant evidence, and give two examples.
2. Explain competent evidence, and give two examples.
3. Explain the importance of rules of evidence. Give examples.
4. Explain the importance of common law to our system of law today.
5. Explain *Marbury v. Madison* (1803) and the impact the case had on the judicial system.
6. Why is the Fourteenth Amendment one of the most important to the rights of citizens?
7. Explain the concept of jurisdiction, and give four examples of the different types of jurisdiction.
8. How does a case get to the Supreme Court? What is the basis for acceptance of an appeal?
9. What is the Missouri Plan, and how does it work?
10. What is voir dire? What are the different challenges available during voir dire?

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