CENGAGE

Criminal Law *and* Procedure

Eighth Edition

Daniel E. Hall, J.D., Ed. D.

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***Criminal Law and Procedure,* Eighth Edition**
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Dedication

Few people are blessed with having a lifelong friend. I am one.
Kevin, thanks for five decades of friendship.

Brief Contents

Contents

Chapter 3

The Ingredients of Crime: Thinking and Acting 41

Chapter 4

Crimes Against the Person 74

Chapter 5

Crimes Involving Property 119

Chapter 6

Crimes Against the Public 149

Chapter 7

Parties and Incomplete Crimes 211

Chapter 8

Factual and Legal Defenses 223

Chapter 9

Constitutional Defenses 251

Part 2
Criminal Procedure

Chapter 10

Chapter 11

Chapter 12

Chapter 13

Searches and Seizures: Exceptions 372

Chapter 14

Interrogation, Surveillance, and Forensic Practices 405

Chapter 15

The Pretrial Process 447

Preface

It is a privilege to offer you the eighth edition of *Criminal Law and Procedure*. Now 30 years on the market, I am humbled in the knowledge that tens of thousands of students, and thousands of professors, at universities and colleges throughout the United States and Canada have relied on *Criminal Law and Procedure* to support their classroom learning and teaching.

This revision is more than an update. It is the largest and most comprehensive revision the book has undergone in a decade. The basic organization, approach, and pedagogy are the same as in previous editions. But rapid and significant changes in technology and society have resulted in an additional chapter, new sections in existing chapters, new cases, new graphics, and new textual discussion throughout.

Organization of the Text

If you are new to this book, welcome. What follows are its organizational and pedagogical features. If you have used the text in the past, rest assured that the revisions, while large, won't disrupt your learning plan. I have detailed what is new, what has been revised, and what has been eliminated in the *Changes in the Eighth Edition* section, which appears below.

The organization, content, and pedagogy are the same as before. My highest priorities are to present the material in a manner that is accessible to the undergraduate student and to get the law right. All of the pedagogical features of the earlier editions have been retained, including the hybrid textbook/casebook approach, highlighted definitions, glossary of terms, table of cases, and a thorough index. The distinction between chapter questions and chapter problems continues in this text, the former testing content knowledge and the latter testing the students' problem-solving, critical thinking, and analytical skills.

Keeping in mind the diverse audience of students and instructors who use this text, I have designed two general methods of use. The first is as a combination text and casebook. The second method is to omit the cases and use the text alone. Both methods are possible because I do not use any case to exclusively teach a point of law. Instead, the cases are used to illustrate a point in practice and to develop the cognitive skills of students. Accordingly, if time does not permit it or the educational goals of an instructor are focused elsewhere, the cases may be omitted without losing substantive content. As always, I take liberties with case editing. String citations and other non-content matter are often omitted, sometimes without indication, to make the reading of the cases smoother. Readers are advised to find the official case for the full, unedited version.

The first half of the text covers substantive criminal law, and the second half of the text discusses both the constitutional dimensions of criminal procedure and the practical dimensions of the criminal justice process.

Key Features

Ethical Considerations that expose students to ethical questions in criminal law and general ethical principles and laws that apply to players in the criminal justice system

Writing Style that challenges but does not overwhelm undergraduate students

Key Terms that are in bold on first use and clearly defined in the margin

Oyez Feature, which offers edited cases that reinforce content and promote the development of case analysis skills

Sidebars that can be used to spark class discussion and student interest in issues involving the criminal justice system and criminal law. To provide context for the frequency of the crimes and topics discussed, a sidebar labeled CrimeStats appears throughout.

Exhibits that reinforce textual material and help illustrate important ideas

Review Questions that call for content-related answers to reinforce and retain chapter concepts

Chapter Problems & Critical Thinking Exercises that are intended to develop critical thinking and problem-solving skills

Changes in the Eighth Edition

I have added new material and updated existing material to keep abreast of changes in both the law and the criminal justice disciplines. The changes and additions include, inter alia, the following:

- For the first time, the book is offered in full color.
- The Fourth Amendment chapter is divided into two chapters, one covering foundational material and the second covering the many exceptions to the warrant and probable cause requirements.

- Several new subchapters have been added.
- The law has been updated throughout. This includes United States Supreme Court opinions issued as late as June 2021.
- Many new Oyez case excerpts have been added and several older cases removed. The new cases cover, among other subjects, mens rea, murder, cybercrime, sexual assault, civil rights, duress, dual sovereignty (*Gamble v. United States*), Third-Party Doctrine and cell data (*Carpenter v. United States*), Fourth Amendment seizure (*Torres v. Madrid*), unanimous jury verdicts (*Ramos v. Louisiana*), and jury impeachment for racial bias (*Pena v. Colorado*).
- Over a dozen new exhibits and a dozen new photos have been added.
- The number of additions, edits, and deletions from the text narrative are too many to be listed. The more significant changes include the following:
  - o New material on civil rights crimes and equal protection
  - o An expanded discussions of the fundamental elements of crimes, mens rea, actus reus, and concurrence, and a new discussion of attendant circumstances
  - o New material on police liability, particularly qualified immunity
  - o Recent developments in felony murder
  - o A discussion of the evolving definition of rape
  - o New material on the various forms of cyber and computer crime
  - o New material on crimes involving animals
  - o The issue of wrongful convictions, particularly the role of false memories and eyewitness misidentification
  - o An expanded examination of crimes against the public, using the Capitol insurrection of January 6, 2021, for illustrations
  - o Dual sovereignty
  - o Free Speech issues that are hot now, including True Threats and Fighting Words
  - o An expanded discussion of self-defense, including Stand Your Ground laws
  - o An enlarged discussion of electronic and digital surveillance
  - o An enlarged discussion of interrogation techniques, including police deception
  - o New material on plea bargaining
  - o New material on legislative amelioration and executive commutations and pardons

I love to hear from professors and students about my books. If there is material that you want to see added, or there is something that can be improved, please write to me at hallslawbooks@gmail.com.

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The Cengage Instructor Center is an all-in-one resource for class preparation, presentation, and testing. The instructor resources available for download include:

- **Instructor's Manual.** Provides activities and assessments for each chapter (including business cases with corresponding assessment activities) and their correlation to specific learning objectives, an outline, key terms with definitions, a chapter summary, and several ideas for engaging with students with discussion questions, ice breakers, case studies, and social learning activities that may be conducted in an on-ground, hybrid, or online modality.
- **Test Bank.** A comprehensive test bank, offered in Blackboard, Moodle, Desire2Learn, and Canvas formats, contains learning objective-specific true-false, multiple-choice, and essay questions for each chapter. Import the test bank into your LMS to edit and manage questions and to create tests.
- **PowerPoint Slides.** Presentations are closely tied to the Instructor's Manual, providing ample opportunities for generating classroom discussion and interaction. They offer ready-to-use, visual outlines of each chapter that may be easily customized for your lectures.
- **Transition Guide.** Highlights all of the changes in the text and in the digital offerings from the previous edition to this edition.

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I would like to thank the Product Manager Abbie Schultheis and the Vendor Content Manager, Arul Joseph Raj of Lumina Datamatics, for their continued support and belief in this text.

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Table of Cases

Part 1

Criminal Law

Chapter 1

Introduction to the Legal System of the United States

Chapter Outline

Federalism

Learning Objective: Describe federalism and explain its impact on criminal law and procedure.

In this textbook, you will be introduced to two important and high-profile areas of U.S. law: criminal law and criminal procedure. As the idiom *If it bleeds, it leads* expresses, crime and the criminal justice system are popular fodder for journalists. Unfortunately, however, much of what appears in the news is wrong. As is commonly said today, it is "fake news." The objective of this book—obviously—is to help you learn criminal law and procedure. But it is more than that. You should be a more informed member of the community and a more discerning observer of the criminal justice system when you complete this book.

Criminal law doesn't spring from the Cloud. It is part of a larger legal and political system that dates back nearly a thousand years. Therefore, this chapter begins by framing criminal law in its larger historic and political context. This can be complicated, both because the history is long and because contemporary criminal law and procedure exists at several levels and in many forms. These include federal and state constitutional law, the common law, and statutory law. It will be easier to understand modern criminal law if we first explore the basic structure of American government. Let's return to your high school civics class.

federalism
A system of political organization with two or more levels of government (for example, city, state, and national) coexisting in the same area, with the lower levels having some independent powers.

The United States is divided into two sovereign forms of government—this is referred to as **federalism**. Think of federalism as a vertical division of power with the national government resting above the state governments. This doesn't mean the states are subservient to the federal government. Often, the states are independent or "sovereign." The Framers of the Constitution of the United States established these two levels of government in an attempt to prevent the centralization of power. The belief that "absolute power corrupts absolutely" was the catalyst for the division

Sidebar

At trial, a *sidebar* is a meeting between the judge and the attorneys, at the judge's bench, outside the hearing of the jury. Sidebars are used to discuss issues that the jury is not permitted to hear. In this text, the sidebars will appear periodically. This periodic feature contains information relevant to the legal subject being studied.

of governmental powers and the many checks and balances between them that are baked into the three branches of the federal government.

In theory, the national government, commonly referred to as the *federal government,* and the state governments each possess authority over citizens, as well as over particular policy areas, free from the interference of the other government. This is known as **dual sovereignty**. But the Framers of the Constitution intended to establish a limited federal government. That is, most governmental powers were to reside in the states, with the federal government being limited to the powers expressly delegated to it by the U.S. Constitution. This principle is found in the Tenth Amendment, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or the people."

dual sovereignty
When multiple governments have concurrent authority over people or policy.

A very important responsibility of the states is to regulate for the health and welfare of its citizens. This is known as the **police power**. In spite of its name, the police power isn't only about criminal justice. It refers to any effort to improve the welfare of the people. Consider, for example, the COVID-19 pandemic. The responsibility, and authority, to control the spread of the virus and to protect the public from infection fell mostly to the states. That is why governors and state health officials, not federal officials, issued orders about social distancing, masking, and closing businesses. It is through the police power that the states protect people from one another. Murder, rape, arson, burglary, and thefts are state crimes. The primacy of the states in protecting for the general welfare is reflected in the work of the courts. About 95% of all crimes are tried in state courts.

police power
The government's authority and power to set up and enforce laws to provide for the safety, health, and general welfare of the people.

But there are small zones of authority that are exclusively federal. These authorities are specifically listed by the U.S. Constitution. They include:

1. Coin money, punish counterfeiters, and fix standards of weights and measures.
2. Establish a post office and post roads.
3. Promote the progress of science and useful arts by providing artists and scientists exclusive rights to their discoveries and writings.
4. Punish piracy and other crimes on the high seas.
5. Declare war and raise armies.
6. Conduct diplomacy and foreign affairs.
7. Regulate interstate and foreign commerce.
8. Make laws necessary and proper for carrying into execution other powers expressly granted in the Constitution.

The last two of these powers—the regulation of interstate commerce and the making of all necessary and proper laws—have proven to be significant sources of federal authority. Through the **Commerce Clause**, the federal government asserts criminal law jurisdiction over crimes that occur in more than one state, such as kidnapping and the trafficking of persons across state lines. The Necessary and Proper Clause enables the federal government to create criminal laws to support its other specifically listed powers, such as the criminalization of mail fraud under its power to create a post office. Also important is the Supremacy Clause of Article VI, which provides that

Commerce Clause
Found in Article I, sec. 8 of the Constitution, this clause empowers the federal government to regulate commerce between the states, with foreign governments, and Indian tribes.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause declares federal law, if valid, to be a higher form of law than state law. Of course, if the federal government attempts to regulate an area belonging to the states, its law is invalid and the state law is controlling. But if the federal government possesses **jurisdiction** or concurrent state and federal jurisdiction exists, federal law reigns supreme. If concurrent jurisdiction exists, state law is set aside if (1) it conflicts with federal law or (2) Congress has declared that federal law shall exist alone. The latter is known as "preemption." This relationship, which clearly distinguishes federal and state authorities, is known as **dual federalism**. Federal law rarely invalidates state criminal law because state and federal criminal laws are more likely to be parallel or complementary. In such cases, a state government and the federal government have **concurrent jurisdiction** (see Exhibit 1–1) and engage is what is known as **cooperative federalism**.

jurisdiction
The geographical area within which a court (or a public official) has the right and power to operate. Or the persons about whom and the subject matters about which a court has the right and power to make decisions that are legally binding.

dual federalism
A model of governance where the federal government and states have distinct, separate authorities.

concurrent jurisdiction
Two or more jurisdictions or courts possessing authority over the same matter.

cooperative federalism
A model of governance where the federal government and the states share in governing.

Cooperative federalism, which is not a third jurisdictional model, but instead, a relational descriptor, is characterized by significant interaction between the states and federal government (and local forms of government) in an effort to effectively regulate and administer laws and programs. Cooperative federalism is focused on federal and state collaboration, not on drawing lines of authority between the two.

There are many illustrations of successful federal-state alliances. The government's response to COVID-19 is an example. The states took the lead with regulating businesses and individuals while the federal government led the effort to control the borders, support research, and fund the development and distribution of a vaccine. The War on Terror that has been fought since the 9-11 attacks is another example. The states and federal government have developed information sharing and other joint law enforcement and intelligence processes. In terms of the law, both state and federal **terrorism** laws exist. You may find it odd, or unfair, but the Supreme Court had decided on a couple of occasions (the most recent being in 2019) that it does not violate double jeopardy for an individual to be tried and punished by both the federal and a state government. You will learn more about this in Chapter 9.[1]

terrorism
The definition of terrorism is the subject of ongoing debate. However, one federal statute defines it as activities that involve violence or acts dangerous to human life that are violations of law and appear to be intended to intimate or coerce a civilian population, to influence a policy of government by intimidation or coercion, or to affect the conduct of government through mass destruction, assassination, or kidnapping.[2] 18 U.S.C. §2331.

As you learned earlier, a few policy areas belong exclusively to the federal government. Punishing counterfeiters is an example. Although the expansion of federal authority is likely to continue to increase as people and goods become

Exhibit 1–1 Federal and State Criminal Jurisdiction

State Jurisdiction	Concurrent Jurisdiction	Federal Jurisdiction
1. States may regulate for the health, safety, and morals of their citizens	1. Those acts that fall into both federal and state jurisdictions	1. Acts in interstate or international commerce and that stem from an enumerated federal power
2. Those acts that involve a state government, its officials, and property Examples: Murder; rape; theft; driving under the influence of a drug; gambling	Examples: Bank robbery of a federally insured institution; an act of terrorism against the United States that harms an individual, state property, or individual property	2. Crimes involving the government of the United States, including its officials and property Examples: Murder of a federal official or murder on federal land; interstate kidnapping; interstate flight of a felon

Sidebar

How to Brief a Case

You are about to read the first judicial decision found in this text. Decisions of courts are often written and are commonly referred to as *judicial opinions* or *cases*. These cases are published in law reporters so they may be used as precedent. Many cases appear in this text for your education. Your instructor may also require that you read other cases, often from your jurisdiction. The cases included in your book have been edited, citations have been omitted, and legal issues not relevant to the subject discussed have been excised. There is a common method that students of the law use to read and analyze (also known as briefing) cases.

Most judicial opinions are written using a similar format. First, the name of the case appears with the name of the court, the cite (location where the case has been published), and the year. When the body of the case begins, the name of the judge or judges responsible for writing the opinion appears directly before the first paragraph. The opinion contains an introduction to the case, which normally includes the procedural history of the case. This is followed by a summary of the facts that led to the dispute, the court's analysis of the law that applies to the case, and the court's conclusions and orders, if any.

Most opinions used here are from appellate courts, where many judges sit at one time. After the case is over, the judges vote on an outcome. The majority vote wins, and the opinion of the majority is written by one of those judges. If other judges in the majority wish to add to the majority opinion, they may write one or more concurring opinions. Concurring opinions appear after majority opinions in the law reporters. When judges who were not in the majority feel strongly about their position, they may file dissenting opinions, which appear after the concurring opinions, if any. Only the majority opinion is law, although concurring and dissenting opinions are often informative.

Here is a suggested format for briefing cases:

1. Read the case. On your first reading, do not take notes; simply attempt to get a *feel* for the case. Then read the case again and use the following suggested method of briefing.
2. State the *relevant* facts. Often, cases read like little stories. You need to weed out the facts that have no bearing on the subject you are studying.
3. Identify the legal issue of the case. The issue is the legal question that is being answered by the court.
4. Identify the applicable rules, standards, or other laws, as they apply to the issues you have identified.
5. Explain the court's decision and analysis. Why and how did the court reach its conclusion? Note whether the court affirmed, reversed, or remanded the case. You may also want to do the same for concurring or dissenting opinions.

more national and international in character, the Supreme Court has reaffirmed the central role of states in protecting the people, and it has conversely made it clear that the federal government can only make laws when the Constitution expressly authorizes it to do so.

For example, the Supreme Court invalidated the federal Gun-Free Zone Act of 1990 because it found no genuine connection between guns around schools and interstate commerce. This case is featured in your first Oyez.

Oyez

About This Feature: Oyez (pronounced O-Yay) is a Latin word that found its way into French and eventually into English. The word means "hear ye" and is used to attract attention. Traditionally, it is called out three times to open court sessions. The Supreme Court of the United States continues to open its sessions with it. Specifically, the Marshall of the Court calls out the following:

> The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court.

Oyez is used in this book to announce that you are about to read a court case that illustrates the subject you are studying. The cases, which can be dozens of pages long, are "excerpted," or reduced, to their most relevant parts. Both state and federal cases are featured. Your first Oyez case is *Lopez v. United States*. In it, the Supreme Court of the United States discusses whether the federal government has the authority to control guns in and around schools.

(continued)

United States v. Lopez
514 U.S. 549 (1995)

Chief Justice Rehnquist delivered the opinion of the Court

In the Gun-Free School Zones Act of 1990 [Act], Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce ... among the several States ...." U.S. Const., Art. I, § 8, cl. 3.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38-caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. . . .

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." . . .

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in anyone branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." . . .

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. '[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.' Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce and those activities that substantially affect interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. . . .

We now turn to consider the power of Congress, in the light of this framework, to enact [Act]. The first two categories of authority may be quickly disposed of: [Act] is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [Act] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if [Act] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce. . . .

Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. . . .

Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law. . . .

The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. . . .

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Two years later, the Brady Handgun Violence Protection Act was invalidated in *Printz v. United States*[3] because it required state officials to conduct background checks on gun purchasers. The Court held that Congress was without the authority to direct local enforcement officers in this way. In yet another case favoring state authority, *United States v. Morrison,*[4] the Supreme Court struck down part of the Violence Against Women Act because it held that it was a state, not federal, authority to provide victims of sex crimes with civil remedies against their attackers. In another 2000 case, *Jones v. United States,*[5] the Court invalidated the application of a federal arson statute to the prosecution of a man for firebombing his cousin's home. The Court rejected the United States' theory that it had jurisdiction because the home's mortgage, its insurance, and its natural gas were all purchased in interstate commerce. The Court penned that if it were to accept the government's position, "hardly a building in the land would fall outside the federal statute's domain."

However, a connection was found in the 2005 case *Gonzales v. Raich*.[6] In that case, the federal government's prohibition of the possession of marijuana was upheld, although state law allowed its possession and use for medical purposes. The interstate nature of marijuana production and sales made for an easy case of federal jurisdiction. In fact, the plaintiffs conceded this point. Their theory that California's law permitting limited use of marijuana should trump federal law failed, largely because the federal government had a "rational basis" to believe that the state law would undermine the intention of the federal law by providing a stream through which interstate drug trafficking could occur.

In 2010, the Court affirmed a federal statute that delegated the authority to seek civil commitment of federal sex offenders after their sentences were served to federal prosecutors. Similar state laws were previously upheld, but in the 2010 case *United States v. Comstock*,[7] the defendant complained that civil commitment was a traditional state authority and accordingly, the federal law was invalid. Relying on the Necessary and Proper Clause, the Court rejected the argument. That the statute required the federal government to give the appropriate state officials the first opportunity to file for commitment in state court also reduced the Court's concerns that state autonomy was threatened.

Local governments have not been mentioned so far. This is because the Constitution does not recognize the existence of local governments. However, state constitutions and laws establish local forms of government, such as counties, cities, and districts. These local entities are often empowered by state law with limited authority to create criminal law. These laws, usually in the form of ordinances, are discussed in Chapter 2.

The result of this division of power is that the states (as well as other jurisdictions, such as the District of Columbia), the federal government, territories and local governments each have a separate set of criminal laws. For this reason, you must keep in mind that the principles you will learn from this book are general. It is both impossible and pointless to teach the specific laws of every jurisdiction of the United States in this textbook.

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Separation of Powers

Learning Objective: Describe the separation of powers with an emphasis on how it impacts criminal law and criminal procedure.

Another division of governmental power is known as **separation of powers**. This is the division of governmental power into three branches—the executive, legislative, and judicial—making a horizontal division of power, just as federalism is the vertical division (see Exhibit 1–2). Each branch is delegated certain

separation of powers
Division of the federal government (and state governments) into legislative (lawmaking), judicial (law interpreting), and executive (law enforcement) branches.

Exhibit 1–2 Division of Governmental Power

	Legislative Branch	Executive Branch	Judicial Branch
The Government of the United States (Federal Government)	U.S. Congress	President of the United States	Federal Courts
State Governments	State Legislatures	Governors	State Courts

functions that the other two may not encroach upon. The executive branch consists of the president of the United States, the president's staff, and the various administrative agencies that the president oversees. Generally, it is the duty of the executive branch to enforce the laws of the federal government. In criminal law, the executive branch investigates alleged violations of the law, gathers the evidence necessary to prove that a violation has occurred, and prosecutes alleged criminals. The president does this through the various federal law enforcement and administrative agencies.

statute
A law passed by a legislature.

The legislative branch consists of the U.S. Congress, which creates the laws of the United States. Congressionally created laws are known as **statutes**. Finally, the judicial branch comprises the various federal courts of the land. That branch is charged with the administration of justice. A more comprehensive discussion of the judicial branch follows later in this chapter.

In a further attempt to diffuse governmental power, the framers designed a system of checks and balances that prevents any one branch from exclusively controlling most functions. Several checks can be found in the Constitution.

For example, Congress is responsible for making the law. This function is checked by the president, who may veto legislation. The president is then checked by Congress, which may override a veto with a two-thirds majority. The president is responsible for conducting foreign affairs and making treaties and for serving as commander in chief of the military. The Senate, however, must approve the treaties negotiated by the executive branch, and Congress has been delegated the authority to make the rules that regulate the military. In the context of criminal law, this means that Congress, state legislatures, and local councils declare what acts are criminal; for their part, the president, state governors, prosecutors, and law enforcement agencies detect and respond to criminal acts, prosecute violators, and administer judicially ordered punishments. The judicial branch interprets criminal law, oversees criminal adjudications, sentences offenders, and to a limited extent oversees the entire system of adjudication and punishment.

Through the power of judicial review, the judiciary may invalidate actions of the president or Congress that violate the Constitution. In contrast, the political branches select federal judges through the nomination (president) and confirmation (Senate) process. Unpopular judicial decisions may be changed either by statute, if the issue is one of statutory interpretation, or by constitutional amendment, if the issue is one of constitutional interpretation. Rogue judges, even though appointed for life, can be impeached and removed by Congress.

Even though the U.S. Constitution does not establish three branches of government for the many states (the U.S. Constitution designs the structure of the federal government only but also demands that states have republican forms of government), all state constitutions do, in varying forms, model the federal constitution. The result is a two-tiered system with each tier split into three parts.

In this form of government, the legislature defines what acts are criminal, what process must be used to ensure that a wrongdoer answers for an act, and what punishment should be imposed for the act.

The duty of the executive branch is to enforce and implement the laws created by the legislature, as well as to enforce the orders of courts. This is done by two independent law enforcement agencies; police and prosecutors. For example, if a state legislature prohibits cyberstalking, state or law enforcement officers will investigate a suspect and turn them over to a local or state prosecutor, who will decide whether to prosecute. There are over 18,000 law enforcement agencies in the United States. The vast majority of these agencies are found in the states. State and municipal law enforcement agencies are known by a variety of names (e.g., highway patrol, state police, bureau of investigation, county sheriff, township constables, and city police). Many state and local agencies have overlapping jurisdiction. A city police officer, for example, shares jurisdiction with both the county sheriff and state police.

Although federal law enforcement comprises a small number of the 18,000 agencies, there are many law enforcement agencies, including the Federal Bureau of Investigation, Drug Enforcement Administration, U.S. Marshal Service, Department of Homeland Security, Immigration and Customs Enforcement, U.S. Secret Service, U.S. Coast Guard, Transportation Security Administration (including the Air Marshal Service), and the Department of the Treasury. Many federal agencies that don't have law enforcement as their primary responsibility have law enforcement officers. For example, the U.S. Post Office has a large number of officers in its Postal Inspection Service and the Food and Drug Administration employs a large cadre of investigators.

When a law enforcement agency has completed its investigation, the case is turned over to a prosecutor. The prosecutor is the attorney who represents the people. The prosecutor leads every aspect of the prosecution; the filing of the charge, conducting grand juries, negotiating plea agreements, trying the case, recommending punishment, and representing the state during appeals. In the federal system, the prosecutor is referred to as a U.S. Attorney. In the states and localities, prosecutors are known as district attorneys, county attorneys, state attorneys, city attorneys, or, simply, prosecutors. U.S. Attorneys are appointed by the president of the United States, subject to confirmation by the U.S. Senate, and state prosecutors are either elected by the people or appointed by an executive officer.

Finally, the judicial branch is charged with the administration of justice. The courts become involved after the executive branch has arrested or accused an individual of a crime as well as at certain points during criminal investigations. The duties of the judicial branch are explored further in the next section of this chapter. Lawyers, legal assistants, and law enforcement officials are likely to have significant contacts with state and federal courts; therefore, it is important to understand the structure of the court system.

Courts

Learning Objective: Describe the organization and role of courts in the American criminal justice system.

Of the three branches of government, attorneys and other legal professionals have the most interaction with the judicial branch. For that reason, the judicial branch is singled out for a deeper discussion.

Within the federal and state judiciaries, a hierarchy of courts exists. All state court systems, as well as the federal court system, have at least two types of courts: trial courts and appellate courts. However, because each state is free to structure its judiciary in any manner, significant variation is found in the different court systems. What follows are general principles that apply to all states and the federal system.

trial court
A court that hears and determines a case initially, as opposed to an appellate court. A court of general jurisdiction.

Trial courts are commonly featured in movies, television, and streaming dramas. A criminal case begins at a trial court. This is where witnesses testify, the bloody hand and axe are presented—often to a jury as well as a judge—and where verdicts and sentences are announced. In the federal system, trial courts are labeled as U.S. District Courts. The United States is divided into 94 judicial districts, using state boundaries to establish district limits. Each state constitutes at least one district, although larger states are divided into several districts. For example, Kansas has only one district, and the federal trial court located in Kansas is known as the U.S. District Court for the District of Kansas. California, in contrast, is made up of four districts; the Northern, Eastern, Central, and Southern Districts of California.

State trial courts are known by various names, such as district, superior, county, and circuit courts. Despite variations in name, these courts are similar.

appellate court
A higher court that can hear appeals from a lower court.

brief
A written document filed with a court through which a party presents a legal claim, legal theory, supporting authorities, and requests some form of relief.

record on appeal
A formal, written account of a case, containing the complete formal history of all actions taken, papers filed, rulings made, opinions written, and so forth.

remand
The return of a case from a higher court to a lower court with instructions for the lower court to act in some manner, e.g. conduct a new trial or rehear an issue.

Appellate courts review the decisions and actions of trial courts and lower appellate courts for error. Appellate courts do not conduct trials; no witnesses are called and the bloody knife is not introduced as evidence. Instead, the judges review the **briefs** submitted by the parties and examine the **record** from the trial court for mistakes, known as trial court error. Often, but not always, appellate courts will hear arguments from the attorneys involved in the case. After the appellate court has reviewed the record and examined it for error, it will issue a written opinion. An appellate court can reverse, affirm, or remand the lower court decision. To *reverse* is to determine that the lower court has rendered a wrong decision and to change that decision. An affirmation leaves the lower court opinion unchanged.

In some cases, an appellate court will remand the case to the lower court. A **remand** is an order to return the case to a lower court, often with instructions, such as to reconsider the case without specific evidence that was determined to have been unlawfully considered the first time. If a mistake can't be corrected, a new trial may be ordered. For example, if an appellate court decides that a judge acted in a manner or made a decision that prevented a criminal defendant from having

Sidebar

The Workload of U.S. Courts

The court system is actually many court systems composed of the federal system and the many state systems. In 2018, approximately 84 million cases were filed in state and local trial courts. Of these, 53% were traffic offenses, 20% were criminal cases, 20% were civil cases, 6% were domestic cases, and 1% were juvenile cases.

Source of state statistics: State Court Caseload Digest. (National Center for State Courts 2019). Retrieved from courtstatistics.org on December 28, 2020.

In 2019, the federal system was composed of 1 Supreme Court, 13 appellate courts, and 94 district courts. The district courts had 390,555 total cases, of which 92,678 were criminal cases. The regional courts of appeals saw 48,486 appeals. A total of 776,674 bankruptcies were filed in the U.S. bankruptcy courts. In 2018, 6,442 cases were filed, 73 were heard, and 69 cases terminated in the Supreme Court.

Source of federal statistics: 2019 Judicial Business of the United States Courts, Administrative Office of the United States Courts: *http://www.uscourts.gov/ and Chief Justice's Year-End Summary of the Federal Judiciary (2019) found at supremecourt.gov.*

a fair trial, and the defendant was convicted, an appellate court may reverse the conviction and remand the case to the trial court for a new trial with instructions that the judge not act in a similar manner.

In the federal system and many states, there are two levels of appellate courts, an intermediate and highest level. The intermediate level courts in the federal system are the U.S. Courts of Appeal.[8] There are 11 judicial circuits in the United States, with 1 court of appeals in each circuit. Additionally, there is a court of appeals for Washington, D.C., and for the federal circuit. Therefore, there are 13 U.S. Courts of Appeal in total (see Exhibit 1–3). Appeals from the district courts are taken to these courts.

The highest court in the country is the U.S. Supreme Court. Appeals from the circuit courts are taken to the Supreme Court. Also, appeals of federal issues from state supreme courts go to the U.S. Supreme Court. Although an appeal to a circuit court and to a state's first appellate court (and often its second level of appeal as well) is generally a right any litigant has, the Supreme Court is not required to hear most appeals, and it does not. In recent years, the Supreme Court has denied review of approximately 97% of the cases appealed. Therefore, the states' supreme courts and federal circuit courts are often a defendant's last chance to be heard.

Many states have two levels of appeals; some have only one. Most states label their high courts "supreme court" and their intermediate level court the court of appeals. An example of an exception is New York, which has named its highest court the Court of Appeals of New York and refers to its trial courts as supreme courts, county courts, city courts, and district courts.

In states that have only one appellate court, appeals are taken directly to that court. New Hampshire is such a state, so appeals from New Hampshire's trial courts are taken directly to the Supreme Court of New Hampshire. In most instances, a first appeal is an appeal of right. This means that the appellate court is required to hear the case. However, second appeals are more likely to be discretionary; the appellate court can decide to hear, or not hear, these cases. To have a case heard by the U.S. Supreme Court and most state supreme courts, the person appealing must seek **certiorari**, an order from an appellate court to the lower court requiring the record to be sent to the higher court for review. When "cert." is granted, the appellate court will hear the appeal; and when certiorari is denied, it will not.

certiorari
(Latin) "To make sure." A request for certiorari (or "cert." for short) is like an appeal, but one that the higher court is not required to take for decision. It is literally a writ from the higher court asking the lower court for the record of the case.

Finally, be aware that a number of **inferior courts** exist. These are courts that fall under trial courts in hierarchy. As such, appeals from these courts do not usually go to the intermediate-level appellate courts, as described earlier, but to the trial level court first. Municipal courts, police courts, and justices of the peace are examples of inferior courts. An appeal from one of these courts is initially heard by a state trial level court before an appeal is taken to a state appellate court. The federal system also has inferior courts. The U.S. Bankruptcy Courts are inferior courts because appeals from the decisions of these courts go to the district courts, in most cases, and not to the courts of appeals. Only after the trial court has rendered its decision may an appeal be taken to an appellate court.

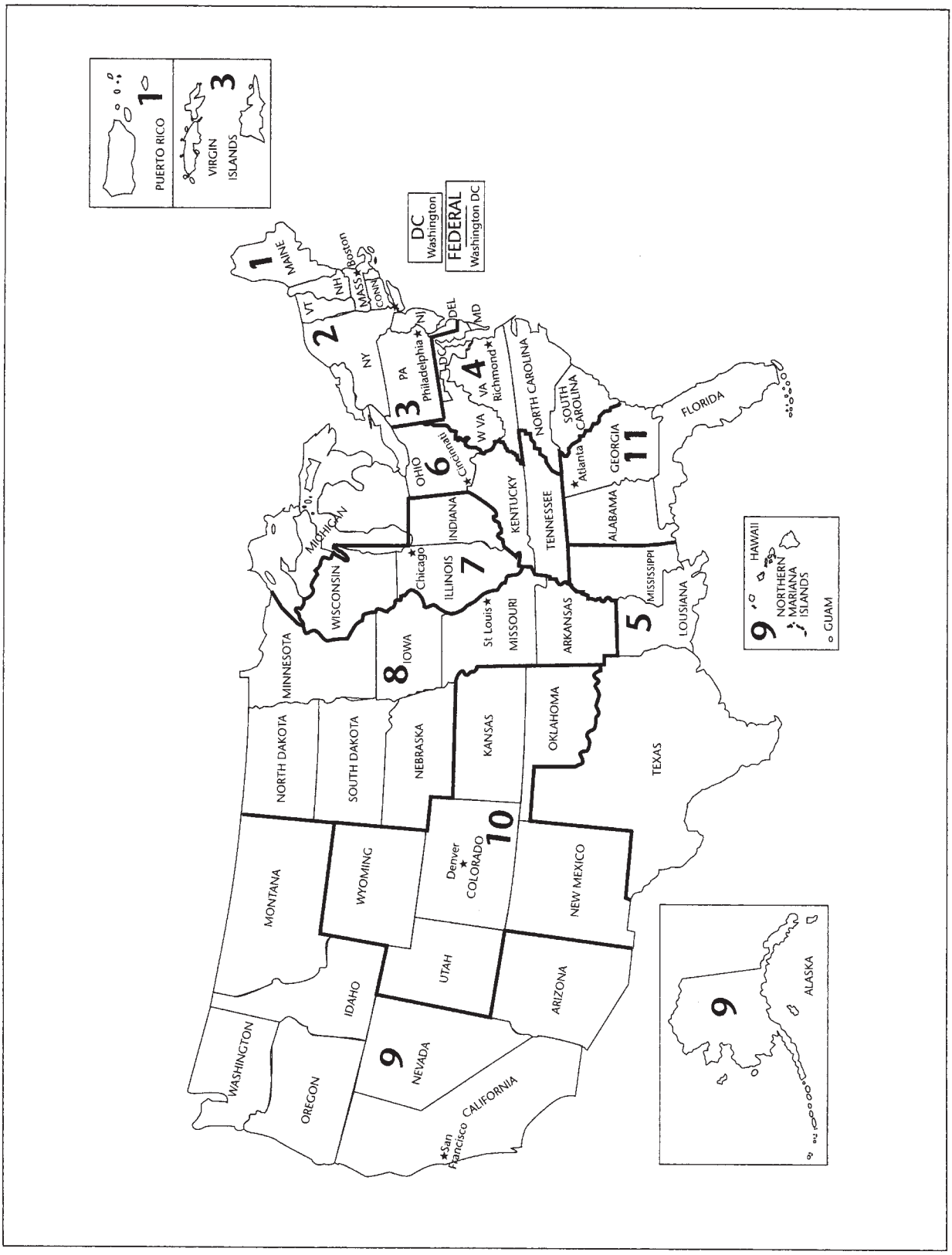
inferior court
A court with special, limited responsibilities, such as a probate court.

Many inferior courts in the state system are not **courts of record**. No digital, audio, or stenographic recording of the trial or hearing at the inferior court is made. As such, when an appeal is taken to the trial level court, it is normally **de novo**. This means that the trial level court conducts a new trial, rather than reviewing a record as most appellate courts do. Federal district courts do not conduct new trials, as all federal courts, including bankruptcy courts, are courts of record. State inferior courts have limited jurisdiction; for example, municipal courts usually hear municipal ordinance violations and only minor state law violations. The amount of money that a person may be fined and the amount of time that a defendant may be sentenced to serve in jail are also limited. Generally, no juries are used at the inferior court level.

court of record
Generally, another term for trial court.

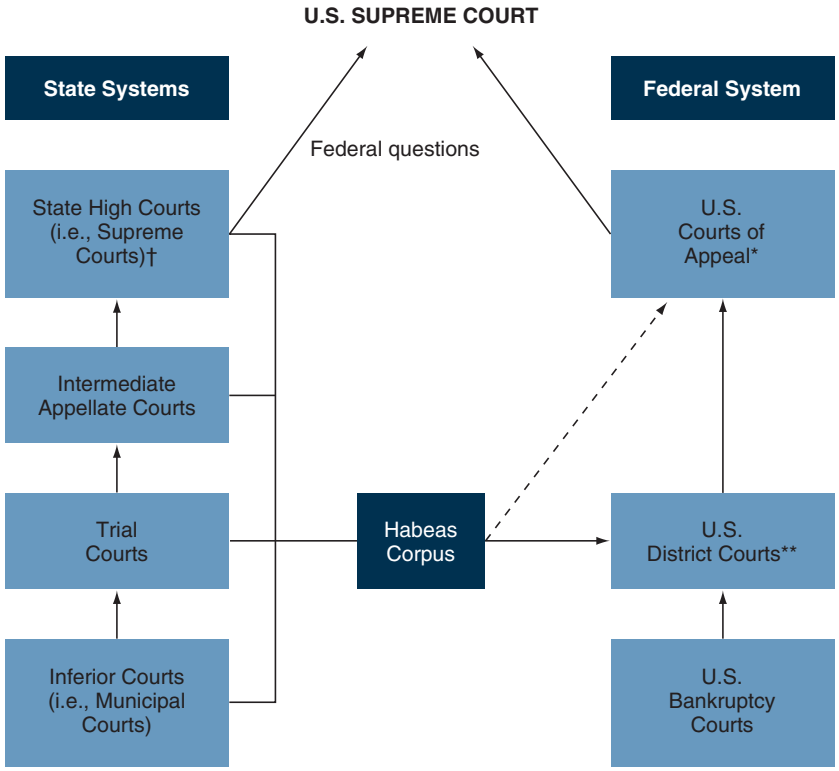
de novo
Anew. For a case to be tried again as if there had not been a prior trial.

Exhibit 1–3 The 13 Federal Judicial Circuits



Source: http://www.uscourts.gov/court_locator.aspx

Exhibit 1–4 State and Federal Court Structures



*The Federal Circuit hears cases from the U.S. Claims Court, Court of International Trade, Board of Patent Appeal and Interferences, and findings of various administrative agencies.

**District courts and circuit courts both review habeas corpus petitions from those incarcerated in the state system.

†Issues of federal law only.

Exhibit 1–4 is a basic diagram of the federal and state court systems. The appellate routes are indicated by lines drawn from one court to another. Later in this book you will learn how the appeals process works and how the federal and state systems interact in criminal law. Note where this diagram is located so that you may refer to it later.

Most state trial courts are **courts of general jurisdiction**. Courts of general jurisdiction possess the authority to hear a broad range of cases, including civil law as well as criminal. In contrast, **courts of limited jurisdiction** hear only specific types of cases. You have already been introduced to one limited jurisdiction court, the municipal court. Inferior courts, such as municipal courts, are always courts of limited jurisdiction. Some states employ systems that have specialized trial courts to handle domestic, civil, or criminal cases. These may be in the form of a separate court (e.g., Criminal Court of Harp County) or may be a division of a trial court (e.g., Superior Court of Harp County, Criminal Division). Drug courts, Military Veteran courts, and juvenile courts are other examples. Appellate courts may also be limited in jurisdiction to a particular area of law, such as the Oklahoma Court of Criminal Appeals.

The federal government also has special courts. As previously mentioned, a nationwide system of bankruptcy courts is administered by the national government.

court of general jurisdiction
Another term for trial court; that is, a court having jurisdiction to try all classes of civil and criminal cases except those that can be heard only by a court of limited jurisdiction.

court of limited jurisdiction
A court whose jurisdiction is limited to civil cases of a certain type, or that involve a limited amount of money, or whose jurisdiction in criminal cases is confined to petty offenses and preliminary hearings.

In addition, the U.S. Claims Court, Tax Court, and Court of International Trade are part of the federal judiciary, and each has a specific area of law over which it may exercise jurisdiction. Often, those cases over which they have jurisdiction are exclusive of district courts. However, the jurisdiction of those courts is outside the scope of this book, as they deal only with civil law. Criminal cases in federal court are heard by district courts, and criminal appeals are heard by the U.S. Courts of Appeals.

Let's turn from the organization of courts to their function. First, it must be emphasized that all courts—local, state, and federal—are bound by the U.S. Constitution. Consequently, all courts have a duty to apply federal constitutional law. This is important in criminal law because the criminal procedure rights found in the U.S. Constitution are much broader and deeper today than in the past. You will learn a lot more about these rights in the second half of this book.

As previously mentioned, the judicial branch is charged with the administration of justice. The courts are the place where civil and criminal disputes are resolved, if the parties cannot reach a resolution themselves. In an effort to resolve disputes, courts must apply the laws of the land. To apply the law, judges must **interpret** the legislation and constitutions of the nation. To *interpret* means to read the law in an attempt to understand its meaning. This nation's courts are the final interpreters of law. If a court interprets a statute's meaning contrary to the intent of a legislature, the legislature may rewrite the statute to make its intent clearer. This type of revision has the effect of "reversing" the court's interpretation of the statute. The process is much more difficult if a legislature desires to change a judicial interpretation of a constitution. At the national level, the Constitution has been amended 27 times. The amendment process is found in Article V of the Constitution and requires action by the federal legislature as well as by the states. Amending a constitution is more difficult than amending legislation.

interpret
Studying a document *and* surrounding circumstances to decide the document's meaning.

The judicial branch is independent from the other two branches of government. It is the duty of the courts of this nation to remain neutral and apply the laws fairly and impartially. At the federal level, the judiciary is shielded from interference from the other two branches. For example, the Constitution prohibits Congress from reducing the pay of federal judges after they are appointed. This prevents Congress from coercing the courts into action under the threat of no pay. The Constitution also provides for lifetime appointments of federal judges, thereby keeping the judicial branch from being influenced by political concerns or the waves of public opinion. Judicial independence permits courts to make decisions that are disadvantageous to the government or unpopular with the people, but are required by law.

The need for an independent judiciary is particularly important when one considers the role courts play as the guardians of constitutional principles, including civil rights. **Judicial review** is the power of courts to invalidate legislation and the acts of the executive branch that are unlawful. To strike a law or to tell the police or a state governor that they have violated the law requires tremendous will. At the federal level, judges have the security of lifetime appointment, so they judge without worrying about angering the president or Congress. Alexander Hamilton wrote of the power of judicial review, and of the importance of an independent judiciary, in the *Federalist Papers,* where he stated:

judicial review
The authority of a court to review and invalidate legislation and executive action that are unlawful.

> Permanency in office frees the judges from political pressures and prevents invasions on judicial power by the president and Congress.
>
> ■ ■ ■
>
> The Constitution imposes certain restrictions on the Congress designed to protect individual liberties, but unless the courts are independent and have the power to declare the laws in violation of the Constitution null and void these protections amount to nothing. The power of the Supreme Court to declare laws unconstitutional leads some to assume that the judicial branch will be superior to the legislative branch. Let us look at this argument.

> Only the Constitution is *fundamental* law; the Constitution establishes the principles and structure of the government. To argue that the Constitution is not superior to the laws suggests that the *representatives of the people* are superior *to the people* and that the Constitution is inferior to the government it gave birth to. The courts are the arbiters between the legislative branch and the people; the courts are to interpret the laws and prevent the legislative branch from exceeding the powers granted it. The courts must not only place the Constitution higher than the laws passed by Congress, they must also place the intentions of the people ahead of the intentions of the representative. . . .

The landmark case dealing with judicial review is *Marbury v. Madison,* 1 Cranch 137, 2 L. Ed. 60 (1803). Writing for the Court, Chief Justice Marshall wrote that even though the Constitution does not contain explicit language providing for the power of judicial review, Article III of the Constitution implicitly endows the judiciary with the authority. Although seldom used by the Supreme Court for over a hundred years following the *Marbury* decision, it is now well established that courts possess the authority to review the actions of the executive and legislative branches and to declare any law, command, or other action void if it violates the U.S. Constitution. The power is held by both state and federal courts.

The power to invalidate statutes is rarely used, for two reasons. First, the judiciary is aware of how awesome the power is; consequently, courts invoke the authority sparingly. Second, many rules of statutory construction exist and have the effect of preserving legislation. For example, if two interpretations of a statute are possible, one that violates the Constitution and one that does not, one rule of statutory construction requires that the statute be construed so that it is consistent with the Constitution. Although rarely done, statutes are occasionally determined invalid. In Chapters 8 and 9, on defenses, you will learn many constitutional constraints on government behavior. These defenses often rely on the authority of the judiciary to invalidate statutes or police conduct to give them teeth.[9]

Comparing Civil Law and Criminal Law

Learning Objective: Compare and contrast civil and criminal law.

Now that you are familiar with the larger governmental context within which criminal law fits, let's take a look at how it relates to other areas of law. A common categorization of the law is to break it into subject areas. The largest categories are civil and criminal law. The differences between criminal law and civil law are significant. Yet, there are also many similarities and areas of overlap. Exhibit 1–5 compares criminal and civil law.

The biggest difference between criminal law and civil law is their differing objectives. There are at least five purposes or objectives of criminal law. First, criminal law is intended to deter undesirable behavior. A second purpose is to offer victims and the community at large a sense of retribution. A third purpose is to incapacitate offenders; to reduce their opportunity to reoffend. This is done through imprisonment, electronic monitoring, death, and other methods. Fourth, the rehabilitation of offenders is also an objective in many cases. A fifth and growing purpose is restoration. Restorative justice focuses on healing victims and to making the offender whole again, in the community. You will dig deeper into each of these in this chapter.

Civil law, on the other hand, has as its primary purpose the compensation of people who are injured by someone else's conduct. Many definitions of civil law exist. This author prefers a negative definition—civil law is everything but criminal

Exhibit 1–5 Criminal and Civil Law Compared

	Criminal Law	Civil Law
Purposes	Retribution, deterrence, incapacitation, rehabilitation, restoration	Compensation and deterrence
Remedies	Fines, restitution, imprisonment, counseling, rehabilitation, injunctions, capital punishment	Damages and equitable relief
Parties	Government and individual defendant	Individual plaintiff and defendant (or government as individual)
Standard of Proof	Beyond a reasonable doubt	Preponderance of evidence
Burdens	Government bears burden of proof and process designed to protect rights of defendant (due process)	Plaintiff bears burden of proof and parties treated equally in process

law. There are many areas of civil law, including tort, contract, property, intellectual property, and family law. Contract law and tort law are two of the largest areas of civil law.

contract
An agreement that affects or creates legal relationships between two or more persons. To be a *contract,* an agreement must involve at least one promise, consideration, persons legally capable of making binding agreements, and a reasonable certainty about the meaning of the terms.

damages
Money that a court orders paid to a person who has suffered damage (a loss or harm) by the person who caused the injury (the violation of the person's rights).

tort
A civil (as opposed to a criminal) wrong, other than a breach of contract.

negligence
The failure to exercise a reasonable amount of care in a situation that causes harm to someone or something.

intentional
Determination to do a certain thing.

strict liability
The legal responsibility for damage or injury, even if you are not at fault or negligent.

compensatory damages
Damages awarded for the actual loss suffered by a plaintiff.

Contract law is a branch of civil law that deals with agreements between two or more parties. You probably have already entered into a contract. Apartment leases, credit card agreements, and book-of-the-month club agreements are all contracts. To have a **contract**, two or more people must agree to behave in a specific manner. If you violate your obligation under a contract, you have committed a civil wrong called a breach of contract. The landlord may sue you for your breach and receive **damages**. *Damages* are monetary compensation for loss.

Tort law is a branch of civil law that is concerned with civil wrongs but not contract actions. You have likely seen television ads for personal injury attorneys. These attorneys are practicing in the tort law area. A civil wrong, other than a breach of contract, is known as a **tort**. Torts are different from contracts in that the duty owed another party in contract law is created by the parties through their agreement. In tort law, the duty is imposed by the law. For example, Donald Triden heaves a beer bottle across a dance floor at a bar, hitting and injuring Joe Bump. Donald has committed a tort. Even though they have not entered into an agreement to not harm each other, Donald is liable because the law requires that we all act reasonably in situations where it is possible to harm people or property.

When a person fails to act reasonably and unintentionally injures another, that person is responsible for a **negligence**. Automobile accidents and medical malpractice are examples of negligent torts. When a person intentionally injures another person, an **intentional** tort has occurred. Many intentional torts are also crimes, and this is one zone where criminal and common law overlap. If at that fraternity party Donald makes Joe angry, and as a result Joe intentionally strikes Donald with the bottle, Joe has committed both a crime and an intentional tort. Although criminal law may impose a jail sentence (or other punitive measures), tort law would normally only seek to compensate Donald for his injuries.

The final type of tort is the **strict liability** tort. In these situations, liability exists even though the tortfeasor acted with extreme caution and did not intend to cause harm. An example of a strict liability tort is blasting. Whenever a mining or demolition company uses blasting, it is liable for any injuries or damages it causes to property, even if the company exercises extreme caution.

Damages that are awarded (won) in a lawsuit to compensate a party for actual loss are **compensatory damages**. Compensatory damages do just what the name

states—compensate the injured party. However, another type of damages exists—**punitive damages**. Contrary to what you have learned so far, punitive damages are awarded in civil suits and are intended to deter undesirable behavior. Punitive damages are often requested by plaintiffs but are rarely awarded. If punitive damages appear to you to be more of a criminal law tool than a civil tool, you are right. It is an oddity in the law.

punitive damages
Damages that are awarded over and above compensatory damages or actual damages because of the wanton, reckless, or malicious nature of the wrong done by the plaintiff.

Trial courts have considerable discretion in awarding punitive damages. There is a limit, however. In the 1996 case *BMW v. Gore*,[10] a jury verdict in actual damages of $4,000 accompanied by a punitive damages award of $4 million, which was reduced to $2 million by the state Supreme Court, was set aside by the U.S. Supreme Court because it found that the plaintiff wasn't on notice, a due process requirement, that it could be penalized by such a sum. As such, the judgement was arbitrary. Because it was a civil case, not a criminal case, the court couldn't turn to the Eighth Amendment's bar on excessive fines to review the award. Instead, it held that due process, the basic fairness clause that applies to all governmental conduct and decisions, expects punitive damages awards to be reasonable, considering three factors: (1) the degree of reprehensibility of conduct, (2) the disparity between actual harm and the punitive award, and (3) a comparison of the award to similar civil or criminal penalties. What was plaintiff Gore's injury? He had not been told that the car he purchased had been repainted to cover damage from acid rain. On remand, the trial court gave the plaintiff the choice between a new trial or accepting $50,000 in punitive damages.

In State Farm v. Campbell[11] a plaintiff sued an insurance company over a $50,000 liability policy. The jury awarded the plaintiff $2.6 million and actual damages of $145 million in punitive damages. The trial judge reduced the punitive award to $1 million. The Supreme Court, applying the *BMW* criteria, found the 9:1 ratio of actual to punitive damages excessive and remanded the case to the state court with an order to reduce the award.

In the well-known case involving the massive oil spill in Alaskan waters by one of Exxon's oil tankers, *Exxon Shipping Co. v. Baker,*[12] the jury award of $2.5 billion in punitive damages and $507 million in actual damages, a 5:1 ratio, was found to be excessive. Unlike the earlier cases, *Exxon* was not decided on due process grounds but, rather, upon maritime law. Regardless, the Court's rejection of the 5:1 ratio is instructive in all cases.

The last major case in which the Supreme Court reviewed a punitive damages award was *Philip Morris U.S.A. v. Williams.*[13] The jury award of $821,485.50 in actual damages and $79.5 million in punitive damages—which had been reduced by the trial judge to $32 million in punitive damages—was reversed and remanded to the trial court to reduce the punitive damages figure. In addition to being excessive, the Court rejected the award because it punished the company for harm caused to third parties, people not involved in the litigation. On remand, the award was reinstated with a different theory. Philip Morris appealed this decision to the U.S. Supreme Court, which denied certiorari.

Finally, a few other differences between criminal law and civil law should be mentioned. First, in civil law the person who brings the lawsuit (the plaintiff) is the person who was injured. For example, suppose you are at the grocery store doing your shopping and request the assistance of a checkout person who has recently divorced a spouse who looks very much like you. The checker immediately becomes enraged and vents all of his anger for his ex-wife on you by striking you with a box of cereal. He has committed a possible assault and battery in both tort law (these are intentional torts) and criminal law. However, in tort law, you must sue the checker yourself to recover any losses you suffer.

In criminal law, on the other hand, the government—whether national, state, or local—always files criminal charges. At some point in your life you may have read a sign in a store that threatened to prosecute shoplifters to the fullest extent

Sidebar

About Case Names, Titles, and Captions

Cases filed with courts are given a case title, also known as a case name. The title consists of the parties to the action. In civil cases the title is *citizen v. citizen,* for example, *Joe Smith v. Anna Smith*. In criminal actions the title is in the form of *The Government v. Defendant*. For example, *United States of America v. Joe Smith* or *State of New Mexico v. Rul Aman.*

Cases also have captions. The caption appears at the top of the title page of all documents filed with a court and includes the case name, the court name, the case number, and the name of the document being filed with the court. The illustration in Exhibit 1–6 is an example of both a criminal case caption and a civil case caption.

of the law. Well, the store can't do it. What the store can do is to file a complaint with the police or prosecutor. The government will then determine whether to file criminal charges. This is because a violation of criminal law is characterized as an attack on the citizens of a state (or the federal government) and, as such, is a violation of public, not private, law. Because it is public, the decision to file—or not to file—is made by the prosecutor.

Civil cases are entitled *Sue Yu v. Ima Innocent;* in criminal law, it is *government* (i.e., *State of Montana*) *v. Ima Sued*. In some jurisdictions, criminal actions are brought under the name of the people. This is done in New York, where criminal cases are entitled *The People of the State of New York v. Ima Guilty*.

There is no difference between a criminal action brought in the name of the state and a criminal action brought in the name of the people of a state. All prosecutions at the national level are brought by the United States of America. Note that governments may become involved in civil disputes. For example, if the state of South Dakota enters into a contract with a person, and a dispute concerning that contract arises, the suit will be titled either *citizen v. South Dakota* or *South Dakota v. citizen*.

The two fields also differ in what is required to have a successful case. In civil law one must show actual injury to win. If, in our grocery store example, the box of cereal missed your head and you suffered no injury (damages), you would not have a civil suit. However, a criminal action for assault or battery may still be brought, as no injury is required in criminal law. This is because the purpose of criminal law is to prevent this type of conduct, not to compensate for actual injuries.

To turn this idea around, there are many instances in which a person's negligence could be subject to a civil cause of action, but not to a criminal action. If a person accidentally strikes another during a game of golf with a golf ball, causing injury, the injured party may sue for the concussion received; but no purpose would be served by prosecuting the individual who hit the ball. No deterrent effect is achieved, as there was no intent to cause the injury. In most cases, society has made the determination (through its criminal laws) that a greater amount of **culpability** should be required for criminal liability than for civil. Criminal law is usually more concerned with the immorality of an act than is tort law. This is consistent with the goals of the two disciplines, as it is easier to prevent intentional acts than accidental ones. These concepts will be discussed later in the chapter on mens rea.

culpable
Blamable; at fault. A person who has done a wrongful act (whether criminal or civil) is described as "culpable."

The Social Contract

Learning Objective: Describe the social contract and explain its relationship to criminal law.

In 2020, Hong Kong residents were jailed for peacefully demanding more rights from the Chinese government, Thai protestors were arrested for criticizing

Exhibit 1–6 Simple Caption—Criminal Case and Civil Case

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA))
_____ Plaintiff,)
v.) Case No. _____
)
IMA CRIMINAL,)
_____ Defendant)

Motion to Suppress Evidence

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND
NORTHERN DIVISION

RASHEED D. JONES)
Plaintiff,)
)
v.) Case No.
)
LING WONG,)
Defendant)

Defendant's Motion for Summary Judgment

Thailand's king, and journalists across the globe were punished for reporting stories or expressing political opinions that offended governments. In spite of the stresses of a deep political divide, increasing distrust of once trusted institutions, a pandemic, demonstrations calling for racial justice, and violence in the streets, the United States has remained largely free of government censorship and arbitrary detention and punishment.

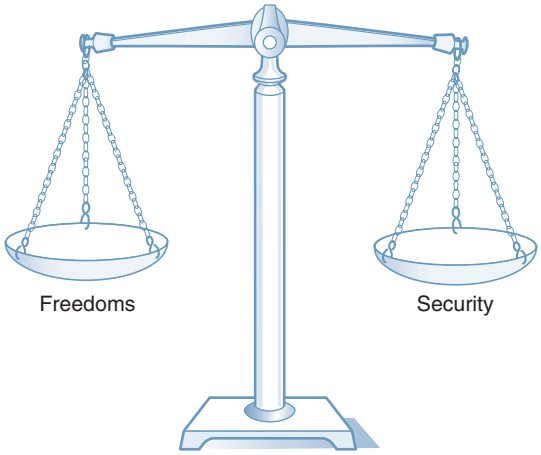
This is true, in part, because freedom and liberty are part of this nation's DNA. It was, in part, the longing for freedom of religious thought that caused the English Puritan emigration from England to what was to become Plymouth, Massachusetts, in 1620. Later, the desire for freedom from the oppressive crown of England was the catalyst for the Declaration of Independence and the American Revolution. Finally, the fear that all governments tend to abuse their power led to the creation of a constitution that contains specific limits on governmental power and specific protections of individual rights. But what exactly is freedom?

Freedom, or liberty, is the ability to act without interference. In a political and legal sense, it means the ability to act free from the interference of government. However, even in the freest societies, personal behavior is limited. This is because the actions of every member of society have the potential, at times, to affect other members. The total absence of government is anarchy. Without government, there would be little control over behavior. The strong and cunning would prey on the weak and unintelligent; the licentious on the decent. Although it is true that to live in such a world would be living free from government interference, it would not be a life free of oppression and arbitrary harm.

To prevent anarchy and to protect people from one another, the people have entered into a **social contract** that defines the respective rights and responsibilities of

social contract
An implied agreement between all people that they will obey the laws and relinquish a measured amount of liberty in exchange for security.

Exhibit 1–7 Maximizing Security and Liberty: The Tension Between Freedom and the Need for Governmental Protection



To reach the greatest individual freedom & personal security, unchecked individual freedom must be balanced with security to prevent & punish harmful behaviour.

the people and government. People implicitly agree to relinquish a measured amount of liberty, to obey the laws, and to be engaged in self-governance in exchange for a collective protection from one another and foreign threats. Maintaining the "right" balance between liberty and security is a perennial challenge (see Exhibit 1–7).

The Social Contract is expressed in the Preamble to the U.S. Constitution. It states:

> "We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The idea is also found in the Declaration of Independence, where Thomas Jefferson penned:

> . . . that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."

Inherent in the Social Contract are limits on liberty. Per the common expression, "One person's liberty ends at the tips of the noses of other people." On the other hand, government must be controlled. As the British historian Lord Acton observed, absolute power corrupts absolutely. The Constitution establishes a zone of freedom over which government is prohibited from, or at least must have a very good reason for, regulating. The individual freedoms that comprise this zone are known as individual rights, civil rights, or **civil liberties**.

civil liberties
Individual liberties guaranteed by the Constitution and, in particular, by the Bill of Rights.

In nearly all nations, governmental involvement in the affairs of people is increasing. This is due in part to the increasing interdependence of the people. That is, members of society now depend on one another to provide goods and services that were once commonly self-provided. In addition, the staggering increase in world population has caused people to have much more contact with one another

than they did in the past. The larger the population, contact between people, and dependence of people on one another, the greater the number of conflicts and problems that will arise. These problems often demand governmental responses that can threaten liberty.

Crisis also tends to alter the security/liberty balance. This has been true during wars, when the government is given more latitude to restrict freedoms in the interest of national security. This isn't a new phenomenon. There is a Latin phrase that dates back a couple thousand years to express it, *inter arma enim silent leges*, which translates to "in times of war, law falls silent." War isn't the only crisis that leads to increases in governmental power. Consider, for example, the COVID-19 pandemic. The governmental response to the spread of the disease led to losses in liberty. The restrictions on social gatherings, the closure of businesses, mandatory masking, and the impact of those measures on speech, religion, and other rights would be quickly invalidated by the courts in normal circumstances. But the threat of an easily transmitted, quickly spreading, deadly disease was found by most courts to justify temporary suspensions of individual rights.

Ethical Considerations

Basics on Ethics in Criminal Law

This feature, which appears in every chapter of this book, examines a particular ethical issue or dilemma that attorneys, judges, legal assistants, law enforcement officers, and parties confront in criminal cases.

In criminal cases, the various parties are governed by different sets of rules. Attorneys are regulated by state bar authorities. Most state bar authorities have adopted a modified version of the American Bar Association's (ABA) model rules. The ABA first issued a set of rules, the Canons of Professional Ethics, in 1908. In the 1960s, the ABA issued a new set of rules under the title Model Code of Professional Responsibility. Then, 20 years later, the Model Rules of Professional Conduct were issued. Today, it is the Model Rules that most states have adopted, typically with modifications. Accordingly, the Model Rules will be referenced in this book.

State bar authorities, not the ABA, enforce ethics rules. Typical sanctions for violations are reprimands, suspensions of the right to practice, restitution, and disbarment, which is the permanent removal from the practice of law. Additionally, judges possess the authority to discipline violations by attorneys (actually anyone appearing before the court) and contemptuous behavior with fines, temporary incarceration, and other penalties. Although not regulated by state or federal governmental authorities, paralegals are guided by the National Association of Legal Assistants and the National Federation of Paralegal Association codes of professional conduct. More significantly, paralegals are indirectly regulated by state bars through their supervising attorneys, who are ultimately accountable for the research conducted by, and documents drafted by, their paralegals. Law enforcement officers are bound by state and federal laws and departmental rules.

Above all of these rules are the U.S. Constitution and the 50 state constitutions. Today, there is considerable constitutional case law that looks, smells, and tastes like ethics rules. Prosecuting attorneys, for example, are required to disclose evidence that tends to prove innocence to defendants. A violating prosecutor may be disciplined by a court, regardless of the bar's rules on the subject.

In each of the following chapters, a different dimension of ethics in criminal law will be explored more fully.

Key Terms

appellate courts
Bill of Rights
briefs
certiorari
civil liberties
Commerce Clause
compensatory damages
concurrent jurisdiction
contract
cooperative federalism
court of record
courts of general jurisdiction
courts of limited jurisdiction
culpability
damages
de novo
dual federalism
federalism
inferior courts
intentional
interpret
judicial review
jurisdiction
negligence
police power
punitive damages
record
remand
separation of powers
social contract
statute
strict liability
terrorism
tort
trial courts

Review Questions

1. What is the primary duty of the executive branch of government in criminal law?
2. Define the term "court of record."
3. Define jurisdiction and distinguish between a court of general jurisdiction and a court of limited jurisdiction.
4. What are the goals of criminal law? Civil law?
5. Who may file a civil suit? A criminal suit? How are these different?
6. What are compensatory damages? Punitive damages?
7. Should punitive damages be permitted in civil law? Explain your position.
8. Define culpability.

Problems & Critical Thinking Exercises

1. In 1973, the U.S. Supreme Court handed down the famous case *Roe v. Wade,* 410 U.S. 113 (1973), wherein the Court determined that the decision to have an abortion is a private decision that is protected from government intervention, in some circumstances, by the U.S. Constitution. Suppose that a state legislature passes legislation (a state statute) that attempts to reverse the *Roe* decision by prohibiting all abortions in that state. Which is controlling in that state, the statute or the decision of the U.S. Supreme Court? Explain your answer.
2. Assume Congress responds to the COVID-19 pandemic with the following legislation. What are the constitutional arguments in favor of, and opposed to, the authority granted by Congress in each section?

   Viral Disease Response and Recovery Act

   Section 1

   The President of the United States shall have the emergency authority to close the borders of the United States to commerce, immigration, and emigration, if needed to control the spread of disease that threatens the health and welfare of the people.

   Section 2

   The Director of the Center for Disease Control shall have the emergency authority to redirect the agency's appropriations to research and programs that are determined to be needed to address the outbreak of an infectious disease or other public health emergency.

   Section 3

   The President of the United States shall have the authority to close businesses, order the people into quarantine, and to regulate travel and commerce on all roads and highways in the United States to address the outbreak of an infectious disease or other public health emergency.

3. Assume that the U.S. Supreme Court has previously determined that regulation of traffic on county roads is a power reserved exclusively to the states. In reaction to this opinion, the U.S. Congress enacts a statute providing that the regulation of county roads will be within the jurisdiction of the U.S. Congress from that date forward. Your law office represents a client who is charged with violating the federal statute that prohibits driving on all roads while intoxicated. Do you have a defense? If so, explain.
4. In theory, people can increase their "freedom" by establishing a government and relinquishing freedoms (civil liberties) to that government. Explain why this paradox is true.
5. A bomb is exploded in a crowded shopping mall, killing 50 people and injuring hundreds of others. A written message is received at the local police station claiming that the attack was perpetrated by Foreigners for a New United States (FNUS), an established organization that has as its purpose the "destruction of the government of the United States and its citizens who support their government." Agents of the Federal Bureau of Investigation, working with local police, traced the message to Terry Ist, a leader of FNUS. Terry Ist was charged, convicted, and sentenced pursuant to the following federal statute:

   Terrorism

   i. Terrorist organization: The Attorney General, upon credible evidence that an organization has as a purpose to bring harm to the United States or its citizens, may declare such organization a terrorist organization by publishing notice of such declaration in the *Federal Register*.

   ii. Any individual who is a member of a terrorist organization, as declared by the Attorney General in the previous section of this law, and who causes harm to person or property with the intent of (i) intimidating or coercing a civilian population; (ii) influencing the policy of a government by intimidation or coercion; or (iii) affecting the conduct of a government by mass destruction, assassination or kidnapping is guilty of terrorism, a felony.

   iii. The government of the United States shall have exclusive jurisdiction to prosecute individuals for all crimes arising from acts of terrorism, as defined by this law herein.

   After Terry Ist's conviction, the state where the bombing took place requested that Terry be turned over to it, where he was to be tried for murder and other offenses. The United States refused, citing section iii of the above law. Further, the U.S. Attorney filed a motion to have the case removed to federal court, along with an accompanying motion to dismiss the criminal action, asserting that section iii prohibits the state prosecution. Discuss the federalism issue, making the best case for both the state and federal governments. Conclude by explaining who should prevail and why.

Endnotes

1. *Gamble v. United States*, 587 U.S. (2019)
2. 18 U.S.C. §2331.
3. *Printz v. United States*, 521 U.S. 98 (1997)
4. *United States v. Morrison*, 529 U.S. 598 (2000)
5. *Jones v. United States*, 529 U.S. 848 (2000)
6. *Gonzales v. Raich*, 545 U.S. 1 (2005)
7. *United States v. Comstock*, 560 U.S. 126 (2010)
8. 28 U.S.C. § 41 *et seq.*
9. For more on the separation of powers and federalism, See Daniel E. Hall and John P. Feldmeier, *Constitutional Law: Governmental Power and Individual Freedoms*, 4th ed. (Upper Saddle River, NJ: Prentice Hall Publishing, 2021), chapters 1–7. Chapter 1 contains a discussion of judicial review authority.
10. 517 U.S. 559 (1996).
11. 538 U.S. 408 (2003).
12. 554 U.S. 571 (2008).
13. 549 U.S. 346 (2007).

Chapter 2

Introduction to Criminal Law

Chapter Outline

Criminal Law and Criminal Procedure Compared

Learning Objective: Define, compare, and contrast criminal law and criminal procedure.

This text is divided into two parts. The first part covers criminal law and the second part, criminal procedure. In all areas of legal study, a distinction is made between substance and procedure. Substantive law defines rights and obligations. Procedural law establishes the methods used to enforce legal rights and obligations. The substance of tort law defines what a tort is and what damages an injured party is entitled to recover from a lawsuit. Substantive contract law defines what a contract is, tells whether it must be in writing to be enforceable, who must sign it, what the penalty for breach is, and other such information. The field of civil procedure sets rules for how to bring the substance of the law before a court for resolution of a claim. To decide that a client has an injury that can be compensated under the law is a substantive decision. The question then becomes how injured clients get the compensation to which they are entitled. Procedural law tells you how to file a lawsuit, where to file, when to file, and how to prosecute the claim. Such is the case for criminal law and procedure.

criminal law
The branch of the law that specifies what conduct constitutes crime, sets out the defenses to criminal accusations, and establishes punishments for such conduct.

Criminal law, as a field of law, defines what constitutes a crime and what punishment can be imposed for committing crimes. Criminal law also defines the defenses that a defendant may raise. So, in the first half of this book you will study a variety of crimes, such as murder, theft, and sexual assault, as well as several defenses, including mistake, insanity, and self-defense.

Criminal procedure puts substantive criminal law into action. It is concerned with the processes used to bring criminals to justice, beginning with police investigation and continuing throughout the process of administering justice. When and under what conditions may a person be arrested? How and where must the criminal charge be filed? When can the police conduct a search? How does the accused assert a defense? How long can a person be held in custody by the police without charges being filed? How long after charges are filed does the accused have to wait before a trial is held? These are all examples of criminal procedure questions that you will learn in the latter half of this book.

criminal procedure
The rules of procedure by which criminal prosecutions are governed.

In the remainder of the book, the term "criminal law" is used often. Often this refers to general criminal law, including both substantive criminal law and criminal procedure.

Why Punish?

Learning Objective: Compare and contrast the seven common purposes of punishing offenders.

There are two overarching philosophies to explain why conduct is criminalized and punished. The first is retributivism and the second, utilitarianism. To a retributivist, punishment is both needed and earned. For an offender to be right with themselves and the community, they need to "pay for their crimes." To the utilitarian, punishment isn't about retribution. It is about maximizing the greatest good for the greatest number of people. These two philosophies manifest in six commonly recognized objectives, or purposes, of criminal law. The first objective, retribution, is obviously retributivist. The other five—deterrence, rehabilitation, incapacitation, restitution, and restoration—are utilitarian. We begin by looking at deterrence.

Specific and General Deterrence

There are two forms of **deterrence**. *Specific deterrence* seeks to deter individuals from reoffending. It is a negative reward theory. It assumes that people will make the rational choice to avoid being punished again. Of course, there are many factors at play, including whether the actor engages in rational thinking, the perceived likelihood of getting caught again, and the severity of the punishment when compared to the expected benefit of reoffending.

deterrence
To prevent an individual from committing a crime.

General deterrence attempts to deter all members of society from engaging in criminal activity. In theory, when the public observes Mr. X being punished for his actions, the public is deterred from behaving similarly for fear of the same punishment. Of course, individuals will react differently to the knowledge of Mr. X's punishment. Individuals weigh the risk of being caught and the level of punishment against the benefit of committing the crime. All people do this at one time or another. Have you ever intentionally run a stoplight? Jaywalked? If so, you have made the decision to violate the law. Neither crime involves a severe penalty. That fact, in addition to the likelihood of not being discovered by law enforcement agents, probably affected your decision.

Presumably, if conviction of either crime was punished by incarceration (time in jail), then the deterrent effect would be greater. Would you be as likely to jaywalk if you knew that you could spend time in jail for such an act? Some people would; others would not. It is safe to assume, however, that as the punishment increases, so does compliance. However, one author observed that it is not as effective to increase the punishment as it is to increase the likelihood of being punished.[1] It is unknown how much either of these factors influences behavior, but it is generally accepted that they both do.

Incapacitation

Incapacitation, also referred to as restraint, is the third purpose of criminal punishment. Incapacitation does not seek to deter criminal conduct by influencing people's choices, but prevents criminal conduct by restraining those who have committed crimes. Criminals who are restrained in jail or prison—or in the extreme, executed—are incapable of causing harm to the general public. This theory is often the rationale for long-term imprisonment of individuals who are believed to be beyond rehabilitation. It is also promoted by those who lack faith in rehabilitation and believe that all criminals should be removed from society to prevent the chance of repetition.

Crimes that are caused by mental disease or occur in a moment of passion are not deterred because the individual does not have the opportunity to consider the punishment that will be inflicted for committing the crime before it is committed. Deterrence methods are effective only for individuals who are sufficiently intelligent to understand the consequences of their actions, are sane enough to understand the consequences of their actions, and who are not laboring under such uncontrollable feelings that an understanding that they may be punished is lost.

Rehabilitation

Rehabilitation is another purpose for punishing offenders. The theory of rehabilitation is that if the criminal is subjected to educational and vocational programs, treatment and counseling, and other measures, it is possible to alter the individual's behavior to conform to social norms. As expressed by another author:

> To the extent that crime is caused by elements of the offender's personality, educational defects, lack of work skills, and the like, we should be able to prevent him from committing more crimes by training, medical and psychiatric help, and guidance into law-abiding patterns of behavior. Strictly speaking, rehabilitation is not "punishment," but help to the offender. However, since this kind of help is frequently provided while the subject is in prison or at large on probation or parole under a sentence that carries some condemnation and some restriction of freedom, it is customary to list rehabilitation as one of the objects of a sentence in a criminal case.[2]

The concept of rehabilitation has come under considerable scrutiny in recent years, in part because the success of rehabilitative programs is questionable. Advocates of rehabilitation point out, however, that these programs would be more successful if better funded.

Retribution

Retribution, or societal vengeance, is the fourth purpose. Simply put, punishment through the criminal justice system is society's method of avenging a wrong. The idea that one who commits a wrong must be punished is an old one. The Old Testament speaks of an "eye for an eye." However, many people question the place of retribution in contemporary society. In reality, rarely is retribution the sole purpose. In most instances, society's desire for revenge can be satisfied while fulfilling one of the other purposes of punishment, such as incapacitation.

It has also been asserted that public retribution prevents private retribution.[3] That is, when the victim (or anyone who might avenge a victim) of a crime knows that the offender has been punished, the victim's need to seek revenge is lessened or removed. Therefore, punishing wrongdoers promotes social order by preventing vigilantism. Retribution in such instances has a deterrent effect, as victims of crimes are less likely to seek revenge. This is a good example of how the various purposes discussed are interrelated.

Restitution

As you learned earlier, courts occasionally order offenders to compensate their victims for their actual losses. An accountant, for example, who embezzled $25,000 from a client may be ordered to repay the money, saving the victim from undergoing the expense and inconvenience of suing in civil court.

Restoration

Restorative justice focuses on healing victims and restoring the offender to the community. The victim-in-fact, the victim's family, offender, offender's family, and the larger community are involved in the process. Inclusive open dialogue, mutual respect, and understanding are characteristics of restoration. Actions that are taken include financial restitution, an apology by the offender, forgiveness by the victim, community service, and possibly, incarceration. Restorative justice is commonly found in traditional communities. Although there is little history of restorative justice in the United States, interest in it is growing as the nation searches for alternatives to imprisonment. You will dig deeper into each of these objectives later in this chapter. But this provides us with enough information about the purposes of criminal law to compare with civil law.

See Exhibit 2–1 for a summary of purposes of the outcomes of both the criminal and civil law systems.

Finally, a sociological note. The criminal law isn't the only, nor is it always the best, form of social control. Education, at home and at school, is an important tool; religion and humanism, with their respective emphases on distinguishing between good and evil and respecting life, are others. The human desire to acquire and keep the affection and respect of family, friends, and associates no doubt has a great influence in deterring most people from bad conduct. The civil side of the law, which forces one to pay damages for the harmful results that one's undesirable conduct has caused to others, or which in inappropriate situations grants injunctions against bad conduct or orders the specific performance of good conduct, also plays a part in influencing behavior along desirable lines.[4]

Where Does Criminal Law Come From?

Learning Objective: Define, describe, and apply the various sources of criminal law.

Criminal law exists in many forms, from many sources. Today, most law is made by legislatures. That is the U.S. Congress, state legislatures, and municipal councils and commissions. Further, administrative regulations now make up a much larger percentage of criminal law than in the past. This hasn't always been the case. This discussion begins with another form of law, judge-made law.

The Common Law

The oldest form of criminal law in the United States is the **common law**. The common law developed in England and was brought to the United States by the English colonists.

common law
The legal system that originated in England and is composed of case law and statutes that grow and change, influenced by ever-changing custom and tradition.

> The common law, as it exists in this country, is of English origin. Founded on ancient local rules and customs and in feudal times, it began to evolve in the King's courts and was eventually molded into the viable principles through which it continues to operate. The common law migrated to this continent with the first English colonists, who claimed the system as their birthright; it continued in full force in the 13 original colonies until the American Revolution, at which time it was adopted by each of the states as well as the national government of the new nation.[5]

Exhibit 2–1 The Purposes of Criminal and Civil Law Compared

Purpose	Philosophy	Criminal Law	Civil Law
Deterrence	Utilitarianism	✓	✓
Retribution	Retributivism	✓	
Rehabilitation	Utilitarianism	✓	
Incapacitation	Utilitarianism	✓	
Restitution	Utilitarianism	✓	✓
Restoration	Utilitarianism	✓	

stare decisis
Latin for "let the decision stand. The doctrine that judicial decisions stand as precedents for cases arising in the future.

Simply stated, the common law is judge-made law. To understand how the common law developed, a bit of English legal history, particularly the concepts of precedence and **stare decisis**, is important. Beginning with William the Conqueror in 1066 (the "Norman Conquest"), the English monarchy began using law to reinforce the authority of the monarchy, to displace the preexisting system of feudal law, to promote economic stability and development, and to unify the kingdom. Prior to 1066, all law in England was feudal; it was local and varied between counties, which were known as the shires and hundreds. In the early years after the Norman Conquest, the king sent his judges to hear cases throughout the nation. These judges returned to London, where they discussed their decisions. This process, along with the creation of royal courts, led to the development of rules of court and legal doctrines that would be applied in all cases.

precedent
Prior decisions of the same court, or a higher court, that a judge must follow in deciding a subsequent case presenting similar facts and the same legal problem, even though different parties are involved and many years have elapsed.

One such doctrine, intended to make the law consistent and predictable, held that a legal decision of a court was binding on itself and its inferior courts in the future. The specific decision of a court is known as a **precedent**. The idea that a court's precedent is binding going forward is expressed in Latin as *stare decisis et non quieta movera*. In English, this translates to "stand by precedents and do not disturb settled points." The Supreme Court of Indiana expressed its view of stare decisis:

> Under the doctrine of stare decisis, this Court adheres to a principle of law which has been firmly established. Important policy considerations militate in favor of continuity and predictability in the law. Therefore, we are reluctant to disturb longstanding precedent which involves salient issues. Precedent operates as a maxim for judicial restraint to prevent the unjustified reversal to a series of decisions merely because the composition of the court has changed.[6]

The impact of having royal courts with national authority issuing decisions that bound lower courts was that England, for the first time in its history, had a set of laws that were *common to all people*. Hence, it became known as the Common Law. This didn't happen overnight. It took hundreds of years for the courts and the Common Law to fully develop.

> The common law, as frequently defined, includes those principles, usages, and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express or positive statute or other written declaration, but upon statements of principles found in the decisions of courts. The common law is inseparably identified with the decisions of the courts and can be determined only from such decisions in former cases bearing upon the subject under inquiry. As distinguished from

> statutory or written law, it embraces the great body of unwritten law founded upon general custom, usage, or common consent, and based upon natural justice or reason. It may otherwise be defined as custom long acquiesced in or sanctioned by immemorial usage and judicial decision. . . .
>
> In a broader sense the common law is the system of rules and declarations of principles from which our judicial ideas and legal definitions are derived, and which are continually expanding. It is not a codification of exact or inflexible rules for human conduct, for the redress of injuries, or for protection against wrongs, but is rather the embodiment of broad and comprehensive unwritten principles, inspired by natural reason and an innate sense of justice, and adopted by common consent for the regulation and government of the affairs of men.[7]

As expressed in the above quotation, the common law is dynamic, adapting to meet contemporary challenges. As one court stated, "The common law of the land is based upon human experience in the unceasing effort of an enlightened people to ascertain what is right and just between men."[8]

While courts (and the monarch) were responsible for making law in the early years of the common law, the situation changed with the advent of Parliament in the thirteen and fourteenth centuries. Although early Parliament had very limited authority, it eventually evolved into the general lawmaking body of England, displacing courts in the lawmaking function. Today, legislatures in all common law nations are the primary lawmakers. In the United States, the Congress of the United States is the federal lawmaker and the legislatures of the states are each responsible for making state laws. However, for reasons detailed later, courts continue to play an important role in the development of the common law.

What this meant for criminal law is that judges created crimes and defenses, as they heard cases. As time passed, established "common law crimes" developed. First the courts determined what acts should be criminal, and then the specifics of each crime developed; what exactly had to be proved to establish guilt, what defenses were available, and what punishment was appropriate for conviction. Let's imagine how this happened. At some point in time, nearly a thousand years ago, a man killed his neighbor who insulted him. A local official known as a shire-reeve (today, a sheriff) brought the man who committed the homicide to a court. That court declared the homicide to be a crime, naming it murder and ordering the defendant's death. A precedent was set; murders were to be punished by death. But years later the court is faced with a different case. A defendant is brought before the court for killing a man who inexplicably attacked him with an axe. In this case, the court decides that a person may use deadly force in self-defense and sets the defendant free. A new precedent, building on what came before, has been established. This process continues in perpetuity.

The 13 original states all adopted the common law. Most did so through their state constitutions. Today, nearly all of the states have forbidden courts from creating new crimes. This responsibility falls to democratically elected legislatures, which have the authority to amend or abolish judge-made law. Subject to these limitations, courts occasionally recognize new defenses, interpret statutory law, and continue to interpret and define old Common Law doctrines. One caveat on the authority of legislatures to set aside judge-made law is needed. Legislatures don't have the authority to change judicial interpretations of constitutional law. These can only be changed by a higher court or through constitutional amendment.

The Principle of Legality

Whether common law crimes should continue to exist is debated. Those who favor permitting common law crimes believe courts to need the authority to "fill in the gaps" left by the legislatures when those bodies either fail to foresee all potential crimes or simply forget to include a crime that was foreseen. However, a separation of powers question is raised by this scenario: namely, should the judicial branch actively

second-guess or clean house for the legislative branch? Such conduct does appear to be the exercise of legislative authority. However, few people want intentionally dangerous or disruptive behavior not to be criminalized, and it appears to be impossible for legislatures to foresee all possible acts that are dangerous and disruptive.

Those who oppose a common law of crimes point to the concept embodied in the phrase *nullum crimen sine lege*, which translates roughly to "there is no crime if there is no statute." Similarly, *nulla poena sine lege* has come to mean that "there shall be no punishment if there is no statute." These concepts, when considered in concert, insist that the criminal law must be written, that the written law must exist at the time that the accused committed the act in question, and that criminal laws be more precise than civil laws.[9] This is the *principle of legality*.

The legality principle is premised on the common sense idea that people are entitled to know, prior to committing an act, that the act may be punished. This is commonly referred to as *notice*. The idea is consistent with general notions of fairness and justice, not only in the United States but to peoples around the world. All that is required is notice of the law, not that every individual prosecuted under the law have actual knowledge of it. The law imposes a duty on all people to be aware of written law. As is commonly said, "ignorance of the law is no excuse." The *Keeler* case discusses the legality principle.

The *Keeler* is an opinion of the California Supreme Court; therefore, it is not the law of all of the United States. Similar decisions have been made in other states, however.

Oyez

Keeler v. Superior Court
2 Cal. 3d 619, 470 P.2d 617 (Ca. Supreme Court 1970)

Mosk, J.

In this proceeding for writ of prohibition, we are called upon to decide whether an unborn viable fetus is a "human being" within the meaning of the California statute defining murder. We conclude that the legislature did not intend such a meaning, and that for us to construe the statute to the contrary and apply it to this petitioner would exceed our judicial power and deny petitioner due process of law.

The evidence received at the preliminary examination may be summarized as follows: Petitioner and Teresa Keeler obtained an interlocutory decree of divorce on September 27, 1968. They had been married for sixteen years. Unknown to the petitioner, Mrs. Keeler was then pregnant by one Ernest Vogt, whom she had met earlier that summer. She subsequently began living with Vogt in Stockton, but concealed the fact from petitioner. Petitioner was given custody of their two daughters, aged 12 and 13 years, and under the decree Mrs. Keeler had the right to take the girls on alternate weekends.

On February 23, 1969, Mrs. Keeler was driving on a narrow mountain road in Amador County after delivering the girls to their home. She met petitioner driving in the opposite direction; he blocked the road with his car, and she pulled over to the side. He walked to her vehicle and began speaking to her. He seemed calm, and she rolled down her window to hear him. He said, "I hear you're pregnant. If you are, you had better stay away from the girls and from here." She did not reply, and he opened the car door; as she later testified, "He assisted me out of the car . . . [I]t wasn't rough at this time." Petitioner then looked at her abdomen and became "extremely upset." He said, "You sure are. I'm going to stomp it out of you." He pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows. She fainted, and when she regained consciousness, petitioner had departed.

Mrs. Keeler drove back to Stockton, and the police and medical assistance were summoned. She had suffered substantial facial injuries, as well as extensive bruising of the abdominal wall. A Caesarian section was performed, and the fetus was examined in utero. Its head was found to be severely fractured, and it was delivered stillborn. The pathologist gave as his opinion that the cause of death was skull fracture with consequent cerebral hemorrhaging, that death would be immediate, and that the injury could have been the result of force applied to the mother's abdomen. There was no air in the fetus' lungs, and the umbilical cord was intact. . . .

The evidence was in conflict as to the estimated age of the fetus; the expert testimony on the point, however, concluded "with reasonable medical certainty" that the fetus had developed to the stage of viability, i.e., that in the event of premature birth on the date in question, it would have had a 75 percent to 96 percent chance of survival.

(continued)

An information was filed charging petitioner, in count I, with committing the crime of murder. . . .

Penal Code section 187 provides: "Murder is the unlawful killing of a human being, with malice aforethought." The dispositive question is whether the fetus which petitioner is accused of killing was, on February 23, 1969, a "human being" within the meaning of the statute. If it was not, petitioner cannot be charged with its "murder". . . .

■ ■ ■

We conclude that in declaring murder to be the unlawful and malicious killing of a "human being," the Legislature of 1850 intended that term to have the settled common law meaning of a person who had been born alive, and did not intend the act of feticide—as distinguished from abortion—to be an offense under the laws of California.

■ ■ ■

The People urge, however that the sciences of obstetrics and pediatrics have greatly progressed since 1872, to the point where, with proper medical care, a normally developed fetus prematurely born . . . is "viable" . . . since an unborn but viable fetus is now fully capable of independent life. . . . But we cannot join in the conclusion sought to be deduced: we cannot hold this petitioner to answer for murder by reason of his alleged act of killing an unborn—even though viable—fetus. To such a charge there are two insuperable obstacles, one "jurisdictional" and the other constitutional.

Penal Code section 6 declares in relevant part that "No act or omission" accomplished after the code has taken effect "is criminal or punishable, except as prescribed by this code. . . ." This section embodies a fundamental principle of our tripartite form of government, i.e., that subject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch. Stated differently, there are no common law crimes in California. . . . In order that a public offense be committed, some statute, ordinance or regulation prior in time to the commission of the act, must denounce it.

■ ■ ■

Applying these rules to the case at bar, we would undoubtedly act in excess of the judicial power if we were to adopt the People's proposed construction of section 187. As we have shown, the Legislature has defined the crime of murder in California to apply only to the unlawful and malicious killing of one who has been born alive. We recognize that the killing of an unborn but viable fetus may be deemed by some to be an offense of similar nature and gravity; but as Chief Justice Marshall warned long ago: "It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." . . . Whether to thus extend liability for murder in California is a determination solely within the province of the Legislature. For a court to simply declare, by judicial fiat, that the time has now come to prosecute under section 187 one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise of construing it. . . . to make it "a judicial function". . . "raises very serious questions concerning the principle of separation of powers."

The second obstacle to the proposed judicial enlargement of section 187 is the guarantee of due process of law. . . .

The first essential of due process is fair warning of the act which is made punishable as a crime. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law."

Also note that the court determined that the common law violates "ordinary notions of fair play" and that no warning or notice was given to Keeler that his act could be defined as murder. As the court noted, these requirements are embodied in the **due process** clauses of the U.S. Constitution and the constitutions of the many states. There are two dimensions to due process, procedural and substantive. Procedural due process, in both civil and criminal law, requires that individuals be put on notice of impending government action, be given an opportunity to be heard and to present evidence, and in some cases, benefit from other rights, such as having counsel appointed and having the case heard by a jury. Substantive due process recognizes individual rights to act or not to act. For example, privacy is not explicitly protected in the Constitution of the United States. Regardless, the Supreme Court has found an implicit right to privacy in the due process clauses' protection of liberty. Through this implicit right, the Court has invalidated laws prohibiting interracial marriage, prohibiting the use of contraception by married persons, and prohibiting women from ending pregnancies in some circumstances.

due process
The *due process* clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution require that no persons be deprived of life, liberty, or property without having notice and a real chance to present their side in a legal dispute.