

CRIMINAL COURTS

A Contemporary
Perspective

FIFTH EDITION

Craig Hemmens
David C. Brody
Cassia Spohn



Criminal Courts

Fifth Edition

Craig Hemmens dedicates this book to Rolando Del Carmen, who taught him how to write about the law without sounding (too much) like a lawyer, and to Mary, Emily, Sera, Amber, Harley, and Billie, for giving him something he loves even more than his work.

David Brody dedicates this book to Jim Acker and Nick Lovrich for their past and continued mentorship.

Cassia Spohn dedicates this book to her children, Josh and Jessica, and to all the students whose inquiring minds and insightful questions have helped shape her thinking about prosecution, sentencing, and other court processes.

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Preface

This is a textbook for an undergraduate criminal justice/criminology course on courts. The book is comprehensive in its treatment of courts, covering all the areas that are generally covered in courts textbooks intended for criminal justice courses, such as court structure, courtroom actors, and the trial and appeal process. In addition, it covers related areas often not covered in courts textbooks. These include judicial decision making, specialized courts, and comparative court systems. This comprehensive approach allows instructors to cover all the “standard” material and also add selections that they consider interesting and relevant to their particular course.

In this textbook, we cover several areas: (a) criminal court processes; (b) the courtroom actors and their different roles; (c) court structures and operation, in both the federal and state systems and from trial through appeal; and (d) the nature of legal and judicial reasoning.

Our Approach in This Book

In the first section of the book (Chapters 1–4), we provide a discussion of the judicial function, the role and purpose of law, sources of law, the different types of law, and the structure of the American court system. These topics are essential building blocks for the detailed discussion of the criminal courts system and its participants that follows. We first explain why it is important to study courts and the decisions that court actors make as they process criminal cases. We discuss the origins of the modern court system, which can be traced back hundreds of years to early Roman law and English common law. We also explain how the traditional view of courts, in which courts and court actors simply apply the law, is inadequate; because laws are often vague and ambiguous, courts also make law. We then discuss two competing views of the criminal justice system—the crime control model and the due process model—and explain how these models can be used to examine and analyze the criminal court system. We then provide an overview of the historical development of the court system, and we discuss the structure and organization of federal and state courts today. This is followed by an introduction to each of the courtroom actors and the roles they play as well as a discussion of the path that the typical criminal case follows as it is processed through the court system.

In the second section of the book (Chapters 5–9), we provide an in-depth discussion of the various participants in the criminal court system—prosecutors, defense attorneys, judges, criminal defendants, crime victims, and the jury. While this book is intended to cover the criminal court *system*, a complete understanding of the system is impossible without an understanding of its major *actors*. We explain that the judge plays an important but limited role in the criminal process;

the power of judges is constrained by rules that require them to be fair and unbiased, by procedures to disqualify or remove them if they are not impartial, and by appellate court rulings on questions of law and procedure. We also discuss the methods of selecting judges, the effects of recruiting more women and racial minorities to the bench, and the consequences of using nonlawyer judges. We discuss the inadequacies of the traditional adversarial model and explain that criminal case processing is characterized more by cooperation and consensus than by conflict. Our discussion of prosecuting attorneys focuses on their highly discretionary and largely invisible charging decisions and the factors that affect these decisions. We also discuss legal and practical constraints on prosecutorial discretion. Our discussion of defense attorneys includes an examination of the right to counsel and of Supreme Court decisions interpreting that right as well as an examination of research comparing the effectiveness of private attorneys and public defenders. Our discussion of jurors focuses on the jury selection process, with an emphasis on the issue of racial discrimination in the selection of jurors. We also examine the role of jury consultants, the factors that jurors take into consideration during deliberations, and the practice of jury nullification.

In the third section of the book (Chapters 10–14), we discuss the pretrial, trial, and posttrial processes. We cover a diverse range of court-related topics, including the courtroom work group, courtroom legal culture, and plea bargaining. We next discuss the goals of sentencing, focusing on retributive and utilitarian justifications for punishment. We also examine the judge's options at sentencing and summarize the results of research analyzing the factors that judges take into account as they attempt to fashion sentences that fit offenders and their crimes. We discuss the rules that guide the appellate process and explain how the writ of habeas corpus has evolved over time. We conclude with a chapter on specialized, or problem-solving, courts. We explain that these courts—drug courts, domestic violence courts, and juvenile courts—take a broader and more comprehensive approach to delinquency and criminality; they also attempt to address the underlying social and economic factors that contributed to the defendant's involvement in crime.

Pedagogy Included in This Book

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In this book, we use several pedagogical tools designed to help undergraduate students gain a fuller understanding of the criminal court system. These include the following:

1. *The criminal court system as seen through the eyes of a participant.* Several chapters feature a “View From the Field” concerning a topic covered in the text written from the perspective of a participant in the process. This provides students with an enhanced understanding of the rules and processes covered in the text while explaining the nuances of the court process and the interinstitutional aspect of the criminal justice and court systems.

2. *Examination of current controversies.* Several chapters feature a controversial topic related to the chapter's topic. This will serve both to foster thought and discussion and to increase the student's interest in the subject matter. The discussion is presented in a neutral manner with equal coverage of the various theoretical, political, or ideological positions raised by the issue.
3. *Comparative courts feature.* Several chapters feature a "Comparative Courts" item related to the chapter's topic. This feature includes a discussion of how a foreign court system deals with the topic. This feature provides students with some context for their study of the American court system and allows instructors to engage students in a compare/contrast pedagogical exercise.
4. *Discussion of relevant social science research.* Several chapters include a discussion of "current research" related to the chapter's subject matter. These discussions are written with the undergraduate reader in mind and focus on how research can help policy makers and court system workers evaluate and implement processes and programs.
5. *Movies and the courts.* Several chapters feature a "Movies and the Courts" discussion of famous movies depicting the court system and how these movies correctly and incorrectly portray the court system.

In addition to these highlighted pedagogical features, each chapter includes the following pedagogy:

1. Tables and figures in each chapter
2. Chapter-opening photographs that set the stage for the chapter to come
3. Key terms at the end of each chapter
4. Chapter summaries at the end of each chapter
5. Discussion questions at the end of each chapter
6. Lists of relevant Internet sites at the end of each chapter

Additional items included in the book include a glossary, references and suggested readings, case index, and general index.

Instructor Teaching Site

A password-protected site, available at edge.sagepub.com/hemmens5e, features an extensive test bank, PowerPoint presentations, and lecture notes.

New to This Edition

- A new feature examines key cases that have impacted the courts, such as *Manuel v. City of Joliet, Illinois, et al.* (2017) regarding Fourth Amendment rights and *Rippo v. Baker* (2017) related to the importance of judicial impartiality.
- Many new current controversies are examined, such as the changing laws on marijuana usage, the recent addition of Neil Gorsuch to the U.S. Supreme Court, prosecutorial discretion, and the balance between victim's rights and defendant's rights.
- Updated discussion of the death penalty, court-administered bail, domestic violence courts, race and waiver to adult court, and new research on habeas corpus and the effect of attorney type on bail decisions offer coverage of important topics affecting the court system.
- The latest cases, data, and research have been updated throughout to provide students with a view of the court system today.
- As recommended by reviewers, the chapter on Specialized Courts has been moved to the end of the book and is now Chapter 14.
- Chapter 8 now includes an example of a Victim Impact Statement.
- The chapter material has been streamlined and the number of boxed features has been reduced to enhance students' reading experience.

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Cassia Spohn is a regents professor in the School of Criminology and Criminal Justice at Arizona State University. She is the author of several books, including *The Color of Justice: Race, Ethnicity, and Crime in America* (with Sam Walker and Miriam DeLone) and *How Do Judges Decide? The Search for Fairness and Equity in Sentencing*. She has published a number of articles examining prosecutors' charging decisions in sexual assault cases and exploring the effect of race/ethnicity on charging and sentencing decisions. Her current research interests include the effect of race and gender on court processing decisions, victim characteristics, and case outcomes in sexual assault cases, judicial decision making, sentencing of drug offenders, and the deterrent effect of imprisonment. She is a fellow of the American Society of Criminology and of the Academy of Criminal Justice Sciences. She is a past president of the Academy of Criminal Justice Sciences.

The Purpose and Structure of American Courts

Chapters

1. Introduction: Law and the Judicial Function
2. Sources of Law
3. Types of Law
4. Court Organization and Structure



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Introduction

Law and the Judicial Function

Why Study Courts?

A glance at the headlines of any major newspaper reveals that crime is a pressing national concern. Stories about crime, especially violent crime, figure prominently, as do the crime-fighting strategies proposed by legislators, prosecutors, and other government officials. Decisions by prosecutors and judges—particularly in high-profile cases involving heinous crimes or well-known victims or defendants—also get front-page billing, along with appellate court decisions that strike down or affirm criminal convictions and Supreme Court decisions that affect the operation of the criminal court system. Clearly, the editors of these newspapers believe that the public has a voracious appetite for news about crime and the handling of crime by our nation's courts.

This degree of media attention to courts and their outcomes is not really surprising. Every day, in cities throughout the United States, court officials make decisions that affect the lives of ordinary Americans and determine how private businesses and governmental institutions will operate. Some of these decisions—such as a judge's ruling that a person ticketed for speeding must pay a small fine—are relatively trivial and have little impact on persons other than the speeder. Other decisions—for example, a prosecutor's decision to seek the death penalty or a jury's decision to acquit a defendant charged with a serious crime—are weightier and have greater impact. Decisions of appellate courts, especially those handed down by the U.S. Supreme Court, have a further-reaching impact. Consider, for example, the Supreme Court's 1963 decision that all persons charged with felonies in state courts have the right to an attorney (*Gideon v. Wainwright*, 1963) or its decision in 2005 that U.S. district court judges are not required to follow the federal sentencing guidelines (*United States v. Booker*, 2005).

Courts provide several functions. First, courts settle disputes by providing a forum for obtaining justice and resolving disputes through the application of legal rules and principles. It is in court that injured parties may seek compensation and the state may seek to punish wrongdoers. Private parties may seek redress in civil court, and the state may seek to punish violators of the criminal law in criminal court. Although the courtroom is not the only place that people may go to settle disputes, Americans traditionally have turned to the courts for redress. Other cultures, such as the Japanese, use the courts much less frequently.

Second, courts make public policy decisions. Policy making involves the allocation of limited resources (such as money and property) to competing interests. America has a long tradition of settling difficult policy questions in the courtroom rather than in the legislature. This is because politicians often avoid settling complex or difficult problems for fear of alienating their constituents or because the competing interests are unable to compromise. In addition, the rights of minorities are often unprotected by the legislature, which, by its very nature, represents primarily the interests of the majority, so courts are forced to step into the breach. Finally, there is a tradition of using litigation as a tool for social change.

Third, courts serve to clarify the law through the interpretation of statutes and the application of general principles to specific fact patterns. Courts are different from the other branches of government in many ways, but perhaps the most significant difference is that courts are reactive; that is, courts do not initiate cases but rather serve to settle controversies brought to them by others—plaintiffs and defendants, in legal parlance. This frequently involves the interpretation of statutes written by the legislature.

What Is Law?

Laws are created by the legislature, provide rules to guide conduct, and are a means of resolving disputes and maintaining order through the medium of the courts. Courts are forums for dispute resolution. This dispute may be between two private parties, such as a dispute between a landlord and a tenant or between a buyer and a seller of merchandise. Or the dispute may be between the state and an individual, as when a defendant is charged with violating some provision of the criminal code.

The court system has a complex set of rules and procedures. Evidence law governs what information the jury can see and hear and how this evidence may be presented to them. There are seemingly innumerable rules governing how parties to a lawsuit may proceed and what motions they can make, either before or during trial, and even after the verdict is entered. The court system has a number of important roles. These include the prosecutor, defense attorney, judge, witnesses, and the defendant.

Courts are charged with settling legal disputes. But what is a legal dispute? For our purposes, a legal dispute is a disagreement about a law—what it means, how it is implemented, or, in the case of criminal law, whether a person has violated the law. The next question, then, is what exactly is “law”? Our definition is this: **Law** is a written body of rules of conduct applicable to all members of a defined community, society, or culture that emanate from a governing authority and are enforced by its agents by the imposition of penalties for their violation.

This definition is appropriate for all modern legal systems, but it would not completely fit preliterate societies because, by definition, such societies do not possess writing, nor do they typically employ agents to enforce rules of conduct. However, law as a system of proscribed and prescribed behavior is certainly not unique to highly developed societies with written statutes and a formal system of law enforcement. All people living together in organized groups have had at least some type of rudimentary rules for governing conduct. They would not last very long as organized groups if they did not, for law is at the center of all organized social life. Indeed, the word *law* itself has come to us from a variety of Latin and Nordic words meaning “to bind” (people together). People who are “bound together” share a common culture, and all cultures share certain core elements. Our first task is to see how these common elements are related to law.

The Code of Hammurabi

The first legal codes showed that there were well-advanced societies that exhibited signs of mature civilizations many centuries ago. The **Code of Hammurabi** (Hammurabi was a king of Babylonia who lived from 2123 to 2081 BC) was long acknowledged as the oldest known written code of law. We now know, however, that other documents of this type existed in the area of the Middle East called Mesopotamia, but no other was so broad in its scope. The code was discovered inscribed on a stone round pillar. It was not law in the sense that law is understood today—that is, a set of abstract principles applicable to all. Rather, it was a set of judgments originally pronounced to solve a particular case. Nor was it an attempt to cover all possible situations as modern codes do, and as far as we know, it was never copied and distributed to those officials charged with the day-to-day administration of Hammurabi’s vast kingdom. Nevertheless, the system of justice contained in the code showed signs of mature development, although it was quite different from what we would recognize as such today.

Hammurabi’s Code governed relationships in the society related to sexual behavior, property rights, theft, and acts of violence. The law forbade retaliatory actions and blood feuds among the people, leaving punishments to be dispensed by the king’s agents. The “eye for an eye, tooth for a tooth” (*lex talionis*) concept of justice is clearly stated in the code, predating the Old Testament passage familiar to Jews, Christians, and Muslims. The law introduced specified standards of conduct and amelioration by an independent third party to settle disputes. Cruelty and inhuman behavior to those accused of wrongdoing were restricted by the legal code. A written code, theoretically impartial in its application, represented a tremendous advance for society in general and the administration of justice in particular.

Two Opposing Perspectives: Consensus and Conflict

Sociologists who study the law as a social institution and its function as a social control mechanism tend to view it in terms of one of two broad perspectives. Some scholars view society as basically good, just, and more or less providing equal opportunity for all individuals within it. These people hold what is called the consensus view of society. Others view society as basically unjust, unequal, and discriminatory. These people hold what is called the conflict view. **Consensus theorists** emphasize how society is structured to maintain its stability and view it as an integrated network of institutions (the family, church, school, economy, government) that function to maintain social order and the system as a whole. Social stability is also achieved in this view through cooperation, shared values, and the cohesion and solidarity that people feel by being part of a shared culture. Consensus theorists are aware that conflicts often arise in social life but stress that such conflicts are temporary and can be and are solved within the framework of shared fundamental values, as exemplified by a neutral legal system.

Conflict theorists consider society to be composed of individuals and groups with sharply different interests and to be characterized by conflict and dissent. People and groups everywhere, they maintain, seek to maximize their interests. Because resources are limited, conflict between different individuals and groups is inevitable and continuous. The stability and order that consensus theorists see is only temporary and maintained by coercion rather than consensus—that is, the ability of more powerful people and groups to impose their will on the less powerful. The social institutions so lauded by consensus theorists function to maintain the privilege of the few and to keep the many subservient to them.

Which view is correct? The simple answer is that it is impossible to say without specifying what society we are talking about. All societies are characterized by both consensus and conflict; it is almost impossible to imagine any society not being so. We have to remember that these two competing models are examples of what sociologists call *ideal types*. Ideal types are abstract conceptual tools that accentuate the phenomenon being studied purely for analytical purposes; they lay no claims to mirror the day-to-day reality of any concrete example of that phenomenon. Let us examine law in the context of these two ideal-type models of society.

The Consensus Perspective

The consensus perspective views law as basically a neutral framework for patching up conflicts between individuals and groups who primarily share the same set of fundamental values. Law is viewed in a manner analogous to the immune system of the body in that it identifies and neutralizes potential dangers to the social body before they can do too much damage. Thus, law is a just and necessary mechanism

for controlling behavior detrimental to peace, order, predictability, and stability. Specific legal codes are assumed to express compromises between various interest groups regarding issues that have been contentious in the past, not the victories of some groups over others. Law is also seen as reflecting the community's deeply held values and as defining the rights and responsibilities of all those within it, and it is a legitimate expression of morality and custom. If coercion is sometimes needed to bolster conscience, it is because the individual, not the law, is flawed. The law is obeyed by the vast majority of people not out of fear but out of respect, and it is willingly supported by all good people.

The Conflict Perspective

Underlying the conflict perspective of the law is a view of human nature that sees human beings as basically exploitive and duplicitous creatures (although conflict theorists believe we have become that way because of the greed and egoism instilled in us by living in a capitalist society, not because we are born that way). It also avers that law functions to preserve the power and privilege of the most exploitive and duplicitous among us, not to protect the weak and helpless. The conflict perspective of law asserts that social behavior is best understood in terms of struggles and conflicts between groups and individuals over scarce resources. Although thinking of social processes in terms of conflict between rival factions (usually between social classes) goes back as far as Plato, the more formal treatment of conflict as a concept traces its origin to the thought of 19th-century German philosopher Karl Marx.

Marxist legal scholars certainly agree with scholars from other perspectives that law exists to settle conflicts and restore social peace but insist that conflicts are always settled in favor of the ruling class in any society. The ruling class always wins because it is this class that makes the rules governing social interaction. For Marxist legal scholars, society is divided into two classes: the rulers and the ruled. Because the ruling class—by which Marx meant the owners of the means of production (i.e., factory owners and entrepreneurs)—controls the means of production, it is able to control politicians, the media, the church, and all other social institutions that mold social values and attitudes, and thus the law.

Why do the exploited not recognize their exploitation and the ways in which the law supports it? Marx and Engels explained this puzzle with reference to the idea of **false consciousness**. By false consciousness, Marx and Engels meant that the working classes have accepted an ideological worldview that is contrary to their best interests. Workers have been duped into accepting the legitimacy of the law by the ruling classes and are not aware that the law does not serve them. They blindly obey the law, believing that they are behaving morally by doing so. The ruling class can generate the false consciousness of the workers by virtue of its control over key institutions such as education, religion, the media, and, of course, the law itself. These institutions define what is right and wrong, and they control the flow of information so that it conforms to the worldview of the ruling class.

Because both consensus and conflict are ubiquitous and integral facts of social life, we have to address both processes in this book while attempting to remain agnostic with respect to which process “really” characterizes social life in a general sense. It is hoped that it will become plain to the reader that the consensus perspective is most suitable for explaining certain sets of facts and that the conflict perspective is better suited to explaining other sets of facts. We hope that it will also become plain that conflict is as necessary as consensus to maintain the viability of a free society.

What Is the Relationship of Law to Justice?

When most people think of justice, they probably think of law, but law and justice are not identical. Law *can* be in accordance with justice, but it can also be the furthest thing from it. Law is in accordance with justice when it respects, cultivates, and protects the dignity of even the lowliest person living under it; it violates justice when it does not. We have to be confident that we can find justice and that we can harness it and put it to practical use for the benefit of humankind, just as scientists seek to harness the laws of nature and put them to practical use. When all is said and done, it is only through law that justice can be achieved.

Equity is a term derived from the Latin word for “just” and refers to remedies for wrongs that were not recognized (neither the remedies nor the wrongs) under English common law. Equity principles are still heavily used in family and contract law since they allow judges to fashion necessary remedies not readily apparent from a reading of legal statutes.

The idea of equity in law in medieval England evolved on parallel tracks with the evolution of the role of the king’s chancellor, who was essentially the king’s most important minister (his “prime minister”). One of the chancellor’s responsibilities was to handle petitions from the king’s subjects seeking relief from rulings in the courts. This relief was sorely needed because, by the 13th century, the court system had become very inflexible. Judges frequently applied the same abstract principles and procedural rules rigidly to every case regardless of the issues involved. Judges also failed to realize that ever-changing social circumstances and mores require a dynamic “living” system of law. As a result of the rigidity of common-law practice, many people felt unjustly treated by the courts and turned to the king (through his chancellor and his staff) to seek justice. This does not mean that the common law of the time was inherently unfair. The law was more incomplete and inflexible than purposely unfair, and equity was conceived of as a corrective for the rigidity and impersonal nature of law.

With an increasing number of petitions being filed, an entirely independent court system with its own distinct set of principles and procedures was eventually implemented, known as the Court of Chancery. The first mention of such a court was in 1280, during the reign of Edward I (1239–1307). Judges presiding in these courts were directed to view each case as unique, to be flexible and empathetic,

and to think in terms of principles of fairness rather than rules of law. Because it was a corrective, many equity decisions were contrary to the principles of the common law as a rational and predictable legal system (Reichel, 2005). It is important to note that equity supplemented, not replaced, common law: Equity “begins where the law ends; it supplies justice in circumstances not covered by the law” (McDowell, 1982, p. 23). In other words, if justice was to be served in England, the cold formality of common law alone would not suffice. Courts of Chancery were a necessary “add-on” because of the equity defects apparent in the rigid common law at the time.

Over the centuries, common law and equity engaged in dynamic cross-pollination to the benefit of both. The common law became fairer and more flexible, and the judges of the chancery courts began relying on rational legal principles and precedent to make equity more predictable. They eventually became so alike that formal distinctions between the two courts were removed in 1875, although there are still provisions for separate courts of law and equity in England. Some states in the United States (notably, Delaware) have chancery courts, but most U.S. judges are empowered to hear cases of both law and equity.

What kinds of legal decisions violate equity, and what exactly is an equity decision? Civil law (i.e., noncriminal law) in the United States throughout most of the 19th century was very much oriented toward protecting the legality of contracts between individuals. As long as no specific contract was violated, the defrauding, maiming, and killing of innocent consumers and workers by defective products and dangerous working conditions was not cause for legal action. Victims of defective and/or dangerous products could not sue the manufacturers because the guiding legal principle was *caveat emptor* (let the buyer beware). Companies had no legal duty to be concerned with the welfare of those to whom they sold their products; it was incumbent on buyers to be concerned with their own welfare. Similarly, unhealthy and dangerous working conditions in mines, mills, and factories were excused under the Contract Clause of the Constitution. American law in this period was as rigid as 12th-century English law as judges mechanistically applied legal rules without concern for standards of equity. Equity became more and more a consideration of American courts in the late 19th and early 20th centuries, however, as laws were passed making companies liable for defective products and protecting workers from unsafe working conditions.

The Rule of Law

The only way we can be reasonably assured of integrating important aspects of justice with a legal system is to ensure strict adherence to what is called the rule of law. This idea of the rule of law, not of men, evolved in the English-speaking world from the time of the Magna Carta (1215) through the English civil wars (1642–1646 and 1648–1649) and the Glorious Revolution (1688–1689) of the

17th century. These struggles of the English people were efforts to gain freedom from arbitrary government power and oppressive sovereigns. The struggles for freedom and liberty continued with the American Revolution and Civil War and are still going on today around the world.

Although the rule of law can be violated, the fact that it exists serves as a rallying point and source of legitimacy for those who would oppose individuals and governments who violate it. According to Philip Reichel (2005), the rule of law contains three irreducible elements:

1. It requires a nation to recognize the supremacy of certain fundamental values and principles.
2. These values and principles must be committed to writing.
3. A system of procedures that holds the government to these principles and values must be in place.

The first element is relatively unproblematic; it is difficult to imagine a modern organized society not recognizing a set of fundamental values that they hold supreme. These ultimate principles may be secular or religious. The second element is also relatively unproblematic. Any culture possessing a written language would be expected to put such important guiding principles into writing so that all may refer to them. Documents containing these principles may be the culture's holy books or a nation's constitution. The third element is much more problematic because it determines whether a country honors its fundamental values in practice as well as in theory.

At its core, law is a set of lifeless statements; it has no life apart from human actors. If the law is to be consistent with justice, it can be so only if the procedures followed by the servants of the law are perceived as fair and equal.

The system of procedures to hold the government to its principles is best articulated by the concept of **due process**. When we speak about something that is our due, we are usually referring to something that we feel we are rightly entitled to. Due process is procedural justice that is due to all persons whenever they are threatened with the loss of life, liberty, or property at the hands of the state. Due process is essentially a set of instructions informing agents of the state how they must proceed in their investigation, arrest, questioning, prosecution, and punishment of individuals who are suspected of committing crimes. Due process rules are thus rules that attempt to ensure that people are treated justly by the state. Unlike distributive justice, due process is not something a person earns by their actions; it is something that is due (hence the term) to everyone without exception simply because of their humanity.

To understand what due process means today and how far we have come in implementing it, let us examine what people went through in times when the idea of due process would have been foreign to most people. Imagine you are in France 300 years ago. Soldiers come to your house in the dead of night, batter your door

down, arrest you, and place you in a filthy dungeon. Further imagine that you genuinely do not know why this is happening to you. You try to find out for years while rotting in that dungeon, but no one you ask has the slightest idea. All you and they know is that you are the victim of one of the infamous *lettres de cachet* (“sealed letters”). These letters were issued by the king, his ministers, or some other high-ranking aristocrat, ordering authorities to seize and imprison anyone who had in any way offended them. When (or if) you were finally released, there is nothing you could do about what had happened because it was all perfectly legal under the Code Louis of 1670, which governed France until the implementation of the Code Napoleon in 1804. The Code Louis is a perfect example of a system of positivist law being at odds with justice.

Justice, The Law, and Packer’s Models of Criminal Justice

Every matter of controversy in criminal justice has at its core at least two competing sets of ideas. In the courts, every decision a judge makes, at either the trial or appellate level, tends to pit two contradictory sets of values against each other. Consider a criminal trial. The prosecutor presents a case that represents the interests of the state, one that is designed to prove that the defendant is guilty and should be held accountable for the crime with which they are charged. In contrast, the defense attorney presents a case in the interest of their client. The defense attorney attempts to raise doubt about the defendant’s guilt and insists that the legal procedures designed to protect the defendant’s rights be followed. The competing sets of values that each of these actors brings to the table—and that are found at all other stages of the criminal justice process as well—have been described by Herbert Packer (1968) as the crime control and due process perspectives.

Packer’s (1968) models of the criminal process are just that—models, and not depictions of reality. He sees them as polarities—as the two ends of a continuum along which the actual operation of the criminal justice system will fall. He also cautions against depicting one model as the way things work and the other as the way things ought to work. In his words, the two models “represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process” (Packer, 1968, p. 153). The value systems that “compete for priority” are regulating criminal conduct and preventing crime, which the crime control model views as the most important function of the criminal process, and protecting the rights of individuals, which the **due process model** emphasizes.

In the sections that follow, we describe the crime control and due process models in detail, focusing on their differences. These differences are summarized in Table 1.1.

Table 1.1 Packer’s Crime Control and Due Process Models

	Crime Control Model	Due Process Model
Views criminal justice system as an	Assembly line	Obstacle course
Goal of criminal justice system	Controlling crime	Protecting rights of defendants
Values emphasized	Efficiency, speed, finality	Reliability
Process of adjudication	Informal screening by police and prosecutor	Formal, adversarial procedures
Focus on	Factual guilt	Legal guilt

Two Models of Criminal Justice

The Crime Control Model

As its name suggests, the **crime control model** (see Packer, 1968, pp. 158–163) views the suppression of criminal conduct—that is, controlling crime—as the most important function of the criminal justice system. The primary function of the system is to control crime by apprehending, convicting, and punishing those who violate the law. Failure to control crime, according to this perspective, leads to a breakdown in public order. If citizens believe that laws are not being enforced, they will have fewer incentives to obey the law, which will lead to an increase in crime and to a greater risk of victimization among law-abiding citizens. As Packer (1968) notes, failure to control crime eventually leads “to the disappearance of an important condition of human freedom” (p. 158).

According to the crime control model, *efficiency* is the key to the effective operation of the criminal process. A high proportion of offenders whose offenses become known must be apprehended, tried, convicted, and sentenced. Moreover, this must be accomplished in a system where the crime rate is high and resources for dealing with crime are limited. Thus, the model emphasizes *speed*, which depends on informality and uniformity, and *finality*, which means that there should be few opportunities for challenging outcomes. The requirement of informality means that cases should be screened by police and prosecutors to determine the facts and to separate the probably innocent from the probably guilty; judicial fact finding, which is more time-consuming and thus less efficient, should be the exception rather than the norm. Uniformity means that officials should follow routine procedures in most cases. As Packer (1968) puts it, “The process must not be cluttered up with ceremonious rituals that do not advance the progress of the case” (p. 159).

The metaphor that Packer (1968) uses to describe the operation of the criminal process under the crime control model is that of an assembly line: “an assembly-line

conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers . . . who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product . . . a closed file” (p. 159). As this suggests, the goal is to move cases through the justice process as swiftly as possible. Suspects who are “probably innocent” are screened out early in the process by police and prosecutors; those who are “probably guilty” are moved quickly and perfunctorily through the remaining stages in the process and are convicted, usually by a plea of guilty, as expeditiously as possible. Thus, the system achieves the goal of controlling crime by separating the innocent from the guilty early in the process, by extracting early guilty pleas from those who are not screened out by police and prosecutors, and by avoiding trials.

A key to the operation of the crime control model is the **presumption of guilt**, which rests on a belief in the reliability of the screening process operated by police and prosecutors. That is, defendants who are not screened out early in the process by police and prosecutors are probably guilty and therefore can be passed quickly through the remaining stages in the process. The presumption of guilt is simply a prediction of outcome: Those not screened out early in the process are probably guilty and more than likely will plead guilty or be found guilty at trial. The **presumption of innocence**, on the other hand, means that until the defendant has been adjudicated guilty, that person is “to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question” (Packer, 1968, p. 161).

In summary, the crime control model views the apprehension and conviction of criminals as the most important function of the criminal justice system. It characterizes the criminal process as an assembly line that moves cases forward in a uniform and predictable way. The model places great faith in the reliability of fact finding by police and prosecutors. It suggests that the process is operating with maximum efficiency if cases involving the probably innocent are screened out early by police and prosecutors and if the rest of the cases, which involve defendants who are presumed to be guilty, are disposed of as quickly as possible, preferably with guilty pleas.

The Due Process Model

Whereas the crime control model views the criminal process as an assembly line, the due process model sees the process as an obstacle course. Each stage in the process, according to Packer (1968, pp. 163–172), is designed not to move cases forward as expeditiously as possible but rather to throw up hurdles to carrying the case from one stage to the next. There are other differences as well. Whereas the crime control model stresses efficiency, the due process model stresses reliability and minimizing the potential for mistakes. And whereas the crime control model places great faith in the ability of police and prosecutors to separate the probably innocent from the probably guilty, the due process model contends that informal, non-adjudicatory fact finding carries with it a strong likelihood of error.

It is important to point out that the values underlying the due process model are not the opposite of those found in the crime control model. Like the crime control model, the due process model acknowledges the importance of controlling crime. However, the due process model rejects the premise that screening of cases by police and prosecutors is reliable. More to the point, the due process model stresses the likelihood of error in these informal screening processes. As Packer (1968) points out,

People are notoriously poor observers of disturbing events . . . ; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not). (p. 163)

Because of the strong possibility of mistakes in the early stages of the process, the due process model calls for fact-finding procedures that are formal, adjudicative, and adversarial. The case against the accused, in other words, should be “publicly heard by an impartial tribunal” and “evaluated only after the accused has had a full opportunity to discredit the case against him” (Packer, 1968, p. 164). The model also rejects the notion of finality; rather, there should be constant scrutiny of outcomes to ensure that mistakes have not been made.

There also are sharp differences between the two models in the degree to which mistakes can be tolerated. That is, there are differences in the weight given to reliability (a strong probability that factual guilt has been determined accurately) and efficiency (expeditious handling of the large number of cases that the system takes in). The crime control model is willing to sacrifice some reliability in pursuit of efficiency. It tolerates mistakes up to the level at which they interfere with the goal of preventing crime; if too many guilty people go free or if there is a general view that the system is not reliable, crime might increase rather than decrease. The due process model rejects this view, arguing that mistakes must be prevented and eliminated. To the extent that efficiency requires shortcuts that reduce the reliability of outcomes, efficiency must be sacrificed.

To ensure a high degree of reliability in the process, the due process model requires that both factual guilt and legal guilt be proved. Factual guilt simply means that the evidence shows that there is a high probability that the defendant committed the crime of which they are accused. Legal guilt, on the other hand, refers to the process by which determinations of guilt are made. Defendants are not to be deemed guilty unless all the mandated procedures and rules designed to protect the rights of the accused have been followed. A defendant charged with an assault that was witnessed by several bystanders who are willing to testify against them may well be factually guilty of assault. His legal guilt at the time of charging, on the other hand, is an open question. If the determination of factual guilt is not

made in a procedurally correct way, the defendant is not legally guilty and cannot be held accountable for the crime with which he is charged.

The due process model, then, resembles an obstacle course in which cases must navigate hurdles set up to ensure that determinations of guilt are reliable. The key to this is formal, adjudicative, and adversarial fact-finding procedures with constant scrutiny of outcomes to ensure that mistakes have not been made. Defendants are presumed to be innocent until proven guilty, legally as well as factually.

An Illustration of the Models in Action

A series of Supreme Court cases that illustrate the “tinkering” that goes on to modify the excesses that might arise with exclusive use of either model involves an escaped mental patient named Robert Williams who kidnapped, raped, and murdered a 10-year-old girl named Pamela Powers on Christmas Eve, 1968. Two days after the crime, Williams turned himself in to the police in Davenport, Iowa. Because the crime took place in Des Moines, a detective was dispatched to transport Williams from Davenport. Williams’s lawyer secured the detective’s agreement not to question Williams during the trip. However, the officer—concerned that if Pamela’s body were not found before the snow fell, it would not be discovered until the following spring—engaged Williams in conversation, during which the detective made statements, but did not ask questions, about how important it was to the family to find Pamela’s body so that they could give her a proper Christian burial. This so-called “Christian burial speech” touched Williams, who then directed the detective to the girl’s frozen body. Based on this evidence, Williams was convicted of murder.

The case reached the U. S. Supreme Court in 1977 (*Brewer v. Williams*, 1977). The Court overturned Williams’s conviction by a vote of 5–4, stating that Williams had not waived his right to counsel during questioning and that the officer’s “Christian burial speech” constituted custodial interrogation. It was reasoned that since Williams’s confession was obtained in violation of his right to counsel, any evidence obtained based on it (Pamela’s body) was inadmissible under the exclusionary rule. The majority of the justices were focused on whether Williams had received a fair trial; concerns about crime control and efficiency were secondary.

Brewer v. Williams is an example of the limitations of the due process model. However, this case was one of a number of cases involving the boundaries of custodial interrogation from a time when the crime control model ran amok. The most famous of these cases was *Brown v. Mississippi* (1936), which involved the alleged murder of a White man by three Black men. All three men were sentenced to death on the basis of confessions obtained under torture (they were whipped and told that the whippings would not stop until they confessed). The injustice to the community inherent in the *Brewer* case can be viewed as one of a number of correctives to the injustices suffered by defendants and typified in the *Brown* case.

After Williams was retried, and again convicted, he appealed to the Supreme Court. This time, in *Nix v. Williams* (1984), which enunciated the inevitable discovery exception to the exclusionary rule, the Court upheld Williams's conviction, ruling that search parties looking for Pamela's body would have found it by lawful means eventually, and thus the fact that it was found sooner because of Williams's confession was irrelevant.

The Ongoing Battle

In an ideal world, judges and other criminal justice officials would balance due process and crime control ideals. They would strive for efficiency while insisting on reliability. In the real world, this is probably not possible; many decisions tip in one direction or another. High caseloads, limited resources, and concerns about protecting the community may lead to shortcuts that threaten reliability or to decisions that chip away at the procedural regulations that protect the rights of criminal defendants. Similarly, concerns about restraining the power of criminal justice officials may lead to decisions that make it more difficult for the criminal process to apprehend and convict those who commit crimes.

A good example of an issue where use of the crime control and due process models would lead to different conclusions is plea bargaining. According to the crime control model, the criminal process is operating most efficiently when defendants who are not screened out by police and prosecutors plead guilty at the earliest possible moment. The criminal process would break down if too many defendants insisted on taking their cases to trial. The crime control model thus sees nothing wrong with allowing prosecutors to reduce charges or drop counts in exchange for guilty pleas or permitting judges to make it clear to defendants that those who plead guilty will be treated more leniently than those who insist on a trial. It is assumed that while plea bargaining may result in guilty pleas by those who are innocent, this type of mistake is likely to be rare, as those who have survived the screening process are in all probability guilty. Disposing of a large proportion of cases as quickly as possible via guilty pleas is, according to this model, the only feasible means of achieving the goal of crime control.

It is no surprise that use of the due process model leads to a different conclusion. According to this model, guilty pleas, which effectively preclude any oversight of the early, informal stages of the process, should be discouraged. The due process model values reliability and contends that mistakes are likely early in the process; because of this, guilty pleas that occur soon after the prosecutor decides to charge have a high probability of producing unreliable factual determinations of guilt. In addition, the model does not allow prosecutors or judges to promise defendants leniency in return for a guilty plea. Defendants, no matter how overwhelming the evidence, have the right to have the charges against them tried using the procedures required by law; they should not be coerced to enter a guilty plea or punished for exercising their constitutionally protected right to a trial. Moreover, before accepting a guilty plea, the judge adjudicating the case should be

required to both establish the defendant's factual guilt and ensure that the process that brought the defendant into court has been free of mistakes. According to the due process model, it is only by following these rules that the reliability of outcomes can be guaranteed and mistakes minimized.

Judicial Functions

Courts provide several functions. They provide a forum to settle disputes, either in civil court or criminal court. They make policy decisions that politicians may be unwilling to make for fear of not being reelected. They also serve to clarify the law through the interpretation of statutes and the application of general principles to specific fact patterns. Courts are different from the other branches of government in many ways, but perhaps the most significant difference is that courts are reactive; that is, courts do not initiate cases but rather serve to settle controversies brought to them. In the process, courts are forced to choose one side over the other, or to interpret the law and apply it to a unique set of facts—this is sometimes referred to as “making law.”

How Judges “Make Law”

It is often said that our political system is a “government of laws, not men.” This means that individuals in our system are governed by laws and not by the whims of those in power; it also means that the law applies to everyone—even to those in power—and that no one is above the law. Related to this is the notion that the law is “a set of rules transcending time, geography, and the circumstances surrounding specific cases” (Eisenstein et al., 1988, p. 5). According to this line of reasoning, judges simply apply the law in a rigid and mechanistic way to the specific cases that arise. Stated another way, judges “find” the applicable law and apply it to the case at hand.

The problem with this traditional view of law and the role of courts is that much of “the law” is broad and ambiguous. Thus, the judges who are charged with enforcing the law must first interpret it. They must decide what the law means and whether it is applicable in the given situation. Consider, for instance, a legislatively enacted statute that prohibits disturbing the peace, which is defined as “willfully disrupting the peace and security of the community.” This statute, which neither defines *willful* nor offers examples of conduct that would “disrupt the peace and security,” obviously leaves room for interpretation. Constitutional provisions, which are another source of law, have similar limitations. Take, for instance, the Fourth Amendment to the U.S. Constitution. It protects against unreasonable searches and seizures, but it does not define *unreasonable*. Because of these inherent ambiguities in criminal statutes, state and federal constitutions, and

View From the Field



The Role of the Courts in America

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The role of the courts in America, as directed by its magistrates, judges, and Supreme Court justices, is to ensure fairness to individuals while attempting to ascertain the truth of the matter asserted. Achieving these two goals requires a balance of expertise, experience, and emphasis.

Expertise, in my opinion, largely consists of having the knowledge to hand down good oral

or written opinions concerning the authenticity of the evidence and claims presented before the court. Experience means having a “seasoned,” practical understanding that is based on personal observation from encountering and going *through* things in life as they occur over a long period of time. Emphasis requires that the court consider as important above all else the goal of ascertaining the truth, along with satisfying the defendant’s constitutional right to a fair trial. If the court is properly emphasizing these goals, there should be a significant amount of stress between the adversaries as they attempt to present and defend their case.

other sources of law, judges are called on to interpret the law. Judges’ use of their position to interpret the law has a long history. It began during what is known as the common law period in England. We discuss the development of the common law, as well as its associated principles, in the next section.

Development of the Common Law System

The Western legal tradition may be traced to the Code of Hammurabi. This is the first known written legal code, and it expressed a retributivist “eye for an eye” philosophy. The Roman Empire eventually adopted many of the principles of the Code of Hammurabi. The spread of the Roman Empire brought Roman law to Western Europe, but it had minimal impact on English common law. The Norman conquest of England in 1066, however, brought feudal law, which provided the basis for the common law, to England. During the following several hundred years, England slowly developed what came to be known as the common law system. By the reign of Henry II (1154–1189), who is often referred to as the “father of the common law,” a body of law had been developed and applied nationally. Judicial decisions were written down, circulated, and summarized. The first systematic attempt to collect and explain these decisions was compiled under the supervision of Henry’s chief justice, Ranulf de Glanvill, in a book titled *Treatise on*

the Laws and Customs of the Realm of England, around 1188. This book details the transition from what was essentially the irrational decision making of pre-Norman England to adherence to formal legal rules. The result was a more unified body of law, which came to be known as the **common law** because it was in force throughout the country.

The next important document in the evolution of common law was the Magna Carta of 1215. The Magna Carta was a document drawn up by English barons to limit the power of the sovereign (specifically, the notorious King John of Robin Hood fame) and to assert certain rights. Contained in the document are the first dim glimpses of many of the rights we take for granted today, such as the right to trial by jury, the proportionality of punishment, and the privilege against self-incrimination. Although King John's acquiescence to the provisions of the charter was a victory for the barons, it meant little at the time for the common person.

Henry de Bracton's *On the Laws and Customs of England*, written between 1250 and 1260, furthered the development of the common law. Bracton was a judge in England who believed that the common law was based on case law, which was, in turn, decided based on ancient custom rather than on authoritative codes imposed on people from above. The common law is thus judge-made law. That is, it was law created by judges as they heard cases and settled disputes. Judges wrote down their decisions and, in doing so, attempted to justify their decisions by reference to custom, tradition, history, and prior judicial decisions. *On the Laws and Customs of England* was essentially a compilation of these judicial rulings made over the previous decades arranged to show how prior decisions, or precedent, may guide future rulings.

Originally, judges made decisions without referring to other cases or courts. They simply heard the case and decided the appropriate outcome, based on their understanding of the law as they had learned it through the reading of legal treatises. But as time went by, judges came to rely on prior decisions as a means of justifying their decision in a particular case. As judges began to rely on previous judgments, they developed the concepts of stare decisis and precedent.

Precedent

Under the common-law system, every final decision by a court creates a **precedent**. This precedent governs the court issuing the decision as well as any lower, or inferior, courts. The common law system was brought to America by the early colonists. Many of the principles of the common law, including precedent and a belief in stare decisis, remain in force today in American courts. Thus, all courts in a state are bound to follow the decisions of the highest court in the state, usually known as the state supreme court. All courts in the federal court system are bound to follow the decisions of the U.S. Supreme Court. This is the notion of precedent.

Precedent is binding only on those courts within the jurisdiction of the court issuing the opinion. Thus, a decision of the Idaho Supreme Court is not binding

Comparative Courts

The basic features of civil law are almost mirror opposites of the features of common law. France has a civil-law system. What follows is a list of some of the distinctive features of the French civil-law system:

1. *Civil law is written rather than unwritten.* As opposed to the common law's slow accumulation of case law derived from decisions based on local customs, the Napoleonic Code and its successors are all codes of conduct (statutes) written from above and imposed on citizens and subjects below.
2. *Precedent is not officially recognized.* The codes laid down in civil law are complete the day they are enacted and are not subject to judicial review. As such, there is no need to refer to past cases for guidance. In practice, however, no code is so complete as to provide unambiguous guidance in all matters coming before the courts, and civil-law judges often refer to case law and thus to precedent. The main difference between the common- and civil-law approaches is that in civil law, precedent is not binding.
3. *It is inquisitorial rather than adversarial.* This is the primary distinguishing feature of civil law vis-à-vis common law. The **inquisitorial system** is a system of extensive investigation and interrogations carried out to ensure that an innocent person is not subjected to trial. The term *inquisition* should be thought of as denoting "inquiry" as the term *adversarial* denotes "contest." The inquisitorial focus is on truth and not so much on procedure, so many of the procedural protections afforded suspects in common-law countries either do not exist or exist in modified form.
4. *It has traditionally made little use of juries.* There is some use of juries in civil-law countries in very serious criminal cases, but they don't have the same role that they have in common-law countries. In France, juries consist of three professional judges and nine laypersons. In a jury trial, all jurors and judges are allowed to question witnesses and the accused. Jury deliberations are doubtless dominated by the professional judges on whom the laypersons must rely for explanations of the law, but guilt or innocence is determined by a secret ballot in which all 12 votes are of equal importance. A verdict requires the agreement of at least eight of the 12 jurors rather than unanimity.
5. *Judicial review is used sparingly.* The French equivalent to the American Supreme Court in terms of dealing with constitutional issues is the Conseil Constitutionnel (the Constitutional Council). This entity is unique among national supreme courts in that it lies outside the judicial system (it is a council rather than a court hearing cases forwarded to it from lower courts). The council's main function is to rule on the constitutionality of proposed legislation, not legislation already in effect, when

asked to do so by leaders of the various political parties. Some civil-law countries tend to view the practice of judicial review of legislation as inherently antidemocratic and a violation of the separation of powers principle. The reason that the American model of judicial review is rejected in France is that the French believe that important decisions affecting large numbers of people should be made by legislators elected by and accountable to the voters, not by appointees with lifetime tenure.

While the French civil-law system has its benefits, it also has its limitations. The investigation of a crime often takes a long time, during which the accused is typically held in custody

without bail. Bail is infrequently granted in France because it operates under a crime control model and because the accused is expected to be available to help with the inquiry. Also, by the time a case gets to trial, everyone involved basically knows what is going to happen because the trial is more a forum for a review of the known facts (of which all parties are aware) than a forum for fact finding. The system is one of professional bureaucracy that lacks the same measure of lay participation favored by common-law countries. The expectation of cooperation on the part of the defendant, as well as the negative conclusions that the judge and jurors can draw if they do not cooperate, is something that an American due process purist finds alarming.

Source: Reichel, P. (2005). *Comparative criminal justice systems: A topical approach* (4th ed.). Upper Saddle River, NJ: Prentice Hall.

on any court in Texas. Texas courts are not subject to the jurisdiction or control of Idaho courts and thus are free to interpret the law differently from Idaho courts, if they see fit to do so. Decisions from courts in other jurisdictions, although not binding, may be persuasive. This simply means that another court may give consideration and weight to the opinion of other courts. Thus, a Texas court may consider, if it chooses, the judgment of an Idaho court or any other state court. Courts may do this when faced with an issue that they have not dealt with before but that other courts have examined. Moreover, when judges look to the past or other jurisdictions and can find no guiding precedent, they must decide the case according to their interpretation of legal principles.

There also are situations where judges do not follow precedent, either because they believe that the facts in the case at hand distinguish it from cases decided previously or because they believe that the precedent, although once valid, should be overruled. In the first instance, the judge rules that facts in the case being decided are sufficiently different from those found in previous cases that the legal principles announced in these cases do not apply. In *Gideon v. Wainwright* (1963), for example, the U.S. Supreme Court ruled that Clarence Gideon, an indigent defendant who was charged with a felony in a Florida state court, should have been provided with an attorney to assist him with his defense. According to the

Court, “In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” Sixteen years later, however, the Court ruled in the case of *Scott v. Illinois* (1979) that an indigent defendant who was sentenced only to pay a fine was not entitled to an attorney. The Court’s earlier ruling that the right to a fair trial required the appointment of counsel for “any person haled into court” notwithstanding, in this case, the Court stated that the Constitution required only “that no indigent defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense.” What distinguished the two cases, in other words, was the fact that Gideon was sentenced to prison whereas Scott was not.

Occasionally, judges will decide that the precedent is no longer valid and should not be followed. They can handle this in two ways. They can simply ignore the earlier case and decide the case at hand as if there was no binding precedent, or they can overrule the earlier case. Often the process of overruling a precedent is gradual. The court finds more and more circumstances that distinguish new cases from the earlier case until it becomes obvious that the precedent has outlived its usefulness. Former Supreme Court Justice William O. Douglas (1974) argued that this gradual erosion of precedent “breeds uncertainty” since “years of litigation may be needed to rid the law of mischievous decisions which should have fallen with the first of the series to be overruled.”

According to Justice Douglas, then, it makes more sense for the court to overrule the outdated precedent as soon as it is clear that it has to go. The Supreme Court has done so on a number of occasions. In *Taylor v. Louisiana* (1975), for example, the Supreme Court considered a Louisiana law that gave women a blanket exemption from jury service; women who wanted to serve were required to ask that their names be placed on the lists from which jurors were chosen. The result was that few women volunteered, and most defendants, including Billy Taylor, were tried by all-male juries. In *Taylor*, which was decided in 1975, the Supreme Court struck down the Louisiana law and overruled a 1961 decision, *Hoyt v. Florida*, upholding a nearly identical Florida law.

In the *Hoyt* case, the Court ruled that women “are the center of home and family life” and therefore should be allowed to decide for themselves whether jury service was an unreasonable burden. According to the Court’s decision in the *Hoyt* case, it is not “constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.” Fourteen years later, the Court changed its mind, ruling that “if it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed.” Clearly, the Court’s interpretation of the requirement that the jury pool must be drawn from a **random cross section of the community**, as well as its view of the role of women, had

Table 1.2 Examples of Supreme Court Decisions Overruled by Subsequent Decisions	
Original Case	Subsequent Decision
<p><i>Plessy v. Ferguson</i> (1896)</p> <p>Upheld the constitutionality of racial segregation in public accommodations under the “separate but equal” doctrine.</p>	<p><i>Brown v. Board of Education</i> (1954)</p> <p>Struck down a Kansas law that established racially segregated public schools and stated that the doctrine of “separate but equal” has no place in education: “Separate educational facilities are inherently unequal.”</p>
<p><i>Bowers v. Hardwick</i> (1986)</p> <p>Upheld the constitutionality of a Georgia sodomy law; held that the right to privacy found in the Fourteenth Amendment does not extend to this type of sexual conduct.</p>	<p><i>Lawrence v. Texas</i> (2003)</p> <p>Struck down a Texas sodomy law; held that intimate consensual sexual conduct is protected by the Fourteenth Amendment.</p>
<p><i>Booth v. Maryland</i> (1987)</p> <p>The Eighth Amendment bars the use of victim impact statements during the penalty phase of a capital case; information provided in them is not relevant to the blameworthiness of the defendant.</p> <p><i>South Carolina v. Gathers</i> (1989)</p> <p>The Eighth Amendment precludes prosecutors from introducing evidence of the victim’s character during the penalty phase of a capital case.</p>	<p><i>Payne v. Tennessee</i> (1991)</p> <p>The Eighth Amendment does not bar the admission of victim impact evidence or prosecutorial argument regarding the victim’s character during the penalty phase of a capital trial; “a state may legitimately conclude that evidence about the victim and the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.”</p>
<p><i>Arkansas v. Sanders</i> (1979)</p> <p>A police search of personal luggage taken from a lawfully detained vehicle requires a warrant under the Fourth Amendment.</p>	<p><i>California v. Acevedo</i> (1991)</p> <p>Police may search a container in a vehicle without a warrant if they have probable cause to believe that it holds contraband or evidence.</p>

changed. (See Table 1.2 for examples of other instances in which the Supreme Court overruled its own decisions.)

The fact that statutes and constitutional provisions are ambiguous and that judges cannot always look to precedent for guidance in specific cases, then, means that judges are frequently called on to make law. Judges, in other words, do not simply “find the law.” As the *Hoyt* and *Taylor* cases reveal, in interpreting the law, they often must choose between competing social, economic, and political values.

Stare Decisis

Stare decisis means “let the decision stand.” Under the principle of stare decisis, if there is a prior decision on a legal issue that applies to a current case, the court will be guided by that prior decision and apply the same legal principles in the current case. In situations in which the law is ambiguous and the same issue has come up before, it makes sense to look to past decisions—that is, to precedent—to see how the matter was resolved previously.

For instance, in deciding whether searches are “unreasonable” under the Fourth Amendment, it makes sense for judges to examine past decisions regarding the issue. Stare decisis is thus the judicial practice of looking to the past for pertinent decisions and deferring to them. As Benjamin Cardozo (1974), who was a Supreme Court justice from 1932 to 1939, put it, the first thing a judge does “is to compare the case before him with the precedents, whether stored in his mind or hidden in books . . . in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins” (p. 26).

Stare decisis, then, is the principle behind establishing the value of prior decisions, or precedent. It is a principle that assures us that if an issue has been decided one way, it will continue to be decided that way in future cases. Through a reliance on precedent and the principle of stare decisis, common-law courts were able to provide litigants with some degree of predictability regarding the courts’ decisions.

Precedent establishes a legal principle, but not every pronouncement that a court makes in a ruling establishes precedent. Pronouncements that do are known as **ratio decidendi** (“the reason for the decision”), which is the legal principle or rationale used by the courts to arrive at their decisions. Additional supporting statements are called **obiter dicta** (“things said by the way”), or simply dicta. These statements are other legal or nonlegal arguments used to support the ratio decidendi and do not constitute precedent.

Precedent is not necessarily unchangeable. Judge-made law may be overruled by an act of the legislature if the constitution permits the legislature to do so. In addition, the court that issued the precedent may overrule it, or a higher court may reverse the decision of a lower court. If an intermediate-level appeals court decides an issue one way and the losing party appeals to a higher appeals court (such as a state supreme court), that higher court may reverse the decision of the lower court. Higher-level courts are not bound by the judgments of lower courts. They are bound only by the decisions of courts above them in the court structure.

Stare decisis, then, involves a respect for and belief in the validity of precedent. Precedent is simply the influence of prior cases on current cases. Understandably, courts are reluctant to reverse decisions they made previously because this is a tacit admission of error. Courts do so, however, when presented with a compelling justification. Thus, stare decisis is not an inflexible doctrine but merely the general rule. There are always exceptions, as with most areas of the law.

Alternatively, rather than expressly overrule a prior decision, a court may instead seek to *distinguish* the prior case from the present case on grounds that

the facts are slightly different. By doing so, the court can avoid overruling a prior decision while coming to what it considers the proper result in the present case. Until a decision is expressly overruled, it stands as an accurate statement of legal principles, or “good law.”

Judicial Review

What happens when two prior decisions are in conflict, and there is no clear precedent? Or when one law comes into conflict with another? In the United States, the answer to that question is the courts, through the power of judicial review. **Judicial review** simply means the court has the power to examine a law and determine whether it is constitutional. To make this determination, judges must examine the law and compare it with the Constitution. This requires them to interpret the language of both the statute and the Constitution. If the judge determines the law is constitutional, they uphold the law; if not, they declare it unconstitutional and therefore void.

For example, the Fourth Amendment prohibits “unreasonable” searches. Suppose a state legislature passes a law allowing police officers to search anyone they encounter on a public street. Is this law constitutional? Or does it violate the prohibition on unreasonable searches? To answer this question, judges must examine the history and meaning of “unreasonable” as contained in the Fourth Amendment. They do this by examining precedent.

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

Marbury v. Madison, 1803

Marbury v. Madison is perhaps the most important case ever decided by the Supreme Court because it established the authority of the high court. Article III of the Constitution created the Supreme Court, but it did not discuss whether the Supreme Court could review legislation or interpret the Constitution.

At the time of the adoption of the Constitution, there was heated debate concerning which branch of government had the authority to declare an act void. There were three suggestions on how to handle such a situation: (1) Each branch within its sphere of authorized power has the final say; (2) the Supreme Court has the final say, but only as to the parties in cases before the court; and (3) the Supreme Court has the final say. This controversy was finally resolved

by the opinion in *Marbury*. An examination of the case provides insight into this controversy and how the Supreme Court handled the situation.

President Adams, a Federalist, appointed 42 of his fellow Federalists as justices of the peace for the District of Columbia just days before turning over the office to incoming President Thomas Jefferson, a Democrat. Adams's secretary of state, John Marshall, delivered most of the commissions to the newly appointed justices of the peace but failed to deliver Marbury's.

The newly elected president's secretary of state, James Madison, refused to deliver Marbury's commission, so Marbury applied directly to the Supreme Court for a **writ of mandamus** (a writ compelling public officials to perform their duty). The Supreme Court was granted original jurisdiction in such matters by the Judiciary Act of 1789. The Supreme Court agreed to hear the case but was unable to hear it for 14 months because Congress passed a law that stopped the Supreme Court from meeting.

In 1803, the Supreme Court reconvened, heard the case, and decided Marbury was entitled to his commission but that the Supreme Court could not issue a writ of mandamus. Chief Justice John Marshall (formerly Adams's secretary of state) wrote the opinion of the court. Marshall said:

1. Marbury was entitled to his commission because he had a legal right that was not extinguished by the change in office of president or the failure to deliver the already signed commission.
2. A writ of mandamus was a proper legal remedy for enforcing Marbury's right.
3. However, the Supreme Court lacked the constitutional authority to issue such a writ. This was because the Judiciary Act of 1789 gave the Supreme Court original jurisdiction in such cases, but this grant of authority to the Supreme Court was unconstitutional because Article III of the Constitution defined Supreme Court jurisdiction and Congress could not expand this authority through a statute.

The Judiciary Act of 1789 had the effect of changing (by enlarging) the jurisdiction of the Supreme Court, but Congress cannot pass a statute that changes the Constitution. The only way to change the Constitution is through a constitutional amendment. As stated by Chief Justice Marshall, "an act of the legislature, repugnant to the Constitution, is void." In other words, the Constitution is superior to congressional legislation.

Prior to the decision in *Marbury*, Democrats argued that the Supreme Court lacked the authority to declare acts of other branches of the federal government unconstitutional, while Federalists supported judicial review. If the Supreme Court had issued a writ of mandamus, it could not have forced Madison to honor it. The Supreme Court thus was faced with a serious challenge to its authority. Marshall's opinion saved the court's prestige while allowing the Democrats to claim a political

victory (not having to appoint any more Federalists as justices of the peace). What was more important in the long term, the decision established as law the idea that the Supreme Court has the authority to review the constitutionality of congressional activity (and presidential acts): This is judicial review.

This was a major victory for the Supreme Court, and although opposed at the time, it was accepted at least in part because the result in the case was satisfactory to opponents of a strong Supreme Court. The Supreme Court did not use the power of judicial review to invalidate congressional legislation again until 1857.

The Role of Courts in the Criminal Justice System

It is misleading to view criminal courts as institutions isolated from the rest of the criminal justice system. Courts, which clearly are integral to the administration of justice, are but one part of the larger criminal justice system. However, the courts play two important and unique roles in the criminal justice system. The first and most common is **adjudication** of criminal offenses. The second is **oversight**.

Adjudication

The primary role played by the courts is to adjudicate criminal offenses—to process defendants who have been arrested by the police and formally charged with criminal offenses. Prosecutors decide who should be charged and then, provided a plea agreement does not circumvent trial, the defendant is brought to court. The state presents its case and so does the defense. The judge decides matters of law, and the judge or jury decides whether the defendant should be held accountable for the crime in question. If the defendant is convicted, the judge also imposes a sentence.

Both law enforcement and corrections officials play supporting roles in the adjudication of criminal offenses. The police determine who will be brought to court, and corrections officials make postsentencing decisions that affect offenders' punishment. However, "the official labeling of someone as a convicted criminal, and the determination of legitimate punishment can be done only by a court" (Eisenstein et al., 1988, p. 9). This adjudication function is most prevalent in limited and general jurisdiction courts at the state level and in U.S. district courts at the federal level. Moreover, adjudication is the most common court function. That is because there are many more trial courts than appellate courts and many more criminal defendants who must be processed than appeals that are filed.

Oversight

Courts, particularly the appellate courts, provide oversight, not just over the lower courts but over the criminal justice system in general. First, when cases are appealed to a higher level, the appellate court decides whether proper procedure

MOVIES and the COURTS

A Man for All Seasons (1966)

The protections that fall under the heading “due process” are now taken for granted in the American court system. But these rights did not always exist, and the early courts were not infrequently used to advance political (and personal) agendas rather than to do justice. An infamous historical example is depicted in *A Man for All Seasons*. This movie tells the story of the conflict between King Henry VIII and Sir Thomas More, the English Lord Chancellor. Henry VIII, a Catholic, seeks a divorce from his first wife, Catherine of Aragon, so that he may marry Anne Boleyn, who, he hopes, will bear his child. Divorce is generally not permitted by the Catholic Church at this time (the 16th century). He seeks the support of Sir Thomas More. More is a devout Catholic and although More does not agree with the King’s desire to divorce, he remains silent.

More’s principles are further tested, however, when the king is named the head of the Church of

England and subsequently when Parliament requires all to take an oath of allegiance to the Church of England or face a charge of treason. An expert in the law, More knows that if he does not state why he is opposed to taking the oath, he cannot be considered a traitor; More refuses to take the oath and is nonetheless arrested and imprisoned in the Tower of London. When More is finally brought to trial, he remains silent until after being convicted of treason on the perjured testimony of Richard Rich. He is then informed that Rich has been promoted to attorney general as a reward for his testimony against More. More then abandons his silence and denounces the illegal nature of the king’s actions, arguing the pope is the only true leader of the Catholic Church, not the king of England. He further declares that the immunity of the Church from State interference is guaranteed by the Magna Carta. More is condemned to death and eventually beheaded.

was followed at the lower level. The appellate court may be asked to decide whether the procedures used to select the jury were appropriate, whether the defendant was denied effective assistance of counsel, or whether the trial court judge should have moved the case to another jurisdiction because of prejudicial pretrial publicity. The appellate decision may come months or even years after the trial that led to the appeal, but the very ability of the appellate court to influence what can happen or should have happened at the lower level is the essence of oversight.

Appellate courts also oversee the actions of other criminal justice officials. They decide whether the behavior of police, prosecutors, defense attorneys, and corrections officials comports with or violates laws and constitutional provisions. Consider, for instance, the Supreme Court’s landmark 1985 decision in *Tennessee v. Garner*. The Court ruled that police officers cannot use deadly force to apprehend unarmed fleeing felons unless it is necessary to prevent the suspect’s escape *and* “the officer has probable cause to believe that the suspect poses