

Fifth Edition

Criminal Law for the Criminal Justice Professional



Norman M. Garland

Southwestern Law School

**Mc
Graw
Hill**



CRIMINAL LAW FOR THE CRIMINAL JUSTICE PROFESSIONAL, FIFTH EDITION

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To my wife, Melissa Grossan

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Preface

Criminal Law for the Criminal Justice Professional, fifth edition, presents a complete basic introduction to the substance of those rules and laws that comprise the fabric of the criminal justice system in the United States. This book, like the fourth edition, describes the structure of the system, the theories underlying criminal responsibility, and the elements of specific crimes. The general principles that motivate the lawmakers have not changed since the development of Anglo-American criminal law, although legislative detail and focus have varied.

This edition takes into account the shifts in emphasis of the lawmakers and courts in the development of American criminal law in the global political, economic, and social climate of the twenty-first century. Straightforward yet analytical, the book aims at delivering to students a timely overview of the state of American criminal law. The book is designed primarily for undergraduates enrolled in basic criminal law classes for Criminal Justice students.



Highlights of the Fifth Edition

Some of the highlights of the fifth edition of *Criminal Law for the Criminal Justice Professional* are as follows:

- **Chapter 1** provides an easy-to-follow introduction to the American criminal justice system.
- **Chapter 2** provides a succinct overview of those principles that limit the legislatures and courts in defining criminal restrictions, with a survey of specific constitutional provisions and how they function.
- **Chapters 3 through 6** present the basic principles of criminal responsibility, the elements of crimes, definitions of parties to crimes, explanation of incomplete crimes, and defenses to crimes. Basic criminal justice theory that has remained relevant over the decades is discussed in these chapters, with classic explanations and examples.
- **Chapter 7** on punishment and sentencing concisely discusses the theories of punishment and the current state of the evolving American law of sentencing. In recent years, no other area of the law has changed so much, especially in the arena of sentencing guidelines and capital punishment.
- **Chapters 8 through 11** present clear and concise definitions of specific crimes of homicide, other crimes against persons, crimes against habitation, and crimes against property, relating the elements of each crime by subject area. The fundamentalist approach to cataloging elements and updating where appropriate makes the coverage of the subjects complete yet user-friendly.
- **Chapters 12 through 16** concisely cover the specialty areas of white-collar crimes; crimes against public order, safety, and morality; drug- and alcohol-related crimes; crimes against the administration of justice; and organized crime, gangs, and terrorism.

All chapters include updated notes and permalinks for URLs.



Features

A number of learning tools are included to make the text easier to teach and, for students, easier to learn, enlivening the material with practical, concrete examples and applications.

- Chapter Objectives that begin each chapter challenge, encourage, and alert students to the major concepts that follow. Next is a Chapter Outline of the major chapter headings, allowing students to preview at a glance the material to be covered.
- The Summary by Chapter Objectives concluding each chapter provides general answers to questions posed by the objectives, an invaluable tool for students who need summation and reinforcement of each chapter's main points.
- Key terms are highlighted in the margins, boldfaced in the text, listed at the end of the chapter, and defined in a comprehensive Glossary at the end of the book.
- Application Case boxes present brief descriptions of important cases pertinent to the text.
- On the Job boxes describe employment opportunities related to the subjects discussed in the chapters.
- Web Exploration boxes point to websites relevant to surrounding topics and contain questions that invite further study.
- The Critical Thinking feature—questions for students that ask them to reflect on important concepts and theories—concludes the main sections of each chapter.
- End-of-chapter Review Questions stimulate class discussion.
- Problem-Solving Exercises, Workplace Applications, and Ethics Exercises pertain to workplace issues, highlight major principles from the chapters, and enable students to begin applying what they've learned.



The fifth edition of *Criminal Law for the Criminal Justice Professional* is now available online with Connect, McGraw-Hill Education's integrated assignment and assessment platform. Connect also offers SmartBook for the new edition, which is the first adaptive reading experience proven to improve grades and help students study more effectively. All of the title's website and ancillary content is also available through Connect, including:

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CHAPTER 1

Nature, Origins, Purposes, Structure, and Operation of the Criminal Justice System

CHAPTER OBJECTIVES

After reading and studying this chapter, you should be able to:

1. State a basic definition of law.
2. Explain what distinguishes the criminal law from other law.
3. Define the common law.
4. State the principle of legality.
5. Explain what the MPC is.
6. Describe the fundamental structure of the American criminal justice system.
7. Name the four basic police functions.
8. State what is required for a law enforcement officer to arrest a suspect.
9. State the purpose of a preliminary hearing.
10. Describe the two alternative methods for charging serious crimes.
11. List the three possible bases for a defendant's pretrial motion to dismiss.
12. State the four possible grounds for appeal of a criminal conviction.
13. State when a defendant is entitled to an attorney at trial.

CHAPTER OUTLINE

- 1.1 The Nature and Origins of Law**
Emergence of Written Law
Civil Law versus Criminal Law

- 1.2 Criminal Law in the United States**
Purpose of the Criminal Law
Statutory Criminal Law
The Principle of Legality

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|-----|--|-----|---|
| | Contemporary Applications of Common Law | | Courts |
| | Application Case 1.1 <i>Keeler v. Superior Court</i> | | Corrections |
| | The Model Penal Code | 1.4 | Operation of the Criminal Justice System |
| | The Growth of Federal Criminal Law | | Arrest |
| 1.3 | Structure of the Criminal Justice System | | Pretrial Procedures and Issues |
| | Law Enforcement | | Trial of the Case |
| | Prosecution and Defense | | Post-Conviction Procedures and Issues |
| | | | Review and Applications |

1.1 The Nature and Origins of Law

The definition of the word *law* is multifaceted and ranges from simple to complex. For example:

- One dictionary definition of law is “a rule of conduct or procedure established by custom, agreement, or authority.”¹
- A frequently quoted definition of law is “that which is laid down, ordained, or established.”² In this very general sense, law could consist of a culture’s moral code, the commandments of a religion, or the regulations enacted by a political body to govern its members.

In the United States today, most citizens understand the concept of **law** to consist of:

- The federal, state, or local enactments of legislative bodies.
- The known decisions of the courts of the federal and state governments.
- Rules and regulations proclaimed by administrative bodies.
- Proclamations by executives of the federal, state, or local government.

Lawmakers distinguish between two types of rules: (1) religious and moral values and (2) rules created by government to protect individuals and promote social welfare. People recognize that some actions may be immoral even though they are not illegal. In addition, people generally believe that they should be able to live according to their religious principles, as long as their actions do not violate the law.

Citizens of the United States may share a common view of the legitimate sources of law but may also disagree about what behaviors should be regulated by the government. For example, some people believe that abortion should be considered murder and thus should be prohibited by law; others hold that decisions about abortion should be made on personal religious or moral grounds, without governmental interference.

By June 2019, in the United States, there has been a successful campaign to enact legislation that restricts access to abortions. The goal is for the Supreme Court to erode or reduce the right to abortion established by *Roe v. Wade*. In May 2019, Alabama passed a law that virtually eliminated abortions. Louisiana, Mississippi, Ohio, and Georgia passed what is known as a heartbeat bill that prohibits an abortion if a heartbeat is detected, which could be as early as 6 weeks. Kentucky and Iowa had heartbeat legislation that was struck down by the court. Arkansas prohibits abortion after 18 weeks, while Missouri prohibits after 8 weeks. Utah also prohibited abortion after 18 weeks, but it was struck down. At the same time, Florida, New York, Maine, and Nevada were attempting to enact legislation to protect or expand the right to abortion.³

There is also disagreement on the role government should play in other matters of life and death, such as physician-assisted euthanasia, the use of reproductive technologies, and genetic screening. Other practices, such as gambling and prostitution, are considered immoral by some people, but morally acceptable by others. States differ in their approach to such practices: Gambling of all kinds is prohibited in some states, whereas others use lotteries as a way of raising revenues for public schools.

Many cultures do not make the distinction between secular (nonreligious) and religious law that is so central to American culture. For example, Islamic law, or Sha'ria, is derived from the sacred writings of the Koran. It provides the rules by which Muslim society is organized and governed, and the means for resolving conflicts between individuals and between individuals and the state. In the American colonies, witchcraft was an offense punishable by death under British law because of centuries-old church persecutions of people who were thought to practice beliefs other than Christianity. In Salem, Massachusetts, 20 persons (19 women and 1 man) were hanged as witches in 1692. The English statutes on witchcraft were not repealed until 1736, after thousands of women had been executed for the crime of practicing witchcraft.

Emergence of Written Law

From time immemorial, humankind has sought to minimize turmoil and chaos by the imposition of some set of rules by which to live. From the edicts of kings and conquerors to the U.S. Constitution, rules of conduct for society have been proclaimed and enforced.

Ancient Law

Although human societies have always had rules of conduct, the first known written laws are believed to be those found on clay tablets in Ur, one of the city-states of Sumeria. They were created about 5,000 years ago. A much more extensive set of laws was established by King Hammurabi, who ruled Babylonia from 1792 to 1750 BC. The *Code of Hammurabi* consisted of 282 laws that dealt with marriage, divorce, debt, wages, and the practice of slavery. It also defined criminal acts and penalties for committing them. The laws were carved on a black stone monument that was eight feet high.

English and American Common Law

Every ancient nation eventually developed formal legal codes, and the American legal code derives primarily from that of England. Before the Norman Conquest, the law in England was administered primarily according to Anglo-Saxon customs, with the church playing a major role. After William of Normandy conquered England in 1066, he established the *eyre*—that is, a court with judges who traveled throughout the kingdom once every seven years to hear cases as representatives of the king. The decisions of these judges and of other members of the central judiciary created by the Normans to administer the law formed a large part of England's **common law**.

In England after the Norman Conquest, crimes and civil wrongs were less clearly defined at first. There was no penal code or even a set of criminal taboos discernible from a body of judicial decisions. Common law offenses simply consisted of the use of force against others, which violated the king's peace and could result in both punishment and the imposition of monetary sanctions. Under common law, the use of violence, rather than the consequences of a violent act, was condemned. In other words, the focus was on the violation of the king's peace, rather than on the harm done to the victim.



Everett Collection Historical/Alamy Stock Photo

The Origins of the Common Law Because the United States was originally an English colony, the two countries share a common law heritage.

meet citizens' needs. American statutory law was, and is, created through the state and federal legislatures. Today, the term *common law* refers to the body of law that is derived from judicial decisions rather than from legislative enactment. It can also refer to all of the laws that came from England and from colonial America.

Today, virtually all criminal law is statutory law. This means that crimes are defined by the legislatures of the states and the federal government. The shift came because of the belief that crimes should be defined by elected legislative bodies that are more representative of the people rather than by the courts. You will learn about the two main types of law in the United States in the next section.

Civil Law versus Criminal Law

Today, the U.S. judicial system provides for criminal law violations, also called *crimes*, and civil law violations, also called *torts*.

Criminal Law

Criminal law is different from other types of law, and from civil law in particular, because it involves a violation of public rights and duties, which create a *social harm*. Just as the common law considered a crime to be a violation of the king's peace, rather than a harm done to a victim, modern crimes are considered to be social harms that affect the entire community and that, in turn, must be punished by the community. In other words, what distinguishes the criminal law from all other law is that the criminal law seeks to regulate acts that are contrary to the community interest of the social or governmental unit—federal, state, or local.⁵

Civil Law

Civil law deals with matters that are considered to be private concerns between individuals. It includes laws dealing with personal injury, contracts, and property, as well as administrative law. A violation of civil law is called a **tort**. When a tort is committed, civil law provides a remedy in the form of an action for damages. The same is true for violations of contractual obligations.

The common law developed from this foundation through judicial interpretation and elaboration of the concept of violence until crimes were recognized in such specific categories as homicide, robbery, arson, and assault. Eventually, especially from the sixteenth century on, enactments of Parliament added specific crimes to the array of common law offenses.⁴

Emergence of Modern Criminal Law

When the 13 colonies were established in America, they adopted England's common law. As the colonies developed and the United States was formed, the law of the United States developed separately from the English common law tradition.

Eventually, **statutory law** replaced common law to

For legal purposes, the same act may be both an offense against the state, which is a crime, and an offense against an individual, which is a tort. If someone steals another person's property, the offender may be punished under criminal law by imprisonment and/or a monetary fine and may be required to pay restitution to the victim. In addition, the victim can sue in civil court for monetary damages. The trials of O. J. Simpson in the 1990s illustrate the overlapping of civil and criminal law. In October 1995, Simpson was acquitted of the murders of Nicole Brown Simpson and Ronald Goldman. However, in February 1997, in a civil trial brought against Simpson by the family of Ronald Goldman, the jury awarded \$8.5 million in damages.



CRITICAL THINKING 1.1

1. Why does the complexity of the definitions of law vary so much?

1.2 Criminal Law in the United States

The American and French revolutions stimulated a legislative movement in the area of criminal law. Of special concern was the severity of the criminal law: By 1800, more than 200 different kinds of offenses were punishable by death under English law.⁶

Much of the criminal law reform in England and the United States was influenced by the utilitarian legal philosopher Jeremy Bentham. Bentham reorganized the law of crimes according to the amount of social harm they caused, and most American states have adopted more or less coherent penal codes based on this approach. At least since the late nineteenth century, the criminal law has been expressed in a penal code in all but a few American jurisdictions.

Purpose of the Criminal Law

The underlying purpose of the criminal law is to prevent and control crime. The criminal justice system seeks to achieve this goal by sanctioning behavior that violates the criminal law. To say this, however, is only to begin the subject of inquiry. Other questions include:

- How do we know what conduct to sanction?
- Who, among those who may have engaged in the conduct, should be sanctioned?
- What sanction should be imposed?

The question of what conduct to sanction, also called the question of criminalization or decriminalization, has largely been answered with respect to what most people think of as crime—offenses such as murder, rape, assault, robbery, burglary, and traditional forms of theft. The modern focus of debate is on the question of criminalization in other areas, such as offenses designed to protect public morality, the economy, or the environment or generally to promote public welfare.

The question of who among those who have engaged in the conduct should be sanctioned involves consideration of the basic elements of criminal culpability and criminal defenses. Generally, the criminal law seeks to sanction only those persons who intentionally violated the criminal law, under circumstances that did not involve excuse or justification. The question of what sanction to impose is covered in a later section of this chapter, which discusses punishment.

Substantive Criminal Law versus Procedural Criminal Law

Substantive criminal law consists of those laws, mostly statutory, that define what constitutes criminal conduct subject to prosecution by the state and set forth the punishment for such criminal acts. The substantive criminal law identifies the components required for liability, both mental and physical. Procedural criminal law dictates the methods and the means by which the state proceeds, through the police, public administrators, and the courts, to enforce rights or duties of the substantive law. For example, suppose a person is charged with robbery, which is defined as taking something from another person by force or fear. The possible punishment for robbery is imprisonment. The accused person has just been arraigned in court. The definition of robbery and the punishment that can result are substantive law; the arraignment is procedural law.

The Elements of a Crime

A more complete definition of a crime includes the specification of five elements. A crime has been committed when the following elements are present:

1. A willful unlawful act, the *actus reus* (see **Chapter 3**, pp. 62–67, for a full discussion of *actus reus*).
2. A guilty mind, the *mens rea* (see **Chapter 3**, pp. 68–73, for a full discussion of *mens rea*). The guilty mind element does not require intent to violate the law, but rather the intent to commit the act that the law prohibits.
3. A concurrence of act and intent.
4. The occurrence of harm to a person, property, or society.
5. A causal relationship between the criminal act and the harm.

Statutory Criminal Law

The development of the common law of crimes that began in eleventh-century England continues to a smaller degree today, because some nonstatutory crimes are still recognized in some jurisdictions. Otherwise, the criminal law develops and is redefined by legislative enactment, often in response to societal pressures. For example, in response to a public outcry against rising crime, the U.S. Congress adopted the Violent Crime Control and Law Enforcement Act of 1994, which related to a range of problems from sexual offenses to drive-by shootings. Congress, through such enactments, refines and redefines the criminal law. Similarly, state legislatures regularly redefine the criminal law in each state.

All 50 states and the federal government have their own separate sets of criminal statutes. No state is bound by the criminal laws of another state or by the laws of the federal government. For the most part, criminal law is a matter of state jurisdiction, although the reach of federal criminal law has expanded in recent times. Nonetheless, federal criminal law can apply only to those matters to which federal jurisdiction extends, such as national aspects of drug control or other crimes that involve interstate activities. (See **Figure 1.1.**)

FIGURE 1.1***An Introductory Excerpt from the Violent Crime Control and Law Enforcement Act of 1994*****U.S. Department of Justice Fact Sheet**

The Violent Crime Control and Law Enforcement Act of 1994 represents the bipartisan product of six years of hard work. It is the largest crime bill in the history of the country and will provide for 100,000 new police officers, \$9.7 billion in funding for prisons, and \$6.1 billion in funding for prevention programs that were designed with significant input from experienced police officers. The Act also significantly expands the government's ability to deal with problems caused by criminal aliens.

The Crime Bill provides \$2.6 billion in additional funding for the FBI, DEA, INS, U.S. Attorneys, and other Justice Department components, as well as the Federal courts and the Treasury Department.

SOURCE: <http://www.ncjs.org>

The Principle of Legality

Another reason for the decline of judicially created criminal law definitions is the principle of **legality**, which is a core concept of the American system of criminal justice. Under this principle, no one can be punished for an act that was not defined as criminal before the person did the act.

The principle of legality is *nullum crimen sine lege, nulla poena sine crimen*, which means “no crime without law, no punishment without crime.” Basically, this means “that a person may not be punished unless [his or] her conduct was defined as criminal before [he or] she acted.”⁷ This principle is deeply embedded in the American system of justice. If a court declares that an act is criminal, and it has not previously been defined as criminal, then the principle of legality is violated.

The principle of legality has three corollaries:

1. Criminal statutes should be understandable to reasonable law-abiding people.
2. Criminal statutes should be crafted so as not to delegate basic policy matters to police, judges, and juries for resolution on an ad hoc and subjective basis.
3. Judicial interpretation of ambiguous statutes should “be biased in favor of the accused.”⁸

Contemporary Applications of Common Law

Many states have abolished common law crimes, relying exclusively on statutory or code definitions. For example, Section 6 of the California Penal Code provides, “No act or omission . . . is criminal or punishable, except as prescribed or authorized by this Code.”⁹ But although modern criminal law is essentially statutory, the role of the courts continues. This is so because the criminal statutes often contain vague or general language that requires courts to interpret the statute’s meaning when applied to a particular case.

A classic example is the statutory definition of burglary, which makes a “nighttime” burglary a more serious offense. The term *nighttime* was not defined in some statutes, requiring the courts to decide when a burglary would be considered to have occurred at night. You will read more about how modern laws have adapted to this issue in **Chapter 9**.

Even though the common law is but an antecedent to today’s modern statutory criminal law in most jurisdictions, the common law definitions of crimes continue to play a role in understanding the criminal law. Some states have not abolished common law crimes and still expressly recognize common law offenses, although prosecution of such offenses in those jurisdictions is rare.¹⁰

Moreover, many states' criminal laws are but codifications of the common law crimes. Therefore, if there is a question of statutory meaning, the courts will look to the common law definitions to help understand the term in question. One example of this occurred when the California Supreme Court looked to the common law definition of human being to determine that a fetus could not be a murder victim (see **Application Case 1.1**).¹¹



Application Case 1.1

Keeler v. Superior Court

At one time the definition of murder in California, which had abolished the common law, was the unlawful killing of a human being with malice aforethought. In the case of *Keeler v. Superior Court* (1970), the defendant was charged with murder of a fetus that was stillborn as a result of the defendant's attack on the mother, his ex-wife. The defendant approached his ex-wife, said he heard she was pregnant, and, stating "I'm going to stomp it [the baby] out of you," shoved his knee into her abdomen and struck her.

The Supreme Court of California looked to the common law in concluding that a fetus born dead was not a "human being." As a result, the defendant's murder conviction was set aside. Soon after the *Keeler* decision, the California legislature redefined "human being" in the Code section defining murder to include a fetus.

SOURCE: *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970).



1.1 On the Job

Crime Prevention Officer

Description and Duties: Crime prevention officers (CPOs) are highly experienced and well-trained law enforcement professionals who recognize the value of engaging and educating the community in crime prevention initiatives. CPOs usually are recruited from seasoned, veteran police officers. These officers typically have had years of experience responding to the crimes that are most likely to occur in the local work environments, including but not limited to burglaries, identification fraud, theft, and robberies. A veteran police officer who has investigated numerous crimes will have recognized common patterns among these crimes and therefore would have identified and applied various techniques to prevent them.

Salary: Salaries depend upon experience, training, and other factors.

Other Information: Although all police officers are, to a certain extent, CPOs, this position is generally held by an experienced police officer who has likely spent some years on patrol and now is more involved in the specific task of crime prevention. CPOs regularly attend training. Many CPOs are

trained and certified through their state agencies or organizations in crime prevention. In Colorado, for example, to become certified in basic crime prevention requires an officer to study numerous topics and complete a certification examination. Subjects covered during the course include community policing, neighborhood watch, security surveys, workplace violence, identity theft, retail security, computer safety, crime-free multihousing, juvenile crimes, security hardware, and information on many other topics.

FOR MORE INFORMATION: <https://www.criminaljusticedegreeschools.com/criminal-justice-careers/crime-prevention-specialist/> [<https://perma.cc/G9ZD-T338>].

The Model Penal Code

In 1923, the American Law Institute (ALI), an organization of lawyers, judges, and legal scholars, was founded for the purpose of clarifying and improving the law. One of the major factors leading to the establishment of the ALI was general dissatisfaction with the criminal law. (See **Figure 1.2**.) In 1931, a proposal for a model penal code was presented, but the Depression prevented funding the project. In 1950, a grant from the Rockefeller Foundation rekindled the model penal code project, which got under way in 1952. However, it was not until 1962, after 13 tentative drafts, that the ALI published the Proposed Official Draft of the Model Penal Code.

FIGURE 1.2

The American Law Institute

The American Law Institute was organized in 1923 following a study conducted by a group of prominent American judges, lawyers, and teachers known as “The Committee on the Establishment of a Permanent Organization for the Improvement of the Law.” The Committee had reported that the two chief defects in American law, its uncertainty and its complexity, had produced a “general dissatisfaction with the administration of justice.”

According to the Committee, part of the uncertainty of the law, as it then existed, was due to the lack of agreement among members of the profession on the fundamental principles of the common law. Other causes of uncertainty were reported as “lack of precision in the use of legal terms,” “conflicting and badly drawn statutory provisions,” “the great volume of recorded decisions,” and “the number and nature of novel legal questions.” The law’s complexity, on the other hand, was attributed in significant part to its “lack of systematic development” and to its numerous variations within the different jurisdictions of the United States.

The Committee’s recommendation that a lawyers’ organization be formed to improve the law and its administration led to the creation of The American Law Institute. The Institute’s charter stated its purpose to be “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” Its incorporators included Chief Justice and former President William Howard Taft, future Chief Justice Charles Evans Hughes, and former Secretary of State Elihu Root; Judges Benjamin N. Cardozo and Learned Hand were among its early leaders.

SOURCE: <https://www.ali.org/about-ali/> [<https://perma.cc/DL4K-WTR2>]

The **Model Penal Code (MPC)** is a comprehensive recodification of the principles of criminal responsibility. The drafters of the MPC relied upon existing sources of the criminal law, including codes, judicial opinions, and scholarly commentary. The ALI did not expect or intend that the MPC would be adopted in its entirety anywhere, or that it would result in a uniform national criminal law. The hope was that the MPC would

generate a systematic reevaluation of the criminal law in the nation, and that hope has been fulfilled. An overwhelming majority of the states have adopted revised criminal codes as a result of the MPC. The MPC stands as a model for the reform of principles of American criminal responsibility.¹²

The Growth of Federal Criminal Law

Prior to the Civil War, the power to define and punish crimes in the United States was exercised principally by the states. Since the Civil War, federal criminal law has expanded to overlap areas that previously were within the exclusive province of the states. Thus, there has been an increase in the overlap of federal and state criminal law authority.

The U.S. Constitution restricts the power of the federal government, including its authority, to define and prosecute crimes. The Constitution explicitly enumerates the federal crimes of treason and counterfeiting, as well as crimes against the law of nations and crimes committed on the high seas.¹³ All other federal criminal jurisdictions emanate from the “necessary and proper” clause of Article I, Section 8 of the Constitution, which grants Congress the power to pass legislation necessary to implement any enumerated federal power.

Since earliest times, the U.S. Supreme Court has upheld the exercise of this power. Especially since the Civil War, Congress has enacted criminal laws relating to a wide range of subjects, including civil rights, use of the mails, commerce, narcotics, extortion and robbery affecting interstate commerce, interstate travel to facilitate illegal activities associated with organized crime, organized crime itself, and racketeering.¹⁴ Thus, the definition of federal crimes is an important aspect of the study of American criminal law.



CRITICAL THINKING 1.2

1. Explain the historical significance of the common law.
2. Why is statutory law taking the place of common law in many situations?

1.3 Structure of the Criminal Justice System

The criminal justice system can be viewed from at least three perspectives: as a social system, as a body of legal rules, and as an administrative system.¹⁵ Viewed as a social system, the criminal justice system encompasses all levels of society, from the legislature that enacts the penal code to the citizens whose acts are governed by those laws. This perspective on the criminal justice system is beyond the scope of this book. The criminal justice system as a body of legal rules will be the primary focus of subsequent chapters in this book.

The remainder of this chapter analyzes the criminal justice system as an administrative system. In this role, the criminal justice system is the official apparatus for enforcing the criminal law. It consists of law enforcement agencies, prosecution and defense attorneys, courts, and correctional institutions and agencies. **Figure 1.3** provides an overview of the criminal justice system.

Law Enforcement

The main law enforcement agency in the United States is the police force. Police departments in cities, sheriff's departments in counties, state police, and state bureaus of investigation comprise the largest number of law enforcement officers in the country. In 2016, police departments serving cities with population exceeding 25,000 employed an average of 16.8 officers and a total of 21.4 personnel for every 10,000 residents.¹⁶ This statistic does not include the enormous number of private police (also known as private security) employed on private property such as in office buildings, apartment buildings, shopping malls, and private residential communities. The number of private police engaged in patrol is larger than the number of law enforcement officers engaged in the same activity.¹⁷

The four basic police functions are prevention, investigation, detection, and court preparation.

Prevention

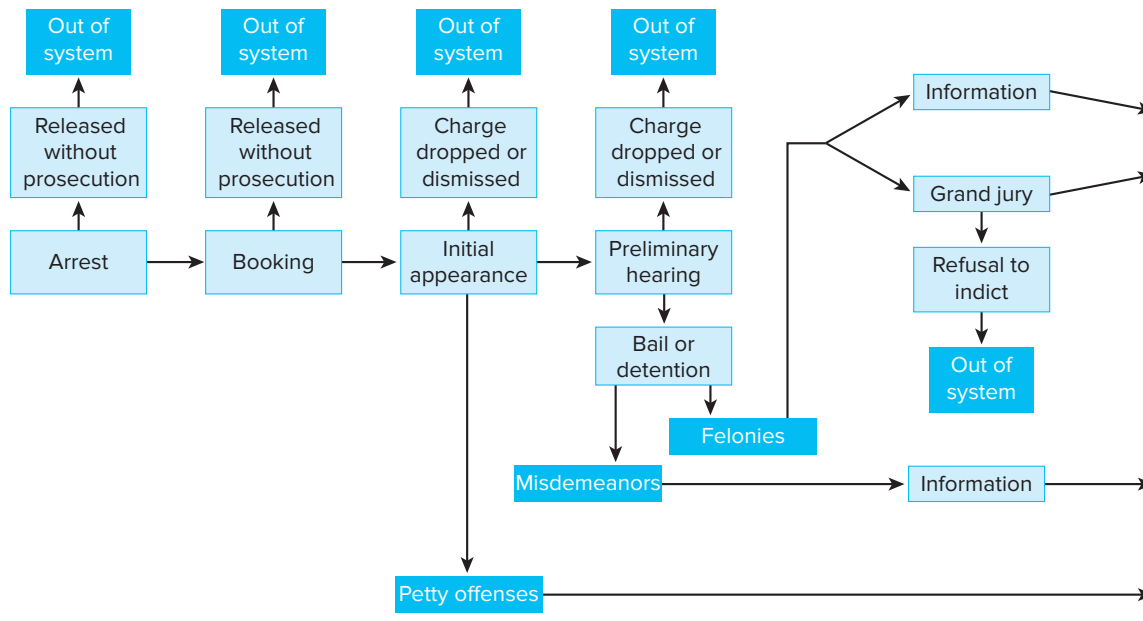
Prevention is carried out by low-ranking officers assigned to cruise an area and watch for criminal activity. In the course of carrying out his or her duties, the police officer exercises substantial discretion in deciding whether to arrest a person suspected of criminal wrongdoing. It is impossible for police officers to arrest all the offenders they encounter. In addition to directly addressing crime, police departments spend a substantial amount of their time carrying out public services such as traffic control, crowd control, and emergency services.

Investigation

Investigation is performed by officers at all levels. Patrol officers often are the first to respond to the scene of a crime and are responsible for securing the area and sometimes gathering evidence. Detectives are usually then called in to perform the main investigation of the crime. Investigation may include examining the crime scene, speaking with witnesses, speaking with victims, taking photographs, and collecting evidence such as fingerprints or DNA to be sent to various labs. It may also entail showing victims photos of possible perpetrators, performing lineups, writing reports, and arresting suspects. For example, in murder cases, the Los Angeles Police Department puts together what it calls a Murder Book, which includes all of the reports involved, a chronology, a witness list, information about the suspect(s), victim(s), and witness(es), photos, and lineup information. Police are often responsible for bringing a case to the district attorney's office to be filed.

Detection

Detection is usually performed by specialized squads consisting of older, more experienced, and higher-ranking officers. Activities associated with crime detection include organized police attempts to locate violators by such devices as setting up roadblocks to check for driving under the influence, monitoring activities in high-crime areas to observe drug trafficking, and using undercover agents to ferret out clandestine criminal activity. Another form of detection work, which has become the focus of popular television dramatic representation, is the use of forensic science in the solution of crimes as well as the preparation of such evidence for presentation at trial.

FIGURE 1.3**Overview of the Criminal Justice System****Prosecution and Pretrial Procedures**

Source: Based on Report of the President's Commission on Law Enforcement and the Administration of Justice: *The Challenge of Crime in a Free Society* 8 (1967).

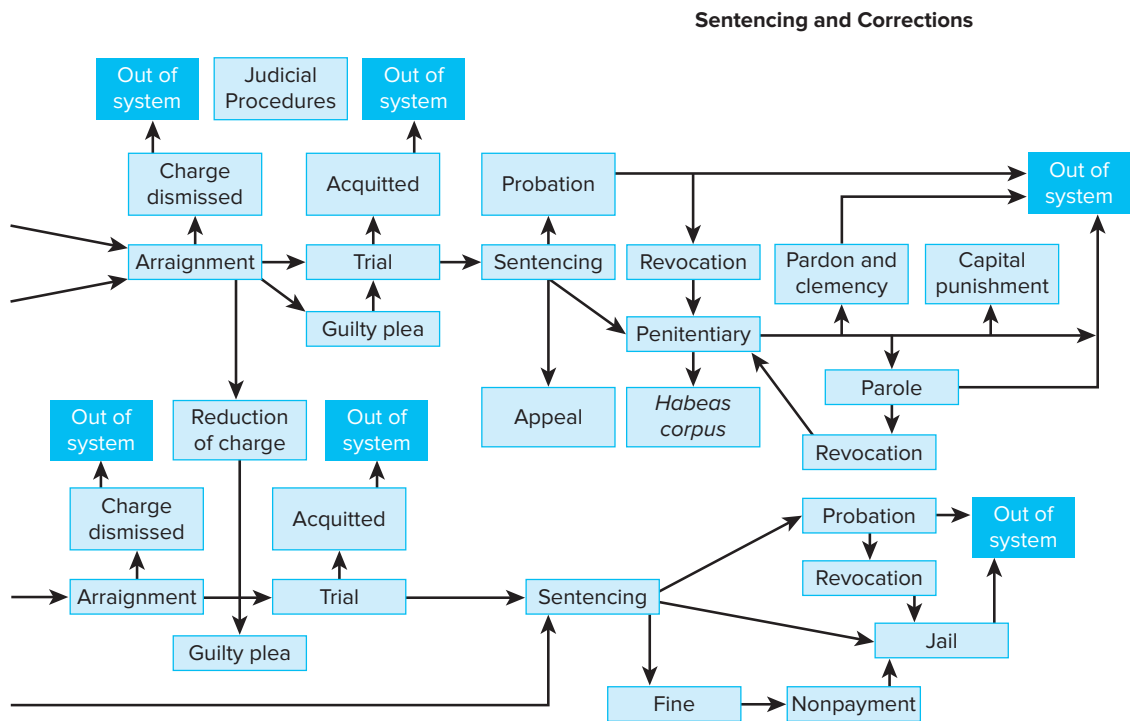
Court Preparation

The police officer's court preparation often begins with the gathering of evidence and the investigation. The officer then has to appear and testify at any and all hearings at which he or she is needed. Officers must prepare for court by reviewing the reports written during their investigation.

Nationally, the Federal Bureau of Investigation (FBI) is charged with the responsibility of investigating federal law violations. Other federal law enforcement agencies include the Drug Enforcement Administration; the Bureau of Alcohol, Tobacco, Firearms and Explosives; the United States Marshals Service; the Bureau of Postal Inspection; the Secret Service; and the Department of Homeland Security (DHS). The Department of Homeland Security was founded on November 25, 2002. Its mission is to secure the nation from threats it faces with honor and integrity and safeguard the American people, their homeland, and their values. It is a cabinet department of the U.S. Federal Government and consists of 22 agencies, including the secret service, customs and border patrol, FEMA, and ICE.¹⁸

All law enforcement agencies provide assistance to the prosecuting attorneys in presenting evidence in court to prosecute those arrested for criminal activities. Therefore, gathering evidence, maintaining the evidence collected, and preparing the evidence for presentation in a court of law are major functions of law enforcement agencies. For these purposes, most law enforcement agencies hire specially trained and educated personnel who are familiar with such specialized fields as ballistics, fingerprint analysis, blood stain analysis, and other areas of scientific methodology.

FIGURE 1.3 (CONTINUED)



Prosecution and Defense

The American criminal justice system is an adversarial one. This means that the process by which guilt is determined is competitive, and the prosecution and defense are seen as adversaries, or rivals. In the American criminal justice system, the accused is presumed innocent until proven guilty, and the right to counsel attaches even before he or she is brought to court (at least with respect to an accused's decision whether or not to remain silent). The prosecuting and defending attorneys contend against each other, seeking a result favorable to their interests. The judge and jury function as independent judicial officers. Decisions from the point before arrest to the end of the process are shaped by this adversarial nature of the judicial system.

The chief prosecuting attorney in most state jurisdictions is a full-time, public county official. He or she is usually elected to office and has a staff of assistant prosecuting attorneys. In some states and in the federal system, the prosecutor is an appointed official. In some rural areas, the office of the prosecutor may be occupied by only one person, who may work only part-time at the job. In many urban areas, the prosecutor's office is very large. The Office of the District Attorney of Los Angeles County, with more than 1,000 lawyers, is said to be one of the largest law offices in the country.

The chief prosecutor in the federal system is the attorney general of the United States. In each of the 94 federal districts,¹⁹ the chief prosecuting officer is the U.S. attorney for that geographic district. The attorney general and the U.S. attorneys are all appointed by the president of the United States. The assistant U.S. attorneys are all federal employees.

It is the job of the prosecutor to take a case from the police and pursue it until the case terminates by trial verdict, guilty plea, or dismissal. The prosecutor must decide whether to pursue a formal charge and, if so, what crime to charge. The prosecutor is also responsible for conducting any plea negotiations, deciding whether to dismiss charges, and trying the case.

Beginning in the 1960s and as refined in recent years, the U.S. Constitution requires that a defendant who is actually incarcerated in jail or prison is entitled to an attorney whether or not he or she can afford one. Moreover, any suspect who is interrogated by the police is entitled to warnings about the right to remain silent and to have an attorney, whether or not the suspect can afford one, present during interrogation. Therefore, many states and the federal government find it necessary to provide defense counsel to many criminal suspects and defendants. This is accomplished either through the private bar (the local attorneys association) or a public defender system.

Defense counsel must zealously represent the criminal defendant from the point of interrogation through the trial process, demanding that the prosecution respect the defendant's rights, treat the defendant fairly, and meet the burden of proof beyond a reasonable doubt in the event the case goes to trial.



1.2 On the Job

Public Defender

Description and Duties: Work with defendants, victims, witnesses, persons having an interest in criminal cases, and varying levels of other governmental organizations. Interact with persons of diverse backgrounds and educational levels. Effectively manage the public in emotional and occasionally hostile situations. Work flexibly with changing deadlines and priorities. Higher job levels require experience as an attorney in the practice of criminal law. Occasionally, experience in a civil or general practice law office can apply.

Salary: Salaries vary from approximately \$61,000 to \$120,000, depending on location and experience.

Other Information: This job is usually a valuable stepping stone for young attorneys seeking to gain experience, but some attorneys make it their career. State applicants are required to have active membership in their state's bar association and must provide a bar number when applying. Federal applicants should be in good standing with a state bar and become admitted to the federal court for which they are applying. Spanish language proficiency is highly desirable.

SOURCE: <https://www.indeed.com/salaries/Public-Defender-Salaries,-California> [https://perma.cc/RYK2-VUGP]; <http://www.coloradodefenders.us/wp-content/uploads/2018/11/OSPD-FY-2019-20-Budget-Request-1.pdf> [https://perma.cc/54BU-594V]

Courts

The United States has a dual judicial system consisting of the federal and state courts. Federal courts exist throughout the nation, and each state also has its own judicial system. All federal offenses are prosecuted in federal court, and all state offenses are prosecuted in state courts. The **jurisdiction** of a court is the scope of its power or authority to act with respect to any case before it. The judicial power of the federal courts, specified in Article II of the U.S. Constitution, "shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

The staff of the courts includes, in addition to the judge, courtroom clerks, judges' clerks, and bailiffs. Bailiffs are law enforcement personnel assigned to keep order in the courtroom, attend to juries, oversee prisoners who are in custody during their court appearances, and otherwise provide security in the courtroom. In many jurisdictions, the bailiff is a deputy sheriff; in the federal courts, the bailiffs are deputy U.S. marshals.

Federal Courts

The federal court system currently includes trial courts in each state and 13 federal courts of appeal, arranged by circuits. Twelve of these are numbered circuits and one is the federal circuit (see **Figure 1.4**). The federal courts have jurisdiction to consider cases charging defendants with violation of federal criminal laws.

State Courts

Each state also has its own court system. The structure of most state court systems is similar to that of the federal court system: trial courts, intermediate appellate courts, and a supreme court. In most states, the trial courts are organized by county. Furthermore, in most states, the trial courts are divided into two levels, an inferior and a superior court. The inferior court, often called the municipal court or justice of the peace court, conducts preliminary hearings in felony cases and trials in cases involving misdemeanors or petty offenses. The superior court, sometimes called the circuit or district court, is a court of general jurisdiction and has jurisdiction over felony trials (see **Figure 1.5**).

FIGURE 1.4

The Federal Court Structure

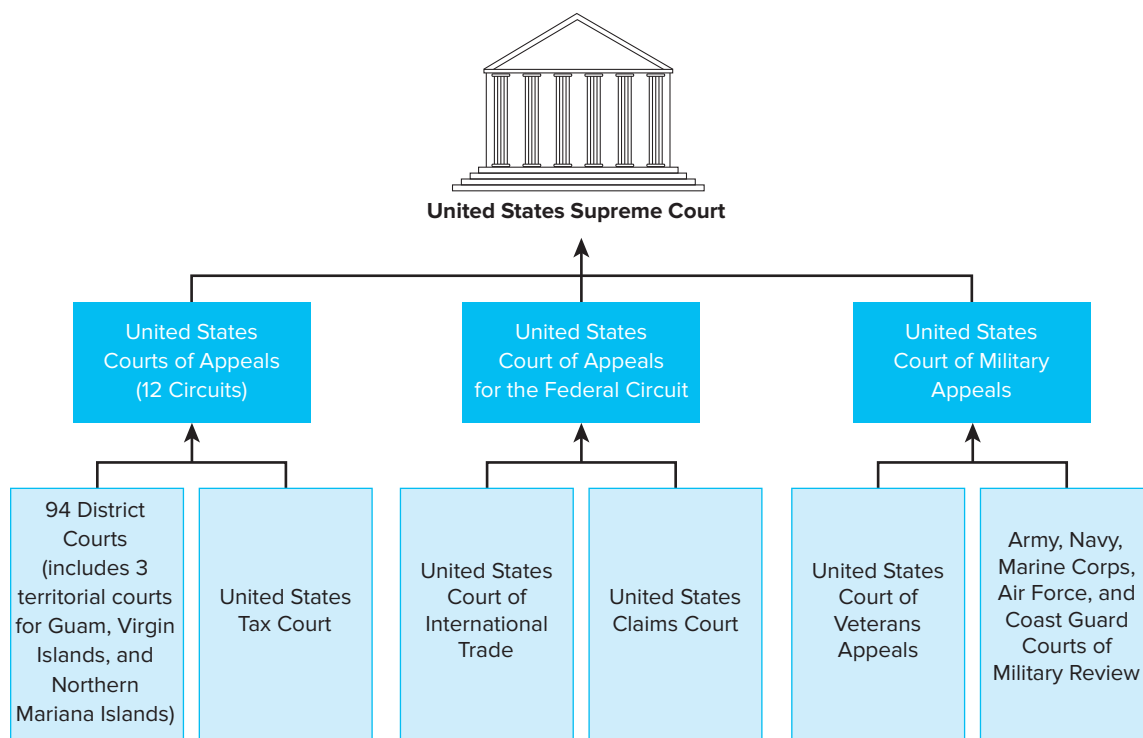
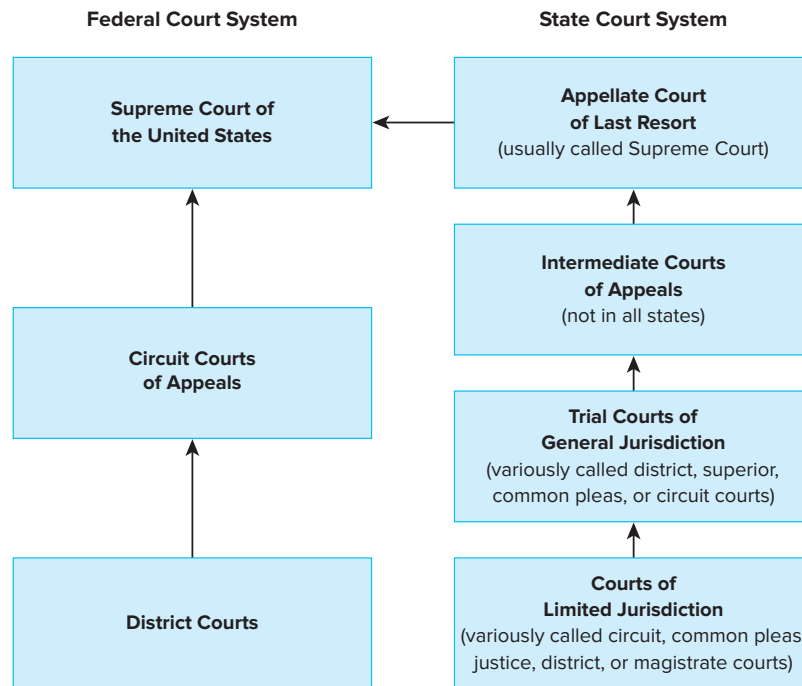


FIGURE 1.5***Dual Court System of the United States******Juvenile Courts***

Each state also has a juvenile court system. Criminal offenders under a certain age, usually 18 or 16, are dealt with in juvenile courts by way of civil, rather than criminal, proceedings. If the offense is particularly serious, the juvenile may be treated as an adult, and the case will be heard in the criminal court. Many youthful offenders who commit offenses that would be crimes if committed by an adult are tried in the juvenile courts before specialized judges who seek to determine the youth's involvement and try to rehabilitate rather than punish the offender.

Juvenile court procedure was intended to be more informal than that of criminal courts. However, U.S. Supreme Court decisions since the 1960s have imposed due process restrictions on the juvenile courts that, although they have increased the rights of juvenile offenders, have also caused juvenile proceedings to become more formal and thus more like those in criminal courts.

Courts and the Fourteenth Amendment

Since about 1930, the U.S. Supreme Court has been interpreting the due process clause of the Fourteenth Amendment to incorporate constitutional criminal procedural requirements that apply to the states. These rights include:

- The right to trial by jury in cases involving serious offenses.
- The right to assistance of counsel in any case in which a sentence of more than six months in jail or prison may be imposed.

- The privilege against self-incrimination, including a ban against comment by the prosecution on the defendant's failure to testify.



Stockbyte/Getty Images

Typical Courtroom Scene Profile of a lawyer and a police officer on the witness stand, with the judge listening.

- The presumption of innocence and requirement of proof beyond a reasonable doubt.
- Freedom from unreasonable searches and seizures.
- The right to silence and counsel during police interrogation.
- The right to compel witnesses' attendance at trial, to confront them, and to cross-examine.
- The right to a speedy and public trial.
- Freedom from double jeopardy.
- Freedom from cruel and unusual punishment.
- Freedom from racial and sexual discrimination in substantive and procedural criminal law.

Violation of these constitutional requirements can be the subject of both state appeals and federal *habeas corpus* claims by prisoners.

Corrections

The American correctional system is made up of correctional institutions, such as jails and prisons, and correctional agencies, such as probation and parole offices. In addition, the broad term *community corrections* includes drug rehabilitation centers, halfway houses, community corrections centers, community service programs, and many other services that are available to less serious criminals or those who have shown significant rehabilitation.

Jails are used to maintain custody of persons arrested pending prosecution and of those sentenced to short periods of confinement, usually up to but not more than one year. Most jails are operated by cities, counties, or both. Jails provide few services, since most inmates are there temporarily. Usually, there are separate jail facilities for women and juveniles.

All states maintain state penal institutions (prisons), consisting of state penitentiaries and juvenile training facilities. Often, the institutions are graded according to the level of security, ranging from maximum to minimum security. The United States has more than 1,000 state prison facilities, with a total population in all the country's jails and prisons of more than 1.3 million as of December 31, 2016.²⁰ Prison facilities are administered by a separate correctional agency of the state or federal government.

Two important features of the correctional system, which actually operate outside the walls of correctional institutions, are probation and parole.

Probation

Most court systems have a probation department attached to them. The probation department investigates defendants prior to sentencing and provides a presentence probation report to the court. In addition, the probation department provides supervision over those persons placed on probation after conviction. Probation is the most frequent disposition for first-time offenders. Probationers are released back into the community and are required to stay out of trouble, avoid association with those involved in crime, attempt to find a job, avoid the use of alcohol and drugs, and report to a probation officer periodically. The probation service is designed to provide counseling, but because of the overwhelming caseload, probation officers usually are able to engage in only nominal supervision.

Parole

Parole supervision is similar to probation supervision, except that the parole service is an agency of the state correctional system rather than the court system. Violations of probation and parole lead to hearings that, in turn, lead to warning, incarceration, or reincarceration.



CRITICAL THINKING 1.3

1. Explain the differences between state and federal courts.
2. What roles do jails and prisons play in the criminal justice process? How do jails and prisons differ?

1.4 Operation of the Criminal Justice System

The organization of the U.S. government is based on the principle of **federalism**, which states that power resides in the states unless expressly granted to the federal government. For this reason, the criminal justice system operates in 51 arenas. The basic system, however, is similar in each jurisdiction. The fundamental structure of the criminal justice system consists of law enforcement agencies, prosecution and defense attorneys, courts, and correctional institutions and agencies.

Law enforcement agents learn about most criminal acts through reports of victims or witnesses. Police also learn about crimes while working on patrol, maintaining surveillance, or through undercover or other investigations. The overwhelming majority of reported crimes are not solved. Investigations of crimes against persons, particularly homicides, take priority; therefore, homicides are solved more often than other crimes.

Arrest

The criminal process most often begins with an arrest. An officer can arrest only if probable cause exists. **Probable cause** is evidence that there is a fair probability that the suspect committed a crime. An officer possessing probable cause may arrest the suspect without a warrant, unless the suspect is in his or her home. Alternatively, the officer can obtain a warrant from a court, authorizing arrest of the suspect if there is a sufficient showing of probable cause. Arrests made by police on patrol are made without a warrant because of the need for a speedy response. Arrest with a warrant is likely to occur only when the arrest has resulted from investigation and there are no exigencies of a crime in progress or “hot pursuit.”

Not all arrests result in prosecution. The decision whether or not to prosecute is made not by the police officer but by the prosecuting attorney and the courts. Often, a perpetrator will have committed a major crime, usually a felony, and several lesser misdemeanors. For example, a suspect may have committed rape, which is the charge that the officer and prosecutor most want to be sure results in a conviction. But the suspect may have also committed the crimes of criminal trespass, breaking and entering into a dwelling, burglary, assault and battery, or theft. The arresting officer should be sure to include in the police report all elements of all the possible crimes that the officer finds the suspect committed. The decision whether or not to charge the suspect with those crimes is up to the prosecutor, and the lesser crimes may be used as a bargaining chip by the prosecutor in plea negotiations.

Pretrial Procedures and Issues

After arrest and booking, and before the stage of the justice process at which the defendant may face a trial, the defendant must make several other court appearances. He or she will also most likely confer with his or her lawyer about plea bargaining, since approximately 90 percent of all felony cases are resolved in this manner. Plea bargaining, which you will learn more about shortly, is a process that helps expedite the justice system by enabling the courts to avoid a lengthy trial.

The key pretrial procedures and issues are bail, charging the crime, the preliminary hearing, the handling of misdemeanor charges, the use of an indictment or information for felony charges, arraignment and plea, plea bargaining, and (where applicable) dismissing the charges.

Bail

Most suspects are entitled to release after arrest and booking, either on the accused’s own recognizance or on bail. **Recognizance** is a promise to appear in court. **Bail** is a deposit of cash, other property, or a bond, guaranteeing that the accused will appear in court. A **bond** is a written promise to pay the bail sum, posted by a financially responsible person, usually a professional bail bond agent. Bail is usually not very high, except in cases where it is shown that there is a risk that the accused will fail to appear for trial.

Charging the Crime

After arrest, the prosecutor will file a charge against the defendant if the prosecutor is satisfied that the evidence is sufficient to support the charge and that the case is worthy of prosecution.

Preliminary Hearing

After the prosecutor files the charge, a judge holds a **preliminary hearing** to determine whether probable cause exists. In some jurisdictions, the preliminary hearing is minimal, providing only a summary review of the sufficiency of the evidence. In other jurisdictions, the preliminary hearing is very extensive, amounting to a mini-trial.

At the preliminary hearing, an arresting officer has the first opportunity to present evidence against the defendant. Many times, the officer will not get to testify at a trial because the defendant decides to enter into a plea bargain after hearing all of the evidence presented at the preliminary hearing. Therefore, the law enforcement officer should view the preliminary hearing as an important step in achieving the best result in a criminal case.

Misdemeanor Charges

If the prosecution establishes probable cause, the defendant is required to answer to the charge in the trial court. If the crime charged is a misdemeanor or petty offense, the defendant will respond to the complaint filed by the prosecutor and enter a plea of guilty or not guilty. If the plea is not guilty, the case will be assigned to a court for trial.

Felony Charges: Indictment and Information

When the crime charged is a felony, the procedure is more complex. The common law rule required that a felony be charged only by a grand jury indictment. A **grand jury** is a panel of persons chosen through strict court procedures to review criminal investigations and, in some instances, to conduct criminal investigations. Grand juries decide whether to charge crimes in the cases presented to them or investigated by them. When a grand jury charges a person with a crime, it does so by issuing an **indictment**.

In the federal system and in many states, felonies can still be prosecuted only by indictment of a grand jury (see **Figure 1.6**). In those jurisdictions, after the police investigate a crime, the prosecutor presents the case to the grand jury. The grand jury hears testimony and decides whether to indict the accused. When the defendant has been arrested on the street in the process of committing a crime, the case can be presented to the grand jury immediately after arrest. In those jurisdictions that do not follow the grand jury procedure, prosecutors file a formal felony charge called an **information**. The information is merely a written statement of the formal charge, signed by the prosecutor.

Arraignment and Plea

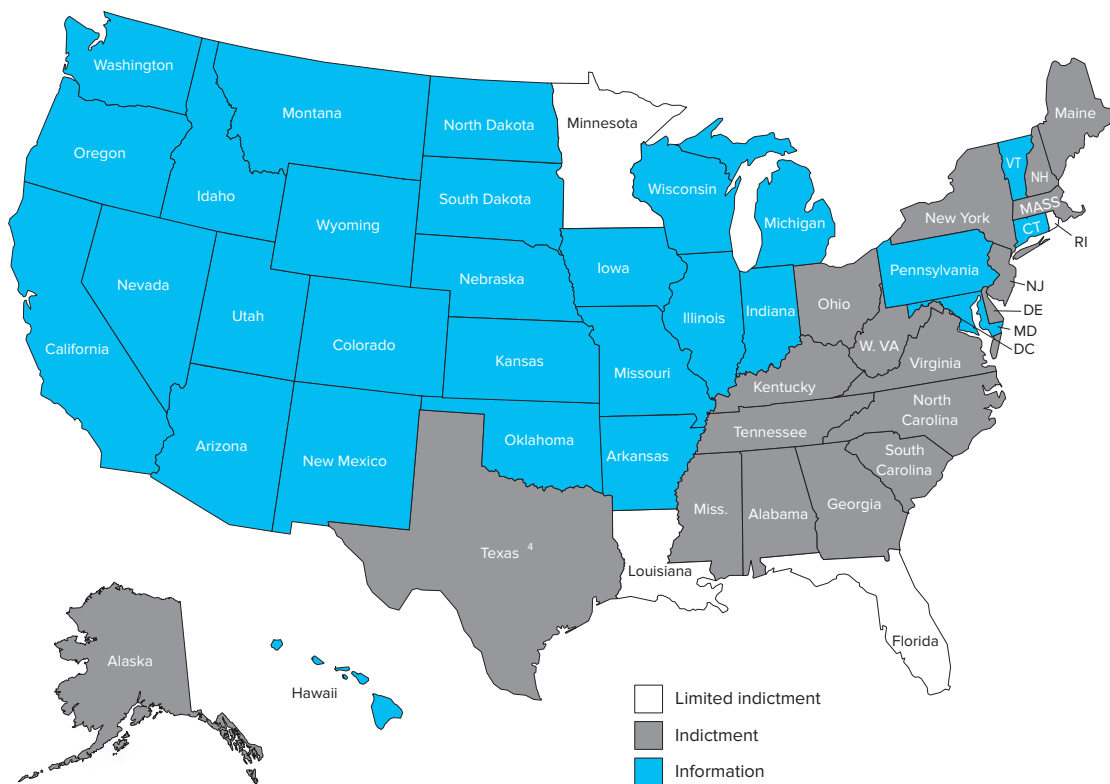
After the formal charges have been filed against a defendant, either by indictment or by information, the defendant appears in court at a proceeding called an arraignment or **arraignment and plea**. This is the defendant's appearance to respond formally to the charges. At this time, the defendant will enter a plea of guilty or not guilty. If the defendant pleads guilty, then the case will be set for sentencing. If the defendant pleads not guilty, the case will be set for trial.

Plea Bargaining

Plea negotiations resolve a majority of all prosecutions filed.²¹ Plea negotiations may result in a reduction of the original charge, which reduces the level of penalty that the judge may impose on the accused. Another result of plea negotiations is that the prosecution recommends a specific sentence to the court, usually involving a lesser punishment than otherwise would be the case. In return, the defense enters a plea of guilty, and the prosecution does not have to expend the time and expense involved in taking the case to trial.

FIGURE 1.6

States That Use Limited Indictment,¹ Indictment,² and Information³ in Felony Cases



¹Four states require prosecution by indictment only as to the most severely punished felonies. Although sometimes described as indictment states, they are more appropriately placed in a separate category, as they do not require grand jury screening for the vast majority of felony charges. Two of the four, Louisiana and Rhode Island, grant to the accused the right to insist upon a grand jury's charge as to any capital offense and any offense punishable by life imprisonment. Florida limits its guarantee to capital offenses, while Minnesota, not having capital offenses, extends its guarantee simply to offenses that are punishable by life imprisonment. In all four states, the need for a grand jury charge is measured by the potential punishment carried by the offense, so it matters not that the prosecutor is not seeking that punishment or that a lesser punishment is imposed. Where the right to a grand jury charge is violated, the consequence is to render invalid any conviction obtained at the subsequent trial on the improper charging instrument." WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, 4 CRIMINAL PROCEDURE § 15.1(e) (4th ed. West November 2018 Update).

²Jurisdictions are commonly described as 'indictment jurisdictions' if they grant to the accused a right not to be held to answer a felony charge unless that charge has been issued by a grand jury through an indictment (or the alternative of a presentment, where the jurisdiction retains the presentment process). Currently, the federal criminal justice system, the District of Columbia, and eighteen states are indictment jurisdictions." WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, 4 CRIMINAL PROCEDURE § 15.1(d) (4th ed. West November 2018 Update).

³Over the years, the number of states allowing felony prosecutions by information (usually only after a preliminary hearing bindover), has grown. Because these states recognize the information as an alternative to the indictment, they commonly are described as 'information states.' Today, 28 states fall in this category. Each of these states has a constitutional, statutory, or court rule provision authorizing the prosecution of any felony offense to be brought by information. All 28 states also have provisions stating that prosecutions may be brought by indictment. Thus, the prosecutor is given an option to proceed by indictment or information (leading some to describe the 'information' states as 'information-option' states). In several information states, this option is entirely theoretical, as the prosecution has no way of obtaining a grand jury from which it can seek an indictment. These include two jurisdictions in which the provisions for creating an indicting grand jury have been repealed and others in which grand juries have not been used for so many years that the indicting grand jury is considered an extinct institution." WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, 4 CRIMINAL PROCEDURE § 15.1(g) (4th ed. West November 2018 Update).

⁴In noncapital felony cases, the accused may waive presentment of an indictment and be tried on information only.

Dismissing Charges

The defendant has a right to challenge the validity of the indictment or information by moving to dismiss the charges. There are only three bases for dismissal:

1. The crime charged is not a violation of the jurisdiction's law.
2. The facts asserted in the indictment or information, even if true, do not constitute the crime charged.
3. No reasonable jury could find the facts alleged on the basis of the evidence presented at the preliminary hearing.

In order to charge a crime, the prosecutor must allege facts as to each element of the crime as defined by law. (The definitions and elements of all major crimes are the focus of this book in **Chapters 8** through **16**.) The validity of a criminal charge is also determined by two other factors: the criminal statutes in effect in the jurisdiction and federal and state constitutional law. In most jurisdictions, a valid criminal charge must allege that the defendant's acts violated some criminal statute. The federal constitutional provisions that relate to substantive criminal law issues include the due process clauses of the Fifth and Fourteenth Amendments and the cruel and unusual punishment clause of the Eighth Amendment. These issues are discussed in **Chapter 2**.

Trial of the Case

In the United States, an accused in a criminal case has a constitutional right to trial by jury for any crime for which the possible sentence is more than six months in jail or prison. The accused, however, can waive that right and have a trial before the judge alone. Before the trial commences, the judge will hear pretrial matters, including motions to exclude evidence.

In the case of a trial by jury, the actual trial process begins with jury selection. The trial proceeds with an opening statement by the prosecution, telling the story of the case and describing the evidence that will be presented. The defense can make its opening next, or it can reserve its opening statement until after the prosecution has presented its case. The prosecution then presents its case, consisting of witnesses, physical evidence, and documents. The defense has the right to cross-examine each prosecution witness. At the conclusion of the prosecution's case, the defense will ask the judge to decide whether the prosecution's evidence is enough to go to the jury, by making a motion for judgment of acquittal. If the motion is granted, the case is over, and the defendant cannot be charged again with that crime.

If the defense's motion for judgment of acquittal is denied, the defendant may rest without presenting any evidence, because the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt. However, in most cases, the defense will present some evidence. The defendant may or may not choose to testify, and neither the court nor the prosecution can make any comment on the defendant's failure to do so. The defense's witnesses are subject to cross-examination by the prosecution. After the defense has presented all of its witnesses, physical evidence, and documents, the prosecution can offer evidence to rebut the defense's case. After that, the defendant has a chance to introduce rebuttal evidence as well.

After the evidence for both the prosecution and defense has been completed—when each side has rested—both sides present closing arguments to the jury or, in a bench trial (a trial without a jury), to the judge. The judge then reads instructions on the law to the jury, after which the jury deliberates until it reaches a verdict.

In the event that the jury cannot reach a verdict on a charge, the judge will declare a mistrial and the prosecution may choose to retry the defendant. If the jury acquits the defendant, double jeopardy prohibits retrial or appeal by the prosecution. On the other hand, if the jury convicts, the accused can seek a new trial from the trial court or seek an appeal to an appellate court.

Post-Conviction Procedures and Issues

If a defendant is acquitted of the charges, he or she will be released from custody. Because of double jeopardy protections under the Fifth Amendment, the justice system cannot try the defendant twice for the same crime. Special exceptions to this exist when a defendant has violated different federal and state laws for the same crime, such as when a drug dealer violates state drug laws and federal organized crime laws simultaneously for the same crime. You will read more about this in **Chapter 16**.

If, however, a defendant is convicted, he or she must be sentenced. The defendant has the right to appeal the sentence, although more than 80 percent of appeals do not succeed. Other types of post-conviction relief include filing a writ of *habeas corpus*.

Sentencing

If the defendant is convicted, the judge will ordinarily order a presentence (or probation) report that provides sufficient information on which to base a sentencing decision. Unless the charge carries a mandatory sentence, the judge will hold a sentencing hearing, entertaining arguments from the prosecution and defense. The judge will then sentence the defendant in accordance with the statutory range. When the prosecution seeks the death penalty, the sentencing hearing will be a second trial before a judge or jury, who will hear evidence of aggravating and mitigating factors. In some states, the jury can also impose a sentence other than the death penalty for serious offenses. See **Chapter 7** for a more extensive discussion of sentencing.

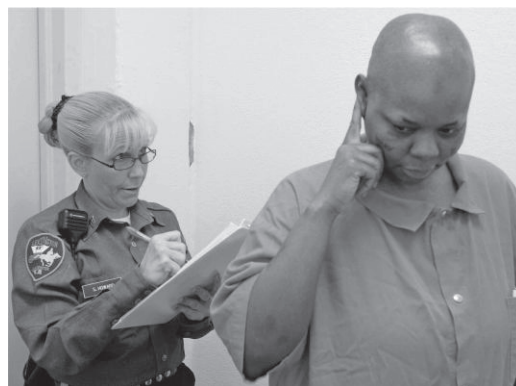
Appeal and Discretionary Review

The bases for appeal of a criminal conviction on substantive grounds are limited to four possibilities:

1. The charge on which the accused was convicted is not a crime, either because the legislature did not proscribe the conduct or because the proscription is unconstitutional.
2. The evidence was insufficient to support a finding of fact on all the elements of the crime beyond a reasonable doubt.
3. Not all of the necessary elements of the crime were alleged.
4. The jury was improperly instructed.

Other grounds for appeal, which do not relate to substantive criminal law issues, involve procedural and evidentiary errors alleged to have been committed by the trial court. In some jurisdictions, many claims to an appellate court are pursued by petition for *certiorari*, which allows the appellate court to decide, at its discretion, whether to hear the case.

An appeal from the state courts to the U.S. Supreme Court can be pursued only through a writ of *certiorari*, which is a written order from the U.S. Supreme Court to a lower court whose decision is being appealed to send the records of the case forward for review. The Supreme Court receives thousands of petitions each year, but it reviews only a handful of criminal cases, mainly those that will settle a question that has been answered differently by different appellate courts or that present a substantial policy question that the Court wishes to address.



AP Images

From Courtroom to Prison After a defendant receives a prison sentence, correctional authorities process her arrival and she becomes an inmate.

Post-Conviction Relief

Habeas corpus, a common law remedy for illegal confinement, exists in modern American criminal procedure to test the validity of a person's incarceration. *Habeas corpus*, which literally means, "you have the body," is a legal action separate from the criminal case. It can be brought only by a prisoner who has exhausted all of the usual appellate remedies. A federal prisoner can seek *habeas corpus* relief in the proper federal district court; state prisoners may seek such relief in the proper state court.

Under federal law, a state prisoner may seek *habeas corpus* relief in federal court if the person alleges that the conviction violated his or her federal constitutional rights. As long as a defendant raises new grounds, he or she can file successive *habeas corpus* petitions. Just as with the original criminal conviction, these post-conviction petitions can be pursued from the trial court level all the way to the highest courts in the states and even to the U.S. Supreme Court. Only rarely, however, can a prisoner seek post-conviction relief based on an issue relating to a substantive criminal law claim (such as the definition, or elements, of a particular crime).

In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA). This law drastically revised the *habeas* statute, making it even harder for state prisoners to obtain federal habeas relief. A *Habeas corpus* petition is filed by state prisoners in federal court under 28 U.S.C. § 2254 in which the state prisoner argues that his detention by state officials violates one of his federal constitutional rights. Generally, a state prisoner is only allowed to file one petition. Every claim that the petitioner wants to raise must be in the petition. In very limited situations, a state prisoner can file a second petition or successive petitions, generally limited to newly discovered evidence situations and claims that involve brand new Supreme Court precedent that has been made retroactive to the state prisoner's case.



CRITICAL THINKING 1.4

1. What are the three bases for dismissing a trial?
2. Explain the various grounds on which convicted criminals appeal their convictions.

REVIEW AND APPLICATIONS

Summary by Chapter Objectives

1. **State a basic definition of law.** Law is a rule of conduct or procedure established by custom, agreement, or authority. Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority and having binding legal force.
2. **Explain what distinguishes the criminal law from other law.** Criminal law seeks to regulate acts that are contrary to the community interest of the social or government unit—federal, state, or local. Therefore, a criminal act, though usually aimed at a personal victim, is perceived as involving a social harm and is prosecuted on behalf of the public.
3. **Define the common law.** The common law means law created by judicial opinion. The United States and England share a common heritage in the common law of England. When the 13 colonies were established in America, and when the United States gained independence, they adopted the common law of England.

4. **State the principle of legality.** A core concept of the American criminal justice system, legality holds that no one can be punished for an act that was not defined as criminal before the person did the act. If a court declares conduct criminal that has not previously been defined as criminal, then the principle of legality is violated.
5. **Explain what the MPC is.** The MPC (Model Penal Code) is a comprehensive recodification of the principles of criminal responsibility, drafted in reliance upon existing sources of the criminal law including codes, judicial opinions, and scholarly commentary. Though not adopted in any state, it has affected a reform of the criminal law in a majority of states, and it stands as a model for the reform of principles of American criminal responsibility.
6. **Describe the fundamental structure of the American criminal justice system.** The fundamental structure of the American criminal justice system consists of law enforcement agencies, prosecution and defense attorneys, courts, and correctional institutions and agencies. Moreover, the organization of American government is based on the principle of federalism, which holds that power resides in the states unless expressly granted to the federal government. For this reason, the criminal justice system operates in 51 arenas: the 50 state governments and the federal government (which includes the District of Columbia).
7. **Name the four basic police functions.** The four basic police functions are prevention, investigation, detection, and court preparation. The prevention function is carried out by low-ranking officers assigned to cruise an area and watch for criminal activity. The investigation function is carried out at all levels and involves everything from gathering data at the crime scene to presenting suspects to victims during lineups. The detective function is usually performed by specialized squads consisting of older, more experienced, and higher-ranking officers. The court preparation function involves testifying at hearings and trial and presenting the evidence in an effort to convict the perpetrator.
8. **State what is required for a law enforcement officer to arrest a suspect.** In the case of felonies, a law enforcement officer must have probable cause to believe that a person has committed a crime before he or she may arrest the suspect. In the case of misdemeanors, an officer can arrest only for offenses committed in the officer's presence.
9. **State the purpose of a preliminary hearing.** The purpose of a preliminary hearing is for a judge to determine whether there is probable cause for the accused to answer to the crime charged. Since many cases do not go to trial because of plea bargaining, this is often the only chance that officers have to offer testimony and present evidence against the accused.
10. **Describe the two alternative methods for charging serious crimes.** Felonies are charged by either an indictment or an information. An indictment is issued by a grand jury, which is a panel of citizens that decides whether to charge crimes in the cases presented to them (or investigated by them). An information, which is a piece of paper on which the charge appears, is filed and signed by the prosecutor.
11. **List the three possible bases for a defendant's pretrial motion to dismiss.** The three possible bases for a defendant's pretrial motion to dismiss are:
 - The crime charged is not a violation of the jurisdiction's law.
 - The facts asserted in the indictment or information, even if true, do not constitute the crime charged.
 - No reasonable jury could find the facts alleged on the basis of the evidence given at the preliminary hearing.

12. **State the four possible grounds for appeal of a criminal conviction.** The four possible grounds for appeal of a criminal conviction are:
- The charge on which the accused was convicted is not a crime, either because the legislature did not proscribe the conduct or because the proscription is unconstitutional.
 - The evidence was insufficient to support a finding of fact on all the elements of the crime beyond a reasonable doubt.
 - Not all of the necessary elements of the crime were alleged.
 - The jury was improperly instructed.
13. **State when a defendant is entitled to an attorney at trial.** A defendant who may be sentenced to more than six months in jail or prison is entitled to an attorney whether or not he or she can afford one. (Those who cannot afford an attorney will have one appointed by the court.)

Key Terms

law The federal, state, or local enactments of legislative bodies; the known decisions of the courts of the federal and state governments; rules and regulations proclaimed by government bodies; and proclamations by executives of the federal, state, or local government.

common law Law created by judicial opinion. Historically, law from America's colonial and English past, which has set precedents that are still sometimes followed today.

statutory law Law created through state and federal legislatures.

criminal law Law that involves the violation of public rights and duties, creating a social harm.

civil law Law that deals with matters considered to be private concerns between individuals.

tort A civil violation; the civil law's equivalent of a crime. A wrongful act that results in injury and leaves the injured party entitled to compensation.

actus reus A willed unlawful act; the wrongful deed that comprises the physical component of a crime.

mens rea A guilty mind, or intent; the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.

legality The principle that no one can be punished for an act that was not defined as criminal before the person did the act.

Model Penal Code (MPC) A comprehensive recodification of the principles of American criminal responsibility.

jurisdiction The power or authority of a court to act with respect to any case before it.

federalism The system of government of the United States whereby all power resides in the state governments unless specifically granted to the federal government.

probable cause Evidence that there is a fair probability that the suspect committed a crime; required for an arrest of a suspect by a law enforcement officer.

recognizance A promise to appear in court.

bail A deposit of cash, other property, or a bond, guaranteeing the accused will appear in court.

bond A written promise to pay the bail sum, posted by a financially responsible person, usually a professional bail bond agent.

preliminary hearing A post-arrest, pretrial judicial proceeding at which the judge decides whether there is probable cause to prosecute the accused. In some jurisdictions, the preliminary hearing is minimal; in others, it is a mini-trial.

grand jury A panel of persons chosen through strict court procedures to review criminal investigations and, in some instances, to conduct criminal investigations. Grand juries decide whether to charge crimes in the cases presented to them or investigated by them.

indictment The paper issued by a grand jury that charges an accused with a felony.

information The paper issued by a prosecutor that charges an accused of a felony.

arraignment and plea The defendant's appearance to respond formally to the charges.

habeas corpus Literally, "you have the body." A legal action separate from the criminal case, it can be brought only by a prisoner who has exhausted all the usual appellate remedies.

Review Questions

1. Name the various sources from which laws derive.
2. What is the difference between common law and statutory law?
3. What is the difference between criminal law and civil law?
4. What is the history of the common law?
5. How did Jeremy Bentham influence criminal law in England and the United States?
6. What is the Model Penal Code, and why was it created?
7. What document restricts federal law, and how?
8. Define *actus reus* and *mens rea*, and explain why they are needed for criminal charges.
9. Name some of the ways in which law enforcement agents learn about criminal acts.
10. Explain the difference between release upon recognizance and bail. What is a bond?
11. What is a grand jury, how does it work, and which jurisdictions use it?
12. What happens at an arraignment? What happens in response to a plea of guilty or not guilty?
13. What is the burden of proof in a criminal trial?
14. What are the basic elements of the criminal trial? Include the different motions and actions of the prosecution and defense.
15. Name and define the three main perspectives from which the criminal justice system can be viewed.
16. Name the different types of departments in which police work, and give some examples of federal agencies.
17. What are the duties of the prosecutor? Of defense counsel?
18. What is jurisdiction? What is the jurisdiction of federal courts?
19. Name three or four constitutional due process rights that apply to state prisoners.
20. What are the general duties of a probation department?

Problem-Solving Exercises

1. **Pretrial Detention** Immediately after being arrested and booked on drug charges or similar offenses, most white middle-class people are released from custody as soon as a family member arrives to post bail. But unemployed people from a lower socioeconomic class facing similar charges may be unable to post bail and may therefore remain in jail until their court appearance, which may be weeks or even months away. According to 1997 Bureau of Justice statistics, 378 state correctional facilities (27 percent of the total) were under court order to reduce population or improve conditions of confinement. Conditions in jails may include sleeping on the floor, long waits to call a family member or lawyer, and limited access to showers. In overcrowded jails, plumbing may fail, resulting in clogged toilets and flooding. Answer the following questions:
 - a. Does being detained in such a setting prior to trial constitute punishment before trial?
 - b. What issues are raised by the fact that the poor are more likely to experience pretrial confinement than upper- and middle-class suspects?
2. **Protection against Cybercrime** You have heard that a new cybercrime has affected several other parts of the country but that prosecutors are unable to press charges because the crime has not been added to their statutes and there is no legal precedent (i.e., common law). You do not want your jurisdiction to have the same problem, and it is clear that this crime could easily happen here. Answer the following questions:
 - a. How do you persuade legislators in your area to pass a law against this crime before it occurs?
 - b. How do you persuade law enforcement to educate people about this crime when it is not yet a crime that they are legally required to enforce? What else can you do to help protect your jurisdiction?
3. **Sentencing Guidelines** You are a county judge and have been in your job for nearly a year. In that time, you have sentenced many drug offenders to the lengthy sentences that are within your options, and your community has strongly supported you. However, you are hearing from state prison authorities that their prisons are highly overcrowded, there are not enough funds to staff them properly, and nonviolent drug offenders are suffering negative consequences such as physical and sexual abuse from more hardened criminals. They strongly urge you to stop sentencing nonviolent drug offenders to any type of incarceration and to use treatment-based alternatives instead. Answer the following questions:
 - a. Which option will you pick? Why?
 - b. Will you suggest or implement any changes to sentencing guidelines or options so that more judges will pick treatment-based alternatives for drug offenders? Why or why not?
4. **Witness Treatment** A witness is called to court to testify against an individual charged with aggravated assault. The accused hit another man over the head with a cue stick in a barroom brawl, causing moderate injuries. The witness comes to court on his day off, waits all morning and part of the afternoon to testify, then at 4:00 p.m. is informed that he can leave because the prosecution and defense have agreed that the defendant would plead guilty to a lesser included offense. Answer the following questions:
 - a. What has occurred here?
 - b. Did the attorneys have a legal obligation to inform the witness of what was going on? What about an ethical duty?
 - c. Should the witness be angry? Why or why not?

5. **Disclosure** You are a federal officer who has arrested a key participant in an undercover drug transaction. You let him transfer the drugs to you and gave him money in exchange; in other words, you caught the perpetrator red-handed. In preparing for the preliminary hearing, the prosecutor tells you not to mention the fact that you were tipped by an informant to go to the scene of the transaction. The prosecutor says that she wants to “spring” this information on the defense at trial. Answer the following questions:
 - a. Does the prosecutor have a legal right to do this? Why or why not?
 - b. What are the possible ramifications of such a move by the prosecutor?
 - c. Is such a move needed in this case? Why or why not?
 - d. What should you do? Why?
6. **Drug Possession** You are an appellate judge hearing the appeal of a convicted offender who was given a 25-year sentence for possession with intent to distribute cocaine and transporting a controlled substance. The cocaine was found in the car she was driving, which was registered in her name but shared with her two roommates; she insists that the drug was not hers and she had no idea that she was transporting it. On the other hand, police surveillance showed her visiting known drug dealers intermittently, and she had several bags in her car that would have been too large not to notice. Answer the following questions:
 - a. Does this defendant have a case? Why or why not?
 - b. Which factors influenced your decision, and what other factors would help you make this decision?

Workplace Applications

1. **Prison Budget** In 1995, for the first time in U.S. history, the total cost of state-issued bonds to finance prison construction surpassed the total for bonds to construct colleges. Compare the budgets for education and corrections in your county and state. Answer the following questions:
 - a. If you were a member of the state legislature, what recommendations would you make concerning funding for these areas?
 - b. How would you set funding priorities for these budget items compared to others?
2. **Find Out about Law School** Contact a professor at your local law school (it might be at your college or university) and ask how a law student could focus his or her studies on criminal law.
 - a. What courses would the student need to take, and what kind of internship or part-time work would help provide useful job experience?
 - b. If one specializes in criminal law, what are some job options after passing the bar? After gaining a few years full-time case experience?
3. **Revise a City Ordinance** You are a judge hearing a case involving a city ordinance that forbids more than five women from living together in the same house. The ordinance is obviously outdated; it was passed during the time that your state was a territory and large numbers of women were imported for purposes of prostitution. The ordinance was thus meant to attack brothels, not law-abiding citizens sharing living quarters. The defendants in this case are six women who have been heavily involved in citywide police reform and have made some political enemies. The prosecutor is zealously trying to get them convicted, and has told you that he would like to see all of them in jail. You, however, feel that the ordinance needs to be struck from the books.