A BRIEF INTRODUCTION TO CRIMINAL LAW

SECOND EDITION

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Brief Contents

Contents

Foreword

Mastery of fundamental doctrines of criminal law is important for undergraduate students interested in careers in law, law enforcement, corrections, forensics, and mental health. Expansive in scope yet accessible to all readers, *A Brief Introduction to Criminal Law* provides thorough treatment of all important areas of criminal law. The work presents historical context, noting the common law and social antecedents to modern criminal law. It depicts traditional and modern theories and types of punishment. Constitutional sources of rights of the accused citizen and related limits on government autonomy and law enforcement are likewise presented.

As would be expected in any authoritative text on criminal law, *A Brief Introduction to Criminal Law* offers a complete treatment of the legal elements of crimes and defenses available to the criminally accused. Importantly, however, the work includes chapters on modern commercial, organized, and international crimes. It covers terrorism and organized and white-collar crimes, which unfortunately appear to be the future of criminality in our shrinking, interconnected, digital world. Throughout, this work profits from the diverse perspectives of its authors, who bring to bear their professional backgrounds in criminal justice, mental health, and criminal defense practice.

What is perhaps most remarkable about this work is that it departs from presenting legal doctrine through judicial opinions. Although the case method is so important for the education of law students, students of criminal justice—including prelaw students—will find it easier to comprehend legal doctrine and concepts as presented within *A Brief Introduction to Criminal Law*. A work on criminal law that is both comprehensive and comprehensible is no small thing. As a law professor, former state and federal prosecutor, and drug court judge, I welcome the publication of *A Brief Introduction to Criminal Law*. Students aspiring to various careers in criminal justice will be enriched by its pages.

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Preface

A Brief Introduction to Criminal Law aims to transmit substantive law and its elemental components in a simplistic and practical manner. Criminal justice students often express frustration concerning the general presentations of criminal law textbooks. Primarily written for law school studies, most criminal law textbooks are rich in legalese and far surpass the fundamental underpinnings required of criminal justice professionals. The unfortunate result is that those most responsible for the law's enforcement often become entrenched in a continuous struggle to decipher legalistic presentations.

Because most criminal law textbooks are authored by attorneys, they often fail to simplify the language and approach of criminal law. Although their methods appear quite successful for preparing future lawyers, their pedagogical "learn it on our own" approach tends to confuse and frustrate professionally oriented students attracted to criminal justice programs. Criminal justice students, much like those of other occupations, learn best from practical, hands-on exercises. Through the collaboration of two nonattorneys with an attorney, *A Brief Introduction to Criminal Law* abandons the case approach while retaining all comprehensive principles of substantive law. *A Brief Introduction to Criminal Law* "holds the hand" of students while walking them through a chronological and simplistic (yet detailed) dissection of the legal labyrinth.

A Brief Introduction to Criminal Law is a gift to students who aspire to master the complexities of substantive law. Legal jargon is unavoidable, but clarification is added when the meaning of language is evasive. Offering students the opportunity to test emerging knowledge of the law, each chapter presents opportunities for critical thought and practice test scenarios. With *A Brief Introduction to Criminal Law*, current and future employment duties related to substantive law are made simple.

Ancillary Materials

A comprehensive set of instructor's materials, including presentations in PowerPoint format and a Test Bank, are available online.

Acknowledgments

We offer sincere thanks to the Criminal Justice editorial staff at Jones & Bartlett Learning. First, we thank Jeremy Spiegel for the initial publishing opportunity. Without his vision, *A Brief Introduction to Criminal Law* would be little more than an idea. We also appreciate the prior editorial contributions of Sean Connelly and Cathleen Sether. Without their guidance, this second edition would not be in demand. Gratitude also is extended to William Larkin (Executive Editor) for providing the direction necessary to bring *A Brief Introduction to Criminal Law* to successful completion. We reserve deepest thanks for Marisa Hines (Associate Acquisitions Editor). Without her hard work and diligence, *A Brief Introduction to Criminal Law* would not have remained on schedule, or evolved into a quality product. Finally, we are indebted to Cindie Bryan (Production Editor) for her contributions regarding the many tasks associated with the production process. On a more general note, we also wish to thank all reviewers of the book. Without their insights and expertise, *A Brief Introduction to Criminal Law* would be a much weaker contribution to the academic discipline.

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Again, we sincerely appreciate all who played a role in the development of *A Brief Introduction to Criminal Law*.

Substantive Criminal Law: Principles and Working Vocabulary

CHAPTER 1

KEY TERMS

Actual cause
Actus reus
Administrative law
Attendant circumstances
Beyond a reasonable doubt
Burden of proof
But-for test
Canon law
Capital felony
Case law
Civil law
Code of Hammurabi
Common law
Compensatory damages
Constitutional law
Constructive intent
Corpus delicti
Crime
Criminal law
Culpable
Declaratory relief
Democracy
Deviance
Federalism
Felony
General intent
Gross misdemeanor
Infraction
Injunctive relief
Intervening cause
Jurisdiction
Least restrictive mechanism
Legal cause
Lesser included offense
Mala in se
Mala prohibita
Mens rea
Misdemeanor
Misprision of felony
Natural law
Negligence
Nulla poena sine lege
Ordinance
Ordinary misdemeanor
Petty misdemeanor
Pork-barrel politics
Positive law
Precedent
Preponderance of the evidence
Procedural law
Property crime
Proximate cause
Punitive damages
Recklessness
Republic
Social contract theory
Specific intent
Stare decisis
Statutory law
Strict liability
Substantial factor test
Substantive law
Tort
Tortfeasor
Transferred intent
True crime
Uniform Crime Reports
Violations
Violent crime
Wobblers

Introduction

Human beings have always sought to establish rules governing human behavior. In ancient civilizations, such rules were derived from society's moral values, customs, and norms. Thus, in most societies, modern laws evolved from this loose set of guidelines into a formal system of written laws designed to maintain social order. Because each society—ancient or modern—has different moral standards, laws and legal systems vary, too.

This chapter explores the foundations of American criminal law. As we progress through its content, readers will develop an appreciation for our form of government—that is, a republic—and learn how social contract theory guides the construction of criminal law. We will also trace the evolutionary path of criminal law by delving into its ancient, religious, and common-law heritage. At the same time, we will demonstrate more modern ways of regulating societal conduct. Readers will learn the differences between civil and criminal law. We will see how crime can be broadly classified (felonies, misdemeanors, violations), distinguished from deviant conduct, defined according to its fundamental elements, and discussed in terms of degrees of social harm. Lastly, we will consider the extent to which serious crime occurs in America today.

The Republic for Which It Stands

The United States is known around the globe for its commitment to democratic values and has come to be regarded, even among its own citizens, as a democracy. Most people believe that our system is a democracy because it tolerates free elections and champions the voice of the people. More accurately, however, the United States can be described as a republic. A simple recitation of the U.S. Pledge of Allegiance highlights this simple truth: ". . . and to the republic for which it stands." Article IV, Section 4, of the United States Constitution guarantees to each state the right to a republican form of government.

The terms *democracy*, *democratic*, *republic*, and *republican* in this context do not refer to the Democratic and Republican political parties or to their members, whom we call Democrats and Republicans. Instead, the terms *democracy* and *republicanism* are used in an abstract way to describe the principles on which two different systems of government are built. A country whose government follows one of these systems is referred to more concretely as a democracy or a republic. These two systems could not be more dissimilar. **Democracy** is a form of government in which elected leaders make decisions for the population with no legal safeguards (such as a constitution) to protect the nation (and the rights of the people) against abuses of power. A **republic**, on the other hand, is a form of government in which elected leaders operate under a constitution that protects the best interests of the nation and its people by limiting the power of its elected officials. Proponents of the latter form of government believe that it encourages leaders to make sound decisions, rather than ones that aim to benefit the elite ("snob rule") or the majority ("mob rule"). Our founders knew that without this safety valve, the nation's long-term interests might be edged out by popular whims or by the concerns of the loudest or greediest segments of society. Many believe that the closer a nation comes to practicing pure democracy, the more likely its elected representatives are to offer handouts in exchange for popular support. This practice of exchanging financial favor for votes is known as **pork-barrel politics**. The Federalist Papers best summarized the dichotomy between these governmental forms:

> *Democracy, as a form of government, is utterly repugnant to—is the very antithesis of—the traditional American system: that of a Republic, and its underlying philosophy, as expressed in essence in the Declaration of Independence with primary emphasis upon the people's forming their government so as to permit them to possess only "just powers" (limited powers) in order to make and keep secure the God-given, unalienable rights of each and every Individual and therefore of all groups of Individuals.*

Social Construction of Law

One of the fundamental underpinnings of American criminal law is that society's expectations be expressed in writing—through laws or judges' formal opinions. This rule is so sacred, in fact, that the American legal system follows the principle ***nulla poena sine lege***, Latin for "no penalty without law." This legal principle ensures that a person accused of wrongdoing cannot be punished unless the behavior is clearly prohibited by written law. It may seem contradictory, then, that the American legal system rests on a foundation of unshakeable trust in government authority. This sacred trust illustrates **social contract theory**. It stipulates that American citizens, in certain well-defined circumstances, will voluntarily waive rights, privileges, and liberties guaranteed by natural law in exchange for government protection. For example, Americans give the government the authority to establish a process that will detect (police), judge (courts), and punish (correctional system) those who violate the peace and dignity of our nation (or state). In exchange, the government agrees to provide services (supported through taxation), regulate commerce, and protect us against foreign and domestic threats. It vows to exercise its power with tremendous caution. Known as the **least restrictive mechanism**, this agreement promises that any government action against citizens, in addition to its being necessary, will be implemented with every effort to minimize intrusion. For example, the government has the right to restrict the freedom of citizens who violate the law (through imprisonment and other means), but it must issue the minimum sentence sufficient to deter future crimes by the individual and to discourage crime within society as a whole. Do you believe the government has made a good-faith effort to abide by this social contract?

Origins of Law

Historically, law originated from three primary sources: ancient law, natural law, and common law. Although we will discuss them separately, keep in mind that these categories do overlap.

Ancient Law

The **Code of Hammurabi** is one of the first sets of laws ever recorded. This code was developed by King Hammurabi of Babylon between 1792 and 1750 BCE. In modern times, if we try to picture where our laws are collected, dry legal reports and big, dusty law books may come to mind. In contrast, the Code of Hammurabi was carved onto a black stone monument. It included about 300 rules, which were believed to have been handed down by the gods. Conduct addressed in the code ranged from criminal offenses to domestic matters, such as marriage and divorce.

An earlier set of written laws existed in Ur, a city-state in ancient Sumeria. These laws appear to be about 5,000 years old. Ancient laws and legal systems also existed in Hebrew, Greek, and Roman civilizations. Each system possessed unique attributes and significantly influenced the development of the modern European and American legal systems.

Natural Law

Natural law is the idea that human behavior is governed by an unalterable code of conduct that reflects our divine attributes and purpose. According to natural law, which dates back to first-century Rome, moral principles are derived from a higher power, from nature, or from reason. Religion is the primary basis of natural law in most world cultures. American law, for example, reflects the principles of Judaism and Christianity; as such, certain acts that are prohibited in the Old Testament, especially those named in the Ten Commandments—murder, theft, perjury (bearing false witness), and so on—are also prohibited under U.S. law.

Conversely, **positive law** is man-made law enacted into statutes for the protection of people as a whole. Historically, positive law was singularly concerned with human activities not addressed within religious circles. It has been argued, however, that one underlying rationale for distinguishing man-made law from religious law was to draw a clear and distinct line between laws derived from logical, rational human decisions and the more ambiguous and irrational moral distinctions premised on natural law (or God's law). The historical intertwining of positive and natural law, then, should be readily apparent; their degree of association does seem to be on the decline, however, as certain natural law prohibitions (such as adultery and homosexuality) have, for all practical purposes, been decriminalized across the nation.

Common Law

Settlers who established the American colonies brought with them the body of law with which they were familiar—the laws of England. There, the legal system had been influenced by monarchs and church authorities. Early communities relied on local customs and mores to resolve most legal disputes. Harsh physical punishment was usually dispensed. In later communities, however, the centralized power of the monarchy allowed a more uniform legal system to be administered throughout England. This change marked the transition from a civil law system to the common-law system, in which judges traveled the countryside (or "rode the circuit") to handle legal matters, a practice formally endorsed by and enacted in the Statute of Westminster in 1285. Judges had authority over several types of courts, including those intended to enforce **canon law**, the law of the Catholic Church.

Consequently, **common law** is often referred to as "judge-made law." In other words, it consists of the rulings of judges as they interpreted existing laws and customs and applied them in a manner consistent with decisions made in preceding cases. A prior court decision is therefore said to set a **precedent** for future cases. This principle is known as ***stare decisis*** ("let the decision stand"). Our modern legal system is essentially a system of precedent, since *stare decisis* requires inferior (lower) courts to abide by the decisions of superior (higher) courts. In complex cases, even higher courts must examine all relevant prior decisions. Adhering to precedent promotes stable and predictable outcomes. Without such dependability, many legal decisions would be regarded as unfair, because laws would be interpreted and applied inconsistently and punishments handed down unreliably. The likely result would be a loss of respect for the law and an increased incidence of crime.

Primary Sources of Criminal Law

Criminal law can be divided into five categories: common, statutory, case, constitutional, and administrative. What has emerged from these sources is a unique American legal system comprised of a vast and complex network of laws. Many of them are new legal measures designed to protect society from emerging problems, such as computer hacking and identity theft. Others have merely been adopted from the historical traditions of old England. The American legal system of today has abandoned the English system of monarchy (or royal families), however, replacing it with a government structure reliant on the power of its citizens. Respect for states' rights, limited government, and personal liberty form the backbone of this modern legal system.

Common Law

As previously discussed, a brief historical examination is sufficient to conclude that American colonists relied heavily on their English culture to form the basis for American criminal law. Without doubt, the laws common to the circuits of England were used to shape the substance of American criminal law. Following our nation's independence campaign against the British, all 13 colonies initially anointed

common law as the appropriate foundation for American jurisprudence. Although colonial Americans did not agree with a substantial portion of English practices (hence the American Revolution), they did recognize the logic of many common-law prohibitions (such as murder, rape, kidnapping, and burglary). The newly created system of **federalism** (strong central government) now usurped some of the previous powers of the individual states; however, even under this new arrangement, states retained the sovereign power—by virtue of the Ninth and Tenth Amendments to the U.S. Constitution—to abolish common law (at their discretion). Accordingly, most states today have exercised that option, choosing instead to adopt a civil system permitting legislators (on behalf of the people) to declare through statute (statutory law) what laws should and will be constructed. It remains true, though, that even in the absence of a formal directive, common law continues to influence the construction of law, as legislative and judicial officials often depend on its heritage of judicial decisions for legal interpretation.

Statutory Law

Statutory law—the body of law made up of written statutes—is rooted in democratic values and forms the bedrock of criminal law in the United States. Statutes are deliberated, debated, created, and enacted not by judges, but by the people's elected representatives, or legislators. Collectively, this body of legislators forms a legislature. The district governed by the legislature and over which its courts have authority is known as its **jurisdiction**. Jurisdiction also refers to the authority of the court to hear and decide a case. Essentially, a system of statutory law allows legislators to regulate the behavior of the people in their districts—that is, their constituents—based on their beliefs. Thus, statutory law is thought to represent the will of the citizenry, as opposed to the isolated opinion of one or a few individuals. Because the U.S. Constitution places few restrictions on what can be considered a crime and does not regulate how crimes are labeled and defined, the statutory codes of each state differ significantly. To illustrate these differences, it is useful to see how the statute for a particular offense is treated in two different states. **Exhibit 1–1** compares grand larceny statutes in Mississippi (a conservative state) with those in New York (a liberal state). The statutes vary with respect to (1) degrees of grand larceny (one in Mississippi and four in New York), (2) value placed on the property (less in Mississippi), and (3) penalties for violations (greater punishment in Mississippi for the most basic larcenous offense).

Exhibit 1–1 Larceny Statutes

Mississippi

§ 97-17-41 Grand Larceny

(1) Every person who shall be convicted of taking and carrying away, feloniously, the personal property of another, of the value of Five Hundred Dollars ($500.00) or more, shall be guilty of grand larceny, and shall be imprisoned in the Penitentiary for a term not exceeding ten (10) years; or shall be fined not more than Ten Thousand Dollars ($10,000.00), or both. The total value of property taken and carried away by the person from a single victim shall be aggregated in determining the gravity of the offense. . . .

New York

§ 155.30 Grand Larceny—fourth degree

A person is guilty of grand larceny in the fourth degree when he steals property where (1): The value of the property exceeds one thousand dollars; or …. Grand larceny in the fourth degree is a class E felony; sentence shall not exceed four years.

§ 155.42 Grand larceny—first degree

A person is guilty of grand larceny in the first degree when he steals property and when the value of the property exceeds one million dollars. Grand larceny in the first degree is a class B felony; sentence shall not exceed twenty-five years.

Source: MS § 97-17-41; NY § 155.30 & § 155.42

Although they differ widely, all state laws are limited by three fundamental restrictions:

1. Legislators must establish that there is a compelling public need to add to the body of criminal law.
2. A law must not infringe on the people's constitutional rights.
3. The legislature must give fair and adequate notice regarding the passage and implementation of new laws. It is fairly simple to meet this obligation using, for instance, billboards and road signs, newspaper and radio announcements, advertisements on television and the Internet, and so on.

Case Law

Federal and state constitutions, through a process of checks and balances, grant the judiciary—that is, the court system—authority to review, interpret, and even overturn laws. As a result, judges have the power and opportunity to influence the development, growth, and direction of American criminal law. Collectively, this body of judicial opinion is referred to as **case law**. Case law represents judicial opinions about the constitutionality of criminal laws, lower court rulings, and decisions made by executive bodies (for example, a state governor or his or her administration).

When appellate (appeals) courts issue opinions, four options are at their disposal:

1. Affirmation of the judicial decision, meaning that the lower court's ruling is supported.
2. Reversal of the decision, meaning that the lower court's ruling is overturned.
3. Return to the lower court, meaning that the decision is reversed but sent back to the lower court with instructions on how to proceed; the case may then come back to the appellate court for a second review if necessary.
4. Reversal and rendering of the decision, meaning that the judgment is immediately proclaimed and entered into the record.

One of the most publicly recognized examples of case law is the U.S. Supreme Court decision in *Roe v. Wade* (1973). In this important case, the justices held that a woman's decision to terminate a pregnancy by means of an abortion during the first trimester is part of her right to privacy. **Exhibit 1–2** illustrates how case law appears in legal venues.

Constitutional Law

Constitutional law also pertains to criminal law, although to a lesser degree. The U.S. Constitution and the constitutions of the independent states regulate what is required and prohibited in the process of enacting legislation. Most issues of constitutional law center on procedure, such as the procedure for obtaining search warrants. But constitutional principles also protect society from abuses in constructing and applying criminal law. For example, the constitutional equal protection clause requires that all laws, such as those governing public education, be applied evenly to all people who must abide by them, such as those who live within a particular school district.

Administrative Law

Even though criminal law is the most visible deterrent against violations of a society's rules, there are many more policies and regulations (thousands, in fact) that regulate our daily behavior. This body of rules is collectively referred to as **administrative law**. For example, the Internal Revenue Service and the Environmental Protection Agency construct regulatory policies that specify, for instance, what percentage of our income is subject to federal taxation and which building materials may be used to construct a new home or office tower. Violations of such regulations are ordinarily settled in

Exhibit 1–2 *Roe v. Wade*

SUPREME COURT OF THE UNITED STATES

410 U.S. 113

Roe v. Wade

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 70-18 Argued: December 13, 1971—Decided: January 22, 1973

BLACKMUN, J., delivered the opinion of the Court, in which

BURGER, C.J., DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined.

WHITE, J. and REHNQUIST, J. filed dissenting opinions.

Issue:

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. . . . A three-judge District Court . . . declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights.

Decision:

State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term.

Source: United States Supreme Court

civil (rather than criminal) court through fines, other economic penalties, or restriction of privileges. More recently, however, federal and state legislatures have begun to empower administrative agencies to bring criminal charges against violators. As such, breaches of regulatory policy, once considered to be exclusively civil matters, now carry more legal weight.

Figure 1–1 outlines the major sources of criminal law we have just discussed.

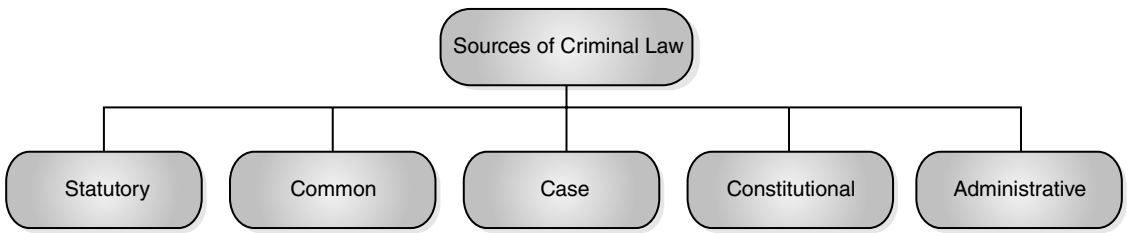

FIGURE 1–1

Types of Legal Wrongs

There are two recognized forms of legal wrongs: public and private. Private wrongs are usually settled in civil court, a valuable mechanism for resolving disputes. Furthermore, the existence of civil court venues to address private wrongs greatly reduces the incidence of crimes that likely would have been

committed as a means of retribution or retaliation had an alternative remedy not been available. Nevertheless, our discussion of private wrongs will be brief here so that we can focus instead on the topic at hand—public wrongs, which are the domain of criminal law.

Private Wrongs

A private wrong falls within the jurisdiction of **civil law** (not criminal law). It is referred to as a **tort** when there is a cause for legal action. The person accused of causing the harm (whether intentional or negligent) is therefore known as the **tortfeasor**. The legal process entails a complainant filing a formal accusation of harm with the court that possesses civil jurisdiction. The complainant seeks one of three remedies (or a combination thereof) for an inflicted wrong: a monetary award, injunctive relief, or declaratory relief.

1. Monetary damage is the most common remedy for private harm. There are two forms of monetary damages: compensatory and punitive. As the name suggests, **compensatory damages** are awarded as a means of compensating or reimbursing the complainant for actual expenses associated with wrongful conduct. For example, an employee unjustly fired may sue and receive compensatory damages equal to the actual losses she suffered as a result of the dismissal, such as back wages and withheld benefits. The aim of awarding **punitive damages**, on the other hand, is to punish individual wrongdoers and deter them from committing the same act(s) in the future. For example, a sexual harassment victim may sue and receive compensatory damages, but punitive damages (sometimes amounting to millions of dollars) may also be assessed by the court to send a message to others who might be inclined to commit such acts.
2. Wronged individuals may also turn to civil courts for assistance with operational problems in the form of injunctive relief. **Injunctive relief** occurs when a court issues an injunction (that is, an order) for an individual or a group to do or stop doing something that is causing harm or may bring about harm in the future. For example, a historic building scheduled to be leveled may be protected, at least temporarily, by securing a court injunction that bars the demolition from proceeding.
3. A complainant may file a lawsuit seeking **declaratory relief**. This occurs when a judge confirms or declares the party's rights according to an applicable contract or statute. The judge's statement or declaration is called a "declaratory judgment."

Public Wrongs

A public wrong is addressed within the body of **criminal law**, which can be either procedural or substantive:

1. **Procedural law** encompasses many procedures required of those empowered to carry out the duties of the criminal justice system. Its purpose is to protect the due process rights of all persons on American soil (regardless of whether their residency is lawful or unlawful). Procedural law sets forth a list of dos and don'ts for criminal justice professionals. Fourth Amendment search-and-seizure guidelines and Sixth Amendment trial rights are but two of many procedural standards intended to ensure fairness in criminal proceedings.
2. If procedural law establishes an even-handed process for prosecuting criminal violations, **substantive law** is the substance or body of law itself. It is composed of the behavioral rules by which those same U.S. residents must abide. Substantive law ensures that members of society are afforded fair notice of what is expected of them. It can therefore be defined as a list of dos and don'ts for members of our

society. The elements defining murder, rape, assault, and robbery are examples of what constitutes substantive law. **Figure 1–2** summarizes the divergent paths of these two forms of legal wrongs.

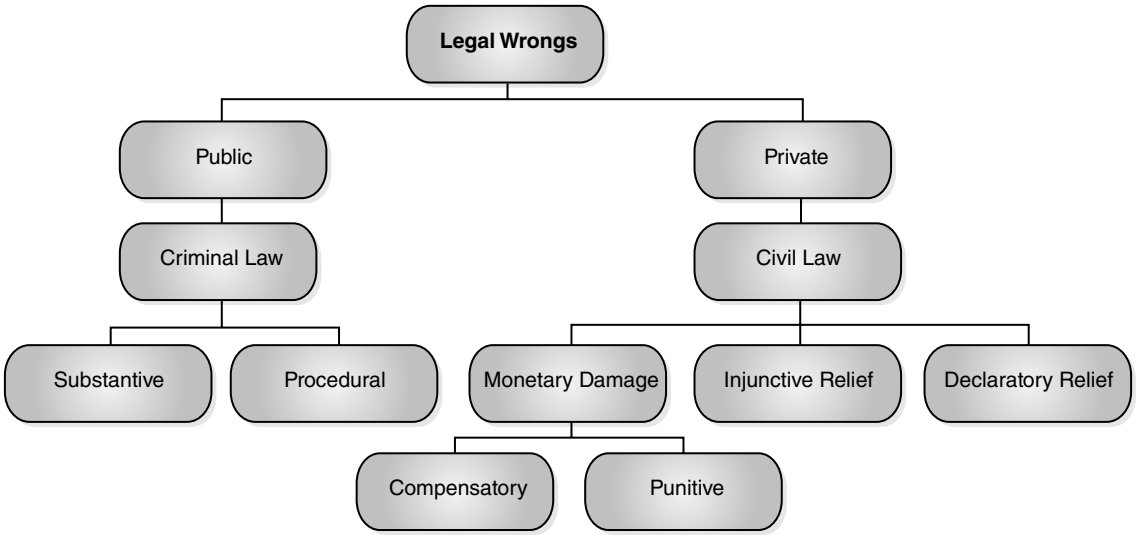

FIGURE 1–2

Crime Defined

Generally speaking, a **crime** is a public wrong that causes social harm. Such an all-encompassing definition may appear to adequately define criminal behavior; after all, no one who cares about justice would behave in a manner that could be construed as harmful to the public welfare—right? But *who* decides what is a crime and *how* an act is determined to have violated the law are of utmost importance. If you believe crime is sufficiently defined in such a generic manner, consider for one moment the person who was adjudicated a criminal for doing little more than behaving in a highly moral fashion —Jesus of Nazareth! It should be obvious, then, that "who" determines what is criminal and "how" it is determined are of utmost importance.

Through the years, many legal scholars have offered definitions of crime. For purposes of simplicity, however, we embrace a specific, yet broad, definition. Crime has three distinct components: (1) commission of an act prohibited by law or omission of an act required by law, (2) lack of any defense, and (3) the act has been codified as a felony or misdemeanor.

Commission or Omission

The first component of our definition of crime illustrates that punishment is reserved for behavioral conduct, not for thoughts alone. The law is clear, however, that behavior consists of both what is done (commission) and what is not done (omission). In other words, even though most criminal regulations specify what an individual must refrain from doing (forging, robbing, and so on), the law also often demands action of a person (such as filing taxes or offering emergency assistance). Commission of crime occurs in a variety of forms (possession or procurement of a prohibited item or substance, for example, or a thwarted attempt to harm someone) as defined by various jurisdictions. Omission is

much more narrowly defined. One historical example, although used today only on the federal level, provided that it was a criminal misdemeanor to conceal the commission of a felony committed by another person, an offense known as **misprision of felony**.

Lack of a Legal Defense

The second component of our definition further clarifies that not all people who engage in legally prohibited conduct are criminally accountable. The law aims to punish only those who commit such acts or ignore (omit) required ones with no reasonable justification or excuse for having done so. In other words, an individual is not necessarily guilty of a crime simply because he or she has deviated from legally established behavioral guidelines.

Codification as Felony or Misdemeanor

The third component of our definition of crime mandates that legal prohibitions be codified as a felony or misdemeanor, meaning that the law must provide written advance notice of its behavioral expectations (referred to as an annotated code) and specifically outline applicable punishments. **Figure 1–3** outlines the three essential components that constitute a crime.

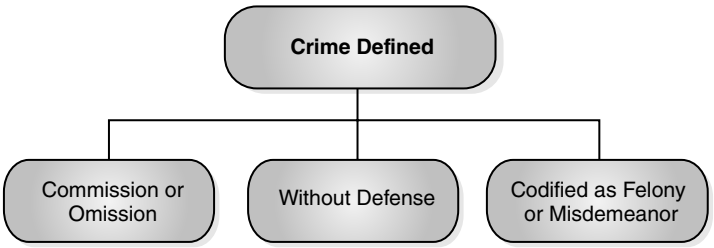

FIGURE 1–3

Crime Classifications

Crime is classified in two ways:

1. Degree of punishment authorized. Punishment can be further divided into three broad categories: felonies, misdemeanors, and violations.
2. Level of moral turpitude (corruption, evil, or indecency) shown. This category is divided into *mala in se* and *mala prohibita* designations.

Felonies, Misdemeanors, and Violations

In common law, a felony was a serious crime for which a person was required to forfeit property to the king to make amends for harm against the crown. Common-law felonies, including murder, manslaughter, rape, sodomy, assault, robbery, burglary, larceny, and arson, were subject to a punishment of death. A common-law crime not punishable by death was referred to as a misdemeanor (a less serious crime).

Although not required to do so, most states today have abandoned the common-law guidelines defining felonies and misdemeanors in favor of a quantified approach. In other words, most states now define a **felony** as a crime for which the authorized punishment is 1 year or more in a federal or state prison. Any felonious crime eligible for the penalty of death or life imprisonment without parole is referred to as a **capital felony**.

A **misdemeanor** is a crime for which punishment is authorized up to, but not including, 1 year in a local (municipal or county) jail. Much like felonies, misdemeanor crimes have been divided into several categories according to their seriousness. Using this classification system, a crime for which punishment ranges from 6 to 12 months in jail is a **gross misdemeanor**, an **ordinary misdemeanor** is a crime for which punishment ranges from 3 to 6 months in jail, and a **petty misdemeanor** represents crimes for which punishment ranges from 10 to 30 days in jail.

Each state is free to penalize criminal offenses according to the needs and values of its jurisdiction, however. Uniformly referring to a particular crime as a felony or misdemeanor, then, may not be accurate. Further complicating the classification landscape is the fact that some states have designated certain crimes as **wobblers**, meaning that the accused can be charged with either a misdemeanor or felony, depending on the circumstances.

In addition to felonies and misdemeanors, modern legal codes often also include a third classification known as **violations**. These state-designated crimes are punished with fines only and are not administratively recorded as criminal acts. Finally, a local **ordinance** is a regulation of problematic behavior at the county or municipal level, the violation of which is referred to as an **infraction**; littering is one example of an ordinance infraction. Ordinances are not prosecuted at the federal or state level; thus, they are not considered to be crimes.

Mala in Se and *Mala Prohibita*

Crimes are also distinguished along lines of moral turpitude—that is, moral corruption, perversion, or other behavior that deviates grossly from the community's accepted standards. Such acts may be considered inoffensive by one community but designated as criminal in an adjacent community. Crimes of moral turpitude are referred to as ***mala in se*** (singular: *malum in se*), meaning "wrong in themselves," or inherently evil or bad. All common-law crimes were *mala in se*.

Similarly, acts thought to involve no moral turpitude but nonetheless considered wrong merely because they are legally prohibited are referred to as ***mala prohibita*** (singular: *malum prohibitum*). Speeding may be the most common *malum prohibitum* offense; it is prohibited but certainly not condemned by society as being immoral. **Figure 1–4** charts the path of these criminal classifications.

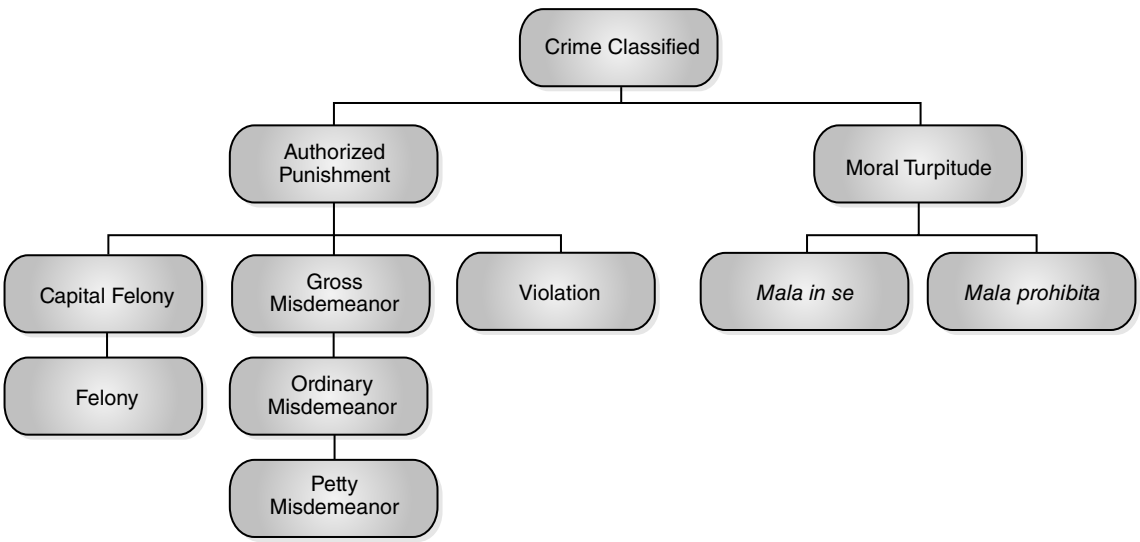

FIGURE 1–4

Distinguishing Between Crime and Deviance

The topics of crime and deviance are so broad that courses spanning full academic terms still fail to provide adequate coverage of them; therefore, the following section is no more than a preliminary introduction to these concepts. Although the terms "crime" and "deviance" are often used interchangeably in casual conversation, they do possess separate and distinct qualities when considered within formal criminal justice settings.

Crime (as previously defined) consists of conduct that society agrees to regulate for its own compelling purposes. **Deviance**, on the other hand, is a sociological concept used to describe behavior that either breaches (deviates from) social norms and values or represents a statistical abnormality. For most of us, the word "deviance" has negative associations. Really, though, it refers only to acts that depart from the ways in which most people behave. Vegetarians (3% of the population) and vegans (less than 1% of the population), for example, represent statistical departures—deviations—from social norms because very few Americans observe those dietary restrictions. Although such behavior is classified as deviance, it should be commended—not punished—for its health benefits and for the commitment to values it reflects. Essentially, then, conduct may deviate from established customs and prevalent activities, yet still not be classified as criminal when there is no compelling need to regulate its consequences. It is also true, however, that many crimes are not seen as deviant. **Pause for Thought 1–1** illustrates the practical difference between a crime and a deviant act.

PAUSE FOR THOUGHT 1–1

Consider the following scenario: Kelly is issued a citation for speeding on the way to work. A colleague witnesses the incident and spreads the word throughout the office. When Kelly arrives, what do you believe the co-workers' response will be?

Scenario Solution

Speeding is a common practice among motorists. Even though most motorists regard themselves as safe drivers, it is undeniable that a large majority have exceeded the speed limit at one time or another; therefore, speeding is not a statistical abnormality. Nor does speeding qualify as a breach of societal values (or norms), because the practice is considered normal. It is nonetheless regulated as a criminal act because of the compelling need to protect motorists from the possible consequences of driving at an unsafe speed.

Essential Elements of Crime and Liability

The most fundamental legal requirement pertaining to government regulation of criminal conduct is that a designated offense (a crime or ordinance) must possess an element known as **actus reus**, translated as "guilty act." Unlike most principles of criminal law, there simply are no exceptions to this legal principle. It is not sufficient, in other words, to demonstrate merely the likelihood a person committed a prohibited or required act. To hold one **culpable** (or blameworthy) for a legal wrong, the government must meet or exceed specified requirements collectively referred to as the **burden of proof**. In criminal cases, this burden is much greater than the **preponderance of the evidence** standard used in civil cases, whereby one need only establish a greater likelihood than not that the act occurred. With respect to the *actus reus* for criminal offenses, the government must prove to a moral certainty—a standard referred to as **beyond a reasonable doubt**—that the act occurred. To do so, the government must show the presence of *corpus delicti* and proximate cause.

Phase I of *Actus Reus*: *Corpus Delicti*

Corpus delicti (plural *corpora delicti*) is translated as "body of the crime." Essentially, it conveys to all persons engaged in the criminal process that there must be substantial evidence to demonstrate, first, that a crime was committed and, second, that the accused person committed the crime. The second component depends on the first, since it is impossible to demonstrate that a person committed a crime if no crime was committed to begin with. In 1959, a California appeals court became the first American court to rule that the *corpus delicti* of murder could be wholly satisfied with circumstantial evidence. After the prosecution has established the *corpus delicti* of an offense, it then must address the issue of causation.

Phase II of *Actus Reus*: Proximate Cause

The **proximate cause** requirement of a criminal offense demands the government prove that illegal conduct in question actually caused the harm (the word *proximate* means near or close). For example, suppose one person slaps another in the face (assault) without causing any apparent harm. Later that night, however, the person who had been struck dies from an apparent heart attack. It is obvious to most reasonable people that the slap did not cause the death. A prosecutor might argue, however, that the death was the culmination of a process that began with the slap, and the person who delivered the blow could be unjustly convicted of homicide. It is for reasons such as this that the law aims to protect the accused by requiring the prosecution to prove a causal connection between the harm in question and the actual conduct of the accused. This is called the **actual cause**.

There are two actual cause examination techniques: the but-for test and the substantial factor test. The **substantial factor test** is the preferred prosecutorial tool because it is an easier standard. Essentially, the test requires only that the government establish, without any direct proof, that the person's actions contributed significantly to, or were a substantial factor in, the resulting harm. Because of the generalities associated with this test, it is normally permitted by judges in cases where it would be nearly impossible to establish causation with more certainty. For example, let us presume for one moment that 10 people simultaneously assault another person, resulting in serious bodily harm. Unless the person causing the serious injuries steps forward and accepts responsibility, it would be nearly impossible to determine which of the 10 people should be most accountable; therefore, the prosecution would only have to establish that an accused person was a substantial factor in the sustained injuries. The stricter and more judicially sanctioned approach, the **but-for test**, essentially begs the question: But for the conduct of the accused, would the harm have occurred? If harm to another would not have occurred but for the defendant's conduct, the defendant is said to be the actual cause of the harm. The hypothetical example in **Box 1.1** illustrates a recipe (of sorts) for how actual cause determination is formulated.

Box 1.1

Actual Cause

Question 1: Would the harm have been avoided but for the conduct of the accused?
Finding: Yes
Conclusion: The accused is the actual cause or cause-in-fact.

It must be remembered that actual and proximate cause are not the same. The legal complexities associated with proximate cause often present unique challenges. Proximate cause is premised on **legal cause**, not just actual cause. It recognizes the unfairness of imposing criminal penalties on those who are the actual cause of harm to another, yet should not be criminally accountable for the harm. Where it can be shown that the defendant intended the harm or should have been able to reasonably anticipate dangers associated with certain conduct, a legal cause determination is fairly straightforward. On the

other hand, in cases in which the harm is beyond the foreseeable scope of the defendant or in which some independent **intervening cause** severs (or breaks) the connection between the defendant's conduct and its harmful consequence, the defendant's conduct may not be the legal cause of the harm. Keep in mind, however, that the law requires assailants to take victims as they find them, meaning that a lack of awareness concerning victims' health conditions cannot be used to avoid criminal responsibility. Considering that a criminal conviction is prohibited without a proximate cause showing, this legal requirement is of monumental importance. The hypothetical example in **Box 1.2** illustrates a recipe of sorts for how a legal (and hence proximate) cause determination is formulated. Moreover, **Pause for Thought 1–2** illustrates the proper legal interpretation regarding proximate cause determinations.

Box 1.2

Legal Cause

Question 1: Was the possibility of harm foreseeable?
Finding: Yes
Question 2: Was there an independent cause intervening between the act and harm?
Finding: No
Conclusion: Accused is the legal cause, and hence the proximate cause.

PAUSE FOR THOUGHT 1–2

Consider the following: Charlie becomes enraged at another driver's aggressive and dangerous maneuvers. Upon arriving at a store and in response to that driver's callous and cavalier attitude, Charlie punches the man (the driver) in the stomach but with no intent to cause serious harm. As a result of a kidney condition unknown to Charlie, the man subsequently dies in the hospital from kidney-related complications. Can Charlie be charged with criminal homicide for the other driver's death?

Scenario Solution

Yes—that driver would undoubtedly still be alive but for Charlie's conduct. Some might argue that the kidney condition could not reasonably be foreseen and should therefore eliminate Charlie's conduct as the proximate cause of death. Although that perspective makes for interesting debate, the legal requirement that we take victims as we find them makes the condition implicitly foreseeable. Concerning the final element, an intervening cause must be independent. A health condition is not independent, but rather dependent on the harm. As such, unless Charlie had some lawful justification or excuse to strike the other driver, then Charlie is criminally culpable for the death.

Role of *Mens Rea*

Most statutes require that the prosecutor prove both the *actus reus* (guilty act) and ***mens rea*** (plural: *mentes reae*), or guilty mind, of a criminal offense in order to hold a person accountable (or culpable) for harmful conduct, generically referred to as **true crime**. In other words, the accused person's state of mind is important. The prosecutor must show that the act was deliberate or at least reckless in nature—that the accused person possessed intent to cause harm. Although rare, the law does carve out occasional exceptions to this rule. According to the principle of **strict liability**, the prosecution does not bear the burden of proof. In cases involving drug possession and statutory rape, for example, the law presumes, rather than requires, proof that the accused had some degree of intent.

Degrees of Intent

Legal codes recognize three forms of intent: specific intent, general intent, and constructive intent:

1. Some crimes require states to prove that a criminally accused person possessed **specific intent** to commit the harm in question. To prove this element, states must establish that the accused

acted willfully and intentionally. In the absence of specific evidence that the person intended to cause harm, a general belief that the person is at fault is insufficient for a criminal conviction. For example, a first-degree murder conviction ordinarily requires proof of premeditation; without such evidence, the defendant must be charged with a lesser included form of criminal homicide, such as manslaughter.

2. Most crimes require only proof of **general intent**, meaning some degree of malevolent or wrongful design in which the defendant knowingly caused harm but with no particular objective.
3. Behavior that is associated with no apparent intent can nonetheless be regulated as criminal conduct in order to compel individuals to maintain a reasonable standard of care. People whose actions are reckless or grossly negligent are said to have possessed the **constructive intent** to cause harm for which they are responsible and thus can be criminally culpable. **Recklessness** (also referred to as gross negligence) is the failure to adhere to a standard of care that a reasonable person would exercise, basically behaving in a fashion in which danger was foreseeable. **Negligence** (often referred to as ordinary negligence), on the other hand, has a common denominator with recklessness, as it also demonstrates a failure to adhere to a reasonable standard of care. It differs, however, in that the accused could not have anticipated the danger.

One must also keep in mind the doctrine of **transferred intent**, which seals legal loopholes regarding unsuccessful criminal attempts. According to this principle, when a person intends to cause harm to one person but instead inflicts harm on an unintended target, the law can transfer general intent (but never specific intent) from the offending party to the party actually harmed. **Pause for Thought 1–3** illustrates how to apply the doctrine of transferred intent.

PAUSE FOR THOUGHT 1–3

Consider the following: Joe becomes angry with Nicholas. In a moment of rage, Joe throws a knife in the general direction of Nicholas. The knife hits and seriously injures an innocent bystander. Is Joe criminally liable for the unanticipated harm to the bystander?

Scenario Solution

Yes, under the doctrine of transferred intent, Joe can legally be viewed as having had the general intent to harm the bystander, and the state would therefore be entitled to charge him with the crime even though Joe held no willful or purposeful intent toward the bystander. Furthermore, it should be obvious that Joe committed this act with recklessness (at a minimum) because he chose not to exercise a standard of care that could be expected of prudent persons.

Attendant Circumstances

In most cases, wrongful actions (*actus reus*) and accompanying intent (*mens rea*) are the essence of what substantive criminal law seeks to eliminate from our midst. Even when intent exists, however, some actions are not considered to be criminal because certain circumstances failed to surround or attend the conduct. Referred to as **attendant circumstances**, these legal exemptions can often mean the difference between freedom and imprisonment. For example, a young woman's age can define the difference between criminal sexual intercourse (statutory rape) and a consensual adult sexual act. At a minimum, attendant circumstances can lessen the severity of punishment associated with a crime. For example, the crime of incest—often the result of molesting a child within the family—often receives greater punishment than the actual crime of child molestation because of its trespass against the sanctity of the family unit—a breach of trust. **Figure 1–5** provides a flow chart to assist with this legal reasoning.

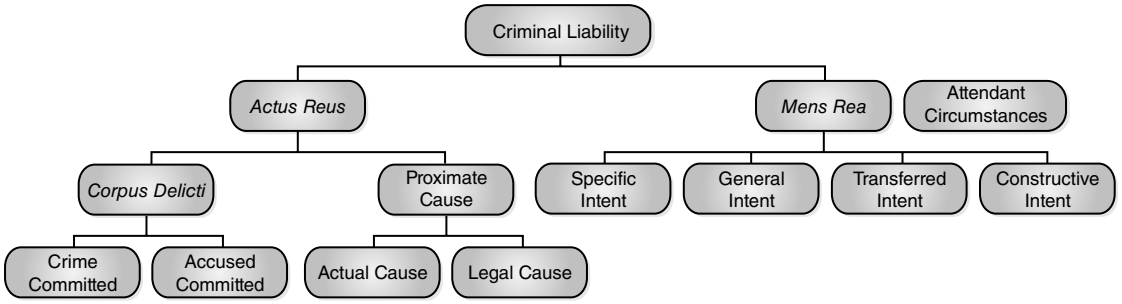

FIGURE 1–5

Crime in America

Behavior in the United States is highly regulated. An attempt to organize and discuss all crimes would produce thousands of head-spinning legal pages. This book therefore considers only the most frequently encountered and problematic crimes within the criminal justice profession. A logical starting point in identifying such crimes is the Federal Bureau of Investigation's (FBI) annual publication *Crime in the United States*. This statistical portrait of crime in America is assembled from approximately 17,000 participating law enforcement agencies, representing about 95% of the total U.S. population. Although severity is a major factor in determining which crimes are included in the publication, the frequency of their occurrence, their geographic impact, and their economic consequences are also important in the selection process.

The **Uniform Crime Reports** (UCR) embedded within this annual publication divides eight crimes into two fundamental categories: violent crime and property crime:

1. Murder, rape, aggravated assault, and robbery make up the **violent crime** grouping. In 2012, law enforcement agencies reported more than 1.2 million violent crimes. Aggravated assault was the most common violent criminal act (62.6%), followed by robbery (29.2%), forcible rape (6.9%), and murder (1.2%).
2. Within the category of **property crime**, larceny (68.5%), burglary (23.4%), motor vehicle theft (8%), and arson (< 1%) were committed nearly nine million times in 2012, resulting in estimated economic losses approaching $15.5 billion (FBI, 2013).

If there is a silver lining, it would be that violent crime and property crime both decreased (by 12.9% and 8.2%, respectively) during the 4-year period from 2008 to 2012. In addition to these eight violent and property crimes, however, their lesser included crimes (or cousins, so to speak) also are discussed throughout the FBI publication. A **lesser included offense** is a crime possessing the fundamental elements required of the greater, more serious crime with which it is categorized, but missing a key component. For example, murder is the most serious form of criminal homicide; manslaughter is a lesser included offense of murder because every murder includes an act of manslaughter.

SUMMARY

This chapter has outlined the principles and working vocabulary (legalese) essential for developing a fundamental understanding of substantive criminal law in the republic known as the United States. From the formation of social contract theory to the application of law in contemporary society, this chapter has offered a picture of the historical evolution and practical application of the rules of substantive criminal law. Students should now have little trouble citing the sources from which law is derived (common, statutory, case, constitutional, administrative) and explaining how crime is traditionally defined and classified (felonies, misdemeanors). Against this backdrop, students should now be armed with the legal tools to decipher whether an accused is culpable for conduct specified in substantive criminal codes: *mens rea*, *actus reus*, and attendant circumstances.

PRACTICE TEST

1. Which of the following is routinely cited as the first set of written laws to govern society?
   - **a.** Code of Hammurabi
   - **b.** Ten Commandments
   - **c.** Dead Sea Scrolls
   - **d.** Babylonian Sacrament
   - **e.** Assyrian Statutory Code

2. What is injunctive relief?
   - **a.** A punitive monetary award
   - **b.** Reimbursement for actual monetary losses
   - **c.** A declaration confirming a party's rights
   - **d.** A shortened sentence due to attendant circumstances
   - **e.** An order for an individual or group to do or stop doing something harmful

3. The FBI uses all of the following factors to determine which crime statistics will be cataloged in its annual Uniform Crime Reports data except what?
   - **a.** Intent
   - **b.** Severity
   - **c.** Economic impact
   - **d.** Geographic distribution
   - **e.** Frequency of occurrence

4. Which system can be described as a government of elected leaders operating under a constitution that safeguards the best interests of the nation and its people by limiting the power of elected officials?
   - **a.** Constitutionalism
   - **b.** Republic
   - **c.** Monarchy
   - **d.** Socialism
   - **e.** Democracy

5. Which principle stipulates that American citizens will voluntarily waive rights, privileges, and liberties guaranteed by natural law in exchange for government protection?
   a. Due process
   b. *Stare decisis*
   c. Equal protection
   d. Social contract theory
   e. Bill of Attainder

6. Which body of law originates with legislatures and serves as the primary source for the establishment of substantive criminal law?
   a. Common
   b. Statutory
   c. Administrative
   d. Constitutional
   e. Case

7. Which body of law manifests the customs and traditions practiced throughout England?
   a. Criminal
   b. Positive
   c. State
   d. Common
   e. Federal

8. Which principle means "let the decision stand"?
   a. *Malum prohibitum*
   b. *Actus reus*
   c. *Mala in se*
   d. *Mens rea*
   e. *Stare decisis*

9. Which kind of crime is defined as an offense punishable by 3 to 6 months incarceration?
   a. Strict liability crime
   b. Gross misdemeanor
   c. Petty misdemeanor
   d. True crime
   e. Ordinary misdemeanor

10. Which of the following represents the legislative efforts of local government (county and/or municipal) to regulate behaviors within its jurisdictional boundaries?
    a. Misdemeanor
    b. Crime
    c. Felony
    d. Administrative law
    e. Ordinance

11. Which principle describes crimes of moral turpitude and means that the acts are "wrong in themselves"?

a. *Malum prohibitum*
b. *Actus reus*
c. *Mala in se*
d. *Corpus delicti*
e. *Mens rea*

12. Which principle translates as "guilty act"?

a. *Actus reus*
b. *Malum prohibitum*
c. *Corpus delicti*
d. *Mala in se*
e. *Mens rea*

13. Which standard is used in civil cases and requires one only to establish a greater likelihood that harm occurred?

a. Beyond a reasonable doubt
b. Civil scale
c. Civil injury
d. Preponderance of the evidence
e. Incurred harm rule

14. Which principle translates as "body of the crime"?

a. *Mens rea*
b. *Mala prohibita*
c. *Corpus delicti*
d. *Mala in se*
e. *Actus reus*

15. Which standard must be sufficiently met in order to hold an accused person liable for harm?

a. Actual cause
b. *Stare decisis*
c. Recklessness
d. Ordinary negligence
e. Proximate cause

16. Which term refers to the initial connection between the harm in question and the conduct of the criminally accused?

a. Circumstantial evidence
b. Actual cause
c. *Corpus delicti*
d. Legal cause
e. Deviance

17. Drug possession and statutory rape are examples of crimes often exempt from the *mens rea* requirement, meaning that they possess what?

a. Injunctive relief
b. Declaratory relief
c. Strict liability
d. General intent
e. Specific intent

18. Which concept means that some degree of malevolent or wrongful design was intended, but with no particularized objective?

a. General intent
b. Constructive intent
c. Specific intent
d. Capital felony
e. Strict liability

19. What legal elements must accompany *actus reus* and *mens rea* in order for most crimes to be punished?

a. *Corpus delicti*
b. Declaratory relief
c. Injunctive relief
d. Attendant circumstances
e. Extenuating circumstances

20. The historical law of the Catholic Church is called what?

a. Canon law
b. Natural law
c. Code of Hammurabi
d. Positive law
e. Statute of Westminster

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Crime and Punishment: Constitutional Limitations and Protections

CHAPTER 2

KEY TERMS

Aggravating circumstance
Bail
Bifurcated proceeding
Checks and balances
Civil forfeiture
Compulsory process
Criminal forfeiture
Death-qualified jury
Determinate sentence
Deterrence
Doctrine of overbreadth
Double jeopardy
Dual sovereignty
Due process
Eminent domain
Equal protection clause
Excessive bail
Exclusionary rule
Executive branch
Federal Sentencing Guidelines
Fine
Forfeiture
General deterrence
Grand jury
Habitual offender statutes
Incapacitation
Incorporation
Indeterminate sentence
Information
Intensive supervision probation
Judicial activism
Judicial branch
Legislative branch
Mitigating circumstance
No bill
Parens patriae
Predicate crime
Privilege against self-incrimination
Probable cause
Probation
Procedural due process
Proportionality of punishment
Rehabilitation
Restitution
Restorative justice
Retribution
Selective incorporation
Sentencing disparity
Sentencing Reform Act of 1984
Separation of powers
Sovereignty
Specific deterrence
Speedy trial
Substantive due process
True bill
Void for vagueness
Voir dire
Wergild

Introduction

This chapter explores the United States Constitution as a principled instrument intended to prevent uncontrolled government intrusion into the lives of citizens. We will examine the role the Constitution plays in both protecting the integrity of the lawmaking function and mediating the relationship between sovereign and citizen. We will pay specific attention to constitutional amendments that affect the criminal justice system. In addition to such constitutional notions of fair play, we will also evaluate prevailing theories of punishment, constitutional limitations on the nature and extent of punishment, and the many alternative forms of punishment.

United States Constitution and Criminal Law

In light of the oppressive system of government that existed in England, those who settled the United States wished to design a government that would be, as Abraham Lincoln stated in the Gettysburg Address, ". . . of the people, by the people, [and] for the people." The framework of the U.S. Constitution, including the Bill of Rights—that is, the first 10 amendments—promotes a balance between government power and personal liberty. Rights are guaranteed and may not be taken away or limited without certain protections. The U.S. Constitution sets forth a three-pronged system of government, with each branch having limited powers. This doctrine of **separation of powers** reflects a concerted effort by the drafters of the Constitution to avoid concentrating government power in one individual, such as a monarch or dictator, or in one branch of government, such as the judicial branch (also called the judiciary, or court system). Remember that the drafters fled a monarchy in order to avoid such situations.

The U.S. Constitution not only separates powers among three branches of government but also distinguishes between power granted to the federal (national) government and that which is reserved for the states. Thus, the Constitution embraces the doctrine of separation of powers on two levels.

The effort to strengthen the national government by specifying matters that fall within its exclusive scope is referred to as federalism; when a conflict arises between state and federal laws, federal law always prevails. Principles of federalism are entrenched in the American legal system and serve to maintain a strong central government while respecting state **sovereignty** (political independence). Subjects that fall within the federal government's domain are declaration of war, regulation of interstate commerce, and operation of the national government. In contrast, certain matters are specifically reserved for the states. For example, each state retains the right to oversee police power, or the authority to protect the health, safety, and welfare of its citizens. Thus, states have the primary authority to enact laws that affect these areas.

The presence (or absence) of power within each branch of government regulates the system as a whole by providing **checks and balances**. For instance, the power to make laws is vested in (granted to) the **legislative branch** (United States Congress), but its conduct is held in check by the **judicial branch** (Supreme Court), which interprets those laws and may even declare them unconstitutional. Likewise, the **executive branch** of the federal government exercises checks on the legislative branch when the president vetoes legislation, and it acts as a check on the judicial branch when the president pardons a person who has been convicted of a crime. Checks on the legislative branch, in turn, are balanced by Congress's ability to impeach judges, override the president's veto in certain situations, and control funding of items on the president's agenda. In other words, checks and balances are reciprocal safety mechanisms, of sorts, designed to prevent tyranny (oppression) by any single branch. Each branch is thereby

held in check by specific powers vested in the other two branches. This three-branch system of government is also used by the states; however, state governments must abide by their respective state constitutions.

In principle, the judicial branch does not make laws; however, critics contend that some federal judges have attempted to do so indirectly by making subjective (biased) court decisions that advance a particular agenda, rather than considering the facts of the case and applying the law impartially. This practice is referred to as **judicial activism**.

Constitutional Principles and Limitations

The U.S. Constitution contains several provisions designed to limit the nature and extent of government intrusion into the lives of American citizens. We will focus only on provisions that may apply to criminal law or affect the legal process and punishment. Before we do so, however, we must understand certain overarching legal doctrines that restrict the manner in which laws may be drafted or applied. First, laws must be specific enough for an average or reasonable person to determine what conduct is or is not prohibited. If a law is not sufficiently specific or clear, a court may rule the law **void for vagueness**. In other words, the law is so broad or imprecise that an average person could not be expected to determine what conduct it specifies as legal or illegal. Vague laws are not constitutional because they violate due process, which is set forth in the Fifth and Fourteenth Amendments.

Although the functions of creating and applying criminal law have historically been reserved to the states, federal government jurisdiction in criminal matters continues to expand. Thus, a given criminal offense may constitute a violation on both the state and federal levels. Given this significant and increasing overlap, we will address constitutional principles that apply to each.

Constitutional provisions regarding the application of criminal law are generally found in four amendments to the U.S. Constitution: the Fourth, Fifth, Sixth, and Eighth Amendments, which are all contained in the Bill of Rights. These provisions were made applicable to the states by the Fourteenth Amendment.

The Bill of Rights was originally intended to apply only to the federal government. The U.S. Supreme Court affirmed this interpretation in an 1833 case known as *Barron v. Baltimore*. The purpose of limiting applicability of the Bill of Rights was to reassure states that the federal government would not encroach on state issues, hence the enduring states' rights debate. Most state constitutions possessed comparable provisions to protect individual rights; however, after the Civil War, it became apparent that states, too, must be subject to constitutional limitations of government power in order to protect newly freed slaves in states whose governments might seek to infringe on citizens' individual liberties.

Fourteenth Amendment

In 1868, the Fourteenth Amendment was enacted. It includes three central provisions (see Figure 2-1):

1. *Privileges and immunities clause*
2. *Due process clause*
3. *Equal protection clause*

Over the next several decades, the other amendments that comprise the Bill of Rights were applied to the states through **incorporation** — a process whereby the protections set forth in the

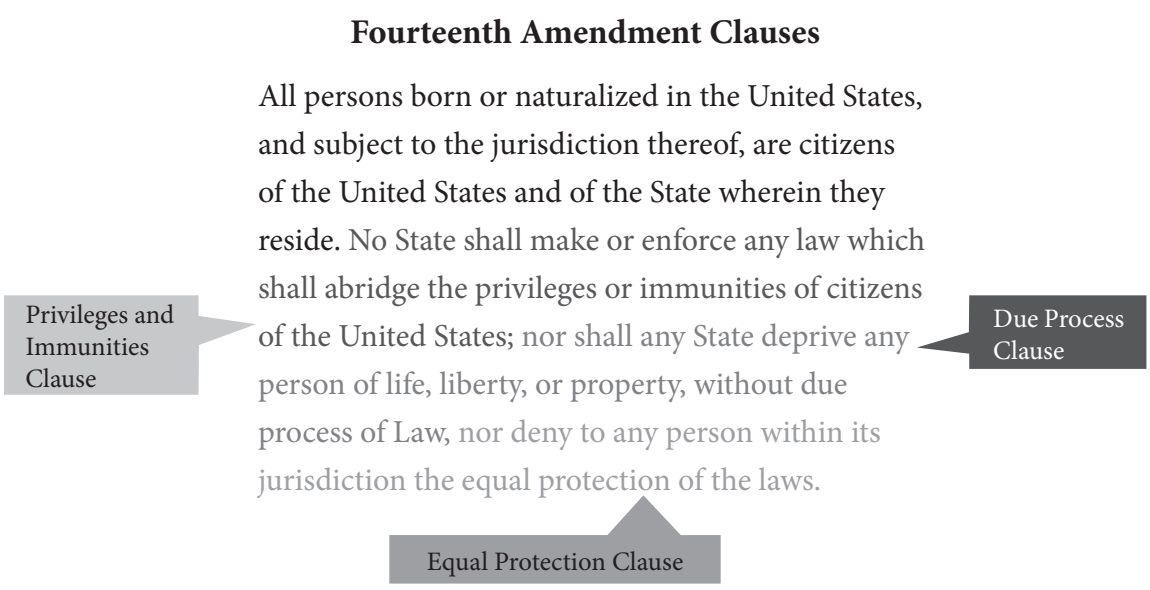

FIGURE 2–1

Bill of Rights are extended to the states by applying the Fourteenth Amendment, particularly the due process clause.

The U.S. Supreme Court has waffled on the issue of incorporation over the years. Although some Supreme Court Justices favor states' total adoption of all rights contained in the Bill of Rights, others opt for **selective incorporation** — a process of applying to the states only rights that are fundamental in nature. Determining which rights are fundamental has been a long and arduous process for the court. Today, however, only two provisions in the Bill of Rights have not been applied to the states:

1. Fifth Amendment right to grand jury indictment
2. Eighth Amendment prohibition against excessive bail

Due process refers to the requirement that government follow certain procedures before infringing on the life, liberty, or property of a citizen. A precise definition of due process is difficult to provide, as its boundaries have proved unclear. We will discuss interpretations of due process in the section devoted to the Fifth Amendment. The **equal protection clause** prohibits states from making random and unreasonable distinctions among people that limit their rights and freedoms. Although the equal protection clause does not prohibit all distinctions, states must be able to demonstrate sufficient justification for the classifications it chooses to establish. For example, states may not enact laws or regulations that allow only Native Americans to drive. This would be an unconstitutional distinction based on race or ethnicity, a characteristic over which one has no control and that is unrelated to one's ability to drive. In fact, all race-based classifications are treated as suspect by the U.S. Supreme Court and are illegal.

Cases involving gender, age, and out-of-wedlock births are also subject to heightened consideration by the court. The state must establish that an important state interest is at stake and that the proposed law substantially protects that interest. If it can do so, the law or policy may be

upheld. For example, establishment of an age requirement for obtaining a marriage license may be upheld if the state can demonstrate that one or more important state interests—promoting the stability of marriage and protecting minors from prematurely assuming adult responsibilities—are at issue and can show that the law addresses those interests. Such laws represent the ***parens patriae*** function of the state—a Latin term literally interpreted as "the parent or father of the nation." This doctrine holds that the state serves ultimately as the parent or guardian of those who cannot make decisions for themselves, such as children and people with certain disabilities. Resolution of equal protection challenges can undoubtedly be difficult and has evolved into a complex area of the law.

Fourth Amendment

Having been subjected to the unbridled power of the police to interfere in the lives of private citizens in England, the drafters of the U.S. Constitution wanted to ensure that American citizens were protected from unreasonable search and seizure within their homes and in other places in which there is a reasonable expectation of privacy (*Mapp v. Ohio*, 1961). The Fourth Amendment is crucial in guaranteeing individual rights and liberties. This amendment protects citizens by limiting government authority to intrude on their privacy in order to search for evidence:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

As society and technology have evolved, the individual expectation of privacy has become a complex, enduring issue. For example, *United States v. Jones* (2012) required the court to decide how the Fourth Amendment applied to the use of modern technology in a drug trafficking case. Without first securing a search warrant, law enforcement officers attached a global positioning system (GPS) device to a suspect's vehicle to track his movements. The Court concluded that this action did constitute a search under the Fourth Amendment, and it was therefore ruled unconstitutional.

The task of determining whether a search or seizure is unreasonable has been an arduous one for state and federal courts. Some scholars suggest that all searches conducted without probable cause are unreasonable; however, the U.S. Supreme Court has allowed a lesser standard, known as "reasonable suspicion," to be applied in limited circumstances as the basis for a search. For example, searches carried out in public schools (*New Jersey v. T.L.O.*, 1985) and stop-and-frisk searches (*Terry v. Ohio*, 1968) are allowed by this standard. In recent years, the Court has remained vigilant in protecting individual privacy rights from government intrusion.

The drafters of the U.S. Constitution also included a provision that requires probable cause to exist before an arrest or search warrant may be issued. **Probable cause** is a judicial determination indicating there is a strong probability that a crime has been committed, that the individual named in the warrant application committed the crime, and in the case of a search warrant, that evidence of a crime will be found in the area(s) described in the application. Probable cause is a legal standard requiring that a threshold level of proof be reached. The evidence, however, need not be as conclusive as that required to meet other standards, such as beyond a reasonable doubt, clear and convincing evidence, and preponderance of the evidence.

When law enforcement officers apply for a warrant, the Fourth Amendment requires them to describe with "particularity" the areas or persons to be searched or arrested. The particularity requirement was intended to prevent the use of general warrants, which had been common in 18th-century

England. Once in hand, such warrants essentially allowed police to search any place for any thing. Having unrestricted access to the homes, persons, and personal effects of private citizens created significant opportunities for abuse. Thus, the drafters of the U.S. Constitution included the particularity requirement to place limits on when searches and arrests could occur. Finally, all warrant applications must be made under oath or affirmation.

Without a mechanism for enforcement and accountability, Fourth Amendment protections are meaningless. Thus, the U.S. Supreme Court affirmed the use of the **exclusionary rule**, which prohibits prosecutors in criminal trials from using evidence obtained in violation of the Fourth Amendment (*Weeks v. United States*, 1914; *Mapp v. Ohio*, 1961). This rule is intended to discourage law enforcement from knowingly violating the Fourth Amendment.

Fifth Amendment

When most Americans think of the safeguards offered by the Fifth Amendment, the protection against self-incrimination comes immediately to mind; however, this provision is only one of several contained in this important amendment:

> *No person shall be held to answer for a capital, or otherwise infamous Crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

GRAND JURY The Fifth Amendment guarantees citizens the right to be indicted by a **grand jury**—a body of citizens drawn from the rolls of registered voters and asked to determine whether sufficient evidence exists to proceed to trial. After criminal charges have been filed against a defendant, the prosecutor presents the state's case to the grand jury, which hears only from the prosecutor and not from the defense. A defendant may testify if he or she wishes, but doing so is unusual given the potential for a defendant to incriminate him- or herself. The purpose of the grand jury is to protect citizens from arbitrary prosecution. As such, use of grand jury proceedings serves as another check on prosecutors' power to bring citizens to trial.

Grand juries operate in secret, and their deliberations are closed to the public. After hearing the prosecution's presentation of the evidence, the grand jury may return a true bill of indictment or no bill. A **true bill** indicates that there is sufficient evidence to proceed to trial. **No bill** means the opposite—that there is insufficient evidence to continue. A grand jury may also serve as an investigatory body. In this capacity, it may subpoena witnesses and compel testimony or demand that certain documents be produced. In *Hurtado v. California* (1884), the U.S. Supreme Court held that the right to be indicted by a grand jury is not binding on the states. Thus, whereas the defendant in any federal case is entitled to have the facts presented to a grand jury for review, defendants in state prosecutions may not have the same privilege. Most states do, in practice, use grand juries even though doing so is not constitutionally required. In other states, as an alternative to assembling a grand jury panel, the prosecutor files with the court a formal charging document called an **information**.

DOUBLE JEOPARDY The U.S. Constitution, as well as most state constitutions, contains a prohibition against **double jeopardy**, which occurs when a citizen is twice put in jeopardy—that is, placed at risk—of conviction or loss of liberty for the same offense. During medieval times, there were no limits

on the number of times a defendant might be tried or punished. The drafters of the U.S. Constitution were careful to eliminate such practices from their new legal system in order to shield citizens from the extreme physical and psychological stress of enduring multiple prosecutions and punishments. In *Green v. United States* (1957), the U.S. Supreme Court held as follows:

> *The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to the embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*

Double jeopardy embodies the idea that the government gets only one bite at the apple, so to speak. It is prohibited on two levels: First, the government may prosecute an individual only once for a particular crime. If the jury returns a not guilty verdict, the defendant may not be retried for the same offense; however, if a mistrial is declared or if the defendant wins an appeal, a subsequent trial is permitted. Second, multiple punishments are prohibited by double jeopardy. If a defendant is tried for murder and found guilty, only one sentence for the crime of murder is permitted. If the defendant is convicted of two murders, however, separate sentences for each crime are authorized. Thus, when a defendant is charged with multiple counts or multiple crimes arising from the same circumstance or transaction, separate punishments for each count or charge are legally permissible.

There are a few exceptions to the general prohibition against double jeopardy. For example, if **dual sovereignty** applies, the defendant may be prosecuted multiple times by different governments or by different levels of government (for example, by different states, or by federal and state governments). In such situations, the authority to prosecute, convict, and punish is derived from different sovereigns, or independent governments. The U.S. Supreme Court has consistently upheld the doctrine of dual sovereignty. **Pause for Thought 2–1** illustrates how to interpret this legal issue.

PAUSE FOR THOUGHT 2–1

Consider the following: A kidnapper abducts a convenience store clerk from a small town in Louisiana and transports the victim to Florida before releasing him. The alleged kidnapper is later apprehended and charged by the Federal Bureau of Investigation with kidnapping, a federal charge resulting from a federal crime. The state of Louisiana, however, also charges the man with the same crime, pursuant to a state statute. In a pretrial motion, the defendant's lawyer argues that the pursuit of both federal and state charges for the same offense violates the double jeopardy clause of the U.S. Constitution. Is the attorney's argument valid?

Scenario Solution

No, the attorney's argument is not valid. The kidnapping charges are being pursued by different governments (that is, the state of Louisiana and the federal government), and the dual sovereignty exception therefore applies. The double jeopardy prohibition has not been violated.

SELF-INCRIMINATION The constitutional **privilege against self-incrimination** provides that no person be compelled to act as a witness against himself. This compulsion may consist of psychological coercion or physical force. Inclusion of this provision in the U.S. Constitution was necessary to protect Americans from physical and mental torture, which was commonly used in England to obtain confessions. In light of this history, the drafters of the Constitution sought to forbid expressly the use

of such tactics. Thus, if questioned, a suspect may refuse to speak to law enforcement about a crime. This privilege also allows defendants to refuse to testify at trial and prohibits the prosecution from commenting on this refusal (*Griffin v. California*, 1965).

The privilege against self-incrimination applies only to testimonial evidence—in other words, verbal admissions of guilt. It is not a violation of the Fifth Amendment to compel a person to provide a writing sample, blood sample, fingerprints, or other forms of nontestimonial evidence. Another requirement is that the testimonial evidence be incriminating. The defendant may invoke the privilege only to shield himself from incrimination. In order for a statement to be incriminating, it must in some way provide information that subjects a declarant (the person who makes the declaration or disclosure) to the possibility of loss of liberty. If the statement would only embarrass or humiliate the declarant or bring about a civil action, such as a claim for monetary damages, the privilege may not be invoked.

This privilege gained national attention in 1966, when it became the central issue in *Miranda v. Arizona*. In this case, the U.S. Supreme Court addressed the need for verbal warnings regarding self-incrimination (and other rights). The court acknowledged the psychological coercion to which suspects are often subjected when in the custody of law enforcement and under interrogation. If these two circumstances exist, law enforcement officers must read the Miranda warnings to a suspect before he or she is interrogated. The warnings state the following:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in court.
3. You have the right to speak to an attorney before questioning and to have your attorney present during questioning if you wish.
4. If you cannot afford a lawyer, one will be appointed free of charge before questioning.
5. You can decide at any time not to answer any questions or make any statements.

DUE PROCESS We noted earlier in this chapter that due process refers to the requirement that certain procedures be followed before the government may infringe on the life, liberty, or property of a citizen, and that the limits of due process have proved difficult to define. Due process is guaranteed by the Fifth Amendment. A second due process clause was included in the Fourteenth Amendment to ensure that due process rights would apply not only at the federal level but also at all levels of government. The Fifth and Fourteenth Amendment clauses are virtually identical and have been interpreted by courts in a similar manner. In *Solesbee v. Balkcom* (1950), the U.S. Supreme Court held as follows:

> *It is now settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just.*

The U.S. Supreme Court has spent decades interpreting the due process clause, producing two distinct dimensions: substantive due process and procedural due process (see the discussion of substantive and procedural law in Chapter 1). **Substantive due process** is intended to preserve certain freedoms and protections that are integral to the concept of liberty. In other words, certain notions are so central to a free society that government interference in those areas should be restricted. For example, the U.S. Supreme Court has ruled that freedom of choice regarding termination of pregnancy (*Roe v. Wade*, 1973), conception (*Griswold v. Connecticut*, 1965), and parenting are guaranteed

by substantive due process. **Procedural due process** requires that a fair process be applied before a person is deprived of life, liberty, or property. For example, before one may be deprived of liberty, notice of charges, the opportunity to be heard, and a fair trial must be provided. Such a provision ensures that individuals accused of crimes will not be persecuted in a random, impulsive, or unpredictable manner.

The U.S. Supreme Court has held that individuals must not be compelled to "speculate" as to the meaning of a law (*Lanzetta v. New Jersey*, 1939). Such laws are considered void on grounds that they are too vague and thereby violate due process, a notion known as the "void for vagueness" doctrine. Vague state laws violate the due process clause of the Fourteenth Amendment, whereas unclear federal laws violate the due process clause of the Fifth Amendment. Vagrancy, curfew, and loitering statutes have been particularly problematic under the void for vagueness doctrine on grounds that they are both vague (not specific enough) and overly broad (so general that they might apply to and criminalize even seemingly legal behavior). This **doctrine of overbreadth** is typically raised in cases involving First Amendment protections, such as freedom of assembly and speech.

EMINENT DOMAIN The final protection provided by the Fifth Amendment is that of **eminent domain**, a requirement that citizens be given fair compensation when the government takes private property for public use. Although this provision has little to do with criminal law or procedure, it provides a remedy for citizens when their property is needed for public use, and ensures that the government cannot seize private property at will without compensating the owner. Eminent domain has evolved into a complex area of the law, with many avenues by which a property owner can challenge the annexation itself or the reasonableness of the compensation.

Sixth Amendment

Like the Fifth Amendment, the Sixth Amendment contains many different protections that apply to criminal procedure. These include the right to a speedy and public trial, the right to an impartial jury drawn from the venue where the crime occurred, the right to receive notice of the charges brought by the government, the right to confront witnesses at trial, the right to compel witnesses to appear at trial, and the right to assistance of counsel:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.*

RIGHT TO A SPEEDY AND PUBLIC TRIAL In felony matters, defendants are entitled to a speedy and public trial. A **speedy trial** is one that occurs without unnecessary delay. Those familiar with the criminal justice system understand that delay is inevitable. Thus, the Sixth Amendment prohibits only unreasonable or unnecessary delay, rather than all delay. This protection gives criminal defendants the opportunity to have their cases heard and disposed of (decided) within a reasonable period. It is imperative, however, that a criminal defendant assert this right.

What is considered reasonable is defined on two levels. First, state statutes establish timelines for criminal trials. For example, a state statute may require that a trial be held within 270 days of indictment. Any trial that does not take place within this window may violate the statute. Second, reasonableness is determined by the Sixth Amendment as interpreted by the U.S. Supreme Court in

Barker v. Wingo (1972) and other cases. In *Barker*, the Court established a four-pronged balancing test to evaluate any claim that the government had denied the defendant a speedy trial:

1. Length of the delay
2. Reason for the delay
3. Defendant's assertion or nonassertion of the right. A criminal defendant cannot allow the clock to run and then claim that the right was violated. All defendants have a clear obligation to demand a speedy trial.
4. Establishment of prejudice to the defendant resulting from the delay. In other words, the defendant must show that the delay has created some disadvantage in achieving a favorable outcome.

If the defendant claims a violation of the speedy trial provision, the appellate court will apply the *Barker* balancing test to the facts of the case and weigh the conduct of the prosecution and the defense. If the court concludes that a violation has occurred, it may dismiss the indictment or reverse and remand the case so that the trial court may do so. Such a dismissal would be warranted, as the Sixth Amendment right to a speedy trial is considered to be a fundamental constitutional right.

The Sixth Amendment also requires that jury trials be public. This provision reassures criminal defendants that the proceedings will be open to public scrutiny and protects them from government persecution in secret. Sunlight, as the saying goes, is the best antiseptic. The U.S. Supreme Court states the point a bit more academically: "The knowledge that every criminal trial is subject to contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power" (*In re Oliver*, 1948).

RIGHT TO AN IMPARTIAL JURY With the exception of petty offenses, those facing criminal charges are entitled to have their case heard by a jury. This requirement was not applied to the states until 1968, when the Court incorporated the right via the due process clause of the Fourteenth Amendment (*Duncan v. Louisiana*, 1968); even before this decision, however, most states provided for the right to trial by jury in their own state constitutions or statutes. This right is intended to shield criminal defendants from overzealous prosecutors and judges by leaving to the jury's discretion the central issue in every criminal trial: the resolution of factual matters.

The Sixth Amendment also guarantees each criminal defendant the right to an impartial jury. Again, this protection is intended to ensure that cases are resolved by objective jurors. Juries should be chosen from a cross-section of the community in which the crime occurred. To ensure objectivity, the process of ***voir dire*** is used to assess jurors' competence, uncover biases, and determine whether they have any previous knowledge of the case or the actors involved. The prosecutor and defense attorney are allowed to question or challenge prospective jurors and assess their responses to determine which citizens they wish to accept and exclude as jurors. A challenge for cause is the exclusion of a juror based on responses to questions posed during *voir dire*. Such challenges may be made if the juror has preexisting knowledge of the case; is related to or knows the defendant, judge, or attorneys; has a conflict of interest in the case; or knows other facts that may undermine the ability to be impartial in the case.

An attorney can also issue a peremptory (final or decisive) challenge to exclude a prospective juror. Unlike a challenge for cause, a peremptory challenge, in theory, may be used for any reason; for example, perhaps the defense attorney does not like the color of the suit of a particular juror. The attorney may use one of the allotted peremptory challenges to exclude that juror, and he or she will be dismissed. The continued use of peremptory challenges has been the subject of much controversy. Given the potential

for abuse, legal scholars and commentators have suggested that such challenges no longer be allowed. In *Batson v. Kentucky* (1986), the U.S. Supreme Court held that the due process clause of the Fourteenth Amendment prohibits the use of peremptory challenges to exclude jurors solely on the basis of their race. In a later case, *J.E.B. v. Alabama* (1994), the court extended this logic by ruling that peremptory challenges cannot be used to exclude jurors solely on the basis of gender. Peremptory challenges may not, then, be used as a tool to perpetuate gender or racial discrimination. Nevertheless, criminal defendants are not entitled to seat a jury of any particular racial or gender makeup—only one that is impartial.

NOTICE OF CHARGES The Sixth Amendment further requires that criminal defendants receive notice of the charges against them. Notice of the nature and cause of the accusation is required to ensure that the defendant is able to formulate a meaningful defense against the allegations. For purposes of the Sixth Amendment, notice typically takes the form of an indictment or an information containing written notice of the specific allegations. In order to satisfy the Sixth Amendment, the indictment must be served (personally presented) to the defendant.

RIGHT TO CONFRONT WITNESSES AT TRIAL The Sixth Amendment includes the right to confront adverse witnesses and cross-examine them during trial. This provision has been a central issue in many cases before the U.S. Supreme Court. The court has held that the confrontation clause guarantees a criminal defendant the right to a face-to-face meeting with his or her accuser—that is, the right to cross-examine the witness at trial.

In *Crawford v. Washington* (2004), the U.S. Supreme Court reviewed the historical bases of the confrontation clause. In essence, the framers of the U.S. Constitution sought to prohibit the use of one-sided affidavits and depositions filed outside of court, as opposed to in-court testimony given at trial. Prior testimonial evidence may not be produced at trial unless the prosecution can establish that the witness is no longer available and that the defendant had a previous opportunity for cross-examination. In its opinion, the court specifically referenced the case of Sir Walter Raleigh. During his trial for treason, the prosecution presented an affidavit from his accuser. The accuser did not appear at trial, but the affidavit was nevertheless read to the jury by a third party. Raleigh was given no opportunity to cross-examine his accuser. This process merely allowed the reading of hearsay evidence to a jury in a capital case. Such a procedure deprived the defendant of an opportunity to confront his accuser and cross-examine him regarding recollection, credibility, and motives. Thus, the accuser went untested by what Justice Antonin Scalia calls ". . . the crucible of cross-examination."

RIGHT TO COMPEL WITNESSES During criminal trials, the defendant has the right to **compulsory process**, which means that he or she may compel the appearance of a witness who may offer favorable testimony. The defendant may need a witness to testify regarding character or alibi, or to contest or confirm facts of the case. Although many witnesses attend court proceedings voluntarily when needed, others may not wish to become involved. In such cases, a defendant may subpoena the witness to appear in court. If the individual fails to appear, law enforcement may secure his or her presence. Alternatively, failure to appear may be held in contempt of court.

In *Washington v. Texas* (1967), the U.S. Supreme Court applied this Sixth Amendment right to states through the Fourteenth Amendment:

> *The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.*

The Court held that this right is a fundamental element of due process, given that the testimony of witnesses is the linchpin of a defendant's ability to mount a vigorous defense.

RIGHT TO COUNSEL The Sixth Amendment guarantees every criminal defendant the right to assistance of counsel (legal advice). Counsel must be afforded at all critical stages of the judicial process (*Kirby v. Illinois*, 1972). Thus, the Sixth Amendment right to counsel is triggered when formal charges are filed against the defendant and the machinery and resources of government begin to target him. After the defendant is indicted (charged), counsel must be present at interrogations, lineups, and any other legal transactions. The requirement of counsel is intended to ensure that proceedings against the defendant are fair and that all rights are protected. Given that few criminal defendants possess the necessary legal knowledge to represent themselves effectively, the right to counsel is important. In an adversarial system, the defendant requires knowledgeable counsel to ensure a level playing field. For poor defendants, counsel must be appointed by the court, and the legal team compensated with government funds.

In *Gideon v. Wainwright* (1963), the U.S. Supreme Court addressed the appointment of counsel for poor defendants. The court held that lawyers in criminal courts are "necessities, not luxuries." Regardless of financial status, they concluded, all defendants must have assistance of counsel. This requirement applies when defendants face charges that could result in imprisonment for 6 months or longer. The mere appointment or presence of counsel does not fulfill this obligation, however. Rather, counsel must provide "effective" assistance (*Strickland v. Washington*, 1984). Whether an attorney is appointed by the court or privately retained by the defendant, he or she must offer competent legal representation. When failure to do so results in prejudice to the defendant (that is, an unfavorable outcome), ineffective counsel may be deemed a violation of the Sixth Amendment.

Eighth Amendment

The Eighth Amendment provides three rights for those charged with criminal offenses:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Inclusion of these protections in the Bill of Rights reflects the drafters' effort to avert the severe punitive measures often taken against criminal defendants in England before and after conviction. The Eighth Amendment became the primary constitutional limitation on punishment.

In *Atkins v. Virginia* (2002), the U.S. Supreme Court explained that the Eighth Amendment guarantees individuals the right not to be subjected to excessive punitive measures. This right flows from the basic "precept [principle] of justice that punishment for crime should be graduated and proportioned to [the] offense" (*Weems v. United States*, 1910). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of government to respect the dignity of all persons.

EXCESSIVE BAIL **Bail** is a court-determined amount of money, or property to be deposited, in order to secure a defendant's release pending trial. The sole purpose of imposing bail is to ensure the defendant's presence at forthcoming criminal proceedings. Bail is not intended to punish the defendant for alleged wrongdoing. In English common law, bail was guaranteed, but the amount was often set so high that the defendant could not obtain release. Although the Eighth Amendment does not guarantee that bail will be set in any given case, it does require that when bail *is* set, the amount not be excessive. What constitutes "excessive" has been the subject of much debate. In *Stack v. Boyle* (1951), the U.S. Supreme Court provided some guidance. The court held that **excessive bail** is an amount in excess of that which is necessary to reasonably ensure the defendant's presence at trial. In cases in which the defendant is charged with a capital crime (an offense eligible for the death penalty), many states do not allow bail to be set. In noncapital cases, though, a criminal defendant is entitled to bail unless the prosecutor can demonstrate that the defendant is a threat to public safety, to witnesses, or to self, or is a flight risk.

States differ somewhat regarding the process required to set bail. In some jurisdictions, a bail amount may be determined by the court during arraignment. Once bail has been set, the defendant can then request a hearing to ask that the amount be reduced. In other jurisdictions, a full hearing is required to set bail. At such hearings, each side may present evidence regarding the following factors:

- Nature of the offense
- Defendant's criminal history
- Risk of flight or failure to appear in court
- Defendant's financial ability
- Any threat posed by the defendant (to himself or others)

After considering these factors, the court may then determine an initial bail amount or reduce the sum it originally set.

EXCESSIVE FINES The Eighth Amendment also places constitutional limitations on fines that may be imposed by the federal government. Again, this provision simply requires that fines not be "excessive" in nature; however, the U.S. Supreme Court has not extended this particular provision to state governments through the Fourteenth Amendment process of incorporation.

CRUEL AND UNUSUAL PUNISHMENT Criminal punishment in England was extremely severe. As such, the drafters of the U.S. Constitution sought protections to prevent the use of torture, maiming, and other cruel or disproportionate punishments. In *Weems v. United States* (1910), the U.S. Supreme Court held that the Eighth Amendment requires ". . . that punishment for a crime should be graduated and proportioned to the offense." Examination of the **proportionality of punishment** is most apparent in cases in which the death penalty is imposed. In capital cases, the court must conduct a proportionality review to ensure that capital punishment is not disproportionate to the crime. In reviewing other murder cases, the court attempts to determine whether a punishment other than death has been ordered for similarly situated defendants. Such a process is designed to ensure that the death penalty is applied consistently (*Walker v. Georgia*, 2008).

A precise definition of "cruel and unusual" does not exist, but the U.S. Supreme Court has addressed the issue in many cases. The prohibition against such punishment, like other broad language in the Constitution, must be interpreted according to context, history, tradition, precedent, and constitutional purpose and function. In evaluating whether particular punishments are so disproportionate as to be cruel and unusual in nature, the court looks to the "prevailing standards of decency that mark the progress of a maturing society" (*Trop v. Dulles*, 1958). To assess these standards, the court reviews legislative enactments, state practices, and jury behavior.

More recently, in *Roper v. Simmons* (2005), the U.S. Supreme Court concluded that imposing the death penalty is cruel and unusual when applied to any juvenile who was under 18 years of age at the time of the offense. A few years earlier, the court held that imposing a sentence of death is cruel and unusual when applied to offenders with mental retardation (*Atkins v. Virginia*, 2002). In each of these opinions, the court reviewed legislative enactments, state practices, and jury behavior to determine prevailing standards of decency and tolerance for such punitive measures.

Two recent cases provide insight into the present implications of the Eighth Amendment for "get tough on crime" measures involving juvenile offenders. In *Graham v. Florida* (2010), the U.S. Supreme Court addressed the sentencing of juvenile offenders to life without parole. The court concluded that imposing such a sentence on a juvenile offender in a non-homicide case violates the Eighth Amendment. Two years later, in *Miller v. Alabama* (2012), the court addressed the

application of mandatory sentencing guidelines to juveniles in homicide cases. Once again relying on the Eighth Amendment, the court concluded that "automatic" imposition of such a sentence is unconstitutional. In cases in which life without parole is a sentencing option for a juvenile offender, the court imposing punishment must consider factors that relate to culpability. The conclusions in these cases reflect the court's belief that youthful offenders should have an opportunity for rehabilitation and eventual reintegration into society, perhaps reflecting Americans' deeply ingrained notions of personal liberty.

Having reviewed the constitutional limitations on the restriction of personal liberty and punishment, we will now turn to a more general discussion of punishment to examine its goals and to survey the many forms of punishment that may be imposed on a criminal offender.

Criminal Punishment

In general, the ultimate purpose of punishment is to achieve social order and control. Punishment or the threat thereof exists to prevent individuals from violating the law and thereby harming society. Many goals or theories have been advanced to guide the use of punishment for criminal offenses. Here we will focus on retribution, deterrence, rehabilitation, and incapacitation. We will also briefly address the emerging use of restorative justice.

Retribution

Retribution is often referred to as the "just deserts" model of punishment. Its central principle is that offenders deserve punishment for their wrongful acts and that society has a responsibility to inflict punishment on those who violate its norms. Biblical notions of punishment and the sentiment of the Code of Hammurabi reflect the notion of retribution, or *lex talionis,* meaning "an eye for an eye, a tooth for a tooth" as found in Exodus 21:23–27. Both the biblical and nonbiblical versions of these principles suggest that wrongdoers be punished in a manner proportionate to the crime. Such ideas have been debated for centuries.

Deterrence

The principle of **deterrence** hinges on the effect of the threat of punishment on criminal offenders and on society at large. The deterrence model suggests that the mere threat of punishment is enough to prevent many people from engaging in illegal acts. For this threat to be meaningful, however, punishment must be swift, certain, and consistent.

Acceptance of the deterrence model requires one to embrace the notions that human beings possess free will and have the power to make rational choices about their behavior, criminal or otherwise, by weighing the pros and cons of engaging in a given act. If the possible disadvantages (such as punishment) outweigh the potential advantages (such as the monetary reward of robbing a convenience store), the person will not engage in the behavior; if the perceived disadvantages do not outweigh the advantages, the person will commit the act. Thus, in order to prevent social harm, punishment must be proportionate to the crime—it must be severe enough to discourage criminal behavior.

Deterrence can be divided into two categories: general deterrence and specific deterrence. **General deterrence** refers to the effect an offender's punishment has on the community. Although it is too late to affect the choice made by the actual offender, members of society at large will see the punishment being meted out to the convicted offender and be inclined to avoid similar behavior.

In contrast, **specific deterrence** refers to the effect that the existence of certain punishments has on the offender. Severe punishment will serve as a warning not to commit such crimes in the future.

Rehabilitation

Proponents of **rehabilitation** (or reformation) believe that society should use punishment to transform offenders into meaningful members of society. Education, mental health services, drug abuse treatment, and vocational training are examples of rehabilitative interventions. The goal of rehabilitation was the guiding principle of the correctional system in the 1960s and 1970s; however, faced with increasing crime rates and staggering numbers of drug-related offenders, legislators and policy makers no longer found the idea of reform appealing. In fact, the public's tolerance for rehabilitative programs declined as citizens began to demand accountability from the correctional system.

Incapacitation

Incapacitation refers to the removal of a criminal offender from society after conviction in order to reduce the likelihood of causing future harm. There are many ways to incapacitate criminal offenders, but the prevailing method is incarceration (imprisonment), which removes an offender from society for a specified period of time, thereby leaving little opportunity to engage in damaging acts.

Restorative Justice

Restorative justice is an emerging concept that aims to reconcile the relationship between victim and offender, using the assistance of a trained mediator to identify and address the consequences of the offender's act. Restorative justice focuses on healing. Rather than viewing crime as an offense against the state, restorative justice attempts to work through the consequences of a crime for the victim and the offender. Not every case lends itself to restorative justice and therefore it is not always appropriate given the circumstances. However, when used, participants generally report positive experiences and attain some measure of closure from the events.

Types of Criminal Punishment

In the modern American criminal justice system, forms of punishment range from monetary fines to capital punishment (death penalty). The U.S. Congress or a state legislature determines the appropriate penalty for a particular offense. Typically, specific penalties are described in the statute, or law, in which the offense is defined. This description provides notice to the public regarding possible penalties, such as fines and/or terms of imprisonment, for violating the statute. The primary limitations on criminal punishment outlined in the U.S. Constitution are as follows:

- The Fifth and Fourteenth Amendments specify that due process must be followed before punishment is imposed.
- The Eighth Amendment prohibits excessive fines from being levied.
- The Eighth Amendment further prohibits imposition of cruel and unusual punishment.

Fines

A **fine** is a court order for the offender to pay a fixed sum of money as penalty for a criminal offense. Modern fines are descendants of the **wergild**. In English common law, a wergild was compensation an offender was required to pay to the state and to the victim (or his family). The amount of a fine

varies with the severity of the crime. Fines for misdemeanors may be as low as $25, whereas certain felonies may generate fines of hundreds of thousands of dollars. Determination of fines for criminal offenses is left largely to the discretion of the legislative body.

Forfeiture

Forfeiture refers to the seizure of real or personal property used to commit or facilitate a criminal act. Forfeitures, like fines, were allowed by English common law. After an offender was convicted of a felony, the king could seize real or personal property as punishment. Modern-day forfeiture may be either civil or criminal. **Civil forfeiture** refers to property loss as the result of a civil proceeding. **Criminal forfeiture** is property loss imposed as a penalty for criminal conduct.

The use of forfeiture has increased significantly over the last several decades, and is now commonly used by both federal and state authorities. Forfeitures are typically used in cases involving drug trade, white collar crime, conspiracy, and pornography. Several cases challenging the use of forfeiture have been heard by the U.S. Supreme Court.

Incarceration

Incarceration (or imprisonment) is also a common form of punishment. The United States currently has one of the highest rates of incarceration of any industrialized nation. A variety of factors may contribute to this. For example, politicians frequently run for office with a "tough on crime" message. The public seems to prefer a rigid approach to crime, since many citizens are more comfortable knowing that offenders are living behind bars, as opposed to remaining in the community. Thus, the use of incarceration contributes to a feeling of public safety and societal well-being. Finally, despite the high financial costs associated with constructing and operating prisons, few resources are available to develop alternative programs.

Felony offenders serve their sentences in a state or federal penitentiary, whereas misdemeanor offenders serve time in a county jail. Correctional facilities may be either public or private; an increase in privatization has considerably changed the American correctional system over the last 30 years. Incarceration comes in many forms. Different models are used to calculate the length of an offender's sentence. The following discussion focuses on several key concepts that illustrate how a term of imprisonment is determined.

INDETERMINATE SENTENCES An **indeterminate sentence** occurs when a legislature sets forth minimum and maximum incarceration periods, but allows a trial judge, correctional authority, or parole board to determine ultimately when an offender is released. For example, the state legislature may set the sentence for burglary at 10 to 20 years in the penitentiary. After conviction and a sentencing hearing, the trial court will sentence the offender to a term of imprisonment not less than 10 and not more than 20 years. The correctional system will decide how much of the sentence is actually served, however, using a number of factors, including the inmate's behavior while incarcerated, the nature of the offense, the offender's criminal history, and participation in activities or programs indicative of rehabilitation. In the end, the correctional system simply wants to ensure that an inmate is no longer a threat to public safety and has been rehabilitated.

DETERMINATE SENTENCES A **determinate sentence** exists when a legislature specifies the term of imprisonment for a particular crime. Rather than leaving the sentence entirely to a judge's discretion, a determinate system limits him or her to a specific range—say, 1 to 4 years for breaking into and entering an unoccupied dwelling. Determinate sentences regained popularity in the 1970s. The public and policy makers had become frustrated by cases in which trial judges imposed little

or no prison time for heinous crimes or, on the other hand, imposed harsh prison terms for minor offenses. To reduce this sentencing disparity (inconsistency), many states turned to determinate sentencing schemes.

SENTENCING GUIDELINES Sentencing guidelines are a type of determinate sentencing used by many states and by the federal government. The chief purpose of establishing **sentencing guidelines** is to reduce sentencing disparity, which occurs when individuals receive markedly different sentences for similar offenses. Sentencing guidelines make up a complex grid of offenses and recommended sentences. Judges are restricted to sentences commensurate with the recommended sentence in the grid, but some judicial discretion is allowed. Judges may consider the pre-sentence report, with its summary of the offender's criminal, psychological, employment, educational, family, and social history, to either reduce or increase the number of points, thereby influencing the sentence. If the judge considers these factors, the sentencing order must specifically say so.

In passing the **Sentencing Reform Act of 1984**, Congress created the Federal Sentencing Commission, which is responsible for developing the **Federal Sentencing Guidelines** for federal courts. Initially, federal judges were required to adhere strictly to the guidelines when imposing sentence; however, in *United States v. Booker* (2005), the U.S. Supreme Court held that the provisions that made the guidelines binding on federal judges violated the Sixth Amendment guarantee of trial by jury. After *Booker*, the guidelines became advisory rather than mandatory.

MANDATORY SENTENCES Mandatory sentences are another type of determinate sentencing. The call for greater reliance on mandatory state sentences stems from public demand for truth in sentencing. Many convicted offenders received substantial sentences at the time of conviction but, after taking into account significant credit (or good time) while in prison, were often released after having served a fraction of their original sentence. Anger over early release caused a shift in public opinion and policy toward truth-in-sentencing measures, such as mandatory minimum sentences.

Imposition of mandatory sentences, such as mandatory life imprisonment for convicted murderers, removes all discretion from the trial judge. The legislature sets the mandatory sentence to be imposed. Mandatory sentences and sentencing guidelines in state courts have come under intense scrutiny by the U.S. Supreme Court. In *Apprendi v. New Jersey* (2000) and *Blakely v. Washington* (2004), the court invalidated certain provisions of mandatory sentencing arrangements and indicated its preference for more individualized decision making during sentencing.

HABITUAL OFFENDER (THREE STRIKES) LAWS Habitual offender (or "three strikes") laws reflect the public's growing intolerance of recidivism (relapse into criminal behavior after an initial conviction). Most of these statutes require that a specific sentence, usually life imprisonment, be imposed after a third felony. Hence they are known as three-strikes laws or **habitual offender statutes**.

The number of previous offenses is the first prerequisite that the state must establish in order to sentence a person as a habitual offender, or "career criminal." Although not all states use three as the magic number, many do. States may also specify the type of felony that qualifies as a **predicate crime**, defined as a previous offense for which a defendant has been convicted. For example, if a state limits predicate crimes to violent felonies, the prosecution would have to demonstrate that the offender had committed three violent felonies before he or she could be sentenced under the habitual offender statute. Finally, the statute may require that the offenses occur within a particular time frame, such as three violent felony convictions within a 10-year period; however, time limitations are rare among such statutes.