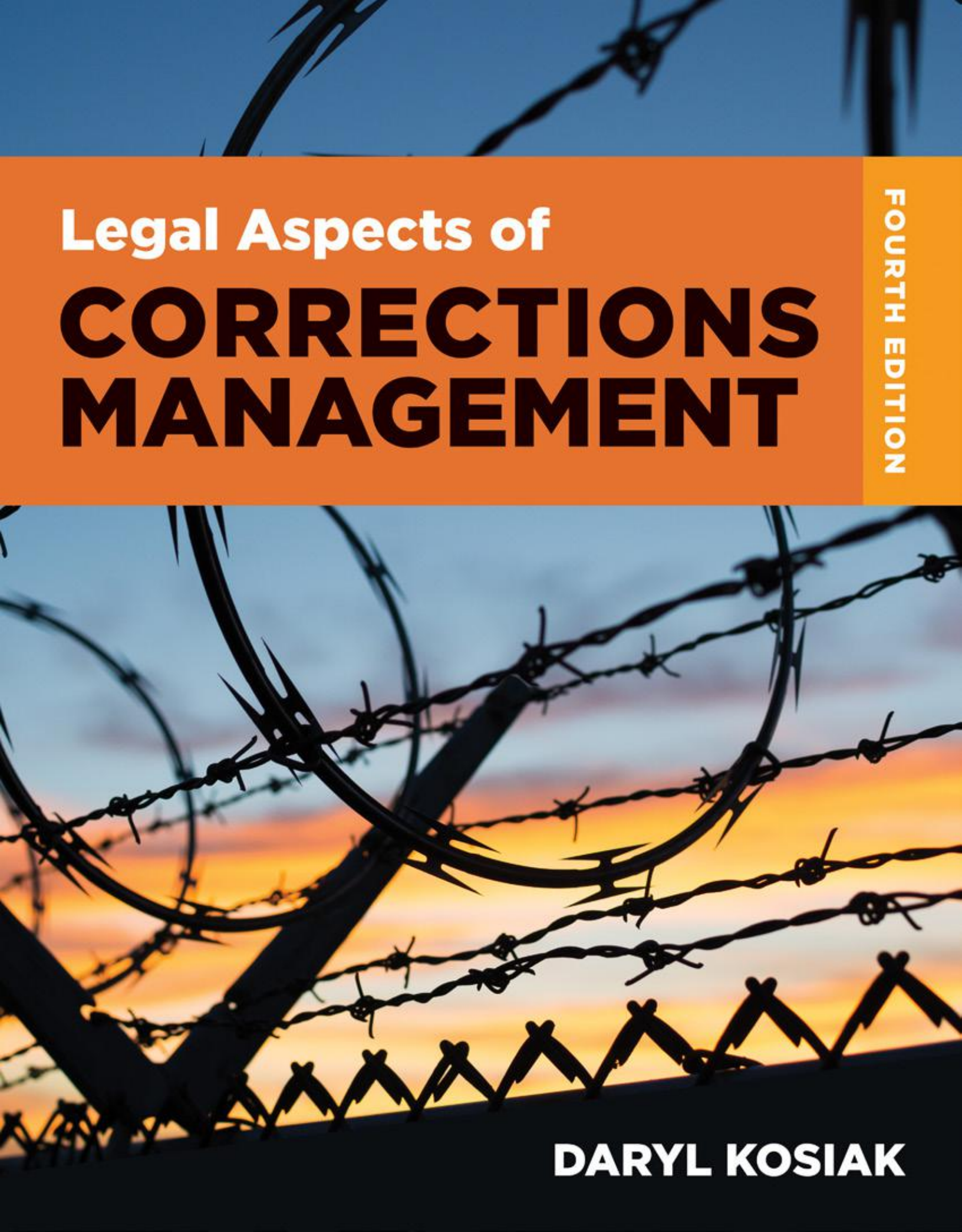
# Legal Aspects of CORRECTIONS MANAGEMENT

FOURTH EDITION



DARYL KOSIAK

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# CORRECTIONS MANAGEMENT

FOURTH EDITION

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This 4th Edition of *Legal Aspects of Corrections Management* is dedicated to Clair A. Cripe, 1935-2020, in recognition of his contributions to the field of correctional law.


# Brief Contents


# Contents


# Preface to the 4th Edition

This is the fourth edition of *Legal Aspects of Corrections Management*, and while the first edition was published over 20 years ago, many of the critical issues related to correctional law remain the same, spanning some 60 years of case law development. This edition is an updated discussion of the law, which most forcefully impacts the operations of corrections. It is a voluminous body of law—court cases, statutes, regulations, and standards. And it is a body of law that continues to evolve, expand, and become more complex.

By far the most important legal influences and constraints on corrections are those coming from the courts. The book presents an introduction to the workings of the courts, with an emphasis on Supreme Court decisions, as these decisions define corrections law throughout the country. First, there is a description of how the legal system works in the United States, the nature of the criminal justice system, and how legal conflicts and issues get into courts. In those organizational respects, there has been little change over recent years. How the courts have ruled upon those legal complaints that are brought to them is the main focus of the book.

The law of the U.S. Constitution is the major thrust of judicial actions in this area. Those constitutional rulings form the central part of the book. The Supreme Court has provided guidelines on most areas where the practices of corrections are impacted by provisions of the Constitution. This fourth edition presents those governing Supreme Court decisions. Plus, it updates the case law with recent court rulings, including applications of the Supreme Court's guidance by courts at lower levels. The updated edition also contains expanded examples of state corrections policy, updates in such areas as interstate compacts and collateral consequences of convictions, and discussions of employee law and standards of conduct.

To some extent in reaction to those court rulings, the legislative branches of federal, state and local government (particularly the U.S. Congress) have enacted statutes that regulate and circumscribe correctional practices, as well as the very basic aspect of going to court. This edition presents that group of recent enactments. Congress has delegated the authority to operate federal correctional facilities to the Attorney General (18 U.S.C 4001). However, Congress still exercises great control over federal prisons by enacting statutes that govern the Bureau of Prisons (BOP), the BOP's budget, and the federal prison population. The great majority of persons under correctional supervision in the United States are supervised by state and local governments, and in some areas, private contractors working with governmental correctional agencies.

In creating this updated edition of the text, I was able to expand on the excellent work of Clair A. Cripe and Michael G. Pearlman, the co-authors of the earlier editions. Clair's contributions to the field of correctional law, with his hands-on experience as a correctional attorney, included significant time as the General Counsel for the Federal Bureau of Prisons. As a practicing correctional lawyer during the beginning of the prisoner rights revolution, Clair had a view of the field of correctional law from its inception. In this respect, his contributions and observations not only helped shape the law but also how at least one correctional agency responded to changes in law. Important aspects of these contributions included an astute understanding of the thinking of judges on the federal bench, and crafting legally sound policies and procedures, which were responsive to correctional needs. As Clair himself noted in the Preface to the First Edition of this text:

> *I was there with those hard-nosed wardens and commissioners of the 1960s when the first cases came down, which required revision of practices that had been assumed to be solidly justified, impervious to outside review.*

Mike Pearlman added additional depth based on his experience working in prisons, his legal training and work, and his teaching in a college and university setting.

Daryl Kosiak


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PART 1

# Sources of Corrections Law

Part I (Chapters 1 through 4) examines the background of corrections and of the law. Chapter 1 provides a brief introduction, reviews the organization of the text, and looks at a broad and general history of the law and how our legal system in the United States works. In Chapter 2, the focus is on the criminal justice system—looking at the field of corrections and how it fits into the bigger criminal justice picture and the different components that make up the field of corrections. Chapter 3 focuses on the specific legal provisions that are most often encountered in corrections litigation. The chapter also examines the types of legal actions that are most often used by prisoners or other offenders to complain about their conditions and treatment. Chapter 4 discusses, the legal steps that occur in a corrections lawsuit.

Virtually any kind of corrections activity performed in any of the various corrections agencies and facilities may be the subject of a lawsuit. The first part of the text sets the stage for a better understanding of what "corrections law" means, where it comes from, and how it affects the individual corrections worker. These introductory chapters describe the sources of this area of the law. The sources are found in American law itself and in its intersection with the practical workings of corrections agencies, in their huge variety and complexity.


CHAPTER 1

# An Introduction to the Law and to the Legal Aspects of Corrections Management

*The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.*

U.S. Constitution, Article III, Section 1

## CHAPTER OUTLINE



The purpose of this text is to acquaint the reader with the legal complexities of the correctional component of the criminal justice system in the United States. While the correctional system is impacted by many factors, the most significant, and the one factor that has changed dramatically, is the impact of the law and judicial opinions on correctional policies and practices. Since the 1960s, the law has had more of an impact on corrections than any other factor or force. More than new programs. More than research. More than studies and developments in criminology, rehabilitation methods, or any theories of punishment and sentencing. The law has also had more of an impact on corrections than management theory and even new technologies.

Court rulings have directly impacted the operations of corrections facilities. They have also changed the way managers have had to think about their decision making, on matters great and small. In setting their priorities

in running institutions and community programs, corrections administrators must take legal considerations into account. This means that, from academic study to the day-to-day work of the corrections officer, legal rulings have been absorbed into the corrections field.

It has not been easy for corrections professionals to accommodate the legal "intrusions." Corrections professionals know their business. They know what the problems are and what needs to be done. The last thing they ever wanted was a bunch of uninformed, or ill-informed, outsiders (that is how corrections workers saw the lawyers and the judges) to make their work more complicated and unpredictable.

As the legal "revolution" in corrections occurred, particularly in the 1960s and 1970s, corrections managers resented the intrusion of the law into their work. That resentment was deep-seated and bitter. With time, most of the corrections managers understood that they needed advice that would help them get along with the courts with the least possible confrontation and the least amount of outside intrusion. Inmate litigation became endemic and, for most people working in adult corrections, litigation was accepted as an inevitable part of corrections operations and management.

Those established, hard-nosed administrators and workers of the 1960s and 1970s are now retired from the profession. They have been replaced by managers who, from the time they came to work, had to face the realities of litigation and court involvement. Some current corrections administrators would prefer the simpler task of running prisons and jails without legal intrusions, but they know that this is not possible in the world of corrections in the United States. (I am careful to specify "in the United States," because, to my knowledge, no other country experiences anything close to the level of involvement of the courts in corrections that occurs in this country.)

This brings us to the purpose of writing this text. It is designed to serve as a teaching reference for those who are going to work in corrections or those who want to know more about this part of the criminal justice field. At the same time, it should serve as a reference tool for today's corrections workers who need, and want, to know what they must do to run corrections facilities with minimal legal entanglements.

I began working in corrections in the 1980s with some of the previously mentioned old-line wardens and commissioners who were working in the 1960s when the first "prisoners' rights" cases were decided. The court decisions required corrections administrators to revise practices that had been considered solidly justified and immune to outside review. It was not easy being a corrections lawyer, preaching a new sermon of caution and concern based on a scripture of constitutionality. Corrections lawyers were often disliked, even though they worked for the government and were proposing what was considered to be best for the protection of corrections principles and corrections workers.

In the intervening decades since the prisoners' rights revolution began in the 1960s, thousands of lawsuits and hundreds of court decisions have defined legal constraints on corrections policies and practices. For example, in the twelve-month period ending on March 31, 2018, 26,650 prisoner civil rights and prison conditions lawsuits were filed in the 94 United States District Courts.[1] Most importantly, the U.S. Supreme Court, over time, has produced (at the rate of about one or two decisions per year) the central constitutional guidelines.

There is an expression that "prisons reflect society"; this refers to the view that what a person sees in the "free world" exists in some form or other within the correctional environment. Accordingly, there is no aspect of correctional life and work, to my knowledge, that has not been the subject of litigation. Over time, many areas have been ruled to be outside of the realm of judicial review. This text focuses on those areas that are inside that realm: those areas in which lawyers and judges will insist upon compliance with constitutional or other legal standards.

## Organization of the Text

This text presents the accumulated legal developments (limitations) in a format that is created with the corrections practitioner in mind. It begins with general discussions of what the law is and in what areas it interfaces with corrections. Most of the text is a detailed presentation of what the law has said about specific areas of corrections operations and practices.

First, we look at the background of corrections and of the law. Next, we look at constitutional law—those areas of corrections work in which different provisions of the U.S. Constitution have been examined to see whether they define or limit what may be done by corrections officials. In many areas, there are now Supreme Court decisions

that provide the authoritative word and interpret the U.S. Constitution on corrections issues. This is one of the most exciting aspects of corrections. The following provisions of the U.S. Constitution will be covered:

- Inmate access to the courts
- The First Amendment: inmate correspondence, inmate association rights, visiting, and religion
- The Fourth Amendment: search and seizure and privacy
- The due process provisions of the Fifth and Fourteenth Amendments, as they apply to such areas as inmate discipline, classification, transfers, personal injuries, and property loss
- The Fourteenth Amendment Equal Protection clause
- The Eighth Amendment as it applies to the death penalty and other sentencing issues, conditions of confinement, cruel and unusual punishment, and health care

Our look at constitutional law also includes a discussion of probation and parole, community corrections, and fines. Finally, we will look at law that governs corrections by means other than the Constitution and at corrections issues that are somewhat outside of the central core of managing prisons.

For each subject covered, there are other resources to assist the reader with understanding the material, along with a general summary and "Thinking About It" questions, which are relevant to the covered material. To help you find important statements of the law as you look through this text, holdings of cases and statements of important legal principles are given in boldface font. On every Supreme Court opinion, you can expect to find a boldface presentation of the important statements of the Court in that case. In the text, use of the word Court refers to the U.S. Supreme Court. If there are such important statements of the law in other cases (or in statutes), these will be presented in boldface font as well.

A glossary of key terms that defines words and terms that are often found in corrections, criminal justice, or the law is located near the end of the text. The glossary is followed by an alphabetical listing of cases. The Table of Cases also provides the page number(s) where the case can be found within the text.

We note that throughout the text, the words *he* and *she* and the words *his* and *her* are used interchangeably. The use of these terms reflects the significant number of women working in the corrections field. During 2005, women accounted for 33% of the employees in correctional facilities under state or federal authority (Stephan, 2005).[2]

My hope is that this text will serve as a handy reference to the corrections professional and as a valuable teaching resource for the criminal justice professor and student. It must be understood that this text is a digest—it distills into a comparatively small volume what has become an overwhelmingly large body of law. The goal has been to make this text an understandable collection of essential and representative court decisions, combined with some background on the various aspects of corrections on which those decisions touch.

## The Law

What is the law? Legal scholars do not agree on definitions. A generally accepted definition of the law is the set of principles and rules established to determine the rights and duties of the people of a state (*state* is used here in the sense of any level of autonomous government) and to resolve disputes among those people. The law has binding legal force.

Central to nearly all legal systems, and certainly to ours in the United States, is the judiciary. **Courts** are the voice of legal authority. The courts interpret and administer the laws, and determine the specific rights and duties of persons within the jurisdiction. Note that the courts are central to the legal system of government, not to all of government. There are three branches of government, and each branch is theoretically of equal importance.

## Historic Origins

American law mainly comes from English law, which in turn comes historically from Roman law, with some influences from the Normans, the Scandinavians, and church (**canon**) law. After the American Revolution, in the late 1700s, there was a reaction against many things English, including legal decisions and procedures. Generally law in the United States adopted English concepts and legal language. Louisiana is an exception due to its French law tradition, until today. Several southwestern and western states include a Spanish influence, particularly in property matters.

English law relied very heavily on the decrees, orders (sometimes called **writs**), and **decisions** of its judges. Together, these judicial pronouncements constitute the **common law**.[3] In English law, there was equity law

alongside common law. **Equity** dealt with matters of "doing the right thing" (keeping the "King's conscience"), particularly in hardship cases. Separate courts, called **chancery courts**, handled equity matters. In equity cases, courts ordered specific performance or injunction rather than money damages, and they developed maxims rather than decisions. Equity was used when common law did not provide an adequate remedy.[4] Equity law was also taken from English law and incorporated into American law. However, in most jurisdictions in the United States, equity and common law have been merged, so that both kinds of cases are heard in the same courts. As part of the revolutionary break from English rule in 1776, the former colonies, now states, adopted written **constitutions** as the prime statement and source of the law. The same was done for the federal government in the "supreme law" of the land, the U.S. Constitution. The reliance on written constitutions was the most significant break from English legal tradition because Britain does not have a codified constitution. Today, it is still the most significant difference between English and American law, which are in most other respects closely related.

## Branches of Government

The constitutions of the United States and of each of the individual states establish three branches of government:

1. The legislature, which enacts laws
2. The executive branch, which enforces and carries out the laws
3. The judiciary, which interprets and applies the laws

These very basic descriptions of the functions of the three branches do not take into account some governmental activities that do not fall clearly into one category or another. For the purpose of this text, however, these broad definitions describe the basis for the activities of government and the conflicts that almost inevitably come out of them.

The functions of the three branches of government also give rise to two important principles of our American government. The first is the **separation of powers**, which holds that each branch should perform its own function and should not intrude into the functions of the other two independent branches. The second major principle is one of **checks and balances**, which establishes, by constitutional requirements, procedures whereby each branch has some constraints on each of the other two. An example is the process of appropriating money: Only the legislature (Congress) can impose taxes and raise money for the government to spend. Thus, the executive branch cannot carry out any activity it wishes, unless the money for it is appropriated. But the president must approve, in turn, any appropriation of money, and can veto an appropriation.

Another foundation of the American government is the establishment of a national (**federal**) government, along with the recognition of the political independence of each state. This system leads to certain hierarchical principles: federal law prevails in conflicts with state or local law *Gonzales v. Raich*, 545 U.S. 1 (2005). However, federal laws that encroach upon the historic legislative authority of the states to regulate activities within their borders have been declared unconstitutional. *United States v. Windsor*, 570 U.S. 744 (2013). The U.S. Constitution is the highest source of law, over statutes, treaties, and regulations. Thus, the U.S. Constitution is the highest law in the country.

> **This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.**
>
> U.S. Constitution, Article VI, Clause 2

In the same manner, the constitution of a state is, for that state, the supreme source of law. The legislature of each state enacts laws within the framework of its constitution (as does the federal legislature, the Congress).

In the early decades of the United States, laws were principally derived from common law (judicial) decision making. Legislatures were not very active. This changed during the late 1800s (from the Civil War on), and the national Congress and the state legislatures became more and more active in the 20th century. The courts did not back off from their historic role, though, so the American legal system is truly a mixture of the elements of common law development (with its emphasis on judicial decisions), along with **statutes** and **regulations**.

# The Court System

## Federal Courts

Under the U.S. Constitution, judicial authority is given to "one Supreme Court, and in such inferior Courts as the Congress may from time to time…establish" (Article III, Section 1). Thus, the U.S. Supreme Court is the only court established by the Constitution. The Constitution specifies neither the number of members who will sit on the Supreme Court (it has varied from six to 10), nor the qualifications of Court members or the Court's precise **jurisdiction** (what kinds of **cases** it will review).

The lower federal courts are established by statute. Federal courts may consider civil matters (involving private rights), criminal cases (involving violations of federal criminal law), equity-type cases (involving the spirit of fairness) and commercial matters (involving business and commerce). But unlike state courts of general jurisdiction, "[f]ederal courts are courts of limited jurisdiction," possessing "only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co*., 511 U.S. 375 (1994).

The first level of federal courts includes the U.S. District Courts. These are the federal courts in which **trials** are held and federal cases are initially filed and disposed of. A case is a dispute or controversy between opposing parties that a court is asked to resolve. Every state has at least one federal district. Larger states may have several district courts. Thus in some states there may be a Northern, Southern, Eastern, Western, Middle, or Central Districts. California, Texas, and New York each have four districts, which is the greatest number of districts in any one state. Each federal judicial district also has a separate U.S. Bankruptcy Court.[5]

There are usually several judges appointed to sit in each district. Cases are heard before a single judge.[6] Assisting the U.S. district judges on many matters, but not with the same wide authority, are U.S. magistrate judges.

The district court's role is to receive **evidence** about the "facts of the case" (establishing who did what). Higher-level courts will not retry a case, but instead serve as a forum for review and **appeal**. This review process is one reason why cases with factual similarities can have different results.

Appeals from the decisions of the federal district courts are taken to U.S. Courts of Appeals. Each **court of appeals** has jurisdiction over several states. Appeals from all of the district courts in those states are taken to the designated court of appeals. The geographic area that a court of appeals covers is called a "circuit." The circuits are numbered, and there are now 11 numbered federal circuits.[7] For example, all federal appeals from Maine, New Hampshire, Massachusetts, and Rhode Island (plus Puerto Rico) are taken to the U.S. Court of Appeals for the First Circuit. Appeals from the U.S. District Courts in Vermont, New York, and Connecticut go to the Second Circuit Court of Appeals. In common usage, these courts are sometimes called "circuit courts." You will hear, as a common abbreviation, something like, "That case was decided in the Eighth Circuit," which means the U.S. Court of Appeals for the Eighth Circuit decided the case. **FIGURE 1-1** is a map showing the breakdown of the United States into federal judicial circuits.

In most cases, when appeals are taken, the lawyers for each side file **briefs**, arguing their cases in writing, and later they argue their cases orally before the court of appeals. There are usually three judges who sit and decide each case at the appellate level. Sometimes, in special matters and because of the importance of the case, it will be heard by all members of that particular court. This is called a hearing **en banc**. Cases are decided by a majority of the judges who sit on the case. One judge is designated to write the **opinion** of the court. If not all of the judges agree, the disagreeing judge or judges will often write a dissenting opinion. In some cases, one or more judges may agree with the outcome but not with the rationale used by other judges. In these cases, that judge may write a concurring opinion. This practice of writing majority and dissenting opinions goes on in the Supreme Court, as well. With nine justices voting, there are many more dissenting opinions in the Supreme Court.

It is the **majority opinion** that prevails for the individual case on which the judges are deciding. That opinion also becomes the prevailing law, or **precedent**, on any legal matter that is decided by that case. It is the governing law for that circuit, and it will be followed by all courts in that circuit when that particular legal question arises in the future. It is not binding in other circuits but may be looked to for guidance by other courts. Through this procedure, you can see that there may be disagreeing opinions or legal conclusions in different circuits. This does happen, and such disagreements are often grounds for taking cases to the Supreme Court. Only the Supreme Court can resolve differences between the lower federal courts of appeals. Sometimes the judges on an appellate court will decide a case without a majority of the judges agreeing on a rationale for the decision. The outcome and rationale gathering the most votes is called a **plurality decision**.

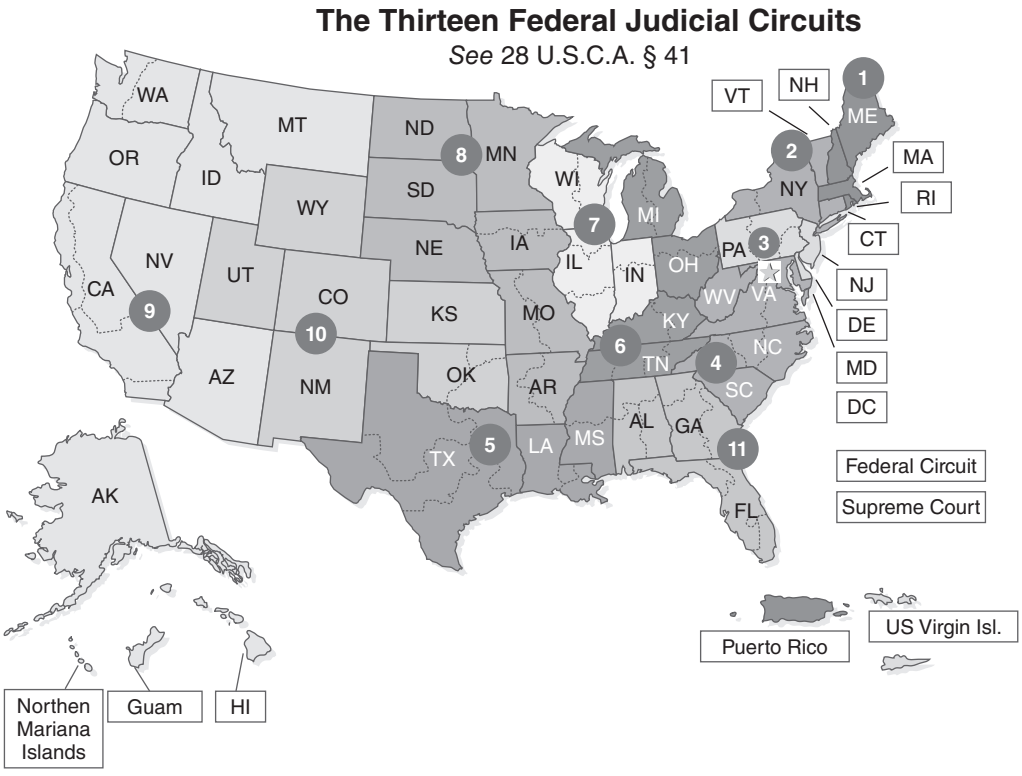



**FIGURE 1-1** The Thirteen Federal Judicial Circuits. United States Courts. Court Locator.

United States Courts. Court Locator. Available from https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

The U.S. Supreme Court is the highest and final federal appellate court. There is a direct appeal to the Supreme Court on only a few kinds of cases (for example, if a federal law, or a state law of statewide application, is found by a three judge district court to be unconstitutional, that decision can be appealed directly to the Supreme Court).[8] Most cases come to the Supreme Court by means of **certiorari**, which means that the Supreme Court certifies that the legal question raised by the case is of considerable importance and that the Supreme Court should decide that question. As noted, one frequent basis for the Supreme Court to review a case is that it presents a question that has caused a conflict or difference of opinion between two or more courts of appeals.

When a party loses its case in a court of appeals and it wants the Supreme Court to consider and reverse that decision, it files a petition for a writ of certiorari, which is a legal paper asking the Supreme Court to review the lower court's decision. The Supreme Court votes (in chambers—not in public) on whether the case is one that the Supreme Court should consider. If four or more justices vote to review the case, the Court issues an order certifying the case to be heard in the Supreme Court. This is called granting a writ of certiorari. If, as in most cases that are petitioned to the Supreme Court, the justices do not vote to review the case, the writ of certiorari is denied. Each year, several thousand cases are taken by petition to the Supreme Court. The Court votes to accept the appeal or grant certiorari in relatively few cases (73 cases were argued, 69 cases were decided, and 66 signed opinions were issued in the 2018-2019 term).[9]

Cases in the Supreme Court, like the appellate courts, are considered by a process that involves each party submitting written briefs and then arguing the case orally before the Court. All cases in the Supreme Court are considered by all nine justices of the Court unless there are extenuating circumstances such as when a justice disqualifies themselves because of some prior involvement, or a vacancy on the Court that remains unfilled. Thus some cases are decided by eight or fewer justices.

The Supreme Court still sits in a "term of court," as virtually all courts once did. The term of the Supreme Court runs from October through June. Lower federal courts no longer have such terms. Federal judges at all levels (the Supreme Court and district and appeals courts) are appointed by the president, with the advice and consent of the Senate (meaning their appointments must be approved in the Senate by affirmative vote). They serve for life and can be removed only by impeachment. This contrasts with the states, where many judges are elected to their offices.

## State Courts

Each state has a similar hierarchy of courts, which is structured much like the federal system. In every state, there are levels of trial courts and appellate courts. That is as far as a general statement can go, because there is a huge difference among states regarding how their court systems are organized and named. You will have to investigate the state of interest to you regarding what the courts at different levels are called.

For example, **trial courts** may be called circuit courts (typically for counties), district courts, superior courts, or municipal courts (in larger cities). There may be courts authorized to handle certain specialized kinds of cases at the first level, such as juvenile courts, probate courts, domestic relations courts, and traffic courts. In some jurisdictions, all of these special matters and all kinds of cases—civil and criminal—are handled in the trial courts, which we then call **Courts of General Jurisdiction**. It is becoming more and more common, especially in counties and cities of larger populations, to reduce the burdens on the trial courts by having more minor matters taken to small-claims courts (for civil matters with limited jurisdiction, such as those involving matters of up to $5,000), police courts, magistrates, or justices of the peace (for criminal matters, with jurisdiction to impose small sentences such as fines or short jail terms of 10 days or fewer). Persons often appear in these small-claims courts or traffic courts without counsel, which tends to save money and speed up the process.

Most states have two levels of appellate courts. The middle level is called a court of appeals, an appellate division, or some similar name. A few states (Delaware, Maine, Montana, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming) do not have an intermediate appellate court and have only one level of appeal. Two states, Alabama and Tennessee, have separate intermediate appellate courts for criminal and civil matters but allow appeals from those intermediate courts to the state supreme court.[10]

The final level of appeal in the state is usually the **supreme court** of that state, with a few exceptions (exceptions include the Court of Appeals in New York, where the supreme court is a first-level court; the Supreme Judicial Court in Massachusetts; the Court of Appeals in Maryland; the Supreme Judicial Court Sitting as Law Court in Maine; and the Supreme Court of Appeals in West Virginia). These appellate-level courts handle appeals in all kinds of cases, both civil and criminal. Only Texas and Oklahoma have supreme appellate courts that are divided—one for civil and one for criminal cases.[11]

As noted previously, state judges at all levels are elected in many states. In some states, judges are appointed by the governor or by legislative election.[12] The means of selecting state judges, particularly by election, has been the subject of criticism and debate. In many states, the judges do not run as nominees of political parties, making them (theoretically) separated from the partisan political process. Upon re-election, many judges may run unopposed, reducing the political effects on their offices.

# Criminal and Civil Law

Legal matters are divided, for study and for practical concerns, into divisions or topics. A division is often made between criminal and civil matters of the law. What difference does it make? It is not purely an academic question. In some jurisdictions, certain courts only consider one kind of case or the other, civil or criminal. Some lawyers specialize in **criminal law** and others practice only **civil law**. There are different rules of procedure in federal and in many state courts that govern criminal trials and proceedings, as opposed to civil ones.

Examples of different rules include those for **burden of proof**. For criminal cases, the standard is proof beyond a reasonable doubt; the evidence must be entirely convincing in establishing the defendant's guilt. In civil cases, the usual standard is proof by a preponderance of the evidence; the evidence must show a greater likelihood that the person did, as opposed to did not commit the act as charged. This is also referred to as the "greater weight" of the evidence. The reason for this dual standard and for the higher standard of proof in criminal trials is that, in a criminal case, the defendant is facing the loss of freedom (**liberty**). Different burden of proof standards can lead to different results, even with the same basic facts. Perhaps the best-known example is the O. J. Simpson case, where the former football great was found not guilty of murder in the criminal trial but had a monetary judgment entered against him in the civil trial, which was based on the same set of facts.

**Crimes (criminal offenses)** are those acts that are described by a state (that is, a government) in its laws or regulations as prohibited activities, for the protection of its citizens. Every citizen has a duty to conform to those standards of conduct. A violation of that duty, or commission of such a prohibited act, is a crime, and the violator (the criminal or the **offender**) is subject to punishment. It is important to note that the description of criminal

acts and the punishment authorized for them are matters of legislation and not judicial (common) law. A crime is a violation of a duty owed to the state and all of its citizens. Court actions are thus brought by state officials, called prosecutors (often district or state attorneys), on behalf of all citizens in that state. There are, of course, wide ranges of criminal activities, from the practically trivial (parking and small traffic matters) to violations of the most horrendous nature (homicides, acts of terrorism, and other violent behaviors).

Crimes are often divided into the more serious, called **felonies**, and the less serious, called **misdemeanors**. This is done for procedural reasons (such as the type of punishment upon **conviction** or the kinds of court procedures that apply). The most common dividing line between felonies and misdemeanors is the maximum **penalty** authorized for the particular offense. As a general rule, if a crime carries a penalty of more than one year in prison, it is a **felony**; if it carries a penalty of one year or less, it is a misdemeanor. There are, in some criminal systems, offenses of even lesser importance than misdemeanors, such as **petty offenses** (which may be punishable only by fines or by jail terms of 30 days or less, as examples).

Civil law is the entire body of law that is not criminal—that is, it deals with duties owed by one person to another and not to the state. (This area of noncriminal law is also sometimes called "private law.") The two most common kinds of civil law are contracts and torts. Contract law is the set of rules established to deal with promises made by one person to another. For legal purposes, a "person" may be a corporation, business, or an agency as well as an individual human being. At one time, contract law was governed primarily by court decisions and precedents—that is, by common law. Over time, legislatures have enacted more and more rules with respect to contracts, so that the law today is a large mix of common law and legislation.

Tort law covers other types of duty owed by one person to another (that is, other than duties owed by contracts) and is the means by which an **injury** or harm caused can be remedied through a legal action. In civil law, both for contracts and for torts, the remedy that is most often sought by the injured person are money damages; although in some cases, specific performance (of a contract) or injunctive relief (to force action or to restrain it) may be the remedies sought. All of these are now considered to be civil actions (and almost all of the litigation in the corrections field is civil, not criminal.)

Some actions may be a violation both of criminal law and civil duties owed to others. For example, **assault** may lead to a civil suit, whereby an individual attempts to recover money damages for the harm inflicted by a wrongful action. The same activity, investigated by the police, may be the basis for a prosecutor bringing a criminal prosecution for assault.

Civil actions are usually initiated when an **attorney** files a legal document —a **complaint (civil procedure)**— on behalf of their client, asking for relief, usually in terms of money damages, because of a wrong inflicted or a duty violated by another person. The person bringing the action is the **plaintiff**; the person sued is the **defendant**. By contrast, criminal cases are brought by a **grand jury** (handing up an indictment) or by a prosecutor (filing a bill of information or some other title in lesser cases). A criminal prosecution is brought by the state (or the people of the state) against a defendant, who is charged with wrongdoing. (Of course, there may be multiple defendants involved in criminal activity. In a civil case, there may also be more than one plaintiff and more than one defendant.) Class actions are civil cases in which, for purposes of economy, a plaintiff or a group of plaintiffs who have the same legal complaints against a defendant (or defendants) may be joined together by a court into a single class; one plaintiff or several are allowed to proceed with the lawsuit on behalf of all the others, who are notified of the proceedings. A decision or judgment in a class action suit is entered on behalf of all of the plaintiffs and is binding on all the parties.

While criminal law and civil law are the two major components of the law, the law may be categorized in other ways. Any one, or all of the following may be evident in criminal or civil litigation.

**Case law** is the common law that was discussed earlier. It refers to written decisions of courts published in law books (called reporters) or available in digital format on court websites and other legal research platforms such as Westlaw, Findlaw or Google Scholar. A significant portion of this text includes a discussion of case law.

**Statutory law** is the body of law created by the acts of the various legislatures, including Congress. Examples of such laws, discussed later in this text, are the Prison Litigation Reform Act and the Interstate Agreement on Detainers.

**Administrative law** is a body of law created by administrative agencies (for example, departments of justice and state regulatory agencies). These laws, discussed with statutory law, are seen in the form of rules, regulations, orders, and decisions. Administrative law is often developed to more effectively carry out statutory law.

**Procedural law** refers to the methods by which a legal right or duty is enforced (for example, entering a plea, presenting evidence, or establishing jurisdiction).

**Substantive law** is the whole area of the law that creates and defines legal rights and obligations (for example, tort law and criminal law).

## Summary

- Law in the United States is principally derived from English law, which in turn was largely based on judicial rulings, collectively called the common law. A major difference between the United States and England is that the supreme law of the land in the United States is the Constitution. Each of the states also has a written constitution, which is the highest law of that state.
- In the federal, state, and local governments, there are three branches: legislative, executive, and judicial. Each of these branches has separate powers, which are spelled out in the respective constitutions.
- Under the Supremacy Clause of the U.S. Constitution, laws of the federal government are the highest laws of the country. The U.S. Supreme Court is the highest court of the country.
- In the federal government, the levels of courts are trial courts, called U.S. District Courts; appellate courts, called U.S. Courts of Appeals (designated primarily by numbered circuits); and the U.S. Supreme Court.
- Cases in the Supreme Court are usually considered when at least four justices of the Court agree to review a case by granting a writ of certiorari (certifying the case's importance to be heard in the Supreme Court). Only a small percentage of cases that are petitioned (appealed) to the Supreme Court are actually reviewed by the Court. In a few cases, there is a right of direct appeal to the Supreme Court.
- Each state has similar levels of courts: trial courts at the county, city, or town level; appeals courts (in most states); and a supreme court, which is the final judicial authority for cases brought under state laws.
- Legal matters are divided into criminal law and civil law. Criminal law is used for the prosecution of offenders who violate statutes that define conduct or activity that is prohibited because it is offensive to the state's citizens. Upon conviction of any such crimes, sanctions (sentences) are imposed, as authorized by the state's criminal statutes. Civil law comprises the rest of the law—that is, all of the law that is not criminal. There are many kinds of civil law, but the most common are contract law (the duties owed by one person to another because of promises made) and tort law (the remedies the law provides for injuries done by one person to another, other than by contract violation). The law may be further categorized into such areas as case, statutory, administrative, procedural, and substantive law. Any of these may appear within the context of criminal and civil litigation.

## Thinking About It

Mary, a sentenced inmate in Missouri, tells prison officials the First Amendment requires prisoners to have access to Netflix. To support her demand, the inmate gives officials a copy of a state court opinion from Hawaii, which ruled that prisoners have a constitutional right to access Netflix.

Are prison officials in Missouri obligated to follow decisions of courts from other states? What if the opinion was from a federal district court in another state?

## Key Terms

**administrative law**
**appeal**
**assault**
**attorney**
**brief**
**burden of proof**
**canon law (church law)**
**case (legal proceedings)**
**case law**
**certiorari**
**chancery (court of chancery)**
**checks and balances**
**civil law**
**common law**
**complaint (civil procedure)**
**constitution**
**conviction**
**court**
**court of appeals**
**court of general jurisdiction**
**crime (criminal offense)**
**criminal law**

**decision**
**defendant**
**en banc (courts)**
**equity (courts)**
**evidence**
**federal**
**felony**
**grand jury**
**injury**
**jurisdiction**
**liberty**
**majority opinion**
**misdemeanor**
**offender**
**opinion (court)**
**penalty**
**petty offense**
**plaintiff**
**plurality opinion**
**precedent**
**procedural law**
**regulation**
**statute**
**statutory law**
**substantive law**
**supreme court**
**trial**
**trial court**
**writ**

## Endnotes

1. Administrative Office of the U.S. Courts. *2019 Annual Report of the Director: Judicial Business of the United States Courts*. Table C-2 U.S. District Courts–Civil Cases Commenced by Basis of Jurisdiction and Nature of the suit. Washington, DC. https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2019/06/30
2. Stephan, J. *Census of State and Federal Correctional Facilities, 2005*. (2005). Appendix table 12. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice, October 2008.
3. Courts and Tribunals Judiciary: History of the Judiciary: When Common Law Failed. https://www.judiciary.uk/about-the-judiciary/history-of-the-judiciary/ There was, in English law, equity law alongside common law. Equity dealt with matters of "doing the right thing" (keeping the "King's conscience"), particularly in hardship cases. Separate courts, called chancery courts, handled equity matters. In equity cases, courts ordered specific performance or injunction rather than money damages, and they developed maxims rather than decisions. Equity was used when common law did not provide an adequate remedy. Equity law was also taken from English law and incorporated into American law. However, in most jurisdictions in the United States, equity and common law have been merged, so that both kinds of cases are heard in the same courts. The equity concept persists in some different legal language, in some differences in philosophical approaches to cases, and in procedural differences, such as the fact that there is a right to a jury trial only in common law cases and not in equity matters, which are decided by the judge alone. (This explains why there is no jury in injunction cases.) An example of a chancery court in the United States is Delaware's Court of Chancery. https://courts.delaware.gov/chancery/jurisdiction.aspx, Tennessee also has retained chancery courts, and the jurisdiction of the chancery court is as follows:
   *CHANCERY COURTS*
   *Chancery Courts are courts of equity that are based on the English system in which the chancellor acted as the "King's conscience." A chancellor, the judge who presides over chancery courts, may modify the application of strict legal rules and adapt relief to the circumstances of individual cases. Chancery Courts handle a variety of issues including lawsuits, contract disputes, application for injunctions and name changes. A number of matters, such as divorces, adoptions, and workers' compensation, can be heard in either chancery or circuit court.* http://www.tsc.state.tn.us/courts/circuit-criminal-chancery-courts/about
4. See endnote 3.
5. There are also specialized courts in the federal system, such as bankruptcy courts (exclusive jurisdiction over bankruptcies), U.S. Tax Court (jurisdiction over disputes between taxpayers and the Internal Revenue Service), and military tribunals. Administrative Office for U.S. Courts, *Court Role and Structure*. https://www.uscourts.gov/about-federal-courts/court-role-and-structure. There is also a Court of International Trade which hears civil cases relating to customs and international trade law. U.S. court of International Trade, *About the Court*. https://www.cit.uscourts.gov/ and the Court of Appeals for the Armed Services. Which exercises worldwide jurisdiction over persons subject to the Uniform Code of Military Justice. Court of Appeals for the Armed Services. https://www.armfor.uscourts.gov/newcaaf/home.htm toms courts, tax courts, and military courts-martial. These trial-level courts have counterpart appellate courts. These specialized courts are not of concern to us in this study, because they do not deal with corrections matters, with the exception of the military courts—including the Court of Military Appeals—which do deal with sentencing and corrections litigation.
6. 28 U.S. Code Section 2284 requires that a district court consisting of three judges be convened when required by an act of Congress or in cases involving challenges to the apportionment of congressional districts. 28 U.S. Code Section 3626(a)(3)(B) requires release orders made in prison conditions lawsuits be made only by three judge courts pursuant to 28 U.S. Code 2284. This section of the PLRA was one issue addressed by the Supreme Court in *Brown v. Plata*, 563 U.S. 493 (2011) which is discussed in the chapter on health care.
7 Administrative Office for the U.S. Courts. *About the U.S. Courts of Appeal*. https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals. See Figure 1-1: The Thirteen Federal Judicial Circuits. In addition, and as an exception to the numbering rule for circuits, there are two courts of appeals that sit in the District of Columbia. The U.S. Court of Appeals for the District of Columbia Circuit hears appeals from the U.S. District Court for the District of Columbia. The Federal Circuit Court hears appeals from specified federal boards and administrative courts.

8. 28 U.S. Code Section 1253 authorizes any party to "appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." There is an even smaller number of cases that may, by direction of the Constitution (Article III, Section 2), be brought directly and from the beginning into the Supreme Court. These are cases that involve ambassadors and those in which a state is a party. There have been a few such cases, which involved such matters as disputes between states about their boundaries or the allocation of water from rivers. Because the Supreme Court is not a trial court and has no procedure to take testimony or receive evidence, it has usually appointed a special master to conduct such a trial on its behalf.
9. John G. Roberts, 2019 Year End Report on the Federal Judiciary. The Supreme Court of the United States. https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf
10. Information on the Alabama Court of Criminal Appeals can be found at: http://judicial.alabama.gov/Appellate/AppellateProcessChart. Information on the Tennessee Court of Criminal Appeals can be found at: http://www.tsc.state.tn.us/courts/court-criminal-appeals/about
11. National Center for State Courts. (2020). *State Court Web sites.* Available at: https://www.ncsc.org/Information-and-Resources/Browse-by-State.aspx. Accessed December 13, 2020. Under the states listed, there is a court structure chart.
12. National Center for State Courts. Methods of Judicial Selection. Available at: http://judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=. Accessed February 9, 2020


CHAPTER 2

# Corrections and the Criminal Justice System

*It is the mission of the Federal Bureau of Prisons to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.*

Mission Statement of the Federal Bureau of Prisons

## CHAPTER OUTLINE

- The Police
- Arrest and Release
- Prosecution
- The Courts
- Sentencing
- Corrections
  - Probation
  - Fines
  - Restitution
  - Electronic Monitoring
  - Community Service and Creative Sentencing

This chapter provides a quick, broad look at the criminal justice system in the United States and how corrections, as a discipline, fit into that system. Because there are many areas in which the different components of criminal justice interrelate, it would be desirable to coordinate planning and working between those components. In practice, unfortunately, and in most jurisdictions, there is very little coordination among the different components. That lack of coordinated planning is also evident in most legislatures, where programs and appropriations are historically pursued in one area, with little attention paid to how legislative action may affect other criminal justice areas.

One example of such lack of attention to coordinated planning is a fairly common one: the enactment of new criminal statutes that increase the penalties for crimes without consideration for the impact that action will have

on police, prosecutors' offices, the courts, and corrections. For example, the implementation of determinate sentencing (a sentence with a fixed term, such as five years) and the abolishment of parole have clearly achieved a "get tough on crime" position.

The U.S. prison population grew dramatically after 1970, increasing from just over 200,000 sentenced state and federal prisoners in 1969 to over 300,000 by 1980. See Appendix 2-1, Offender Population Fact Sheet on the Navigate eBook site on jblearning.com.

To illustrate, we can look at Florida. Between 1993 and 2007, the state's inmate population grew from 53,000 to over 97,000. A number of state correctional policies and practices contributed to this growth. In 1995, Florida's legislature abolished **good time** credits and discretionary release by the parole board. The legislation required every inmate to serve 85% of his sentence. A "zero tolerance" policy was also put in place, requiring probation officers to report every offender who violated any condition of supervision and increasing prison time for these "technical violations." From this legislative action, the number of violators in Florida's prisons increased by an estimated 12,000.[1] This report also noted that while crime in Florida did drop during this time, crime also dropped as much or more in other states that had not increased, or had even shrunk, their prison systems. A by-product of this increase is the need for additional expenditures. This impacts the state's budgetary resources, as those newly expended funds can detract from the funds that are available for other programs.

Since 2011, the federal government and many states, including Florida, have taken steps to reduce their correctional populations. In 2018, Congress passed, and the President signed into law, the First Step Act (FSA), P.L. 115-391. The major components of the FSA requires the Federal Bureau of Prisons (BOP) to implement a risk and needs assessment tool for offenders and to develop institutional programs with the goal of reducing recidivism, make changes to federal sentencing procedures for certain offenses, and reauthorize the federal Second Chance Act of 2007.[2]

At the same time, practices such as determinate sentencing and the abolishment of parole have produced the unintended consequence of lessening the motivations for inmates to abide by an institution's regulations and work toward their release. This placed an increased burden on prison administrators to maintain institution security and good order. Some state governments and state legislatures have tried to provide a more comprehensive process by creating criminal justice planning agencies for an entire state or by better organizing committee work and legislative drafting in the legislature. On the federal level, legislation was first introduced in 2009 in the United States Congress proposing the establishment of the National Criminal Justice Commission. The legislation proposed making the commission responsible for a comprehensive review of all areas of the criminal justice system, including criminal justice costs, practices, and policies of federal, state, local, and tribal governments. In 2010 the bill passed in the U.S. House but did not pass in the U.S. Senate. The bill was reintroduced in Congress on August 1, 2019 as the National Criminal Justice Act of 2019.[3]

Criminal law deals with violations of duties that citizens owe to the society at large. By enactments of the legislature, certain conduct is considered prohibited and violates society's standards. By those legislative actions, such conduct is considered criminal. These legislative enactments, taken together, constitute the "criminal law" for a specific jurisdiction. When conduct is declared to be criminal, the statute that defines the crime also sets the punishments (or range of punishments) that accompany that particular crime.

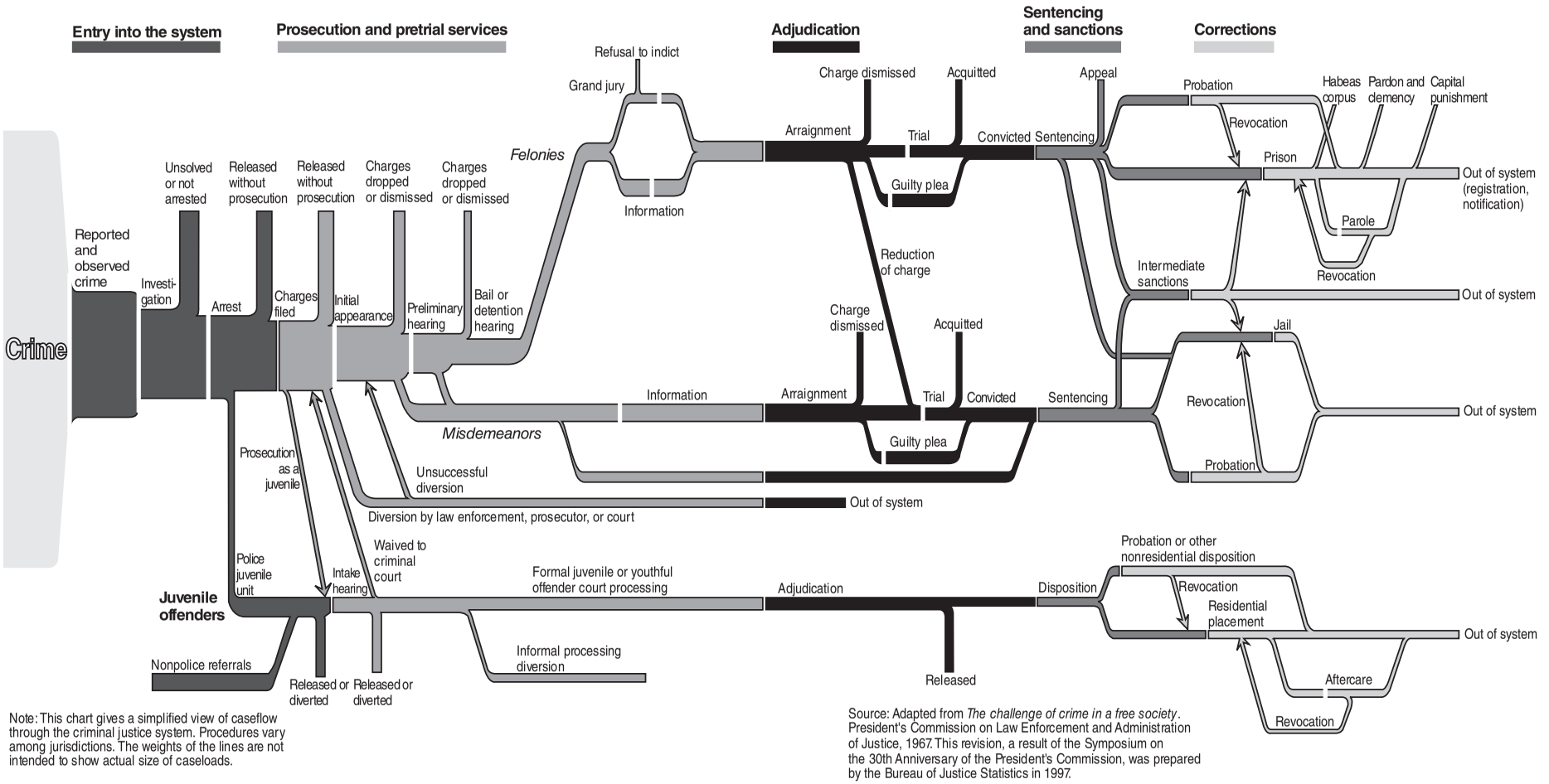
The legislature, whether state or federal (or even local, in cases where counties, towns, or cities have been given limited authority to legislate on criminal matters), also defines the procedure by which crimes are investigated, prosecuted, and punished. In law schools, courses are often taught in these two areas: criminal law, which examines the substantive law of criminal activities, definitions of different crimes, and classification of crimes; and criminal procedure, which is the study of the agencies and actions of criminal law enforcement, prosecution, court proceedings, and criminal sanctions. These procedures, as well as the agencies and individuals that pursue them, make up the criminal justice system.

**FIGURE 2-1** shows the main elements in the United States' criminal justice system. There may be variations of this system in individual states, but the major components are the same: police, prosecution, courts, and corrections.

## The Police

The role of the police in our criminal justice system is to prevent, detect, and investigate crime and apprehend offenders. This role is sometimes called law enforcement. The police carry out this role within the constraints of constitutional and statutory requirements and with the overriding principle that their work is done for the protection and welfare of the public as a whole.

**What is the sequence of events in the criminal justice system?**




Note: This chart gives a simplified view of caseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.

Source: Adapted from *The challenge of crime in a free society*. President's Commission on Law Enforcement and Administration of Justice, 1967. This revision, a result of the Symposium on the 30th Anniversary of the President's Commission, was prepared by the Bureau of Justice Statistics in 1997.

**FIGURE 2-1** The criminal justice system. The above diagram illustrates the sequence of events in the criminal justice system. To link to a description of one of the areas shown, go to http://bjs.ojp.usdoj.gov/content/largechart.cfm and click on the section of interest.

Bureau of Justice Statistics, United States Department of Justice. Available from https://www.bjs.gov/content/largechart.cfm

Crimes may be committed within sight of the police. Most crimes, however, are not observed by the police. Some of these are reported to the police, and some are never reported. The police have the authority to prevent crimes, enforce the criminal law, investigate criminal activities, turn investigative material over to prosecutors for initiating criminal prosecutions, and work with prosecutors in the prosecution of cases.

Police have great discretion in investigative matters. Through training and experience, they learn that certain crimes may be effectively handled informally. Some reported crimes are investigated vigorously and swiftly; others are investigated perfunctorily or not at all. These investigative decisions are based on local law enforcement policy, which, in turn, is derived from a range of sources, including available police resources and the relative seriousness of different crimes as viewed by the police department, prosecutors, and local courts. In theory, the views of the police department, prosecutors, and the courts reflect the opinions and attitudes of the citizenry in that jurisdiction regarding the relative seriousness of different crimes. After all, the criminal justice system is founded on the premise that criminal law should appropriately punish those who violate prescribed standards of conduct.

Because of the volume of crime in most jurisdictions and seriously limited police resources, the discretionary action of police is, in fact, a potent element of law enforcement. Decisions not to investigate or decisions to handle some cases of misconduct that are technically criminal by informal resolution, such as with a discussion and warning, result in a large number of criminal matters that proceed no further into the system. Adding the cases that are never reported and those that are handled "in-house" by the police (that is, the cases that are not referred for prosecution), only a small minority of the total cases of criminal conduct is pursued in the courts. For example, in 2018 in California, there were 215,283 felony arrests. Convictions were obtained in 65.7% of those arrested, 12.6% of cases were dismissed or acquitted after charges were filed, 18.6% were prosecution rejections and resolution and 3% were released by the police without further referral to prosecutorial agencies.[4]

## Arrest and Release

Of significant importance, especially to the accused, is the decision to hold the suspect in custody. Taking a person into custody based on suspicion of criminal conduct is called **arrest**. There are precise standards that the police use to decide whether a person may be arrested. These involve such elements as the seriousness of the offense committed, the record of the suspect, actions of the suspect when apprehended, and, certainly, action that has been taken in comparable cases. If taken into custody by the police (by physical restraint, such as placing in handcuffs and placing in a cell), the suspect will be advised of their right to remain silent and to contact and consult with an attorney. The suspect will also be booked, which can include photographing and even taking a DNA specimen. This is where the information about the crime and the suspect is entered into the police records.

At this point, there may be a process for obtaining **release on bail**. An attorney will often move promptly to obtain bail or have the suspect **released upon their own recognizance (ROR)** (that is, without any bail or any **bond** having to be posted). Depending on the crime and local procedures, this may be obtained in some cases without court review. Otherwise, the application for release will be made at the initial court appearance or as soon thereafter as possible.

## Prosecution

Another component with great discretionary authority is the prosecution. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The title for this agency varies. In federal courts, each federal judicial district has a U.S. Attorney, who has prosecutorial authority. In the states, prosecutions are pursued at the county or city (or town) level. These prosecutors are called state's attorneys, district attorneys, prosecuting attorneys, city attorneys, or other titles, depending on the location.

The police bring to the prosecutor's office their records of investigation, which include the complaint made (by the victim or others); statements of witnesses; other evidence gathered; in some cases, a statement by the accused (confession); the prior record of the accused; and, usually, recommendations for prosecution. The **prosecutor** weighs this information and makes a decision about proceeding. Weak cases may be dropped here or sent back for further investigation. More complex cases may remain under continuing investigation by the police. However,

such a case may be referred to the prosecutor for preliminary review regarding the strength of the case or to meet time requirements to bring the accused into court for an initial appearance while they are under arrest.

If the prosecutor decides that there is sufficient evidence to proceed, the prosecutor will initiate the formal steps of prosecution. The steps depend upon the nature of the crime and how serious that crime is. This in turn may vary from one jurisdiction to another. (As with all criminal justice procedures discussed in this text, this discussion is based on the most common practice. The reader should always be aware that circumstances may be different in a particular local jurisdiction.)

If the offense is minor—that is, a petty offense—the prosecutor files a complaint, an **information**, or a criminal charge, and the defendant is taken promptly before a lower court (a magistrate, a commissioner, or a justice of the peace). Note that once **charges** are filed, the person accused of the criminal act has become a defendant—a party in a criminal proceeding. The title of the case will typically read, "*The People of the State*" or "*The State of (name of the state) versus (name of the accused), defendant*" For minor crimes, the proceedings are usually quick; the defendant is advised of their rights and asked for their plea. Even if the defendant denies the charges, the case will usually proceed quickly. If a trial is requested, an early trial date will be set, but sufficient time for attorneys to prepare and to obtain the presence of necessary witnesses must be allowed. If the defendant is found guilty (by plea or by trial), penalties are proportionally smaller (usually limited to fines or short jail terms) for minor offenses.

If the offense is a more serious one, the crime is considered to be either a misdemeanor or a felony. As noted previously, in most jurisdictions, misdemeanors are offenses that carry penalties of up to one year in prison. Most jurisdictions have sub-classes of felonies and misdemeanors, with a corresponding difference in the maximum sentence. An example, North Dakota has two classes of misdemeanors: a Class B misdemeanor which carries a maximum penalty of 30 days in jail and a fine of $1500 or both compared to a Class A misdemeanor which carries a maximum penalty of one year in jail and a fine of $3000 or both. (North Dakota Century Code Section 12.1-32-01.) The state of Missouri has five classes of felonies labeled A-E, with a Class E felony carrying a maximum term of imprisonment of 4 years, and a Class A felony carrying a minimum term of ten years and a maximum term of 30 years or life. (Revised Statutes of Missouri 558.011.) Felonies are offenses that carry penalties of more than one year in prison. For misdemeanors, prosecutors can almost always file the charges by signing an information or similar prosecutive document. For felonies, an **indictment** is one method of charging the accused, and this requires taking the evidence before a grand jury, which decides whether there is sufficient evidence to take the accused to trial, and, if there is, the grand jury hands up an indictment. (Some states have no grand juries. Other jurisdictions seldom use them.) It is common for a defendant who is charged with a felony to be asked to waive indictment and to agree to proceed by information. Thus only a small number of prosecutions nationwide originate with grand jury action. The Fifth Amendment to the U.S. Constitution requires felony prosecutions to be initiated by a grand jury, unless waived by a defendant. Neither the Fifth Amendment nor the Fourteenth Amendment Due Process clause requires the use of grand juries in state prosecutions. *Hurtado v. California*, 110 U.S. 516 (1884) (Fifth Amendment) and *Alexander v. Louisiana*, 405 U.S. 625 (1972) (no right to a grand jury indictment provided by the Fourteenth Amendment.)

Soon after arrest, defendants are brought before the lower (preliminary) judicial authority, where they are advised of their rights, the assignment of **counsel** is discussed (if they have not retained an attorney), and the sufficiency of the charges is preliminarily reviewed by a judicial official, ensuring, for the first time, review of the evidence by someone outside of the prosecution and police offices. Whether by indictment, information, or other official prosecutor's charges, the case is formally and publicly filed in the court system at this time. After an information or indictment is filed, the defendant is taken before the criminal court for arraignment.

At **arraignment**, the accused person is brought before the court and is asked to enter a plea of "guilty" or "not guilty." Arraignment is conducted in open court and consists of reading the indictment or information to the defendant or otherwise providing them with the substance of the charges against them. At arraignment, the court makes certain that indigent defendants (persons without funds) are provided counsel. Here also the defendant elects whether to waive a **trial by jury** or have a **trial by judge** alone (bench trial).

After reviewing the evidence presented at this preliminary stage, the court may order some charges to be dismissed for insufficient evidence or some charges to be reduced to lesser offenses. From these earliest stages, the defense counsel will negotiate with the prosecutor to get charges dropped or reduced, either on the basis of the strength of the case or in return for entering a guilty plea. The defense counsel will file motions with the court, challenging the legality of the prosecution papers, sometimes challenging arrest or other police actions, or challenging the propriety of detention.

## The Courts

After the initial papers are filed with the court clerk, the judge assigned to the criminal matter has jurisdiction over the disposition of the case.

> **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 defence.**
>
> U.S. Constitution, Amendment 6

> **No person shall be … deprived of life, liberty, or property, without due process of law.**
>
> U.S. Constitution, Amendment 5

> **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**
>
> U.S. Constitution, Amendment 14

Every criminal court must ensure that constitutional standards for **criminal proceedings** and **due process** are met. If the defendant pleads guilty, the court makes sure that the defendant's guilty plea is understood and is voluntarily made. If the defendant pleads not guilty, the case proceeds to trial. If the defendant waives their right to have a trial by jury, the court will consider the evidence presented at trial and make the decision as to the defendant's guilt. During a jury trial the judge supervises all proceedings, makes rulings on evidence and procedural matters, and instructs the jury about the law that applies to their deliberations. A defendant found not guilty is released (unless there are other charges pending on which to hold them). A defendant found guilty is then ready for sentencing.

The corrections component involvement in the criminal justice process can begin as early as the arrest stage if the suspect is detained in jail, and for some, pretrial release may include aspects of correctional supervision. However, for many criminal defendants, the corrections stage of criminal justice becomes involved at sentencing. Sentencing is the legal process that anticipates the correctional function. In many cases, corrections authorities may be involved in the sentencing itself. But sentencing is a judicial function; only courts impose **sentences**, as authorized by the criminal statutes. It is true that, in some jurisdictions, sentencing reforms in recent years have diminished the wide authority of sentencing judges by prescribing mandatory or determinate sentences. In most cases, these procedures reduce the range of sentences that may be imposed by the judges. There is usually a formula, in states that have adopted sentencing, under which elements of criminal conduct are described and assigned values, which are then used (in charts or by other means) to arrive at a narrow range of sentences. Judges may be allowed to go above or below these sentence guides, for reasons that are found in the record and that are based on circumstances that are particularly mitigating or aggravating, compared with the average case. The National Center for State Courts reports that 21 states have some system of sentencing guidelines.[5] In 2008, the National Center for State Courts issued a research report on "Assessing Consistency and Fairness in Sentencing-A comparative Study in Three States."[6] The report indicates at least 20 states and the District of Columbia have sentencing guidelines. These guidelines are described as "a relatively new reform effort to encourage judges to take specific legally relevant elements into account in a fair and consistent way when deciding whether a convicted offender should be imprisoned, and if so, for what length of time." Guidelines may be either advisory (voluntary) or mandatory (more presumptive—stricter requirements for departure from the guidelines, tighter sentencing ranges, more vigorous appellate review). (See endnote 6). Where such sentencing guidelines have not been adopted, judges are typically given (by the legislature, through the criminal statute) a wider range of penalties that may be imposed. While many judges object to the restrictions placed on their wide discretion as a result of sentencing guidelines or **mandatory sentences**, others welcome the attempts to ensure more consistent results in sentencing from case to case across all courts in the jurisdiction.

# Sentencing

To assist in their sentencing decisions, it has become common in many jurisdictions for the courts to request sentencing reports regarding individual defendants. The Supreme Court has made it clear that individualizing sentences to fit particular defendants is an approved practice (*Williams v. New York*, 337 U.S. 241 (1949)). In that case, the Court also emphasized that the sentencing procedure is more relaxed than the strict procedural and evidentiary requirements of **due process** at the criminal trial itself:

> **[A] sentencing judge … exercise[s] a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law … Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics … [M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.**

The Court repeatedly emphasized the importance of individualizing sentences in modern sentencing philosophy. The reason for this was also stated by the Court:

> **Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.**

Note that this was said in a case where the Supreme Court upheld the imposition of the death penalty. However, *Williams* is still good law, and it is often cited to sustain rulings about the relaxed nature of sentencing portions of criminal trials and importance of getting as much information as possible about the defendant in order to fit the sentence to the individual. To assist the courts in this process, the Supreme Court recognized the value of the sentencing report:

> **Under the practice of individualizing punishments, investigational techniques have been given an important role. [The reports of probation workers] have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information.**

Presentencing reports are often sought, particularly in felony cases. In earlier days, these reports usually came from the prosecutor and possibly from the defense. To obtain a fairer, more balanced, and more consistent report, nowadays, such reports are usually provided by a judicial office, the probation office, or even from the corrections department. Sometimes, these reports are started before the defendant is found guilty. More often, the judge orders a report to be prepared following the defendant's entering a guilty plea or after conviction. This report usually reviews the criminal conduct of the defendant but focuses more on social, educational, psychological, medical, and family background and needs. These, together with the criminal record that is always available from the police and prosecution, are used to enable the court to impose a more informed sentence:

> The aim of the [federal] presentence investigation is to provide a timely, accurate, objective, and comprehensive report to the court. The report should have enough information to assist the court in making a fair sentencing decision and to assist corrections and community corrections officials in managing offenders under their supervision (Administrative Office for the U.S. Courts, 2013).[7]

See Appendix 1, model **presentence report**, on the Navigate eBook site on jblearning.com, which shows the kind of language that would be used in providing a good report to the sentencing judge. This model report is very detailed and involves complicated criminal activity. It shows the range of information a judge needs in order to make an informed sentencing decision.

This inevitably brings us to the question: What is the purpose of sentencing? Although some criminal statutes have attempted to address this ultimate penological question, most legislation is silent, or ambiguous, about the purpose of punishment. The historic and traditional answer to the question is that we sentence criminal offenders for **retribution**, **incapacitation**, **deterrence** (general and individual), and **rehabilitation**. When a judge sees rehabilitation as the primary purpose to be achieved in sentencing, the presentence report, with its detailed information about the defendant, is of greatest use. For incapacitation, retribution, or general deterrence, the details of the

defendant's psychological or educational background may be viewed as irrelevant, except for possible mitigation or aggravation in exceptional cases.

In any event, the final answers regarding the purposes of sentencing have not yet been made. Criminal justice authorities, and especially legislatures, have not reached an agreement about which of the grand purposes (individually or in combination) are most justified in sentencing. The debate continues, and what is certain is that judges and the public, as well as professors and legislators, hold widely varying views about the proper purposes of punishment. The emphasis on one sentencing goal or another seems to shift from decade to decade. Rehabilitation as a primary goal was widely taught in schools beginning in the 1930s and after. It was finally adopted by many judges and legislatures in the 1950s and 1960s. By the 1980s, serious questions were raised by academicians, correctional practitioners, and judges regarding the goal of rehabilitation as a correctional purpose. These concerns, and those of the public in response to increasing criminal activity led to a swing of the pendulum in the 1980s and 1990s toward retribution and incapacitation as the justifiable (and more clearly achievable) goals of sentencing. In the first part of the 21st century, there was a belief that imprisonment was warranted for persons committing the most serious criminal acts (e.g., violent crimes) but that alternatives should be considered for persons posing a minimal risk to the community. In August 2010, the American Correctional Association (ACA) approved a new public correctional policy that, with respect to criminal sentencing, said:

> The length of a term of incarceration resulting from a criminal conviction should be only as long as necessary to accomplish the objectives of punishment … This will optimize the cost to the taxpayers … minimize any deleterious effects of imprisonment, and maximize the chances for the successful reintegration of offenders into the community after release and also ensure that the public's interest in the long-term incarceration of habitual, violent and predatory sexual offenders is preserved.[8]

Beginning in the second decade of the 21st century, there has been a strong movement to address the large prison U.S. correctional supervision population. In addition to the above noted ACA action, the federal government made changes in federal sentencing law. Examples include The First Step Act noted earlier, and reforms to federal law, such as the Fair Sentencing Act, which reduced the disparity in federal law for possession of crack cocaine from 100/1 to 18/1.[9] States also have taken steps to address sentencing disparities.[10] Nongovernmental organizations have initiated steps to inform the public and policymakers and to suggest changes to federal and state sentencing laws, which impact corrections such as The Urban Institute, The Pew Charitable Trusts, The Marshall Project, The Sentencing Project, the Vera Institute of Justice, and the Prison Policy Initiative.[11]

## Corrections

**Corrections** is the collection of agencies that perform those functions that carry out the sentencing orders of criminal courts. It is the last component in the continuum of criminal justice activities of the criminal justice system. Included in corrections are (1) the probation authority, (2) **jails** (at least to the extent that they carry out short sentences, usually called jail terms), (3) the agencies that perform community corrections functions, (4) prisons, and (5) paroling authorities. Under our definition, those who collect **fines** and **restitution** money (often clerks of the court) and those who assist in supervising offenders in the community (which may include the police) are also part of corrections. But the five authorities listed are the principal, traditional components of corrections.

Sentences in the United States range from fines, restitution, community service, probation supervision, suspended sentences, and terms of imprisonment, to execution in capital cases. Corrections agencies carry out all of these sentences. Fines and restitution are typically paid by the defendant to the clerk's office or another judicial office, so involvement of a corrections agency in such cases is minimal as long as payments are made.

Probation is a type of sentence that allows the defendant to remain in the community, and it usually allows an offender to stay at their home and keep their job. The defendant who is placed on probation is required to report regularly to a probation officer who counsels the probationer and helps in crises. There are always conditions imposed by the court that govern the activities of the defendant. Violations of these may result in a negative report to the court. If these are serious enough, the probationer may be called into court to determine whether the probation should be revoked. Courts rely heavily on the insights and judgment of the probation officers on these matters. In most cases, if probation is revoked, the defendant can be sent to prison at that time.

Nonpayment of fines or restitution may also result in the defendant being called before the court to face possible jail terms as sanctions.

It should be noted that, for all of these components of corrections for **adults**, there are similar components in the **juvenile** justice system. From probation to **incarceration**, specialized juvenile agencies handle delinquency cases in the criminal justice system.

In recent years, there has been much said and written about "alternatives to imprisonment." In truth, there have always been alternatives to imprisonment (probation being the main one), but because of the attention, legislatures and courts have looked to additional ways to sentence. Why? There are many reasons. Because of crackdowns on sentencing (longer sentences for many offenses, especially involving violence), prisons have become more crowded. Prisons are expensive to build and run. For less serious offenders, at least, it seems to make sense to use anything that might work instead of prison. But what will work? Here are descriptions of some of the alternatives that have been tried.

## Probation

**Probation** is a commonly used sanction and is often used for first- or second-time offenders and those involved in less serious crimes. The essence of probation is that the defendant is allowed to remain in the community while under some degree of supervision by a **probation officer**. In some cases, a judge imposes a term of imprisonment upon a defendant and suspends the execution of it as long as the defendant satisfactorily completes a designated period of time under supervision. Some states authorize the suspensions of sentences involving fines or other penalties or the suspension (deferring) of the imposition of a sentence, allowing the judge (upon revocation of probation) to impose any sentence that could have been imposed at initial sentencing.

There are usually general conditions imposed upon the **probationer** that are used in all similar cases. (For example: do not commit any offense, do not use drugs, and maintain steady employment.) In addition, very specific conditions geared to the individual defendant may be used. (For example: do not go to the Main Street Tavern, where there are bad influences; get training in welding to improve your employment opportunities; and pay restitution of $150 per month to the victims from whom you embezzled money.) See Appendix 2- mandatory, standard, special and other conditions of supervised release, on the Navigate eBook site on jblearning.com.

Although many people (in the media, in the public, and even in the judiciary) do not consider probation a sanction, but rather a "slap on the wrist" that allows criminals to get off free, probation is properly viewed as an alternative sanction, carrying varying degrees of restraint on freedom. In many jurisdictions, more than half of the persons who are sentenced receive probation. More persons are on probation supervision in the United States than are in prison. At the end of 2018, 6,410,000 adults were under some form of correctional supervision in the United States. Of that number, 3,540,000 were on probation, 878,000 were on parole, 738,400 were in jails and 1,465 million were in state and federal prisons.[12]

Probation officers have a difficult job. One of the major problems they face is the large numbers of persons whom they are expected to supervise. Sometimes, the numbers run to 200 offenders or more per officer. Some states have actively attempted to lower the number of probationers supervised by probation agents. For example, Georgia has lowered its average probation officer case load from 250 in 2008 to 130 in 2017.[13] This usually means that officers look after the most demanding problem probationers, and many probationers are left unsupervised. At best, many probationers report in every month or so by telephone, which serves as their supervision.

There are many degrees of supervision within the realm of probation. At one extreme is *unsupervised probation*, which is virtually an oxymoron, given that supervision is the essence of probation. Still, with overloads of probationers, many officers do minimal supervision on many cases. Because of the reality of minimal supervision by probation officers, some courts approve probation for some defendants without any supervisory contact at all. Unless the probationer is arrested for a new offense, probation is dormant. At the other extreme is intensive probation, in which a court requires much more frequent contact between probation officer and probationer. This level of contact necessarily requires smaller **caseloads** for the probation officer, and if there are resources for this in the jurisdiction, *intensive probation* is a more meaningful alternative for some defendants who would otherwise go to prison. Some studies indicate that intensive probation results in more violations—which could be explained by the fact that probationers placed on intensive probation are more at risk (more likely to commit violations) or

that greater supervision uncovers more technical violations.[14] Many well-trained probation officers in this country, with additional resources, could make probation a strong and viable sentencing alternative. Probation is the most reliable and potentially the most valuable type of community correction.

It is important to distinguish between probation and parole. Probation is a sanction, imposed by a judge at sentencing. **Parole** is release from a term of imprisonment by a paroling authority. They are similar in that both probationers and parolees are released into the community and placed under the supervision of government officers; in some jurisdictions, the same officers supervise both probationers and parolees. But the status of probationers and the status of parolees are very different, both in their initial placement and in their revocation. Both placement and revocation of probationers are done by the sentencing court. The placement into parole and revocation of parole—returning the parolee to prison—are done by the paroling authority, which is usually an independent administrative board or a commission appointed by the executive, typically by the governor of the state. In the federal criminal justice system, offenders frequently receive a judicially imposed term of supervised release following their release from a sentence of imprisonment. During supervised release, the offender is monitored by U.S. Probation Officers. Like probation, a violation of supervised release conditions results in a hearing before the sentencing judge who can revoke the supervised release and return the offender to prison for an additional period of incarceration.

## Fines

For many offenses, fines may be used in lieu of, or in addition to jail or prison terms. For crimes at the bottom end of the severity scale (traffic offenses), fines have become the accepted method of punishment. In some other countries, fines are used more often than in the United States. The advantages of fines are that they are punitive; fairly easy to administer; and fairly easy to fit into a sentencing schedule, with ranges of severity. The disadvantages are that fines are seen as being unavailable for many defendants who are indigent, and they are viewed by some as being not punitive enough for high-income defendants (such as drug dealers or wealthy, white-collar defendants). Using fines for the latter types of defendants is often seen as an example of rich people being able to buy their way out of criminal difficulties.

## Restitution

Restitution is an attempt in the criminal system to make the injured "whole," to even the balance that has been unjustly tipped by the criminal act. Victims may feel that restitution is a satisfying type of sentence, because they personally receive something for their injuries.

Every state gives courts statutory authority to order restitution. In over one-third of the states, courts are required to order restitution unless there are compelling or extraordinary circumstances. An example is Florida Statutes section 775,089 (2019) which provides that "[i]n addition to any punishment, the court shall order the defendant to make restitution to the victim for: 1) Damage or loss caused directly or indirectly by the defendant's offense; and 2) Damage or loss related to the defendant's criminal episode, unless it finds clear and compelling reasons not to order such restitution."

Restitution sanctions are some of the oldest kinds of sentences used.[15] The concept is one of leveling benefit and loss; the defendant must pay back their ill-gotten gains, either directly to the victim or to some place (such as a victims' fund) where it can be used for the good of those harmed by criminal activity. The U.S. Department of Justice report on ordering restitution[16] identifies an issue that impacts restitution. This is the presence of conflicting directives on restitution within a state; for example, states may give the victim the right to restitution but may fail to require that courts order restitution. Some other identified restitution problems include the victim's failure to request restitution, the difficulty in calculating loss, and the defendant's inability to pay.

As with fines, there are frequent problems in making sure restitution is paid. This is partly because payments are being made over time. In addition, many offenders who were ordered to pay are confined and unable to make significant payments until they are released or placed in a work program; other factors can include limited assets, difficulty in securing and maintaining employment, and the lack of skills to get higher-paying jobs. Efforts are being made by the states to enforce restitution orders, including improved monitoring of restitution payments; the attachment of state payments to the defendant; the revocation of probation or parole for willful failure to pay; and using state entities or private collection agencies to collect restitution (any collection fee can be added to the

amount of the debt).[17] An example of a state's efforts to improve a victim's experience with issues related to restitution is the information on the Colorado Judicial Branch website on Victim Restitution.[18]

## Electronic Monitoring

All 50 states, the District of Columbia, and the federal government use electronic devices to monitor persons under correctional supervision via parole, probation or pretrial release.[19] The rationale for the use of these devices is that with huge supervision loads and difficulty in keeping track of offenders in the community, electronic monitoring does what a probation/parole officer cannot do—keep constant track of the whereabouts of the offender. This, in theory, helps to enforce the conditions of community release that relate to where the probationer/parolee can be, whether at home or at work, or at limited other places (such as school, church, or social places). There is usually a bracelet, anklet, or other electronic device, including smart phones, that provides real time information on a monitored person's location. Programs go by different names depending on the jurisdiction, including "location monitoring" in the federal system, or "satellite-based monitoring" in North Carolina or "supervised electronic confinement" in California. Although there are some equipment and administrative costs associated with running such programs, they are, of course, far less expensive than the cost of imprisonment. Some argue that, for persons at the lower end of the imprisonment spectrum, electronic monitoring provides public protection and a degree of sanction that justify its use as an alternative to prison. A publication from the International Association of Chiefs of Police (IACP) notes electronic monitoring may also be used for individuals posing a higher risk. The publication states that law enforcement agencies are beginning to get funding from state legislatures to begin Global Positioning Satellite (GPS) sex offender tracking programs.[20] The costs of such programs can be high and can be passed on to the person supervised. In Portage County, Wisconsin, the cost for electronic monitoring includes a $25 risk evaluation fee, $30 for an installation fee, and a daily monitoring fee of $22 plus tax, which must be paid in advance.[21]

Like most innovations in the criminal justice system, as the use of the practice expanded, litigation followed. As the use of electronic monitoring increased (estimates reflect that the practice increased by 140% from 2006 to 2016), legal questions arose related to the burden placed on the individual offender's constitutional rights. In *Grady v. North Carolina*, 575 U.S. 306, (2015), the Supreme Court addressed a Fourth Amendment issue related to electronic monitoring. After defendant Grady had completed a state prison sentence, a state court ordered, pursuant to state law, that Grady be required to wear a GPS tracking bracelet for the rest of his life. Grady argued that under U.S. Supreme Court precedent, such an order constituted a search and violated his Fourth Amendment right to be free from unreasonable searches and seizures. Grady's arguments were unsuccessful in state courts, which ruled that requiring Grady to wear the monitoring bracelet was not a search within the meaning of the Fourth Amendment. In a unanimous *per curiam* opinion, the Court ruled:

> ***The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment Search.***

The judgment of the North Carolina Supreme Court was vacated and the case was returned to the state courts for further proceedings not inconsistent with the Court's opinion. This opinion did not address or resolve all of the new legal issues, which are raised by electronic location monitoring but only established that such practices impact federally protected constitutional rights.

## Community Service and Creative Sentencing

To avoid prison as a sanction and to give more clout to the noncustodial sentence, some courts regularly use an order for **community service** or for some type of work or activity that is intended to "teach a lesson." Sometimes, these sanctions are used often enough (such as requiring offenders who have committed less-serious offenses to work in the parks for a certain number of days) that they have become established alternative sanctions. We also read about them in the press, in instances in which a judge is reported to have used a "creative" order to fit the criminality of a particular offender. A slumlord is ordered to live for two weeks in one of his filthy apartments and to clean it up, or an attorney is ordered to give talks to high school classes on the benefits of the American legal system. These examples illustrate an inherent problem in such sentencing: it is eccentric and departs from a system that aims for consistency as a goal to promote fair sentencing. It also tends to be used for the affluent offender.

Creativity probably needs to be encouraged, but creative ideas should be incorporated into sentencing standards to avoid any further disparity in our sentencing structure.

## Summary

- The criminal justice system in the United States is divided into four components: police, prosecution, courts, and corrections.
- Police prevent, detect, and investigate crimes and apprehend offenders. Different levels of crimes are handled by the police with different levels of intensity. There is considerable discretion given to the police in carrying out their functions.
- When a suspect is taken into custody, this is called an arrest. An arrested person will be taken before a judicial authority to obtain release on bail or on recognizance.
- Police take their records of investigation to prosecutors. Prosecutors evaluate the investigative material and, if they determine that there is sufficient evidence to proceed, they will take steps to file charges (by indictment from a grand jury, information, or criminal complaint). Felonies, which typically carry penalties of more than one year in prison, may be initiated by indictments. Lesser offenses (misdemeanors or petty offenses) are initiated by information or criminal complaints.
- Once charges are filed, the criminal court is responsible for seeing to it that a speedy and fair trial is conducted. The procedural rules for guaranteeing fair trials (due process) are complex. If the defendant is convicted, which may be by jury trial or by the court alone, he may be sentenced according to the criminal statutes in the jurisdiction.
- Many courts use sentencing reports, from the probation office or another source, to assist in sentencing, especially in higher-penalty cases. The Supreme Court has encouraged the individualization of sentences.
- Corrections agencies carry out the sentences of the criminal courts. The field of corrections includes probation authorities, jails, community corrections agencies, prisons, and parole authorities. (There are also juvenile corrections counterparts to all of these criminal corrections agencies for adults.)
- Fines and restitution orders are other types of sentences, but they are usually enforced by officials within the judicial system (such as clerks of court) and so are not included within traditional "corrections agency" definitions. Electronic monitoring, community service, and other "creative sentencing" alternatives have been employed in recent years. These are typically supervised and enforced by one of the traditional corrections agencies.
- All 50 states and the federal government utilize some type of electronic monitoring of persons under community supervision. The U.S. Supreme Court has ruled that the use of such monitoring on an individual who has completed their sentence constitutes a search under the Fourth Amendment to the U.S. Constitution. *Grady v. North Carolina*.

## Thinking About It

How would you decide the following true case? William is 88 years old and fell in his home, causing permanent paralysis from the neck down. He tells his wife of over 60 years, Frances, that he is in constant pain and no longer wants to live. After two weeks of watching her husband's suffering and listening to his pleas for death, Frances brings a gun to the hospital where she shoots and kills William. She then tries to kill herself with the weapon but the gun jams. You are the prosecutor—what would you do? What is the purpose of criminal sanctions in this case?

## Key Terms

**adult**
**arraignment**
**arrest**
**bond (appearance bond)**
**caseload (corrections)**
**charge**
**community service**
**corrections**
**counsel**
**criminal proceedings**
**deterrence**
**due process (due process of law)**
**fine**
**good time**
**incapacitation**
**incarceration**

**indictment**
**information**
**jail**
**juvenile**
**parole**
**presentence report**
**probation**
**probation officer**
**probationer**
**prosecutor**
**rehabilitation**
**release on bail**
**released upon their own recognizance (ROR)**
**restitution**
**retribution**
**sentence (criminal law)**
**sentence, mandatory**
**trial by judge (court trial)**
**trial by jury (jury trial)**

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CHAPTER 3

# Habeas, Torts, and Section 1983

*The essence of habeas corpus is an attack by a person in custody upon the legality of that custody. The traditional function of the writ is to secure release from illegal custody.*

*In 1670, the Chief Justice of England was able to say, in ordering the immediate discharge of a juror who had been jailed by a trial judge for bringing in a verdict of not guilty, that "the writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it."*

U.S. Supreme Court, *Preiser v. Rodriguez*

## CHAPTER OUTLINE

- Habeas Corpus
- Torts
- Section 1983

Although corrections is part of the criminal justice system, most of the litigation that affects corrections officials is in the civil area. Remember that within the legal system the law is divided into two main types: criminal and civil. In some jurisdictions, there are different courts that handle criminal and civil matters. Usually, there are different rules that govern criminal cases as opposed to civil cases. There are also different standards of evidence in the two kinds of trials. As you may remember, in a criminal case, the defendant is facing the loss of freedom thus a higher standard of proof is required. There are, especially in larger jurisdictions, different lawyers who specialize in handling the different kinds of cases. The civil law is for adjudication of controversies between individual, private parties. The criminal law is for the administration of criminal laws, the end goal of which is the punishment of wrongs done to the public.

Corrections staff are sometimes involved in criminal cases. Probation officers make sentencing reports to judges at the sentencing stage of criminal trials. When persons under community supervision do not meet the conditions of their community placement, the probation officers, or others, who supervise the offenders will go into court to report on their status. That court is usually the criminal court that originally tried and sentenced the defendant. Jail and corrections officers will also go into court as witnesses in criminal cases, typically in cases in which offenses (such as escape or assault) have been committed in the jail or prison facility.

Except for the comparatively small number of appearances in criminal cases, such as those just mentioned, corrections staff will be seen mostly in civil court cases, not criminal. Most of this text is a review of the kinds of

cases that make up corrections litigation. This area of the law is sometimes called "prisoners' rights." The dockets in many jurisdictions in this country, especially in those jurisdictions where a large prison facility is located, are clogged with many lawsuits filed by prisoners or others serving sentences. This examines the major kinds of cases that make up correctional law litigation.

From 1980 to 1996, the number of prisoner petitions filed by federal and state inmates in U.S. district courts rose from 23,287 in 1980 to a high of 68,235 in 1996. In 1996, the Prison Litigation Reform Act (PLRA) was enacted. The PLRA has had an impact in reducing the number of prisoner litigations, as intended (See Appendix 3-1 on the Navigate eBook site on jblearning.com). Prisoner petitions in the U.S. district courts declined by 21% from 1996 to 2019, while the prison population increased by over 30%. These totals do not include prisoner petitions filed in state courts. One of the requirements of the PLRA is for prisoners to exhaust available administrative remedies within the correctional system prior to bringing a prison conditions law suit in federal court. In *Woodford v. Ngo,* 548 U.S. 81 (2006), the Supreme Court held that the PLRA requires the proper exhaustion of administrative remedies for inmate grievances before inmates bring Section 1983 actions into federal courts .Today, there are some who believe that the PLRA has been "too effective," in preventing judicial consideration of meritorious issues.[1]

## Habeas Corpus

Habeas corpus is one of the oldest kinds of court actions, going far back into English law. It is recognized, and guaranteed, in the U.S. Constitution:

> **The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.**
>
> U.S. Constitution, Article I, Section 9

Availability of the writ is also assured in state constitutions, where it is sometimes called "the great writ of liberty."

A habeas corpus action is started when a prisoner (or detainee) files a **petition**, asking for relief. The matter complained about must be the legality of imprisonment (or detention). The relief sought is release from illegal confinement. The petition should be filed against the person or authority who is the official custodian. The person filing the paper (for our purposes, a prisoner) is called a **petitioner**; the custodian (in prisoner rights cases, the **warden** or **superintendent**) is called the **respondent** in the case. (This is in contrast to other civil cases, where the action is usually started by filing a paper called a complaint; the parties in such a case are the plaintiff and the defendant. In Appendix 3, (see 1997 complaint on the Navigate eBook site on jblearning.com) there is a copy of a 1997 complaint filed in the United States District Court for the District of Columbia. The complaint states the facts as alleged by the claimant, the violative claims that are being made, and the relief that the plaintiff wishes the court to grant.)

In a habeas action, the court will then order the respondent to show cause why a writ of habeas corpus should not be issued (why the prisoner should not be released). Habeas corpus is regarded as an urgent legal action; the **response** by the custodian is usually required within a very short time (often 10 days or fewer), and all actions by the court are usually taken in a prompt manner. Habeas corpus actions are treated as emergency matters and, as such, go to the top of court dockets, ahead of other types of civil cases. After an attorney for the custodian (the respondent) responds, the court may dismiss the petition, hold a hearing to obtain more information, or grant the request and issue a writ. (Note that only courts can issue writs. In prisons and jails, we often hear of inmates who file writs; they are called writ-writers. This is poor nomenclature, and bad use of language, because only judges—and not inmates—have the legal authority to write writs.)

**Habeas corpus** is Latin for "have the body." It is an order directed to the person with custody, commanding him to "have," or produce, the body of the person who is in custody before the court. In fact, there are several types of habeas corpus, and all of them have Latin names. The common one is the writ of *habeas corpus ad subjiciendum.* When the term *habeas corpus* is by itself, this is the type that is meant. It is used to review the legality of the **confinement** of the detainee or prisoner. Two other types are encountered occasionally in corrections: *habeas corpus ad prosequendum* is a writ issued by a court ordering the custodian to bring the prisoner before the court for purposes of prosecution; *habeas corpus ad testificandum* is an order to bring a prisoner before the court to give evidence in a court case. Some courts still use these kinds of writs to bring

prisoners to court, although, as the decades go by, fewer and fewer courts are using these ancient (and foreign language) styles of orders.

A habeas corpus action will ordinarily be filed in the court where the prisoner is being held—that is, the court with jurisdiction over the custodian (the warden, for example) and the prisoner. (*Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 1973). Braden was indicted in Kentucky in 1967 on two criminal counts. He escaped from the custody of Kentucky and remained at large until he was later arrested in Alabama. He was convicted in Alabama and confined within that state. Although he was located in Alabama, he filed a habeas corpus action in Kentucky, which was granted by the district court in that state. The court of appeals reversed, holding that the law requires that the prisoner be within the territorial limits of the district court. Stating that the writ is directed to and served on the "jailer," not the prisoner, the Supreme Court reversed, holding that "the language of § 2241(a) requires nothing more than that the court issuing the writ has jurisdiction over the custodian."

Relief in habeas corpus is release from custody. It traditionally meant total release from confinement. In more recent years, it has also been used to achieve release from limited confinement or a particular type of confinement. (For example, a prisoner may use habeas corpus to claim that his placement in **segregation** in an institution was illegal. If he is successful, the court may order his release but only into the regular prison population.)

Habeas corpus is not the proper action to test the guilt or innocence of the person in custody. (That is properly accomplished in the court where the person in custody is prosecuted or in appeals from judgments of that court.) Damages are not awarded in habeas corpus actions. Habeas corpus is, however, one of the tools almost always used by attorneys for persons under death sentence to challenge the propriety of that status.

There are federal statutes that spell out the authority of federal courts to issue writs of habeas corpus. These statutory provisions are contained in Title 28 of the U.S. Code. Federal laws are compiled, for ease of use, in a collection of books called the *U.S. Code.* (The *U.S. Code Annotated* is just another version of this collection, which includes commentary and court decisions printed with each section to show what has been done with each particular section.) The entire body of statutes is divided into titles. Each title deals with a different subject matter. Title 28, which we refer to here, deals with the judiciary and court matters. Within each title, there are chapters and sections. These divisions are also made for ease of use and to make individual subjects easier to find. When referencing federal statutes, we will provide the title number followed by the section number. (For example, 28 U.S.C. § 2241 stands for Title 28, U.S. Code, Section 2241).

There are provisions for federal prisoners to seek habeas corpus relief, which are found under Title 28, U.S. Code, Section 2241. There are also provisions that authorize federal courts to consider applications from state prisoners for release under Title 28, U.S. Code, Section 2254. As a general rule, federal courts are not quick to jump into habeas matters involving state prisoners; they usually defer to the states to take care of such problems in their own courts, as the federal law contemplates.

In an effort to limit a prisoner's ability to file petitions in federal court, Congress, in 1996, passed the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA made several amendments to the habeas corpus requirements. For example, an amended Section 2254 provides that federal habeas corpus relief is only available to a state prisoner if the petitioner has exhausted the remedies that are available for such relief in the state where they are confined or detained; if there is no available state exhaustion process; or if there are circumstances that exist to make the process ineffective to protect the rights of the applicant. This section further allows federal courts, upon finding that the application for a writ of habeas corpus has no merit, to dismiss the application even if there has been no **exhaustion** at the state level. Another example of the amendments occurs in Section 2255 and establishes a one-year period of limitation for a federal prisoner to file a motion attacking the legality of his sentence. The section specifies when the limitation period begins to run.

As suggested above, one objective of AEDPA was to promote the finality of criminal convictions and sentences. Contrary to its intent, AEDPA may have resulted, at least initially, in a higher number of petitions filed in U.S. district courts, especially with respect to petitions filed by state inmates using Section 2254. In April 1997, the year following passage of AEDPA, the number of habeas corpus petition filings by state prisoners had increased from 1.1 per 1,000 inmates per month to 3.4 per month—an increase of 2,600 petitions. In the year 2000, four years after the passage of the AEDPA, the number of state prisoner habeas petitions increased to 21,090. The number of such petitions has declined, reaching 14,360 in 2018[2] (see **FIGURE 3-1**).

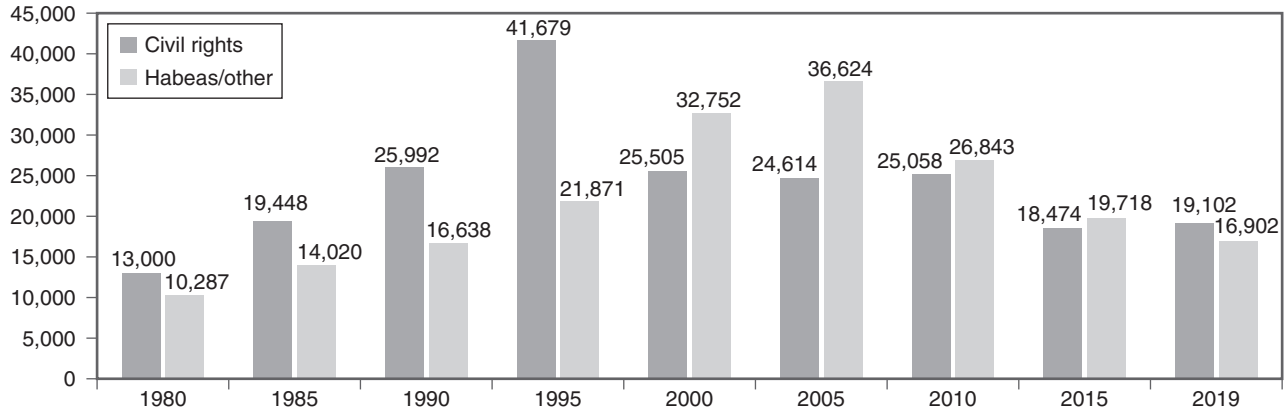


**FIGURE 3-1** Prisoner Litigation in U.S. Courts.

Data from 1980 – 2000 Scalia, J. *Prisoner Petitions Filed in U.S. District Courts 2000 with Trends 1980-2000.* (Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice, 2002). 2005, 2010, 2015 and 2019 data collected from Administrative Office for U.S. Courts, Caseload Statistics Data Tables, Table C-2, *U.S. District Courts-Civil Cases Commenced, by Bavsis of Jurisdiction and Nature of Suit during the 12 month period ending March 31, 2005*-2010-2015 and 2019. https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables

Correctional Litigation in Federal Court System Data Bullets

- The number of prisoner petitions filed by federal and state inmates in U.S. district courts rose from 23,287 in 1980 to a high of 68,235 in 1996. This total includes suits by both federal and state prisoners, and includes civil rights actions, prison conditions case, habeas challenges to custody, and sentence modification actions.[i]
- From 1980 to 1996, fewer than 2% of the petitions were adjudicated in favor of the inmate and 62% were dismissed.[ii]
- Prior to 1996, 24% of inmate petitions that were dismissed in the district courts were appealed.[iii]
- In 1996, the Prison Litigation Reform Act (PLRA) was enacted. The PLRA has had an impact in reducing the number of prisoner litigations, as intended. At year-end 1996, there were approximately 1.18 million prisoners under the jurisdiction of federal or state adult prison authorities.[iv]
- By 2000, after enactment of the PLRA, prisoner petitions in district courts had declined by 15% (9,978) to 58,257. This decrease occurred while the prison population had increased by over 2% (272,000) to 1.39 million.[v]
- In 2010, prisoners filed 51,901 petitions in district courts, a 24% decline (16,334) from 1996 while the prison population had increased by 400,000 to 1.6 million.[vi]
- For the computational period of April 1, 2018, to March 31, 2019, 54,066 prisoner petitions were filed in federal district courts.[vii] Prisoner petitions in the federal courts of appeal made up 26% (12,593) of appeals commenced in the 12 months ending March 31, 2019.[viii]

# Torts

A **tort** is a private wrong or injury for which a court will provide a remedy in the form of damages. It is also an ancient remedy in English law. A tort always involves a violation of some duty owed to the person injured—other than by agreement of the parties (that is, by contract). These are the two main areas of the civil law: torts and contracts.

[i] Scalia, J. *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000* (Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice, 2002),

[ii] Id.

[iii] Id.

[iv] Id.

[v] Id.

[vi] Administrative Office for U.S. Courts, Caseload Statistics Data Tables, Table C-2, *U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit during the 12 month period ending March 31, 2005*-2010-2015 and 2019.

[vii] Administrative Office for U.S. Courts, Caseload Statistics Data Tables, Table C-2, *U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit during the 12 month period ending March 31,* 2019.

[viii] Administrative Office for U.S. Courts, Caseload Statistics Data Tables, Table B-1 , *U.S. Courts of Appeal-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit during the 12 month period ending March 31,* 2019.

There are three elements in any tort action: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) injury (damage) as a proximate result of the breach of duty. The duties that are owed have been established by law and go back to principles of the common law. Some are defined (in more recent times) in legislation, but even those are based on, and are interpreted by, court rulings.

Torts may be either intentional or negligent. In intentional torts, the wrong is done by someone who intends to do what the law has declared to be wrong. In negligent torts, the wrong is done by someone who fails to exercise the degree of care that is required by the law in performing acts that are otherwise permissible.

The most common type of tort that we encounter in our everyday lives today is probably the accident that is caused by the negligent operation of an automobile. The injury caused may involve property damage, personal injury, or both. Every driver has a duty to operate a vehicle safely and in accordance with rules of the road, and every driver must learn and adhere to those rules. Failure to use proper or "reasonable" care in the operation of a vehicle is a breach of duty, and, if it causes injury to another person, it is a tort. The injured party may file suit for the injury suffered and, in doing so, becomes a plaintiff against the defendant who has injured him.

There are two types of **damages** that may be recovered in a civil tort suit: compensatory damages and punitive damages (although some states do not allow punitive damages in tort actions). Compensatory damages are awarded to cover the actual monetary loss suffered by the plaintiff. In cases of property damage, these would include the costs of restoring or repairing the property. In cases of personal injury, compensatory damages would include medical bills, lost wages, pain and suffering, and an estimate of future losses in these same categories. Punitive damages are designed to punish the defendant for severely bad conduct. Here, more than simple **negligence** is required; a defendant may have shown gross negligence (acting recklessly) or willful negligence (acting intentionally to cause harm) in order to justify an award of punitive damages. There are also nominal damages, which are damages of small amounts that are awarded when a tort has technically been committed, but the judge or jury deciding on the amount of damages believes that a minimal award is the most just result. Again, the relief given in a tort action is an award of money. There is no injunctive relief in tort suits, and attorney fees are not usually given in common law tort suits.

The most frequently encountered common law torts are assault, **battery, false imprisonment, libel**, and **defamation**. Negligent loss of someone else's property is also a tort, as is medical malpractice. These last two are the kinds most often encountered in corrections facilities, although assault and battery are also the basis of some prisoner suits.

In English law, the **sovereign** (the king or queen) could not be sued in its (his or her) own courts, unless the sovereign gave permission to be sued. The courts were a part of the sovereignty and, as such, could not be used to attack the sovereign. Over the centuries, the courts became more and more independent, but the principle of sovereign immunity continued. It was carried over into the United States, where the legal principle states that the sovereign (the government) cannot be sued without its permission. Most governments have abandoned strict sovereign immunity. Today, the federal government permits tort actions to be brought (with strict statutory restrictions), and most state governments permit some kinds of tort actions against the state. These are usually called tort claim acts. In most cases, they require administrative claims to be made first against the government. If those are not successful, the injured party may be able to go into court to pursue the tort action.

For some time, even though there was a Federal Tort Claims Act, there was some question as to whether federal prisoners could sue the U.S. government for tort injuries. Lower courts had ruled both ways—that they could and that they could not. The Supreme Court finally ruled that federal inmates could use the Tort Claims Act in *United States v. Muniz,* 374 U.S. 150 (1963). Two cases were decided under *Muniz:* one dealing with injuries suffered by an inmate who was assaulted during a prison disturbance (Muniz), and a second case dealing with an inmate who went blind (Winston) as a result of alleged medical malpractice by government doctors. Those two kinds of cases happen to be the most common kinds of tort claims arising out of federal prison operations, except for claims for damaged or lost property.

Prison systems routinely take temporary custody of the personal property of prisoners, including at those times when prisoners are transferred between facilities. During these transfers, some personal property of the prisoner may be lost or damaged while in the possession of prison officials. To compensate prisoners for such losses, if caused by a negligent act or the omission of a prison employee, various administrative procedures have been developed. An example of this type of administrative procedure is Title 31, U.S.C. Section 3723, which permits a prisoner to submit a claim to the Bureau of Prisons for personal property that was lost or damaged as a result of the negligence of a federal employee. Claims may not exceed $1,000 and must be presented within one year of the loss.

In *Ali v. BOP,* 552 U.S. 214 (2008), the U.S. Supreme Court ruled that federal prisoners could not use the Federal Torts Claims Act (FTCA) to seek damages from the United States for the loss or damage to personal property while in the possession of BOP employees as Congress had expressly precluded consideration of these types of claims under the FTCA.

## Section 1983

There is another major group of legal actions available to prisoners, sometimes called constitutional torts. These are torts in the sense that they represent injuries or harm suffered by a person because of wrongful actions by another. They are not common law torts, however, because they are not included in the body of torts that have been developed by court rulings (common law) over the centuries. Instead, they are injuries caused by a violation of rights guaranteed by the Constitution. They are recognized and authorized as court suits by a federal statute, which is contained in the Civil Rights Act of 1871. This law is codified in Title 42, U.S. Code, Section 1983:

> **Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.**

As the Supreme Court has stated: "*Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred.*" *Baker v. McCollan*, 443 U.S, 187 (1979). Most states also have provisions in state law that allow suits to be brought for injuries sustained as a result of violations of state constitutional guarantees.

Although it was enacted in 1871, the federal Civil Rights Act was not used much until the civil rights litigation explosion of the 1950s and the prisoner rights litigation explosion of the 1960s. Since then, it has been the most frequently used type of lawsuit in corrections litigation. Lawsuits under Section 1983 allege that state officials have deprived the prisoners of their constitutional rights. Examples include the right to due process in disciplinary hearings (Fifth and Fourteenth Amendments) in *Wolff v. McDonnell,* 418 U.S. 539 (1974); access to law libraries in *Bounds v. Smith,* 430 U.S. 817 (1977); and access to health care (Eighth Amendment) in *Estelle v. Gamble,* 429 U.S. 97 (1976). Thousands of these suits are filed in federal courts each year. Section 1983 actions are the most frequently used type of prisoner litigation. Habeas corpus and torts are limited in scope and the kinds of relief they make available. Section 1983 allows broad relief, in law, equity, or any "other proper proceeding." This has resulted in suits in which both damages and injunctive relief are commonly sought, and often given, in Section 1983 actions.

There are two main kinds of injunctive relief: (1) *restrictive injunctions,* in which defendants are enjoined (that is, they are legally ordered to stop) from doing things they have been wrongfully doing; and (2) *mandatory injunctions,* in which defendants are required to do things they should have been doing. If plaintiffs can show that government authorities have not been following constitutional requirements, it may be most valuable to obtain **injunctions**, either to stop them from doing something (ordering prison officials to stop putting people into a segregation unit that is inadequately heated, for example) or to require them to start doing something (ordering prison officials to adequately heat the segregation unit in winter, for example).

State prisoners also brought suits in federal court using the Civil Rights Act, because the federal courts (at least in the 1960s and 1970s) were seen, in most jurisdictions, as being more liberal, and more likely to rule in favor of prisoners than state courts. Also, the law as it applies to prisons became more established, over time, in federal courts, and prisoners in one jurisdiction could use rulings in other parts of the country as leverage to get favorable rulings in their own situations. As already noted, a state prisoner is barred from bringing a habeas corpus action in a federal court unless the prisoner has already used the state remedies that are available to litigate the same matter. This was confirmed in *Wilwording v. Swenson,* 404 U.S. 249 (1972), and *Preiser v. Rodriguez,* 411 U.S. 475 (1973).

The Supreme Court, in *Heck v. Humphrey,* 512 U.S. 477 (1994), held that a state inmate's claim for damages is not cognizable (capable of being tried or examined) under Section 1983 if a judgment for the plaintiff would imply that the conviction or sentence was invalid, unless the inmate could show that such conviction or sentence had already been invalidated. The question in *Edwards v. Balisok,* 520 U.S. 641 (1997), was whether an inmate's