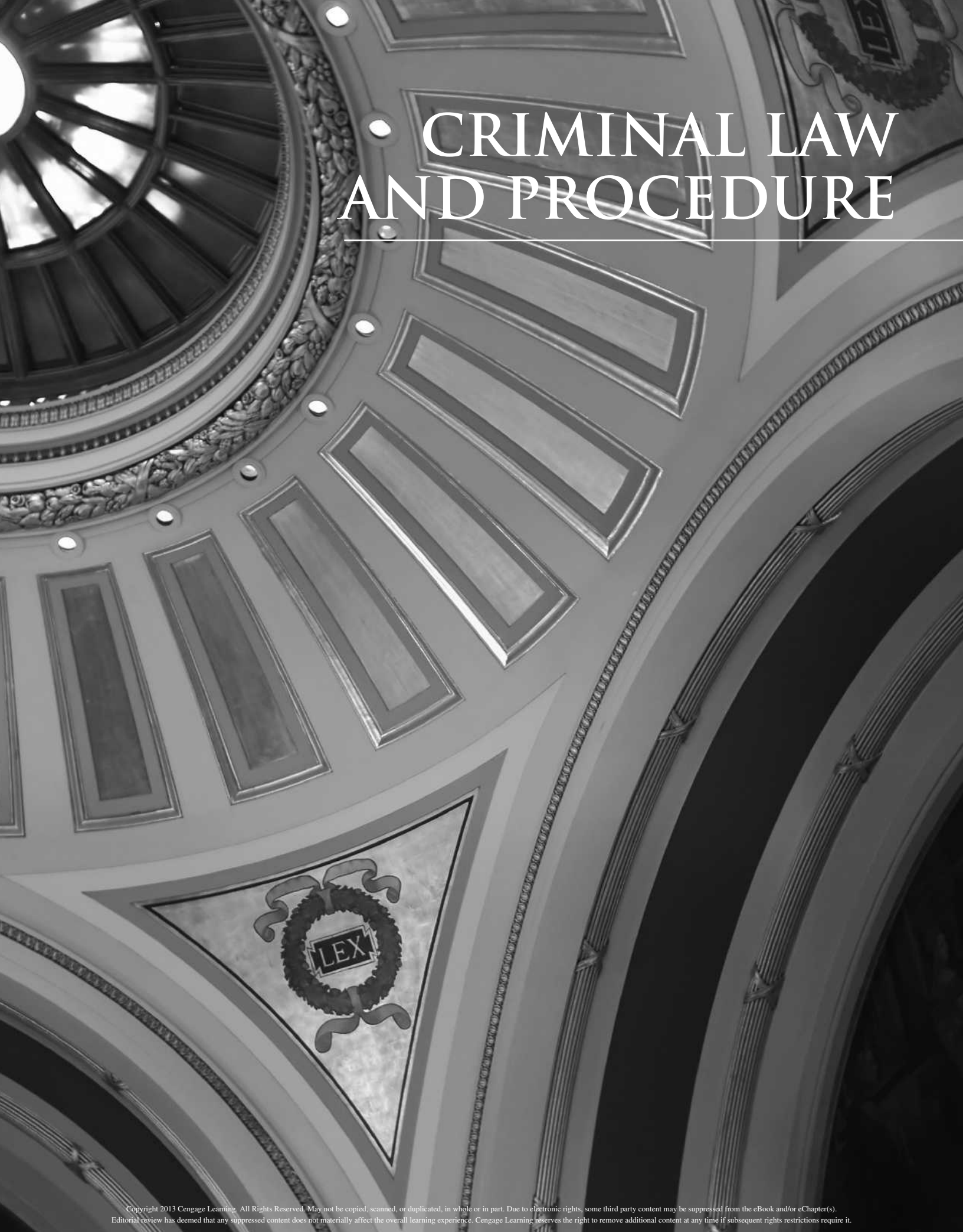
FOURTH EDITION

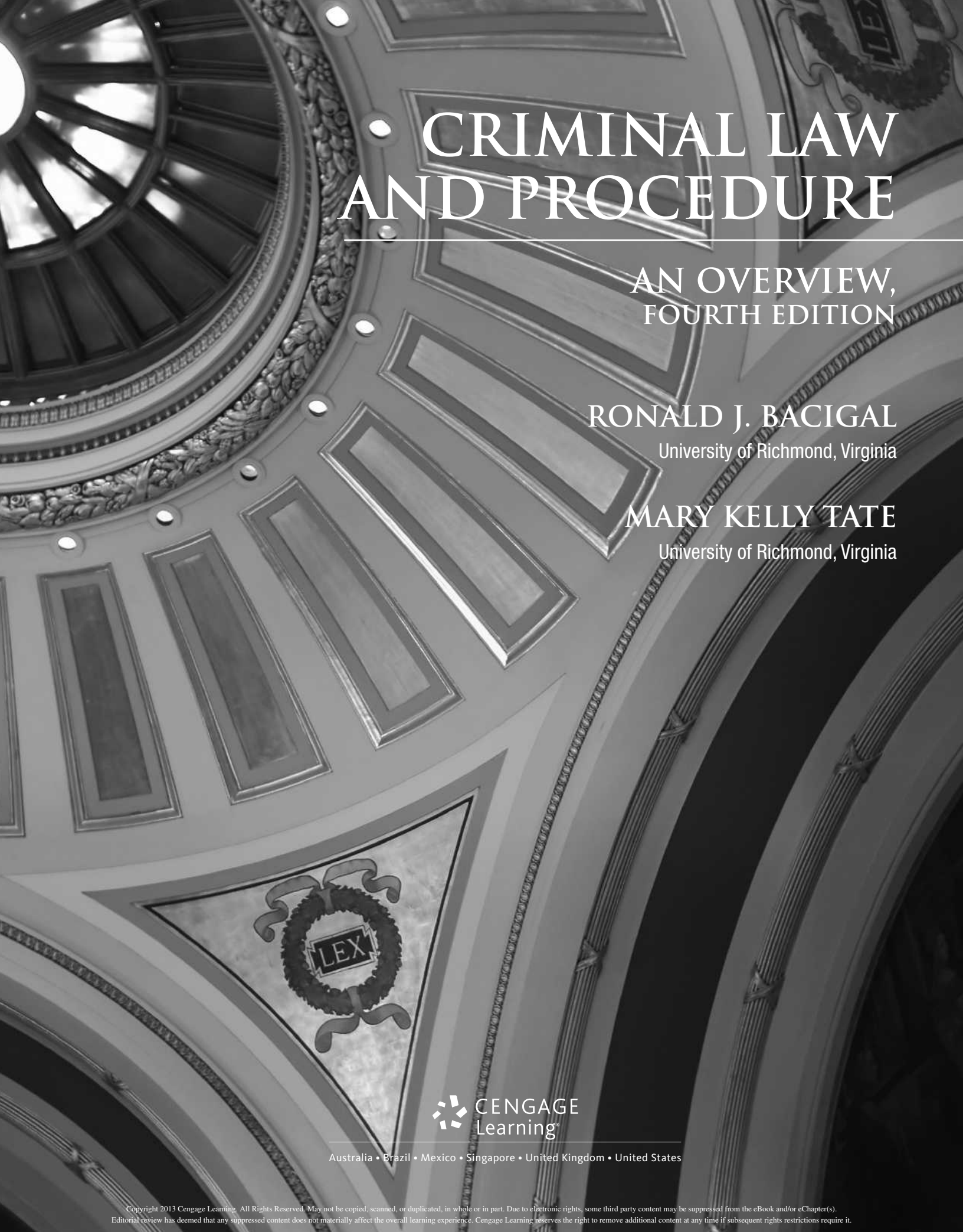
CRIMINAL LAW & PROCEDURE

AN OVERVIEW

RONALD J. BACIGAL | MARY KELLY TATE



CRIMINAL LAW AND PROCEDURE



CRIMINAL LAW AND PROCEDURE

AN OVERVIEW, FOURTH EDITION

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TO GRANT, PEYTON, EMMY, AND JAMES

–RONALD BACIGAL

TO MY CHILDREN: JOHN, STEPHEN, AND CLAIRE TATE

–MARY KELLY TATE

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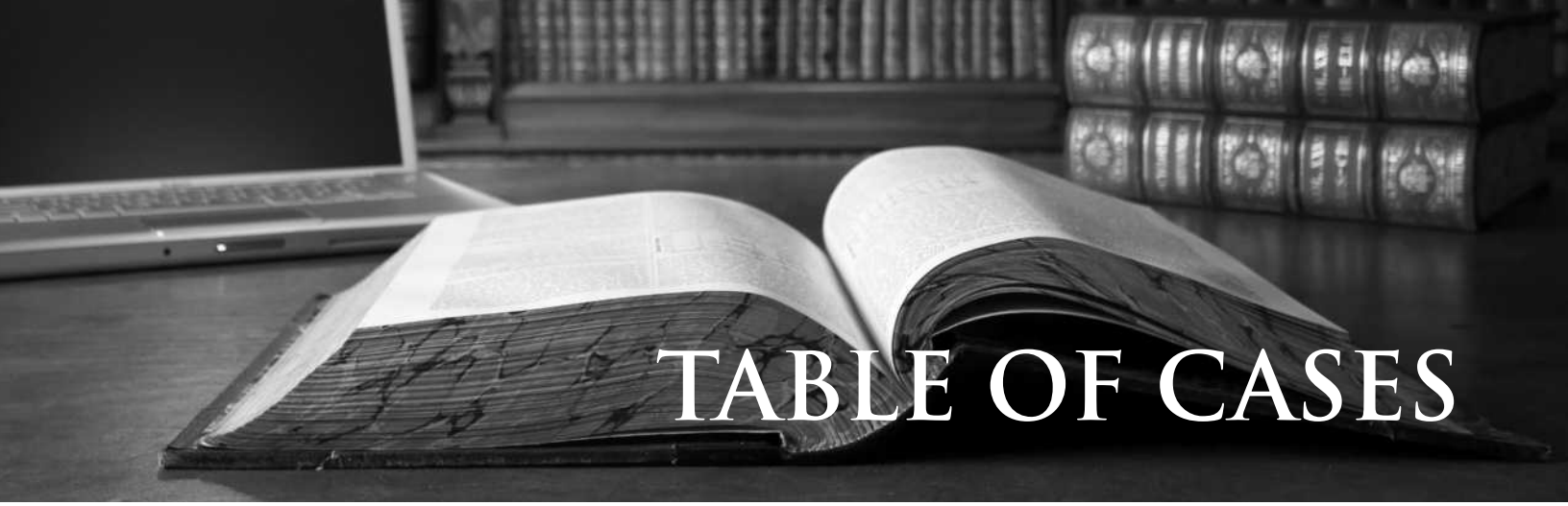

TABLE OF CASES

The principal cases are in bold type. References are to pages. Cases cited in principal cases and within other quoted materials are not included. This index includes the most current citation as of press time. In some more recent cases, citations from the Supreme Court Reporter are not yet available.

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PREFACE

THE GOAL OF THIS BOOK is to provide an introduction to both the practice and the theory of criminal law. Thus, it may be used in a number of diverse educational programs such as undergraduate criminal law classes, associate-degree criminal justice programs, or paralegal courses. Depending on the needs of the students, sections of the book addressing either theory or practice can be emphasized, ignored, or given cursory coverage. For example, in a course emphasizing theoretical aspects of the criminal justice system, the contractual relationship between counsel and client (Chapter 8) can be deleted in favor of focusing on the coverage of the fundamental conflict between individual privacy and the government's use of electronic surveillance (Chapter 11). In contrast, a course stressing the pragmatic aspects of criminal practice might cover the contractual nature of the attorney–client relationship, while omitting coverage of electronic surveillance, which is used in only a small number of actual cases. The first half of the book covers substantive criminal law, while the second half discusses both the constitutional dimensions of criminal procedure and practical aspects of the criminal justice process.

Because this text covers both substantive criminal law and criminal procedure, it is suitable for a single course designed to provide an overview of the entire criminal justice system, or it can be used in separate courses focusing on either substantive or procedural law. If this book is used in separate courses covering substantive and procedural law, the text can be augmented with materials or lecture references to the laws of a specific jurisdiction. Chapters 1 through 7 define criminal responsibility and address the major felonies recognized in most if not all jurisdictions. Although these chapters provide a textual foundation for a course on substantive criminal law, they can be tailored to a particular jurisdiction by supplementing the text with statutory and case law from a specific locality. For example, Chapter 6 acquaints students with the elements of common law burglary, but students preparing for careers as paralegals will need to become familiar with specific forms of statutory burglary in their own states.

In a course limited to the procedural aspects of criminal law, Chapters 8 through 16 contain enough material to support a semester-long course. Because a great deal of criminal procedure is of constitutional dimension, these chapters have universal application. There remains, however, ample opportunity to supplement constitutional procedure with the rules of a particular locality. For example, Chapter 14 notes that each jurisdiction has rules governing the timing and content of motions for pretrial discovery.

Whatever the nature of the course in which this book is used, the text material constitutes a narrative account of the law. Abundant case summaries are interwoven with the text to bring the "real world" into the classroom. The use of these case excerpts can be varied to suit individual tastes. The cases enhance the textual discussion of law, but for the most part, any case may be eliminated without depriving the student of exposure to the relevant law.

NEW TO THE FOURTH EDITION

- New **Learning Objectives** focus readers' attention on key concepts within each chapter and reinforce the most important concepts and law practices to direct students' review and study.
- New **Practice Exercises** and **Discussion Questions** help readers apply concepts in a hands-on environment and encourage critical thinking about key legal issues. Two new **Essay Assignments** in every chapter provide opportunities to frame detailed arguments and demonstrate comprehension.
- New **Sidebar** features add current perspective on key legal concepts by highlighting and clarifying significant chapter topics.
- Fresh emphasis on **Case** excerpts helps readers fully understand legal changes and rulings. The authors have thoroughly updated the text with new excerpts and explanations to ensure students gain a full understanding of criminal law practices today.
- Updated **Exhibits** clarify key points. Recognized for a clear, reader-focused presentation, this edition continues to clarify even the most difficult legal concepts and rulings with useful illustrations, sample forms, and meaningful exhibits.
- Updated **Companion Websites** for instructors and students provide instructional resources and the latest rulings. These companion websites are more helpful than ever with an online instructor's manual, Powerpoint® slides, computerized test bank, study resources and Web links, and more. You'll also find the latest relevant Supreme Court decisions to keep your course as current as possible.

CHAPTER FORMAT

- Chapter outlines open each chapter to focus attention on the main elements students will encounter.
- Learning Objectives identify key concepts for each chapter and reinforce important law practices.
- Key terms are set in boldface type and defined in the margin where they first appear within the chapter.
- Exhibits, such as jury instructions, sample documents, and forms, illustrate how theories discussed in the chapter appear in the "real world."
- Case excerpts help readers apply legal concepts to real-world situations.
- Sidebars highlighting and clarifying significant chapter topics add current perspective on key legal concepts.
- A chapter summary provides a brief review of the main points covered.
- Concept summary charts at the end of many chapters depict and contrast the key points covered.
- Discussion questions and practice exercises are designed to stimulate deliberation and practical application of the chapter material.
- Essay assignments provide opportunities to frame detailed arguments and demonstrate comprehension.
- At the end of each chapter is a list of helpful websites that are germane to chapter materials.

SUPPORT MATERIAL

This book is accompanied by a support package that will assist students in learning and aid instructors in teaching. The following supplements accompany this text:

- An instructor's manual and test bank is available online and includes suggestions on classroom coverage, descriptions of hypothetical situations to stimulate classroom discussion, suggested "answers" or approaches to the discussion questions, and a brief summary of the facts and holding of each case cited within the chapter. A comprehensive test bank provides objective test questions and answers. To access this resource, please visit www.cenagagebrain.com, and search on this book's ISBN (located on the back cover and the copyright page).
- A student companion website contains chapter outlines, Web links, exhibit downloads, and quizzes to help you study. To access this resource, please visit www.cengagebrain.com, and search on this book's ISBN (located on the back cover and the copyright page).

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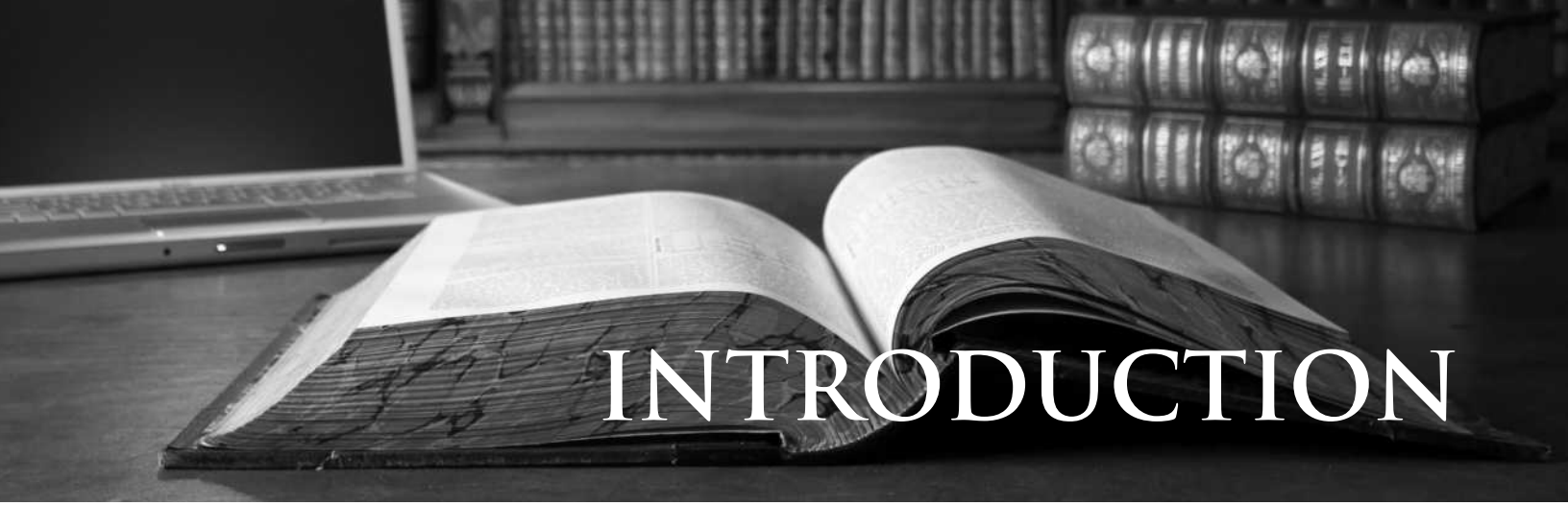

INTRODUCTION

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Coroners
Magistrates
Court Clerks
Probation Officers
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SUMMARY

Criminal law is an intricate and fascinating subject. The American Bar Association maintains that criminal law is the proper concern of all lawyers, and it also is of primary concern to the general public. Any skeptics may view a typical night of television programs and compare the number of "cop" shows with the number of shows that focus on contract law or property law.

People have an understandable curiosity and fascination with a branch of law that deals with thieves, rapists, robbers, and murderers—the seamy side of life. At the other end of the spectrum, however, criminal law, primarily constitutional procedure, addresses our highest aspirations: the right to privacy, liberty, freedom, and the need to limit government power over "we the people." Prosecutors often see themselves as protecting the community from dangerous lawbreakers, while defense counsel frequently characterize themselves as "Liberty's Last Champion," the motto of the National Association of Criminal Defense Lawyers.

These diametrically opposed views of criminal law have produced a criminal justice system that is like no other in the world. The United States leads the Western world in the number of persons incarcerated and condemned to death. At the same time, this country outstrips all nations in the constitutional and procedural protections given to those accused of crime. Similar paradoxes are manifested in the substantive law that defines criminal conduct. For example, the U.S. Supreme Court has elevated freedom of speech to unprecedented heights and guards against legislative attempts to criminalize the exercise of free speech (e.g., burning the American flag). The same court, however, has deferred to state legislatures that promulgate what some perceive to be puritanical laws against private sexual conduct (e.g., premarital or same-gender sex). You may judge for yourself whether these contradictions are part of the strength or weakness of the American criminal justice system.

The first part of this book addresses substantive criminal law, which declares what conduct is criminal. Chapters 1 through 4 discuss general principles of criminality that apply to most if not all crimes. Chapters 5, 6, and 7 address the definition of specific offenses like murder or larceny. The second part of the book (Chapters 8 through 16) addresses the procedures through which the substantive law is enforced. However, considering the complexity of criminal procedure, an overview of the criminal justice process and the steps that carry an individual case from start to finish is a helpful place to start.

OVERVIEW OF A CRIMINAL CASE

The procedural stages in a criminal case are not the same in all states. This overview presents a "typical felony case" in a "typical" jurisdiction.

Prearrest Investigation

When an alleged crime is reported or discovered, the police must investigate to determine whether a crime was committed, and if so, by whom. The principal participants in this "cops and robbers" stage are the police and those whom they suspect of criminal activity. The courts, prosecutors, and defense counsel normally address the investigatory process in retrospect when determining whether the police acted in accordance with constitutional or statutory provisions governing police investigative practices. Chapters 9, 10, and 11 address the most frequently litigated prearrest investigative procedures: temporary detentions, search and seizure, and electronic surveillance.

Arrest

An arrest generally occurs when the police investigation uncovers facts sufficient to constitute probable cause to arrest—in other words, a reasonable belief that the suspect committed a crime. Although a judicial officer, normally a magistrate, may determine the adequacy of the facts constituting probable cause and issue an arrest warrant, most arrests are made by police officers acting without a judicially issued warrant.

An arrest, of course, does not mean the end of police investigation of the crime. Incident to arrest, the police officer usually will search the suspect's person and remove any weapons, contraband, or evidence relating to the crime. Following arrest, police investigation may continue in the form of interrogating the suspect, conducting further searches for additional evidence, or placing the suspect in a lineup or other identification procedure.

Booking Process

In a typical arrest, the arrestee is transported to the police station and subjected to what is known as a booking process. The process, which is primarily clerical, consists of (1) completing the arrest report and preparing the arrestee's permanent police record, (2) fingerprinting and photographing the arrestee, and (3) entering on the police "blotter" the name of the arrestee, the personal effects found in that person's possession, and the date, time, and place of arrest.

First Appearance before a Judicial Officer

A person held in police custody has a right to a judicial hearing on the grounds for detaining the person. If the suspect was arrested without an arrest warrant, a judicial officer (perhaps a lower court judge, often a magistrate) must determine whether the police had probable cause to arrest the accused. If probable cause is lacking, the suspect must be released from custody. If the arrest was lawful, the judicial officer must determine whether to hold the arrestee in pretrial custody or to set bail—in which case the accused will be released pending trial. Bail may consist of posting cash or a secured bond with the court, or the accused may be released into the custody of another or released on "personal recognizance," which is an unsecured promise to appear for trial.

Preliminary Hearing

Many jurisdictions have eliminated the preliminary hearing stage and allow the prosecutor to go forward with the case by filing an "information" stating the charges, or by taking the case directly to a grand jury, which may indict the accused for specific crimes. A preliminary hearing is a judicial proceeding to determine whether there are reasonable grounds to require the accused to stand trial. The prime distinction between a preliminary hearing and a first appearance is that the preliminary hearing is an adversary proceeding in which the accused is allowed to introduce evidence, whereas a first appearance is normally an *ex parte* proceeding in which the judge or magistrate hears only the evidence that constituted probable cause to arrest the accused.

If the preliminary hearing judge determines that reasonable grounds to try the accused have not been shown, the accused must be released from custody. This release, however, is not an acquittal; a grand jury may subsequently indict the accused for the crime and force the accused to stand trial on the indictment.

Grand Jury Indictment/Information

Many jurisdictions require that all felony charges be submitted to a grand jury composed of citizens selected to review the evidence and determine whether the evidence is sufficient to justify a trial on the charge sought by the prosecution. A grand jury has significant power to investigate crime, primarily by subpoenaing witnesses and documentary evidence relevant to the charge. Generally, only the prosecution's evidence is presented to the grand jury; the accused is not heard, nor is defense counsel permitted to be present or offer any evidence.

Some jurisdictions have eliminated grand juries or permit, at least in some cases, prosecutors to bypass existing grand juries and present the charged crimes in the form of an information. An information is a written accusation of a crime, unilaterally prepared by the prosecutor.

Arraignment and Plea

Arraignment consists of bringing the accused before the court, informing that person of the charges, and asking the accused to enter a plea to the charges. In some jurisdictions, arraignment may take place weeks in advance of the actual trial, while other jurisdictions postpone arraignment until the trial is scheduled to begin.

In most jurisdictions, the accused may enter a plea of guilty, not guilty, or *nolo contendere*. A plea of nolo contendere has the same effect as a plea of guilty, except that the admission of guilt cannot be used as evidence in any other action. For example, former Vice President Spiro Agnew pled nolo contendere to bribery charges, but the plea was not admissible in subsequent civil litigation concerning whether taxes were due on the unreported bribes.

In the majority of cases, the defendant's guilt and the applicable range of sentences are determined by a plea agreement struck between the prosecutor and defense counsel. In most plea agreements, the defendant agrees to plead guilty to a charge in exchange for the prosecutor's promise to drop other charges or to recommend a reduced sentence.

Pretrial Motions

Pretrial motions are requests that the trial court take some action, such as dismissing a defective indictment, ruling on the admissibility of illegally obtained evidence, or ordering the parties to disclose certain information. In essence, these matters can or must be disposed of prior to the trial on the merits of the case. All jurisdictions have rules governing the time period within which pretrial motions must be filed with the trial court.

Trial

The American criminal justice system is an adversarial process that assigns each participant in the trial a defined role. The judge is not an advocate for either side, but is concerned with enforcing procedural rules. The prosecutor's primary task is to marshal the evidence against the defendant. The defendant has no obligation to present any evidence or play any part in the trial, because a defendant may rely on the presumption of innocence and remain passive during the trial. The defense attorney is an advocate for the accused, with the primary responsibility of winning the case without violating the law. The jury (or the judge alone in a bench trial) hears the evidence from both sides and must decide whether the defendant committed the charged offense.

Sentencing

Some states permit the jury to set the punishment, but most jurisdictions entrust sentencing to the trial judge. By statute, certain convictions require a mandatory sentence, in which case the judge has no discretion. In most cases, the judge exercises some discretion and may impose any sentence within statutory limitations, or the judge may determine the appropriate sentence according to sentencing guidelines enacted by the legislature. As part of the sentencing determination, the judge also may be empowered to suspend a portion of the sentence and place the defendant on probation. Parole and time off for "good behavior" are awarded by correctional authorities and are not part of the initial sentencing process.

Appeal and Habeas Corpus

A convicted defendant may appeal a conviction to an appellate court, which will review the trial proceedings and either reverse or affirm the trial court decision. If the conviction is "reversed and remanded," then the defendant's conviction is set aside, although the defendant may be required to stand trial again. A second trial may be precluded, however, if the appellate court reverses the conviction because of insufficient evidence to justify the conviction.

The excerpts of cases in this book are the written opinions of appellate courts, announcing and often explaining their decisions. Most opinions are signed by one judge; and, when

joined by a majority of the judges, this opinion constitutes the judgment of the court. Judges who agree with the decision but wish to address other considerations may write separate concurring opinions. Judges who disagree with the court's decision may write dissenting opinions.

If the attempt to obtain a reversal of the conviction on appeal fails, the defendant may file a collateral attack on the conviction, the most common form of collateral attack being a habeas corpus petition. A habeas corpus petition is a collateral attack because it is not a continuation of the criminal process, but a civil suit brought to challenge the legality of the restraint under which a person is held. (*Habeas corpus* is a Latin term meaning "you have the body.") Because the action is a civil suit, the petitioner (the confined person) has the burden to prove that the confinement is illegal.

CRIMINAL JUSTICE PROFESSIONALS

Like any organization, the operation of our criminal justice system is dependent on the people who administer the system. Because of the popularity of movies and television shows about criminal justice, most people are familiar with the roles played by police officers, prosecutors, defense attorneys, and judges. Less publicized, but no less important, is the vital role played by coroners, magistrates, court clerks, probation officers, and paralegals.

Law Enforcement Agencies

Law enforcement agencies are charged with enforcing criminal laws that range from traffic offenses to serious felonies. At the national level, the Federal Bureau of Investigation (FBI) is the largest agency empowered to deal with violations of federal criminal laws. In addition to the FBI, other federal agencies investigate specific types of violations of federal law: for example, the Drug Enforcement Administration; the Bureau of Alcohol, Tobacco, and Firearms; the Customs Service; the Secret Service; and the Immigration and Naturalization Service.

At the state level, the state police are charged with prevention and investigation of all crimes covered by state law. At the local level, police departments or sheriff's offices exercise broad powers as the chief law enforcement officers of their communities. Their responsibilities include enforcing state law as well as local ordinances.

Prosecutorial Agencies

Prosecutorial agencies review the information gathered by law enforcement agencies and decide whether to proceed with formal charges. At the national level, the U.S. Department of Justice and U.S. Attorney's offices, distributed geographically throughout the country, initiate a prosecution for a federal offense. At the state level, the state attorney general's office may initiate certain prosecutions, but such offices normally limit their function to handling appeals of convictions. Most state prosecutions are initiated by district attorneys geographically distributed throughout the state.

Defense Bar

Criminal defendants may hire attorneys to represent them in all criminal prosecutions, no matter how minor the offense. Indigents, who cannot afford to hire counsel, may have defense counsel appointed at public expense whenever the indigent faces possible imprisonment. Many states have established a public defender's office to represent indigents. As a supplement to, or in place of, a public defender's office, many states utilize a court-appointed list of attorneys who have volunteered or been recruited to represent indigents.

Courts

In the federal system, the principal trial court is the U.S. District Court, which presides over the prosecution of serious federal crimes. Trials of federal misdemeanors are often handled by federal magistrates, who are appointed by federal district judges. The U.S. Circuit Courts of Appeal hear appeals from convictions in the District Court. Thirteen judicial circuits cover the United States and its possessions. The U.S. Supreme Court reviews the decisions of the lower federal courts and many decisions of the state courts.

The structure of state court systems varies considerably, but every state has one or more levels of trial courts and at least one appellate court. A common arrangement of a state court system includes a lower court—often called police court, magistrate court, or a court not of record—which tries minor or petty offenses; a higher trial court, often called a court of record, which tries more serious offenses; and an appellate court, which reviews the decisions of the lower courts.

Coroners

A coroner's inquest is peculiar to homicide cases, and its function is to determine the cause of death. Although this determination is merely advisory and can be either accepted or ignored by the prosecutor, the inquest may uncover evidence useful to both the prosecution and the defense. Many jurisdictions have replaced the coroner system (which sometimes required a finding by the coroner's jury made up of six laypersons) with a medical examiner system staffed by forensic pathologists.

Magistrates

In some jurisdictions, magistrates are judges who preside over lower courts (often called magistrate or police court) in which traffic violations and minor misdemeanors are tried. In other jurisdictions, magistrates have no trial jurisdiction. As their primary function, they determine whether there is probable cause to issue search or arrest warrants. They also determine the conditions of any pretrial release of an arrested suspect.

Court Clerks

Court clerks, who may be elected or appointed in a given jurisdiction, handle the vast amount of paperwork involved in bringing a case to trial. For example, the clerk's office may be responsible for issuing subpoenas for witnesses or documents; filing the formal charge upon which the accused will stand trial; summoning the jurors and administering requests to be excused from jury duty; scheduling the court's docket and use of multiple courtrooms; and receiving pretrial motions requesting the court to take some form of action.

Probation Officers

Convicted defendants are sometimes granted a suspended sentence and may avoid incarceration as long as they demonstrate good behavior and comply with the terms of the court's granting of probation. Probation officers supervise the conduct of the individual on probation by monitoring whether the individual is gainfully employed, has made restitution to any victim of the crime, and is avoiding further breaches of the law. Prior to conviction, probation officers may be ordered to investigate the background of the defendant and prepare a presentence report recommending an appropriate sentence.

Paralegals

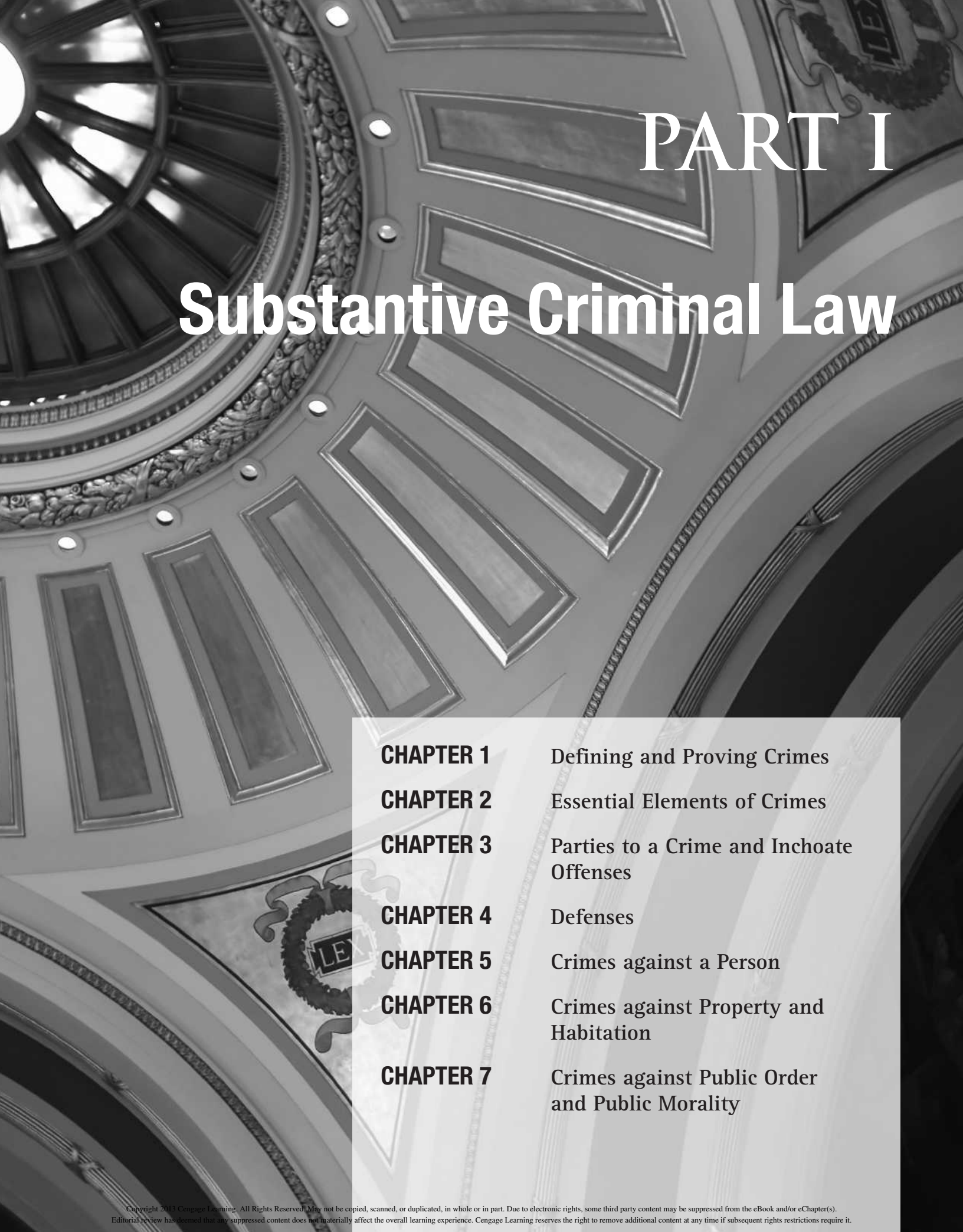
Like court clerks, paralegals may be responsible for organizing the vast amount of paperwork often generated by a criminal case: for example, obtaining and filing police reports, coroner's finding, transcripts of a preliminary hearing, grand jury indictments, and requests for and responses to pretrial discovery motions. What may be unique to criminal justice paralegals is their involvement in the factual investigation and legal research surrounding the case.

As part of their tasks related to *factual* investigation, paralegals may be asked to interview victims, witnesses, and police officers; draft preliminary charges when assisting a prosecutor; draft motions to dismiss the complaint when assisting defense counsel; draft subpoenas and locate witnesses; and prepare trial notebooks that organize the presentation of evidence, particularly any documents or exhibits to be used at trial.

Criminal justice paralegals are also responsible for many *legal* tasks requiring them to research the substantive law governing the charged offense, draft pretrial motions or responses to such motions, draft legal memoranda and briefs on contested points of law, prepare presentence reports or responses to such reports, and draft post-trial motions.

SUMMARY

Although the specific tasks of criminal justice professionals vary, a fundamental knowledge of the substantive criminal law and the essence of criminal procedure is crucial to the performance of a criminal justice professional. In simplified form, the foundation for this specialized knowledge of the criminal justice system is the subject matter of this book.



PART I

Substantive Criminal Law

CHAPTER 1

DEFINING AND PROVING CRIMES

LEARNING OBJECTIVES

Once you have finished this chapter, you should be able to:

- Explain the differences between criminal law and civil law.
- Outline some of society's goals in administering certain types of punishments for crimes.
- Identify the ways crimes are defined by the government.
- Discuss common law and its continuing impact on the American legal system.
- Identify the prosecution's burden of proof.
- Discuss the role of a judge in a jury trial.

CHAPTER OUTLINE

THE PURPOSES OF CRIMINAL LAW

In the broadest sense, both civil and criminal law are attempts to create and maintain "the good society." The law of torts, the law of contracts, and every other branch of civil law prohibit or require specific conduct within the social community. For example, tort law demands that citizens behave reasonably to avoid injuring others. Contract law commands citizens to honor the commitments that they pledged in contracts. Failure to live up to these requirements subjects the citizen to suit in civil courts and to the imposition of civil sanctions—most commonly, paying monetary damages to an injured party. Thus, civil law governs the issues that arise between individual parties over private rights. In a typical civil case, the injured party brings suit for damage to their personal rights, person, or property. The injured party (the plaintiff) seeks some sort of compensation (usually monetary) for the injury to that party's person or property.

Just as civil law does, criminal law also prohibits or requires specified conduct. Some of the commands of the criminal law are expressed as affirmative requirements to "file your income tax return," or "take care of your children." However, most criminal law commands are prohibitions of conduct—"Do not murder, rape, or rob." Criminal law thus encompasses principles of right and wrong as well as the principle that wrong will result in penalty. The government brings a criminal case for violation or injury to public rights. An individual who violates criminal laws has damaged the rights of the public as a whole, regardless of the status of any individual victim.

Of course, individual victims may pursue civil suits because a single act may give rise to both criminal and civil cases. The most famous example is the litigation surrounding O. J. Simpson. In criminal proceedings, Simpson was initially tried and acquitted of two charges of murder. The families of the victims then brought and prevailed in a civil suit against Simpson for wrongful death. (The constitutional prohibition against double jeopardy precludes multiple criminal prosecutions for the same offense, but has no application to civil suits.) To learn more about the differences between O. J. Simpson's criminal trial and his civil trial, visit http://articles.cnn.com/1996-09-16/us/9609_16_simpson.case_1_murder-trial-sharon-rufo-ronald-goldman?_s=PM:US.

The most fundamental difference between the two branches of law is that civil law normally focuses on compelling a person to compensate an individual victim for any harm suffered, whereas criminal law uses punishment as a means of controlling the behavior of citizens. Conviction of a crime carries a penalty of imprisonment or a fine paid to the government rather than to a particular victim.

Theories of Punishment

The forms of punishment utilized by the criminal justice system are designed to control behavior in a variety of ways:

1. *Incapacitation/Restraint*. Executing a criminal is the most extreme form of rendering a person incapable of committing future crimes. Criminals restrained in prison cannot cause further harm to the general public during the length of their sentence.
2. *Specific deterrence*. By punishing the criminal for the crime, society demonstrates its ability and willingness to protect itself against those who commit crimes. The theory is that, after being exposed to society's power to punish, the criminal will be taught a lesson and will refrain from any future misconduct.
3. *General deterrence*. When the general public observes criminals being punished for their crimes, the public is deterred from criminal conduct for fear of similar punishment. The effectiveness of this rationale depends on the degree of punishment and the degree of certainty that criminals will be caught, convicted, and punished.

4. *Rehabilitation.* Society may seek to prevent a criminal from committing other crimes by forcing that person to undergo training, psychological counseling, or some form of moral or social education as to the need for law-abiding patterns of behavior. If successful, rehabilitation will allow the individual to reenter society as a productive human being.
5. *Retribution.* Punishment may express the moral condemnation of the community and is a lawful means of avenging a wrong. In upholding the constitutionality of the death penalty, the U.S. Supreme Court noted: "capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate wrongs."[1] Public retribution also lessens the desire for private retribution by the victim or others who might seek personal revenge for the criminal's wrongdoing. For example, if society punishes the killer, the victim's friends and family have less need to avenge the death.

To some extent, all penal systems rely on a mixture of incapacitation, deterrence, rehabilitation, and retribution.

SIDEBAR

Retribution: The Supreme Court recently affirmed that retribution is a "legitimate reason to punish," so long as the sentence imposed is directly related to the culpability of the individual offender being sentenced. *Graham v. Florida*, 130 S.Ct. 2011, 2028 (2010).

THE SOURCES OF CRIMINAL LAW

In the United States, criminal offenses are defined by common law, statute, or administrative regulation. Except for the crime of treason, constitutions generally do not delineate crimes, but constitutions impose limitations on the government's power to define criminal conduct. Globally, criminal justice systems vary widely. To quickly access some of these differences, view the U.S. Department of Justice's World Factbook of Criminal Justice Systems at http://bjs.ojp.usdoj.gov/content/pub/html/wfcj.cfm.

Common Law

common law

judge-made law defining crimes and establishing the rules of criminal responsibility according to custom and tradition.

A great deal of our modern-day criminal law has its roots in English common law. English criminal law in the 17th and 18th centuries was grounded in **common law** because the definition of crimes and the rules of criminal responsibility were largely promulgated and shaped by judges based on custom and tradition. (When a legislative body enacts penal statutes, judges may be restricted to interpreting statutory law and thus have less freedom to apply custom and tradition.) Far from being a matter of common sense or universal knowledge, however, the common law was an elaborate set of rules generally understood only by the legal profession. This special understanding of the common law helped establish the power and influence the legal profession has enjoyed in the Anglo-American tradition. William Penn, the founder of what later became the Commonwealth of Pennsylvania, demonstrated this point by persistently challenging a disconcerted court recorder's understanding of common law.

TRIAL OF WILLIAM PENN

6 How.St.Trials 951 (1670), *available at* www.constitution.org/trials/penn/penn-mead.htm.

Penn: *I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.*

Rec: *Upon the common law.*

Penn: *Where is that common law?*

Rec: *You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common law, to answer your curiosity.*

Penn: *This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.*

continued…

Rec: *The question is, whether you are Guilty of this Indictment?*

Penn: *The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.*

Rec: *You are an impertinent fellow, will you teach the court what the law is? It is* Lex non scripts*, that which many have studied 30 or 40 years to know, and would you have me tell you in a moment?*

Penn: *Certainly, if the common law be so hard to understand it is far from being common.*

(Visit www.ushistory.org/penn/bio.htm for a short history of William Penn and his role in helping to shape the values underpinning the U.S. Constitution.)

The common law was, and remains (when in effect), a dynamic and fluid attempt to adapt the law to changing social conditions. Common law develops according to principles of **precedent** and ***stare decisis***. When a court renders a decision, that decision becomes binding on all future cases before the same court and all inferior courts. Thus, when a new case raises an identical issue decided in a prior case, the court must decide the issue the same way—*stare decisis*—meaning "to stand by precedents and follow settled points."

American criminal law in the 20th century was largely governed by penal statutes (enacted by Congress or state legislatures) that served to supplement or replace the common law. When the legislature, rather than the judiciary, formulates rules of criminal responsibility, a controversy may arise as to whether the judiciary retains authority to enforce, create, or reshape common law offenses. In many ways, this controversy is one facet of the debate between **judicial activism**, employed by judges who interpret law as a means to achieve social goals, and judges who practice **judicial restraint** by viewing judicial power as strictly limited by the separation of powers doctrine. The clash between judicial activism and judicial restraint lies at the heart of *Shaw v. Director of Public Prosecutions*.

precedent

prior decisions must be followed in deciding subsequent cases raising the same legal issue.

stare decisis

courts should follow established precedents and not disturb settled principles.

judicial activism

interpretation of the law by judges to achieve broad social goals.

judicial restraint

practiced by judges who view judicial power as strictly limited by the separation of powers doctrine and by earlier case decisions.

SHAW v. DIRECTOR OF PUBLIC PROSECUTIONS

House of Lords (1961) (Visit www.parliament.uk/lords/ for more information about the House of Lords, and the upper chamber of the United Kingdom's Parliament.)
2 W.L.R. 897, 2 All E.R. 446

The defendant, Frederick C. Shaw, published "The Ladies Directory," a booklet of some 28 pages, most of which were taken up with the names and addresses of women who were prostitutes, together with a number of photographs of nude female figures; and the matter published left no doubt that the advertisers could be got in touch with at the telephone numbers given and were offering their services for sexual intercourse and, in some cases, for the practice of sexual perversions. Shaw was convicted of "conspiracy to corrupt public morals" and appealed to the House of Lords. (Shaw was not charged with conspiracy to commit prostitution, because prostitution was not a crime in England.)

VISCOUNT SIMMONDS

My Lords . . . I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offense of a public nature. In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. That is the broad head (call it public policy if you wish) within which the present indictment falls.

In the past, when Lord Mansfield declared that the Court of King's Bench was the *custos morum* [the guardian of morals] of the people and had the superintendency of offenses *conta bonos mores* [contrary to good morals], he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offenses which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain

continued…

since no one can foresee every way in which the wickedness of man may disrupt the order of society. I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them.

LORD REED

In my opinion there is no such general offense known to the law as conspiracy to corrupt public morals. To superintend the wickedness of man would leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanor. However beneficial that might have been in days when Parliament met seldom, or at least only at long intervals it surely is now the province of the legislature and not the judiciary to create new criminal offenses.

Finally I must advert to the consequences of holding that this very general offense exists. It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what conduct is not criminal, particularly when heavy penalties are involved.

In the United States, the issue in *Shaw* would not be presented in such dramatic fashion. Even the most "activist" U.S. judge would be reluctant to claim power to act as enforcer of good public morals. However, constitutional litigation often raises questions of the relationship between the judicial function and public morals, particularly when expressed by a democratically elected legislature. These issues, often called "social" issues, are perennial controversies in modern American politics. They are especially important in presidential elections because presidential power extends to the appointment of federal judges who enjoy lifetime appointment and are often asked to decide divisive issues. For example, may a state legislature prohibit "immoral" sex between adult members of the same gender? The U.S. Supreme Court said yes in *Bowers v. Hardwick*,[2] then reversed itself in *Lawrence v. Texas* (see Chapter 7).

Model Penal Code

Within the United States, the application of common law varies by jurisdiction. The courts of a particular jurisdiction may or may not be free to apply the common law depending on whether the particular jurisdiction has abolished common law crimes or retained the portions of common law unaltered by statute. Even in jurisdictions where the common law has been abolished, the court may sometimes consult the common law for whatever persuasive effect it has in analyzing statutory language, or in defining terms used in the statute. A court may also look to the Model Penal Code as a nonbinding guide to interpreting criminal law. As a practical matter, judges are often faced with difficult challenges in deciding how to interpret the law, be it the common law, statute, or the Constitution.

Model Penal Code

a suggested guide for enactment and interpretation of criminal law; the Code is not law unless adopted and enacted by a legislature.

The **Model Penal Code** is a suggested model to guide enactment and interpretation of criminal law. The Code was promulgated by the American Law Institute, an association of lawyers, judges, and legal scholars. The Code is not law unless adopted and enacted by a legislature. Nonetheless, courts frequently cite the Model Penal Code as a rational as well as a helpful guide to understanding criminal law. Reference will be made throughout this book to both common law and Model Penal Code approaches to criminal law. Selected excerpts from the Model Penal Code are included in Appendix B of this text.

Statutory Law

The common law evolved through judicial decisions that sometimes identified obscure general principles subject to elaborate exceptions or technical qualifications. For example, common law arson covered the burning of a home, but not the use of explosives to destroy a home, unless some portion of the structure remained standing and caught fire after the explosion. These seemingly arbitrary interpretations can sometimes be explained by a common law judge's desire to avoid imposing the death penalty on the defendant.

(Historically, all but the most minor crimes mandated capital punishment.) The logic behind other common law doctrines, if such logic ever existed, has been lost to antiquity. Finally, in some cases it may be that Charles Dickens's caustic comment is true: "If the law say that; the law be an ass."

When legislatures take over the primary task of defining crimes by enacting criminal codes, they often attempt to state the law in a more straightforward fashion. But despite the legislatures' best efforts, some ambiguity will always be present in criminal codes. At other times, a statute may be kept deliberately vague as part of a compromise to ensure its passage. In either case, the common law may assist a court in interpreting criminal law statutes. The common law, however, must yield to the clear language of the statute and to the **legislative intent** underlying the statute. The legislature's primacy here is due to its democratic role as the branch assigned law-making powers. (The intent of particular legislators is often expressed during debate over passage of a proposed statute.) Courts also may be called on to resolve a conflict between the words actually used in a statute, and what the legislature intended the words to mean. The conflict between legislative intent and the plain meaning of a statute divided the U.S. Supreme Court in *Caminetti v. United States*.

legislative intent

the purpose for which the legislators enacted a particular statute.

CAMINETTI v. UNITED STATES

Supreme Court of the United States, 1917
242 U.S. 470, 37 S.Ct. 192

(The case consolidated three convictions for violation of the White Slave Traffic Act—transporting women in interstate commerce for purposes of debauchery and for an immoral purpose. Each of the three defendants had transported a woman across state lines for the purpose of having the woman serve as his mistress and concubine.)

JUSTICE DAY DELIVERED THE OPINION OF THE COURT:

It is contended that the act of Congress is intended to reach only "commercialized vice," or the traffic in women for gain, and that the conduct for which the several petitioners were indicted and convicted, however, reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the case, the acts charged and proved, upon which conviction was had, do not come within the statute.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Although the legislative history surrounding the White Slave Traffic Act indicates that Congress was primarily concerned with "commerce" and "pecuniary gain" arising from White Slavery, when the language of the statute itself is plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. [Convictions upheld.]

JUSTICE MCKENNA, DISSENTING:

The drafter of the White Slavery Act stated to Congress that: "The legislation is not needed or intended as an aid to the states in the exercise of the police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution."

In other words, it is vice as a business at which the law is directed, using interstate commerce as a facility to procure or distribute its victims. This being the purpose, the words of the statute should be construed to execute it, and they may be so construed even if their literal meaning be otherwise. The judicial function should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute's graphic phrase "white slave traffic." And it was such immorality that was in the legislative mind, and not the other.

As recent Supreme Court nominees have learned, judicial interpretation of law fuels the political debate regarding judicial restraint and judicial activism. On a more practical level, interpretation of statutes is what allows judges, lawyers, and paralegals to ply their trade. An old adage advises lawyers, "If the law is against you, argue the facts. If the facts are against you, argue the law." This type of advice may apply when choosing whether to argue in favor of legislative intent or in favor of giving a statute its literal meaning. Any judge, lawyer, or paralegal must be prepared to research and analyze alternative ways of reading criminal statutes.

vagueness doctrine

holds any statute unconstitutional when citizens "must necessarily guess at its meaning and differ as to its application."

Although there is almost always some ambiguity in statutes, too much uncertainty can render the statute unconstitutionally vague—subject to the **vagueness doctrine**—when "men of common intelligence must necessarily guess at its meaning and differ as to its application."[3] Statutes punishing vagrants or "street people" are prime examples of impermissibly vague legislation because such statutes often loosely define vagrants as rogues and vagabond, or dissolute persons, common drunkards, and persons wandering or strolling around from place to place without any lawful purpose. Such overly nebulous vagrancy statutes invite police and prosecutors to harass or punish persons whose lifestyles are offensive to them. Far-reaching, unchecked discretion of the sort risked by vague criminal statutes offends basic notions of what it means to move and live freely in an open society. The *Morales* case demonstrates that the vagueness doctrine places restrictions upon even understandable attempts to "preserve the city's streets and other public places so that the public may use such places without fear."

SIDEBAR

Vagueness Doctrine: In recent years, the vagueness doctrine has been frequently litigated in the Supreme Court in the context of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which imposes higher prison sentences for persons convicted of firearm crimes after three or more previous convictions for a "violent felony" or serious drug offense. The Supreme Court decided four cases between 2007 and 2012 challenging the ACCA as void for vagueness because of the difficulty in distinguishing "violent felonies" from other crimes. See *Sykes v. United States*, 131 S.Ct. 2267 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007). In each of these cases, the Court upheld the constitutionality of the ACCA, but not without controversy. See *Sykes*, 131 S.Ct. at 2284 (Scalia, J. dissenting).

CITY OF CHICAGO v. MORALES

527 U.S. 41, 119 S.Ct. 1849 (1999)

JUSTICE STEVENS announced the judgment of the court:

In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place. The council found that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area" and that "aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear." The ordinance creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than 6 months, and a requirement to perform up to 120 hours of community service.

Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang member." Second, the

continued...

persons must be "loitering," which the ordinance defines as "remaining in any one place with no apparent purpose." Third, the officer must then order "all" of the persons to disperse and remove themselves "from the area." Fourth, the person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance.

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. The term "loiter" may have a common and accepted meaning, but the definition of that term in this ordinance—"to remain in any one place with no apparent purpose"—does not. It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not. The broad sweep of the ordinance also violates the requirement that a legislature establish minimal guidelines to govern law enforcement. There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she "shall"—order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." As we discussed in the context of fair notice, the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose."

As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to determine what activities constitute loitering." The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene. It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

In our judgment, the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. We are mindful that the preservation of liberty depends in part on the maintenance of social order. However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

Accordingly, we conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague.

Administrative Regulations

The vagueness doctrine applies to both statutes and administrative regulations because the U.S. Supreme Court has recognized that administrative agencies may define criminal violations in promulgated regulations if the legislature provides sufficiently detailed standards to guide the drafting of regulations.

Although most crimes are defined in statutes or court decisions, administrative regulations also may identify certain conduct as criminal in nature. For example, the Internal Revenue Service (IRS) and the Environmental Protection Agency (EPA) promulgate regulations that

SIDEBAR

Vagueness Doctrine and Administrative Regulations: In 2012, the Supreme Court found the Federal Communication Commission's (FCC) application of its indecency regulations unconstitutionally vague in *FCC v. Fox TV Stations, Inc.*, 132 S.Ct. 2307 (2012). Under the indecency regulations, the FCC may impose civil fines, revoke broadcasting licenses, and deny renewal applications for violations of federal obscenity laws. Federal district courts may also impose fines and/or imprisonment for up to two years for violations. The case arose from the FCC's civil enforcement of the indecency regulations in response to Fox's broadcast of several expletives during the 2002 and 2003 Billboard Music Awards and ABC's seven-second broadcast of a nude, adult female buttocks during an episode of "NYPD Blue." At the time of the broadcasts, the FCC did not consider the incidents a violation of indecency regulations. In 2004, however, the FCC issued an order indicating fleeting expletives would constitute an actionable statutory violation and concluded Fox and ABC violated the standard. The Court held the FCC failed to give the broadcasters notice that fleeting expletives and momentary nudity could be actionably indecent prior to the broadcasts. Therefore, the FCC's standards were void for vagueness. Though the case invalidated the civil application of the indecency regulations, the vagueness doctrine applies similarly to criminal regulations.

supplement the more general laws enacted by Congress. In such situations, the courts must determine whether the regulating agency has acted within its delegated authority, or whether the agency has usurped the legislative power to make laws.

UNITED STATES v. MITCHELL

United States Court of Appeals, Fourth Circuit,
1994 39 F.3d 465 (4th Cir. 1994)

OPINION OF THE COURT

Mitchell was employed by the Fish and Wildlife Service of the United States Department of the Interior (FWS). Outside his employment at the FWS, Mitchell booked big-game hunting trips to Asia and promoted sport-hunting programs of exotic wild animals.

An acquaintance of Mitchell, Don Cox, traveled to the Punjab province of Pakistan where he illegally hunted and killed two Punjab urials and a Chinkara gazelle. Because he could not obtain permits from Pakistani wildlife authorities to export the hides and horns, Cox arranged to have Mitchell smuggle them out of Pakistan and into the United States.

On September 25, 1987, Mitchell arrived with the contraband at Dulles International Airport. He completed a United States Customs Service Declaration Form, but did not complete a FWS Declaration for Importation or Exportation of Fish or Wildlife Form. And, Mitchell failed to disclose that he was importing untanned animal hides into the United States.

Mitchell was convicted of violating 18 U.S.C. § 545 by importing merchandise "contrary to law" in that he failed to: (1) declare the items as required by the Customs regulation; (2) file a form required by the FWS regulation; and (3) comply with the Agriculture regulation.

[Mitchell contended that the "contrary to law" provision of § 545 does not embrace administrative regulations.]

In determining the scope of the "contrary to law" provision of § 545, we first examine the language of the statute. Because the word "law" within the meaning of § 545 is not defined, we must give the word its ordinary meaning. "Law" is commonly defined to include administrative regulations.

For regulations to have the force and effect of law they must first be "substantive" or "legislative-type" rules, as opposed to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." An inherent characteristic of a "substantive rule" is that it is "one affecting individual rights and obligations." Second, the regulation must have been promulgated pursuant to a congressional grant of quasi-legislative authority. Third, the regulation must have been promulgated in conformity with congressionally imposed procedural requirements such as the notice and comment provision of the Administrative Procedure Act.

Because the regulations Mitchell was charged with violating affect individual rights and obligations, were authorized and contemplated by appropriate grants of quasi-legislative authority, and were promulgated in conformity with applicable procedural requirements, we conclude that those regulations have the force and effect

continued…

of law and therefore are encompassed by the "contrary to law" provision of § 545.

DISSENTING OPINION

Where, as here, a defendant does something unpleasant, and does it in an underhanded way, the inclination is to uphold his conviction. However, I do not believe that is the proper and acceptable course when the statute under which he was convicted does not reach him. Accordingly, I respectfully dissent, even though applying the law correctly would lead to a nonserendipitous result.

It is not irrational to require Congress, if it means something, to say it. The language of the statute under which defendant Richard M. Mitchell was convicted, 18 U.S.C. § 545, prohibits importation into the United States in a manner "contrary to law." The question here is whether law means only statutory law or whether it also extends to Customs Service, Fish and Wildlife Service, and Department of Agriculture regulations. Unlike the majority, I conclude that it is grievously ambiguous whether failure to comply with a regulation is included within the statutory phrase "contrary to law," and that the ambiguity should therefore be applied in favor of the defendant.

Constitutional Limitations

The vagueness doctrine does not challenge the legislature's power to define crimes; it requires only that a penal statute be drafted with precision. Certain provisions of the U.S. Constitution, however, limit the legislative power to create crimes. For example, Article 1, Section 9, of the Constitution prohibits bills of attainder and *ex post facto* laws. **Bills of attainder** bypass the courts and convict an individual by legislative pronouncement. ***Ex post facto laws*** retroactively make innocent conduct illegal. They also may increase the punishment for a criminal act or decrease the standard of proof required for a conviction.

Bills of attainder

legislative acts convicting an individual of a crime.

***ex post facto* laws**

laws that retroactively make innocent conduct illegal; increase the punishment for a criminal act; or decrease the standard of proof required for a conviction.

Unlike the explicit prohibition of bills of attainder and *ex post facto* laws, most constitutional provisions guarantee procedural fairness to criminal defendants. For example, the right to counsel, the right to a public trial, and the right to an impartial jury are included within the U.S. Constitution's Bill of Rights. A few constitutional mandates within the Bill of Rights, however, go beyond procedural considerations by limiting the government's power to prohibit and punish certain conduct. For example:

> The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." Thus a statute criminalizing the burning of the American flag violates the First Amendment right to freedom of speech.[4]
>
> The Fourth Amendment right of privacy limits the government's power to regulate certain aspects of our private lives. Thus the legislature may not make it a crime for married couples to possess birth control devices.[5] As another example, the legislature may not punish people for possessing pornography in the privacy of their own homes.[6]
>
> The Eighth Amendment prohibition of "cruel and unusual punishment" limits legislative authority to make some conduct criminal. As *Robinson v. California* noted, even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

ROBINSON v. CALIFORNIA

Supreme Court of the United States, 1962
370 U.S. 660, 82 S.Ct. 1417

JUSTICE STEWART delivered the opinion of the court:

A California statute makes it a criminal offense for a person to "be addicted to the use of narcotics." This appeal draws into question the constitutionality of that provision of the state law.

The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs. The right to exercise this power is so manifest in

continued...