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## OVERVIEW OF CRIMINAL PROCEDURE



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In a typical year, there are more than 60 million contacts between police and the public. This includes more than 20 million traffic stops, 3 million street encounters, and millions of other investigations, arrests, and situations where police are acting in a public welfare role. About half of all contacts are initiated by the public. Police officers use nonlethal force about 1 million times,<sup>1</sup> lethal force over 1,000 times, and arrest 10 million to 14 million people per year.<sup>2</sup> About 100 officers are intentionally or accidentally killed and over 50,000 are assaulted during these encounters.<sup>3</sup> These activities result in over 17 million criminal cases in state courts and over 60,000 criminal cases in federal courts.<sup>4</sup>

All of these events, from pulling over a speeding motorist to a murder trial, are governed by the rules of criminal procedure. Many of these rules balance the interests of the people in personal security against their individual liberties. In this way, the law of criminal procedure reflects the most important political and social values of the American people.

Therefore, the law of criminal procedure is important to you as a resident of the Nation, as a person who may encounter the police, as a possible future police officer, other criminal justice professional, if you become an attorney, and, of course, as a student. Unfortunately, much of the law that appears in social media, news sources, film, and cable and streaming television is sensationalized and wrong.

By the time you complete this book, you will know how to analyze criminal procedure problems and you will be a more critical consumer of criminal justice news. Your learning begins with a more

detailed explanation of what criminal procedure is, and what it isn't. In subsequent chapters, you will study the most significant criminal procedure rights, including freedom from unreasonable searches and seizures, freedom from self-incrimination, due process, trial rights, and the substantive rights, such as free speech, religion, and to bear arms, that limit the authority of government to criminalize conduct and expression.

## INTRODUCTION TO CRIMINAL PROCEDURE

### LEARNING OBJECTIVE

Define criminal procedure, distinguishing it from criminal and civil law.

One approach to learning a new subject is to begin by outlining it, to give it structure. This is true of law. There is an organization of legal subjects that is commonly used by lawyers, courts, legislators, and professors. That organization divides law into different branches, or fields.

Starting way out, at the 100,000 foot view, there are two large groupings of law—**civil law**, or **private law**, and **public law**. Civil law is concerned with private rights and disputes between private parties. Injuries caused by negligence or intentional conduct, such as a car accident and striking a political opponent, and contract violations, such as when a company fails to supply promised computer chips to a computer manufacturer, are examples of civil wrongs.

As the name suggests, public law involves the government, or the people collectively. There are several areas of public law. Administrative law, the law that defines the powers and processes of government agencies; tax law; **constitutional law**; criminal law; and criminal procedure are areas of public law. While closely related, criminal law and criminal procedure are distinctly different subjects.

**Criminal law**, as a branch of law and as an academic field of study, defines the precise conduct that society prohibits and punishes, the punishment for violations, and the defenses that an accused may raise to avoid, or lessen, criminal liability. The following are examples of criminal law questions:

- What must a prosecutor prove to convict a defendant of cyberstalking?
- What is the difference between murder in the first degree and murder in the second degree?
- Is it self-defense to kill a person who is threatening to slap your face?
- Is it entrapment for an undercover police officer to offer to sell drugs to a user?

Criminal law and civil law differ in important ways. First, in who initiates a case. This party is known as the plaintiff. In criminal cases, the plaintiff is the state. In civil cases, it is the individual who was injured. Second, they differ in purpose. Civil law is intended to compensate the injured; to make them “whole” again. The most commonly sought outcome—the “**remedy**”—is money, or **damages** in legal language. For example, the individual who is hurt by an attacker can obtain reimbursement for their medical bills and lost wages through a civil action. Sometimes, money damages are not adequate. Imagine, for example, that a thief has stolen a ring that has been in a family for four generations. The victim doesn't want the thief to pay damages, they want the ring returned. In such a case, the plaintiff will ask the court to order the defendant to return the ring. This type of remedy is referred to as an **injunction**. A third remedy that is sometimes available in civil cases is **punitive damages**. These monies exceed the actual losses of a plaintiff. They are awarded to punish, or deter, bad behavior. Punitive damages, therefore, overlap with criminal law in purpose.

An example of an award of punitive damages was the award of \$25 million to each of 22 defendants for actual damages and additional \$4.14 billion in punitive damages against Johnson & Johnson, the manufacturer of baby powder, for failing to warn women that their powder might cause ovarian cancer. A jury in the case later said the punitive damages amount was intended to take back 40 years of

profits Johnson & Johnson had earned on its baby powder. On appeal, the punitive damages award was reduced to \$1.4 billion because the appellate court found jurisdiction and other procedural errors in the case.<sup>5</sup>

Although a prosecutor can obtain compensation for the injuries and other losses on behalf of a crime victim in a criminal case (restitution), criminal law's primary purposes are to deter harmful conduct; incapacitate people who pose a threat to others; rehabilitate and restore offenders to productive, law abiding lives; and to punish. The purposes of criminal punishment will be explored in greater detail in a later chapter.

The third major difference between criminal and civil law is in process. Because criminal cases can result in execution, prison, and other losses of liberty, the rules are different. More is expected of the government to take a person's life or liberty than of a plaintiff who sues for money damages in civil law. The government, for example, must prove a criminal case beyond a reasonable doubt. This is a much higher standard than that of civil cases, preponderance of the evidence. Also, criminal defendants are protected by several constitutional rights that are not available to defendants in civil cases. This book examines these matters in greater detail. If you want to know more about criminal law, refer to this book's companion text, *Caught in the Act: Fundamentals of Criminal Law*. For a comparison of criminal law and civil law, see Table 1.1.

Criminal law doesn't exist in a vacuum. It must be brought to life. The area of law that operationalizes criminal law is **criminal procedure**. Criminal procedure defines the steps and processes of criminal cases. The following are examples of criminal procedure questions:

- How are criminal cases filed with courts?
- How and when does a defendant challenge an illegal search by police?
- At trial, does the defendant or the state address the jury first?
- What is the page limit for documents filed with the court?

But criminal procedure isn't only about procedural nuts and bolts. The field of criminal procedure also includes the constitutional and statutory protections of suspects, defendants, and convicted persons. The following constitutional questions fall into the academic study of criminal procedure:

- When is probable cause required for police to conduct a search or seizure?
- May a police officer search a person's home without a warrant?
- May border agents turn on a traveler's phone and look at the contents?
- May a confession that has been beaten out of a defendant be used at trial?

**TABLE 1.1** ■ Criminal Law and Civil Law Compared

	Criminal Law	Civil Law
Philosophy	Public Wrong	Private Wrong
Purpose	Deterrence, incapacitation, rehabilitation, restoration, retribution	Compensation
Remedies (outcomes)	Imprisonment, community service, fines, restitution, execution, and more	Money damages and injunctions
Plaintiff	State	Person wronged
Standard of Proof	Beyond a reasonable doubt	Preponderance of evidence
Process	Defendant protected by constitutional rights	Defendant not entitled to the protection of most constitutional rights

- When is a defendant entitled to an attorney?
- Do police need to have a warrant to take blood for DNA testing from an unwilling suspect?
- Is it cruel and unusual punishment to require a convicted sex offender to undergo chemical castration?

These questions aren't about the steps in the process—they are about substantive legal principles. The importance of these principles to a free society can't be overstated. Colloquially, individual rights are sometimes referred to as technicalities when they are applied in criminal cases. For example, you may have heard the phrase, "He got off on a technicality." This phrase is used to describe the rare case where a defendant ends up unpunished, or a prosecution is made harder, because of the bad behavior of police or prosecutors.

To be clear, this type of outcome occurs in a small number of cases. In addition to being rare, these outcomes are more than mere technicalities; they are the result of deeply rooted principles of fair play. Requiring that a legal document be limited to 10 pages, not 11, is a technical rule. Holding the government accountable for violating an individual's civil rights isn't. The protection of liberty isn't easy, nor is it without its costs. In 2021, famous actor Bill Cosby, who was once known as America's Dad, was released from prison after serving less than three years of a 10-year sentence for sexual assault. The decision to free Cosby was made by the Pennsylvania Supreme Court because Cosby's due (fair) process rights had been violated. Specifically, the state had promised Cosby that he wouldn't be prosecuted for the sexual assault, provided Cosby agreed to waive his right to be free from self-incrimination in a civil suit brought by the victim. The prosecutor was motivated to make the deal by his conclusion that it was unlikely he could prove Cosby's guilt to a jury and the victim's interest in having Cosby testify at her civil trial. Cosby agreed, testified at a deposition, settled the lawsuit, and was subsequently prosecuted, in violation of his agreement with the prosecutor.<sup>6</sup> The decision to reverse the conviction was undoubtedly difficult for the victim, and many other people. It is important to remember that the decision wasn't a vindication of Cosby, it was a vindication of the rights of all people. This security–liberty balance is the heart of the study of criminal procedure.



Bill Cosby, once a super celebrity, was successful in overturning his convictions for sexual assault.

Pool/Pool/Getty Images Entertainment/Getty Images

## Questions and Problems

Label each of the following scenarios as involving a civil law, criminal law, or criminal procedure matter.

1. Polly fails to stop at a red light and crashes into a car driven by Aryana, who is driving through the intersection on the green light. Aryana's car repairs total \$5,000 and her medical bills, \$10,000. Aryana sues Polly to recover her losses.
2. Polly fails to stop at a red light and crashes into a car driven by Aryana, who is driving through the intersection on the green light. The local prosecutor files a Class B felony count of reckless driving against Polly. She defends by alleging that while she may have been negligent, her conduct isn't reckless, as defined by state law.
3. Polly fails to stop at a red light and crashes into a car driven by Aryana, who is driving through the intersection on the green light. The first police officers at the scene, Dave and Rob, search Polly's car. They discover an open bottle of liquor. Polly is charged with reckless driving and possessing an open container of alcohol while driving. Polly believes the officers violated her rights by searching her car without a warrant. She files a motion (asks the court) to have the bottle excluded (not allowed into evidence) from her trial.

## LET'S MAKE A DEAL: THE SOCIAL CONTRACT

### LEARNING OBJECTIVE

Identify the two major values that underpin the social contract and explain how they interact to form the social contract.

As the *Cosby* case reveals, there is an inherent tension—if not conflict—at the core of the American republic. On the one hand, the Framers of the Nation, fresh off their experience with British oppression, were intent on protecting individual liberty. On the other hand, they believed a stronger national government was needed to build the new Nation's economy, to protect the people from foreign enemies, and to protect the people from one another. As Professor Steven Pinker points out in *The Better Angels of Our Nature: Why Violence Has Declined*, the development of the nation-state led to the greatest decline in human violence in history.<sup>7</sup> Without government, anarchy would reign and people would be subject to the violence and perversions of their neighbors. Conversely, the immense power of government presents its own threat. As James Madison, constitutional framer and fourth President of the United States observed, “[t]he essence of Government is power; and power, lodged as it must in human hands, will ever be liable to abuse.”<sup>8</sup> Consequently, governmental power must be limited and checked.

The balance of these two interests—security and liberty—is delicate and people have different ideas about how to weigh them. Governmental power is legitimized on the theory that members of society implicitly agree to relinquish some of their liberties, and to obey the law, in exchange for their security. This arrangement is known as the **social contract** or **social compact**.

Obviously, the conflict between security and liberty is not unique to the United States. But it is made more acute by the Nation's emphasis of individual autonomy and individual rights. For societies that prioritize the collective interests of the people over individual liberties, the balance is not only different, but less contentious.

Professor Herbert Packer posited two models—or poles on a continuum—to illustrate different sets of values that underpin criminal justice systems.<sup>9</sup> Packer's models offers a way to imagine the security–liberty balance in the criminal justice context. Packer's first model, the **crime control model**, prioritizes the efficient deterrence and punishment of crime. Police are given wide authority to control crime and victims' rights are emphasized. Determining whether a defendant committed a crime—**factual guilt**—in a quick and efficient manner are priorities.

**TABLE 1.2** ■ The Crime Control and Due Process Models Compared

	Crime Control	Due Process
Objective	To minimize and punish crime in an efficient manner	To minimize and punish crime while respecting individual liberties and autonomy
Philosophy	Crime is so harmful that individuals must make significant sacrifices, including more convictions of the innocent than in the due process model, to control it.	While crime is harmful, individual rights and autonomy are so important that society must make sacrifices, including less convictions of the guilty, in its efforts to control it.
Efficacy	Identifying and punishing offenders is a high priority. Wrongful convictions are more acceptable.	Tolerance for freeing the guilty over convicting the innocent.
Efficiency	A smooth, rapid, financially efficient process is a priority.	Efficiency is a low priority.
Policing	More proactive	More reactive
Judicial Process	Assembly-line, efficient	Obstacle course. Technical, slow, inefficient
Punishment	More retributive	More utilitarian

In the **due process model**, factual guilt is important but **legal guilt** is required. Legal guilt refers to a defendant's factual guilt *and* the use of a fair process. Individual rights, such as the right to be free from unreasonable searches, the presumption of innocence, and the access to legal counsel, are guaranteed. The processing of criminal cases, known as **adjudication**, is slowed by technical and constitutional expectations. The due process model is commonly analogized to an obstacle course, while the crime control model is visualized to be an assembly line. Consequently, the more due process-oriented a system is, the more difficult and costly it is for the state to investigate and prosecute offenders. Additionally, the community's security interests are often subordinated to liberty interests. See Table 1.2 for a comparison of the crime control and due process models.

Sir William Blackstone, the 18th Century jurist who is still cited by courts and scholars today, posited that it is better for 10 guilty persons to go free than for one innocent person be punished.<sup>10</sup> While there is disagreement about the details of **Blackstone's Ratio** (Is 10:1 the right ratio? Should the seriousness of the offense or threat to society be considered?), the hypothesis that it is better to err on the side of casting the criminal justice net so narrowly that a few guilty go unpunished, over casting it so widely that innocent people get ensnared in it, has ancient roots and continues to be a part of the United States criminal justice system.

### Questions and Problems

1. Define and describe the relationship of the two, sometimes competing, interests that underpin the social contract.
2. Contract law requires mutual assent, or a "meeting of the minds," to an agreement. This is typically proven in a written contract that is signed by the parties to it. No one in the United States is asked to consciously agree to the terms of the social contract. Without the assent of an individual, is it fair to hold that person accountable under the social contract? Explain your answer.
3. Identify three features of the U.S. criminal justice system that most closely align with the crime control model and two that more closely align with the due process model.
4. Explain your choices. Do you see any political, economic, or social patterns in the two sets? For example, is one set more conservative or liberal?

## THE CRIMINAL JUSTICE SYSTEM, OR IS IT SYSTEMS?

### LEARNING OBJECTIVE

Describe and contrast the relative authorities of the United States and the states to regulate conduct using criminal law.

The criminal justice system instituted by the Framers didn't spring out of their imaginations. Several elements went into its formation, including British law, which had been developing for 800 years, the American adaptations to that law during the colonial period, the political philosophy of the Enlightenment, and the American experience with British rule. A background in this history is needed to understand why the criminal justice system looks the way it does today.

Before the 9th century, England didn't have a uniform set of laws. Instead, Anglo-Saxon (early English) law was diverse, varying from one region to another. These regions were known as shires and hundreds, the former being the larger geographic unit that included several hundreds. Shires and hundreds had their own courts, which applied their own laws. Each shire was overseen by a shire reeve, a royal officer who was responsible for keeping the peace and representing the crown. Today's sheriffs are decedents of the shire reeve.

The situation changed in 1066 when William the Conqueror, the French duke of Normandy, won control of England in the bloody, one day Battle of Hastings. The impact that William and subsequent Norman kings had on England was huge. What had been a fractured and divided people were united under one monarch, foreign political alliances changed, a strict feudal system with the crown owning all property was imposed, the Catholic Church's English leadership was replaced with French clergy, new architecture and art were introduced, and elements of the French language blended into the English language.

Most significant to this textbook was the change in law brought by the Normans. William didn't immediately impose widespread changes to Anglo-Saxon law. Instead, the law slowly evolved from the fragmented, locally based Anglo-Saxon system to a more uniform, national system. Because William took ownership of all land, property law was an area that changed more rapidly than others.

In criminal law, several significant changes developed. One of the most important changes was that serious crimes were treated as public, not private, offenses. Consequently, the authority to prosecute these crimes shifted from the individual, where it had been prior to the Norman Conquest, to the state.



William the Conqueror, depicted here in the Bayeux Tapestry, was responsible for changes to Anglo-Saxon law, including the introduction of a national court system.

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Another significant change was the introduction of national courts, beginning with the Curia Regis, or King's Court, shortly after William took England in 1066. Subsequently, many other courts were created. Over hundreds of years, the judges of these courts developed a body of that law that replaced the customary law that predated the Norman Conquest. For the first time, the English people shared a common set of laws. Unsurprisingly, these new laws became known as the **Common Law**. The British colonists transplanted the Common Law to the colonies of what would later become the United States. With the exception of Louisiana, which follows the Civil Law tradition of France, the United States remains a Common Law nation today. The Common Law will be discussed in greater detail later in this chapter.

By the 18th century, many Americans were frustrated with British rule, which was considered oppressive, arbitrary, and discriminatory of the colonies. This led to the colonies declaring independence in 1776, the Revolutionary War, and ultimately, independence from the British in 1783.

The new Nation's first constitution was the Articles of Confederation in Perpetual Union, which became effective in 1781. The Articles of Confederation continued to recognize the independence of the former colonies. Consequently, the federal government under the Articles of Confederation was weak and ineffective. For example, the federal government didn't have a standing army or navy and it lacked taxing authority. Fearing that the country's future was in jeopardy, the states agreed to have a convention to revise the Articles of Confederation.

In the hot summer of 1787 in Philadelphia, Pennsylvania, 55 delegates from 12 colonies met to revise the Articles of Confederation. Suspicious of the meeting, the 13th colony, Rhode Island, chose not to be represented. Among the delegates were American icons, including George Washington, Benjamin Franklin, James Madison, George Mason, and Alexander Hamilton.

The delegates quickly decided that small edits to the Articles of Confederation weren't going to be enough; a new constitution was needed. They met through the summer, debating and compromising during the day and drinking beer and wine at local taverns at night. Influenced by their experiences with British tyranny and the wisdom of the philosophers of the Enlightenment, who wrote about limited government, fair process, proportional punishment, and rationalism, the delegates established an architecture of government that was intended to advance the Nation's development while protecting individual liberty. The new Constitution of the United States was sent to the states for ratification, where it was debated in communities throughout the Nation. Ultimately, the Constitution was ratified and became effective in 1789.



George Washington, president of the Constitutional Convention, addressing the Convention's delegates.

Ian Dagnall / Alamy Stock Photo

Although the Framers intended to increase federal authority, the concern that “absolute power corrupts absolutely,” motivated them to maintain the centrality of the states while strategically increasing federal authority. In this new structure, both the states and the federal government are “sovereign.” This sovereignty gives each a zone of exclusive authority and in many policy areas, zones of shared power. This form of government, where there are two sovereign units, is known as **federalism**. The purpose of installing a federal form of government was to control power by not resting too much of it in one government.

In the new structure, the states retained their status as the default governors. The federal government, on the other hand, has only those powers that have been expressly enumerated—listed—in the Constitution. The Tenth Amendment codifies this principle. It reads

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

What powers belong to the federal government? The authority to create a national post office, to declare war, and to establish an army and navy are a few examples. It also has the authority to regulate commerce between the states, with foreign nations, and with Indian tribes in what is known as the **Commerce Clause**. Another provision, the **Necessary and Proper Clause**, empowers Congress to make all laws that are needed to execute its other enumerated powers. Similarly, three amendments enacted after the Civil War, the Thirteenth through Fifteenth, expressly authorize Congress to make laws to bring their commands to life. They have, essentially, their own Necessary and Proper Clauses. The Thirteenth Amendment abolished slavery and involuntary servitude; the Fourteenth Amendment protects due process, equal protection, and the privileges and immunities of statehood; and the Fifteenth Amendment extended the vote to all men, regardless of race, color, or prior enslavement. Congress has enacted many civil rights laws to enforce these amendments.

Finally, the **Supremacy Clause** declares federal law to be superior to state laws. Consequently, any state law that is inconsistent with the Constitution, treaties, or laws created by Congress is invalid.

Most relevant to criminal procedure, the **police power** was reserved to the states. Although the term *police* is commonly used when referring to law enforcement officers today, the term had broader meaning in 1787. The police power referred to all regulation for the welfare of the people. Regulating criminal conduct, establishing health and public welfare standards, protecting property rights and land use, and providing for education are all within the state police power. The primacy of the states in criminal law continues today, as reflected in the number of criminal cases heard in state and federal courts. Ninety-five percent of all criminal cases are adjudicated in state courts.

The federal government isn’t forbidden from creating criminal laws. But unlike the states, which automatically have the authority to create criminal laws under the police power, Congress is limited to creating crimes within its enumerated powers.

The Constitution specifically recognizes four federal crimes, treason, piracy and crimes of the high seas, counterfeiting, and offenses against the law of nations. Using the Necessary and Proper Clause, the federal government also punishes conduct related to its other powers. For example, Article I, section 8 of the Constitution gives Congress the authority to create a national post office. Even though the Constitution doesn’t specifically give Congress the authority to create criminal laws to protect the post office, it has criminalized mail fraud and the theft of mails as “necessary and proper” to its post office power. Federal power also extends to matters involving federal officers and property. The January 6, 2021, insurrection at the United States Capitol is an example. Many people who were involved were charged with trespass, theft, and property damage. These are typically state crimes. But because the acts involved federal property, the United States had **jurisdiction** to prosecute the crimes.

The relationship of federal and state jurisdiction can be complicated. The power to punish conduct is sometimes held by one, but not the other. In other situations, they hold concurrent jurisdiction—also known as “dual sovereignty.” Consider the crime of murder, for example.

- Charles, a member of a cult, kills Tate during a ritualistic ceremony. The ceremony takes place in an abandoned building in Red Sun, Arizona. Charles has committed murder under Arizona state law.

- Charles, a member of a cult, believes the president of the United States is evil and his leadership will bring about the collapse of the Nation. Charles assassinates the president while he is delivering a lecture on a college campus in Red Sun, Arizona. Charles has committed state murder, and federal murder because he killed a federal officer.
- Charles, a member of a cult, believes the president of the United States is evil and his leadership will bring about the collapse of the Nation. Charles assassinates the president on the lawn of the White House. Charles has committed federal murder because he committed the crime on federal property and because the victim is a federal officer. This crime is exclusively federal because no state has jurisdiction in Washington, D.C.

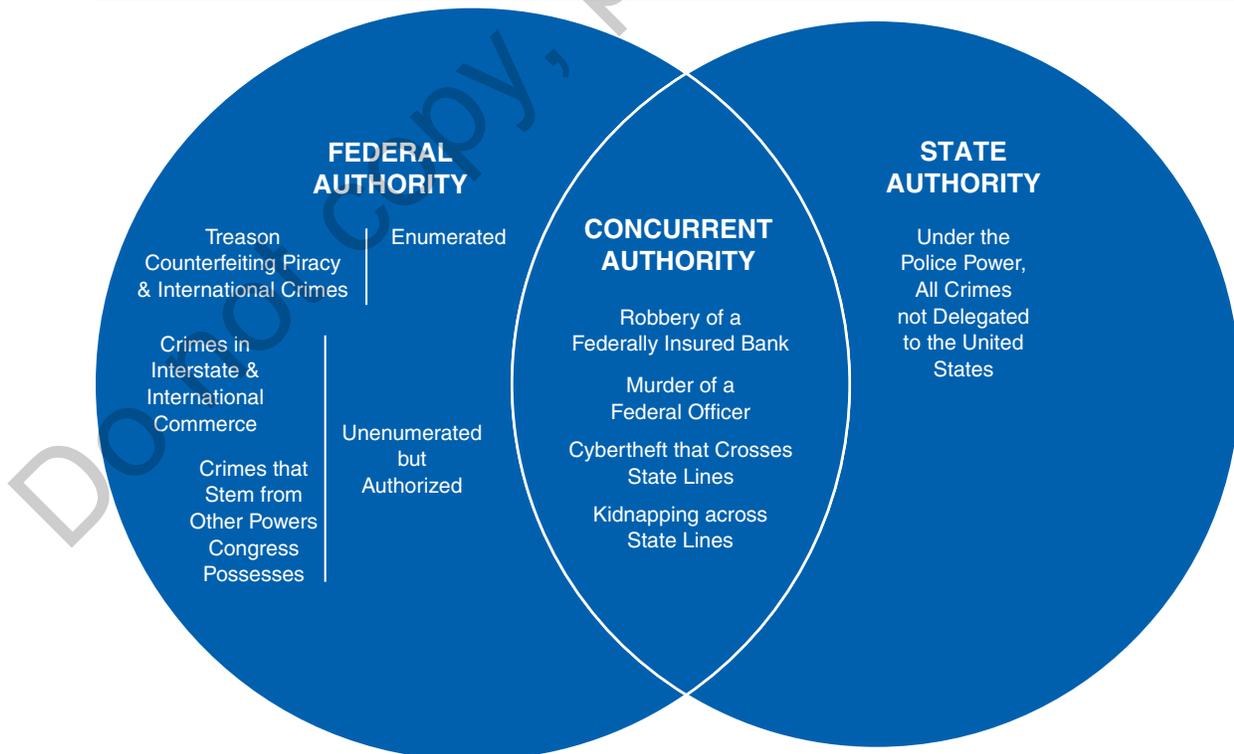
Figure 1.1 visualizes the relationship of federal and state criminal jurisdiction.

Federal jurisdiction has expanded considerably since the Nation’s founding. But it isn’t boundless. The Supreme Court of the United States, which shall be referred to as **SCOTUS** for the remainder of this book, has decided several federalism criminal cases. While they don’t paint a complete picture of the law, they offer a rough sketch of the limits of federal criminal authority.

The most powerful tool in Congress’ belt to expand federal criminal authority is the Commerce Clause. There are two circumstances where Congress uses its Commerce power to regulate crime; when an actor commits a crime in interstate commerce and when an actor uses items that have traveled in interstate commerce to commit a crime. Jurisdiction over the former is more obvious than the latter. The cyberthief in Nebraska who hacks into bank accounts in Ohio and Florida is clearly acting in, and impacting, interstate commerce.

Committing a crime using a tool that has traveled in interstate commerce is different. In 1789, most products were made and used locally. Today, nearly all products are made, transported, sold, or consumed in interstate or international commerce. How often have you read “made in China” on a product? This includes guns, knives, drugs, clothes, electronics, and bank accounts. If the

**FIGURE 1.1** ■ Federalism and Criminal Law



Commerce Clause were interpreted as applying to every product that has traveled, used parts that traveled, was produced or assembled, or insured or financed by companies, in interstate or international commerce, the federal government would have jurisdiction over nearly every crime in the United States. While the Commerce Clause has been a significant factor in the expansion of federal power, this interpretation is a step too far. For federal authority to be legitimate, a defendant's criminal act must

1. use of the channels of interstate commerce, or
2. use the instrumentalities of interstate commerce or persons or things in interstate commerce, or
3. substantially affect interstate commerce.

The landmark cases that apply these tests are *United States v. Lopez* (1995) and *United States v. Morrison* (2000).<sup>11</sup> In *Lopez*, SCOTUS reviewed the conviction of a 12th-grade student for violating the federal Gun-Free School Zone law.

You will learn more about *Lopez* in a special feature of this book, Digging Deeper. Every chapter has two or more Digging Deeper presentations. The first Digging Deeper examines the *Lopez* case. Additional information about what you are reading, and why, in the Digging Deeper features appears immediately below, before the *Lopez* case.

## DIGGING DEEPER

### What Is the Digging Deeper Feature About?

Recall from earlier in this chapter that judges interpret the law as part of their responsibility to hear and decide disputes. For example, imagine that a police officer uses a K-9 to sniff a car for drugs. The dog signals to the presence of drugs, resulting in a full search of the car by the officer. The defendant could challenge the warrantless sniff by the dog as an unconstitutional search. The trial judge's decision, and those any courts above that review the trial judge's decision, are treated as the law of that specific case, and possibly, as precedent in future cases. We read these opinions to predict the outcomes of future cases and to learn the law. You will learn more about the role of judges later in this chapter.

To deepen your study, select judicial opinions are included in your readings in a feature titled Digging Deeper. What you will read in this feature are the words of the court that decided the case, not your author. Published cases vary in length. In rare instances, an opinion is one-page long. Cases over 100 pages can be found. The typical opinion falls between 10 and 30 pages. The cases in Digging Deeper have been reduced, commonly to one to three pages. Because of the significance of the U.S. Constitution to criminal procedure, and the role of the SCOTUS as the highest interpreter of federal law, most of the cases in this book are from that Court.

Judges follow a common pattern when writing opinions. A court will outline the facts of the case, identify the legal question that is being answered, apply and discuss the law, and render a decision. Most of the cases in Digging Deeper are from appellate courts. That means the court is deciding whether a trial court or lower appellate court made the correct decision. Possible outcomes on appeal include affirmation (the lower court was correct), and reversal (the lower court was wrong). Often a reviewing court will remand a case with instructions. To remand is to return the case to a lower court with an order to do something new or different than it did before. For example, an appellate court may reverse a conviction and remand the case to the trial court for a new trial. Your first Digging Deeper case is *United States v. Lopez*. It is presented in this section of the book for a reason—it is about federalism. Specifically, it addresses federal authority to criminalize conduct under the Commerce Clause. Read this case excerpt and identify the important facts, the legal question the Court is answering, the law that it applies, the outcome, and most importantly, explain the Court's rationale. Why did it decide the way it did?



A Gun-Free School Zone sign.

Julia Hiebaum / Alamy Stock Photo

### Your First Digging Deeper

Can the federal government outlaw the possession of a gun around a school?

Case: UNITED STATES v. LOPEZ

Court: SCOTUS, 514 U.S. 549

Year: 1995

Opinion by: REHNQUIST, CHIEF JUSTICE

In the Gun-Free School Zones Act of 1990 [Act], Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act

exceeds the authority of Congress “[t]o regulate Commerce . . . among the several States. . . .” U. S. Const., Art. I, § 8, cl. 3.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38-caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. . . .

A federal grand jury indicted respondent on one count of knowing possession of a firearm at a school zone. . . . The District Court conducted a bench trial, found him guilty of violating § 922(q), and sentenced him to six months’ imprisonment and two years’ supervised release.

On appeal, respondent challenged his conviction based on his claim that § 922(q) exceeded Congress’ power to legislate under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed respondent’s conviction. . . . Because of the importance of the issue, we granted certiorari, 511 U. S. 1029 (1994), and we now affirm.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” . . .

“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in anyone branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” . . .

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. “[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.” Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce and those activities that substantially affect interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must “affect” or “substantially affect” interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause. . . .

We now turn to consider the power of Congress, in the light of this framework, to enact [Act]. The first two categories of authority may be quickly disposed of: [Act] is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [Act] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if [Act] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce. . . .

Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms.<sup>3</sup> Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. . . .

Under our federal system, the “States possess primary authority for defining and enforcing the criminal law. . . .

The Government’s essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being. . . .

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent

was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

[The Gun Free School Zone Act is therefore, unconstitutional.]

Five years later, the Court invalidated another federal law for similar reasons in *Morrison*. The case involved a college student who alleged that two peers raped her. The student sued her university and the two men she alleged raped her for money damages under the federal Violence Against Women Act (VAWA). Relying on its Commerce Clause powers to create the VAWA, the United States asserted that gender-motivated violence substantially affected interstate commerce by impeding the employment, travel, and other economic activity of the victims and potential victims of that violence. SCOTUS invalidated the law, finding that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." To permit her case to proceed, the Court held, would "completely obliterate the Constitution's distinction between national and local authority." In short, a state has the authority to create such a law under its police power, but the United States doesn't.

In the same term, SCOTUS also invalidated the conviction of a man for residential burglary in *Jones v. United States*. The Court rejected the hypothesis that the United States had jurisdiction because the home's mortgage and insurance were purchased in interstate commerce. Justice Ginsburg, speaking for the Court, wrote that

[w]ere we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in" any commerce-affecting activity, would have no office.

Although the Court's decision in this case was based on the statutory requirement of interstate commerce, its reasoning and conclusion are easily transferable to the Commerce Clause.<sup>12</sup>

The justices reiterated their respect for the presumption in favor of state authority over traditional crimes by declaring that even when Congress has the authority to regulate conduct over what has traditionally fallen into the police power, it must be clear in its intent. In the words of the Court,

Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.<sup>13</sup>

Despite these limitations, examples of successful uses of the Commerce power to regulate traditional crime can be found. In a decision from 1985, SCOTUS allowed a federal conviction for arson to stand. In this case, *Russell v. United States*,<sup>14</sup> the defendant attempted to burn down an apartment building he owned. What made his case different from the Jones arson just discussed was the nature of the buildings. The subject of Jones's arson was a home. Russell, on the other hand, involved an apartment building. The Court concluded that the apartment building was in interstate commerce.

Another example is the 2015 decision *Gonzales v. Raich*.<sup>15</sup> The defendant in Raich challenged the application of the federal Controlled Substances Act to his use of marijuana, which was legal under California law. He didn't contest the interstate character of marijuana use and sales, but instead claimed

that California's explicit legal approval of his use should trump the federal government's prohibition. SCOTUS rejected his argument, finding that the cumulative effect of allowing the states to regulate the drug differently would undercut federal law. So, Congress, the Court concluded, may "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."

In the 2019 case, *United States v. Hill*,<sup>16</sup> a federal appellate court upheld the prosecution of a defendant who assaulted a coworker at an Amazon fulfillment center under the federal Hate Crimes Act. The defendant confessed that he attacked the coworker because he was gay. The statute created federal jurisdiction over hate motivated assaults and batteries that are committed across state borders, that use weapons that traveled in interstate commerce, or that use a channel, facility, or instrumentality of interstate or foreign commerce. Because Amazon ships its products across state lines and the assault occurred in the Amazon facility while the victim was working, causing the area where the assault occurred to be closed for a short time and the victim to miss work for a day, the judges concluded that the federal government had jurisdiction.

The Constitution has another architectural feature that is intended to protect the people against tyranny: the division of the federal government into three branches, commonly known as the **separation of powers**. The legislative branch, the Congress of the United States, is responsible for lawmaking. The executive branch, with the president at the apex, is responsible for enforcing the laws made by Congress (and other functions, such as serving as commander in chief of the military), and the courts adjudicate disputes and interpret the law. State governments are similarly organized.

Because each state and territory, as well as the federal government, has its own set of criminal laws; its own procedures; its own Common Law; and its own courts, cops, and prosecutors, the United States doesn't have one criminal justice system. It has over 50. And each is a complex set of independent, yet interdependent, players. Police and prosecutors work closely and need one another. But they are structurally independent of one another, and poor coordination and lack of cooperation sometimes hinders law enforcement. Another public player, the courts, are also important. You will study them in greater depth in Chapter 2. There are other public agencies that play important roles in criminal justice, including corrections and victims' services agencies. Not all criminal justice services are provided by the government. Private businesses and nonprofit organizations, such as those that offer bail bonds, mental health, and offender services are also important. Consequently, the United States has a large set of loosely related, structurally fragmented criminal justice systems.

While these systems have more in common with one another than not, important differences exist. For reasons that will be discussed in detail later, the U.S. Constitution plays a greater role in unifying criminal procedure law today than it did in the Nation's early years. Much of what you will learn in this book is constitutional criminal procedure. Therefore, most of the rules you will learn apply throughout the Nation, to every police officer and prosecutor, and in every court.

## Questions and Problems

Discuss whether the United States has constitutional jurisdiction in each of the following cases.

1. Fred Dewey is a partner in the law firm Dewey, Cheatem, and Howe. He is representing Ima Victim in a divorce. She and her soon-to-be ex-husband live in the same town. Ima paid her attorney's fees and courts costs using money she earned working for DeliveryAsia, a company that packs and ships American made products to customers in Asia. Dewey embezzles \$5,000 from Ima during the divorce. He is charged with violating a federal embezzlement statute. The federal government is asserting jurisdiction over the case because the money that Dewey embezzled was earned by Ima while performing work in interstate commerce.
2. Ronald Butcher strikes a neighbor, Paul Rand, breaking his nose. Ronald was angry that Paul put his yard waste on Ronald's property. Ronald owns his own glass blowing business and Paul is a manager at a local advertising firm. Federal prosecutors have charged Ronald with battery, alleging federal jurisdiction because the tools used to cut the yard waste were purchased in interstate commerce.

3. Ronald Butcher attacks Paul Rand, his representative to Congress, during a townhall meeting that is organized by Paul. The purpose of the meeting is for Paul to connect with his constituents. Paul suffers broken ribs and other injuries. Ronald is charged by federal prosecutors with felony battery on a member of Congress.

## COMPETITION, NOT COOPERATION: ADVERSARIAL SYSTEM

### LEARNING OBJECTIVE

Describe the Adversarial System, using the Inquisitorial System for comparison.

Nearly all nations fall into one of two traditions, or families, of law. You have already been introduced to the first, the Common Law family. As you learned earlier, it was founded in England. It was spread by the English during their colonial period. At one point in history, it was commonly said that the sun never set on the British Empire because Britain had colonies all over the world. Although the colonial period has ended, the Common Law has survived where it was planted. Consequently, the common law is found in Australia and New Zealand, Bangladesh, Barbados, Belize, Canada (except Quebec), India, Hong Kong, Jamaica, Liberia (based on U.S. common law), Singapore, Uganda, United States, and many other nations.

The second legal family is Civil Law. This is not the same as the civil law that was contrasted with criminal law earlier in the chapter. In this context, Civil Law refers to a legal tradition that was founded in Italy. It spread throughout Europe and through colonialization, much of the world. Belarus, Belgium, Cambodia, Quebec in Canada, China, Colombia, Costa Rica, Dominican Republic, France, Germany, Greece, Italy, Ivory Coast, Nepal, Russia, Switzerland, Turkey, and many other nations fall into this family.

Recall from the earlier discussion that in the early common law, courts made most of the law. Through *stare decisis*, the courts applied their decisions to future cases. In the civil law tradition, however, law was written by teams of experts, and later, by legislative bodies. The courts played no role in lawmaking. In many Civil Law nations, judges were expected to adhere to the words of the written law, codes, and they are forbidden from applying case precedent. Even though legislatures are the lawmakers in the United States today, courts continue to be highly influential through interpretation and the doctrine of *stare decisis*.

In addition to differing in the lawmaking and interpretative functions, the two families differ in the adjudication methods they use. The Civil Law's **inquisitorial system** empowers judges, over prosecutors and defendants, to oversee investigations, develop the factual theories of the case, and to run trials. Inquisitorial systems are run as continuous, cooperative investigations.

By contrast, Common Law nations use the **adversarial system** (sometimes referred to as the accusatorial system) of adjudication. Differing considerably from the inquisitorial system, the adversarial system empowers the parties to develop their own theories of the case and to present their own evidence. Judges are passive; acting as referees in the competition to find the truth. While the inquisitorial system is premised on the hypothesis that truth is best found through cooperation, the adversarial system presumes that truth is more likely to be found through competition.

Because the adversarial method emphasizes truth through competition, it is highly oral and confrontational. Oral testimony, with its opportunity to press a witness for the truth, is prioritized. This is reflected in the Sixth Amendment's right to cross-examine witnesses and to confront accusers. The inquisitorial method, on the other hand, permits the admission of witness statements into evidence that are not subject to cross-examination, a method that is unconstitutional in the United States. One scholar has criticized the orality of the adversarial system because it revictimizes rape victims by requiring them to retell their stories to multiple people—police, rape counselors, prosecutors, judge and jury, and by requiring them to endure sometimes intense cross-examination by defense attorneys.<sup>17</sup>

Proponents of the adversarial model counter by emphasizing the importance of confrontation to finding the truth and reducing wrongful convictions.

The relaxed attitude toward the admission of written testimonial evidence reveals another difference between the two methods. The inquisitorial method is less formal and technical than the adversarial method. In the adversarial system, evidence and procedural rules are highly technical and the processes are formal. Each stage of the process is distinct, particularly trial, which is a highly structured, almost theatrical, event. The rules of evidence are intended to reduce prejudice and to enhance justice. Often the intention of the rules of evidence is to keep prejudicial evidence away from the jury, which is presumed unable to distinguish credible evidence from untrustworthy and prejudicial evidence. In the inquisitorial system, all evidence is added to the file, known as a dossier, and assessed, weighed, and considered or rejected. The process is more fluid, with the various stages running together to form one continuous investigation.

There is more to the adversarial system than process. America's due process expectations are woven into the criminal justice process. The rights you will explore in future chapters—including inter alia, the freedom from unreasonable searches and seizures, freedom from self-incrimination, the right counsel, and the right to a public jury trial—are part of the adversarial system. There are also important unenumerated rights. Consider the burden of proof, for example. In the United States, the burden of proof rests with the state. This is both an adversarial method and an operationalization of the unenumerated due process guarantee of the **presumption of innocence**. The burden of proof is, in actuality, two burdens; the burden of production and the burden of persuasion. The former requires the state to produce evidence of guilt and the latter requires the state to convince the fact finder, a jury or judge, of the defendant's guilt.

In the United States, the defendant is under no obligation to defend themselves. A defendant can choose to be passive through the entire process—investigation, pretrial, and trial. As is



In support of the adversarial system, the Sixth Amendment guarantees the right to cross-examination of witnesses at trial.

Old Visuals / Alamy Stock Photo

discussed in a later chapter, the right to remain silent is taken so seriously that a prosecutor may not call a defendant to testify at trial, out of a concern that forcing a defendant to “plead the Fifth” Amendment right to be free from self-incrimination in open court will prejudice the jury. Beyond bearing the burden of production and persuasion, the state must prove its case by a high evidentiary standard, **beyond a reasonable doubt**. There are other examples of rules that protect liberty, such as the **Rule of Lenity**, which requires a court to interpret an ambiguous law in a manner that is favorable to the defendant. In the words of John Marshall, one of America’s great chief justices, “[t]he rule that penal laws are to be construed strictly is founded on the tenderness of the law for the rights of individuals.”<sup>18</sup>

Due process rights only mean something in adversarial nations only mean something because of the impact they can have at trial. Consider illegally seized evidence. The inadmissibility of the evidence, through the Exclusionary Rule, is very important to the parties. As observed by one scholar, this feature of the adversarial model—that the parties are always looking ahead to assess what may happen at trial—makes trial, as rare as it happens, the *center of gravity* of the adversarial process. In the inquisitorial model, on the other hand, nearly all evidence is received into the dossier. Depending on the nation, this includes evidence that would be inadmissible in an adversarial nation. For this reason, and because the process is more fluid and less focused on “trial,” the same author refers to the ongoing investigation as the center of gravity in the inquisitorial system. See Table 1.3 for a summary comparison of the two systems.

**TABLE 1.3 ■ The Adversarial and Inquisitorial Systems Compared**

	Adversarial	Inquisitorial
Truth-Seeking Philosophy	A competition between the state and defendant is the best way to find the truth	Judicially managed cooperation best finds the truth
Priorities	Legal guilt, due process prioritized over efficiency	Factual guilt; efficiency
Role of Parties	Active; develop case theories, argue the law, independently investigate, and present evidence	Less active; cooperate in a judicially managed investigation
Role of Judge	Passive; neutral arbitrator who ensures justice, decides the law after it has been argued by the parties, and resolves conflicts	Active; oversees entire process, responsible for deciding theories of the case, deciding what witnesses and evidence to pursue, and resolves conflicts
Victim	Lesser role, but greater than in the past; stressful process	Greater role; less stressful process
Process	Occurs in stages; highly technical and formal	Fluid; informal
Center of Gravity	Trial	Investigation
Where?	Common Law nations	Civil Law, Socialist, and Religious nations

### Questions and Problems

1. Compare and contrast the different approaches at finding the truth of the adversarial and inquisitorial systems.
2. Compare and contrast the roles of the parties and the judge in the adversarial and inquisitorial systems.

## LAY DOWN THE LAW: SOURCES OF CRIMINAL PROCEDURE

### LEARNING OBJECTIVE

Identify and describe the various forms of law that are important to criminal procedure.

Whether a specific rule of criminal procedure applies nationally or only locally depends on the source of the rule. The United States is a constitutional republic. Laws are created by elected government officials, by appointed government officials, and on occasion, by the people directly. There are several sources of **criminal procedure law**.

### Statutory Law

**Statutory law** is the second form of law. Again, the United States and each of its states and territories have statutory law. Statutes are laws created by legislative bodies. At the federal level, the Congress of the United States is the lawmaker. The state and territorial legislatures are known by different names, such as Arkansas General Assembly, California State Legislature, American Samoa Fono, and Massachusetts General Court. Yes, you read that correctly; the Massachusetts General Court is a law-making body, not a court of law.

It is statutory law that declares acts to be crimes, establishes punishments, details the authorities of police and prosecutors, and outlines the steps criminal cases take in court. Occasionally, legislatures also protect liberties. As you will learn later, legislatures may extend individual rights beyond what constitutions protect, but they may not reduce them.

When legislatures publish their laws, they group them together by subject matter to make it easier to find specific laws. These groups of statutes are known as codes. So, you can find most criminal statutes organized into criminal codes. At the federal level, you can find both criminal law and criminal procedure in Title 18 of the United States Code, titled Crimes and Criminal Procedure.

### Referendum

Statutory law is a **republican** method of making law; the people elect representatives to make law. About half of the states also permit the people to directly make law through popular **referendum**, also known as a ballot initiative or question. This is a form of **democracy**, or direct lawmaking by the people. There is no referendum at the federal level; all statutory law is made by Congress. Referenda processes vary between the states. Some states enable referenda to create statutory law, others permit it to be used to amend their constitutions, and many provide for both. In many states, a referendum may be started by the people, after a minimum number of signatures have been obtained. In some states, the legislature may place questions on the ballot for popular vote. The referenda process can be powerful. Several states in recent years have decriminalized the use of marijuana through referenda and in 2018, the people of Florida voted to restore the voting rights of ex-felons who were not convicted of murder or felony sex offenses.<sup>19</sup>

### Ordinances

**Ordinances** are created by local government lawmaking bodies, such as city and county councils, and occasionally directly by the voters. If properly enacted, ordinances have the authority of a state statute. But they are subordinate to statutory and constitutional law. Many cities and counties have their own criminal laws and courts.

### Administrative Law

Government agencies also make law. Although administrative agencies fall into the executive branch of government, which doesn't normally make law, they are empowered to *promulgate* (a fancy word

for making and announcing to the public) law, commonly known as either rules or **regulations**. Most agency rules are civil or administrative. But sometimes agencies create criminal rules. Constitutional limitations to statutory law also apply administrative rules. Today, there are far more administrative rules than statutes. Administrative rules are organized into codes, in the same manner as statutory law.

### Common Law

As you learned earlier, the Common Law was introduced by the Norman rulers. For a long time after the Norman Conquest, the only lawmakers were the king and the courts. England didn't yet have a parliament. Consequently, judges had to create law to decide the criminal and civil cases brought before them. The judges created **substantive criminal laws** (defining crimes), procedural laws (how cases are to be filed and heard), and rules to guide their decision-making. **Stare Decisis** is an example of last of these. Stare decisis is Latin for “to stand by that which is decided.” Consider murder, for example. Imagine that hundreds of years ago in a small farming village, Essex, the shire reeve brought a defendant, Tom Denning, to a court because he kills his neighbor with an axe. Tom confesses to the act, explaining that he was upset because the woman he was romantically interested in rejected him in favor of the victim. The court finds Tom's conduct shocking and contrary to the “natural principles of man” and announces that the killing of a person with a bad intent (malice aforethought in the language of the common law) to be a crime and Tom is sentenced to die. The case, *Crown v. Tom Denning*, becomes precedent for the crime of murder.

Under the doctrine of stare decisis, the law of that case—that the killing of a human being with malice aforethought is murder—becomes **precedent** that is applied to future cases with similar facts. When stare decisis is combined with a hierarchy of courts, with higher courts imposing their legal pronouncements on those below, law starts becoming uniform throughout England. This is how the common law came by its name.

But the law isn't frozen. Stare decisis is only applied when the facts of a precedential case are substantially similar to the facts of the new case. If they are different, the law of the old case isn't applied and possibly, new precedent is created. Let's return to Essex, where a second homicide occurs. As before, the defendant, Oliver Crowsik, kills his neighbor with an axe. But in this scenario, Oliver commits the act when he finds the neighbor attempting to sexually assault Oliver's daughter. As before, the shire



The Supreme Court of the United States (SCOTUS) has the final word on the meaning of the Constitution.

Kent Nishimura / Contributor/Los Angeles Time/Getty Images

reeve brings the defendant to court. But the court refuses to apply the precedent, finding the facts between Tom's case and Oliver's case to be different. Instead, the court declares new law. It finds that the use of deadly force to protect another person from death or serious bodily injury to be justified and releases the defendant. Consequently, the case *Crown v. Crowsik* becomes precedent for the doctrine of self-defense.

The common law was brought to the United States by the early English colonists. However, its subsequent evolution in the United States was different than in England. The colonies "received" and changed the Common Law to fit their needs, values, and social circumstances. As is true of other former colonies of Great Britain, or the United Kingdom, the United States has its own version of the Common Law that continues to evolve.

Eventually legislatures replaced courts as the primary lawmakers, Parliament in England and state legislatures and Congress in the United States. But the role of courts in interpreting, and occasionally announcing new law, has continued until today. Very important to criminal law and procedure, SCOTUS is the final word on the meaning of the Constitution. All of the states have adopted the Common Law, in varying degrees. Louisiana, which was founded by French colonists, more closely follows the French (civil) law, although it has adopted many features of the Common Law, particularly in the realm of criminal law. Because legal history informs our understanding of modern law, there are references to the old Common Law throughout this book.

The Supreme Court often turns to the Common Law in criminal procedure cases. For example, in its 2021 decision *Torres v. Madrid*, the justices relied on Common Law precedent to conclude that shooting a suspect is a "seizure" under the Fourth Amendment, even though the suspect survived and successfully fled.<sup>20</sup> In the Court's words, "[T]he common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped."

## Executive Orders

A form of law that has been in the news a lot in recent years is the **executive order**. The president of the United States, governors of the states, and other officials issue orders. Most executive orders concern the functioning of government, or the execution of the executive's responsibilities. Ordering government offices to close during a crisis or to lower flags to half-mast to honor someone who has died are examples of orders that aren't lawmaking and therefore, are valid. Sometimes these orders are inherent in the executive officer's position. In other instances, the legislature empowers the executive officer to make rules. The recent COVID-19 directives to shelter-at-home, to close businesses, and to socially distance are examples. Most states had legislation in place to address emergencies long before COVID-19 was known to the world. Most state statutes specifically empowered governors and health officials to act during public health emergencies. For example, Minnesota's peacetime emergencies law delegates to the governor the duty to "protect the public peace, health and safety, and preserve the lives and property of the people of the state." It further provides that the governor may direct and control "the conduct of persons in the state," "entrance or exit from any stricken or threatened public place, occupancy of facilities, and the movement and cessation of movement of pedestrians, vehicular traffic," and "the evacuation, reception, and sheltering of persons." It was under this law that the governor declared a peacetime emergency and issued stay-at-home, social distancing, and other executive orders.<sup>21</sup>

A criminal law executive order that finds itself in the news on occasion are pardons, commutations, and reprieves. A pardon absolves a person of criminal liability, a commutation reduces a sentence, and a reprieve is an order to suspend or delay a punishment. In the federal system, the president has absolute authority over pardons and commutations. In the states, this authority is held by governors, boards, or sometimes both.

Sometimes executives, particularly when frustrated with a legislature that won't act to solve a problem, issue orders that involve policy; these orders are new law. For example, President Barack Obama issued an executive order known as Deferred Action for Childhood Arrivals, which permitted individuals who were in the Nation illegally, but who were brought to the country as children, to defer their deportation and President Donald Trump issued an executive order banning immigrants from specific nations from entering the United States. An executive order that goes too far into the business of the

legislature or the courts is unconstitutional. Ultimately, it is the courts that decide if executive orders are constitutional, just as they do with statutes.

### Constitutional Law

The most influential source of criminal procedure law is the Constitution of the United States. Also, all 50 states and the territories have their own constitutions. In this book, references to the “Constitution” are to the Constitution of the United States, unless otherwise noted. As the highest form of law, all laws, federal, state, and territorial must fall in line with it. Laws that violate the Constitution are void. Much of this book is devoted to the Constitution’s role in criminal procedure. Let’s begin with an overview of how the Constitution protects liberty.

### Questions and Problems

1. What governmental bodies are responsible for creating criminal law in the states and federal government today?
2. SCOTUS has decided that the Second Amendment to the Constitution protects the right of the individual to possess a handgun in the home. State legislature conducts hearings on gun-related deaths, which have been on the rise. They learn from researchers that accidental gun shootings account for a majority of the gun fatalities in the home. Consequently, they start a referendum process to amend the state constitution to forbid guns in the home. The referendum is approved by 70% of the voters. Subsequently, Charlton is arrested for possessing a handgun in his home. He asserts that the state constitutional provision is invalid. Is he right? Explain your answer.

## WE THE PEOPLE: THE CONSTITUTION AND CRIMINAL PROCEDURE

### LEARNING OBJECTIVE

Identify the three reasons the Constitution of the United States has a greater impact on criminal procedure today than in the past.

The first three words of the Constitution, *We the People*, pack a punch. After thousands of years of rule by kings, queens, tsars, princes, and potentates of peoples all over the world, a group of people declared themselves to be above the rulers. The Constitution wasn’t created by government. It, and government itself, was created by the people. That basic philosophy—that the people are sovereign—underpins American government, liberty, and the social contract.

As you learned earlier, the Framers intended to protect the individual from tyranny while simultaneously creating a government that would protect the people and enable the Nation to prosper. Dividing governmental power, through federalism and the separation of powers, was one way the Framers used to guard against uncontrolled, centralized power. The original Constitution also contained a handful individual rights, including **habeas corpus**, which provides courts with the authority to review detentions; a prohibition of **ex post facto** laws, or the declaration that an act may not be made after it occurs; a prohibition of legislatures from acting as judge and jury, known as **bills of attainder**; evidentiary requirements and a limitation on the punishment for treason; and finally a guarantee of a jury trial in federal criminal cases.

But when the proposed Constitution went to the states to be ratified in 1787, there was outcry across the Nation about the absence of more thorough protections of individual liberties. The Antifederalists, a group opposed to creating a strong national government, were vocal in expressing their concerns. Thomas Jefferson, Patrick Henry, and George Clinton were of this philosophy. They had two related objections to the proposed constitution. First, they believed the federal government was given too

much power, to the disadvantage of the states. Second, they thought the federal government posed a threat to liberty.

On the other side, Federalists, such as James Madison and Alexander Hamilton, argued that additional protections were unnecessary because the federal government's powers were limited in such a manner that neither state powers nor individual liberties were in jeopardy. The Federalists had another reason to oppose a federal bill of rights. Believing it impossible to identify all the rights people are "endowed with," they feared that an enumeration of rights would later result in limiting liberty to the enumerated rights.

But the concern of the people about the possibility of an oppressive federal government was so great that Madison and other Federalists feared that the Constitution wouldn't be ratified without adding a bill of rights, so they compromised. They agreed to support the creation of a bill of rights immediately following the ratification of the Constitution. The Constitution was ratified when the ninth state, New Hampshire, approved it in 1788. It became effective in 1789.

As promised, the first Congress under the Constitution immediately went to work on a bill of rights. Madison, largely copying the Virginia Declaration of Rights, which had been authored by George Mason, proposed seventeen amendments. Twelve of these were approved by Congress and sent to the states for approval. Ten of the twelve were immediately ratified, to become effective in 1791. You know these ten amendments as the Bill of Rights.

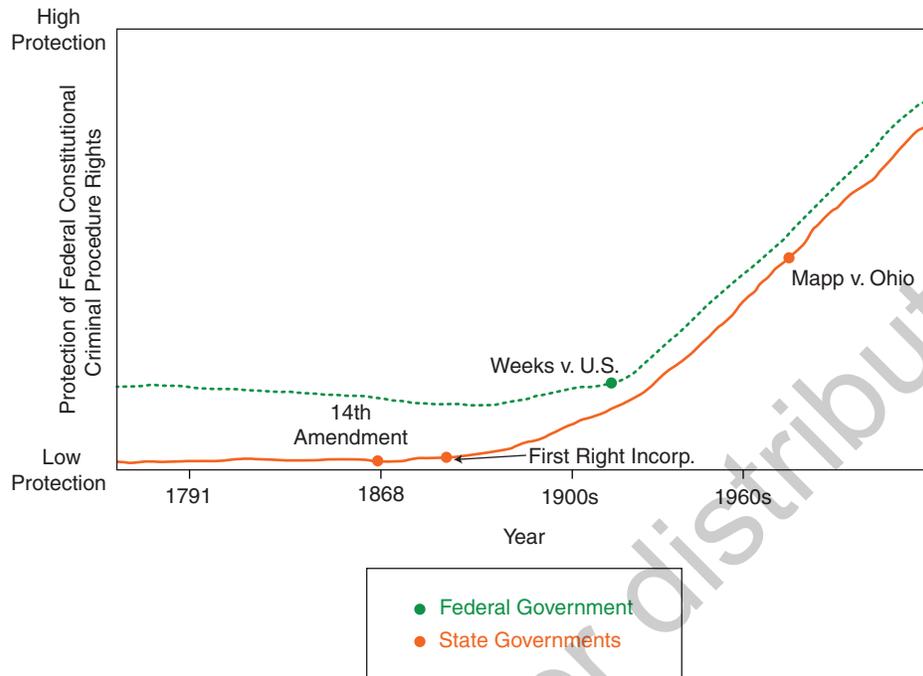
The five proposals that Congress didn't send to the states were a longer declaration of popular sovereignty that was rejected in favor of the succinct *We the People*; a statement about the separation of powers; a provision prohibiting the military draft of men who were "religiously scrupulous" of bearing arms; and the application of three rights to the states, freedom of conscience, freedom of the press, and the right to a jury trial. The first proposal that went to the states but wasn't ratified included a change in the number of members in the House of Representatives. If the amendment had been approved, the House of Representatives would have as many as 6,000 members today. Imagine the chaos of a House that size! The other amendment was eventually ratified in 1992—202 years after it was proposed. It is simple and uncontroversial; Congress can't give itself a pay raise in its current session. Instead, raises don't appear in the members' paychecks until the next session convenes.<sup>22</sup> Known as the Compensation Amendment, it is the Twenty-Seventh and last amendment. A timeline of the significant dates in the history of the Constitution can be found in Figure 1.2.

Let's return to criminal cases. The rights found in the Constitution and the Bill of Rights had a serious limitation. Most notably, only a small segment of the population benefited from them. Consequently, the Constitution wasn't a significant source of law in criminal cases. But there has been a revolution—a **constitutionalization** of criminal procedure over the past 100 years. There are three reasons the Constitution is more important in criminal law, both state and federal, today than in the past:

- incorporation doctrine
- exclusionary rule
- expansion of specific rights

Let's begin with the incorporation doctrine. Historical records make clear that the Bill of Rights was intended to apply to the federal government, but not to the states. That meant that federal government had to respect freedom of speech, couldn't force defendants to confess, and so on. But the states were free to respect these rights, or not. Consequently, the rights of the people varied from state to state. Nearly all prosecutions took place in state courts. So, the rights a defendant enjoyed, or didn't, depended on the state where they were prosecuted. But this would change.

As a result of the Civil War, three constitutional amendments were ratified. The Thirteenth Amendment abolished slavery and involuntary servitude and the Fifteenth Amendment recognized the right of all men, including formerly enslaved individuals, to vote. Women did not acquire the right to vote until the adoption of the Nineteenth Amendment in 1920. The Fourteenth Amendment, ratified

**FIGURE 1.2** ■ Significant Dates in the History of the Constitution

in 1868, is the most important amendment to criminal law. Among many other important declarations, it protects the following rights:

- **Citizenship:** All people born or naturalized in the United States, and subject to the jurisdiction of the United States, are citizens of the United States and of the state where they reside.
- **Privileges or immunities:** SCOTUS has defined this clause narrowly. It includes a few specific rights, including the right to travel between the states and the right to be protected from violence while in custody.
- **Equal protection:** This provision demands that the states not discriminate between people for racial, ethnic, religious, sex, and other reasons.
- **Due process:** Under this provision, a state may take a person's life, liberty, or property only after providing due process. SCOTUS has also held that this clause protects substantive rights, such as the right to privacy.

The Fifth Amendment also has a Due Process Clause that is identical in language to the Fourteenth Amendment's Due Process Clause. Remember, at the time of its adoption, the Bill of Rights only limited the power of the federal government. This changed with the Fourteenth Amendment, which was intended to create a national minimum, a safety net, of fairness. And that is precisely what due process means—to have a fair process. The states are free to raise the safety net higher, for example, to add or enlarge rights, but they can't lower it.

Determining the height and width of the national safety net hasn't been easy. The phrase "due process" doesn't, on the surface, say much. What is due or fair? Defining the meaning of the various clauses of the Fourteenth Amendment has been a slow and bumpy process. There is evidence that Framers of the Fourteenth Amendment had big ambitions for the Privileges or Immunities Clause. And at one time, it appeared SCOTUS would interpret it in this manner. But this changed in the 1870s when the Court all but read the Privileges or Immunities Clause out of the Constitution.<sup>23</sup> Although it didn't happen quickly, the Court eventually turned to the Due Process Clause to protect the procedural

and substantive rights that may have been intended for the Privileges or Immunities Clause. But what rights are protected? Several interpretations were advanced by scholars and justices. These included

Interpretation 1: Independent Meaning Doctrine: The Fourteenth Amendment’s Due Process Clause is not connected to the Bill of Rights. Some of the rights overlap, but the rights found in the Bill of Rights are not the basis of “due process,” and therefore, they do not automatically apply in state courts.

Interpretation 2: Fundamental Fairness Doctrine: A rights found in the Bill of Rights applies against a state when justice demands it. This decision is made on a case-by-case basis.

Interpretation 3: Total Incorporation Doctrine: The Bill of Rights *IS* due process; all of the rights found in the first 10 amendments apply in state courts—automatically.

Interpretation 4: Total Incorporation Plus Doctrine: As is true of Total Incorporation, all of the rights found in the Bill of Rights apply against the states. However, rights deemed fundamental that are not found in the Bill of Rights also apply.

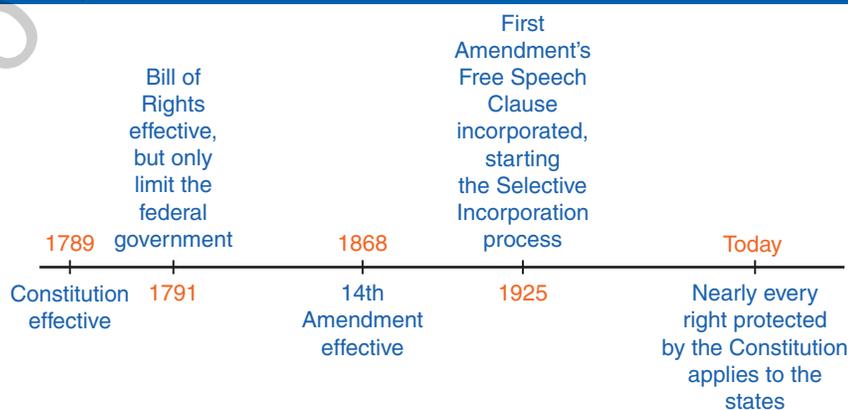
Interpretation 5: Selective Incorporation Doctrine: Only the most important (fundamental) rights in the Bill of Rights apply against the states. Unlike Fundamental Fairness, this isn’t a case-by-case determination. Once a right is found to be fundamental, it applies against the states, in all cases.

After years of disagreement between the justices, SCOTUS settled on the **selective incorporation doctrine**. A right is “selected” to be incorporated if it is (1) fundamental and (2) necessary to an ordered liberty. More simply, a right is incorporated if it is really, really important. Today, nearly all of the rights found in the Bill of Rights have been incorporated. The first to be incorporated was either the Fifth Amendment’s requirement that when government takes property it must provide compensation in 1897 or the First Amendment’s freedom of speech in 1925.<sup>24</sup> Since then, SCOTUS has added, one by one, nearly all of the criminal law rights. The last “textual” right to be incorporated was the freedom from excessive fines in 2019. See Figure 1.3 for a timeline of important dates in the history of the incorporation doctrine, listing of the status of each right found in the Bill of Rights.

In the last sentence, the word textual was enclosed in quotation marks to draw your attention to a detail about incorporation. A textual right is one that you can find written in the Constitution, such as the Eighth Amendment’s right to be free from excessive fines. But there are rights that are unwritten but implicit. These **unenumerated rights** can be incorporated. This happened in 2020 in *Ramos v. Louisiana*,<sup>25</sup> where the Court held that the enumerated right to a jury trial includes the unenumerated right to a unanimous verdict. This right is the most recent to be incorporated. See Table 1.4 for a list of rights and their incorporation status.

The effect of the selective incorporation doctrine is that every judge, in every courtroom in the United States, has an obligation to enforce incorporated rights. And they do. Judges often tell local,

**FIGURE 1.3** ■ Incorporation Timeline



**TABLE 1.4 ■ Is a Defendant Protected in State Court?**

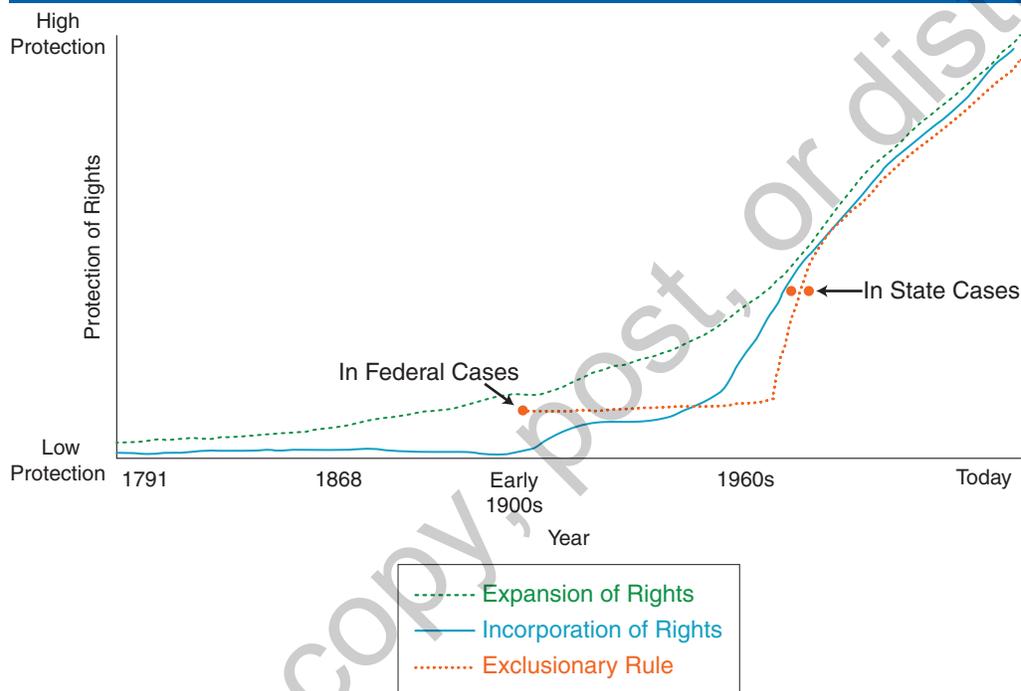
What Right?	Has it Been Incorporated by SCOTUS?
First Amendment—speech	Yes, in <i>Gitlow v. New York</i> , 268 U.S. 652 (1925)
First Amendment—religion	Yes, in <i>Everson v. Board of Education</i> , 330 U.S. 1(1947) and <i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)
First Amendment—press	Yes, in <i>Near v. Minnesota</i> , 283 U.S. 697 (1931)
First Amendment—assembly	Yes, in <i>DeJonge v. Oregon</i> , 299 U.S. 353 (1937)
First Amendment—grievances	Yes, in <i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963)
Second Amendment—arms	Yes, in <i>McDonald v. Chicago</i> , 561 U.S. 742 (2010)
Third Amendment—quartering of troops	No, but lower courts have said yes
Fourth Amendment	Yes, through several cases including <i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)
Fifth Amendment—grand jury	No
Fifth Amendment—self incrimination	Yes, in <i>Malloy v. Hogan</i> , 378 U.S. 1 (1964)
Fifth Amendment—double jeopardy	Yes, in <i>Benton v. Maryland</i> , 395 U.S. 784 (1969)
Fifth Amendment—takings	Yes, in <i>Chicago, Burlington &amp; Quincy Railroad Co. v. City of Chicago</i> , 166 U.S. 226 (1897)
Fifth Amendment—due process	Fourteenth Amendment has its own Due Process Clause
Sixth Amendment—counsel	Yes, in <i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)
Sixth Amendment—public trial	Yes, in <i>In re Oliver</i> , 333 U.S. 257 (1948)
Sixth Amendment—jury trial	Yes, in several cases upholding right to impartial jury, number of jurors, etc.
Sixth Amendment—speedy trial	Yes, in <i>Klopfer v. North Carolina</i> , 386 U.S. 213 (1967)
Sixth Amendment—confront accusers	Yes, in <i>Pointer v. Texas</i> , 380 U.S. 400 (1965)
Sixth Amendment—compulsory process	Yes, in <i>Washington v. Texas</i> , 388 U.S. 400 (1965)
Sixth Amendment—notice of charge	Yes, in <i>In re Oliver</i> 333, U.S. 257 (1948)
Seventh Amendment—jury trial in civil cases	No
Eighth Amendment—cruel punishments	Yes, in <i>Robinson v. California</i> , 370 U.S. 660 (1962)
Eighth Amendment—excessive bail	No, but likely. Referred to as incorporated in dicta in <i>Schilb v. Kuebel</i> , 404 U.S. 357 (1971)
Eighth Amendment—excessive fines	Yes, in <i>Timbs v. Indiana</i> , 586 U.S. ____ (2019)
Ninth Amendment	Although no right has been found exclusively through the Ninth, it has been used as secondary support for rights found under the Fourteenth
Tenth Amendment	Although it refers to powers of the people, no rights have ever been declared under the Tenth

state, and federal police that they are wrong. This is an awesome power that many judges around the world don't possess. Said another way, many people around the world aren't as protected as Americans against governmental abuse.

Recall that incorporation is one of three reasons the U.S. Constitution means more in criminal law today than it did in the past. The second is the creation of remedies to enforce these rights. This includes the **exclusionary rule**, a doctrine that requires illegally seized evidence to be “excluded” from criminal trials. Another remedy is civil liability. Although limited, it is possible today to sue governments and government officers who violate rights in ways that weren't possible at the Nation's founding. You will read more about these remedies in future chapters.

Finally, the third reason the federal constitution has increased in importance in criminal law is the broadening of criminal procedure rights. Think about the rights landscape this way; incorporation expanded rights vertically—through the federal, state, and local levels. Modern interpretation of those rights has expanded them horizontally. For example, few federal criminal defendants who couldn't afford to hire attorneys had a right to appointed counsel in the early 1800s. When the right existed, it only included trial. Further, there was no federal right to appointed counsel in state courts whatsoever. Today, the right to counsel has expanded horizontally to include interrogations by police, pretrial activities, and sentencing. Further, in a vertical expansion, nearly all indigent defendants are entitled to have counsel appointed at the expense of the government in all courts, local, state, and federal. A brief introduction to the constitutional rights that apply to criminal cases follows in the next section of this chapter. You will more closely examine these, and the tools that are used to enforce them, in future chapters. See Figure 1.4 for a visual illustration of the relationship of the three variables that have increased the significance of the Constitution in criminal law.

**FIGURE 1.4** ■ Incorporation, Expansion, and Exclusion



### Questions and Problems

1. What are the three reasons identified in the chapter for the increased influence of the U.S. Constitution in criminal law?
2. The Ninth Amendment was the product of a compromise that was necessary to get the Constitution ratified. To date, the Ninth Amendment has not been used to protect any right. One problem with the Ninth is identifying the rights to be protected. The risk the open-ended and unbounded language of the Ninth presents is that judges could simply apply their own values, and thereby, act as legislators. You will learn later that the Court has recognized several unenumerated rights using the Fourteenth Amendment's Due Process Clause. The right to interracial marriage is an example. It is not found in the Constitution, but the Court held that it is a protected privacy right. How should Ninth Amendment and Fourteenth Amendment substantive due process decisions be made? What evidence should judges rely upon to determine if an unenumerated right exists?

## ON THE RIGHT[S] SIDE OF THE LAW

### LEARNING OBJECTIVE

Briefly describe the criminal procedure rights protected by Constitution and Bill of Rights.

Armed with an understanding that nearly all constitutional rights apply to all levels of government, and that they are backed up with the power of the exclusionary rule, let's look at those rights. What you will read in this section is a brief introduction to these rights. Much of the remainder of the book is devoted to taking a deeper dive into them.

#### First Amendment

The First Amendment protects six freedoms: speech, press, exercise of religion, to be free from the government establishing an official religion, to assemble with other people, and to complain to the government. These rights are substantive. They limit what the government may punish.

#### Second Amendment

The right to keep and bear arms is protected by the Second Amendment. This right is one of the most recent to be incorporated. What "arms" are protected and what it means to "bear" them will be explored.

#### Fourth Amendment

This amendment will receive the greatest attention in this book. It demands that all searches and seizures be reasonable. Further, it requires the government to have probable cause to believe a crime has been committed or that evidence will be found in a specific location before a search or seizure may occur. In some circumstances, it also requires the government to obtain a warrant from a judge. Three chapters are devoted to this amendment. You will learn how it applies to persons, homes, cell phones, cars, and other property.

#### Fifth Amendment

Many rights are found in the Fifth Amendment, including freedom from being tried or punished more than once for the same offense, to a fair process if life, liberty, or property is taken, to be charged by a group of citizens (grand jury indictment), not just a prosecutor, to be free from self-incrimination, and to be compensated for government takings of property. As you read earlier, all of these rights have been incorporated, except grand jury indictment. This right, therefore, is only guaranteed in federal court. Regardless, many states require grand jury indictment under their laws.

#### Sixth Amendment

Commonly known as the trial rights amendment, the Sixth guarantees a speedy and public jury trial, to notice of criminal charges, to confront one's accusers, to use the power of the state to compel witnesses to testify at trial, and to the assistance of counsel in one's defense.

#### Eighth Amendment

The rights in the Eighth Amendment bookend the formal judicial process. On the early end, the Eighth Amendment guarantees, with a few exceptions, the right of a defendant to be released before trial. The right is conditioned upon posting money, known as bail, which is used to ensure that the individual will appear in court. At the other end of the process, freedom from cruel and unusual punishments and excessive fines is guaranteed. Only the Bail Clause hasn't been incorporated. But most scholars agree that it will be incorporated when the issue is next presented to SCOTUS.

## Fourteenth Amendment

You have already been introduced the Fourteenth Amendment's incorporation doctrine. While that would be enough for any amendment to accomplish, the Fourteenth does much more. It guarantees people the equal protection of the laws, privileges and immunities, citizenship rights, and in criminal law, it independently protects several unenumerated procedural and substantive rights, such as the right to privacy and to travel. You will learn more about these rights in chapter 11. Also, it is ready in any individual case to protect a defendant from an unfair practice. In that sense, it is the Constitution's safety net.

## Don't Forget State Constitutions

You are now familiar with the importance of the U.S. Constitution in criminal law. Much of the expansion of criminal procedure rights you learned about occurred during the 1960s, when Earl Warren was Chief Justice of SCOTUS. The period is often referred to as the Warren Court Era. Warren had been appointed by President Dwight D. Eisenhower. A conservative who opposed what the Warren Court did, President Eisenhower referred to Warren's appointment as his "biggest damn fooled mistake." Warren retired in 1969, to be replaced by Warren E. Burger. Chief Justice Burger moved the Court in a more conservative direction, often limiting the impact of the criminal justice decisions of the Warren Court.

Dismayed by the direction of the Court, Justice William Brennan published an article in 1977 calling on the states to strengthen their constitutional protections.<sup>26</sup> For Brennan, if the Constitution wasn't going to expand its protection of the people, state constitutions should. This became known as **new judicial federalism**. In response, many state courts began turning to their own constitutions more than they had in the past. For example, in 2019 the Colorado Supreme Court held that under its constitution that a police dog sniff of a vehicle for marijuana is a search requiring probable cause. The same sniff is not a search under the Fourth Amendment.<sup>27</sup> Other state high courts have also expanded rights beyond what the U.S. Constitution protects. For example, you learned above that sex-based discrimination under the federal Equal Protection Clause are tested using the intermediate "substantial relationship" test. But the California Supreme Court has elevated the review of allegations of sex discrimination by the state to the strict scrutiny standard.<sup>28</sup> Concerning the good faith exception to the Exclusionary Rule that the U.S. Supreme Court adopted, which permits evidence seized illegally, but in good faith, to be used against a defendant, the Pennsylvania Supreme Court wrote, "[w]e flatly reject the notion."<sup>29</sup> So don't forget the states. While they may not reduce U.S. constitutional rights, they sometimes bolster them.

## Questions and Problems

1. Briefly describe the subjects of the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments.
2. The Fourth Amendment imposes three different requirements on governments that conduct searches and seizures. What is the baseline requirement for all searches and seizures? What are the two additional requirements that are sometimes expected?
3. Research your state's constitution. Does it protect any right to a greater extent than does the U.S. Constitution? Compare the protection in your state constitution to the federal constitutions.

## THE PROCESS

### LEARNING OBJECTIVE

Identify the basic stages of a criminal case, from investigation to appeal.

Later in this book, you will read entire chapters devoted to the pretrial and trial processes. Between now and then, however, there will be many references to the various stages of criminal procedure. This section is intended to paint a high-level picture of the stages of a criminal case. There isn't one path that

all criminal cases follow. The process for a case that starts when an officer makes an arrest after personally observing a barroom brawl is different from a case that starts with a secret year-long investigation of government corruption.

The stages of a criminal case include discovery or suspicion of crime, investigation, arrest, formal charge, pretrial, trial, sentencing, and appeal. Police can discover crimes on their own, through luck, surveillance, a confession, or a report by a third party. As you learned earlier, law enforcement officers are largely independent from prosecutors and judges in the performance of their duties.

One occasion where a judge may become involved is when an investigator needs authorization, known as a **warrant**, to conduct a search or to make an arrest. Investigators involve prosecutors when they have legal questions and when they are ready to discuss pretrial and trial strategy.

At some point, law enforcement will turn its case over to a prosecutor, who will make the decision whether to proceed with a prosecution. In some cases, the prosecutor makes this decision. In others, the prosecutor must take the case to a group of citizens, known as a grand jury, who make the decision.

If criminal charges are filed, the person charged, the “defendant,” is either arrested or arrangements are made for the defendant to surrender themselves to police. The defendant is to be quickly presented to a court, where the judge confirms that the person held is the person named in the warrant or complaint, bail is set, a not guilty plea is entered into the record, the rights of the defendant are explained, and an attorney is appointed if the defendant can’t afford to retain their own.

It is at this point that the formal pretrial process begins. Although this stage is still largely under the control of the state and defendant, the court is more involved than during the investigative stage. During the pretrial phase, the defendant and prosecutor continue to collect evidence and develop their factual and legal strategies. The court is often asked to become involved during the pretrial stage. As examples, a defendant may challenge the initial bail decision or ask the court to exclude evidence that was illegally obtained from their trial. A request that a court issue an order is referred to as a **motion**.

Recall from the earlier discussion that the center of gravity of the adversarial process is trial, even though only a small fraction of criminal cases make it to trial. Accordingly, the parties’ efforts are aimed at preparing for, or assessing the likelihood of prevailing at, trial. This assessment is important because it informs discussions, known as plea bargaining, between the prosecutor and defendant to end the case before trial. For state, a plea agreement is efficient. Trials are expensive and time consuming.



Judges authorize warrants for officers to conduct searches or make arrests.

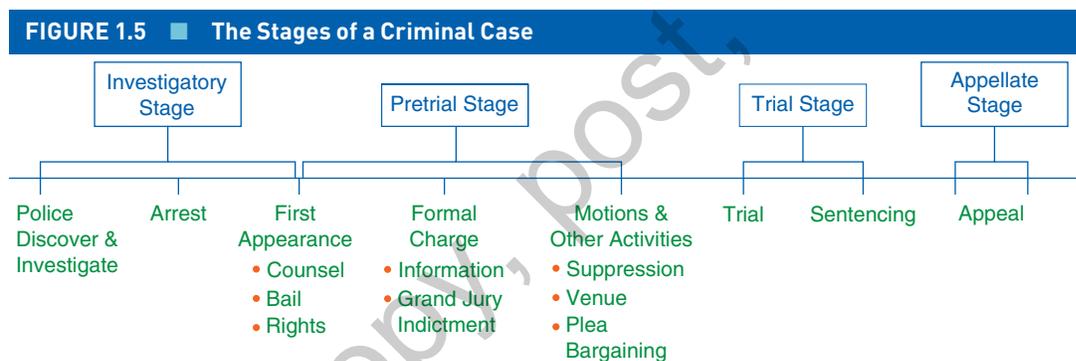
Siriluck Srikumbang / EyeEm/Getty Images

For a defendant, a plea agreement reduces the risk of a more severe punishment. Plea bargaining is controversial today. Concerns about the process will be discussed in a later chapter.

If the parties don't reach an agreement, the case will proceed to trial. In nearly all cases, a defendant has the right to be tried before a jury of peers. A defendant may waive this right and be tried by the judge. At trial, the judge is responsible for making all evidentiary and legal decisions. The jury decides the question of **ultimate fact**: whether the defendant is guilty or not. The standard of proof at trial is high. A jury, or judge, must find the defendant guilty beyond a reasonable doubt on each individual element of the charged crime. Sometimes, the jury must also decide the facts that influence sentencing, such as whether a gun was used during the crime or whether the defendant acted cruelly.

If the defendant is convicted, the judge will schedule sentencing. In the time between the conviction and sentencing, a presentence investigation is conducted. The investigator will gather evidence about the defendant, including the individual's criminal, medical, and psychological histories, as well as evidence about the harm the crime caused on victims. This data is presented to the judge in a presentence report. If the jurisdiction has guidelines for sentencing, the investigator's calculation of the recommended sentence is also included. The sentencing hearing is adversarial, so the defendant and prosecutor may introduce evidence to increase (aggravate) or reduce (mitigate) the punishment.

The final stage is appeals. Because double jeopardy, or being tried or punished twice for the same crime, is prohibited, the state may not appeal an acquittal. But a defendant may appeal their conviction. There are many procedural and substantive limitations to appeals. With rare exception, defendants may not appeal factual errors—"but I didn't do it!" Instead, legal errors may be appealed, such as a judge allowing illegally seized evidence to be used at trial. See Figure 1.5 for a flowchart of the stages of a criminal case.



### Questions and Problems

1. Identify the basic stages of a criminal case.
2. Who decides questions of law? Questions of fact?

## THE PEOPLE IN THE PROCESS

### LEARNING OBJECTIVE

Describe the role of the major participants in the criminal justice system, including the rights of victims that are commonly protected by the states and the differing ethical responsibilities of the prosecutor and defense attorney.

Many people and agencies play important roles in the criminal justice system. This chapter introduces you to the most prominent actors. The defendant is not discussed in this section because most of the remainder of the book is devoted to the rights of the defendant.

## Police

The responsibility to enforce the law, control crime, maintain the peace, to protect people and property, and to provide limited social welfare services falls to law enforcement agencies. In some nations, one or a handful of national police agencies perform these functions. With three layers of government and a tradition of local policing, the United States is different. It has over 18,000 police agencies at the federal, state, territorial, and local levels. There are over 1 million employees, about 70% of them sworn officers, in law enforcement agencies in the United States. On average, there are 2.4 sworn officers per 100,000 residents.<sup>30</sup>

The Federal Bureau of Investigation (FBI), U.S. Secret Service, Drug Enforcement Agency (DEA), and Bureau of Alcohol, Tobacco, and Firearms (ATF) are a few of the many federal law enforcement agencies. At the state level, every state, except Hawaii, has a uniformed state police force and many also have investigative counterparts to the FBI, such as the Kansas Bureau of Investigation.

There are also many administrative agencies, at all levels of government, that have fully empowered law enforcement investigators. The United States Postal Inspection Service, a unit of the United States Postal Service, for example, enforces postal laws, such as theft of the mail, sending obscene and dangerous items through the mail, and mail fraud.

Most law enforcement agencies in the United States are local, e.g. county sheriffs and municipal police. These agencies perform the bulk of traditional crime control and prevention work. The typical agency is small, with less than a dozen officers. At nearly 36,000 officers, New York City has the largest police department in the United States.<sup>31</sup> To qualify to be a municipal or state police officer, a candidate has to complete police academy training, be duly sworn, have no or only a minor criminal history, satisfy physical and psychological health requirements, and be in possession of a high school diploma or a college degree, depending on the agency.

In a nation that falls on the due process side of Packer's continuum, police are expected to perform their duties with respect for individual liberties and fair process. The Constitution is an important source of law in this regard. In addition, police officers are bound by statutory law and departmental policies.

With the exception of constitutional rules announced by SCOTUS, which apply nationally, the expectations and practices of police vary by jurisdiction. Although not law, the International Association of Chiefs of Police (IACP) has two sets of ethical policies, the "Law Enforcement Code of Ethics" and the "Police Code of Conduct." The former is a succinct, broad statement that is written to be used as an oath of office. It states that officers hold a position of public trust and that they are obliged to not to violate that trust.

The Police Code of Conduct is more specific than the Code of Ethics. It prohibits discriminatory treatment of individuals based upon status, sex, religion, political belief, or aspiration; the unnecessary use of force; the infliction of cruel, degrading, or inhuman treatment; violation of confidences, except when necessary to the performance of duties or as required by law; bribery; the acceptance of gifts; refusals to cooperate with other law enforcement officials; and other unreasonable and inappropriate behavior. The Code of Conduct further qualifies the necessary force requirement by stating that force should be used "only with the greatest restraint and only after discussion, negotiation and persuasion have been found to be inappropriate or ineffective." Further, a police officer is expected to behave in a manner that inspires confidence and respect for law enforcement officials. Further, police officers are to attempt to obtain maximum public cooperation and to enforce all laws with courtesy, consideration, and dignity.

Violations of law and departmental policies can result in administrative discipline, revocation of "sworn status," civil liability, and criminal liability. Police accountability is an important and hot contemporary topic. A full chapter is devoted to it later in this book.

For the remainder of this book, references to police or law enforcement officers are to any one of the previously mentioned agencies.

## Prosecutors

Police are half of the executive branch's law enforcement team. Prosecutors are the other half. *Prosecutors* are government attorneys. They are responsible for the adjudication of defendants. Their duties include

filing criminal charges, as well as all other legal documents; engaging in pretrial activity, such as discovery and plea negotiations; and appearing in court. Prosecutors also provide legal advice to police officers concerning the law of searches, seizures, arrests, interrogations, and surveillance techniques. Prosecutors appear at grand jury hearings, where they present evidence and assist the jury in other ways.

At the federal level, the highest law enforcement official and prosecutor is the attorney general, who must be nominated by the president and confirmed by the United States Senate. The attorney general is a cabinet member who heads the Department of Justice (DOJ).

Within each judicial district is one U.S. attorney, a subordinate of the attorney general, who also is selected through the nomination and confirmation process. The U.S. attorneys are the chief federal prosecutors in their respective districts. Although attorneys in the DOJ office in Washington sometimes prosecute cases, most federal prosecutions are pursued by U.S. attorneys. Federal law also provides for the appointment of an independent counsel (special prosecutor) when government officials are suspected of violating the law.

Each state also has an attorney general. The states vary in the structure of their local prosecutorial agencies, but most have elected prosecutors, who may be known as *prosecutor*, *district attorney*, or *state attorney*. The degree to which these individuals answer to the state attorney general differs between jurisdictions. Many municipalities also have attorneys who prosecute ordinance violations.

Like police, prosecutors must adhere to the Constitution. In addition, attorneys are bound by ethical rules. These rules are enforced by bar associations—the professional body that oversees and supports attorneys—and by courts. There are two sets of rules in the United States; the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. Every state has adopted, with local modifications, one or the other. Both defense counsel and prosecutors have responsibilities to their clients. For a defense attorney, the duty is to an individual client. The prosecutor, on the other hand, has a different kind of client—the people. SCOTUS said of the prosecutor:

The prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”<sup>32</sup>

The Model Code of Professional Responsibility states that the “responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”<sup>33</sup> In practice, this means that a prosecutor has an ethical obligation to ensure that a prosecution is warranted and to request dismissal of a charge when demanded by justice. Prosecutors are not to trump up charges or to make false accusations to increase their coercive power in plea negotiations. Prosecutors must request a fair sentence from a court. The use of perjured or falsified evidence violates a prosecutor’s ethical duty to justice and to a court. Also, as you will learn in a later chapter, a prosecutor has a constitutional duty to disclose exculpatory evidence.<sup>34</sup> This includes all evidence that mitigates the degree of an offense or could result in a lesser punishment.<sup>35</sup> Further, prosecutors are not to avoid pursuing a line of evidence because it may lead to exculpatory evidence.<sup>36</sup> Obviously, prosecutors have a duty to follow the law and to ensure that the rights of everyone involved in the process are respected. In short, prosecutors have an obligation to be fair. Conversely, prosecutors have an obligation to pursue a prosecution when the facts of the case demand it. At trial, unless a prosecutor becomes convinced that the accused is innocent, they are to zealously pursue a conviction.

Violations of the law by prosecutors are punished in different ways. Ethical violations may result in discipline by the bar, an offended court, or both. Common sanctions include private and public reprimands, suspension, and disbarment. Under court rules and rules of procedure, other sanctions, such as monetary penalties, may be assessed. All courts have the authority to punish anyone appearing before them, including lawyers, for contempt. Like police, some violations of the law can be prosecuted in both civil court and criminal court.

## Prosecutorial Discretion

Imagine a single police officer happening upon a street gang of 10 who are beating a rival with their fists and weapons. The officer screams for them to stop hitting their victim and to stay in place. But they all run. It is not possible for the officer to catch all of them. Instead, the officer must pursue one, maybe two, of the offenders. The officer has a lot of options. She may choose the slowest runner, the offender who appeared to be in charge, or the offender who used a pipe to deliver their blows. Any of these choices would be reasonable.

Police and prosecutors routinely exercise considerable **discretion** when making these types of decisions, many which must be made in the moment, with little time for reflection. Who to investigate, arrest, and prosecute are all discretionary decisions. There are several factors that are considered in the prosecution decision. First, recall that a prosecutor's, and to a lesser extent, a police officer's, ethical obligation requires that they seek justice, not convictions. Prosecutors are not to maintain a prosecution simply because a case can be won. Rather, the totality of the facts must be examined, and it must be determined that a prosecution will further justice. The justice obligation continues through the entire process. Economics is the second reason prosecutors cannot pursue every case. The resources of the prosecutor and law enforcement agencies are limited. Not every case can be prosecuted, because there are inadequate investigators, police officers, prosecutors, and other resources. Other factors include an accused's criminal, social, and economic history; the likelihood of conviction; the cost of prosecution, including the probable time investment; public opinion; the seriousness of the crime; the desires of the victims; police expectations and desires; and political concerns.

Although prosecutorial discretion is broad, it is not absolute. First, the authority to file a *nolle prosequi*, or dismissal, may be limited. The further along a case is in the process, the more involved the court becomes in the decision. Generally, the decision not to prosecute before the formal charge (information or indictment) is filed is left to the prosecutor without judicial intervention. However, a small number of states require judicial approval of *nolle prosequi* decisions.

Once the formal charge has been filed, judicial approval of dismissal is the rule rather than the exception. This is true in the federal system, which also requires leave of court to dismiss complaints.<sup>37</sup>

Second, decisions to prosecute that are motivated by improper criteria may violate equal protection. The Fourteenth Amendment prohibits each state from taking actions that “deny to any person within its jurisdiction the equal protection of the laws.” Although the Fifth Amendment does not contain this language, the Supreme Court has interpreted the Fifth Amendment's Due Process Clause as requiring equal protection of the laws. A claim that it is unfair to prosecute a person because other known violators are not prosecuted will not be successful, unless it can be shown that the accused has been singled out for an improper reason.

Generally, three elements must be shown to establish improper, discriminatory prosecution: first, that other people similarly situated were not prosecuted; second, that the prosecutor intentionally singled out the defendant; third, that the selection was based upon an arbitrary classification. SCOTUS stated in *Oyler v. Boles*,<sup>38</sup> that there is an equal protection violation when “the [prosecutor's] selection was *deliberately* based upon an unjustified standard.” Prosecutions based upon race, religion, and gender are examples of equal protection violations. Also, a prosecution intended to punish an individual for exercising a constitutional right is improper.

## Defense Attorneys

The Sixth Amendment to the Constitution provides that all persons have a right to be represented by counsel in criminal cases. As you will learn later, the right has expanded from allowing counsel to the government providing counsel to every defendant who is facing jail time and who can't afford to hire their own. Counsel for “indigent” defendants may be appointed from the private bar or, as is the case in many jurisdictions, a public defender will be assigned. Defense counsel—whether a paid private defender or a public defender—owe a client the same loyalty and zeal in representation.

Defense attorneys have demanding, and sometimes morally challenging, ethical responsibilities. Unlike the prosecutor, whose duty is to see that justice is achieved, the defense attorney must zealously

represent the accused, within the bounds of the law,<sup>39</sup> regardless of innocence or guilt. Representation that is dogged, that challenges the state, is zealous. The rule is clear that zealous representation is bounded by the law. An attorney may not fabricate, hide, or destroy evidence. The use of perjured testimony is also forbidden.

The obligation to zealously represent criminal defendants is often misunderstood by the public. A defense attorney is not to be understood as agreeing with, or defending, the alleged crime. Rather, they are holding the government accountable. Defense attorneys act in the public good by providing a line of defense between governmental overreach and the people. Unfortunately, the defense attorney who fulfills their constitutional and ethical responsibilities is sometimes the source of public animosity and ridicule because people transfer their outrage for a crime from defendant to defense counsel.

Another ethical requirement of the defense attorney is to keep client communications secret. Attorneys are generally prohibited from disclosing client communications.<sup>40</sup> In a famous 1975 case, *People v. Belge*, an attorney was indicted for not reporting the known whereabouts of human remains. He learned of the remains during a conversation with a client who was charged with murder. It later came to light that the attorney knew where his client hid the body of a teenage victim and the prosecutor responded to a public outcry by charging the attorney under the health ordinance. The attorney didn't deny violating the law. But he asked the court to dismiss the charge because he was forbidden from disclosing the information by both the code of ethics and the Fifth Amendment's privilege against self-incrimination. The court's decision in the case appears in the next Digging Deeper feature.

## DIGGING DEEPER

Should a defense lawyer be punished for violating a law that conflicts with an ethical obligation?

Case: PEOPLE V. BELGE

Court: Hamilton County Court, New York. 372 N.Y.S.2d 798

Year: 1975

Opinion by: ORMAND N. GALE, J.

In the summer of 1973, Robert F. Garrow, Jr. stood charged in Hamilton County with the crime of murder. The defendant was assigned two attorneys, Frank H. Armani and Francis R. Belge. A defense of insanity had been interposed by counsel for Mr. Garrow. During the course of the discussions between Garrow and his two counsel, three other murders were admitted by Garrow, one being in Onondaga County. On or about September of 1973, Mr. Belge conducted his own investigation based upon what his client had told him and with the assistance of a friend the location of the body of Alicia Hauck was found in Oakwood Cemetery in Syracuse. Mr. Belge personally inspected the body and was satisfied, presumably, that this was Alicia Hauck that his client had told him he murdered.

This discovery was not disclosed to the authorities, but became public during the trial of Mr. Garrow in June of 1974, when, to affirmatively establish the defense of insanity, these three other murders were brought before the jury by the defense in the Hamilton County trial. Public indignation reached the fever pitch; statements were made by the District Attorney of Onondaga County relative to the situation and he caused the Grand Jury of Onondaga County, then sitting, to conduct a thorough investigation. As a result of this investigation Frank Armani was No Billed by the Grand Jury, but [an indictment . . . was returned against Francis R. Belge, Esq., accusing him of having violated [the public health law], which, in essence, requires that a decent burial be accorded the dead, and . . . requires anyone knowing of the death of a person without medical attendance, to report the same to the proper authorities. Defense counsel moved for dismissal of the Indictment on the grounds that a confidential, privileged communication existed between him and Mr. Garrow, which should excuse the attorney from making full disclosure to the authorities. The National Association of Criminal Defense Lawyers, as Amicus Curiae . . . succinctly stated the issue in the following language:

"If this indictment stands, the attorney-client privilege will be effectively destroyed. No defendant will be able to freely discuss the facts of his case with his attorney. No attorney will be able to listen to those facts without being faced with the Hobson's choice of violating the law or violating his professional code of Ethics."

Initially in England, the practice of law was not recognized as a profession and certainly some people are skeptics today. However, the practice of learned and capable men appearing before the Court on behalf of a friend or an acquaintance became more and more demanding. Consequently, the King granted a privilege to certain of these men to engage in such practice. There had to be rules governing their duties. These came to be known as "Canons." The King has, in this country, been substituted by a democracy, but the "Canons" are with us today, having been honed and refined over the years to meet the changes of time. Most are constantly being studied and revamped by the American Bar Association and by the bar associations of the various states. While they are, for the most part, general by definition, they can be brought to bear in a particular situation. Among those is the [rule that] confidential communications between an attorney and his client are privileged from disclosure . . . as a rule of necessity in the administration of justice. . . .

The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense. . . .

When the facts of the other homicides became public, as a result of the defendant's testimony to substantiate his claim of insanity, "Members of the public were shocked at the apparent callousness of these lawyers with the public interest and with simple decency." A hue and cry went up from the press and other news media suggesting that the attorneys should be found guilty of such crimes as obstruction of justice or becoming an accomplice after the fact. From a layman's standpoint, this certainly was a logical conclusion. However, the constitution of the United States of America attempts to preserve the dignity of the individual and to do that guarantees him the services of an attorney who will bring to the bar and to the bench every conceivable protection from the inroads of the state against such rights as are vested in the constitution for one accused of a crime. Among those substantial constitutional rights is that a defendant does not have to incriminate himself. His attorneys were bound to uphold that concept and maintain what has been called a sacred trust of confidentiality.

The following language of the brief of the Amicus Curiae further points up the statements just made: "The client's Fifth Amendment rights cannot be violated by his attorney. . . . Because the discovery of the body of Alicia Hauck would have presented 'a significant link in the chain of evidence tending to establish his guilt' . . . Garrow was constitutionally exempt from any statutory requirement to disclose the location of the body. And Attorney Belge, as Garrow's attorney, was not only equally exempt, but under a positive stricture precluding such disclosure. Garrow, although constitutionally privileged against a requirement to compulsory disclosure, was free to make such a revelation if he chose to do so. Attorney Belge was affirmatively required to withhold disclosure. The criminal defendant's self-incrimination rights become completely nugatory if compulsory disclosure can be exacted through his attorney." . . .

It is the decision of this Court that Francis R. Belge conducted himself as an officer of the Court with all the zeal at his command to protect the constitutional rights of his client. Both on the grounds of a privileged communication and the interests of justice the Indictment is dismissed.<sup>41</sup>

Belge's decision to keep the information secret wasn't only legal, it was ethically commanded. But his decision, even though emotionally hurtful to the victim's family, didn't pose a threat to life or limb. The situation is different when a client may harm someone. An attorney is permitted, but not required, to report a client's intention to commit a crime.<sup>42</sup> Therefore, if a client informs his attorney that he intends to kill his former lover, who he believes will testify against him, the attorney may inform the police without the threat of professional discipline.

An attorney is obligated to represent a criminal defendant when appointed by a court or if requested by the bar association. An attorney may be excused for compelling reasons. In no event is belief in a defendant's guilt or disgust with the alleged acts compelling.<sup>43</sup>

Clients have a right to be kept informed and to participate in their own defense. So, defense counsel is to be in continuous contact with their client. Decision-making authority is divided between attorney and client. The defendant has the absolute right to decide how to plead, whether to accept a prosecutor's offer to settle, whether to testify, and whether to demand a jury trial. Attorneys, on the other hand, are generally in control of lesser decisions, such as what evidence to present and the order of witnesses. There are other decisions that are to be made collaboratively and if there is a conflict between a client and counsel, the attorney may have to be replaced.

## Judges

Courts are the third branch of government, independent of the executive branch's police and prosecutors. The judiciary is responsible for the resolution of disputes and the administration of justice. In criminal law, judges are responsible for issuing warrants, supervising pretrial activity, presiding over hearings and trial, deciding guilt or innocence in some cases, and passing sentence on those convicted.

Having a fair and impartial party make these determinations is an important feature of the U.S. criminal justice system, and is mandated by the Constitution in many instances, as you will learn in the following chapters. A judge has the obligation to remain unbiased, fair, and impartial in all cases before the bar.

Like attorneys, judges are subject to a code of ethics. Most states have enacted the Code of Judicial Conduct. Judges are to be fair and impartial.<sup>44</sup> In criminal cases, judges must be sensitive to defendants' rights and be careful not to imply to a jury that a defendant is guilty.

## Victims

The legal victim of crime is the state. This is why criminal prosecutions are brought by, and in the name of, the government. Every crime also has a victim-in-fact. This is the person who is assaulted, battered, raped, threatened, or robbed. Victims play a role in the investigation and prosecution of their crimes in several ways.

Once overlooked, victims have greater rights to participate in their cases today than in the past. Victims' rights organizations actively lobbied in the 1980s to introduce both state constitutional amendments and legislation to bolster victims' rights. Change was quick. In 1982, only four states had victims' bills of rights. That number increased to 44 by 1987, and today, all 50 states and the federal government have victims' rights laws. Similarly, **victim impact statements**, once constitutionally forbidden, are now permitted at sentencing in a majority of states.<sup>45</sup>



Olympic gymnast Aly Raisman gives a victim impact statement at the trial of former USA Gymnastics team doctor Larry Nassar. Nassar was convicted of multiple counts of sexual assault of a minor.

Associated Press/Dale G Young

The federal government's victims' rights statute is a good illustration of victim's right legislation. It reads as follows:

18 U.S.C. § 3771. Crime victims' rights

(a) RIGHTS OF CRIME VICTIMS. —A crime victim has the following rights:

1. The right to be reasonably protected from the accused.
2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
5. The reasonable right to confer with the attorney for the Government in the case.
6. The right to full and timely restitution as provided in law.
7. The right to proceedings free from unreasonable delay.
8. The right to be treated with fairness and with respect for the victim's dignity and privacy.
9. The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
10. The right to be informed of the rights under this section and the services described in section 503© of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607©) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

There are constitutional limitations to victims' rights. The Sixth Amendment's right to confront an accuser and to cross examine witnesses is an example. For example, a law that allows adult accusers in sexual assault cases to testify virtually, in an effort to protect them from emotional distress, violates the Confrontation Clause. However, in a reasonable exception to the rule, a young child is permitted to testify remotely and a defendant's cross examination of an alleged child victim can be limited in manner to protect the child from emotional harm.<sup>46</sup>

One issue in victims' rights that has been controversial has been the use of **victim impact evidence** in sentencing, parole, pardon, and clemency decisions. Victim impact evidence refers to a victim's testimony about the physical, emotional, and financial harm caused by a crime. This evidence may not be heard at trial because it is not material to the guilt decision. But it is used for other purposes, including sentencing, parole, pardon, and clemency. Its influence in parole, pardon, and clemency is less contentious than its use at sentencing. Even SCOTUS has waffled on this question.

In *Booth v. Maryland* (1987),<sup>47</sup> SCOTUS held that consideration of victim impact evidence in a capital case violates the Eighth Amendment's prohibition of cruel and unusual punishments because it "may be wholly unrelated to the blameworthiness of a particular defendant, and may cause the sentencing decision to turn on irrelevant factors such as the degree to which the victim's family is willing and able to articulate its grief, or the relative worth of the victim's character. Thus, the evidence in question could improperly divert the jury's attention away from the defendant. Moreover, it would be difficult, if not impossible, to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." Just two years later, the Court expanded *Booth* in *South Carolina v. Gathers* (1989)<sup>48</sup> to include victim impact statements by prosecutors to juries. And then again, only two years later, the Court handed down another decision on victim impact evidence. But the Court had changed in this two year period. Two of the of the justices who voted in the 5–4 majority in *Booth*, William J. Brennan and Lewis F. Powell, had retired and were replaced with justices who saw things differently. Consequently, in a 6–3 vote, the Court overruled *Booth*'s conclusion that the use of victim impact evidence is per se unconstitutional in *Payne v. Tennessee* (1991).<sup>49</sup> And that decision stands. So, victims are heard by judges and juries at the sentencing stage in most jurisdictions. But *Booth* wasn't overruled entirely. A few of the limitations announced in *Booth* continue today, such as

limiting the testimony of victims to the harm they personally experience. They may not comment on the punishment they deem appropriate or speak to the crime itself, except as witnesses in the guilt phase of the trial. Also, the Due Process Clauses of the Fifth and Fourteenth Amendments empower trial judges to limit or exclude evidence that is unduly prejudicial or duplicative.<sup>50</sup>

Victims are also more likely to be compensated for their financial losses than in the past. Trial courts can order convictees to pay restitution to their victims and many states and the federal government have publicly funded **victim compensation funds**. Ohio, for example, allows victims of violent crime to apply for compensation up to \$50,000 for medical, psychological, crime scene cleanup, funeral, and other expenses. Between 1976 and 2019, Ohio paid more than \$380,000,000 to crime victims. The fund also reimburses medical facilities for sexual assault testing and offers grants to victim support services, domestic violence shelters, child advocates, and similar programs.<sup>51</sup>

**Restorative justice** has received a lot of attention in recent decades. The guiding purpose of a restorative justice approach is to restore the victim, offender, and community to their pre-harm places. Retribution and incapacitation are deemphasized. Restorative justice is wholistic; it equally considers the interests of all of the parties involved. Its method is less formal than the traditional adversarial approach. The victim, offender, and possibly others are brought together in an effort to repair the harm to the victim and to find a way to restore the offender's standing in the community through a process aimed at reaching consensus. Admission of guilt, apology, forgiveness, service, compensation of the victim, and rehabilitation are common objectives. This doesn't preclude incarceration, fines, or other traditional punishments, but they are deemphasized. The process is believed by some to facilitate the psychological healing of the parties, in addition to satisfying retributive, rehabilitative, and deterrence objectives. Communities around the United States are experimenting with restorative justice in different ways. Regardless of the model, victims have a greater role in restorative justice than in the traditional adversarial system.

Finally, as you learned earlier, victims may sue their offenders in civil court for intentional and negligence torts. Damages in civil law are broader than court ordered restitution. Restitution is limited to "out of pocket" expenses, including medical and psychological services, loss of income, and property damages. Civil damages, on the other hand, include out of pocket expenses, as well as pain and suffering and loss of marital consortium (sex and companionship). Both criminal and civil courts may also order the return of property.

Recall from an earlier chapter that the burden of proving liability is lower in civil cases, typically preponderance of the evidence. So, it is easier to prove that a defendant committed the alleged offense in tort law. Regardless of the differing standards for proving commission of the offense, the standard for proving the harm is the same for criminal restitution and civil damages; preponderance of the evidence. In criminal law, after a defendant is found guilty beyond a reasonable doubt, a separate sentencing hearing occurs, at which the prosecutor is only expected to prove a victim's harm by the lower preponderance standard.

There is another important difference between civil and criminal law; most of the constitutional protections of criminal law are not applicable. As examples, a defendant may be called to testify without violating the Fifth Amendment and the Exclusionary Rule doesn't apply. One limitation on restitution that doesn't exist for civil damages is a defendant's ability to pay. Although SCOTUS has not decided it, many courts assume the Eighth Amendment's prohibition of excessive fines limits restitution. Beyond the Eighth Amendment, many states have imposed this limitation statutorily. Civil courts are not limited in this manner. Indeed, the largest barrier to victims receiving financial compensation is the inability of perpetrators to pay.

From the victim's perspective, restitution is often preferable to civil action because the prosecutor, not a hired attorney, is responsible for proving the case, it often occurs more quickly, and it can be enforced through contempt citations, while civil judgments rely on less effective enforcement methods. This isn't true, however, if a victim wants to recover loss of consortium or pain and suffering damages. To obtain this compensation, a victim must civilly sue their offender. Whether the offender is prosecuted has no bearing on a victim's ability to sue. Also, acquittal in a criminal court does not preclude a civil judgment. An example was the high profile case of former professional football player

and actor, O.J. Simpson. He was criminally charged and acquitted of murdering his ex-wife, Nicole Brown Simpson, and her friend Ronald Goldman. Following the acquittal, Mr. Goldman's father sued Mr. Simpson for the wrongful death of their son and won a judgment of over \$33 million. Why it is possible, and consistent, for the state to lose the criminal case but the family to win the civil case will be discussed in more detail in a later chapter.

### Questions and Problems

1. A prosecutor has filed a criminal charge against Ronald. During a pretrial interview with the state's only eyewitness, the prosecutor becomes convinced the witness is lying about what she observed. Without the witness' testimony, the state doesn't have enough evidence to establish probable cause. But the witness is so highly regarded and credible that the prosecutor expects her testimony to persuade the jury to convict. The victim of the crime is advocating for the prosecutor to go to trial. What is the prosecutor's ethical obligation? Explain your answer.
2. Finch Atticus, a defense attorney, is representing Ronald against charges of assault. Although he has no proof of his guilt, Finch doesn't believe Ronald's story and concludes that he is guilty of the crime. What is Finch's ethical obligation in this situation? Explain your answer.
3. Identify and discuss two ways crime victims play a greater role in the prosecution of their cases than in the past.

### IN A NUTSHELL

All modern societies balance the liberties of the individual against society's need for order and security. The balance varies between nations. In the United States, liberty is prioritized. This perspective is a part of the American DNA, as reflected in its revolutionary birth and Enlightenment philosophical influences. Individual rights are thought to be inherent. They aren't given by government; they are a gift of birth. Herbert Packer's model presents a way to conceptualize this balance in criminal justice. Of the two poles he identified, crime control and due process, the United States falls closer to the latter. The long history of the common law, beginning with the Norman Conquest of 1066, has been a continuous march in the direction of limited government and rule of law. The march continued in the American colonies, as seen in the conduct and laws of colonists, in the Constitution and Bill of Rights and in the expansion of rights in their breadth, in their depth through Incorporation to the states, and in their effect through the Exclusionary Rule.

The state's authority to limit the individual's freedom is legitimized by the theory of social contract. As America has become larger in population, more economically and technologically complex, and more socially diverse, the social contract has been strained. Unity is easier in a small, simple, heterogeneous nation. Undoubtedly, America is grappling with how to adapt its republican form of government with its contemporary reality. This challenge has implications for the criminal justice system. Social unrest can lead to a rebalancing of liberty and security, in favor of the latter. It will be important for the Nation to remain true to its best ambitions and principles, including due process, proportionality in punishment, and rule of law as it adapts.

### KEY TERMS

Adjudication  
Adversarial system  
Bills of attainder  
Blackstone's Ratio  
Civil law  
Commerce Clause  
Common Law

Constitutional law  
Crime control model  
Criminal law  
Criminal procedure law  
Due process model  
Ex post facto law  
Exclusionary rule

Executive orders  
Factual guilt  
Habeas corpus  
Inquisitorial system  
Jurisdiction  
Legal guilt  
Motion  
Necessary and Proper Clause  
New judicial federalism  
Ordinances  
Private law  
Public law  
Referendum

Regulations  
Restorative justice  
SCOTUS  
Social contract  
Statutory law  
Substantive criminal law  
Supremacy Clause  
Ultimate fact  
Unenumerated right  
Victim compensation fund  
Victim impact evidence  
Warrant

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