

FUNDAMENTALS OF

.....
CRIMINAL LAW

Caught in the Act

DANIEL E. HALL



Fundamentals of Criminal Law

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Fundamentals of Criminal Law

Caught in the Act

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PREFACE

The goal of this textbook is to offer students a comprehensive survey of criminal law in an accessible format with examples that are relatable to college students in the 2020s. After 30 years of textbook writing, I have learned that student readings do not have to be dense and impenetrable to be effective. On the other hand, students need to be challenged to dig into concepts, to learn terminology and doctrine, and to apply the law. To accomplish these apparently conflicting goals, several writing and pedagogical techniques have been employed.

WRITING STYLE AND PEDAGOGY

In what I believe to be a unique feature, nontraditional headings are used to ease the reader into the subject and to provoke student curiosity. The section on battery, for example, is titled “Sticks and Stones May Hurt Me,” followed by the section on true threats, which is titled “Words May Hurt Me.”

The study of criminal law involves a considerable amount of element learning, and it is common to embed the elements in the author’s narrative discussions. Often, these discussions leave students unsure about a crime’s specific elements, particularly when jurisdictional variances are acute. For clarity and to frame my narratives, I have included a specific listing of the elements, often at the start of a discussion. This approach not only frames the discussion but acts as an easy reference for the student who later returns to the material for a quick refresher.

Most significantly, the book is written specifically to the undergraduate student who may be taking their first law course. Legal terms are defined as they are encountered for the first time, and the writing style is purposely accessible. The writing level and style is intended to speak to, but not down to, students. These objectives aren’t accomplished at the expense of learning. Students are eased into more challenging material.

PEDAGOGY

An introductory text naturally includes lower-level cognitive learning. But it doesn’t have to be limited to it. To push students up the Bloom’s taxonomy, examples that illustrate how the law applies to specific factual scenarios appear throughout the book. Students themselves are asked to apply what is learned through questions and problems that appear in every topical section, as opposed to the traditional method of having students do this after an entire chapter has been read.

I believe that reading judicial opinions is good for learning, for many reasons. They reinforce the narrative discussion, develop analytical and reasoning skills, and often humanize the subject. Students are interested in real people engaged in real conflict. Cases speak to them. Of course, there isn't room in a textbook for 20-page judicial opinions, nor is it important that every student read every case in full. So highly edited cases appear in every chapter in a feature titled Digging Deeper. The case excerpts are not used exclusively to teach the law, as is often done in law school. Rather, they supplement the narrative discussion. Accordingly, the cases can be skipped without any loss of content if you don't have the time or interest in the case method.

There are many factors that influence my case selection and editing decisions. Obviously, relevance and how well a case illustrates the subject are the most important. How amenable a case is to reduction, its age, and the quality of the court's writing also are considered. To make the cases more reader-friendly, editorial liberties have been taken. Sting citations and other references have been removed without indication. Other redactions are signaled with ellipses.

Graphics can be good learning tools. Many graphics and charts that compare, summarize, and illustrate concepts appear throughout the text. Photos have also been included to break up the text and to connect the subject to contemporary or historic events.

To appeal to students "where they are," many examples are drawn from contemporary events. Chapters open with crime stories, often from the headlines, and similar references to contemporary events and problems are found throughout the chapter discussions. There has been a lot of change to criminal law in recent decades, and more is to come during the 2020s. Although the objective of this book is to teach what the law "is," contemporary questions about what it "ought" to be are acknowledged and, on occasion, given brief exploration.

CONTENTS

The first chapter begins with a brief history of the Common Law and how it has shaped American criminal law. The centrality of the due process model, the distinction between civil and criminal law and between criminal law and procedure, the purposes of punishing offenders, the sources of criminal law, and how crimes are classified are all examined.

An introduction to the United States Constitution, with an emphasis on the amendments that limit the authority of the state to criminalize conduct, is the subject of the second chapter. The exclusionary rule and the role of state constitutions in the protection of liberty are highlighted.

The third chapter details the architecture of crimes and their essential elements. *Mens rea*, *actus reus*, attendant circumstances, concurrence, and causation are examined closely. This is followed in Chapter 4 with a discussion of the parties to crimes and incomplete crimes. Many authors cover this material later in their books. But I believe that earlier is better; it prepares the students to apply causation and relative liability to the crimes and defenses that follow.

Defenses to crimes are split into two chapters. Justifications and factual defenses are found in Chapter 5 and excuses in Chapter 6. Many good recommendations were made by

the reviewers. One was to address crimes against the person before homicide, so Chapter 7 is devoted to crimes less than murder and Chapter 8, to homicide. Special attention is given to civil rights crimes, including the laws that apply to police misconduct.

Chapter 9 turns from crimes against people to crimes that involve property, including trespass, arson, burglary, and theft. Chapter 10 expands on Chapter 9 by taking a deeper dive into two growing areas of crime—commercial offenses and cybercrime. Problems that students will recognize from the lives of their contemporaries, such as sexting and cyberbullying, are included.

Chapters 11 and 12 cover crimes against the public and state. Specifically, Chapter 11 covers morality-based and other public welfare offenses. Chapter 12 offers broad coverage of crimes against the state as a political entity. In a post-9/11, post-U.S. Capitol insurrection world, this chapter contains timely and important material. It uses select prosecutions of the breach of the Capitol on January 6, 2021, as a platform to discuss many of the crimes featured in the chapter. Both Chapters 11 and 12 build on earlier discussions of the First Amendment by applying the Miller and O'Brien tests to the offenses discussed.

SUMMARY OF PEDAGOGICAL FEATURES

- Accessible, student-friendly writing style
- Comprehensive coverage, but not so long to be overwhelming or so dense to be dull
- Fun, thought-provoking headings
- Excerpted cases in the Digging Deeper feature that illustrate content and enable analytical development (if preferred, may be omitted without any loss of content)
- Contemporary problems, examples, and content
- Questions and problems at the end of every section
- Examples and factual hypotheticals throughout
- Graphics, data tables, summary tables, illustrations, and photos throughout
- Running glossary

ANCILLARY MATERIALS

- **Chapter Test banks** provide a diverse range of pre-written options as well as the opportunity to edit any question and/or insert personalized questions to effectively assess students' progress and understanding

- **Lecture notes** summarize key concepts by chapter to ease preparation for lectures and class discussions
- Editable, chapter-specific **PowerPoint slides** offer complete flexibility for creating a multimedia presentation for the course
- **Sample course syllabi** for semester and quarter courses provide suggested models for structuring one's course
- **Class activities** for individual or group projects provide lively and stimulating ideas for use in and out of class reinforce active learning.
- A course cartridge provides easy LMS integration

SUGGESTIONS FOR THE USE OF THIS BOOK

For lower-division courses that emphasize content learning, the book and its ancillary resources can be used exclusively. If an awareness of local law is part of the curriculum, the book is easily supplemented by asking students to read the counterpart state statute (or local ordinance). This offers the opportunity for students to compare the Common Law—or the dominant approach—that is described in the book with your state's specific laws. This type of comparative analysis enriches students' learning.

If the learning objectives of a course are to develop higher-order cognitive skills, as well as to learn the content, case analysis is a good supplement to the readings. In my classes, I have all students in my classes read all of the case excerpts in the book. In addition, I assign each student two or more cases, depending on the size of the class, to find, read fully, brief, and present to the class. Typically, I add more recent cases (or state-specific cases) to the cases that appear in the book. Students enjoy being the master of their cases, and I have discovered that the case method, as old as it is, is a very good pedagogical tool for developing analytical and communication skills.

Criminal law is exciting beyond legal doctrine. Police accountability, juvenile culpability, the legitimacy of holding one person responsible for the actions of others, the insanity defense, the balance of free speech and regulating harmful expression, whether plea bargaining is unfairly coercive, police and prosecutorial discretion, decriminalization of drug and petty social welfare offenses, and the nation's evolving values about sexual assault are issues of continual discussion in social media; they command the headlines in the mainstream media, and quite likely, they are important to students. Tapping into these topics through supplemental readings, debate, research, and presentations allows students to explore the complexities of crime, criminal law, and punishment.

Daniel E. Hall

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OVERVIEW OF CRIMINAL LAW

Criminal law is an exciting subject. Criminal conduct is interesting because it represents the worst of humanity—scandalous, selfish, and sometimes cruel and inhumane acts. Some crimes get attention because they are clever, occasionally genius. If you are like most people, most of what you know about criminal law has been learned from media in the form of news reports, movies, television, and streaming crime dramas. Unfortunately, *Law and Order* doesn't always get it right. That is where this book, and your criminal law course, step in. By the time you have completed reading this book, you will be able to impress, or possibly annoy, your friends and family by explaining what is right and wrong in their favorite crime shows.

A LONG HISTORY

Learning Objective: Explain the development of the Common Law, as applied to criminal law, from its origin to today.

When threatened, humans have two natural responses: fight or flight. And for most of human history, one or the other happened when a person was threatened or harmed. The response was personal, reflexive, and driven by the instinct to survive. Several thousand years ago, however, these in-the-moment responses were supplemented. Vendetta, or seeking revenge after the fact, is an example. Vendetta transcended the fight-or-flight instinct. It is cognitive, reflecting either a desire for retribution or to incapacitate offenders so they are no longer a threat. In time, personal responses evolved into collective action. The community, not the victim or the victim's family, began to hold offenders accountable. Unbounded vengeance was replaced with norms of justice and proportionality. These ideas were often expressed in written codes or court decisions.

The earliest known code of law in human history, Ur-Nammu, dates back to 2000 B.C.E. in Mesopotamia. It includes several crimes and punishments, including death for committing murder and robbery as well as fines for poking out the eye, cutting off the nose with a copper knife, or severing the foot of another person. Other ancient laws, such as the Code of Hammurabi (mid-1700s), also contain what the modern world would consider criminal laws.

By the 11th century, two families of law emerged in Europe: **Civil Law** and **Common Law**. Civil Law was first seen in Italy in the 7th century, faded away, and was revived in the 11th century. It then spread from Italy to nations throughout Europe, and those nations spread it around

Criminal law: A branch of law, and legal study, that defines criminal offenses and defenses to criminal accusations.

Civil law: A branch of law concerned with the private rights of individuals. It is intended to provide individuals with a legal mechanism to be compensated for their injuries by the people who harm them.

Common Law: A comprehensive approach to law that relied, in its early development, on courts—not legislatures—to create law. They did this by deciding the law of individual cases. That law then became precedent for future like cases. Founded in 11th-century England, it spread to England's colonies and territories and was brought to the United States by colonists. The Common Law is a lower form of law than constitutional and statutory law.

Inquisitorial system: A method of investigation and adjudication found in Civil Law nations, such as France and Italy. Characterized as a continuous investigation, courts play an active role in the entire process, including the evidence gathering and theory development of a case.

the world as they expanded their colonial empires. It is found in the majority of the nations of the world today. Civil Law relies on written codes made by legal experts—and later legislatures—as the primary source of law.

The Civil Law's **inquisitorial system** of adjudicating cases empowers judges over prosecutors and defendants to oversee investigations, develop the factual theories of cases, and run trials. Inquisitorial systems are run as continuous, somewhat cooperative investigations.

The Common Law traces its roots to the Norman Conquest of England in 1066. The Norman kings brought a very different form of law to England. Before the Norman invasion, the law was feudal. Wealthy landowners made and enforced the laws and, therefore, law varied from place to place. These geographic spaces were known as shires and hundreds. In the early years of Norman rule, judges, not a legislature, made the laws. Eventually, through a system of hierarchy, lower courts were expected to follow the precedent of higher courts (*stare decisis*). This resulted in England's first national laws—or laws that were “common” to all people. Unlike the Civil Law, where law was changed abruptly through legislation, the Common Law evolved incrementally, as judges interpreted and applied the law to new cases.

Common Law nations use the **adversarial system** of adjudication. Differing considerably from the inquisitorial system, the adversarial system empowers the parties to advance their own theories of the case and to put on their own evidence. Judges are passive, acting as referees in a competition to find the truth.

Although the judges in old England were less active in developing the facts of cases, they were, and continue today, to be responsible for deciding the law and procedure of individual cases. The effect of hundreds of years of decisions, creating law that was applied in future cases through *stare decisis*, is a large body of judicially created substantive and procedural law.

Outside of the courts, many historical events also shaped Common Law. One of the most significant events was the **Magna Carta**, or “Great Charter of Liberty,” of 1215. The Magna Carta was a political–legal document forced upon King John by rebelling nobles. Through the Magna Carta, the King recognized that he was subject to the law, promised not to interfere with churches, and recognized several individual rights, including a right to inherit property, to be free from oppressive taxation, to be tried by a jury of peers, to receive due process, and to be free from arbitrary imprisonment. Just as the Magna Carta was compelled under threat of sword, it failed shortly after the sword was sheathed. Lasting only 3 months, King John, with the support of the Catholic Pope, suspended the Magna Carta. John died months later, leaving a 9-year-old heir to the throne, Henry III. Too young to rule, a regent was appointed to rule until Henry III reached adulthood. The regent reinstated a modified version of the Magna Carta in 1216 and another version in 1217. Henry III issued the final version of the Magna Carta in 1225, 2 years after he assumed control.

Adversarial system: A method of investigation and adjudication found in Common Law nations. Characterized as a competition, the parties are active, and the judge is in the role of referee, only becoming involved periodically to resolve disputes or ensure justice.

Magna Carta: Also known as the Great Charter of Liberty. Forced upon King John in 1215, it represents the first appearance of rule of law.

Rule of law: The idea that all people, including government leaders, are subject to the law.

While previous rulers in world history had granted rights to the people, the Magna Carta is regarded as the first demonstration of **Rule of Law**, the idea that laws should apply to everyone, because King John acknowledged that he didn't give the rights to the people—they existed with, or without, his consent. Of course, it was a different time and not all people enjoyed these rights. Only the powerful were protected by them. Regardless, the Magna Carta set the stage for the development of the rights that are protected by the federal and state constitutions today.

Subsequently, other important laws about crime and criminal procedure were issued by Parliament, with the consent of the monarch, including the Petition of Right of 1628, which reinforced the Common Law right to have imprisonment reviewed for lawfulness (*habeas corpus*), prohibited martial law (the suspension of law and rights) during peacetime, limited the authority of the monarch to tax, and forbade the quartering of troops in citizens' homes. Sixty-one years later, another important law protecting the rights of people was issued. Through the English Bill of Rights of 1689, the Crown recognized the supremacy of Parliament over the monarchy, as well as the rights to free speech in Parliament, to petition the King with grievances, to be free from the quartering of troops in one's home, to receive a jury trial in certain cases, to be free of cruel punishments, and to be free from excessive fines.

The English courts also created important legal principles, many that are found in England, the United States, and other liberal democracies today. The requirements that a defendant be convicted by a high standard of proof, beyond a reasonable doubt, and the presumption of innocence are examples. Add to these developments the philosophical influence of the Enlightenment, with its ideas of proportional punishment, due process, freedom of speech, and empiricism, the adversarial system was molded to not only find factual guilt but to protect the rights of defendants. This combination of **factual guilt** (did the defendant actually commit the crime?) and a requirement of a fair process is known as **legal guilt**.

As happened with Civil Law, the English Common Law followed England to the peoples it colonized. This included peoples from all over the world. India, Australia, New Zealand, Belize, Barbados, most of Canada, Fiji, Ghana, Hong Kong, and of course, the United States are among the many Common Law jurisdictions. The rights found in the U.S. Constitution and its first 10 amendments, the Bill of Rights, often mimic and sometimes extend what first developed in England.

An authoritative expression of the early Common Law that is still relied upon today is Sir William Blackstone's *Commentaries on the Laws of England* published in 1765. These books were so important that early American lawyers and judges would keep a set in their saddlebags as they traveled from town to town to practice law or to hear cases.

The influence of the Common Law didn't stop at the ratification of the Constitution. You will find references to old British Common Law in court decisions issued today. The presumption of innocence and proof beyond a reasonable doubt, for example, are not found in the U.S. Constitution, but the Supreme Court of the United States (**SCOTUS**) has found them to be

Factual guilt: To commit the elements of a crime.

Legal guilt: The idea of investigating and adjudicating criminal suspects using a just process. Factually guilty people may be punished less harshly or not at all when treated unfairly in the process.

SCOTUS: Supreme Court of the United States.

implicit in the guarantee of due process because they have been a part of the Common Law for centuries. British roots can also be seen in U.S. courts every day, where defendants and prosecutors compete to persuade juries of their respective truths while judges stay on the sidelines, except to referee disputes and ensure fairness. See Figure 1.1 for a timeline of important dates in the history of the Common Law.

QUESTIONS AND PROBLEMS

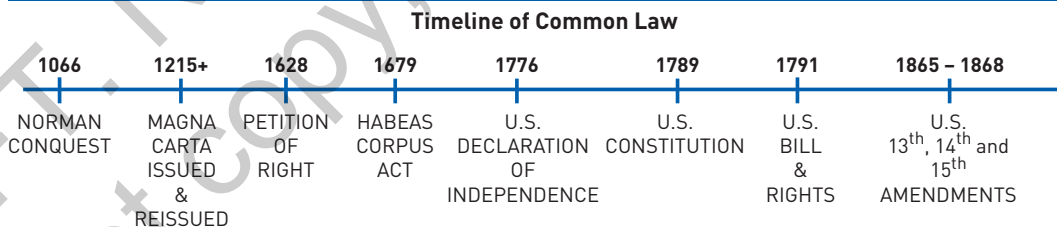
1. What was the Magna Carta, and why is it significant to U.S. law today?
2. Distinguish factual guilt from legal guilt.

WHAT CRIMINAL LAW IS

Learning Objective: Define criminal law.

A crime is an act that society finds so harmful, threatening, or offensive that it is forbidden and punished. Not all social wrongs are crimes. Has someone with a cold ever shook your hand or not covered a cough when standing near you? These are socially unacceptable acts, but they don't lead to arrest and punishment. However, if the person has a disease that is more dangerous and infectious than a cold, such as COVID-19, the same act may be a crime.

FIGURE 1.1 ■ Timeline of Common Law



Folkways: Expected rules of behavior that have evolved to give order to life.

Crime: An act that society finds so harmful, threatening, or offensive that it is forbidden and punished.

Norms: Expected behaviors.

Defense: Law or fact that is used to reduce or fully eliminate criminal liability.

Every society has informal ways of life. Social expectations about behavior are known as **norms**. There are several types of norms. A **folkway** is an expectation that makes life more orderly and predictable. But it is not grounded in morality. For example, it is customary in the United States to permit people on an elevator to get off before entering. There are good reasons for this practice. It speeds up the process of stopping between floors and makes it easier for passengers to get on and off the elevator. But to step on before others have had time to get off doesn't violate a moral code; it is just inconsiderate. A norm that is grounded in morality is known as a **more**. An extramarital affair is an example of a violation of a more because most people believe this conduct to be immoral.

Laws are a third type of norm. The key distinction between law and other norms is the use of a community's authority to enforce laws. In criminal law, that means to create formal laws and to adjudicate and punish people who violate them. In most cases, crimes are also violations of folkways or **mores**. Rape, for example, is both immoral and criminal. On the other hand, fewer mores are crimes. Recall the earlier example: extramarital affairs. At one time illegal, today they are not, but regardless of the law, most people find sexual cheating to be morally wrong.

Criminal law, as a branch of law and as an academic field of study, defines crimes and the defenses to criminal accusations. As you will learn later in this chapter, many legal authorities can declare an act to be a **crime**. These same authorities can also declare that people charged with certain crimes are entitled to use a **defense**. In some cases, the Constitution of the United States, as well as each state's constitution, may offer a defense. Said another way, constitutions sometimes protect the rights of people to act. The First Amendment, for example, protects many rights, including the freedom to believe and practice any religion. If the United States were to make it a crime to attend a Catholic mass and Nadia were arrested for violating this law, she would hold up the First Amendment as her defense, and unless the judge knows nothing about the law, the case would be dismissed.

QUESTIONS AND APPLICATIONS

1. Define criminal law.
2. Caroline is enjoying lunch at BigBurrito. The restaurant is very crowded. Near the end of her meal, Caroline belches very loudly. It is heard by nearly everyone in the

Mores: Expected rules of behavior that are grounded in morality. The word is pronounced "more-ray."

Substantive criminal law: The law that identifies and defines crimes and the defenses to criminal accusations.

Criminal procedure law: (1) The steps and processes that are used to adjudicate a criminal case. (2) The constitutional limitations on the state's criminal law authority.

Adjudication: The process of a case in court, from start to finish. It is also used to refer to the final outcome, or judgment, of a case. In criminal law, this refers to a finding of guilty or not guilty.

restaurant. Some people are disgusted; others think it is funny. Has Caroline violated a norm? If so, was it a folkway, more, or crime?

3. Identify a crime in your state that is also a violation of a more. Identify another crime that is not a violation of a more. Explain both of your answers.

WHAT CRIMINAL LAW ISN'T

Learning Objective: Compare and contrast criminal law, criminal procedure, and civil law.

Criminal law is substantive; it defines crimes and defenses to crimes. What is required to prove murder? What if a defendant murdered, but in self-defense? These are **substantive criminal law** questions. And they will be answered in this book!

Criminal Procedure

Substantive criminal law must be brought to life; processes are needed to put it into action. **Criminal procedure** is the field that defines these steps and processes; it makes criminal law “real.” The process that a court case goes through is known as **adjudication**.

- How are criminal cases filed with courts?
- How does a defendant challenge an illegal search by police?
- At trial, does the defendant or the state address the jury first?

These are criminal procedure questions. Criminal procedure also includes the constitutional aspects of criminal adjudications. As examples, the following constitutional questions also fall into the academic study of criminal procedure:

- When is probable cause required?
- May a police officer search a person’s home without a warrant?
- May border agents turn on a traveler’s phone and look at its contents?
- May a confession that has been beaten out of a defendant be used at trial?
- When is a defendant entitled to an attorney?

Public law: Any law that concerns the relationship of an individual and government.

Private law: Also known as civil law; any law that concerns the relationship of one person to another.

State action: A command, decision, or act that can be attributed to a government.

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Although constitutional criminal procedure is not a criminal law topic, it is too important and too fun to skip entirely. You will take a quick tour of important constitutional requirements in a later chapter, and there will be references to the Constitution throughout this book.

Civil Law

When learning new subjects, structuring the subject can be helpful. Indeed, there is an organization of law that is commonly used by lawyers, courts, legislators, and professors. That organization divides law into different categories, also known as branches or fields. There is a lot of overlap between the various branches. But there are also important differences. One distinction is drawn between **public law** and **private law**. Most law that deals with the relationship between a person and their government falls into the public law category. Criminal law, administrative law, and constitutional law are examples of public law.

Most of the time, public law applies when there is **state action**—that is, a government acting in some manner against a person. By the way, don't let the term "state" confuse you. It refers to government at all levels, not just the 50 states. For the remainder of this book, "state" and "government" will both be used to refer to the United States, a specific state (e.g., California, Wyoming, etc.), or a local government (e.g., Boston, Cincinnati). In criminal law, a legislature's decision to forbid an act, a police officer's decision to arrest a violator, and a prosecutor's decision to file charges and to try an individual for a crime are all state actions.

As you learned earlier, not all violations of norms are legal wrongs. Similarly, not all legal wrongs are crimes. A common distinction in law is between criminal law and civil law. Law that concerns the relationship of one person to another person falls into the private law category also known as civil law.

The biggest difference between criminal law and civil law is their differing objectives. Criminal law has several objectives, including punishment and deterrence. We will explore the objectives of criminal law in greater detail in a moment. Civil law is different. Its objective isn't to punish; it is intended to compensate people for harms caused by other persons.

During your study of law, you will discover that exceptions exist for every rule. In some cases, the rule is smaller than its exceptions. So here is your first exception: **punitive damages**. In some cases, a plaintiff in a civil lawsuit can receive a damages award that exceeds the actual proven harm. Instead of compensating the plaintiff, punitive damages are intended to punish and deter future misconduct by the defendant. One high-profile punitive damages case

Punitive damages: Money damages in a civil suit that exceed compensation and are intended to punish and deter future misconduct.

Contract law: A form of civil law where two or more persons create an agreement that may be enforced in court.

Tort: A civil wrong not arising out of a contract. There are three forms of tort: negligence, intentional, and strict liability.

Negligent tort: Injury to a person or property damage resulting from another person's failure to act reasonably.

Intentional tort: Injury to person or property damage that was intended by the defendant.

Strict liability tort: A form of liability that is not concerned with state of mind, or fault. If a person is responsible for the act that results in injury or damages, even though unintentional and the person was acting reasonably, liability exists.

was *Liebeck v. McDonald's Restaurants*. In 1992, Stella Liebeck put a cup of McDonald's coffee between her legs while sitting in a parked car. As she removed the lid to the coffee to add sugar and cream, coffee spilled out onto her legs and groin. The coffee was so hot that it caused third-degree burns, requiring skin grafts. Attempts to settle with McDonald's for her medical bills were unsuccessful, so she sued. The jury found for Ms. Liebeck; however, it concluded that she was 20% responsible for the accident. Both the high temperature of the coffee and a history of injuries and complaints about the heat of the coffee factored into the jury's deliberations. Actual damages were found to be \$200,000, so the jury awarded \$160,000, or 80%. Additionally, it recommended \$2.7 million in punitive damages. That amount equaled 2 days of McDonald's revenues from coffee sales. Finding it excessive, the trial judge reduced the punitive damages award to \$480,000, and ultimately, the parties settled for about \$500,000.¹ The case garnered international attention and has been used by people of different legal and political perspectives to advance their causes. Tort reform advocates continue to use the case as evidence that civil juries are out of control. On the other side, advocates for using the law to control corporate greed and to increase corporate responsibility see the case as a success. Regardless, it is an illustration of the use of civil law to accomplish what are traditional criminal law objectives. The opposite is also true. There is a feature of criminal law that looks more like civil law. In some cases, the state may request that an offender compensate a victim for actual damages caused by a crime. This is known as restitution. Contrast this with a fine, which an offender pays to the state itself.

There are many types of civil law. **Contract law** is one. Contracts are about promises. Most people expect others to live up to their promises. Quite often, this is a social expectation, such as when Grandma promises to cook Thanksgiving dinner. Let's say Grandma chooses to go to a casino instead of cooking dinner. While she may disappoint her family, who were looking forward to her deep-fried turkey and green bean casserole, she hasn't committed a breach of contract. But business and professional affairs depend on promises. Imagine the harm that would befall Apple if one of the suppliers of materials needed for the production of its newest iPhone were to decide, at the last minute, to sell the materials to another company. This would likely cause a delay in the release of the new iPhone, reduce sales, cause Apple's stock to decline in value, and possibly lead to employee layoffs and terminations. To prevent this from happening, Apple can enter into a legally enforceable contract with the supplier. The contract would bind the supplier to provide the materials and for Apple to pay for them. A violation of contract,

Writ: A court order.

Preponderance of the evidence: Standard of proof used to decide who wins in a civil case. It is also used in criminal law for specific questions, but never in the determination of guilt. A plaintiff must persuade the fact finder that its claim is more likely true (greater than 50%) than not to satisfy the preponderance standard.

Fact finder: The person or body responsible for weighing the evidence and deciding what evidence is true. Both judges and juries are fact finders. In criminal law, a defendant has a right to have a jury of peers find the facts in the ultimate determination of guilt. Judges find facts when issues arise before, during, and after trial. Judges only find the facts in regard to the ultimate question of guilt when a defendant has waived the right to a jury trial.

Beyond a reasonable doubt: Standard of proof required to convict a defendant in a criminal case. While the standard has not been precisely quantified, it is less than beyond all doubt and considerably more than preponderance of evidence.

known as a breach, can be taken to court, and the breaching party can be ordered to pay for any harm (damages) it causes.

Another type of civil law is **tort** law. A tort occurs when one person hurts another person or another person's property. There are three forms of torts. You are likely familiar with the first: *negligence*. Have you ever seen an advertisement that urges you to contact an attorney if you have been injured in a slip and fall, car accident, or because you became sick at work? Those are examples of negligence—the tort of being harmed by another person who has behaved unreasonably, but not necessarily intentionally. The McDonalds coffee case discussed earlier is another example of a **negligent tort**. Let's consider another example that is common today: the person who causes an accident because they are texting while driving. The driver is responsible for compensating the victims of their negligence for their injuries and property losses.

A change in our car crash facts illustrates the second type of tort. If the driver sees their enemy driving on the same street, swerves to hit the enemy, and indeed makes impact, they are committing an **intentional tort**. As may be obvious to you, the difference between negligence and intentional torts is what is in the driver's head: Do they want to hit the other car, or are they simply careless? Assault, battery, trespass, and false imprisonment are intentional torts; they are also crimes. Our driver's intentional collision with her enemy may result in both a civil lawsuit and criminal charges.

There is a third type of tort that isn't concerned with a defendant's fault at all: **strict liability**. In cases of strict liability, a defendant is liable for damages resulting from their conduct—*period*. It doesn't matter if the injuries were unintended, and it doesn't matter if the defendant acted reasonably. Strict liability is rare. It is imposed when an act is highly dangerous or the likelihood of harm is very great. The use of explosives, serving alcohol to intoxicated persons who subsequently injure others in car accidents, and the defective manufacturing of some consumer products are examples. Of course, plaintiffs like strict liability because it is easier to win when intentionality or negligence don't have to be proved.

There are other forms of civil law, including the law that determines what happens to a person's property after death (probate); the law of marriage, divorce, and children (family); and the law governing disputes over ownership and rights to property (property).

Recall that the objective of civil law is to restore a plaintiff to the position they were in before the injury happened. The law uses money to “remedy” injuries most of the time. These monies are referred to as damages. Returning to the texter who causes a crash, the defendant

Clear and convincing evidence: Standard of proof that is applied in civil and administrative cases in which substantial personal interests are at stake (e.g., deportation and retraining orders). It is also applied to specific criminal law matters, such as the determination of whether a defendant's right to bail should be limited. The standard is defined as evidence that is substantially more likely to be true than not.

Probable cause: The standard of proof required by the Fourth Amendment to the Constitution of the United States for a search or seizure to be conducted. An officer has probable cause when the facts available to the officer warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.

Reasonable suspicion: Less than probable cause, and therefore an exception to the Fourth Amendment's probable cause requirement; police officers are sometimes permitted to conduct brief detentions and limited searches when a reasonable suspicion of criminality, supported by specific and articulable facts, is present. Reasonable suspicion is but more than a mere scintilla or a hunch, although an officer's experience may inform the decision.

could be ordered to pay for the plaintiff's medical bills and loss of income if work was missed. Sometimes, money isn't enough. Instead, a plaintiff wants a court to order the defendant to do something or to not do something. If a precious family heirloom is stolen, the victim of the theft will likely want the ring back more than they want its value in cash. So the plaintiff may ask the court to issue an order, known as a **writ**, for a return of the property.

In addition to objectives, civil law cases are similar in other ways that are different from criminal cases. First, the standard of proof in civil cases is lower than in criminal cases. Known as **preponderance of the evidence**, a party in a civil case wins if the **fact finder** (jury or judge) believes a party's version of the facts and damages are more likely true than not. This is a quantified standard: Greater than 50% wins. But it's not about quantity; it is about quality. Having more evidence doesn't win a case. Persuading the fact finder that one's version of the case is more likely to be true than the other party's version is what is required.

The standard in criminal cases is different. Because the punishment in criminal cases can be so severe, the state has the burden of proving guilt by a very high standard: **beyond a reasonable doubt**. Unlike preponderance of the evidence, beyond a reasonable doubt is not quantified. Although the standard is not mentioned in the Constitution of the United States, SCOTUS has held that it is constitutionally required by due process.² But SCOTUS has not defined "beyond a reasonable doubt," so state definitions vary. Although the standard is higher than preponderance, proof beyond *all doubt* is not required anywhere. Some state definitions refer to moral certainty of guilt. To use everyday language, beyond a reasonable doubt means that a person is "damn sure of guilt." In the more precise words of one federal court,

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts. Reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.³

At trial, the state must prove every element of the crime beyond a reasonable doubt for the defendant to be convicted. Elements are the parts of a crime. You will learn much more about elements later.

The different standards of proof between criminal and civil law sometimes lead to conflicting outcomes. Consider the famous O.J. Simpson case. The former professional football player and actor was criminally charged with the murder of his ex-wife, Nicole Brown Simpson, and

Parties: The persons involved in a dispute. If the dispute is in court, the parties are also known as litigants.

Defendant: A litigant who is sued is referred to as the defendant.

Plaintiff: A litigant who files a civil suit is referred to as a plaintiff.

Victim-in-fact: A person or legal entity that is harmed by another. In civil cases, the victim-in-fact may sue to be compensated for injuries. In criminal law, a victim-in-fact does not have the legal authority to prosecute the offender.

Victim-in-law: The government when acting as a public prosecutor.

her friend, Ron Goldman. His 1995 televised criminal trial was commonly referred to as the “trial of the century.” Although this is an exaggeration, the trial was a sensational event that gripped the nation. Represented by 11 prominent lawyers known as the “Dream Team,” Mr. Simpson was acquitted of both murders. Later, however, the father of Ron Goldman sued Mr. Simpson for the wrongful death—a tort—of his son. The jury returned a verdict of \$33.5 million in favor of Mr. Goldman. The outcome confused many people, who didn’t understand how Mr. Simpson could be acquitted in one trial and found responsible in another. The answer is found in the difference between civil and criminal law. Because the beyond a reasonable doubt standard is so much greater than the 50% plus a feather preponderance standard, it is possible for a defendant to be acquitted in a criminal case but found liable in a civil case. In the *Simpson* case, the criminal jury didn’t find proof of O.J.’s guilt beyond a reasonable doubt, but the civil jury found proof of his guilt by preponderance of the evidence.

Guilt isn’t the only decision that is made in criminal cases. Judges make many decisions before trial, during trial, and after trial. Each decision requires one of the parties, either the defendant or the state, to prove its position by a certain level of confidence. Rarely does the beyond a reasonable doubt standard apply in these decisions. Rather, lesser standards of confidence are required. Preponderance of the evidence, which you already learned applies in civil law cases, is common. Another standard, **clear and convincing evidence**, is used in a few, specific cases. As an example, the Eighth Amendment to the Constitution of the United States entitles a defendant to be released from jail pending trial, subject to posting money (bail) to ensure



PHOTO 1.1 O.J. Simpson shows the jury a new pair of Aris extra-large gloves, similar to the gloves found at the Bundy and Rockingham crime scene on 21 June 1995, during his double-murder trial in Los Angeles, CA.

Photo by VINCE BUCCI/AFP via Getty Images

FIGURE 1.2 ■ Standards of Proof

Standards of Proof	
LEVEL OF PROOF	WHEN APPLIED
Beyond All Doubt	Never Expected
Beyond a reasonable doubt	Required for criminal convictions
Clear and convincing evidence	Used in civil and administrative cases when liberties are at issue; occasionally in criminal cases for specific questions—never guilt
Preponderance of the evidence	Standard to win a civil case. Also used in criminal cases for specific questions—never guilt
Probable cause	Required for many searches and seizures
Reasonable suspicion	Required for specific, limited searches and seizures
Scintilla	Never used
No evidence	Never used

the defendant's appearance in court. But the right to bail isn't absolute. Defendants who are a threat to others or who are flight risks may be held without bail. Many jurisdictions require the government to establish dangerousness or flight risk by clear and convincing evidence. Clear and convincing evidence is more than preponderance and less than beyond a reasonable doubt; it exists when the truth of the party's allegation is substantially more likely to be true than not.

There are two other important standards in criminal law. One is so common that it is part of every American's vocabulary. **Probable cause** is required by the Fourth Amendment to the Constitution of the United States before law enforcement officers may conduct searches or seize persons or property. Like the beyond a reasonable doubt standard, probable cause is not precisely quantified. But its relationship to the other standards is known, and that helps to understand how much is required to satisfy the probable cause standard. Probable cause is less than preponderance of the evidence and more than a scintilla of evidence. SCOTUS has held that probable cause exists when the facts available to an officer warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.⁴

Another frequently used evidentiary standard of proof is reasonable suspicion. This standard, which is less than probable cause but more than a mere scintilla of evidence, is applied to specific searches and seizures where the probable cause standard isn't used. A well-known reasonable suspicion case was the 1968 SCOTUS decision *Terry v. Ohio*.⁵ In *Terry*, SCOTUS held that police may conduct a short investigatory stop of a suspect, but not an arrest, if the officer has a **reasonable suspicion** of criminality that is supported by specific and articulable facts. A police officer's hunch is not adequate, although the officer's experience may be factored into the reasonable suspicion determination. SCOTUS permitted the stop with less than probable cause because it involved a brief, less intrusive encounter than a full arrest.

You just learned a lot of standards of proof; let's use Figure 1.2 to put it all together.

In addition to differences in objectives and standard of proof, criminal and civil law vary in how they proceed. First, the **parties**, or litigants, are different. In all criminal cases, the individual charged with the crime is the **defendant**. In criminal cases, the **plaintiff** is always the government. This is true even if a specific individual was harmed by the defendant. Known as the **victim-in-fact**, the harmed individual doesn't have the authority to file a criminal prosecution. Instead, the state, as the **victim-in-law**, must file and prosecute the criminal charge. Governments identify themselves differently in the official court filings. The state may be expressed in the formal name of the government (e.g., *State of Texas v. Pagel*, *United States of America v. Wang*) or on behalf of the people (e.g., *People of the State of Illinois v. Smith*). There is no difference between the two.

Civil cases, on the other hand, are between private parties. So both parties are persons or corporate entities (e.g., *Reginald Teel v. Grace Kathryn* or *Amazon, Inc. v. Nikole Casey*). The government can be a private party when it is acting as a legal person, not as a public prosecutor. The state of Alabama, for example, may sue a contractor who has negligently constructed a public building that is falling apart (e.g., *State of Alabama v. Buildo, Inc.*). This is an example of a civil case, even though a government is the plaintiff. If the building were to fall, killing several occupants, the government could file a criminal case against Buildo, Inc., and its employees who were responsible for the deaths. In this instance, the government is both a civil plaintiff in the civil case and a prosecutor in the criminal case.

An important difference between criminal and civil cases is the application of the Constitution of the United States. Because criminal cases are filed and pursued by the state and the consequences can include serious punishments, including imprisonment and death, the Constitution is always present. Criminal defendants enjoy the protection of many constitutional rights that civil defendants do not. Here are a few examples:

- Speedy, public trial
- Privilege against self-incrimination, including the right to not be called as a witness by the prosecution at trial
- Representation by an attorney, paid for by the state in cases where defendants can't afford to hire their own
- Proof beyond a reasonable doubt
- No double jeopardy (to not be tried or punished twice for the same act)
- Questions of law that are unclear are to be decided in the favor of the criminal defendant over the state

The Constitution's protections make a difference; in some cases, they can change the outcome of a case. Returning to the O.J. Simpson case, Mr. Simpson was made to testify in his civil case while he chose to invoke his privilege against self-incrimination in his criminal trial. This

difference, along with the differing standards of proof, may explain why he was acquitted by the criminal jury and found liable by the civil jury.

Juvenile Delinquency

The law of juvenile delinquency is closely related to criminal law. In many respects, the two appear to be the same. Both deal with bad behavior, the state initiates both criminal and juvenile delinquency actions, and often the police are involved in both. But the two also differ in a couple of important ways. First, the objectives of the two are more different than alike. Criminals are punished; juveniles are rehabilitated. As you will learn, rehabilitation is one of many dimensions of criminal punishment. Juveniles determined to be delinquent, on the other hand, are provided with psychological, emotional, and drug and alcohol treatment; education; and life skills development with the intention of preparing them for a productive and law-abiding life.

Juvenile law is not uniform. The definition of who is considered a juvenile varies, for example. The minimum age in the United States is 6, although older is more common. Most states set the age of adulthood at 18. There is sometimes overlap between the jurisdiction of the juvenile justice and criminal justice system. In these cases, authorities decide whether to charge the offender as an adult in criminal court or as a juvenile. In most states, a minor can be declared delinquent for offenses that fall into one of two categories: status offenses and acts that are crimes for adults. Status offenses are acts that are not crimes if committed by adults, such as school truancy.

TABLE 1.1 ■ Criminal, Civil, and Juvenile Law Compared

	<i>Criminal</i>	<i>Civil</i>	<i>Juvenile</i>
Parties	State files an indictment or information against an individual or corporation	Individual, corporation or government files the case against another individual, corporation, or government	State files petition against juvenile
Objectives	Deterrence, retribution, rehabilitation, incapacitation	Compensation	Rehabilitation
Burden of proof	Beyond a reasonable doubt	Preponderance of evidence	Beyond a reasonable doubt
Outcomes	Death, imprisonment, fine, restitution, supervision, and more	Money damages, court orders	Education, counseling, treatment, detention
Constitution's role	Limits what acts can be made criminal; substantial protections of defendants (e.g., right to an attorney, right not to testify)	Limits what acts can lead to liability; smaller role in the process than in criminal law	Similar, but more limited, than in criminal law

Because the juvenile justice system isn't focused on punishment, the constitutional rights that defendants enjoy in criminal court only partially apply. Like a criminal defendant, a juvenile is entitled to have an attorney, to remain silent, to cross-examine witnesses, and to have the state prove delinquency beyond a reasonable doubt. But other rights, such as to a jury trial, do not apply. For a summary of the differences between criminal, civil, and juvenile law, see Table 1.1.

QUESTIONS AND APPLICATIONS

Eva Small is upset with her city government. She posts the following on Snapchat on June 1: "The city council and mayor's support of the new shopping mall is nonsense. A beautiful park will be lost, an ugly mall will be built, and all of it so a rich developer can get richer."

The month before Eva's posting, the city council enacted an *ordinance* (local law) that made it a misdemeanor crime, punishable with a fine of \$100 to \$1,000 and a jail sentence of 7 to 60 days, to "utter, in person or through social media, opinions about the city council or the mayor of the city that are disparaging or offensive."

On June 3, two city police officers stopped Eva on the street, took her phone over her objection, turned it on, and searched for her Snapchat app. While searching her phone, the officers discovered a picture of her breaking into the city's administration building. She was arrested and charged with violating the new ordinance *and* with breaking and entering into a public facility.

Eva has responded with the following defenses. Label each as either an issue of criminal law or criminal procedure.

1. The statement she posted on Snapchat doesn't fall within the scope of the conduct prohibited by the ordinance.
2. The statement she posted on Snapchat is protected speech under the First Amendment to the Constitution of the United States.
3. Her stop by the police officers violates the Fourth Amendment to the Constitution of the United States.
4. The seizure and search of her phone by the police officers violates the Fourth Amendment to the Constitution of the United States.

Label the facts in Questions 5–7 as presenting a civil case or a criminal case. If a civil case, identify it as negligence, intentional, or strict liability tort.

5. Kym is with her friend Zoe, in Zoe's home. Kym entered the home through the back door and proceeded directly up the home's back stairs to Zoe's bedroom. The two chatted while awaiting a third friend, Zack. The three planned to go to see a movie together. Zack arrived later than planned, honked the horn of his car, and Kym jumped up and said to Zoe, "Let's go, we can still make the movie before it starts." She ran out of the room and down the home's master stairway. Kym followed closely behind Zoe. In her rush, Kym didn't see a banana peel on the stairs. She slipped on the peel and fell down the stairs, breaking an arm and a leg. She wants Zoe to pay for her medical bills.⁶
6. Kym is studying criminal law with her friend Zoe in Zoe's home. Zoe excuses herself to the bathroom during their studies. While in the bathroom, Kym looks for a highlighter marker on Zoe's desk. She inadvertently discovers a picture of Zoe and Kym's girlfriend, Sandi, kissing. Enraged, Kym begins shouting at Zoe. Confused about what is happening, Zoe exits the bathroom to find Kym waiting outside the door. Kym

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immediately strikes Zoe in the face. Zoe falls to the floor and hits her head on a table. She suffers cuts and bruises to her head, requiring medical care. She wants Kym to pay for her medical bills.

7. Kym is studying criminal law with her friend Zoe in Zoe's home. Zoe excuses herself to the bathroom during their studies. While in the bathroom, Kym looks for a highlighter marker on Zoe's desk. She inadvertently discovers a picture of Zoe and Kym's girlfriend, Sandi, kissing. Enraged, Kym begins shouting at Zoe. Confused about what is happening, Zoe exits the bathroom to find Kym waiting outside the door. Kym immediately strikes Zoe in the face. Zoe falls to the floor and hits her head on a table. She suffers cuts and bruises to her head, requiring medical care. Kym offers to pay Zoe's medical expenses. Zoe refuses the money, calls the police, and Kym is arrested and charged by the prosecutor.
8. Do you believe punitive damages should be available in civil cases? If so, should a defendant be protected by the same rights found in criminal law? Explain your answers.

WHY PUNISH?

Learning Objective: Identify and describe the five primary objectives of criminal law punishment.

As you have learned, the differing objectives of criminal and civil law are important. The differing objectives are so important that the nation's most fundamental law, the Constitution, applies differently to them. Why do we punish wrongdoers? The Christian theologian St. Augustine wrote, "Punishment is justice for the unjust."

There are two dominant philosophies of punishment: retribution and utilitarianism. To a retributivist, punishment is deserved; offenders should suffer to pay for their crimes. To the utilitarian, punishment is needed to maximize the greatest good for the greatest number of people. There are six commonly recognized objectives that spring from these two rationales. Two objectives, retribution and restitution, are retributive. The other four—deterrence, rehabilitation, incapacitation, and restoration—are intended to protect, or benefit, society. Let's take a look at each.

Deterrence

Stopping crime before it occurs is a significant objective of criminal law. Using fear, the law deters people from criminality. There are two forms of deterrence. The first is *general deterrence*. Under this theory, the public at large is deterred from committing crimes when they see offenders punished. *Specific deterrence*, on the other hand, focuses on the individual. Punishing a person for today's offense is intended to deter that individual from future offenses.

Classical (older) theory suggested that there are three elements to deterrence: certainty, celerity, and severity. The first is the certainty of getting caught. The more likely a person believes they will be caught, the greater the deterrent effect of the law. The second element of deterrence is celerity, or the speed of justice. Punishing an offender months after a crime has

been committed is more effective than years later when few people will connect the crime to its punishment. The third element is the severity of the punishment. The assumption of this element is that people engage in rational choice; they balance the benefits of offending against the costs. These theories assume people make rational choices about being involved in crime. This assumption is questionable and the efficacy of deterrence is unclear.

Retribution

The second objective of criminal law punishment is *retribution*, or giving an offender their *just desserts*. The idea is also expressed as paying one's debt to society. Under this theory, the offender owes a debt to the community, rather than (or in addition to) the individual victim. Vengeance is a very old practice, quite possibly a natural instinct. The idea of public vengeance is also very old. One of the most ancient laws known to us was Hammurabi's Code. Dated to about 1750 B.C.E., Hammurabi's Code contained the principle of an "eye for an eye" and a "tooth for a tooth" long before it appeared in the Jewish Torah and Christian Old Testament.

In addition to satisfying the public's need for vengeance, retribution may also deter the victim from seeking personal retribution, thereby reducing further violence and preventing the victim from becoming an offender. To many people, vengeance is an archaic, cruel act that governments should not commit. Regardless, SCOTUS has upheld retribution as a legitimate criminal law objective,⁷ and it often underpins state and federal criminal law.

Rehabilitation

The third objective of criminal law is the *rehabilitation* of the offender. Rehabilitation is focused on helping an offender to mature, to become self-sufficient, and to reintegrate into society. Rehabilitation programs typically involve formal education, occupational training, mental health counseling, and other programs that are designed to separate the offender, both psychologically and physically, from the causes of their criminal behavior. Like deterrence, rehabilitation has been heavily researched, and its efficacy is unclear.

Incapacitation

Incapacitation, the fourth objective, is the use of physical restraint to protect the general public. Imprisonment, house arrest, the use of technology to track and limit where offenders may travel and visit, and the death penalty are the most common forms of incapacitation. By limiting an offender's geography, the public is protected from the drug dealer, the violent from visiting a victim's home, the child sex predator from being near schools, and the burglar from breaking into

Constitutional law: The most fundamental law of the United States. As the highest form of law, all other forms of law are invalid if contrary to the U.S. Constitution.

Statutory law: Law made by the U.S. Congress and state legislatures. Statutory law is the primary form of law that defines crimes, defenses to crimes, and the processes used in criminal cases. A lower form of law than constitutional law.

Model Penal Code (MPC): A recommended criminal code created by a group of scholars and practicing attorneys. Most states have enacted portions of the MPC.

another home. One criticism of the use of imprisonment is that it doesn't stop the offender from reoffending; it only reduces the pool of possible victims to fellow inmates.

Restitution

The final objective is *restitution*. Different from retributive justice, restitutive justice seeks to make the actual victim, not the public at large, whole again. The most common way to do this is to order an offender to compensate their victim for the harm they have caused. The accountant who steals \$10,000 from a client is ordered to repay the loss, for example. In some cases, courts may also order restitution of wages or other indirect losses. Like civil law, monetary restitution seeks to compensate the victim. But restitution can involve more than money. A defendant who damages property, for example, may be ordered to repair it.

Restorative Justice

Restorative justice emphasizes healing those who are harmed by an offense, making the offender whole again, and returning him to full status in the community. The individuals harmed include the victim, victim's family, offender, offender's family, and the larger community. Restoration is premised on the idea that through inclusive open dialogue, mutual respect and understanding will result in healing and community harmony. Outcomes may include restitution, an apology by the offender and forgiveness by the victim, community service, and possibly agreed-upon incarceration. Restorative justice is found in traditional communities and

TABLE 1.2 ■ Philosophies, Objectives, and Methods of Punishment

Philosophy	Objectives	Examples of Methods
Retributive	Retribution	Death, incarceration, hard labor, community service, shaming, forfeiture
Utilitarian	Deterrence, incapacitation, rehabilitation, restitution, restoration	Incarceration, education and training, psychological treatment, drug and alcohol treatment, repaying victim for losses, apologizing for harm and asking for (or giving) forgiveness, sex offender registration, chemical castration of sex offenders, forfeiture

Referendum: Law created directly by the people through a process of gathering a minimum number of voter signatures to place a constitutional amendment or a statutory equivalent on an election ballot for consideration by the general voting public.

Ordinance: Law made by local legislative bodies, such as city councils. A lower form of law to constitutional and statutory law.

Regulation: Law that is created by administrative agencies. A lower form of law to constitutional and statutory law.

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takes many forms, including healing circles and formal apology ceremonies. Although there is little history of restorative methods in the United States, they are receiving increased attention as an alternative to imprisonment. Restorative justice doesn't fit squarely in the retributive or utilitarian models. But of the two, it is more utilitarian because its benefits everyone: offender, victim, and community.

Retributivism and utilitarianism are not mutually exclusive. Both approaches to justice can be found in the ancient and modern world. Today, both are seen in the punishments found in state and federal criminal laws. So which is best? As is so often true in law and justice, the answer is *it depends*. It depends on the objective sought; do you want to reduce how many times the crime occurs (deterrence), do you want to get a pound of flesh (retribution), do you want to prepare the individual to be a better neighbor (rehabilitation), do you want to protect the community (incapacitation), do you want to make the victim whole (restitution), or do you want some combination of these results? The last option is appealing. Why not accomplish more than one if possible? In many cases, multiple objectives are achieved automatically. For example, incarcerating a violent felon serves both retributive and utilitarian (incapacitation) objectives.

The punishment decision isn't just about society's intentions. Efficacy and efficiency are also factors. After all, there is no point in imposing a punishment to deter misconduct if it doesn't deter misconduct. Considerable research has been conducted on the relative successes and costs of various forms of punishment. What has been learned is that punishment is complex—there is no magic pill. Individuals respond differently, and individual responses are not static; they are contextual. As one scholar wrote about deterrence theory, it is “confusing... [and] very difficult to state with any precision how strong a deterrent effect the criminal justice system provides.”⁸ See Table 1.2 for a chart of the philosophies, objectives, and methods of punishment.

QUESTIONS AND APPLICATIONS

The practice of passing through an intersection after a stoplight turns red is on the rise in the United States. The result has been a steady increase in accidents, injuries, and fatalities. The city of Colishun, Ohio, has experienced a 60% increase in accidents caused by red-light running in the past 5 years. Three of these accidents have resulted in deaths. The members of the city council have been urged by their police chief, director of traffic and roads services, and director of public health to act.

Which punishment objective is most emphasized in each of the scenarios in Questions 1 through 4? Explain your answer.

Stare decisis: Latin for “stand by a thing decided.” The doctrine holds that prior legal decisions shall be binding on future cases when the facts of the prior and current case are similar.

Executive orders: Law and declarations created by the president of the United States and the governors of states that are issued to implement their responsibilities. The status of an executive order, relative to other forms of law, varies.

1. The city council enacted an ordinance requiring red-light cameras to be installed at all busy intersections and enacted a progressive system of fines for violations. The first violation is fined \$200, the second \$500, and subsequent violations are fined \$1,000 and bring 1 week to 3 months in jail. The ordinance further required that tickets be issued to all violators. They directed the police chief and the two directors to develop a social media and television information campaign to educate the public about the dangers of red-light running, the law, the penalties, the zero-tolerance policy, and the 100% effective rate of catching violators using the cameras. The campaign is to include the names and punishments of every violator. When enacted, the mayor stated on behalf of the entire council, "We want everyone to know that red-light running is serious business. We are killing one another. If you run a red light, you will be caught and punished. Please think when you are driving and don't do it!"
2. After 6 months of the public information campaign and enforcement measures described in Question 1, there was no decline in red-light running. The police chief presented data that showed red-light runners are often repeat offenders. In another attempt to address the problem, the city council enacted an ordinance requiring every person convicted of red-light running to enroll in a traffic safety program. The curriculum of the program includes a module on the dangers of red-light running, discussions with individuals who have been injured by red-light runners, and in-car driving instruction.
3. After 6 months of the public information campaign and enforcement measures described in Question 1, there was no decline in red-light running. The police chief presented data that showed red-light runners are often repeat offenders. Frustrated, one member of council stated, "I have had it. These people are killing others because they are so selfish and uncaring. We tried education and light punishment to prevent this, and it didn't work. They owe it to everyone to pay for their crimes." The other members shook their heads in agreement, and one commented, "Commit the crime, do the time." They then enacted an ordinance changing the penalties for red-light running to a \$1,000 fine and 5 to 30 days in jail for the first conviction, \$1,500 and 30 to 60 days in jail for the second conviction, and \$1,500 to \$3,000 and 60 to 120 days in jail for three or more convictions.
4. The city council learns that insurance coverage often doesn't pay all of the expenses of accidents resulting from red-light running. Further, because it is expensive and time-consuming for victims to sue in civil court, they often don't recover the expenses not covered by insurance. The city council enacts an ordinance requiring the criminal court to order red-light violators who caused accidents to pay all of their victims' expenses not otherwise covered by insurance.
5. Marshan is 16 years old. He is an only child. He has never known his father. His mother is an alcoholic who has physically abused him most of his life. His mother's abuse put him into the hospital twice. He was once removed from the home by state child protective services officers, but he was returned to his mother after 2 weeks. During the time he was removed from his family home, he received a psychological assessment. The psychologist concluded that he is emotionally immature and suffers from an anger management problem. However, he is intelligent and academically motivated. In spite of his hardships at home, he has maintained a B average and expressed an interest in attending college. He met another 16-year-old boy, Samuel, on social media. The two share an interest in guns. Samuel invited Marshan over to see his guns. During the visit, the two began to argue about politics. Samuel told Marshan to

leave, but Marshan refused, so Samuel grabbed Marshan and pushed him. Instinctively, Marshan pointed the gun at Samuel and pulled the trigger. To his surprise, the gun fired. Samuel died from the gunshot. Apply the five punishment objectives to Marshan and discuss whether each is satisfied. Decide what punishment fits the crime, if any. Explain your decision.

WHERE DOES CRIMINAL LAW COME FROM?

Learning Objective: Identify and describe the various forms of law that are important to criminal law.

Recall that law is a norm that a collective group of people enforces; they punish individuals who violate the norm. 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 forms of law. In criminal law, the following forms of law declare crimes and defenses to crimes, protect civil liberties, and detail the process that courts use when hearing criminal cases.

Constitutional Law

Constitutional law is the first form of law. The United States (federal government) and each of the states have a constitution. The highest form of law in the United States is the Constitution of the United States. In this book, references to the “Constitution” are to the federal Constitution. As the highest form of law, all laws, federal and state, must fall in line with it. Laws that violate the Constitution are void.

The Constitution outlines the structure of government (i.e., federal and state governments’ three branches), defines the authority of those governments, and also lists individual rights. A few rights are found in the original Constitution, but most are found in the amendments. The freedom from unreasonable searches and seizures, the right to a jury trial, and the right to be free from cruel and unusual punishment are examples. You will explore the rights that are important in criminal law in greater detail later.

Felonies: Serious crimes that may be punished with imprisonment of 1 year or longer.

Misdemeanors: Crimes that are punished with imprisonment of less than 1 year.

Infractions: Minor offenses that may be treated as civil or administrative offenses or as minor crimes. These are typically punished with administrative sanctions, fines, and rarely with very short terms of imprisonment.

Grading: A system of classifying crimes by seriousness and corresponding punishment.

Malum in se: An act that is prohibited because it is inherently wrong.

Malum prohibitum: An act that is prohibited by law but isn’t inherently wrong.

Statutory Law

Statutory law is the second form of law. As you already read, the United States and each of the states have statutory law. Statutes are laws created by legislative bodies. At the federal level, the U.S. Congress is the lawmaker. Each state also has a legislature. They are known by different names, such as Arkansas General Assembly, California State Legislature, and Massachusetts General Court. Yes, you read that correctly—the Massachusetts General Court is a lawmaking body, not a court of law.

It is statutory law that declares acts to be crimes and establishes punishments. 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, “Crimes and Criminal Procedure.”

Model Penal Code

Because each state and the federal government have the authority to prohibit, punish, and process cases differently, criminal laws vary. With the objective of bringing some standardization and modernization to criminal law, a group of legal scholars began writing a unified criminal code in the 1950s. They completed their work in 1962. The product, known as the **Model Penal Code**, is not law. Rather, it was created as a model for the states to consider. Today, a majority of the states have adopted portions of the Model Penal Code (MPC). Because it represents the closest thing the United States has to uniform criminal law, it will be discussed throughout this book.

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 ballot 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.⁹

Idaho COVID-19

coronavirus.idaho.gov



GUIDANCE FOR GOVERNOR BRAD LITTLE'S STATEWIDE STAY-HOME ORDER

Updated March 25, 2020

Self-isolate

ALL residents of Idaho must self-isolate and stay and work from home as much as possible, unless you work in healthcare, public safety or an identified "essential business" as defined in order.

Residents can leave homes to obtain or provide essential services.

People at higher risk (over 65 and/or health-compromised) should avoid leaving their homes.

Employers that do not provide essential services as defined in order must take all steps necessary for employees to work remotely from home.

"Essential" facilities & services open

Grocery stores, healthcare facilities, gas stations, pharmacies, essential state and local government functions, laundromats/laundry services, financial institutions, residential and home-based care, veterinary services, hardware stores, limited child care for essential workers, infrastructure, and other businesses essential to the safety and well-being of the residents as defined in the order remain open. Restaurants open but only for drive-thru, carry-out, or delivery.

"Non-essential" facilities & services closed

Includes indoor gyms, recreational facilities, nightclubs, bars, entertainment venues, convention centers, hair and nail salons, public events and gatherings, dine-in restaurants (drive-thru, carry-out, delivery to continue), and other facilities and services not included in "essential" businesses as defined in order.

Limit public transit

Only to provide or obtain essential services.

Limit travel

All non-essential travel must cease.

No gatherings

Limit all non-essential gatherings of any number of individuals outside the household.

Outdoor activity OK

Outdoor activity near your home is not prohibited but residents are encouraged to keep distance of 6-feet from others not in their household.

Practice good hygiene

Wash hands, clean high touch surfaces, cover coughs and sneezes, and do not shake hands.

*Order in effect Wednesday, March 25, 2020, and will remain in effect for at least 21 days
Governor Little and public health officials will reassess before end of 21-day period
Final Stay-Home Order will be available at coronavirus.idaho.gov*

PHOTO 1.2 In March 2020, Idaho Governor Brad Little issued an order requiring his state's residents to stay home whenever possible.

Photo from Idaho governor's office

Ordinances

Ordinances are the local government counterpart of state statutes. They 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 statute. But as a lower form of law, they must not conflict with statutory and constitutional law.

Administrative Law

Administrative law is a somewhat odd feature of U.S. 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. All of the constitutional limitations that are imposed on statutory law 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

The *Common Law* was brought to the United States by our early English colonists. Common Law is judge-made law. In the early years of England, before Parliament existed, judges made most of the law. Eventually, the English Parliament became the primary creator of new law. But the role of courts in interpreting, and occasionally announcing, new law continues today. It is the courts, for example, that are the final word on what law means. 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 to some degree. 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.

Interpretation is the process that gives meaning to a law. For example, imagine a state statute that forbids "sexual cyber harassment." The statute makes it a crime to (1) post a picture of another person who is nude or engaged in a sex act (2) on a social media platform (3) with the legal name or address of that person (4) without that person's permission. As an example of how the Common Law is made, consider Karli Makalini, a social media sensation. She has hundreds of thousands of subscribers to her YouTube channel, where she posts cooking videos. Her online

Precedent: A prior case that is similar in facts.

Separation of powers: The division of governmental authority between the legislative, executive, and judicial branches.

Federalism: The division of governmental power between the federal and state governments.

Checks and balances: A structural feature of government that keeps the three branches of government accountable through the sharing of powers with one another.

Judicial review: The authority of courts to review the acts of the legislative and executive branches for constitutionality.

TABLE 1.3 ■ Types of Crimes

Type	Description
Felony	A crime that is punished with imprisonment of 1 year or longer
Misdemeanor	A crime that is punished with imprisonment of less than 1 year
Infraction	A minor offense, often punished with a fine, community service, or a short jail sentence
Malum in se	A serious offense; inherently wrong
Malum prohibitum	An offense that is not inherently wrong, but prohibited by statute or ordinance

persona is Cooking Karli—she has never posted her legal name on social media. Her former lover posted a nude picture of Karli on Facebook with the caption “Cooking Karli, cooking it up hot.” If the lover were to be charged under the sexual cyber harassment statute, a question of interpretation that the trial court would have to answer is whether Karli’s online persona is a “legal name.” After it is decided, the case would be *precedent*. Under the doctrine of **stare decisis**, the decision in the case would apply to cases in the future that involve the same question: Is an online alias a legal name under the sexual cyber harassment statute?

Executive Orders

The final form of law has been in the news a lot in recent years: **executive orders**. 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. That is the duty of an executive. 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, or they simply come with the executive officer’s job. In other instances, the legislature empowers the executive officer. The recent COVID-19 directives to stay home, close businesses, and socially distance are examples. The 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

Supremacy clause: Article IV, Clause 2 of the Constitution of the United States makes clear that when the federal government and states have concurrent jurisdiction, federal law is superior when the two are in conflict.

Dual sovereignty: A doctrine that empowers multiple sovereigns to prosecute and punish an individual for the same crime without violating the prohibition of double jeopardy.

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,” “the 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.¹⁰ In Photo 1.2, you can read a poster summarizing a similar order by the governor of Idaho.

A criminal law executive order that finds itself in the news on occasion is a pardon, commutation, or reprieve. 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 issue orders that involve policy, particularly when frustrated with a legislature that won’t act to address a problem; 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.

QUESTIONS AND APPLICATIONS

1. The New York Association of Public School Administrators is concerned about bullying in the public schools. Police are often reluctant to respond to calls by parents and school officials in cases of bullying because officers believe bullying is a school or parent concern, not a criminal justice matter. They agree to advocate for a law requiring police to respond to bullying complaints by school officials. Should the group ask a court, the New York State Legislature, or the governor to make the new law?
2. The state of Delaware enacts a statute that mandates whipping as a form of punishment for theft if the value of the item stolen exceeds \$500. Dora has been charged with the theft of an item valued at \$1,000. Dora believes that whipping violates the Eighth Amendment of the U.S. Constitution, which forbids cruel and unusual punishment. She offered to plead guilty if the prosecutor would recommend a jail sentence. The prosecutor refused. She wrote to the governor for help. The governor replied that she agrees that the law is unconstitutional but that she can’t help because she has no authority over locally elected prosecutors. Who has the authority to hear and decide Dora’s cruel and unusual punishment claim?

WHAT ARE THE TYPES OF CRIMES?

Learning Objective: When presented with a crime, you will be able to identify it is a felony, misdemeanor, infraction, malum in se, or malum prohibitum.

Two categorizations of crimes are very common in criminal law. Because these categories will be referred to throughout this text, you are introduced to them now. One divides crimes by the seriousness of punishment and the other by the nature of prohibition (see Table 1.3).

Felony, Misdemeanor, and Infraction

Crimes are often categorized by their seriousness. For our purposes now, seriousness refers to the possible punishment that a court can impose for a crime. Although imprisonment isn't the only form of punishment, it is used to distinguish **felonies**, **misdemeanors**, and **infractions**. Serious offenses are felonies. Crimes that can result in serious personal injury, significant loss to the value of property, and where a defendant had an evil intent are commonly treated as felonies. A crime that can result in imprisonment for a year or longer is a felony. Murder, sexual assault, arson, treason, intentionally causing serious injury, terroristic threat, and theft of property exceeding a minimum value are examples of felonies. Not all felonies are the same. They are "graded" by seriousness. Florida's **grading** scheme, for example, recognizes capital (death possible), life, third-degree, second-degree, and first-degree felonies.

A crime that can lead to less than 1 year of imprisonment is a misdemeanor. Touching another person without their consent but not causing serious injury, stealing a small amount of money, and multiple violations of traffic laws are misdemeanors. Just like felonies, misdemeanors are graded.

There is an even less serious offense than a misdemeanor: an infraction. Parking offenses, jaywalking, and littering are examples. Depending on the state and the specific offense, an infraction may be considered a minor crime or not. If not, imprisonment may not be possible, and an administrative agency or a civil court may process the case. Although infractions may be punished with short imprisonment, most result in fines or administrative action, such as the disciplining of a driving, business, boating, or fishing license.

Accusatorial: An element of the adversarial system that places the burden of proof on the state and otherwise gives the benefit of doubt to the defendant.

Presumption of innocence doctrine: In the United States and many other nations, the state has the obligation to prove a defendant's guilt. In the United States, the state must prove every element of the crime beyond a reasonable doubt. A defendant begins the process innocent and is not obliged to put on a defense.

Rule of lenity: If there are two or more reasonable interpretations of a statute, the interpretation that most favors the defendant is to be adopted.



PHOTO 1.3 The United States Supreme Court Building, also referred to as “the Marble Palace,” houses the Supreme Court of the United States.

Photo by fstockfoto via iStock

Malum In Se and Malum Prohibitum

The distinction between felonies and misdemeanors dates back to the old Common Law in England. The Common Law also distinguished between crimes **malum in se** and **malum prohibitum**. The former is a Latin phrase that means an act is inherently wrong. The act is punished because it is commonly understood by people to be harmful or immoral. Murder and rape, for example, are each malum in se. Crimes that are not so obviously wrong but have been declared to be crimes by a legislature, such as tax evasion, illegal drug use, and trespassing on property, are each malum prohibitum.

Several chapters of this book are devoted to explaining crimes that are found in the statutes of the states and the federal government. Those chapters use yet another common form of classification: the victim. Crimes may be committed against persons, property, the public, and the state. These are useful for teaching and organizing the law. But they are artificial. For example, the burning of a home, known as arson to the law, is a crime against property. But in reality, property doesn't feel pain, and it doesn't suffer financial loss. Crimes against property hurt people. So don't give this categorization too much attention. It is just a convenient way to organize crimes.

QUESTIONS AND APPLICATIONS

Identify each of the following as malum in se or malum prohibitum:

1. Erecting a business sign that is higher than allowed by a statute
2. Underpayment of a property tax
3. Sexual assault of a minor
4. Shooting a parking meter enforcement officer for issuing a parking ticket
5. Urinating in public

HOW DOES THE U.S. CRIMINAL JUSTICE SYSTEM WORK?

Learning Objective: Explain federal and state jurisdiction over criminal law and describe the roles of the legislative, executive, and judicial branches of government in criminal law.

This is a criminal law book, not a book about criminal procedure. But the basics of how criminal cases are processed will help you learn criminal law by framing how the criminal law is put into action. What follows is an overview of the U.S. criminal justice system.

The United States: A Common Law Nation

Over a long span of time, European nations colonized most of the world. In most cases, where a nation went, so went its legal system. Some European countries, such as France and Italy, follow the “Civil Law.” England, on the other hand, has a different history; it was the birthplace of a legal tradition known as the Common Law. Because the United States was once a collection of British colonies (as well as a few colonies from other European nations), it falls into the English, or Common Law, tradition.

Don’t confuse the Civil Law tradition with the civil law of the United States. The Civil Law tradition refers to a family of nations that share a legal history and continue to have similar justice systems. The civil law of the United States, on the other hand, refers to noncriminal cases, such as when two people disagree over who owns a cell phone.

There are many differences between Civil Law and Common Law. One big difference is in how and who made law in the early years. In Civil Law nations, small groups of experts made the law. These groups evolved into legislatures.

In the early Common Law in England, judges played an important role in not only hearing cases but in making law. This has changed over time. Today, Parliament in the United Kingdom and state legislatures and the Congress in the United States are responsible for making their country’s new laws. Regardless of the rise of legislatures in Common Law nations, courts continue to be important players in the criminal justice systems of all Common Law nations. Judges interpret law, hear cases (adjudicate), and are guardians of freedom. Also, old Common

Law principles and processes continue to be followed in the United States, though one exception is Louisiana. As a former French colony, Louisiana employs a hybrid Civil/Common Law system.

An important feature of Common Law courts is the doctrine of *stare decisis*. Translated from its original Latin, *stare decisis* means *to stand by things decided*. The way it works is simple. If the facts of an earlier case are similar to a present case, the law of the prior case is applied in the present case. The prior case is known as **precedent**. What makes *stare decisis* so powerful is that the precedential decision binds not only the court that made the decision, but all lower courts as well. In its 2019 decision for *Gamble v. United States*, SCOTUS decided that the double jeopardy clause doesn't forbid a state and the federal government from both punishing an individual for the same acts. So as the last word on the U.S. Constitution, SCOTUS's decision in *Gamble* binds all courts in the United States, should they be asked to determine whether an individual can be punished by two sovereigns for the same crime.

Absolute Power Corrupts Absolutely

The idea of absolute power corrupting absolutely, which is attributed to Lord John Dalberg-Acton of England in the late 1800s, was fully embraced by the Framers of the United States Constitution. To prevent absolute corruption, the Framers divided the powers of government. They also protected the rights of people, but we will explore that subject in the next chapter. Governmental power was divided in two ways: horizontal and vertical. You are likely familiar with the **separation of powers**, or the horizontal division of power into the legislative, executive, and judicial branches. The legislative branch has the authority to make laws. Only Congress, the state legislatures, and municipal bodies (e.g., city councils) may declare acts to be crimes. The enforcement of these laws falls to the executive branch. Police at all levels of government are executive branch officials. Finally, the third branch is the courts. Courts have several duties, including adjudicating legal cases and protecting individuals from oppressive governmental action.

To understand how courts protect liberty, a quick trip back in time to the presidential election of 1800 is illustrative. A rematch from 4 years earlier, it was a contest between two titans: Thomas Jefferson, a Democratic-Republican, and the incumbent, John Adams, a Federalist. The suggestion that politics is nastier today than in the past is proved wrong by the election of 1800. The supporters of Adams and Jefferson, and sometimes the men themselves, were fierce and ugly to one another. The sexual behaviors, religious beliefs, and integrity of the candidates were front and center. After a highly contentious election, Jefferson won. In an effort to extend the influence of the Federalist agenda into the future, President Adams and the Federalist-controlled Congress changed laws and created new judgeships. The final hours of the Adams presidency were chaotic. Secretary of State John Marshall was busy into the wee hours of the final night of Adams's term, delivering the new appointments created under the new laws. But he ran out of time before they were all put into the hands of the new judges. Subsequently, President Jefferson's secretary of state, James Madison, refused to deliver them. William Marbury, who had been nominated by Adams and confirmed by the Senate to be a justice of the peace, sued.

In what may be one of its most famous decisions, *Marbury v. Madison*,¹¹ SCOTUS announced that courts have the authority to declare the acts of the legislative and executive branches unconstitutional and void. Today, this authority, known as **judicial review**, is a given. But it wasn't before *Marbury*. This decision is very important to criminal law. Through it, every trial judge in the country can declare bad laws void and exclude evidence that has been illegally obtained by police from trial. Take, for example, the controversy over the impact cell phones are having on family life, education, bullying, and the emotional health of youth. If a state legislature were to outlaw the use of cell phones by teenagers and prosecute a teen for making a call with one, the trial court (if the judge is doing their job) would declare the law to be a violation of the defendant's free speech and association rights under the First Amendment and Fourteenth Amendment, strike down the law, and dismiss the criminal case. At the top of the legal pyramid is SCOTUS. As such, it has the final word on the meaning of all federal laws, including the U.S. Constitution. It is said of the court, "It is not final because it is right; it is right because it is final."

Oh, by the way, Marbury lost his case. Although SCOTUS decided that he was entitled to his appointment, it also decided that the statute that gave the court the authority to hear Marbury's case was unconstitutional. So the court pulled a fast one. It announced that it has the authority to tell the president what to do, but it avoided a conflict with President Jefferson, which it most likely would have lost because the republic was young, the court hadn't established its authority, President Jefferson may have refused to comply with its order, and the court has no way to enforce its orders against an obstinate president. But by invalidating the statute and leaving the president's decision to withhold Marbury's appointment alone, the court planted the seed that it is final interpreter of federal law.

Judicial review is an example of another feature of the U.S. system of **checks and balances**. Few powers held by any branch of government are absolute; most involve two branches. Congress's authority to make laws is checked by the president's role in approving or vetoing those laws. A president's veto is further checked, as Congress can override it with a supermajority (two-thirds) vote. The Senate must approve treaties and presidential appointments to important positions. SCOTUS itself is checked through the appointment process, which requires presidential nomination and Senate approval, and through the authority of Congress to define most of the jurisdiction of the federal courts. Judicial review, in turn, is a big check on the president and Congress.

OK, that was the horizontal division. The vertical division is known as **federalism**—the existence of both the federal government and the government of the states.

Making a Federal Case of It

"Don't make a federal case out of it" is a phrase that is sometimes used to express the idea that someone is making a problem bigger than it really is. But the phrase is legally inaccurate. Federal criminal cases are not more serious, or higher forms of crime, than state cases. The authors, or Framers, of the U.S. Constitution created a federal system of government. A federal system is one where there are two levels of government, and each is semi-independent of the other. For the Framers, state governments were to be responsible for the general welfare of the people. The

responsibility for the general welfare is also known as *police power*. Police power refers to the authority of a state to regulate in the interest of the general welfare, security, and health of the people. This includes many of the authorities that are commonly associated with government: controlling and prosecuting crimes, providing courts for people to sue one another, enforcing health codes, ensuring that tradespeople and professionals are adequately trained and ethical, and much more.

In the criminal law context, the Framers intended for the states to be the epicenter of activity, where crimes are declared and courts adjudicate cases. So the least significant of crimes to the most serious (e.g., murder and rape) fall into the jurisdiction of the states. The federal government was to be different—it was to have limited authority. Most of the powers of the federal government are listed in Article I, Section 8 of the Constitution. Some examples of what the federal government has the power to do are to create a national military, to declare war and to defend the United States from foreign nations, to make rules about business between the states and with foreign governments and Native Americans (Indians, in the words of the Constitution), to coin and make money, to regulate immigration, and to create a post office.

There is another provision, the necessary and proper clause, that empowers Congress to make whatever laws are needed to do these things. Consequently, there are federal criminal laws. To counterfeit money, for example, is a federal crime because only Congress has the authority to create a national money. Under the necessary and proper clause, it can also make it a crime to counterfeit money or to use the U.S. postal system to steal from others. The United States also has the authority to protect itself, so an assassin of the president of the United States has committed a federal crime. Although the number of federal crimes has grown over the years, the states continue to be the heart of criminal law. About 95% of all criminal cases are adjudicated in state courts. By the way, the use of the word “adjudicated,” as opposed to “tried,” was intentional because most criminal cases don’t make it to trial—95% of state cases and 98% of federal cases are resolved through guilty pleas.¹² The most common method of reaching a plea is through a plea agreement, where a prosecutor agrees to recommend a specific sentence, to reduce the charge, to dismiss one or more charges, or to some combination of these acts in exchange for the defendant’s guilty plea. The second form of plea is “straight up,” or when defendants throw themselves at the mercy of the court without negotiating with the prosecutor.

Sometimes, federal and state jurisdictions overlap. Consider, for example, the assassination of the president mentioned earlier. Of course, the federal government has laws to protect the president and to punish an assassin, but assassination is also murder. So both the state where the president is killed and the United States have jurisdiction over the murderer. Which government gets to prosecute the murderer? Both. But the **supremacy clause** of the Constitution makes clear that when concurrent jurisdiction exists between a state and the federal government, the federal government win. That doesn’t mean that the state can’t prosecute. It only means that the United States has the option of trying the assassin first. And, yes, the president’s assassin can be tried twice without violating the double jeopardy clause of the Fifth Amendment. SCOTUS has held, as recently as 2019,¹³ that while the same jurisdiction can’t try a person twice for the same offense, two different jurisdictions (two states or a state and the federal government) can punish a person for the same crime. Crazy, huh? This is known as dual sovereignty. The Constitution

only recognizes the states and federal government as sovereign; local governments are subunits of states. Accordingly, a city and its state or two cities in the same state can't prosecute a person for the same crime. The decision in *Gamble v. United States*, discussed earlier, is an example. SCOTUS's decision that multiple sovereigns can prosecute a person for the same offense is precedent, binding every court in the United States.

In many instances, the federal government works closely with the state governments to address a problem. The COVID-19 pandemic of the 2020s is an example. As you now know, the federal government has little authority over health emergencies. Historically, they have been assumed to be part of the state police power. But that doesn't mean that a national response isn't possible. The president, Congress, and other national officials can provide leadership and vision. More concretely, the federal government's authority over immigration empowered President Trump, as authorized by Congress, to restrict travel and close borders in 2020. Congress's authority to oversee interstate commerce, to support science and research, and to provide financial assistance to individuals and businesses was significant in the fight against the spread of the virus. But there is no national martial law provision in the Constitution; there is only a provision for the suspension of habeas corpus when the nation is under attack or is involved in civil war. Health emergencies are not mentioned. The authority to issue and enforce stay-at-home orders, social distancing, and masking appear to be mostly local. Hence, it was governors, state legislatures, and local officials who managed, in consultation with the federal government, these dimensions of the COVID-19 crisis.

Prove It!

All adjudication systems are designed to find the truth: Did the accused (defendant) commit the alleged crime? This question concerns factual guilt. As you learned earlier, Common Law criminal justice systems also emphasize the fairness of the process itself: Did the government play by the rules, and are the rules fair? Did the state prove guilt beyond a reasonable doubt? These questions transcend factual guilt; they are about legal guilt.

The impact of including fairness and a high confidence of guilt in the process is that some guilty people will go unpunished. As Blackstone once wrote, "It is better that ten guilty persons escape than that one innocent suffer." It is possible for a criminal jury to decide that a defendant most likely committed the crime, but for the defendant to be acquitted because more than likelihood (preponderance of the evidence) is expected; the prosecutor must prove the defendant's guilt beyond a reasonable doubt. However, the same case and the same finding in civil court will result in the defendant being found liable. Another example of the impact of requiring a fair process is the inadmissibility of illegally seized evidence at a defendant's trial. In the rare case when illegally seized evidence is essential to a prosecutor's case, its omission from trial can result in a guilty person going free.

The adversarial process is often likened to a sporting competition. The state and defendant are independent players, conducting their own investigations, developing their own theories of the case, and presenting their own cases at trial. Judges in the adversarial system act as referees. They oversee the process, ensure fairness, and become involved only as needed. This is different

from inquisitorial systems, where courts are more involved, sometimes directing evidence collection, developing the theories of the case, and deciding what witnesses will be heard.

Adversarial systems are **accusatorial**; the state bears the burden of proving its case under the **presumption of innocence doctrine**. That means a defendant can sit back, remain silent, and say to the prosecutor, “Prove it,” without offering any defense. The prosecutor has the obligation to overcome the presumption of innocence. The prosecutor’s burden of proof is twofold. First, the prosecutor must introduce evidence that the crime occurred and that the defendant committed it. This is known as the burden of production. Second, the prosecutor must persuade the jury that the defendant committed every element of the crime beyond a reasonable doubt. Unsurprisingly, this is referred to as the burden of persuasion. Although defendants don’t have to prove their innocence, many find it necessary to call their own witnesses and to present their own physical and documentary evidence in order to avoid conviction.

The **rule of lenity** is an additional safeguard. It holds that a defendant is to get the benefit of the doubt in most instances. For example, if two or more reasonable interpretations of a law exist, the interpretation that is best for the defendant is to be adopted by the court. Imagine, for example, a statute reads that “any person convicted of the crime of theft of identity shall be subject to 180 days in prison.” Does the statute require 180 days imprisonment, or does it establish a maximum penalty of 180 days? Applying the rule of lenity, a person convicted under the law may be sentenced up to, but no more than, 180 days in prison.

QUESTIONS AND APPLICATION

For each of the following, identify whether the facts present a situation of legitimate dual sovereignty or double jeopardy.

1. Chanda robs a federally funded bank in the state of Alabama. Both Alabama and the United States charge her with robbery.
2. The City of Wobble, Tennessee, has an ordinance that makes burglary a misdemeanor crime. The state of Tennessee has a statute that declares burglary to be a felony. Both the city of Wobble and the state of Tennessee charge Burt Ler with the burglary of a home.
3. Kid Napper and his ex-wife have a shared parenting order that splits the time of their children between them. They live in California. The parenting order also requires the parents to notify one another if they take their child out of state. On a day when the child was in the care of her mother, Kid showed at the child’s school, took her out early, and left the state. After several days, the police determined that he didn’t intend to return. He was caught several months later in Oregon, the child was returned to her mother, and Kid was charged with kidnapping by the state of Oregon, the state of California, and, because he crossed state lines, the United States.

For each of the following, identify whether factual guilt, legal guilt, both, or neither exists.

1. A jury in a criminal case agrees the defendant likely committed the charged crime, but the state didn’t prove the case beyond a reasonable doubt. The jury renders a not-guilty verdict.

2. A jury in a criminal case finds a defendant guilty. On appeal, the defendant alleges that the prosecutor failed to disclose evidence of his innocence and that there was insufficient evidence to support the jury's verdict, even without the challenged evidence. The appellate court disagrees with both claims and upholds the verdict.
3. A jury in a criminal case finds a defendant guilty. On appeal, it is determined that the bloody knife, a vital piece of evidence, was unlawfully seized by police. The appellate court decides that the trial court should not have allowed it to be presented to the jury. It also decides that without it the state can't prove guilt beyond a reasonable doubt. It orders the case to be dismissed.

IN A NUTSHELL

Humans naturally guard against, and respond to, threats and harm. For thousands of years, norms have been formally enforced through law. Today, criminal law is an important part of social control and the management of serious social problems.

There are two overarching philosophies of punishment: retributivism and utilitarianism. The weight each of these is given and the ways they are operationalized evolves. Each philosophy gives birth to different operational objectives. For retributivism, classical punishment is employed; utilitarianism relies on incapacitation, rehabilitation, restitution, and restoration. Although it is retribution- and incapacitation-focused, modern criminal law also embraces the objectives of deterrence, rehabilitation, restitution, and restoration. These objectives are operationalized through incarceration, death, fines, restitution, community service, restoration, and the occasional public shaming.

The political and legal history of the United States frames a criminal justice system that emphasizes individual liberty, including the rights of criminal defendants to a fair process and to proof beyond a reasonable doubt. The emphasis on liberty isn't without its costs. As Blackstone pointed out, the occasional offender goes unpunished.

In addition to the direct protections of the individual found in the Constitution (e.g., habeas corpus) and the Bill of Rights, the Framers of the Constitution constructed a government of divided powers. Through federalism and separation of powers between the branches, absolute power was avoided, and a "government of laws, not of men" was established. In this system, the states were delegated the authority to regulate for the general welfare of the people, known as the police power. This includes the criminal law, except when the federal government has a direct interest or when a crime crosses state or international borders. So we look to our state legislatures to make criminal laws, state and local police to enforce criminal laws, and state courts to adjudicate criminal cases. As you will see in a future chapter, this doesn't mean that federal law isn't present in state criminal justice. Just the opposite is true: The U.S. Constitution is omnipresent.

LEGAL TERMS

accusatorial
adjudication
adversarial system

beyond a reasonable doubt
checks and balances
Civil Law

clear and convincing evidence
 Common Law
 Constitutional law
 Contract law
 crime
 Criminal law
 Criminal procedure
 defendant
 defense
 dual sovereignty
 executive orders
 fact finder
 factual guilt
 federalism
 felonies
 folkway
 grading
 infractions
 inquisitorial system
 intentional tort
 judicial review
 legal guilt
 Magna Carta
 malum in se
 malum prohibitum
 misdemeanors
 Model Penal Code
 more
 negligent tort

norms
 Ordinance
 parties
 plaintiff
 precedent
 preponderance of the evidence
 presumption of innocence doctrine
 private law
 Probable cause
 public law
 punitive damages
 reasonable suspicion
 referendum
 regulations
 Rule of Law
 rule of lenity
 SCOTUS
 separation of powers
 stare decisis
 state action
 Statutory law
 strict liability
 substantive criminal law
 supremacy clause
 tort
 victim-in-fact
 victim-in-law
 writ

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- 5 392 U.S. 1.

- 6 The classic banana peel slip and fall has been fodder for comic relief for decades. But the risk is real. You can see the death certificate of a man who died as a result of slipping on a banana peel at McClurg's Legal Humor, as well as several tort cases that have been filed by customers against grocers to recover damages resulting from banana peel falls at <https://lawhaha.com/tortland/interesting-tort-cases/>.
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THE CONSTITUTION AND CRIMINAL LAW

THE FEDERAL SAFETY NET

Learning Objective: Identify and explain the three reasons the U.S. Constitution plays a much larger role in criminal law today than in the past.

On May 23, 1957, three Cleveland, Ohio, police officers received an anonymous tip that a bombing suspect could be found in the home of Dollree Mapp. But this wasn't an ordinary case, and Ms. Mapp wasn't an ordinary citizen. The bombing victim was a well-known gambling racketeer, Don King. Mr. King would later promote some of the best boxers of the world, including Muhammad Ali, Larry Holmes, and Mike Tyson. Mr. King is a larger-than-life character who has had many encounters with the law. In the future, Ali, Holmes, and Tyson, and many other people would sue him. Several years before the bombing of his home, Mr. King killed a man for attempting to rob one of his gambling houses, and in 1967, he was convicted of second-degree murder. Ms. Mapp was also known to police. She was independent, feisty, and outspoken.

The officers appeared at Ms. Mapp's door, demanding entry. She refused to allow them to enter and called her lawyer, who told her to demand that the officers produce a warrant. She made the demand, and the officers left, only to return 3 hours later with 7 to 12 additional officers. When Ms. Mapp again demanded to see a search warrant, one of the officers waved a piece of paper in front of her, claiming it to be a warrant. Ms. Mapp grabbed the paper, and a scuffle began, during which Ms. Mapp shoved the paper down her blouse. In response, one of the officers reached down into Ms. Mapp's blouse and retrieved the paper. The officers then entered her home. They found the suspected bomber, who was later cleared of the crime, but they didn't stop there. They searched her home from top to bottom, during which they found obscene materials (by 1950s standards), arrested Ms. Mapp, and subsequently charged her with felony possession of obscenity.

As Ms. Mapp suspected, the police didn't have a warrant. But it was true that she had violated Ohio's obscenity law, and the state could prove it. At the time, Ohio permitted evidence that police obtained illegally to be used at trial. But this wasn't true everywhere; the states were split on the use of illegal evidence. This was true of many rights. Each state decided what rights criminal defendants enjoyed in their courts. And recall, most criminal prosecutions happen in state courts. The effect of these facts was that the United States Constitution's protections didn't mean much. But this would change in a big way, due, in part, to Ms. Mapp and many other people who have fought the system.¹

Why the U.S. Constitution Is Important

That the U.S. Constitution plays a much larger role in criminal law today than in the past is being referred to as **constitutionalism** in this book. As you will learn in this chapter, there are

Constitutionalism: Having fundamental law that limits the authority of government. In this text, it is a reference to the increasingly important role of the U.S. Constitution to criminal law.

three reasons the U.S. Constitution is more important in criminal law, state and federal, today than in the past:

1. Incorporation doctrine
2. Expansion of rights
3. Exclusionary rule

America's current constitution is not its first; it's the second. The nation's first constitution was the Articles of Confederation and Perpetual Union of 1781. Under the Articles of Confederation, the states were superior to the national government. Believing that the weak national government was inhibiting the economic growth and military security of the young nation, the states sent delegates to Philadelphia in the summer of 1787 to "revise" the Articles of Confederation. These men, commonly known as the Framers, chose to scrap the Articles of Confederation and to write an entirely new constitution. They didn't have their states' permission to do this. In fact, they voted to keep their work secret until it was completed. Can you imagine a group of representatives to a Constitutional Convention meeting in secret today? Not likely. Either masses of people would descend on the gathering, insisting on openness, or the delegates would use texting and social media to continuously leak what was happening inside.

While the Framers intended to strengthen the federal government, they also wanted to leave the states as the primary governors. To accomplish these two objectives, they created a federal government that had specific, limited powers (that it didn't have under the Articles of Confederation) but left most governmental authority in the hands of the states. As you learned earlier, the states retained the general police power.

One of the issues that was debated at the Constitutional Convention was whether a list of individual rights should be included. The delegates advocating for a strong federal government, known as Federalists, opposed including a bill of rights. Among those men were James Madison and Alexander Hamilton. They had four reasons for their pushback against a bill of rights. First, they believed that the government's architecture, most notably federalism and the separation of powers, would protect the people from the centralization of power. Second, they didn't find a listing of rights necessary because the new Constitution didn't empower the federal government to violate liberty. In a third related argument, they believed that the protection of liberties was best handled by the states. And fourth, they believed it wasn't possible to identify and list all the freedoms of people, and to create a list would have the effect of limiting individual rights to what appears in the list. Ultimately, the Federalists won unanimous support to exclude a bill of rights. Consequently, the proposed Constitution identified only a few specific rights. These include **habeas corpus**, which provides courts with the authority to review detentions; prohibiting **ex post facto laws**, or the declaration that an act is criminal after it occurs; prohibiting legislatures from acting as judge and jury, known as **bills of attainder**; and finally, a guarantee of a jury trial in federal criminal cases.

Habeas corpus: A Latin phrase that translates to "you have the body." In law, it is a command to bring a detained person to a court to determine if the detention is lawful.

But the absence of a full set of rights proved to be a problem when the proposed Constitution was sent to the states for ratification. Many people screamed foul, and several states preconditioned their ratifications on the addition of a bill of rights. To ensure that the required nine states, of 13, would ratify, the Framers agreed. Consequently, the Constitution was ratified in 1788 and became effective in 1789. That same year, the first Congress under the new Constitution proposed, as promised, 12 amendments. Ten of those amendments were ratified and went into force in 1791. Today, we know them as the Bill of Rights. As a side note, one of the two amendments that wasn't approved was finally ratified in 1992, 202 years later! The amendment isn't dramatic; it simply states that any raise Congress gives itself isn't effective until the next session of Congress. Congressional sessions are 2 years long. The other unratified amendment changed the calculation for the number of members in the House of Representatives. If it were to be ratified, the House of Representatives would grow from its current number of 435 to as many as 6,000. Congress can't seem to get its work done with 435 members of the House of Representatives and 100 senators. Imagine a House of Representatives with over 6,000 members!

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 the 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, rights varied from state to state. And remember, more than 90% of prosecutions take place in state courts. The differences in individual rights between the states were real.

The Civil War would result in a second phase of constitutional liberty and equality. Three new constitutional amendments were ratified during Reconstruction: the Thirteenth, Fourteenth, and Fifteenth. The Thirteenth Amendment abolished slavery and involuntary servitude, and the Fifteenth Amendment recognized the right of all men, including those formerly enslaved, to vote. Sorry, ladies—you didn't acquire the right to vote until the adoption of the Nineteenth Amendment in 1920. The Fourteenth Amendment, ratified in 1868, is the most important amendment to criminal law, and it is broken into five sections. Section 1 protects the following rights:

Ex post facto law: A law that declares an act to be criminal after it has occurred. The Constitution forbids ex post facto laws.

Bills of attainder: A legislative decision to punish a person or legal entity (e.g., companies) without a judicial trial. The Constitution forbids bills of attainder.

Privilege and immunities: Found in both Article IV and the Fourteenth Amendment, these clauses guarantee a limited number of rights against the federal government and fair treatment of states between their citizens and citizens of other states.

Equal protection: Found expressly in the Fourteenth Amendment and implicitly in the Fifth Amendment, a guarantee that government won't, without a compelling reason, treat people differently because of race, national origin, religion, or alienage.

Due process: Found in the Fifth and Fourteenth Amendments, a requirement that government provide a fair process when taking life, liberty, or property. In addition to procedural requirements, due process also includes substantive rights, such as the right to privacy.

- **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, and other reasons.
- **Due process:** Under this provision, a state may take a person's life, liberty, or property only after providing due process (fair 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 that, 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 (e.g., to add or enlarge rights), but they must respect the safety net's minimum protections.

Fairness in the States: Incorporation

Determining the height and width of the national safety net hasn't been easy. After all, the phrase "due process" is very vague. What is due, or fair? Does fairness include the rights found in the Bill of Rights, for example? Interestingly, courts were not pressed to answer this question for many decades. But eventually, they did, and that leads us to the first reason the United States Constitution means more to criminal law today than in the past: the incorporation doctrine. When SCOTUS first began considering the meaning of the Fourteenth Amendment's due process clause, the justices wrestled with different theories. These included the following:

Theory 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.

Theory 2. Fundamental fairness doctrine: A right found in the Bill of Rights applies against a state when justice demands it. This decision is made on a case-by-case basis.

Theory 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.

Theory 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.

Theory 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**. Incorporation refers to extending a right found in the U.S. Constitution from the federal government to the states, using the due process clause. A right is “selected” to be applied to the states if it is (1) fundamental and (2) necessary to an ordered liberty. Said another way, 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 the First Amendment's protection of free speech. That happened in 1925. 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 2.1 for a 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, or enumerated, 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 not written (unenumerated), but implicit. These too can be incorporated. This happened in 2020 in *Ramos v. Louisiana*.

The question in *Ramos* was whether the right to a jury trial includes the right to have all of the jurors agree to convict. The Constitution is silent on the number of jurors needed to convict. In fact, it has nothing to say about the number of jurors at all. However, SCOTUS decided in 1898 that in federal courts, juries of 12 are required, as is jury unanimity for conviction. Many years later, SCOTUS chose not to incorporate the unanimity requirement, and two states, Louisiana and Oregon, permitted convictions with as few as 10 of 12 jurors. In *Ramos*, SCOTUS reversed its earlier decisions and incorporated the right to jury unanimity, making *it* the most recently incorporated right, not the excessive fines clause.

Selective incorporation doctrine: The determination that a right found in the Bill of Rights is fundamental and necessary to an ordered liberty, and therefore, applies to the states.

FIGURE 2.1: ■ 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 & 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 it is likely
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 9th, it has been used as secondary support for rights found under the 14th
Tenth Amendment	Although it refers to powers of the people, no rights have ever been declared under the 10th

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DIGGING DEEPER 2.1

Does a jury have to be unanimous to convict a defendant?

Case: *Ramos v. Louisiana*

Court: Supreme Court of the United States.

Citation: 590 U.S. ____.

Year: 2020

Justice Gorsuch delivered the opinion of the Supreme Court.

[Facts]

Accused of a serious crime, Evangelisto Ramos insisted on his innocence and invoked his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos's guilt beyond a reasonable doubt; they voted to acquit.

In 48 states and in federal court, a single juror's vote to acquit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.

Why do Louisiana and Oregon allow non-unanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed non-unanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.... Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African American juror service would be meaningless."...

The Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what a "trial by an impartial jury" entails.

Still, the promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down....

One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th-century England and was soon accepted as a vital right protected by the common law....

This same rule applied in the young American States. Six State Constitutions explicitly required unanimity. Another four preserved the right to a jury trial in more general terms.

But the variations did not matter much; consistent with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial.

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. By that time, unanimous verdicts had been required for about 400 years. If the term “trial by an impartial jury” carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity....

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a “constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of 12 persons.”...

There can be no question either that the Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is “fundamental to the American scheme of justice” and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment’s right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

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, state, and federal police that they are wrong. This is an awesome power that most judges around the world don’t possess. Said another way, people around the world aren’t as protected as Americans against governmental abuse. We will now turn to what rights are guaranteed, and later in this chapter, you will learn what happens when the police violate a person’s rights.

QUESTIONS AND APPLICATIONS

1. Let’s role-play. You are a SCOTUS associate justice in the early 1900s. How would you have defined due process? Would it have included the rights found in the Bill of Rights? Or would you have defined due process differently? Explain your answer.
2. Are the following rights incorporated? Answer yes or no.
 - a. Freedom from self-incrimination
 - b. Grand jury indictment
 - c. Jury trial
 - d. Freedom from unreasonable searches and seizures

Recidivism: To commit a new crime after being punished for a different crime.

TREAT ME FAIRLY

Learning Objective: Describe the most significant constitutional rights that apply to criminal law.

Recall that there are three reasons the U.S. Constitution means more in criminal law today than in the past. Incorporation was the first; the horizontal expansion of the Bill of Rights. The second is the vertical expansion of those rights. Each right simply protects more than in 1791. Let's begin with the general idea of a fair process and then examine specific rights.

The due process clauses demand that the federal and state governments play by fair rules. They don't forbid the government from punishing people or making laws that burden individual rights. The clauses simply require that the government be reasonable when doing these things. Specifically, both clauses state that "*no person...shall be deprived of life, liberty, or property without due process of law.*" When applying due process to a given situation, two questions must be asked: First, does due process apply to a case? And if it doesn't, what process is required?

Starting with the first question, the reach of the clauses is quite broad. If the government intends to take life or liberty or property, it must use a fair process. Defining these three interests, particularly liberty, is sometimes tricky outside of criminal law. But the most common forms of criminal punishment (e.g., death penalty, imprisonment, and fines) clearly fall within the zone of the three interests protected by due process. Therefore, question number one is easily answered in criminal law.

Let's now return to the thorny issue of what process is "due." You already know (I hope) that most of the rights in the Bill of Rights are part of due process. And we will soon examine these in greater detail. Before we do, let's think about rights that aren't found in the Bill of Rights. A few of these are explicitly found in the Constitution itself; others are "implicit" in due process.

Ex Post Facto and Bills of Attainder

An example of a right found outside the Bill of Rights is the requirement that the government tell a person that an act is a crime and that it will be punished *before it occurs*. This principle is so obvious, so natural, that it doesn't need to be explained. Every time a parent tells a child "I am only going to tell you once," the idea that it isn't fair to punish without a warning is expressed. In law, the prohibition of retroactive lawmaking, or ex post facto (after the fact), is hundreds of years old. There is a Latin phrase that expresses this principle: *nullum crimen sine lege, nulla poena sine lege*, which roughly translates to "no crime or punishment without law." Before the Constitution, this rule was known as the *principle of legality*. Today, the Constitution demands a warning before punishment. First, the Constitution has two ex post facto clauses—Article I, Section 9 applies to Congress, and Article I, Section 10 applies to the states.

Void for vagueness: A criminal prohibition that is so imprecise that a person doesn't know if a specific act is prohibited. Vague statutes violate due process and are invalid.

Overbreadth doctrine: A criminal prohibition that includes acts that may be criminalized and constitutionally protected acts. Overbroad statutes are invalid.

There is more than one type of ex post facto law. All of the following are forbidden because they are ex post facto:

1. A law that declares an act, which is lawful when taken, to be a crime after it occurs.
2. A law that increases the punishment for a criminal act, after it occurs.
3. A law that changes the evidence or procedural rules to a defendant's disadvantage after the criminal act occurs.²

The prohibition of ex post facto laws guarantees that the government can't change the rules in the middle of a game or after the game is over to increase its chances of winning. A legislature may, however, change the rules in ways that favor a defendant. This is known as *legislative amelioration*. A real-life example of this is the First Step Act, a federal law that shortened the prison sentences of many offenders. In addition to early release, the offenders were provided with training and programming intended to reduce the likelihood that they would become involved in crime again, known as **recidivism**. The First Step Act was intended to address a couple of problems. One was the expense and unfairness of having the largest per capita prison population in the world. The second was the discovery of a racial disparity in punishment. Crack cocaine, more common among African Americans, resulted in much longer prison sentences than powder cocaine, which was more common among European Americans. Several thousand inmates were granted early release under the law.³

In addition to the Constitution's prohibition of ex post facto laws, due process guarantees a person a warning, known as "notice," of new crimes. The due process requirement of notice doubles down on the prohibition of ex post facto laws. In a specific case, it also requires that the defendant be fully apprised of the law that has been allegedly violated, the basic facts of the offense, and time to prepare a defense before trial. There are other procedural rights, both explicit and implicit in the Constitution.

Another right that is found directly in the Constitution is the freedom from bills of attainder. Like ex post facto laws, the federal government is prohibited from bills of attainder in Article I, Section 9 and the states in Article I, Section 10. A bill of attainder is a legislative act that punishes without trial. In the United States, only a court may try a person for a crime. Any legislative act that "punishes" is a bill of attainder, even if not strictly for a crime. For example, it was a bill of attainder for Congress to order that three federal employees not be paid for their work because Congress found them to be subversive communists.⁴

Facial challenge: An assertion that a statute is invalid on its face and, therefore, should be stricken in its entirety.

As-applied challenge: An assertion that a statute is invalid as it is applied in a specific case, even though it is valid generally.

Severability: A doctrine that enables a court to remove unconstitutional provisions of a law, leaving the remainder of the law intact.

Void for Vagueness

Remember the rule of lenity, which states that if multiple reasonable interpretations of a criminal statute are possible, the interpretation that most benefits the defendant is to be applied? Let's take that situation one step further. Imagine a law is so broad, so hard to pin down, that it's not possible for a person to know if their act violates the law—for example, if there was a law that forbids “causing trouble” to other people, what is “trouble”? Would playing loud music in a public park be a violation of the law if it annoys others? How about running up behind people and screaming, with the intention of startling them? Or what about an employer who fires an employee for stealing company funds, but it results in the employee's bankruptcy—hasn't the employer caused the employee trouble? Because this law isn't specific about what conduct is illegal, it violates due process. Specifically, it is **void for vagueness**.

In addition to not providing a person with notice of what acts will be punished, vague laws also overempower police and prosecutors by giving them the authority to decide what conduct should lead to arrest and prosecution. This violates the separation of powers because the authority to declare criminal laws belongs to the legislative branch. Also, too much discretion can lead to racial and other forms of discrimination, in violation of the Fourteenth Amendment's guarantee of equal protection. SCOTUS has invalidated many laws for being too vague. A city ordinance that criminalized “persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers” was held to be too vague,⁵ and the court has invalidated several federal laws in recent years for being vague.⁶

Overbreadth

The first cousin of void for vagueness is the **overbreadth doctrine**. A law that criminalizes acts that may be criminalized but also includes acts that are constitutionally protected is overbroad. Consider a free speech problem. The First Amendment protects speech, but with exceptions. Laws regulating speech must be written with precision to avoid including protected speech. For example, consider the following statute:

Criminal Code, Chapter 45. Child Sex Abuse: Images

Purpose: The intent of this law is to protect children under the age of 12 from sexual abuse.

Section 1: A child is any person under the age of 12 years old.

Section 2: A person who produces, distributes, sells, displays, or communicates any image of a child's genitals is guilty of a Class B felony.

The conduct the statute prohibits is clear, so the law is not vague. However, it is overbroad. Consider, for example, a medical school text that has images of nude children that is used to teach pediatric medicine. And what about a mom's photo of her baby playing in the bathtub? Both of these acts fall within the grasp of the law, yet they are protected expression under the First Amendment.

Often, vagueness and overbreadth are seen together. Let's consider the criminalization of cyberbullying. Ubiquitous smartphone use by children, widespread social media, and the

meanness that sometimes comes with youth have combined to make cyberbullying a common and harmful phenomenon. Lawmakers across the United States have scrambled to address it. But it is one of many crimes that is hard to define, at least in a way that is constitutional. For example, consider this law:

Criminal Code, Chapter 120: Cyberbullying and Cyberthreat Prevention Act

Section 1: Any person who shall use a computer network, social media, or other internet service to post a statement about another person that is insulting, harassing, annoying, or offensive shall be guilty of cyberbullying, a Class B misdemeanor.

Section 2: Any person who shall use a computer network, social media, or other internet service to post, on three or more occasions, statements directed at a specific person with the intent to cause the person to fear imminent serious bodily injury or death, and that a reasonable person would interpret the postings as a threat of imminent bodily injury or death and would also believe the person who made the posting has the ability to cause such harm, is guilty of cyberthreat, a Class A misdemeanor.

Section 1 of this law is vague. Reasonable people can, and will, disagree over what constitutes an insult, harassment, an annoyance, or what is offensive. Section 1 is also overbroad. Likely, you have not studied free speech, so you may not be aware that the First Amendment protects a wide range of expression, including “hate speech.” Although there are limits to the First



PHOTO 2.1 Flag-burner Gregory Johnson won his case for burning the U.S. flag on free speech grounds.

Photo by Allan Tannenbaum/Getty Images

Amendment's protection of speech, including what is known as a "true threat," Section 1 criminalizes much more than true threats, and therefore, it is unconstitutionally overbroad. Section 2, on the other hand, is specific in its criminalization of true threat, so it is constitutional.

When confronted with an overbroad or vague criminal statute, a court has two options. First, it can treat the case as a **facial challenge** and strike down the entire law, or it can invalidate the specific prosecution under the theory the law is only invalid **as-applied**. This leaves the law standing to be used in the future.

In some instances, a court can "fix" the law by interpreting it narrowly or by removing the bad language, a process known as **severability**. In our cyberbullying and cyberthreat example, a reviewing court could invalidate the entire law, or it could leave Section 2 intact while invalidating Section 1.

Either way, the legislature has the authority to pass a new law or to amend the severed law, using language that doesn't offend the Constitution. In our child sex abuse images hypothetical example, the statute could be amended to specifically exempt images that serve medical and scientific purposes, and it could also require that children appear in sexually suggestive ways. These changes would narrow the law to better achieve its purpose—to prevent child sex abuse—and it would preclude the law from being used to unfairly prosecute parents, pediatricians, and medical school professors.

Innocence, Reasonable Doubt, and Damnation

Even though it's not spelled out in the Constitution, the presumption of innocence has been recognized as a fundamental right since at least 1895.⁷ This right places the burden of proving guilt squarely on the state.

You have already learned that the state must prove guilt beyond a reasonable doubt. As is true of the presumption of innocence, you won't find the beyond a reasonable doubt requirement anywhere in the Constitution. But SCOTUS has held that due process demands it. This is also true in juvenile delinquency cases.⁸ As you read in Chapter 1, Blackstone posited that a high standard of proof, and other due process protections, will result in guilty persons going free. That is a tradeoff we make in a free society.

The beyond the reasonable doubt standard is an important feature of the U.S. criminal justice system. In theory, it reduces the number of wrongful convictions and keeps police and prosecutors in check. While it is a highly regarded right of defendants today, an interesting fact is that the original purpose of the standard wasn't to protect defendants. Rather, it was created to protect jurors and judges from eternal damnation. According to scholar James Q. Whitman, it was a mortal sin in old Christian law for a judge or juror to render a conviction while harboring a doubt about a defendant's guilt. The beyond a reasonable doubt standard was intended to protect the souls of those decision-makers.¹⁰

First Amendment

Only 45 words in length, the First Amendment packs a punch:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Often referred to as the “first among equals,” the First Amendment protects six very important rights:

- Freedom of speech
- Freedom of press
- Freedom to exercise religion
- Freedom from the establishment of religion
- Freedom to assemble peaceably
- Freedom to petition the government to redress grievances

Laws that violate these rights can be stricken by the courts. Remember judicial review from the last chapter? In a criminal case, this means that the charges against a defendant are dismissed and the defendant is released. Of the six rights, controversies around free speech and religious freedom are most common. There is a lot of case law defining these rights and their limits. For example, you have already learned that the First Amendment’s protections have been incorporated. Even though the First Amendment only tells Congress to respect its rights, case law makes clear that the president of the United States, the states, and local forms of government must also respect them.

Another question that has been heavily litigated is what is meant by the word “speech.” Does the First Amendment limit its protection to oral communication? The courts have answered this clearly: no. All forms of expression—written, digital, nonverbal, and creative (art, sculpture, etc.)—are considered “speech.” And, on occasion, speech and conduct are combined. An example of this is what happened during the 1984 Republican National Convention held in Dallas, Texas. As part of a larger protest of the nomination of Ronald Reagan to be president, Gregory Johnson burned the flag of the United States in the streets near the convention. At the time, Texas made it a crime to desecrate venerated objects, including the flag. Johnson was criminally charged under the desecration statute. In this defense, Johnson asserted that what he did was protected under the First Amendment.

DIGGING DEEPER 2.2

Is burning the U.S. flag protected speech?

Case: *Texas v. Johnson*

Court: Supreme Court of the United States.

Citation: 491 U.S. 397

Year: 1989

Justice Brennan delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question of whether his conviction is consistent with the First Amendment. We hold that it is not....

We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction....

The First Amendment forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."...

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*, of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*, of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, and of picketing about a wide variety of causes....

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, refusing to salute the flag, and displaying a red flag, we have held, all may find shelter under the First Amendment.

That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood."...

"[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a shortcut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design."

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America." Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows:

"The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism."

In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," to implicate the First Amendment.

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or was threatened to occur because of Johnson's burning of the flag....

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." We thus conclude that the State's interest in maintaining order is not implicated on these facts....

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag....

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable....

We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York*, we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually. . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."

Nor may the government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind."

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."...

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction, because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol

Probable cause: The standard of proof required by the Fourth Amendment to the Constitution of the United States for a search or seizure to be conducted. An officer has probable cause when the facts available to the officer warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.

Warrant: A judicially issued authorization for police to conduct a search or seizure.

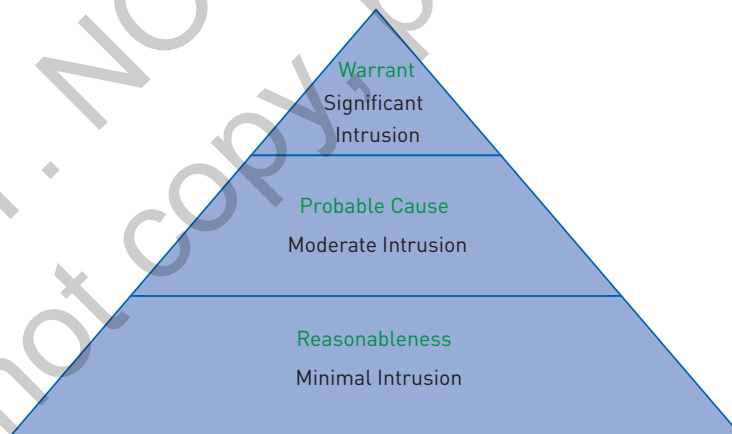
of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals (which held for Johnson) is therefore Affirmed.

The United States protects expression to a greater extent than any other country. The protection of speech includes ideas that are offensive. After all, there is no reason to protect speech that everyone agrees with. Even more, who would decide what speech is too offensive? Do you trust whoever is in power at any moment to decide what speech is acceptable or not? The prospect of the law becoming a political or personal moralistic tool of those in authority is why SCOTUS has chosen to leave it to individuals, through a “free market of ideas,” to decide. As Justice Robert Jackson wrote, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹¹ For this reason, racist, sexist, ageist, and other forms of “hate speech” are protected.

As is true of all rights, however, there are limits. SCOTUS has been careful in narrowly defining these limits and is cautious in creating new ones. Here is a short list of exceptions, though there are others:

- *Obscenity.* Seriously objectionable material, beyond common pornography.
- *Child pornography.* Because children are more likely to be harmed by involvement in pornography than are adults, child pornography may be punished. This includes

FIGURE 2.2 ■ Fourth Amendment Pyramid



Grand jury: A group of citizens who decide if probable cause to believe a suspect has committed a crime exists.

Indictment: Also known as a true bill, a formal criminal charge issued by a grand jury.

TABLE 2.1 ■ Requirements of Specific Searches and Seizures

Action	Description	Pyramid Location
Home search	With rare exceptions, police must have a warrant to search a home.	Top/Warrant
Plain view seizure	An officer may seize evidence that is in plain view, and probable cause exists to believe it is contraband or evidence of a crime.	Center/Probable cause
Automobile search	A car may be searched with probable cause to believe contraband or evidence of a crime will be found. A warrant isn't required.	Center/Probable cause
Terry frisk	Officer may "pat down" the outer clothing of a person subject to a Terry stop, provided a reasonable belief that the suspect is dangerous exists. Also named for the <i>Terry</i> case.	Bottom/Reasonableness
Terry stop	Officer may temporarily detain a suspect when there is a reasonable suspicion of criminality supported by specific and articulable facts. Named for <i>Terry v. Ohio</i> , 392 U.S. 1 (1968).	Bottom/Reasonableness
Search of an arrested person	For the safety of the officer and others, and for administrative reasons (to make a list of the arrestee's possessions), an arrested person may be searched without evidence that contraband will be found. The "search incident to arrest" is automatically authorized.	Bottom/Reasonableness

both involving a child in a sex act and exhibiting nude children in sexually suggestive ways. The objective of this free speech exception is to protect children from harm, not to prevent others from viewing the material. So digitally created, or virtual, images of child pornography are protected, unless they rise to the level of being obscene.

- *Defamation.* Written statements (libel) or oral statements (slander) that are untrue and harmful are not protected. The state may allow defamed people to sue and win money awards, but defamation may not be criminally punished.
- *True threats.* An expression that is intended to cause fear of imminent bodily harm or death, and if the speaker has the apparent ability to do what is threatened, may be criminalized. A true threat must be directed at a specific individual or group of people.
- *Incitement to imminent lawlessness.* Words that are likely to cause imminent lawlessness may be punished.

You will learn more about these exceptions when we explore the specific crimes that criminalize speech—for example, threat—later in the book.

Second Amendment

The Second Amendment reads “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The relationship between the militia clause and the bear arms clause is unclear. Scholars and others continue to debate whether they are connected or independent of one another. If connected, then the right to bear arms only exists for members of the militia. If not, then all people possess a right to bear arms.

Regardless of the ongoing academic debate, SCOTUS found the two clauses to be independent in a case where it held that an individual has a right to possess a handgun in the home.¹² Two years later, the court incorporated the Second Amendment.¹³ But the right to bear arms, as presently understood, is limited to a handgun in the home. Many states and the federal government regulate firearms in many other ways, including owning or possessing only certain types of guns, mandatory licensing or registration, safety training, prohibiting sales to people with criminal or psychological histories, restricting public possession, and limiting sales and distribution. These laws are being aggressively challenged, and it is likely that SCOTUS will soon better define the Second Amendment.

Fourth Amendment

One of the most important protections of rights in criminal justice is the privilege against unreasonable searches and seizures. This right is found in the Fourth Amendment. It is short and to the point:

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

The amendment is fully incorporated, so all searches and seizures by any government officer must follow the amendment’s commands. The words “searches and seizures” have special Fourth Amendment meaning. A seizure of the person, for example, is more than just an “arrest.” Whenever a government officer makes a person feel unfree to leave the situation, a seizure has occurred, subject to a couple of conditions. First, the person’s conclusion that they were not free must be reasonable, and second, the government officer must be acting under official authority, not as a private person. The Framers listed the spaces protected by the amendment—persons, houses, and papers and effects. These three interests include almost everything—the human body, homes, apartments, cell phones, cloud accounts, automobiles, water bottles, and purses and wallets are all protected.

Suspect classification: Laws that discriminate between people by race, alienage, national origin, and religion are suspect.

No right is absolute; the Fourth Amendment doesn't ban all searches. Of course, police officers conduct searches and seizures of people and things thousands of times every day. The Fourth Amendment establishes the rules police must follow when doing these things.

To understand those rules, review Figure 2.2. The baseline, or minimum, requirement of the Fourth Amendment is that the government act reasonably. Searches and seizures must *always* be reasonable; and sometimes, police only have to be reasonable. That is the bottom of the pyramid. In other cases, being reasonable isn't enough. The state must also have **probable cause**. It takes credible evidence, not just a suspicion or a hunch, to prove probable cause. Many searches and seizures are permitted when the government has probable cause and has acted reasonably. Finally, you see the warrant requirement at the top of the pyramid. A **warrant** is a court order to conduct a search, make an arrest, or seize property. Whenever a warrant is required, everything below it on the pyramid is also required (reasonable behavior and probable cause). The point of a warrant is to protect society's most private spaces by interposing a judge between the individual and the state. Only a neutral judge may issue a warrant, the officer who



PHOTO 2.2 Supporters of gay marriage rally in front of the Supreme Court in Washington.

Photo by Allan Tannenbaum/Getty Images

Strict scrutiny test: Laws that discriminate using a suspect classification or that encroach upon a fundamental right are reviewed by courts under the strict scrutiny test. To satisfy equal protection or due process, such laws must be supported by a legitimate compelling governmental interest, be narrowly tailored, and use the least restrictive means possible to accomplish the government's purpose.

has asked for the warrant must swear that the facts presented to establish probable cause are true, and the warrant must satisfy the particularity requirement. “Particularity” simply means details—what precisely is to be searched or seized. A warrant can’t authorize police to go on fishing expeditions.

To make sense of the pyramid, think of it in terms of the level of privacy that the government has intruded upon. Less is required of the government at the bottom of the pyramid because the individual’s privacy interests are minimal. The government’s privacy intrusion is the greatest at the top of the pyramid, so the full warrant, probable cause, and reasonableness requirements are required. There are many exceptions to the warrant requirement. In Table 2.1, you will find a list of some of the most common searches and seizures and where they fall on the pyramid. A more thorough discussion of the Fourth Amendment can be found in a criminal procedure textbook.

Fifth Amendment

Another important set of criminal justice rights is found in the Fifth Amendment, which reads as follows:

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

Under this Amendment, a defendant can’t be made to testify (at all); can’t be tried twice; is entitled to due process; and is entitled to have a group of citizens, known as a **grand jury**, decide whether charges, known as an **indictment** or true bill, should be filed in the first place. All of the rights in the Fifth Amendment, except indictment by grand jury, have been incorporated. Regardless, many states require grand jury indictment for serious crimes. When grand jury indictment isn’t required, a prosecutor can file the charge, known as an *information*, directly.

Sixth Amendment

Like the Fifth Amendment, the Sixth is short but packed full of rights:

Substantial relationship test: Laws that discriminate between people by sex are reviewed by courts under the substantial relationship test. To satisfy equal protection, such laws must be supported by an important and legitimate governmental interest, and the law is substantially related to that interest.

Rational basis test: The default test under the equal protection clause and due process clauses. It is applied whenever a law doesn’t involve a suspect classification or a fundamental right. The least demanding test under the Fourteenth Amendment, a law will survive review if it is supported by a legitimate governmental interest and the law is rationally related to that interest.

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

The reach of the amendment is clear: It only applies in criminal cases. Of the rights found in the Sixth Amendment, a speedy trial has been one of the most difficult and most contentious. SCOTUS has refused to set hard dates and has recognized that there are legitimate reasons for delays. Most states provide for a right to trial within 90 days if the defendant is in custody and 180 days if the defendant is free.

The speedy trial determination is case-specific. The impact COVID-19 will have on speedy trial and public trial rights is yet to be seen. There is precedent for delays due to natural causes. As a consequence of Hurricane Katrina in Louisiana, many trials were postponed well beyond the normal limits of speedy trial. Also, many courts chose to use virtual hearings and trials.

The rights to confrontation and cross-examination are inherent to the “orality” of the adversarial system. The adversarial system assumed that direct, real-time testimony that is subject to interrogation is the best way to find the truth. The state can’t introduce written statements or other evidence without producing the witness to testify at trial.

The Sixth Amendment’s right to counsel is a good example of the expansion of a right. First, it wasn’t incorporated until 1963, although SCOTUS had previously decided that it was incorporated in a very minimal way.¹⁴ Beyond expanding it to the states, the right now applies to many cases it didn’t before. In the early years, only defendants charged with crimes that could be punished with death were entitled to counsel. Over time, the right expanded to felonies, then misdemeanors, and today, every defendant charged with a crime that may be punished with a single day in jail is entitled to have an attorney. This includes the right to have an attorney appointed at the government’s expense if a defendant can’t afford an attorney.

Privacy

Privacy is not specifically protected by the Constitution. The Fourth Amendment has the effect of protecting privacy, but it isn’t a source of any specific right to privacy. SCOTUS has found, however, a number of privacy rights to be implicit in other rights. The most significant source is due process. Of course, due process is about procedure. But it also protects substantive rights. In some instances, the court has primarily relied on due process to protect privacy, but it has also thrown other rights into the mix. An example is the Ninth Amendment, which was the Framers’ way to express that there are more rights than appear in the Constitution. In spite of the obvious intent of the Framers, the Ninth Amendment has never been used by itself to secure a right. But it has been cited as a supporting cast member to the star of the show: substantive due process.

Several areas of private life have been deemed “fundamental” and protected under the due process clauses. These include reproductive, sexual, and marriage rights. The landmark case where the right to privacy was announced was *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Griswold*, a Connecticut statute that criminalized prescribing contraceptives for married couples was invalidated. Justice Douglas wrote, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” Subsequently, this decision was extended to unmarried couples in *Eisenstadt v. Baird*, 405 U.S. 438. Additionally, the right to interracial marriage was found in *Loving v. Virginia*, 388 U.S. 1 (1967), the right of a woman to elect abortion in *Roe v. Wade*, 410 U.S. 113 (1973), the right to sex with a person of the same sex in *Lawrence v. Texas*, 539 U.S. 558 (2003), and the right to same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

QUESTIONS AND APPLICATIONS

In Questions 1 and 2, identify the laws as either ex post facto or a bill of attainder.

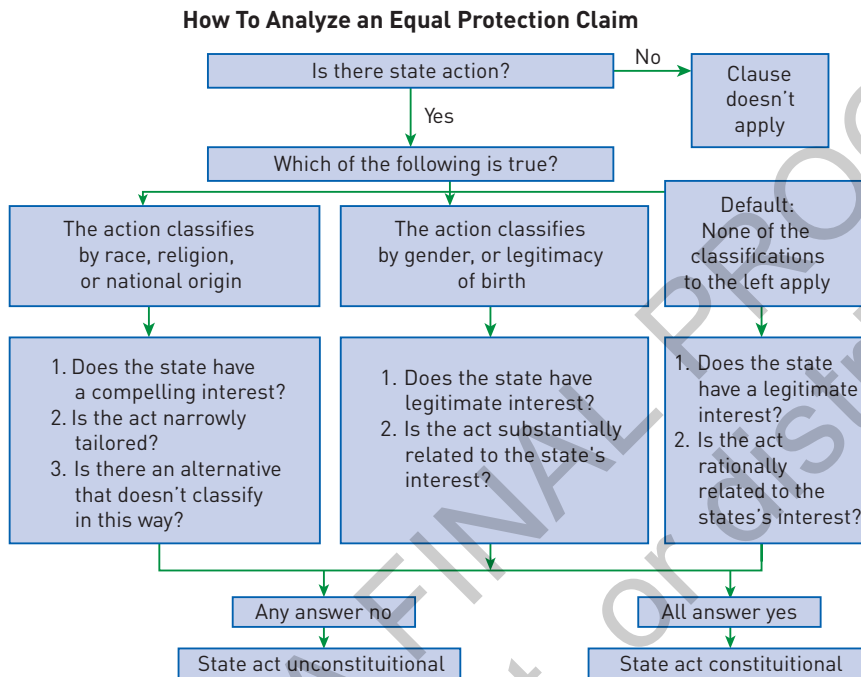
1. Ty is convicted of theft and sentenced to 18 months in prison. During his second month in prison, the state legislature changed the theft statute to include orders of restitution in addition to jail time. The statute applied to all convictions that occur after the law is enacted and to all convictions that occurred within 2 years before the law was enacted. Ty received a notice from the court where he was convicted that he has been ordered to pay the victim of his theft \$2,500 in restitution.
2. Terri Trustworthy, a licensed investment consultant, was sued by a large group of investors who claimed they lost millions of dollars in savings due to her embezzlement and carelessness. The lawsuit is dismissed, and in response to pleas from the investors, Congress enacts a statute that finds Terri liable and orders her to repay the investors' losses.
3. Is the following law vague, overbroad, both, or neither? Explain your answer.

COVID-19 Health Emergency Protection Act

Any person who meets with a large number of people in any space, real or virtual, for any reason other than to provide important and essential services is guilty of a Class B misdemeanor.

In Questions 4 through 6, explain which right is implicated by each scenario and then list in which amendment that right is found.

4. State enacts a statute that declares it a misdemeanor to “utter, publish, or write any statement concerning the governor’s COVID-19 orders to wear masks, socially distance, or to close businesses that are not approved by the governor’s office.”
5. HappyTown City Police Officer James Smiley stops a man on the street for appearing to be grumpy. Officer Smiley asks him what is bothering him. The man replies, “I don’t have to talk to you,” and begins to walk away. Officer Smiley grabs the man and searches his body.
6. Darian is on trial for involuntary manslaughter. The prosecutor calls him to testify. He refuses, and the judge tells him that he will be found in contempt of court if he doesn’t take the stand.

FIGURE 2.3 ■ How to Analyze Equal Protection Claim

TREAT ME EQUALLY

Learning Objective: Describe the three levels of review under the equal protection clause and identify the classifications that fall under each.

In addition to protecting due process, the Fourteenth Amendment forbids the states from denying “to any person within its jurisdiction the equal protection of the laws.” Even though there isn’t an express counterpart that applies to the federal government, SCOTUS has held that the Fifth Amendment’s protection of due process includes the equal protection of the laws.¹⁵ So today, both the federal government and the states must provide equal protection of the laws *and* due process.

A straightforward reading of the equal protection clause appears to demand that the states and federal government treat every person identically all the time. But this rarely happens—nor should it. Discriminating between people is both necessary and common. For example, few people would disagree that there should be a minimum age to drive a car or that a medical school education should be required to obtain a license to practice medicine. Thankfully, the equal protection clause hasn’t been interpreted to require the states to issue driver’s or medical

Exclusionary rule: A judicially created rule that requires evidence that is illegally obtained by the state to be excluded from the trial of the defendant.

licenses to 7-year-old applicants. But some forms of discrimination are more troubling than these examples. Indeed, the equal protection clause was specifically created to address racial discrimination, so there is, therefore, legitimate and illegitimate discrimination in the eyes of the equal protection clause. Stated another way, the law discriminates between different forms of discrimination. (I admit, that was fun to write.)

SCOTUS has developed a method of analysis for equal protection claims. The first step in the analysis is to determine whether the court should apply strict scrutiny, intermediate scrutiny, or rational basis review of the government's action. Most laws and government actions are constitutional if there is a rational basis for them. Under the *rational basis test*, the government must have a legitimate purpose for making the law, and the law must be rationally related to that purpose. Let's use our medical license example from earlier. The state has a legitimate interest in protecting people from poor medical care, and it is reasonable to assume that a person who graduates from medical school will be better prepared to provide quality medical care than a person who hasn't attended medical school, so the medical school requirement easily passes the rational basis test. The rational basis test is the default test that is used by courts to determine if the equal protection clause has been violated.

There are a few classifications, however, that are "suspect" under the equal protection clause. Over the years, SCOTUS has considered several factors when deciding if a classification is suspect. Included are whether people are grouped by immutable conditions, or biological traits, over which a person has no control; whether there is a history of discrimination against a group; and whether the group has a history of being disadvantaged in the political system. Applying these factors, race, alienage, national origin, and religion has been found to be **suspect classification**.

Suspect classifications are not tested under the rational basis test. Instead, the **strict scrutiny test** is applied. This is a hard test for a law to pass because it requires more than simple rationality. It demands these items:

1. The government must have a compelling interest in the regulation.
2. The law is narrowly tailored to accomplish that compelling interest.
3. The law uses the least restrictive means possible, or to put it another way, can the government accomplish its purpose in a way that doesn't classify people? If so, it must follow that path.

The first element concerns the government's interests, and the last two elements concern the means, or manner, it uses to accomplish its goal. To be compelling, an interest must be necessary, vital to the public good. For shorthand, think of this as the "damn good reason test." The second and third elements are focused on the means used to accomplish the damn good reason—did the government narrowly tailor the law to avoid the classification?

In addition to requiring a compelling purpose and a narrowly drafted law, another big difference between the strict scrutiny standard and the rational relationship standard is the burden of proof. If the rational basis test applies, the law is presumed constitutional and the person

challenging the law must prove it to be illegitimate or not designed to achieve its objective. In strict scrutiny review, however, the government must prove that its compelling interest is real; it must put on evidence that there is a problem, that the law will help solve that problem, and that the law is narrowly tailored.

Most, but not all, laws that are put under the strict scrutiny microscope are found to be unconstitutional. Although you will explore fundamental rights later in the chapter, it is worth noting now that the strict scrutiny test applies in a second situation: when laws burden fundamental rights. A law that makes it a crime to express dissatisfaction with the government encroaches on the First Amendment. It would, therefore, be subject to strict scrutiny when reviewed by a court for constitutionality. And by the way, the law would unquestionably fail.

A third test has developed that falls in between strict scrutiny and rational basis; it represents an intermediate level of judicial review. Known as the **substantial relationship test**, a law is constitutional if it furthers a legitimate and important governmental interest and is substantially related to the government's purpose. Sex classifications are an example.

Examples of common forms of discrimination that are not recognized as protected classes are age and wealth. Without a doubt, both exist. There are statutory laws that forbid age discrimination in employment and in certain other circumstances, but the Fourteenth Amendment does not provide any special protection. Income or wealth, on the other hand, is not protected by statute or the Constitution. Laws that distinguish by wealth only need to be rational. This is why people of greater income can be taxed at a higher rate than people of lower income and why it was legal for the government to send COVID-19 support checks to some people but not others. See Figure 2.3 for a flowchart of how to step through an equal protection problem.

Now, let's apply what you have learned about equal protection to criminal law. By its very nature, criminal law treats people differently. Criminals are punished; the general population isn't. Being a "criminal" doesn't put a person into a protected class, so criminal classifications have to pass the **rational relationship test**. The government's interest in protecting people from crime is a legitimate governmental purpose, and a law prohibiting and punishing an offender for constitutionally unprotected conduct is rationally related to that purpose. Consequently, criminal laws don't wrongly discriminate between offenders and others.

Although a law stands a good chance to be found constitutional when tested under the rational relationship standard, that doesn't always happen. The conviction of a police officer in Ohio is an example. The officer, aged 35, met a girl on a dating app. In their conversations, she claimed to be 18. They met and began to have sex, only to be discovered by her mother. The girl, as it turns out, was 14. The officer was charged with two crimes: statutory rape and sexual battery under a statute that prohibits sexual conduct when one person is a minor and "the offender is a peace officer, and the offender is more than two years older than the other person." The statutory rape charge was dismissed after the jury couldn't reach a verdict, but the judge found the defendant guilty on the count of sexual battery by a police officer.

The defendant challenged the law as violating equal protection, asserting that police officers shouldn't be treated differently from other people. The Ohio Supreme Court agreed. The battery law in question protected minors, and adults in some circumstances, from abuses by school officials, physicians, clerics, police, corrections officials, and other authority figures.

However, all of the other listed professionals could only be convicted if they used their position of authority to take advantage of a victim. For example, the law made it a crime for a mental health professional to “induce the other person to submit [to sex] by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes.” But no such connection between the authority of a police officer and the resulting crime existed under the statute. In the defendant’s case, there was no evidence that the victim knew, or that he used, his status as a police officer to coerce or lure her into sex. The law simply punished the defendant differently because he was a cop. The Ohio Supreme Court found the classification to be a violation of both the U.S. Constitution’s and Ohio Constitution’s guarantees of equal protection; it found the law to be irrational.¹⁶

Criminal laws that group people into protected classes are less likely to survive equal protection testing. Today, it is rare for a law to violate equal protection on its face. Most equal protection violations occur when race, ethnicity, and religion influence the decisions of police and prosecutors. A decision to pursue an investigation or prosecution may violate equal protection, even though the law itself doesn’t mention one of the protected statuses. This is known as *selective prosecution*.

What happened to Yick Wo is an example. In 1880, during a period of anti-Chinese sentiment in the United States, San Francisco enacted an ordinance that forbade laundries from operating in wooden buildings unless a permit was obtained. At the time, nearly all of the laundries in the city operated out of wooden buildings, which were susceptible to catching fire. At the time, there were over 300 laundries, most owned by people of Chinese descent. Yick Wo had operated his laundry for over 2 decades when the law went into effect. As required, he applied for a permit, but it was denied. As it turned out, there were over 200 applications from Chinese launderers. All but one was denied, while nearly every permit application was granted to white applicants. In violation of the law, Yick Wo continued to operate his business, was charged, convicted, and fined—and when he failed to pay the fine, jailed. He appealed his conviction, eventually reaching SCOTUS. The court held that while the law was neutral and its intent, to prevent fires in the city, legitimate, the manner in which it was enforced was racially discriminatory. The court dismissed Yick Wo’s charges and ordered his release, as well as the release of other launderers of Chinese descent who were jailed under the law.¹⁷

Today, concerns about the unequal treatment of racial minority groups by police are much in the news. In an effort to combat crime in high-crime areas, New York City employed a large “stop and frisk” program for a decade. The program was intended to be proactive attempt to prevent crime. Several million people were stopped and frisked for contraband and weapons during the life of the program—over 600,000 in 1 year alone. Most of the detainees were people in racial minority groups, which caused concern that race was playing a significant role in the decision-making of police officers. City officials, however, credited the stop-and-frisk program as a major factor in a decline in crime during the period of the program and claimed that data didn’t support the assertion that racist decisions were being made. Eventually, a federal district judge ruled that the program violated equal protection. That judge was later removed from the

New judicial federalism: The interpretation of state constitutions independent from the U.S. Constitution. State constitutions may enlarge, but not reduce, the rights found in the U.S. Constitution.

case by the New York Court of Appeals for having suggested that the plaintiffs bring a lawsuit to challenge the program. Since she had shown a bias in favor of the lawsuit, the appellate court said she should have recused herself from the lawsuit that the plaintiffs eventually filed.¹⁸

In addition to race, ethnicity, and religion, laws sometimes classify by gender. This is illustrated by one case involving statutory rape laws. Statutory rape law presumes that young people are emotionally and psychologically incapable of consenting to sex. To protect minors from potentially harmful sexual liaisons, statutory rape laws make it a crime for an older person to have sex with a younger person under the age of consent within the state, regardless of whether the minor consents or even initiates and encourages the liaison. Laws vary considerably in the minimum and maximum ages for victims and offenders. For a long time, statutory rape laws were gendered; only males could commit the offense and only females were protected. When a 17-year-old male was convicted of the statutory rape of a 16-year-old girl, he challenged the law's sexual classification under the equal protection clause. The case made its way up to SCOTUS, which applied the substantial relationship test because the law classified the victims and offenders by gender. In a controversial decision, SCOTUS found the classification to be legitimate and substantially related to the purpose of the law: to protect girls from sexual intercourse and pregnancy at an age when the physical, emotional, and psychological consequences are particularly severe.¹⁹

QUESTIONS AND APPLICATIONS

Identify whether the following classifications will be tested under the strict scrutiny, substantial relationship, or rational basis test. Explain your answer.

1. State law declares it a misdemeanor for a person to perform genital circumcision of a male younger than 1 year in age as part of a Brit milah or other Jewish practice.
2. State law declares that any person convicted of a felony shall lose the right to vote until that person's punishment has been completed.
3. A state legislature investigates the problem of binge drinking by youth. The legislators hear testimony that young men are more likely than girls to binge drink. Further, when the effects of alcohol on young men and women are compared, they discover that boys are more likely than girls to commit violent crime or to become involved in automobile accidents. Consequently, the state legislature, with the governor's signature, enacts a statute that permits men to begin drinking at 21 and women at 19.

DON'T BE CRUEL

Learning Objective: Identify the three rights found in the Eighth Amendment.

Up to this point, you have learned about rights that limit the government's authority to declare acts to be crimes and other rights that empower defendants to demand a fair process. The Eighth

Amendment is concerned with the other end of the criminal justice process: punishment. It is shorter than the amendments discussed already:

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

There are three distinct rights in the Eighth Amendment—no excessive bail, no excessive fines, and no cruel and unusual punishment. The excessive fines and cruel and unusual punishments clauses have been incorporated, but the excessive bails clause has not. But it is expected to be, eventually, and all the states and the federal government have rules limiting bail and making pretrial release possible in many cases.

Defining cruelty isn't easy. Whatever it is, however, isn't what it used to be. Instead, cruelty is defined using society's "evolving standards of decency." Although familiar to early Americans, lopping off an ear and drawing-and-quartering (when a horse was used to split a person into four pieces) are no longer allowed. In two separate opinions, SCOTUS held that it is cruel and unusual punishment to execute the rapists of an adult and a child.²⁰ There are many cases that address the methods that may be used to execute offenders and the conditions of prison confinement. Prisoners are entitled to sanitary conditions, clothing, minimal nutrition, personal space, and medical care. It is unknown whether there is a limit to the length of imprisonment that may be imposed for minor crimes.

QUESTIONS AND PROBLEMS

1. What are the three protections found in the Eighth Amendment?
2. When the Constitution was ratified, branding was still a lawful form of punishment in some of the states. If it could be proved that most people at that time believed branding to be acceptable, could we employ it today? What evidence would you need to answer this question? Explain your answer.

DON'T USE ILLEGAL EVIDENCE

Learning Objective: Define the exclusionary rule and identify its constitutional source and the case where it was incorporated.

Remember Dollree Mapp from the opening of this chapter? Her Fourth Amendment right was violated by the officers who entered and searched her home without a warrant. The evidence they seized was used at trial to obtain her conviction. That may not be fair, but what is to be done is unclear. The Constitution declares rights, but it doesn't spell out what is to happen when those rights are violated.

Ms. Mapp appealed her case all the way to SCOTUS. Her appeal resulted in the third reason the Constitution means so much in criminal law today: the **exclusionary rule**. Read about this rule in your next Digging Deeper..

DIGGING DEEPER 2.3

Can illegally seized evidence be used to convict a defendant?

Case: *Mapp v. Ohio*, 367 U.S. 643

Court: SCOTUS

Year: 1961

MR. JUSTICE CLARK delivered the opinion of the court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code. As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home."....

The State says that, even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial... [even though the court had previously decided that illegally seized evidence may not be used in federal courts].

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise... the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties; so too, without that rule, the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."...

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover... "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."

Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

In the abstract, the exercise of a right should be free. But in reality, there are costs. Litigation, civil and criminal, can be protracted, time-consuming, financially expensive, and invasive of

one's privacy. In some cases, there are social expenses. Through the exclusionary rule, evidence that police seize illegally is excluded from trial. That can jeopardize the possibility of bringing an offender to justice. That was true of Ms. Mapp. Her case was dismissed, and she was set free. She was later convicted of possession of a controlled substance, served time in prison, was released, and died in 2014 at the age of 91. But freedom doesn't occur automatically when the exclusionary rule is applied. If the state has other evidence, the case will proceed without the excluded evidence.

QUESTIONS AND APPLICATIONS

1. Like judicial review, the exclusionary rule isn't in the Constitution. Should SCOTUS have the authority to create such rules? Construct arguments in favor of and in opposition to the court's creation of the exclusionary rule.
2. What are the costs and benefits of the exclusionary rule? Consider the individual, the community, and the legal system.

DON'T FORGET STATE CONSTITUTIONS

Learning Objective: Define new judicial federalism and provide one example of it in action.

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 was appointed by President Dwight D. Eisenhower, but as 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 and was 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.²¹ For Brennan, if the U.S. 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 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.²² A few other state high courts have been somewhat aggressive in expanding rights beyond what the U.S. Constitution protects. For example, you learned earlier that gender-based discrimination under the federal equal protection clause is tested using the intermediate substantial relationship test. But the California Supreme Court reviews sex discrimination by the state by

the strict scrutiny standard.²³ In regard to an exception to the exclusionary rule that the U.S. Supreme Court adopted, and thereby permitting illegally seized evidence to be used against a defendant, the Pennsylvania Supreme Court wrote, “We flatly reject the notion.”²⁴ The lesson of these cases is clear: do not forget state constitutional law. While it may not reduce U.S. constitutional rights, it sometimes bolsters them.

QUESTIONS AND PROBLEMS

1. New judicial federalism results in greater protection of rights in some states than in others. Is this fair to the people in the states with less protection? What can they do to change their rights?

IN A NUTSHELL

The political DNA of the United States includes a suspicion of governmental authority and a respect for the rights of the individual. The Constitution’s Framers chose to divide the government, both horizontally and vertically, to protect liberty. The federal system can be complex, clunky, and inefficient. But to the Framers, that was a reasonable price to pay to guard against tyranny.

The Framers believed that people have a greater voice, and laws are better tailored to the needs of the people when created at the state and local levels. It is easy to understand their reasoning, given the size of the country at the time. There were fewer than 4 million people spread across 13 states at the time of the adoption of the Constitution. The largest state, Virginia, had a population of about 750,000 inhabitants, and the smallest state, Delaware, had only around 60,000. Consequently, they placed most governmental authority, including the police powers, with the states. Even today, 90% of all criminal cases are adjudicated in state courts. Most crimes, their punishment, and, to some extent, the defenses that may be asserted to criminal charges are made and enforced by the states.

But state authority is not without its limits. Although the individual rights found in the Constitution were originally intended to restrict the federal government and not the states, this changed after the Fourteenth Amendment was ratified. Through selection incorporation, most of what is found in the Bill of Rights, as well as the few rights found in the original Constitution, acts to restrict state authority. The practical impact of this on criminal law can’t be overstated. Every defendant in every courtroom in the United States can assert the Fourth Amendment’s protection against unreasonable searches and seizures, can demand a public jury trial of peers, is free from self-incrimination, and so on. When added to the more expansive interpretation of those rights, particularly after the 1960s, the United States Constitution is a powerful force of liberty.

KEY TERMS

as-applied
 bills of attainder
 constitutionalism
 Due process
 Equal protection
 exclusionary rule
 ex post facto laws
 facial challenge
 grand jury
 habeas corpus
 indictment
 new judicial federalism

overbreadth doctrine
 Privileges or immunities
 probable cause
 rational relationship test
 recidivism
 selective incorporation doctrine
 severability
 strict scrutiny test
 substantial relationship test
 suspect classes
 void for vagueness
 warrant

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12

CRIMES AGAINST THE PEOPLE

On January 6, 2021, Congress convened to count the votes of electors for vice president and president, as required by the Twelfth Amendment to the United States Constitution. The counting of the votes of the members of the Electoral College by Congress is the final step in certifying the president-elect and vice-president-elect. Prior to January 6, President Donald J. Trump, who lost his reelection bid to Joseph Biden, engaged in a campaign to reverse the outcome through dozens of failed court challenges, calls for the electors to change their votes, pressure on state officials to change their states' vote counts, pressure on Vice President Mike Pence and members of Congress to reject several electoral votes for former Vice President Joseph Biden and to declare President Trump the victor, and an intense appeal to supporters in what became known as "Stop the Steal." Consequently, thousands of people attended a "Save America" rally in front of the White House during the January 6 meeting of Congress. At that gathering, President Trump and other speakers addressed the crowd, reiterating the claim that the election was stolen and encouraging them to march to the Capitol. Subsequently, thousands of people walked down Pennsylvania Avenue to the Capitol.

Within a short time after arriving at the Capitol, a mob overcame the police who were protecting the building and its residents. Some of attendees forced their way into the building on the first floor; others scaled the walls and the scaffolding that had been erected for the upcoming presidential inauguration. To gain entry, the mob assaulted officers, killing one. Inside, they made their way through the building into members' offices and onto the floors of both the House of Representatives and the Senate.

Videos, photos, and social media postings surfaced in the days following the insurrection that evinced a wide range of crimes. Some of the actors intended to disrupt Congress; others had expressed interest in murdering Vice President Mike Pence, Speaker of the House Nancy Pelosi, and other members of Congress. Several insurrectionists proudly posted or permitted photos to be taken of themselves during the events, including a man who was seated in the Speaker of the House's office with his feet on her desk, another who waved to a camera as he was stealing the Speaker's lectern, and yet another who was seated in the vice president's chair at the dais of the Senate Chamber. One insurrectionist was killed, and three other people died as a result of the riot, bringing the total dead to five.

The attack on the Capitol was the first since the British invaded and burned the building during the War of 1812. The behavior of the mob, of President Trump and other elected officials, and the apparent unpreparedness of Capitol police all shocked the nation—and the world. Immediately, there were calls for the suspects to be tried for treason and other crimes. Indeed, the crimes of January 6, 2021, will leave an indelible mark on America. The social, economic, and political causes of that dark day will be studied and discussed for decades.

In criminal law terms, a plethora of crimes that are the subject of this chapter—crimes against the "state" or against the "people"—occurred that day. Trespass, theft, assault, and sedition are the most obvious examples of crimes against the people. But as you will read in this chapter, there are many others.

Your study of this category of crimes begins with the most serious, treason.

ET TU, BRUTE

Learning Objective: Identify, describe, and apply the elements of treason.

Treason and murder have long been the most serious crimes in the Common Law—murder because it takes life, treason because it is an attempt to murder a nation. In Dante’s *Inferno*, there is a special place reserved for traitors. Although most historians believe it apocryphal, William Shakespeare, in his play *Julius Caesar*, portrays dictator Julius Caesar uttering the words “Et tu, Brute,” or *You, too, Brutus*, as Brutus joins the mob in its assassination of the dictator.

Traitors to the Crown were punished harshly throughout England’s early history. King Henry VIII had two of his wives executed on the theory that their alleged marital infidelities were acts of treason. Treason was often punished more severely than murder. Murderers were typically executed quickly, while traitors were disemboweled, quartered, and subjected to torture before death. The family of a traitor was punished as well. Through corruption of blood, a traitor’s property was forfeited to the Crown, and no titles or other family rights could be inherited from the traitor. This scarred a family for generations.

The British perspective on treason was transmitted to America. The Framers wrote and spoke about the dishonor and harm of treason. At the same time, they were leery of it. The British had used treason as a weapon to oppress political opponents and to suppress dissent in the American colonies. For example, speaking ill of the King or of the Crown’s policies was sometimes punished as treason. Many Framers were treated as traitors to the British Crown even before the American Revolution began. So they included treason in the Constitution—the only crime to appear there—not to emphasize its importance, but to prevent its abuse. Article III, Section 3 reads:

Clause 1: Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

Clause 2: The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Congress implemented Clause 1, and the resulting elements of the offense are as follows:

18 U.S.C. §2381. Treason

1. A person who owes an allegiance to the United States,
2. *Levies* war or *Adheres* to an enemy of the United States and
3. commits an overt act and
4. possesses treasonable intent.

Treason: Levying war on, or adhering to the enemies of, a nation.

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The first element applies treason law to “a person who owes an allegiance to the United States.” Citizens of the United States clearly fall into this category, as may classes of noncitizens, such as members of the military and permanent residents, who both swear allegiance to the United States.

There are two forms of treason: (1) levying war against the United States and (2) adhering to an enemy of the United States, giving them aid and comfort. The second requires adhering to an enemy nation, or a foreign power. The first doesn't. An enemy is a nation that Congress has declared war upon or at least has authorized the president to use military force against.

Regardless of which form of treason is charged, the government must prove that an “overt act” in furtherance of the treason was taken. Requiring an overt act was the Framers' way to protect against one of the abuses they witnessed under British rule: the use of treason to punish dissenting speech. The First Amendment also protects the right to criticize governmental policies and officers. The treason clause requires the overt act be proved by a confession in open court or by the testimony of two witnesses.

The mens rea of treason isn't specifically identified in the Constitution, but specific intent to betray the nation is most likely required. It is possible, therefore, to provide aid and comfort to an enemy and not be guilty of treason.

A United States soldier offers medical care to a suffering enemy soldier. Although aid and comfort have been provided, there was no intent to betray the United States.

A United States soldier, who is fighting in a war declared by Congress, gives her unit's movement plans and other strategic information to a soldier of an enemy. At the time she hands them over, she states, “America doesn't belong here. The more setbacks we see, the more likely we will leave your country for good.” The soldier has provided aid and comfort to the enemy.

The definition of “levying war” was considered for the first time only a few years after the Constitution was ratified. The case involved Aaron Burr, vice president under President Thomas Jefferson and the man who killed Alexander Hamilton in a duel. But his murder of Hamilton wasn't treason. He was tried for treason in 1807 for allegedly planning to seize part of the United States and Mexico with the intention of creating a new nation. Burr, a rendering of whom can be seen in Photo 12.1, and his codefendants were acquitted at a trial that was presided over by the Chief Justice of the United States John Marshall. Their case resulted in the Supreme Court decision *Ex Parte Bollman and Ex Parte Swartwout* (1807).¹

In *Ex Parte Bollman*, SCOTUS held that planning an insurrection—conspiracy alone—against the United States isn't an overt act. Further, the fact that the men traveled to the place where the co-conspirators were to gather didn't satisfy the overt act element. Chief Justice John Marshall wrote, on behalf of the court, that an “actual assemblage of men for the purpose of executing a treasonable design” must occur. Because the alleged conspirators hadn't reached this point in the plot, if real, they were acquitted.

In a WWII-era case, *Cramer v. United States*,² the Supreme Court issued another narrow interpretation of treason. Mr. Cramer was born in Germany, served in the German military

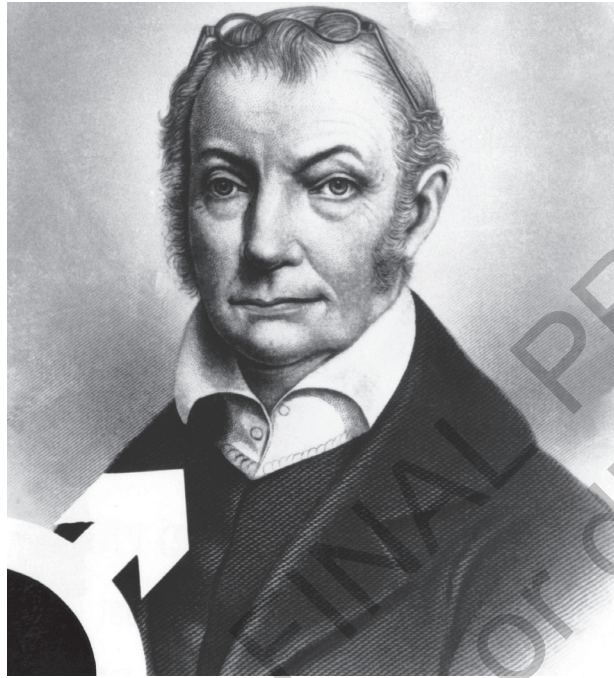


PHOTO 12.1 Aaron Burr, circa 1810. Was he a traitor?

Science History Images / Alamy Stock Photo

during WWI, and subsequently moved to the United States, where he earned U.S. citizenship, was gainfully employed, and crime free. He remained close to his family and friends in Germany, and he sympathized with Germany in its conflicts with other European nations before and during WWII.

Before the United States entered WWII, Cramer developed a friendship with two German men who returned to Germany to support the Nazis. Subsequently, but during the war, the men returned to the United States. They contacted Cramer, and the men met casually on a couple of occasions. Even though he was suspicious of their intentions, Cramer denied having ever been told why or how they returned to the United States. It would later be revealed that they were in the United States to commit sabotage. There was no evidence that Cramer assisted them in their sabotage efforts. Cramer was charged and convicted of treason. He was sentenced to 45 years in prison and a fine of \$10,000. On appeal, SCOTUS reversed his conviction, writing that

[t]he crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our

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cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason....

In addition to a narrow interpretation of what constitutes levying war or offering aid and comfort to the enemy, the court held that subjective intent must be proven, even if by inference. The court found insufficient evidence that Cramer committed an overt act or that he harbored a specific intent to betray the United States.

The treason clause also addresses the punishment for treason. Congress may punish it with death, imprisonment, fines, and a prohibition of holding federal office in the future, but it may not issue an attainder or impose corruption of blood or forfeiture beyond the life of the traitor. The attainder language forbids Congress from declaring a person guilty of treason, a power that Parliament exercised. Instead, treason defendants are entitled to be tried before courts of law. Corruption of blood was an old Common Law punishment that deprived family members from inheriting property or titles of nobility. The prohibition of corruption of blood means that a traitor's family may inherit money and property that is not taken from the offender as punishment, such as fines.

The overt act and double witness requirements are high bars. Consequently, there have been fewer than 50 treason convictions in United States history and none whatsoever in last several decades. Alternatively, federal prosecutors turn to related felonies that don't require two witnesses, such as seditious conspiracy, espionage, or unlawful disclosure of national security secrets. Most of the states have treason laws that parallel federal law. See Table 12.1 for a list of prominent treason cases.

Misprision of treason, or the failure to report known treason, is also a crime. The elements under federal law are that

1. Whoever, owing allegiance to the United States and
2. having knowledge of the commission of any treason against them
3. conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State.

Misprision of treason is punished with as many as 7 years in prison.

At the time of the writing of this book, the attack on the U.S. Capitol had just occurred, and much is to be learned about the intentions and acts of the people involved. For the defendants who entered the building and assaulted officers, the overt act element has been satisfied, even applying Justice Marshall's requirement that there be an "assemblage" of people. But establishing an intent to betray the United States will prove to be more difficult. If history is an accurate predictor, federal prosecutors will charge other crimes, not treason.

Misprision of treason: The crime of failing to report known treason to authorities.

TABLE 12.1 ■ **Prominent Treason Cases**

<i>Year</i>	<i>Defendant(s)</i>	<i>Facts</i>	<i>Outcome</i>
1794	Philip Vigol and John Mitchell	Two of many tax protestors in what is known as Whiskey Rebellion. Several charged with treason.	Convicted and sentenced to death. President George Washington pardoned both.
1807	Aaron Burr	Alleged to have planned an insurrection to make part of the United States and Mexico an independent nation.	Acquitted
1859	John Brown	One of several men charged by Virginia with treason for inciting a rebellion of slaves in the Harpers Ferry Raid.	Convicted. The first person executed for treason in the United States.
1862	William Mumford	Mumford tore down a U.S. flag from a public building during the Civil War.	Convicted and executed in front of the building where the act occurred.
1865	Mary Surratt	Surratt was a co-conspirator in the assassination of President Abraham Lincoln.	Convicted. The first woman executed by the United States.
1942+	Several defendants	Several people were charged with joining the Axis powers during WWII.	Various outcomes, including convictions with years to life imprisonment. Some later received commutations.
1949	Iva Toguri D'Aquino, aka Tokyo Rose	Toguri D'Aquino was alleged to have assisted the Japanese Empire through radio transmissions of propaganda to U.S. soldiers. Her conviction was controversial because the evidence was little and of questionable credibility.	President Gerald Ford issued a full pardon in 1977.
1952	Tomoya Kawakita	Kawakita was born in the U.S. but was living in Japan when it attacked Pearl Harbor in 1941. He remained in Japan, where he was also a citizen. During the war, he worked as an interpreter in a factory that used American POW labor. He returned to the U.S. after the war, and after being identified by a former POW, he was charged with treason. He defended himself by claiming he acted under duress and that he didn't owe the U.S. allegiance during the war. His appeals to SCOTUS failed.	Convicted and sentenced to death. President Dwight D. Eisenhower commuted the sentence to life imprisonment, and President John F. Kennedy ordered his release on the condition that he return to Japan. Kawakita is the last person convicted of treason against the United States.

Closely related to treason is the crime of inciting violence against the government. Under 18 U.S.C. §2383,

1. Whoever incites, sets on foot, assists, or engages in
2. any rebellion or insurrection
3. against the authority of the United States or the laws thereof,
4. or gives aid or comfort thereto

is guilty of rebellion or insurrection. Unlike treason, a defendant doesn't have to owe allegiance to the United States to be guilty of insurrection. Punishment for violations carry as many as 10 years in prison, a fine, and disqualification from holding federal office.

A more controversial law, the Smith Act,³ reaches beyond violent conduct. It criminalizes advocating the overthrow of government. In the language of the law,

whoever knowingly or willfully advocates, abets, advises, or teaches the

duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein,

by force or violence, or by the assassination of any officer of any such government; or

whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof

is guilty of advocating the overthrow of government. If convicted, a defendant can be fined, imprisoned up to 20 years, and shall be ineligible for employment by the United States for 5 years. The constitutionality of the law is in question because it criminalizes speech, not conduct. The law was upheld by SCOTUS in the 1951 decision *Dennis v. United States*, subject to the limitation that the words that are the subject of the prosecution present a clear and present danger to the United States, as outlined in the *Schenck* decision discussed in the following paragraphs.⁴ Six years later, SCOTUS reversed the convictions of 14 communists who were charged under the Smith Act in *Yates v. United States*. The defendants were convicted of joining and organizing a communist organization and teaching communism, a political ideology that

included the need for a violent revolution to overthrow capitalism and bring about social and political change. Applying *Dennis*, the court concluded that the First Amendment's **clear and present danger test** draws a line between belief and advocacy and that the defendants didn't cross that line. In the words of Justice John Marshall Harlan, writing for the court,

In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since “inciting” speech is usually thought of as something calculated to induce immediate action, and since *Dennis* held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow. In other words, the District Court apparently thought that *Dennis* obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action.

The effect of *Dennis*, *Yates*, and other cases is the minimization of the Smith Act. Furthermore, as you will read in just a few minutes, the clear and present danger test has been replaced, at least during peacetime, with the **Brandenburg test**. This test further restricted the authority of government to regulate speech that suggests violence or advocates hate. Specifically, Brandenburg requires speech to be directed at, and likely to produce, imminent lawlessness before it may be punished.

Professor Vostrom teaches political theory at NorthSouth State University. The readings in his political theory course include books and pamphlets by the communists Karl Marx and V. I. Lenin. During his lectures, he mentions on several occasions that he believes a violent revolution is both likely to occur and is needed to bring Americans into a state of equality. His speech is protected because he is teaching a theory in an academic context that is unlikely to incite anyone to violence.

Professor Vostrom teaches political theory at NorthSouth State University; specifically, he teaches communist theory. At the request of a local union, he has been delivering lectures on communist theory and workers' rights at the union's monthly meetings for the past year. Two weeks ago, the employees of a steel plant who are represented by the union went on strike. On the evening of June 2, city police officers attempted to move the striking workers away from the plant. Violence erupted, and a worker was shot and killed. Thirty minutes later, Vostrom stood in front of the workers, who were angry and grieving the loss of their “comrade,” and yelled, “The time is now. You must rise and fulfill the promise of this nation and of Marx. Take control of this plant, as the great communist and worker revolutionaries of Russia, China, and Cuba took control of their nations—and their industries. You have

Clear and present danger test: Developed by SCOTUS in *Schenck v. United States*, this First Amendment doctrine limited the authority of government to regulate speech advocating violence to words that present a clear and present danger to government. Likely replaced by the Brandenburg test.

the power. There are more of us than there are supervisors or police. Arm yourself and act now!” Vostrom’s speech is unprotected because it is directed at, and likely to produce, imminent lawlessness.

Finally, it is also unlawful to willfully interfere with, impair, or cause disloyalty, insubordination, or mutiny in the United States military.⁵ The conduct is punished with fines and up to 10 years in prison during peacetime. During war, the maximum prison time increases to 20 years.⁶

QUESTIONS AND PROBLEMS

1. What are the elements of treason?
2. Michail Gorba Chef is a citizen of the Russian Federation. As a spy in his country’s Foreign Intelligence Service, he is sent to the United States to collect military intelligence. He is caught by the U.S. Federal Bureau of Investigation and charged with treason. Is he guilty of treason? Explain your answer.
3. Robert Brown, born and reared in New Hampshire, uses social media to define a plan to kill the president of the United States, Toby Bartlet, and to take control of the federal government. Over a period of a year, he recruits 200 people from across the United States to join him in an invasion of the White House on the day of Bartlet’s second inauguration. The plan calls for assassinating the president during the inaugural address at the Capitol building while others storm the White House. Members of the group armed themselves, and Brown acquired handheld missile launches and two armored vehicles. Under the leadership of Brown, a former colonel in the U.S. Marines, the group created a detailed plan. The day before the inauguration, all 200 are arrested in hotels located in Washington, DC, and Maryland. The weapons and vehicles were seized. Is Brown guilty of treason? Explain your answer.

SLEEPING WITH THE ENEMY

Learning Objective: Identify, describe, and apply the elements of seditious conspiracy.

After the Electoral College declared former Vice President Joe Biden the victor of the 2020 presidential election—but before the riot at the Capitol—President Donald Trump held a meeting in the White House. In addition to the president, former National Security Advisor and advisor to the president Michael Flynn, attorney Sidney Powell, Chief of Staff Mark Meadows, White House counsel Pat Cipollone, and advisor to the president Rudy Giuliani were in attendance.

Brandenburg test: Developed by SCOTUS in *Brandenburg v. Ohio*, this First Amendment doctrine limits the authority of government to regulate speech advocating violence to words that are directed at, and are likely to produce, imminent lawlessness.

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The group is reported to have discussed declaring martial law and using the military, at gunpoint, to seize voting machines and to rerun the elections in Georgia, Pennsylvania, Michigan, and Wisconsin. At least two in the meeting, Cipollone and Meadows, objected. When the meeting became public, journalists and scholars raised concerns about the antidemocratic and seditious nature of the discussion.⁷

Sedition has been a crime since America's earliest days. Unfortunately, these laws had been used to stifle and punish dissent during British rule, and by the Framers themselves, for the same purpose. Enacted only 8 years after the ratification of the Bill of Rights, the Alien and Seditions Acts of 1798 made it a crime to write false, scandalous, or malicious stories about the government; increased the residency period required to become a citizen; and increased the president's authority to deport dangerous aliens. Targeted at the opponents of President John Adams and the Federalists, several publishers and other supporters of Thomas Jefferson were convicted of sedition.

The provisions of the sedition laws suppressing the press and punishing political speech were controversial. Thomas Jefferson, James Madison, and other prominent Americans openly opposed them. After the law expired by its own sunset provision, Congress reimbursed the paid fines for all those who had been convicted under its authority.⁸

Sedition became an issue again as the nation entered WWI in 1917. There was opposition to the decision to enter the conflict at home, much of it coming from unpopular voices—émigré's from Russia and Europe, communists, anarchists, and pacifists. The dissenters opposed both the U.S. entry into the war and the military draft, which had never been used in America before. Opponents engaged in an antiwar campaign that involved fiery lectures, pamphleting, and, in some cases, encouraging men to evade the draft. There were genuine fears in the general public and in Congress that antiwar advocacy threatened the security of the United States. The recent fall of the Russian Empire to communism intensified these concerns. In response, Congress enacted the Espionage Act of 1917. It prohibited interference with the draft or military operations, insubordination by military personnel, and support of the enemy during wartime.

The Espionage Act was followed by the Sedition Act of 1918. Although referred to by that name, the law wasn't named the Sedition Act. It was, in reality, an amendment to the Espionage Act. It expanded the reach of the Sedition Act to include, during wartime, "disloyal, profane, scurrilous, or abusive language" about the United States, its flag, or the military. Causing others to have contempt for the United States was also made a crime. The postmaster general was given the authority to investigate the use of the mail to deliver items that contained prohibited language.

Many people were prosecuted under the two laws, including labor leaders, communist sympathizers, and peace activists. The broad reach of the laws, particularly the Sedition Act's criminalization of speech, was constitutionally challenged on many occasions. SCOTUS affirmed the laws in three cases in 1919. In the most famous of the cases, *Schenck v. United States*,⁹ Charles Schenck, a socialist, was convicted of conspiracy to violate the Espionage Act for distributing pamphlets that encouraged men to refuse the draft. Justice Oliver Wendel Holmes, writing for

TABLE 12.2 ■ Significant SCOTUS Treason, Sedition, and Riot Cases

Crime	Case	Holding
Treason	<i>Ex Parte Bollman & Ex Parte Swartwout</i> (1807)	Conspiring, planning, and even traveling to the venue of the intended crime are not adequate to prove treason.
Treason	<i>Cramer v. United States</i> (1945)	Subjective intent to levy war or adhere to the enemy must be proved, and simply associating with traitors, without rendering aid and comfort, is not treason.
Sedition, riot, disorderly conduct	<i>Schenck v. United States</i> , <i>Debs v. United States</i> , and <i>Frohwerk v. United States</i> (1919)	Speech may be regulated if it presents a clear and present danger.
Sedition, riot, disorderly conduct	<i>Brandenburg v. Ohio</i> (1969)	Speech may be regulated if it is directed at, and likely to produce, imminent lawlessness. The test was first suggested by Justice Holmes in <i>Abrams v. United States</i> (1919).

the court, penned that the “question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” This announced a new free speech test that would be used to draw the line between protected and unprotected speech: Does the speech create a clear and present danger?

Holmes offered what has become a famous example of a clear and present danger: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” The court determined that Schenck’s efforts to undermine the draft created a clear and present danger. His conviction was affirmed. In two more cases, *Debs v. United States*¹⁰ and *Frohwerk v. United States*,¹¹ the court upheld convictions for speech deemed a clear and present danger.

In one of SCOTUS’s most interesting stories, Justice Holmes, a conservative man from a privileged background who had served the Union bravely in the Civil War, decided less than a year later that he, and the court, were wrong. Influenced by young progressives whom he was mentoring, he disavowed his own clear and present danger test because he concluded that, as it was being applied, speech was underprotected. Unable to persuade his colleagues to apply the clear and present danger test differently or to abandon it, Holmes wrote one of the most famous dissents in SCOTUS history. The case was *Abrams v. United States*.

In *Abrams*, the Court reviewed the convictions of two Russian immigrants who distributed pamphlets (by throwing them out the windows of a building onto the streets of New York City) that expressed opposition to U.S. involvement in the communist revolution in Russia.

Sedition: Speech or acts that inspire a person to rebel against government. The First Amendment limits the authority of government to punish sedition.

Specifically, the defendants called for a general strike by workers, going so far as to suggest that violence may be necessary if the strike wasn't successful in changing America's policy.

As it had done in the *Schenck*, *Debs*, and *Frohwerk* cases, the court affirmed the convictions, finding the content of the pamphlets to be a clear and present danger to the security of the nation. In his dissent, joined by Justice Louis Brandeis, Holmes penned that ideas, good and bad, need to be heard. "The ultimate good desired is better reached by free trade in ideas... that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." This idea became commonly known as the *marketplace of ideas*.

Holmes and Brandeis didn't believe the leaflets were a serious threat to national security, referring to them as silly. Furthermore, their subject was Russia, with whom the United States was not at war. In important language, Holmes and Brandeis advanced a new First Amendment test, advocating that only speech that so "imminently threaten[s] immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country" may be regulated. This is now familiar to you. Nearly 60 years later, SCOTUS adopted Holmes's imminent lawlessness standard in *Brandenburg v. Ohio*, as discussed earlier in this chapter and in Chapter 7. That test protects speech until it is directed at causing imminent lawlessness and is likely to produce such lawlessness. More protective of speech than the clear and present danger test, *Brandenburg* remains the law today, at least during peacetime. Because the clear and present danger test hasn't been explicitly overruled, it is possible that it could be resurrected during wartime.

Through *Brandenburg* and other cases, the First Amendment's protections of free speech and press limit the reach of the crime of sedition. As you learned in earlier discussions, political speech is the highest form of expression. Disagreement with government, political hyperbole, and satire are protected. See Table 12.2 for a summary of significant SCOTUS treason, sedition, and riot cases.

Today, the federal government doesn't have a general sedition law. Instead, it criminalizes conspiracies to commit sedition. One of the distinguishing characteristics between seditious conspiracy and overthrow of government, espionage, and treason is the lack of an overt act. As is true of all conspiracies, the agreement between the conspirators is the full actus reus of the crime, subject to the First Amendment's limitations that were just outlined. The elements of federal seditious conspiracy are as follows:

1. Two or more persons
2. in any State or Territory, or in any place subject to the jurisdiction of the United States
3. conspire to
4. overthrow or put down or destroy by force the Government of the United States or to levy war against them or to oppose by force the authority thereof or by force to prevent, hinder, or delay the execution of any law of the United States

or by force to seize, take, or possess any property of the United States.¹² Violators can be fined under this title or imprisoned not more than 20 years, or both.

QUESTIONS AND PROBLEMS

1. What are the elements of federal seditious conspiracy?
2. Describe the history of sedition and SCOTUS's First Amendment approaches to it.

I SPY WITH MY EYE

Learning Objective: Identify, describe, and apply the elements of espionage.

The last section discussed sedition and made references to the related crime of espionage. Spying for the enemy, a form of **espionage**, can injure a nation's security and finances and cause loss of life.

Federal espionage law is broad, overlapping, and confusing. As one scholar put it,

[The Espionage Act] comprises some of the most confusing and ambiguous federal criminal law on the books. Despite its title, courts agree that the various provisions of the Espionage Act punish much more than traditional espionage. Not only do some provisions apply to government insiders who disclose national security information to the press, but some also appear to leave open the possibility of prosecutions against the press itself, as well as any other downstream publishers (including ordinary citizens).¹³

18 U.S.C. §§ 793 and 794 are the general espionage prohibitions. Section 793 criminalizes the gathering, transmitting to an unauthorized person, or losing of national defense information, and Section 794 makes it a crime for a person to deliver, or attempt to deliver, national defense information to foreign agents or subjects of foreign countries with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation. The required mental state of these crimes varies. Section 793 requires gross negligence. Section 794, on the other hand, requires intent or at least reason to believe that the information will be used to injure the United States or will give advantage to a foreign nation.

Other federal espionage laws include these:

- **Computer Espionage.** 18 U.S.C. § 1030(a)(1) makes it unlawful to knowingly access a computer without authorization, or beyond the scope of one's authorization, and thereby obtain information that has been classified for national defense or foreign relations reasons, with intent or reason to believe that such information is to be used to the injury of the United States or to the advantage of a foreign nation.

- **Communication or Receipt of Classified Information.** 50 U.S.C. § 783 makes it unlawful for any officer or employee of the United States, or of any federal department or agency, to communicate to any person whom he or she knows or has reason to believe to be an agent of a foreign government, any information classified by the president or by the head of such department or agency as affecting the security of the United States, knowing or having reason to know that such information has been so classified. Conversely, it is unlawful for a foreign agent to knowingly receive classified information from a U.S. government employee, unless special authorization has been obtained.
- **Disclosing Intelligence Identities.** 50 U.S.C. § 421 prohibits the unauthorized disclosure of information identifying certain U.S. intelligence officers, agents, informants, or sources.
- **Foreign Agent Registration.** 18 U.S.C. § 951 makes it unlawful for foreign agents to act as such without notifying the attorney general, unless the agent is entitled to a statutory exemption from the registration requirement.

In addition to foreign spies, there have been many disloyal Americans who have been prosecuted under espionage laws for selling state secrets to foreign governments. Ethel and Julius Rosenberg, Robert Hanssen, and Aldrich Ames are four people who became household names after they were discovered to have spied for the Soviet Union. In recent years, the focus has been on economic and national security spying by the Chinese.

Sometimes, the line between patriot and traitor is unclear. Free speech, particularly of a political nature, is fundamental to a constitutional republic. Government is held accountable and self-governance is advanced when the people are informed. Conversely, secrecy is sometimes warranted. Revealing future battle plans or the names of U.S. spies abroad can threaten national security, and kill people. Several whistleblowers have tested the national security/openness dilemma. For these individuals, disclosing national secrets can be an act of patriotism. Daniel Ellsberg, an analyst in the Department of Defense, with the assistance of Anthony Russo, leaked the Pentagon Papers in 1969. The documents revealed lies by successive presidential administrations about the Vietnam War. Hailed by many—and demonized by others—Ellsberg was charged with espionage, and *The New York Times* and *The Washington Post* were ordered to stop printing the papers. Ellsberg was not convicted, and *The Washington Post* won the right under the First Amendment to publish them in *New York Times Co. v. United States* (1971).¹⁴

Equally controversial were the releases of classified information by Chelsea Manning to Wikileaks and Edward Snowden to several newspapers. Both were charged under the Espionage Act. Manning pled guilty, was sentenced to 35 years in prison, and was freed through a commutation by President Barack Obama. Snowden fled the United States, and as of 2021, he was

Espionage: A synonym for spying.

living in Russia and was still wanted by the United States. Like Ellsberg, Manning and Snowden are whistleblowers to some people, villains to others.

QUESTIONS AND PROBLEMS

1. Distinguish espionage from sedition.
2. Research the Snowden and Manning cases. Are either liable for espionage? Are the two equally culpable? Explain your answers.

THE CONSTITUTION ISN'T A SUICIDE PACT

Learning Objective: Identify, describe, and apply the elements of domestic and international terrorism.

In 1949, Justice Robert Jackson wrote a dissent in a case where the court set aside a man's conviction for breaching the peace. Jackson believed the court had gone so far in protecting the defendant's individual rights that the justice put the public at risk. He wrote that "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."¹⁵ The pithy comment, commonly reduced to *The Constitution isn't a suicide pact*, caught on, and it is commonly found in media and legal writings.

Acts of terrorism typically involve traditional crimes, such as murder, battery, and property destruction. What makes terrorism different from these crimes is the intent of the actors. Terrorism involves more than the specific intent to destroy property or to murder; rather, it uses those outcomes to cause fear in the people generally or to influence a government's conduct or policy. The law recognizes both domestic and international terrorism. 18 U.S.C. § 2331 defines *domestic terrorism* as follows:

1. Violent acts or acts that are dangerous to human life
2. that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State and
3. appear to be intended
 - i. to intimidate or coerce a civilian population; or
 - ii. to influence the policy of a government by intimidation or coercion; or
 - iii. to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

4. occur primarily within the territorial jurisdiction of the United States.

The definition of *international terrorism* is the same, except that the acts must occur “primarily outside the territorial jurisdiction of the United States.” If the methods used, the people that are coerced or intimidated, or the location the actors flee to after the crime are beyond the United States, the crime is an act of international terrorism. Capital punishment or life imprisonment is imposed if the terroristic act causes death. Otherwise, long prison sentences, including life, are possible.

Zack failed to pay his U.S. taxes for several years. Angry that the United States won a lawsuit against him to collect the past-due taxes, he plants a deadly virus in the local federal building, killing 50 people. Zack has not committed terrorism because he lacks the intent to intimidate or coerce the people or to influence federal policy.

Zack is unhappy with the U.S. human rights policy for China. He sends the U.S. Department of State an anonymous message, threatening to kill Americans if the policy is not changed. There is no change in policy, so Zack plants a deadly virus in the local federal building, killing 50 people. He follows the act with an audio message to a local radio station, stating, “The virus that started in the federal building is a warning. If the United States doesn’t change its human rights policy regarding China within 30 days, more people will die.” Zack is committing terrorism because he intends to intimate and coerce the population by committing deadly acts.

QUESTIONS AND PROBLEMS

1. What are the elements of domestic terrorism? How does it differ from international terrorism?
2. How does terrorism differ from traditional murder and other crimes of violence?
3. Angry over losing his job at the U.S. Social Security Administration, Andrew plants a bomb in the federal building where he worked. He detonates it, destroying the building, killing 100 people, and wounding another 120 people. He moves to another city to avoid detection and remains low-key. Regardless, he is caught a year later. Has he committed domestic terrorism? Explain your answer.

TO UNPEACEABLY ASSEMBLE

Learning Objective: Identify, describe, and apply the elements of riot under federal law.

The First Amendment protects the right to peaceably assemble. By definition, this right involves acts by more than one person. Throughout U.S. history, the free speech, press, grievance

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petition, and assembly rights have been critical to social change. Abolitionists, suffragettes, civil rights advocates, LGBTQ advocates, and religious groups have all relied upon these rights to spread their messages and to advocate for social and legal change.

As you have read before in this book, no right is absolute. Rights, while expansive, are bound by narrowly and strictly construed exceptions. The First Amendment itself establishes a significant boundary to the right to gather with other people—only peaceable assemblies are protected. Accordingly, it is legitimate for governments to criminalize breaches of the peace. Even when peaceful, reasonable time, place, and manner (TPM) rules may further limit free speech and assemblies. Examples of reasonable TPM restrictions are to require demonstrators in public streets and sidewalks to not impede foot or automobile traffic and to set maximum decibel-level limits in neighborhoods at night. Another limitation exists: when individuals' rights come into conflict with one another. The rights of one person end where the rights of others begin. In no case, however, may government engage in viewpoint discrimination. Consider the following examples:

A statute that criminalizes interfering with the free flow of traffic may be enforced against demonstrators who choose to block a street because it is a viewpoint-neutral, TPM restriction.

A city's decision to deny a permit to a group of people who want to gather in a public park to protest a recent court verdict because city officials believe the group's message is incendiary violates the viewpoint neutrality rule and is invalid.

A group of demonstrators received a permit to meet in a public park. They follow the city's TPM rules. But during their event, violence erupts. Chairs and fists are thrown, a small child who was playing nearby is injured, and park benches are overturned. To restore order, and pursuant to state law that authorizes police and other officials to make arrests and clear public spaces during riots, police officers order everyone to leave the area. One of the demonstrators refuses, citing the permit as her authorization to be in the area. She has committed trespass.

There are many laws that regulate unlawful and destructive conduct in public spaces. Four are discussed in this section: riot, disorderly conduct, trespass, and destruction of public property.

Riot and disorderly conduct are cousins. All states forbid both, as does the federal government. Riot laws vary in the conduct that is prohibited and the number of people required. Texas, for example, requires at least seven people in the group. An individual charged must knowingly engage in conduct that

1. creates an immediate danger of damage to property or injury to persons;
 2. substantially obstructs law enforcement or other governmental functions or services;
- or

3. by force, threat of force, or physical action deprives any person of a legal right or disturbs any person in the enjoyment of a legal right.¹⁶

Three people can make a riot under federal law:

1. an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or
2. a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.¹⁷

Using these definitions, a person violates the antiriot law for any of these acts:

1. Inciting a riot
2. Organizing, promoting, encouraging, or participating in, or carrying on a riot
3. Committing any act of violence in furtherance of a riot
4. Aiding or abetting others in riot¹⁸

Of course, the United States must have jurisdiction over the acts, which means that an alleged rioter must travel in, or use a facility of, interstate or foreign commerce to be guilty of federal riot. The use of the mail, internet, telephone, and wire and cellular communication all satisfy the interstate commerce requirement. Riot is punished with a fine and as much as 5 years in prison.

Returning to the Capitol siege, seen in Photo 12.2, one of the most frequently charged crimes was trespass, which appears in a few different forms in the United States Code. One is the offense of entering or remaining on restricted buildings or grounds,¹⁹ defined as

1. knowingly entering or remaining
2. in any restricted building or grounds
3. without lawful authority to do so.

Offenders are punished with as much as 1 year of imprisonment and a fine, unless the actor is carrying a firearm or dangerous weapon or significant bodily injury occurs, in which case the fine can be larger and the possible prison term increases to 10 years.

Another crime that many of the Capitol siege defendants were charged with applies specifically to the Capitol building. The violent entry and disorderly conduct statute makes it a crime, among other acts, to willfully and knowingly

- A. enter or remain on the floor of either House of Congress or in any cloakroom or lobby adjacent to that floor, in the Rayburn Room of the House of Representatives, or in the Marble Room of the Senate, unless authorized to do so pursuant to rules adopted, or an authorization given, by that House;
- B. enter or remain in the gallery of either House of Congress in violation of rules governing admission to the gallery adopted by that House or pursuant to an authorization given by that House.²⁰

This crime is punished with as much as 6 months imprisonment and a fine.²¹

You learned about criminal mischief, or damaging property, in Chapter 9. Governments across the country have special mischief laws that punish the destruction of public property. In the case of the Capitol riot, many defendants were charged with destruction of federal property.

18 U.S.C. § 1361. Destruction of Federal Property



PHOTO 12.2 The Capitol riot of January 6, 2021.

Photo by Anadolu Agency / Contributor

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Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, or attempts to commit any of the foregoing offenses, shall be punished as follows:

If the damage or attempted damage to such property exceeds the sum of \$1,000, by a fine under this title or imprisonment for not more than 10 years, or both; if the damage or attempted damage to such property does not exceed the sum of \$1,000, by a fine under this title or by imprisonment for not more than 1 year, or both.

QUESTIONS AND PROBLEMS

1. What are the elements of federal riot?
2. Rasheed, Jazmine, and Peter object to a federal law that authorizes the president of the United States to use military force to help the government of another country that is involved in a civil war. They decide to protest outside of the White House. During their protest, they recite the slogan, "No guns, no force, no later remorse!" Their message catches on with people in the streets. After 15 minutes, over 100 people are yelling the slogan at the top of their lungs. Have Rasheed, Jazmine, and Peter committed federal riot? Explain your answer.
3. Rasheed, Jazmine, and Peter object to a federal law that authorizes the president of the United States to use military force to help the government of another country that is involved in a civil war. They decide to protest outside of the White House. During their protest they recite the slogan, "No guns, no force, no later remorse!" Their message catches on with people in the streets. After 15 minutes, over 100 people are yelling the slogan at the top of their lungs. As the group chants, the three pull metal bars and Molotov cocktails from a box and distribute them. Using a bullhorn, Rasheed yells, "Make change happen! Stop this injustice!" At that moment, Jazmine and Peter begin climbing the fence to the White House. Several members of the crowd help them over the fence, while others grab the metal bars and begin swinging them around. Have Rasheed, Jazmine, and Peter committed federal riot? Explain your answer.

DISORDER IN THE COURT

Learning Objective: Compare and contrast civil, criminal, direct, and indirect contempt.

People have many reasons, social and legal, to not obey court orders. Exhibiting disrespect toward and failing to comply with an order of a court is **contempt** of court. The contempt power is an inherent judicial authority and often, a statutorily recognized authority.

There are four forms of contempt. *Direct contempt* refers to acts that occur in the presence of a judge. Although direct contempt usually occurs in the courtroom, judges' chambers and

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office area are included. *Indirect contempt* refers to a violation of a court order that occurs outside of the presence of the court.

Criminal contempt is imposed to punish a person for violating a court order. Civil contempt, by contrast, is a punishment. It is intended to coerce a person into complying with a court order. For example, if Mary refuses to testify at a trial despite an order to testify, the judge may order her confined until she complies. Once she testifies, Mary is free. Consequently, civil contemnors “hold the keys to their jail cells”; criminal contemnors do not. In theory, one who has been held in civil contempt can be punished for criminal contempt after complying with the court order. In practice, this seldom occurs, presumably because judges and prosecutors feel that the acts taken to coerce compliance also adequately serve as punishment. Regardless of the form of contempt, intentional conduct is required. This is obvious in cases of disruptive outbursts that occur in the presence of a judge. It can be more difficult in indirect contempt cases.

The contempt power is significant. Indirect criminal contemnors are entitled to the protections of other criminal defendants, such as a right to a trial, assistance of counsel, and proof beyond a reasonable doubt. Direct criminal contemnors have no such rights because the act took place in the presence of a judge. However, a person held in direct contempt is to be given the opportunity to speak before sentence is imposed, and both the contempt citation and its sentence may be appealed and reviewed for fairness.

Civil contemnors have greater rights than criminal contemnors, but less than criminal defendants. A contemnor does not possess all of the rights of a criminal defendant because civil contempt is not considered a criminal action. Of course, if an appellate court determines that the underlying order is unlawful, the civil contemnor is released. However, the individual may be charged with criminal contempt for failure to comply with the order before it was held unlawful by an appellate court. The fact that a court order may be nullified at some future date does not justify noncompliance. Court orders must be obeyed to ensure the orderly administration of justice. See Table 12.3 for a comparison of the four types of contempt.

The contempt power is broad, but limited. Yelling and cursing at or questioning the integrity of the court all fall on the wrong side of the law. But the line between civil disagreement and contempt is sometimes thin. In your next Digging Deeper case, *In Re Dearman v. State*, the line between an attorney’s advocacy for a client and contempt is discussed.

DIGGING DEEPER 12.1

Is it contemptuous for an attorney to repeatedly object over a judge’s order to stop?

Case: *In Re Dearman v. State*
 Court: Supreme Court of Alabama
 Year: 2020
 Justice Mendheim

H. Chase Dearman petitioned this Court for a writ of certiorari to review the Court of Criminal Appeals' decision affirming, without an opinion, the Mobile Circuit Court's order finding Dearman in direct contempt....

On August 30, 2018, Dearman, an attorney, was representing James Markese Wright at Wright's probation-revocation hearing before the circuit court; Judge James T. Patterson was the circuit-court judge presiding over the hearing. During the course of the probation-revocation hearing, the following exchange occurred between Dearman and Judge Patterson:

[Wright's probation officer]: During the search [of Wright's house], I ended up locating in the kitchen drawer, what was later determined to be a controlled substance.

[The State]: Specifically, what was it?

[Wright's probation officer]: AK-47 Herbal Incense.

[The State]: Would that be on the streets known as—

Mr. Dearman: I object. This officer has no training in narcotics whatsoever. This is not a regular drug and regularly identifiable. And in addition to that, the district court found no probable cause on this case, the facts of which the court is now hearing.

The Court: All right.

Mr. Dearman: We've had a preliminary hearing.

The Court: Alabama Rules of Evidence, Article 11, Miscellaneous Rules, Rule 1101, rules inapplicable. These rules, other than those with respect to privileges, do not apply in the following situations: preliminary questions of fact, grand jury, miscellaneous proceedings including proceedings for extradition or rendition, preliminary hearing in criminal cases, sentencings, granting and revoking probation.

Mr. Dearman: Judge, in district court—

The Court: No. They don't apply.

Mr. Dearman: May I finish my objection?

The Court: No, you may not. There's no objection here. They don't apply. The Rules of Evidence don't apply here.

Mr. Dearman: I have an objection for the record.

The Court: No, sir. The rules don't apply. The rules don't apply, Mr. Dearman.

Mr. Dearman: The Judge is talking over me.

The Court: The rules don't apply.

Mr. Dearman: My objection—

The Court: The rules don't apply.

Mr. Dearman: My objection is—

The Court: The rules don't apply.

Mr. Dearman: My objection is—

The Court: The rules don't apply.

Mr. Dearman: Okay. Let me know when I can speak.

The Court: You're not going to speak. If you're going to make an objection, you're not going to speak.

Mr. Dearman: May the record reflect that I'm not allowed to make—

The Court: Get him out of here. Take the lawyer out. Get out.

Mr. Dearman: May the record reflect—

The Court: Get out.

Mr. Dearman: —that I am being ordered out of the courtroom—

The Court: Get out.

Mr. Dearman: —and the Judge has lost his temper—
 The Court: Get out.
 Mr. Dearman: —again.
 The Court: Get out. Take him back.
 (Proceedings concluded.)

On the same day of the hearing, the circuit court entered the following order:

“Based on his conduct before this court this date at hearing on the probation revocation of his client, James Markese Wright, and specifically his conduct after this court advised Mr. Dearman that per Ala. R. Evid. 1101(b)(3), the rules of evidence do not apply to granting or revoking probation, and because of his contemptuous conduct cted [sic] toward this court immediately after this Rule of Evidence was pointed out to him, this court finds attorney Chase Dearman in direct contempt of court....

“This matter was immediately disposed of by undersigned ordering Mr. Dearman to leave [the] courtroom..., and this court will take no further action in this regard—this time. However, please be advised that further outbursts of this nature may lead to other sanctions....”

Dearman argues that his conduct at the August 30, 2018, hearing did not “constitute an act of direct contempt.” Dearman’s brief, p. 14: Dearman argues that he was not challenging the circuit court’s authority at the August 30, 2018, hearing, but was attempting “to put a timely and complete objection on the record” in defending his client. In so arguing, Dearman argues that the Court of Criminal Appeals’ decision is in conflict with Hawthorne, supra....

In *Hawthorne*, an attorney used the phrase “sons of bitches” during closing argument. There was no objection made by opposing counsel at the time the phrase was used, and the trial court took no immediate action to stop or to reprimand the attorney for using the phrase. It was not until the opposing side was giving its closing argument that the attorney’s use of the phrase “sons of bitches” was objected to as inappropriate. The trial court agreed, stating that “it was highly improper to use that language in the courtroom.” Ten days later, the trial court gave the attorney “an opportunity to be heard as to whether he should be held in contempt of court for using the phrase ‘sons of bitches.’” Following the hearing, the trial court “issued an order finding the [attorney] guilty of direct criminal contempt of court.” The attorney appealed to the Court of Criminal Appeals.

On appeal, the Court of Criminal Appeals stated that “the question is whether the conduct amounts to direct criminal contempt of court” as defined by [statutory law]. The Court of Criminal Appeals stated that, “while the language used was unprofessional, indecorous, unnecessary, and unbecoming of a member of the bar, the record is devoid of any evidence that ‘immediate action [was] essential to prevent diminution of the court’s dignity and authority before the public.’” The Court of Criminal Appeals further stated that “the record is devoid of sufficient evidence that the [attorney’s] use of the phrase ‘sons of bitches’ ‘obstruct[ed] the administration of justice’ or interrupted, disturbed, or hindered the court’s proceedings.

Contempt: Willfully disobeying a judge’s command or official court order, or causing a disruption in court. Contempt can be direct (within the judge’s notice) or indirect (outside the court and punishable only after proved to the judge). It can also be civil contempt (disobeying a court order in favor of an opponent) or criminal contempt.

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In the present case, the circuit court held Dearman in contempt because he repeatedly attempted to make a specific objection after the circuit court determined that the Alabama Rules of Evidence did not apply at the August 30, 2018, probation-revocation hearing. It appears that the circuit court believed that the objection Dearman was attempting to make was related to that particular ruling. However, it is unclear from the record the exact objection that Dearman sought to assert. It is certainly true that the circuit court made its position clear that the Alabama Rules of Evidence do not apply in a probation-revocation proceeding, but it is unclear if Dearman was attempting to object to that particular ruling. The only objections on the record that Dearman made during the probation-revocation hearing are as follows:

Mr. Dearman: I object. This officer has no training in narcotics whatsoever. This is not a regular drug and regularly identifiable. And in addition to that, the district court found no probable cause on this case, the facts of which the Court is now hearing.

Dearman then noted that “we’ve had a preliminary hearing,” at which point the circuit court read from Rule 1101, Ala. R. Evid., which states that the Alabama Rules of Evidence do not apply in probation-revocation hearings. Immediately thereafter, Dearman stated: “Judge, in district court—.” It is at this point that the circuit court would not permit Dearman to continue to speak. Therefore, based on the facts before us, there is nothing indicating that Dearman was attempting to continually object to the circuit court’s ruling that the Alabama Rules of Evidence do not apply in a probation-revocation hearing. Dearman stated that he had “an objection for the record,” but the circuit court responded, “No sir.” Dearman then attempted to state his objection, three times, beginning his objection with “My objection...” or “My objection is...” Each time, however, the circuit court spoke over Dearman and then told Dearman that “you’re not going to speak. If you’re going to make an objection, you’re not going to speak.” This statement of the circuit court indicates that not only was the circuit court not allowing Dearman to object to its determination that the Alabama Rules of Evidence did not apply to the hearing (if that was even Dearman’s objection), but that Dearman could make no objection whatsoever.

As did the Court of Criminal Appeals in *Hawthorne*, we conclude in the present case that the record is devoid of any evidence that Dearman’s conduct “disturb[ed] the court’s business” and that “immediate action [was] essential to prevent diminution of the court’s dignity and authority before the public.” The evidence before us indicates that Dearman, by trying to make an objection on the record to preserve the issue for appellate review, was simply trying to engage the court in the business before it, not detract from it. The immediate action taken by the circuit court in silencing Dearman was not to prevent Dearman from diminishing the court’s dignity or authority, but to prevent Dearman from asserting a necessary objection on behalf of his client.... Dearman specifically stated that his intent was “only to fulfill my duty as the advocate for my client.” Dearman further explained that he believed that “if you do not put [a specific objection] on the record, you’ve lost it forever, and that was all I was simply trying to do. There was no intent on my behalf.” Dearman’s understanding of the law is correct.

[Dearman’s conviction for contempt is] REVERSED and REMANDED.

QUESTIONS AND PROBLEMS

1. Distinguish direct from indirect contempt.
2. Distinguish civil from criminal contempt.
3. Judge Erik Kneehouse orders Katy to turn over an automobile and its title to Megan by June 1. Katy refuses. Judge Kneehouse orders that Katy be jailed until she complies. What form of contempt is represented in this hypothetical?
4. Judge Erik Kneehouse is conducting a juvenile justice proceeding. An attorney becomes enraged at a decision of the court. She knocks over a chair and screams, "You are an idiot. How can you be so heartless and stupid?!" Judge Kneehouse holds the attorney in contempt and fines her \$500. What form of contempt is represented in this hypothetical?

LIAR, LIAR PANTS ON FIRE

Learning Objective: Identify, describe, and apply the elements of perjury.

Perjury was a crime at the Common Law and continues to be prohibited by statute in all states.

The elements of perjury are these:

1. The making of a
2. false statement
3. with knowledge that it is false
4. while under oath or affirmation.

To convict a person of perjury, the prosecution must prove a high level of mens rea: knowledge of the falsity of a statement. As with other crimes, juries are permitted to infer a defendant's knowledge from the surrounding facts.

A statement must be made while under oath to be subject to perjury. Taking an oath to God is ancient; it relied on a witness's fear of eternal damnation to elicit the truth. For those individuals who have a religious objection to "swearing," the law permits an "affirmation." This is simply an affirmation by the witness that they understand truthful testimony is required by law. The purpose of oaths and affirmations are the same. They appeal to the conscience of the witness to be truthful, they formally message the significance of the proceeding, and they remind witnesses that there are legal consequences for lying. The law treats an affirmation in the same manner as it does an oath. Here are examples of both:

Oath: "Do you solemnly state that the evidence you shall give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?"

Affirmation: “Do you solemnly state, under penalty of perjury, that the evidence that you shall give in this matter shall be the truth, the whole truth, and nothing but the truth?”

Perjury laws apply to more than testifying in court. It is perjurious to lie in affidavits, to knowingly present falsities in any document signed before a notary public, for a police officer to submit a complaint and affidavit for a warrant that contains facts known to be untrue, to lie in a deposition before a court reporter (e.g., for deposition), to lie to a grand jury, to falsely testify before Congress, and in many other circumstances.

Some jurisdictions require that the false statement be “material,” or important to the matter. This requirement prevents prosecutions for trivial lies. Some jurisdictions have defined *materiality* as any fact that may affect the outcome of a case. If a statement is not material, even if untrue, perjury hasn’t been committed.

Reggie committed a murder. At trial, he decides to testify. When asked where he was at the time of the murder, he tells the court that he was with his girlfriend, 20 miles away from the scene of the murder. Reggie has committed perjury.

Reggie is called as a witness in a murder trial. A few months before, he saw the defendant thrust a knife into the victim. When asked his name by the prosecutor, he answers, “Reggie Hawkins.” His legal name is Robert Reginald Hawkins, but he prefers Reggie. Although he knows his answer is untrue, the statement isn’t material to the case and, therefore, not perjurious.

A related crime is **subornation of perjury**. This crime occurs when one convinces or procures another to commit perjury. One who commits subornation is treated as a perjurer for the purpose of sentencing.

TABLE 12.3 ■ The Four Types of Contempt

	<i>Criminal</i>	<i>Civil</i>
Direct	Shouting to a judge during a hearing, “F*ck you, I don’t care what you say. You are an idiot, and if I weren’t handcuffed, I would kick your ass.” The judge fines the actor \$200.	An attorney disobeys a judge’s order to stop talking. The judge tells the attorney that they will be fined \$10 for every word uttered from that point forward.
Indirect	A judge issues an order to a witness to produce documents to the police within 48 hours. The witness refuses. The judge sentences the witness to 2 days in jail.	A judge issues an order to a witness to produce documents to the court within 48 hours. The witness doesn’t produce the documents. The judge orders the witness jailed until the documents are produced.

In addition to being a crime in every state, perjury has been made criminal by statute in the United States. 18 U.S.C. § 1621 reads:

Whoever (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly . . . is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true. . . .

Of course, truth is a complete defense to a charge of perjury. Truth is not always easy to determine, and in most close cases, prosecutors don't prosecute. This is largely due to the stringent mens rea element.

In some instances, unsworn lies are punished. Lying to police, for example, can be punished. In most jurisdictions, filing false police reports, even though the reports are unsworn, are misdemeanors. Typically, actual knowledge that the statement is false is required. Although this crime is commonly a misdemeanor, Michigan has a particularly strict law. To threaten a terroristic act falsely can be punished with as many as 20 years in prison and a fine of up to \$20,000.²² Lying to police can also lead to an obstruction of justice charge.

QUESTIONS AND PROBLEMS

1. What are the elements of perjury?
2. Preeda, a deputy state auditor, is called to testify before a grand jury in an investigation of government corruption. In preparation, she reviews notes from the meetings and other documents. When testifying, she confuses the dates of two meetings and testifies falsely. The error puts the grand jury on the wrong investigative track, and they spend weeks pursuing a theory that proves untrue. Frustrated, the grand jury charges Preeda with perjury. Has she committed the crime? Explain your answer.

GETTING IN THE WAY

Learning Objective: Identify, describe, and apply the elements of obstruction of justice.

In the last section, you learned that lying to the police is a crime in some jurisdictions. Even in the absence of a specific statute, lying to the police may be prosecuted as **obstruction of justice**. Any act that interferes with the investigation or administration of a criminal case is obstruction.

Obstruction statutes come in many different forms. One variety focuses on who is obstructed (e.g., police, child welfare officers), and another variety is aimed at specific conduct (e.g., lying, hiding from authorities). Obstruction of justice is a commonly charged crime,

Perjury: Lying while under oath or affirmation.

sometimes being used when other more serious offenses can't be proven. Typically, obstruction of justice occurs when

1. a person intentionally
2. destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information; or induces a witness having knowledge material to the subject at issue to leave the state or conceal himself or herself; or possessing knowledge material to the subject at issue, he or she leaves the jurisdiction or conceals himself
3. with the intent to prevent the apprehension or obstruct the prosecution or defense of any person.

Destroying evidence of a crime, hiding a suspect, lying to investigators, or planting fake evidence of a crime to throw police off the trail of an investigation are examples of criminal obstruction of justice. But any form of obstruction can be prosecuted. In 2020, Shannyn Kemp was sentenced to 3 years imprisonment for obstructing justice. Her husband, Daniel Kemp Sr., was an active duty soldier in the U.S. Army. During an investigation of him for the rape of a minor, Ms. Kemp harassed the minor to the point of dissuading her from providing law enforcement with all the information she had about the alleged rape.²³

The mental state of obstructing justice is demanding. The act of concealing, destroying, and such must be intentional. Moreover, the actor must intend to impede a prosecution or defense. A mother who launders a child's bloody shirt, believing her child hurt herself, is not guilty of obstruction when she later learns that the blood belonged to a victim of the child's rage.

Many high-profile defendants have been charged, investigated, or convicted of obstruction. President Richard M. Nixon was investigated for obstructing the investigation of the Watergate affair, but he was pardoned by President Gerald Ford before prosecutors could act. In 2015, Robel Phillipos, Dias Kadyrbayev, and Azamat Tazhayakov, friends of Boston Marathon bombing defendant Dzhokhar Tsarnaev, were all convicted of obstructing justice and conspiracy to obstruct justice. After the bombings, Kadyrbayev and Tazhayakov, who had been texting with Tsarnaev, went into his dorm room and collected several items, including a laptop, thumb drive, Vaseline, and a backpack. They later destroyed several of the items. The third friend, Phillipos, lied to federal investigators. They were sentenced to 6, 3.5, and 3 years in prison respectively.²⁴

A separate crime from obstructing justice, obstructing governmental operations is forbidden by the federal and many state governments. Returning to the Capitol riot, several defendants were charged with obstructing an official governmental proceeding. One of the most notorious of the rioters, Jake Angeli Chansley, or the "QAnon Shaman," seen in Photo 12.3, pled guilty to obstructing an official proceeding for his role in causing Congress to stop its presidential certification session.²⁵

Subornation of perjury: The crime of asking or forcing another person to lie under oath.

QUESTIONS AND PROBLEMS

1. What are the elements of obstruction of justice?
2. Michael is a college athletic director. He learns that the State Bureau of Investigation (SBI) has begun an investigation into college admissions fraud involving his college and an independent college admissions advisor, Rick Sang. He has done business with Sang for years. After receiving a call from the SBI, where he scheduled a time to discuss the case with the special agent in charge of the investigation, Michael packed up his most prized possessions, emptied his bank account, and without telling anyone where he was going, moved to another state. Has Rick committed obstruction of justice? Explain your answer.



PHOTO 12.3 Jake Angeli Chanstley, the "QAnon Shaman," was convicted of obstructing Congress for his role in the Capitol riot of January 6, 2021.

Photo by JT/STAR MAX/IPx

Obstruction of justice: Intentionally interfering with the investigation or prosecution of a criminal case.

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GIVE ME YOUR TIRED, YOUR POOR, YOUR HUDDLED MASSES YEARNING TO BREATHE FREE

Learning Objective: Identify, describe, and apply the elements of illegal entry into the United States.

It is theorized that the first peoples arrived in the Americas from Asia via the Bering Land Bridge as long as 20,000 years ago. Over thousands of years, the entire continent was settled. In the 1600s, English, Spanish, and Dutch immigrants first appeared in the eastern lands of what is now known as the United States. Subsequently, immigrants from all over the world, including France, Ireland, Germany, Italy, Africa, Russia, China, Japan, and Mexico, bringing with them a diversity of religious beliefs and customs, continue to join our country until this day.

This history earned the United States the reputation as the place for new beginnings—a beacon on the hill offering opportunity and freedom. These sentiments are reflected in the sonnet “The New Colossus” by Emma Lazarus, which appears on the Statue of Liberty. It reads, in part,

“Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!”

Unfortunately, while true, this history is also tarnished. First and most obviously, the ancestors of many African Americans were brought to the United States in enslavement. Second, not every group of free aliens has been welcomed with open arms. Third, some of America’s immigration policies have been ethnically or racially discriminatory. For example, the Nationality Act of 1790 limited naturalization to white people of good character who had lived in the United States longer than 2 years; German and Irish immigrants were disfavored in the mid-19th century; and in 1882, Chinese became the first and only group of people to be expressly excluded because of their nationality.

Regardless of this history, the United States continues to be the most popular destination for migrants. Today, the United States has the largest number of immigrants, in both raw numbers and as a percentage of the population, of any nation. Of the U.S. population of 340 million people, more than 40 million were born in another nation. About 77% of those individuals entered the United States legally, and 45% have become naturalized citizens. One quarter of America’s immigrants come from Mexico, with China and India being tied at 6% each for the second-most common countries of origin. Asian immigration is rising at a faster pace than other ethnicities.²⁶

To administer the modern immigration enterprise, a substantial amount of law and bureaucracy have been created. Most of the law is regulatory, but a minority of it is criminal. One of the most prominent criminal provisions is illegal entry, which is defined as any alien who

1. enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or
2. eludes examination or inspection by immigration officers, or
3. attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.

A first conviction for illegal entry can be punished with a fine and as much as 6 months in prison, and subsequent offenses are punished with a fine and as much as 2 years incarceration.²⁷ Under other laws, these offenders are also subject to deportation. Reentry by aliens who were excluded for criminal convictions is a separate offense that can be punished with as many as 10 years imprisonment. If the prior conviction is for an aggravated felony, the prison time increases to a maximum of 20 years. If a crime is an aggravated felony, it is a matter of federal law, irrespective of how an act is defined by state law. So some misdemeanors under state law are classified as aggravated felonies for purposes of federal immigration law. Murder, rape, sexual crimes against minors, drug trafficking, obstruction of justice, theft and burglary convictions that are sentenced to more than year in prison, and many other crimes qualify.

Other immigration and naturalization crimes exist, such as lying or omitting information on immigration and naturalization forms. Although this policy area is strongly federal, many states have laws that address immigrant involvement in state-funded education and social services, licensing of professions and trades, voting, and public office eligibility.

QUESTIONS AND PROBLEMS

1. What are the elements of illegal entry into the United States?
2. Rudolph entered the United States legally. Four years later, he earned permanent resident alien status. Three years later, he was charged, convicted, and sentenced to 2 years in prison for burglary. After his release, he was deported and ordered not to return to the United States. Regardless, he is found in the United States 2 years later. What is the maximum amount of time he can be sentenced to serve in prison if convicted of illegal reentry?

THE BEST GOVERNMENT MONEY CAN BUY

Learning Objective: Identify and describe at least one campaign finance crime and one electoral integrity crime.

Money in politics has long been a concern. The concern that donors can influence the policy decisions of the officials they support is held by people across the political spectrum. If the amount of money spent is any gauge, there is a reason to worry. The 2020 elections were the

costliest in history. Over \$14 billion was spent, doubling the amount spent in the 2016 election. Over \$6 billion of the spending in 2020 was on the presidential campaign alone. Large individual donations account for 42% of the money raised; individual donations, 22%; self-funding, 13%; and political action committees, 5%.²⁸

Beyond regulating the money of campaigns, there is a body of election law aimed at protecting the integrity of the electoral process, defining voter eligibility, and protecting voting rights. A few of the laws concerning voting rights were covered in Chapter 7. This discussion begins with the criminal aspects of campaign finance and ends with electoral integrity.

The leading federal campaign finance law is the Federal Election Campaign Act (FECA)²⁹ and the regulations issued by the agency responsible for enforcing it, the Federal Election Commission (FEC). Much of the law is regulatory and is enforced by the FEC through administrative processes. But there are criminal provisions that are enforced with regularity by the Department of Justice. Finance laws regulate who can donate, how much can be donated, and how the money may be used.

As to who may donate in federal elections, citizens and permanent residents may donate. Foreign nationals who are not permanent residents of the United States, foreign governments, and foreign corporations are forbidden from donating to federal elections. Also, individuals and corporations who are doing business with the federal government are forbidden from giving to congressional and presidential elections.

Attempts to bypass donor eligibility and donation limitation restriction by so-called conduit contributions, or when one person makes a contribution in their own name with someone else's money, are also prohibited. In a controversial decision, SCOTUS decided that domestic corporations, unions, and other organizations have a First Amendment right to contribute to federal electoral candidates.³⁰

Federal law details how much money may be donated and to whom. For example, in 2022 individuals are limited to donating \$2,900 to each specific candidate, \$5,000 to political action committees (\$10,000 to specific forms of political action committees), and \$36,500 to national party committees. The Democratic and Republican parties have three national party committees each: for the party generally, for House of Representatives races, and for Senate races. The laws detail many other aspects of campaign donations, including how gifts of property, food, and other items of value ("in-kind" donations) are handled, gifts to third-party candidates, and distinguishing between primary and general elections. It is a crime for a donor to give, or a candidate or party to receive, donations that exceed the legal limitations.

FECA, House, and Senate rules also limit how candidates and parties may use campaign donations. The rule is liberal, allowing political spending as well as campaign spending. Television, social network, billboard, radio, and all other forms of advertising; campaign travel; food for social events involving campaign or political staff; renting spaces for rallies and meetings; for legal expenses resulting from the election; and, if victorious, the expenses of moving to Washington, DC, are a few of the many examples of campaign spending. The money may also be used on future campaigns.

Political spending includes donations to other campaigns, donations to charities, and legal expenses resulting from the position itself. The most significant limitation on the use of

donations is the ban on personal use. A candidate may not, for example, buy a home or other items for personal use, pay for a wedding or a funeral (unless a campaign employee dies on the job), or pay off a student loan debt.

State and federal laws also protect the electoral process. Voter fraud and voter intimidation are examples of laws that fall into this category. Voter fraud describes many acts. Voting more than once in an election, voting or registering to vote in another person's name, using a fraudulent ballot, voting when ineligible (underage, not a resident, or not a citizen), and buying votes are examples. In most jurisdictions, the mens rea of these crimes is at least a knowing violation. A mistaken belief by new state residents that they are eligible to vote after 4 months of residency when the minimum is 6 months, for example, is not a crime. Fraud by election officials is also prohibited. So an election officer who knowingly counts fraudulent ballots, counts votes from ineligible voters, or who tampers with votes has committed a crime.

Interfering with another's person vote is also a crime under both federal and state laws. Specifically, intimidating voters is illegal everywhere. Under federal law, it is a crime for any person, including election officials, to intimidate, threaten, or coerce a person, or attempt to do so, "for the purpose of interfering with" that person's right to vote or to vote as he may choose.³¹ It is also a crime to knowingly and willfully intimidate, threaten, or coerce any person, or attempt to do so, for "registering to vote, or voting," or for "urging or aiding" anyone to vote or register to vote.³² And it is a crime to, "by force or threat of force," willfully injure, intimidate, or interfere with any person because they are voting or have voted or "in order to intimidate" anyone from voting.³³ These laws also forbid election fraud, such as delivering fraudulent ballots and reporting fraudulent results. The punishment for violating these laws is a fine or up to 5 years in prison, or both.

QUESTIONS AND PROBLEMS

1. Randy has already reached the limit on how much he can donate to Sam's campaign to be elected to the U.S. Senate. He asks Michelle if she would contribute to Sam's campaign in her own name if he gave her the cash. She agreed. What crime, if any, has been committed?
2. Sam is elected to the U.S. Senate. She has \$350,000 of leftover campaign donations. She uses several thousand dollars to move to Washington, DC, \$100,000 to pay attorneys who represented her in election disputes, and she bought land in the Virgin Islands for her retirement. Were her uses of the money lawful?

TO IGNORE EVIL IS TO BECOME AN ACCOMPLICE TO IT

Learning Objective: Identify, describe, and apply the elements of genocide.

In 1865, Captain Henry Wirz of the Confederate Army was tried for what are now known as “war crimes.” In the last year of the Civil War, Wirz served as the commandant of Andersonville Prison, located in Camp Sumter in Georgia. Andersonville, which housed Union prisoners of war, was vastly overcrowded. While under Wirz’s control, prisoners were physically abused and malnourished, and the poor sanitary conditions made it a cesspool of disease. Consequently, 29% of the inmates of the prison died. News accounts accompanied by photos of survivors whose emaciated conditions put the inhumanity of their treatment into full form spread across the nation after the war. Wirz was arrested, convicted after a long trial, and hanged.

Contemporary historians question the fairness of the trial. It is pointed out many of the conditions in the prison were outside of his control. Wirz complained that as an alien (he was Swiss), he was an easy scapegoat for the crimes of the Confederacy and the mistakes of the Union Army, which had not taken advantage of opportunities to free the prisoners during the war. At his trial, Wirz was denied the right to call all of his witnesses to testify, and he was alleged to have committed murder but the government never identified a victim. Ironically, historians agree, guilty or not, Wirz was denied due process—a fundamental human right. Wirz maintained his innocence until he was hanged. At his execution, Wirz said to his executioner, “I know what orders are... and I am being hanged for obeying them.”³⁴ This defense—following orders—will be heard again by the world after WWII. It was uttered by many of the German and Japanese defendants who were tried for crimes against humanity at the Nuremberg and Tokyo trials.

Up to this point, this book has examined offenses that occur in the United States during peacetime. In certain circumstances, citizens and resident aliens of the United States are accountable in the United States for offenses committed abroad. Military personnel, for example, can be punished under the Uniform Code of Military Justice for acts committed anywhere in the world. Additionally, the United States has treaty obligations that require it to adhere to, and to enforce, international criminal prohibitions. Beyond treaties, basic humanity impresses upon the individual an obligation to act when cruelty is witnessed. As Martin Luther King Jr. wrote, “To ignore evil is to become an accomplice to it.”³⁵

The first international trials for **crimes against humanity** took place in the aftermath of WWII. The magnitude of both world wars can’t be understated. WWII, specifically, resulted in an estimated 70 to 80 million deaths, or 3% of the world’s population. Over half of the dead were civilians. Six million Jewish people were killed in the Holocaust. As a nation, the Soviet Union was hardest hit, with an estimated 20 to 27 million dead. China lost as many as 20 million; Germany, 6 to 9 million; Japan, 2.5 to 3.1 million; Italy, the United Kingdom, and the United States, over 400,000 each. Nearly all of the military dead were men. But millions of women were murdered and raped around the world.

An example of the depth of inhumanity that occurred in WWII comes from a horrific event that is unknown to most Americans. In 1942, 16 U.S. bombers with a total of 80 airmen, under the command of Lt. Colonel Jimmy Doolittle, flew over Tokyo and other cities in Japan, bombing industrial and military targets. While ordered to not bomb the Japanese emperor's palace, bombers flew over it. The objective of the Doolittle Raid, as it would later be labeled, was more psychological warfare than military strategy. By demonstrating that the U.S. could reach the Japanese islands, specifically the emperor, the U.S. intended to demoralize the Japanese and to uplift the Americans, who had been stunned by the Japanese attacks on Pearl Harbor. This half of the story is well known. It is what happened after the mission that is less known.

Because the aircraft carrier, the *USS Hornet*, that transported the airmen to Japan was sighted by the Japanese while at sea, the airmen had to lift off earlier than planned. The early departure meant that they didn't have enough fuel to return to the aircraft carrier. Regardless, the men, all volunteers, continued with the mission. Three were killed in action, and one crew landed in the Soviet Union. All of the other planes crashed in China, a U.S. ally. The Chinese people and foreign missionaries hid and assisted the airmen in evading capture by the Japanese. In their search for the Americans, and to punish the Chinese, Japanese soldiers tore through villages, raping women, intentionally spreading deadly pathogens, razing entire villages and cities, and murdering. In addition to executing three American fliers, the Japanese are estimated to have killed 250,000 Chinese. One bombing raid led to a quarter million civilian deaths.³⁶

In 1945 and 1946, the Allied powers—the Soviet Union, United Kingdom, United States, and France—tried 199 German soldiers, political leaders, and professionals for war crimes, crimes against humanity, and crimes against peace. Formally known as the International Military Tribunal—informally as the Nuremberg trials—161 men were convicted and 37 were sentenced to death.³⁷ A second set of trials of Japanese war criminals began in 1946. The International Military Tribunal of the Far East, the Tokyo Trial, was conducted by 11 nations. Twenty-eight leaders of the Japanese government and military were charged with crimes against humanity, war crimes, and crimes against peace. All were convicted at trials that lasted longer than 2 years. Seven of the defendants were sentenced to death, 16 to life imprisonment, two to lesser prison terms, two died before the trials ended, and one was found insane.³⁸ In the decades after the Nuremberg and Tokyo trials, several other ad hoc tribunals were created around the world to try alleged international criminals.

The United Nations (UN) was another product of WWII, having been created to promote peace and security around the world. Under the leadership of Eleanor Roosevelt, the newly founded UN developed the Universal Declaration of Human Rights (UDHR). The UDHR recognizes 30 rights, including life, liberty, and security of the person; to be free of enslavement; to equal protection; to privacy; to freedom of conscience, religion, and speech; and to be free of arbitrary arrest, exile, and detention. While all the members of the UN, which is nearly every country today, have agreed to the UDHR, it is not legally binding. Regardless, most nations have agreed to hold their citizens accountable for international crimes through treaties. The

Crimes against humanity: Genocide, maltreatment of civilians, and torture and maltreatment of combatants are forms of crimes against humanity.

world's first standing court, the International Criminal Court (ICC), was created in 1998 and became operational in 2002 through an agreement known as the Rome Statute. Considered a court of "last resort," the ICC can try individuals only if their home nations don't. It has the authority to investigate and prosecute genocide, war crimes, crimes against humanity, and the crime of aggression (violations of peace). Over 120 nations have agreed to the jurisdiction of the ICC. The United States is not among them.

As part of its obligations under several treaties, however, the U.S. Congress has enacted several statutes that enable the nation to prosecute its citizens for crimes against humanity. Genocide, war crimes, torture, and the recruitment of child soldiers are among the crimes against humanity that the federal government punishes.

One of the most horrendous of crimes is genocide. Genocide involves the attempted elimination of an entire group of people who belong to the same race, ethnicity, religion, or nationality. The list of human atrocities is stunningly long. About 6 million Jewish people were murdered in the Holocaust of WWII, as many as 3 million people were killed by the Khmer Rouge in Cambodia in the 1970s, nearly 800,000 in the Rwandan Genocide of 1994, and as many as 1.8 million Armenians were murdered in the early 20th century by the Ottoman Empire.

Genocide is defined by federal law as

1. whoever, whether in time of peace or in time of war and
2. with the specific intent to destroy, in whole or in substantial part,
3. a national, ethnic, racial, or religious group
 - a. kills members of that group or
 - b. causes serious bodily injury to members of that group or
 - c. causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques or
 - d. subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part or
 - e. imposes measures intended to prevent births within the group; or
 - f. transfers by force children of the group to another group.

All acts of genocide in the United States are covered by the statute, and any person present in the United States who has committed genocide in another nation may be punished under this statute. The law also applies to acts of genocide abroad if committed by a citizen, permanent resident, or other person owing allegiance to the United States. Punishment for genocide is death, life imprisonment or less, and a fine as much as \$1,000,000.³⁹

War crimes are also criminalized. The definition of a war crime comes from treaty law, including the Geneva and Hague Conventions. The law applies to acts within the United States and abroad, committed by or against members of the U.S. military or any U.S. national (citizen, permanent resident, or person owing allegiance to the U.S.) during times of armed conflict. Examples of war crimes are rape and sexual assault, murder, medical experimentation, and torture. If death results, the actor may be sentenced to capital punishment. Otherwise, the crime

is punished with as much as life in prison.⁴⁰ The recruitment of child soldiers is also forbidden. Any person under the age of 15 is deemed a child. This crime is punished with as many as 20 years in prison or life imprisonment if the child dies while serving as a soldier.⁴¹

Independent from the war crimes law just discussed, another federal law specifically forbids torture by individuals acting under the authority of the United States when outside of the nation. Specifically, the infliction of severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon a person within the actor's custody or physical control is punished with death (if death results), as much as life imprisonment.⁴²

QUESTIONS AND PROBLEMS

1. What are the elements of genocide?
2. Two defenses raised at the Nuremberg trials were duress and due process. In the first, the defendants asserted that they were following orders—orders issued by a ruthless government that was intolerant of dissent. The second defense was that it was wrong to punish the defendants for their crimes because there was no international law to break. Indeed, there was no United Nations and no international law forbidding crimes against humanity. And they were tried by an international tribunal, not by a German or other court. Discuss each defense, making your best argument in support of *and* against the defendants.

IN A NUTSHELL

Crimes against the state involve acts that threaten the integrity of governmental institutions, such as contempt and perjury; threaten government itself, such as treason or sedition; or threaten the people collectively and individually, such as terrorism and crimes against humanity. The Framers' history with England and with themselves in the early years made them wary of treason and sedition. They, therefore, included in the Constitution the elements of, and evidence needed to prove, treason. The requirement of two witnesses, treasonous intent, and an overt act make the crime so hard to prove that it has only been charged a few times—and not at all in the past 50 years. Alternatively, prosecutors turn to espionage and other laws to prosecute treasonous acts.

The misuse of the crime of sedition by the British, and by the Framers themselves, has left it with a stain. Today, the First Amendment's protection of speech guards against the use of sedition to punish dissent. At the federal level, sedition isn't a crime, but seditious conspiracy is.

The political and social turmoil of recent years is a reminder of the importance of legal guardrails in terms of security and liberty. Criminal law is needed to protect public property, people, and to ensure the orderly and equitable use of public goods. At the same time, the Constitution's limits on governmental authority are essential to protect the rights of dissent, including being able to speak and demonstrate in public spaces.

Perhaps the most significant offense isn't treason, but a crime against humanity. The idea of trying persons for violating international, or universal, human rights is relatively new. As codified in U.S. law, genocide, torture, using children in war, and other war offenses can be tried and punished in the United States if committed against or by a citizen or national. Although new, this is an area of criminal law that is likely to expand in the future.

LEGAL TERMS

Brandenburg test	obstruction of justice
clear and present danger test	Perjury
contempt	Sedition
crimes against humanity	subornation of perjury
espionage	Treason
Misprision of treason	

REFERENCES

- ¹ Ex Parte Bollman and Ex Parte Swartwout, 8 U.S. 75 (1807).
- ² *Cramer v. United States*, 325 U.S. 1 (1945).
- ³ 18 U.S.C. §2385.
- ⁴ See, for example, *Dennis v. United States*, 341 U.S. 494 (1951) and *Yates v. United States*, 354 U.S. 298 (1957).
- ⁵ 18 U.S. Code § 2387.
- ⁶ 18 U.S. Code § 2388.
- ⁷ Kimberly Wehle, "No, Flynn's Martial Law Plot Isn't Sedition. But It's Not Necessarily Legal Either," *Politico*, December 24, 2020, Politico.com.
- ⁸ See 70 Am. Jur. 2d 70.
- ⁹ *Schenck v. United States*, 249 U.S. 47 (1919).
- ¹⁰ *Debs v. United States*, 249 U.S. 211 (1919).
- ¹¹ *Frohwerk v. United States*, 249 U.S. 204 (1919).
- ¹² 18 U.S.C. §2384.
- ¹³ M. R. Papandrea, "National Security Information Disclosures and the Role of Intent," *William & Mary Law Review* 56 (2015): 1381.
- ¹⁴ *New York Times Co. v. United States*, 403 U.S. 713 (1971).
- ¹⁵ *Terminiello v. Chicago*, 337 U.S. 1 (1949).

¹⁶ Tex. Penal Code § 42.02.

¹⁷ 18 U.S. Code § 2102.

¹⁸ 18 U.S. Code § 2101.

¹⁹ 18 U.S. Code § 1752(a)(1).

²⁰ 40 U.S. Code § 5104(e).

²¹ 40 U.S. Code § 5109.

²² Michigan Penal Code § 750.543.

²³ “Wife of U.S. Army Soldier Sentenced to Prison for Obstruction of Justice.” Press Release. U.S. Department of Justice, July 22, 2020, justice.gov.

²⁴ R. Sanchez, “Boston Bomber’s Friends Sentenced to Prison,” *CNN*, June 5, 2015, CNN.com.

²⁵ Chansley was convicted under 18 U.S.C. 1512(c). Section 1503 criminalizes obstructions of federal court proceedings, and Section 1505 criminalizes obstructions of Congress and regulatory proceedings. It is likely that Chansley was charged under Section 1512 because the penalties are higher than in Section 1505.

²⁶ A. Budiman, “Key Findings About U.S. Immigrants,” *Pew Research Center*, August 20, 2020, Pewresearch.org.

²⁷ 8 U.S. Code § 1325.

²⁸ “2020 Election to Cost \$14 Billion, Blowing Away Spending Records,” *Center for Responsible Politics*, October 28, 2020, Opensecrets.org.

²⁹ 52 U.S.C. §30101, et seq.

³⁰ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

³¹ 18 U.S.C. § 594.

³² 52 U.S.C. § 20511(1).

³³ 18 U.S.C. § 245(b)(1)(A).

³⁴ K. D. Stringer, “The Andersonville Trial, 1865,” *History.Net*, accessed April 2, 2021, history.net.

³⁵ Hearings Before the Subcommittee on Executive Reorganization of the Committee on Government Operations, United States Senate, Eighty-Ninth Congress, Second Session, December 14 and 15, 1966, Part 14. Washington DC: United States Government Printing Office, 1967.

³⁶ J. M. Scott, “The Untold Story of the Vengeful Japanese Attack After the Doolittle Raid,” *Smithsonian Magazine*, April 15, 2015, smithsonianmag.com.

³⁷ Nuremberg Trials, “Holocaust Encyclopedia,” *The Holocaust Memorial Museum*, accessed March 31, 2021, <https://encyclopedia.ushmm.org>.

³⁸ The Tokyo War Crimes Trials, “The American Experience,” *PBS*, accessed March 31, 2021, PBS.org.

³⁹ 18 U.S. Code § 1091.

⁴⁰ 18 U.S. Code § 2441.

⁴¹ 18 U.S. Code § 2442.

⁴² 18 U.S. Code § 2340 et seq.