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1 INTRODUCTION

Law and the Judicial Function

LEARNING OBJECTIVES

1.1 Explain why courts are an important component of a civilized society.

1.2 Describe the elements of law.

1.3 Explain the significance of the Code of Hammurabi.

1.4 Compare and contrast the consensus and conflict perspectives of law.

1.5 Explain the difference between law and justice.

1.6 Describe the relationship between law and justice.

1.7 Describe the importance of the concept of the rule of law.

1.8 Compare the due process and crime control models of criminal justice.

1.9 Identify the various judicial functions.

1.10 Explain how judges make law.

1.11 Summarize the development of the common law system.

1.12 Explain the role of the courts in the criminal justice system.

WHY STUDY COURTS?

A glance at the headlines of any major newspaper reveals that crime is a national concern. Stories about crime, especially violent crime, figure prominently, as do the crime-fighting strategies proposed by police, prosecutors, legislators, and other government officials. Decisions by prosecutors and judges—particularly in high-profile cases involving heinous crimes or well-known victims or defendants—also get front-page billing, along with appellate court decisions that strike down or affirm criminal convictions and Supreme Court decisions that affect the operation of the criminal court system. Clearly, the editors of these newspapers believe that the public has a voracious appetite for news about crime and the handling of crime by our nation's courts.

This degree of media attention on courts and their outcomes is not really surprising. Every day, in cities throughout the United States, court officials make decisions that affect the lives of ordinary Americans and determine how private businesses and governmental institutions will operate. Some of these decisions—such as a judge's ruling that a person ticketed for speeding must pay a small fine—are relatively trivial and have little impact on persons other than the speeder. Other decisions—for example, a prosecutor's decision to seek the death penalty or a jury's decision to acquit a defendant charged with a serious crime—are weightier and have greater impact. Decisions of appellate courts, especially those handed down by the U.S. Supreme Court, have a further-reaching impact. Consider, for example, the Supreme Court's 1963 decision that all persons charged with felonies in state courts have the right to an attorney even if the state has to pay for them (*Gideon v. Wainwright*, 1963) or its decision in 2005 that

U.S. district court judges are not required to follow the federal sentencing guidelines (*United States v. Booker*, 2005).

Courts provide several functions. First, courts settle disputes by providing a forum for obtaining justice and resolving disputes through the application of legal rules and principles. It is in court that injured parties may seek compensation and the state may seek to punish wrongdoers. Private parties may seek redress in civil court, and the state may seek to punish violators of the criminal law in criminal court. Although the courtroom is not the only place that people may go to settle disputes, Americans traditionally have turned to the courts for redress. Other cultures, such as the Japanese, use the courts much less frequently.

Second, courts make public policy decisions. Policy making involves the allocation of limited resources (such as money and property) to competing interests. America has a long tradition of settling difficult policy questions in the courtroom rather than in the legislature. This is because politicians often avoid settling complex or difficult problems for fear of alienating their constituents or because the competing interests are unable to compromise. In addition, the rights of minorities are often unprotected by the legislature, which, by its very nature, represents primarily the interests of the majority. Finally, there is a tradition of using litigation as a tool for social change.

Third, courts serve to clarify the law through the interpretation of statutes and the application of general principles to specific fact patterns. Courts are different from the other branches of government in many ways, but perhaps the most significant difference is that courts are reactive; that is, courts do not initiate cases but rather serve to settle controversies brought to them by others—plaintiffs and defendants, in legal parlance. This frequently involves the interpretation of statutes written by the legislature.

WHAT IS LAW?

Laws are created by the legislature, provide rules to guide conduct, and are a means of resolving disputes and maintaining order through the medium of the courts. Courts are forums for dispute resolution. This dispute may be between two private parties, such as a dispute between a landlord and a tenant or between a buyer and a seller of merchandise. Or the dispute may be between the state and an individual, as when a defendant is charged with violating some provision of the criminal code.

The court system has a complex set of rules and procedures. Evidence law governs what information the jury can see and hear and how this evidence may be presented to them. There are seemingly innumerable rules governing how parties to a lawsuit may proceed and what motions they can make, either before or during trial, and even after the verdict is entered. The court system has a number of important roles. These include the prosecutor, defense attorney, judge, witnesses, and the defendant.

Courts are charged with settling legal disputes. But what is a legal dispute? For our purposes, a legal dispute is a disagreement about a law—what it means, how it is implemented, or, in the case of criminal law, whether a person has violated the law. The next question, then, is what exactly is "law"? Our definition is this: **Law** is a written body of rules of conduct applicable to all members of a defined community, society, or culture that emanate from a governing authority and are enforced by its agents by the imposition of penalties for their violation.

This definition is appropriate for all modern legal systems, but it would not completely fit preliterate societies because, by definition, such societies do not possess writing, nor do they typically employ agents to enforce rules of conduct. However, law as a system of proscribed and prescribed behavior is certainly not unique to highly developed societies with written statutes and a formal system of law enforcement. All people living together in organized groups have had at least some type of rudimentary rules for governing conduct. They would not last very long as organized groups if they did not, for law is at the center of all organized social life. Indeed, the word *law* itself has come to us from a variety of Latin and Nordic words meaning "to bind" (people together). People who are "bound together" share a common culture, and all cultures share certain core elements. Our first task is to see how these common elements are related to law.

THE CODE OF HAMMURABI

The first legal codes indicate that there were advanced societies that exhibited aspects of mature civilizations many centuries ago. The **Code of Hammurabi** (Hammurabi was a king of Babylonia who lived from 2123 to 2081 BC) was long acknowledged as the oldest known written code of law. We now know, however, that other documents of this type existed in the area of the Middle East called Mesopotamia, but no other was so broad in its scope. The code was discovered inscribed on a round stone pillar. It was not law in the sense that law is understood today—that is, a set of abstract principles applicable to all. Rather, it was a set of judgments originally pronounced to solve a particular case. Nor was it an attempt to cover all possible situations as modern codes do, and as far as we know, it was never copied and distributed to those officials charged with the day-to-day administration of Hammurabi's vast kingdom. Nevertheless, the system of justice contained in the code showed signs of mature development, although it was quite different from what we would recognize as such today.

Hammurabi's Code governed relationships in the society related to sexual behavior, property rights, theft, and acts of violence. The law forbade retaliatory actions and blood feuds among the people, leaving punishments to be dispensed by the king's agents. The "eye for an eye, tooth for a tooth" (*lex talionis*) concept of justice is clearly stated in the code, predating the Old Testament passage familiar to Jews, Christians, and Muslims. The law introduced specified standards of conduct and amelioration by an independent third party to settle disputes. Cruelty and inhuman behavior to those accused of wrongdoing were restricted by the legal code. A written code, theoretically impartial in its application, represented a tremendous advance for society in general and the administration of justice in particular.

TWO OPPOSING PERSPECTIVES: CONSENSUS AND CONFLICT

Sociologists who study the law as a social institution and its function as a social control mechanism tend to view it in terms of one of two broad perspectives. Some scholars view society as basically good, just, and more or less providing equal opportunity for all individuals within it. These people hold what is called the consensus view of society. Others view society as basically

unjust, unequal, and discriminatory. These people hold what is called the conflict view. **Consensus theorists** emphasize how society is structured to maintain its stability and view it as an integrated network of institutions (the family, church, school, economy, government) that function to maintain social order and the system as a whole. Social stability is also achieved in this view through cooperation, shared values, and the cohesion and solidarity that people feel by being part of a shared culture. Consensus theorists are aware that conflicts often arise in social life but stress that such conflicts are temporary and can be and are solved within the framework of shared fundamental values, as exemplified by a neutral legal system.

Conflict theorists consider society to be composed of individuals and groups with sharply different interests and to be characterized by conflict and dissent. People and groups everywhere, they maintain, seek to maximize their interests. Because resources are limited, conflict between different individuals and groups is inevitable and continuous. The stability and order that consensus theorists see is only temporary and maintained by coercion rather than consensus—that is, the ability of more powerful people and groups to impose their will on the less powerful. The social institutions so lauded by consensus theorists function to maintain the privilege of the few and to keep the many subservient to them.

Which view is correct? The simple answer is that it is impossible to say without specifying what society we are talking about. All societies are characterized by both consensus and conflict; it is almost impossible to imagine any society not being so. We have to remember that these two competing models are examples of what sociologists call *ideal types*. Ideal types are abstract conceptual tools that accentuate the phenomenon being studied purely for analytical purposes; they lay no claims to mirror the day-to-day reality of any concrete example of that phenomenon. Let us examine law in the context of these two ideal-type models of society.

The Consensus Perspective

The consensus perspective views law as basically a neutral framework for patching up conflicts between individuals and groups who primarily share the same set of fundamental values. Law is viewed in a manner analogous to the immune system of the body in that it identifies and neutralizes potential dangers to the social body before they can do too much damage. Thus, law is a just and necessary mechanism for controlling behavior detrimental to peace, order, predictability, and stability. Specific legal codes are assumed to express compromises between various interest groups regarding issues that have been contentious in the past, not the victories of some groups over others. Law is also seen as reflecting the community's deeply held values and as defining the rights and responsibilities of all those within it, and it is a legitimate expression of morality and custom. If coercion is sometimes needed to bolster conscience, it is because the individual, not the law, is flawed. The law is obeyed by the vast majority of people not out of fear but out of respect, and it is willingly supported by all good people.

The Conflict Perspective

Underlying the conflict perspective of the law is a view of human nature that sees human beings as basically exploitive and duplicitous creatures (although conflict theorists believe we have

become that way because of the greed and egoism instilled in us by living in a capitalist society, not because we are born that way). It also avers that law functions to preserve the power and privilege of the most exploitive and duplicitous among us, not to protect the weak and helpless. The conflict perspective of law asserts that social behavior is best understood in terms of struggles and conflicts between groups and individuals over scarce resources. Although thinking of social processes in terms of conflict between rival factions (usually between social classes) goes back as far as Plato, the more formal treatment of conflict as a concept traces its origin to the thought of 19th-century German philosopher Karl Marx.

Marxist legal scholars certainly agree with scholars from other perspectives that law exists to settle conflicts and restore social peace but insist that conflicts are always settled in favor of the ruling class in a society. The ruling class always wins because it is this class that makes the rules governing social interaction. For Marxist legal scholars, society is divided into two classes: the rulers and the ruled. Because the ruling class—by which Marx meant the owners of the means of production (i.e., factory owners and entrepreneurs)—controls the means of production, it is able to control politicians, the media, the church, and all other social institutions that mold social values and attitudes, and thus the law.

Why do the exploited not recognize their exploitation and the ways in which the law supports it? Marx and Engels explained this puzzle with reference to the idea of **false consciousness**. By false consciousness, Marx and Engels meant that the working classes have accepted an ideological worldview that is contrary to their best interests. Workers have been duped into accepting the legitimacy of the law by the ruling classes and are not aware that the law does not serve them. They blindly obey the law, believing that they are behaving morally by doing so. The ruling class can generate the false consciousness of the workers by virtue of its control over key institutions such as education, religion, the media, and, of course, the law itself. These institutions define what is right and wrong, and they control the flow of information so that it conforms to the worldview of the ruling class.

Because both consensus and conflict are ubiquitous and integral facts of social life, we have to address both processes in this book while attempting to remain agnostic with respect to which process "really" characterizes social life in a general sense. It is hoped that it will become plain to the reader that the consensus perspective is most suitable for explaining certain sets of facts and that the conflict perspective is better suited to explaining other sets of facts. We hope that it will also become plain that conflict is as necessary as consensus to maintain the viability of a free society.

WHAT IS THE RELATIONSHIP OF LAW TO JUSTICE?

When most people think of justice, they probably think of law, but law and justice are not identical. Law *can* be in accordance with justice, but it can also be the furthest thing from it. Law is in accordance with justice when it respects, cultivates, and protects the dignity of even the lowliest person living under it; it violates justice when it does not. We have to be confident that we can find justice and that we can harness it and put it to practical use for the benefit of

humankind, just as scientists seek to harness the laws of nature and put them to practical use. When all is said and done, it is only through law that justice can be achieved.

Equity is a term derived from the Latin word for "just" and refers to remedies for wrongs that were not recognized (neither the remedies nor the wrongs) under English common law. Equity principles are still heavily used in family and contract law since they allow judges to fashion necessary remedies not readily apparent from a reading of legal statutes.

The idea of equity in law in medieval England evolved on parallel tracks with the evolution of the role of the king's chancellor, who was essentially the king's most important minister (his "prime minister"). One of the chancellor's responsibilities was to handle petitions from the king's subjects seeking relief from rulings in the courts. This relief was sorely needed because, by the 13th century, the court system had become very inflexible. Judges frequently applied the same abstract principles and procedural rules rigidly to every case regardless of the issues involved. Judges also failed to realize that ever-changing social circumstances and mores require a dynamic "living" system of law. As a result of the rigidity of common-law practice, many people felt unjustly treated by the courts and turned to the king (through his chancellor and his staff) to seek justice. This does not mean that the common law of the time was inherently unfair. The law was more incomplete and inflexible than purposely unfair, and equity was conceived of as a corrective for the rigidity and impersonal nature of law.

With an increasing number of petitions being filed, an entirely independent court system with its own distinct set of principles and procedures was eventually implemented, known as the Court of Chancery. The first mention of such a court was in 1280, during the reign of Edward I (1239–1307). Judges presiding in these courts were directed to view each case as unique, to be flexible and empathetic, and to think in terms of principles of fairness rather than rules of law. Because it was a corrective, many equity decisions were contrary to the principles of the common law as a rational and predictable legal system (Reichel, 2017). It is important to note that equity supplemented, not replaced, common law: Equity "begins where the law ends; it supplies justice in circumstances not covered by the law" (McDowell, 1982, p. 23). In other words, if justice was to be served in England, the rigid formality of common law alone would not suffice. Courts of Chancery were a necessary "add-on" because of the equity defects apparent in the rigid common law at the time.

Over the centuries, common law and equity engaged in dynamic cross-pollination to the benefit of both. The common law became fairer and more flexible, and the judges of the chancery courts began relying on rational legal principles and precedents to make equity more predictable. They eventually became so alike that formal distinctions between the two courts were removed in 1875, although there are still provisions for separate courts of law and equity in England. Some states in the United States (notably, Delaware) have chancery courts, but most U.S. judges are empowered to hear cases of both law and equity.

What kinds of legal decisions violate equity, and what exactly is an equity decision? Civil law (i.e., noncriminal law) in the United States throughout most of the 19th century was very much oriented toward protecting the legality of contracts between individuals. As long as no specific contract was violated, the defrauding, maiming, and killing of innocent consumers and workers by defective products and dangerous working conditions was not cause for legal action.

Victims of defective and/or dangerous products could not sue the manufacturers because the guiding legal principle was *caveat emptor* (let the buyer beware). Companies had no legal duty to be concerned with the welfare of those to whom they sold their products; it was incumbent on buyers to be concerned with their own welfare. Similarly, unhealthy and dangerous working conditions in mines, mills, and factories were excused under the Contract Clause of the Constitution. American law in this period was as rigid as 12th-century English law, as judges mechanistically applied legal rules without concern for standards of equity. Equity became more and more a consideration of American courts in the late 19th and early 20th centuries, however, as laws were passed making companies liable for defective products and protecting workers from unsafe working conditions.

THE RULE OF LAW

The only way we can be reasonably assured of integrating important aspects of justice with a legal system is to ensure strict adherence to what is called the rule of law. This idea of the rule of law, not of people, evolved in the English-speaking world from the time of the Magna Carta (1215) through the English civil wars (1642–1646 and 1648–1649) and the Glorious Revolution (1688–1689) of the 17th century. These struggles of the English people were efforts to gain freedom from arbitrary government power and oppressive sovereigns. The struggles for freedom and liberty continued with the American Revolution and Civil War and are still going on today around the world.

Although the rule of law can be violated, the fact that it exists serves as a rallying point and source of legitimacy for those who would oppose individuals and governments who violate it. According to Philip Reichel (2017), the rule of law contains three irreducible elements:

1. It requires a nation to recognize the supremacy of certain fundamental values and principles.
2. These values and principles must be committed to writing.
3. A system of procedures that holds the government to these principles and values must be in place.

The first element is relatively unproblematic; it is difficult to imagine a modern organized society not recognizing a set of fundamental values that it holds supreme. These ultimate principles may be secular or religious. The second element is also relatively unproblematic. Any culture possessing a written language would be expected to put such important guiding principles into writing so that all may refer to them. Documents containing these principles may be the culture's holy books or a nation's constitution. The third element is much more problematic because it determines whether a country honors its fundamental values in practice as well as in theory.

At its core, law is a set of lifeless statements; it has no life apart from human actors. If the law is to be consistent with justice, it can be so only if the procedures followed by the servants of the law are perceived as fair and equal.

The system of procedures to hold the government to its principles is best articulated by the concept of **due process**. When we speak about something that is our due, we are usually referring to something that we feel we are entitled to. Due process is procedural justice that is due to all persons whenever they are threatened with the loss of life, liberty, or property at the hands of the state. Due process is essentially a set of instructions informing agents of the state how they must proceed in their investigation, arrest, questioning, prosecution, and punishment of individuals who are suspected of committing crimes. Due process rules are thus rules that attempt to ensure that people are treated justly by the state. Unlike distributive justice, due process is not something a person earns by their actions; it is something that is due (hence the term) to everyone without exception simply because of their humanity.

To understand what due process means today and how far we have come in implementing it, let us examine what people went through in times when the idea of due process would have been foreign to most people. Imagine you are in France 300 years ago. Soldiers come to your house in the dead of night, batter your door down, arrest you, and place you in a filthy dungeon. Further imagine that you genuinely do not know why this is happening to you. You try to find out for years while rotting in that dungeon, but no one you ask has the slightest idea. All you and they know is that you are the victim of one of the infamous *lettres de cachet* ("sealed letters"). These letters were issued by the king, his ministers, or some other high-ranking aristocrat, ordering authorities to seize and imprison anyone who had in any way offended them. When (or if) you were finally released, there is nothing you could do about what had happened because it was all perfectly legal under the Code Louis of 1670, which governed France until the implementation of the Code Napoleon in 1804. The Code Louis is a perfect example of a system of law being at odds with justice.

JUSTICE, THE LAW, AND PACKER'S MODELS OF CRIMINAL JUSTICE

Every matter of controversy in criminal justice has at its core at least two competing sets of ideas. In the courts, every decision a judge makes, at either the trial or appellate level, tends to pit two contradictory sets of values against each other. Consider a criminal trial. The prosecutor presents a case that represents the interests of the state, one that is designed to prove that the defendant is guilty and should be held accountable for the crime with which they are charged. In contrast, the defense attorney presents a case in the interest of their client. The defense attorney attempts to raise doubt about the defendant's guilt and insists that the legal procedures designed to protect the defendant's rights be followed. The competing sets of values that each of these actors brings to the table—and that are found at all other stages of the criminal justice process as well—have been described by Herbert Packer (1968) as the crime control and due process perspectives.

Packer's (1968) models of the criminal process are just that—models, and not depictions of reality. He sees them as polarities—as the two ends of a continuum along which the actual operation of the criminal justice system will fall. He also cautions against depicting one model as the way things work and the other as the way things ought to work. In his words, the two models "represent an attempt to abstract two separate value systems that compete for priority in

the operation of the criminal process" (Packer, 1968, p. 153). The value systems that "compete for priority" are regulating criminal conduct and preventing crime, which the crime control model views as the most important function of the criminal process, and protecting the rights of individuals, which the **due process model** emphasizes.

In the sections that follow, we describe the crime control and due process models in detail, focusing on their differences. These differences are summarized in Table 1.1.

TABLE 1.1 ■ Packer's Crime Control and Due Process Models

	Crime Control Model	Due Process Model
Views criminal justice system as an _____	Assembly line	Obstacle course
Goal of criminal justice system	Controlling crime	Protecting rights of defendants
Values emphasized	Efficiency, speed, finality	Reliability
Process of adjudication	Informal screening by police and prosecutor	Formal, adversarial procedures
Focus on	Factual guilt	Legal guilt

TWO MODELS OF CRIMINAL JUSTICE

The Crime Control Model

As its name suggests, the **crime control model** (see Packer, 1968, pp. 158–163) views the suppression of criminal conduct—that is, controlling crime—as the most important function of the criminal justice system. The primary function of the system is to control crime by apprehending, convicting, and punishing those who violate the law. Failure to control crime, according to this perspective, leads to a breakdown in public order. If community members believe that laws are not being enforced, they will have fewer incentives to obey the law, which will lead to an increase in crime and to a greater risk of victimization among law-abiding community members. As Packer (1968) notes, failure to control crime eventually leads "to the disappearance of an important condition of human freedom" (p. 158).

According to the crime control model, *efficiency* is the key to the effective operation of the criminal process. A high proportion of offenders whose offenses become known must be apprehended, tried, convicted, and sentenced. Moreover, this must be accomplished in a system where the crime rate is high and resources for dealing with crime are limited. Thus, the model emphasizes *speed*, which depends on informality and uniformity, and *finality*, which means that there should be few opportunities for challenging outcomes. The requirement of informality means that cases should be screened by police and prosecutors to determine the facts and to separate the probably innocent from the probably guilty; judicial fact finding, which is more time-consuming and thus less efficient, should be the exception rather than the norm.

Uniformity means that officials should follow routine procedures in most cases. As Packer (1968) puts it, "The process must not be cluttered up with ceremonious rituals that do not advance the progress of the case" (p. 159).

The metaphor that Packer (1968) uses to describe the operation of the criminal process under the crime control model is that of an assembly line: "an assembly-line conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers . . . who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product . . . a closed file" (p. 159). As this suggests, the goal is to move cases through the justice process as swiftly as possible. Suspects who are "probably innocent" are screened out early in the process by police and prosecutors; those who are "probably guilty" are moved quickly and perfunctorily through the remaining stages in the process and are convicted, usually by a plea of guilty, as expeditiously as possible. Thus, the system achieves the goal of controlling crime by separating the innocent from the guilty early in the process, by extracting early guilty pleas from those who are not screened out by police and prosecutors, and by avoiding trials.

A key to the operation of the crime control model is the **presumption of guilt**, which rests on a belief in the reliability of the screening process operated by police and prosecutors. That is, defendants who are not screened out early in the process by police and prosecutors are probably guilty and therefore can be passed quickly through the remaining stages in the process. The presumption of guilt is simply a prediction of outcome: Those not screened out early in the process are probably guilty and more than likely will plead guilty or be found guilty at trial. The **presumption of innocence**, on the other hand, means that until the defendant has been adjudicated guilty, that person is "to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question" (Packer, 1968, p. 161).

In summary, the crime control model views the apprehension and conviction of criminals as the most important function of the criminal justice system. It characterizes the criminal process as an assembly line that moves cases forward in a uniform and predictable way. The model places great faith in the reliability of fact finding by police and prosecutors. It suggests that the process is operating with maximum efficiency if cases involving the probably innocent are screened out early by police and prosecutors and if the rest of the cases, which involve defendants who are presumed to be guilty, are disposed of as quickly as possible, preferably with guilty pleas.

The Due Process Model

Where the crime control model views the criminal process as an assembly line, the due process model sees the process as an obstacle course. Each stage in the process, according to Packer (1968, pp. 163–172), is designed not to move cases forward as expeditiously as possible but rather to throw up hurdles to carrying the case from one stage to the next. There are other differences as well. Whereas the crime control model stresses efficiency, the due process model stresses reliability and minimizing the potential for mistakes. And whereas the crime control model places great faith in the ability of police and prosecutors to separate the probably innocent from the probably guilty, the due process model contends that informal, non-adjudicatory fact finding carries with it a strong likelihood of error.

It is important to point out that the values underlying the due process model are not the opposite of those found in the crime control model. Like the crime control model, the due process model acknowledges the importance of controlling crime. However, the due process model rejects the premise that screening of cases by police and prosecutors is reliable. More to the point, the due process model stresses the likelihood of error in these informal screening processes. As Packer (1968) points out,

> People are notoriously poor observers of disturbing events . . .; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not). (p. 163)

Because of the strong possibility of mistakes in the early stages of the process, the due process model calls for fact-finding procedures that are formal, adjudicative, and adversarial. The case against the accused, in other words, should be "publicly heard by an impartial tribunal" and "evaluated only after the accused has had a full opportunity to discredit the case against him" (Packer, 1968, p. 164). The model also rejects the notion of finality; rather, there should be constant scrutiny of outcomes to ensure that mistakes have not been made.

There also are sharp differences between the two models in the degree to which mistakes can be tolerated. That is, there are differences in the weight given to reliability (a strong probability that factual guilt has been determined accurately) and efficiency (expeditious handling of the large number of cases that the system takes in). The crime control model is willing to sacrifice some reliability in pursuit of efficiency. It tolerates mistakes up to the level at which they interfere with the goal of preventing crime; if too many guilty people go free or if there is a general view that the system is not reliable, crime might increase rather than decrease. The due process model rejects this view, arguing that mistakes must be prevented and eliminated. To the extent that efficiency requires shortcuts that reduce the reliability of outcomes, efficiency must be sacrificed.

To ensure a high degree of reliability in the process, the due process model requires that both factual guilt and legal guilt be proved. Factual guilt simply means that the evidence shows that there is a high probability that the defendant committed the crime of which they are accused. Legal guilt, on the other hand, refers to the process by which determinations of guilt are made. Defendants are not to be deemed guilty unless all the mandated procedures and rules designed to protect the rights of the accused have been followed. A defendant charged with an assault that was witnessed by several bystanders who are willing to testify against them may well be factually guilty of assault. His legal guilt at the time of charging, on the other hand, is an open question. If the determination of factual guilt is not made in a procedurally correct way, the defendant is not legally guilty and cannot be held accountable for the crime with which he is charged.

The due process model, then, resembles an obstacle course in which cases must navigate hurdles set up to ensure that determinations of guilt are reliable. The key to this is formal, adjudicative, and adversarial fact-finding procedures with constant scrutiny of outcomes to ensure

that mistakes have not been made. Defendants are presumed to be innocent until proven guilty, legally as well as factually.

An Illustration of the Models in Action

A series of Supreme Court cases that illustrate the "tinkering" that goes on to modify the excesses that might arise with exclusive use of either model involves an escaped mental patient named Robert Williams who kidnapped, raped, and murdered a 10-year-old girl named Pamela Powers on Christmas Eve, 1968. Two days after the crime, Williams turned himself in to the police in Davenport, Iowa. Because the crime took place in Des Moines, a detective was dispatched to transport Williams from Davenport. Williams's lawyer secured the detective's agreement not to question Williams during the trip. However, the detective—concerned that if Pamela's body were not found before the snow fell, it would not be discovered until the following spring—engaged Williams in conversation, during which the detective made statements, but did not ask questions, about how important it was to the family to find Pamela's body so that they could give her a proper Christian burial. This so-called "Christian burial speech" touched Williams, who then directed the detective to the girl's frozen body. Based on this evidence, Williams was convicted of murder.

The case reached the U.S. Supreme Court in 1977 (*Brewer v. Williams*, 1977). The Court overturned Williams's conviction by a vote of 5–4, stating that Williams had not waived his right to counsel during questioning and that the officer's "Christian burial speech" constituted custodial interrogation. It was reasoned that since Williams's confession was obtained in violation of his right to counsel, any evidence obtained based on it (Pamela's body) was inadmissible under the exclusionary rule. The majority of the justices were focused on whether Williams had received a fair trial; concerns about crime control and efficiency were secondary.

Brewer v. Williams is an example of the limitations of the due process model. However, this case was one of a number of cases involving the boundaries of custodial interrogation from a time when the crime control model ran amok. The most famous of these cases was *Brown v. Mississippi* (1936), which involved the alleged murder of a White man by three Black men. All three men were sentenced to death on the basis of confessions obtained under torture (they were whipped and told that the whippings would not stop until they confessed). The injustice to the community inherent in the *Brewer* case can be viewed as one of a number of correctives to the injustices suffered by defendants and typified in the *Brown* case.

After Williams was retried, and again convicted, he appealed to the Supreme Court. This time, in *Nix v. Williams* (1984), which enunciated the inevitable discovery exception to the exclusionary rule, the Court upheld Williams's conviction, ruling that search parties looking for Pamela's body would have found it by lawful means eventually, and thus the fact that it was found sooner because of Williams's confession was irrelevant.

The Ongoing Battle

In an ideal world, judges and other criminal justice officials would balance due process and crime control ideals. They would strive for efficiency while insisting on reliability. In the real

world, this is probably not possible; many decisions tip in one direction or another. High caseloads, limited resources, and concerns about protecting the community may lead to shortcuts that threaten reliability or to decisions that chip away at the procedural regulations that protect the rights of criminal defendants. Similarly, concerns about restraining the power of criminal justice officials may lead to decisions that make it more difficult for the criminal process to apprehend and convict those who commit crimes.

A good example of an issue where use of the crime control and due process models would lead to different conclusions is plea bargaining. According to the crime control model, the criminal process is operating most efficiently when defendants who are not screened out by police and prosecutors plead guilty at the earliest possible moment. The criminal process would break down if too many defendants insisted on taking their cases to trial. The crime control model thus sees nothing wrong with allowing prosecutors to reduce charges or drop counts in exchange for guilty pleas or permitting judges to make it clear to defendants that those who plead guilty will be treated more leniently than those who insist on a trial. It is assumed that while plea bargaining may result in guilty pleas by some who are innocent, this type of mistake is likely to be rare, as those who have survived the screening process are in all probability guilty. Disposing of a large proportion of cases as quickly as possible via guilty pleas is, according to this model, the only feasible means of achieving the goal of crime control.

It is no surprise that use of the due process model leads to a different conclusion. According to this model, guilty pleas, which effectively preclude any oversight of the early, informal stages of the process, should be discouraged. The due process model values reliability and contends that mistakes are likely early in the process; because of this, guilty pleas that occur soon after the prosecutor decides to charge have a high probability of producing unreliable factual determinations of guilt. In addition, the model does not allow prosecutors or judges to promise defendants leniency in return for a guilty plea. Defendants, no matter how overwhelming the evidence, have the right to have the charges against them tried using the procedures required by law; they should not be coerced to enter a guilty plea or punished for exercising their constitutional right to a trial. Moreover, before accepting a guilty plea, the judge adjudicating the case should be required to both establish the defendant's factual guilt and ensure that the process that brought the defendant into court has been free of mistakes. According to the due process model, it is only by following these rules that the reliability of outcomes can be guaranteed and mistakes minimized.

JUDICIAL FUNCTIONS

Courts provide several functions. They provide a forum to settle disputes, either in civil court or criminal court. They make policy decisions that politicians may be unwilling to make for fear of not being reelected. They also serve to clarify the law through the interpretation of statutes and the application of general principles to specific fact patterns. Courts are different from the other branches of government in many ways, but perhaps the most significant difference is that courts are reactive; that is, courts do not initiate cases but rather serve to settle controversies brought to them. In the process, courts are forced to choose one side over the other, or to interpret the law and apply it to a unique set of facts—this is sometimes referred to as "making law."

HOW JUDGES "MAKE LAW"

It is often said that our political system is a "government of laws, not men." This means that individuals in our system are governed by laws and not by the whims of those in power; it also means that the law applies to everyone—even to those in power—and that no one is above the law. Related to this is the notion that the law is "a set of rules transcending time, geography, and the circumstances surrounding specific cases" (Eisenstein et al., 1988, p. 5). According to this line of reasoning, judges simply apply the law in a rigid and mechanistic way to the specific cases that arise. Stated another way, judges "find" the applicable law and apply it to the case at hand.

The problem with this traditional view of law and the role of courts is that much of "the law" is broad and ambiguous. Thus, the judges who are charged with enforcing the law must first interpret it. They must decide what the law means and whether it is applicable in the given situation. Consider, for instance, a legislatively enacted statute that prohibits disturbing the peace, which is defined as "willfully disrupting the peace and security of the community." This statute, which neither defines *willful n*or offers examples of conduct that would "disrupt the peace and security," obviously leaves room for interpretation. Constitutional provisions, which are another source of law, have similar limitations. Take, for instance, the Fourth Amendment to the U.S. Constitution. It protects against unreasonable searches and seizures, but it does not define *unreasonable*. Because of these inherent ambiguities in criminal statutes, state and federal constitutions, and other sources of law, judges are called on to interpret the law. Judges' use of their position to interpret the law has a long history. It began during what is known as the common law period in England. We discuss the development of the common law, as well as its associated principles, in the next section.

VIEW FROM THE FIELD

THE ROLE OF THE COURTS IN AMERICA

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The role of the courts in America, as directed by its magistrates, judges, and Supreme Court justices, is to ensure fairness to individuals while attempting to ascertain the truth of the matter asserted. Achieving these two goals requires a balance of expertise, experience, and emphasis.

Expertise, in my opinion, largely consists of having the knowledge to hand down good oral or written opinions concerning the authenticity of the evidence and claims presented before the court. Experience means having a "seasoned," practical understanding that is based on personal observation from encountering and going *through* things in life as they occur over a long period of time. Emphasis requires that the court consider as important above all else the goal of ascertaining the truth, along with satisfying the defendant's constitutional right to a fair trial. If the court is properly emphasizing these goals, there should be a significant amount of stress between the adversaries as they attempt to present and defend their case.

DEVELOPMENT OF THE COMMON LAW SYSTEM

The Western legal tradition may be traced to the Code of Hammurabi. This is the first known written legal code, and it expressed a retributivist "eye for an eye" philosophy. The Roman Empire eventually adopted many of the principles of the Code of Hammurabi. The spread of the Roman Empire brought Roman law to Western Europe, but it had minimal impact on English common law. The Norman conquest of England in 1066, however, brought feudal law, which provided the basis for the common law, to England. During the following several hundred years, England slowly developed what came to be known as the common law system. By the reign of Henry II (1154–1189), who is often referred to as the "father of the common law," a body of law had been developed and applied nationally. Judicial decisions were written down, circulated, and summarized. The first systematic attempt to collect and explain these decisions was compiled under the supervision of Henry's chief justice, Ranulf de Glanvill, in a book titled *Treatise on the Laws and Customs of the Realm of England*, around 1188. This book details the transition from what was essentially the irrational decision-making of pre-Norman England to adherence to formal legal rules. The result was a more unified body of law, which came to be known as the **common law** because it was in force throughout the country.

The next important document in the evolution of common law was the Magna Carta of 1215. The Magna Carta was a document drawn up by English barons to limit the power of the sovereign (specifically, the notorious King John of Robin Hood fame) and to assert certain rights. Contained in the document are the first glimpses of many of the rights we take for granted today, such as the right to trial by jury, the proportionality of punishment, and the privilege against self-incrimination. Although King John's acquiescence to the provisions of the charter was a victory for the barons, it meant little at the time for the common person.

Henry de Bracton's *On the Laws and Customs of England*, written between 1250 and 1260, furthered the development of the common law. Bracton was a judge in England who believed that the common law was based on case law, which was, in turn, decided based on ancient custom rather than on authoritative codes imposed on people from above. The common law is thus judge-made law. That is, it was law created by judges as they heard cases and settled disputes. Judges wrote down their decisions and, in doing so, attempted to explain and justify their decisions by reference to custom, tradition, history, and prior judicial decisions. *On the Laws and Customs of England* was essentially a compilation of these judicial rulings made over the previous decades arranged to show how prior decisions, or precedent, may guide future rulings.

Originally, judges made decisions without referring to other cases or courts. They simply heard the case and decided the appropriate outcome, based on their understanding of the law as they had learned it through the reading of legal treatises. But as time went by, judges came to rely on prior decisions as a means of justifying their decision in a particular case. As judges began to rely on previous judgments, they developed the concepts of stare decisis and precedent.

Precedent

Under the common-law system, every final decision by a court creates a **precedent**. This precedent governs the court issuing the decision as well as any lower, or inferior, courts. The common

law system was brought to America by the early colonists. Many of the principles of the common law, including precedent and a belief in stare decisis, remain in force today in American courts. Thus, all courts in a state are bound to follow the decisions of the highest court in the state, usually known as the state supreme court. All courts in the federal court system are bound to follow the decisions of the U.S. Supreme Court. This is the notion of precedent.

Precedent is binding only on those courts within the jurisdiction of the court issuing the opinion. Thus, a decision of the North Carolina Supreme Court is not binding on any court in Texas. Texas courts are not subject to the jurisdiction or control of North Carolina courts and thus are free to interpret the law differently from North Carolina courts, if they see fit to do so. Decisions from courts in other jurisdictions, although not binding, may be persuasive. This simply means that another court may give consideration and weight to the opinion of other courts. Thus, a Texas court may consider, if it chooses, the judgment of a North Carolina court or any other state court. Courts may do this when faced with an issue that they have not dealt with before but that other courts have examined. Moreover, when judges look to the past or other jurisdictions and can find no guiding precedent, they must decide the case according to their interpretation of legal principles.

COMPARATIVE COURTS

The basic features of civil law are almost mirror opposites of the features of common law. France has a civil-law system. What follows is a list of some of the distinctive features of the French civil-law system:

1. *Civil law is written rather than unwritten.* As opposed to the common law's slow accumulation of case law derived from decisions based on local customs, the Napoleonic Code and its successors are all codes of conduct (statutes) written from above and imposed on citizens and subjects below.
2. *Precedent is not officially recognized.* The codes laid down in civil law are complete the day they are enacted and are not subject to judicial review. As such, there is no need to refer to past cases for guidance. In practice, however, no code is so complete as to provide unambiguous guidance in all matters coming before the courts, and civil-law judges often refer to case law and thus to precedent. The main difference between the common- and civil-law approaches is that in civil law, precedent is not binding.
3. *It is inquisitorial rather than adversarial.* This is the primary distinguishing feature of civil law vis-à-vis common law. The **inquisitorial system** is a system of extensive investigation and interrogations carried out to ensure that an innocent person is not subjected to trial. The term *inquisition* should be thought of as denoting "inquiry" as the term *adversarial* denotes "contest." The inquisitorial focus is on truth and not so much on procedure, so many of the procedural protections afforded suspects in common-law countries either do not exist or exist in modified form.
4. *It has traditionally made little use of juries.* There is some use of juries in civil-law countries in very serious criminal cases, but they don't have the same role that they have in common-law countries. In France, juries consist of three professional judges and nine laypersons. In a jury trial, all jurors and judges are allowed to question witnesses

and the accused. Jury deliberations are doubtless dominated by the professional judges on whom the laypersons must rely for explanations of the law, but guilt or innocence is determined by a secret ballot in which all 12 votes are of equal importance. A verdict requires the agreement of at least eight of the 12 jurors rather than unanimity.

5. *Judicial review is used sparingly.* The French equivalent to the American Supreme Court in terms of dealing with constitutional issues is the Conseil Constitutionnel (the Constitutional Council). This entity is unique among national supreme courts in that it lies outside the judicial system (it is a council rather than a court hearing cases forwarded to it from lower courts). The council's main function is to rule on the constitutionality of proposed legislation, not legislation already in effect, when asked to do so by leaders of the various political parties. Some civil-law countries tend to view the practice of judicial review of legislation as inherently antidemocratic and a violation of the separation of powers principle. The reason that the American model of judicial review is rejected in France is that the French believe that important decisions affecting large numbers of people should be made by legislators elected by and accountable to the voters, not by appointees with lifetime tenure.

While the French civil-law system has its benefits, it also has its limitations. The investigation of a crime often takes a long time, during which the accused is typically held in custody without bail. Bail is infrequently granted in France because it operates under a crime control model and because the accused is expected to be available to help with the inquiry. Also, by the time a case gets to trial, everyone involved basically knows what is going to happen because the trial is more a forum for a review of the known facts (of which all parties are aware) than a forum for fact finding. The system is one of professional bureaucracy that lacks the same measure of lay participation favored by common-law countries. The expectation of cooperation on the part of the defendant, as well as the negative conclusions that the judge and jurors can draw if they do not cooperate, is something that an American due process purist finds alarming.

Source: Reichel, P. (2017). *Comparative criminal justice systems: A topical approach* (7th ed.). Pearson.

There also are situations where judges do not follow precedent, either because they believe that the facts in the case at hand distinguish it from cases decided previously or because they believe that the precedent, although once valid, should be overruled. In the first instance, the judge rules that facts in the case being decided are sufficiently different from those found in previous cases that the legal principles announced in these cases do not apply. In *Gideon v. Wainwright* (1963), for example, the U.S. Supreme Court ruled that Clarence Gideon, an indigent defendant who was charged with a felony in a Florida state court, should have been provided with an attorney to assist him with his defense. According to the Court, "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Sixteen years later, however, the Court ruled in the case of *Scott v. Illinois* (1979) that an indigent defendant who was sentenced only to pay a fine was not entitled to an attorney. The Court's earlier ruling that the right to a fair trial required the appointment of counsel for "any person haled into court" notwithstanding, in this case, the Court stated that the Constitution required only "that no indigent defendant

be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense." What distinguished the two cases, in other words, was the fact that Gideon was sentenced to prison whereas Scott was not.

Occasionally, judges will decide that the precedent is no longer valid and should not be followed. They can handle this in two ways. They can simply ignore the earlier case and decide the case at hand as if there was no binding precedent, or they can explicitly overrule the earlier case. Often the process of overruling a precedent is gradual. The court finds more and more circumstances that distinguish new cases from the earlier case until it becomes obvious that the precedent has outlived its usefulness. Former Supreme Court Justice William O. Douglas (1974) argued that this gradual erosion of precedent "breeds uncertainty" since "years of litigation may be needed to rid the law of mischievous decisions which should have fallen with the first of the series to be overruled."

According to Justice Douglas, then, it makes more sense for the court to overrule the outdated precedent as soon as it is clear that it has to go. The Supreme Court has done so on a number of occasions. In *Taylor v. Louisiana* (1975), for example, the Supreme Court considered a Louisiana law that gave women a blanket exemption from jury service; women who wanted to serve were required to ask that their names be placed on the lists from which jurors were chosen. The result was that few women volunteered, and most defendants, including Billy Taylor, were tried by all-male juries. In *Taylor*, which was decided in 1975, the Supreme Court struck down the Louisiana law and overruled a 1961 decision, *Hoyt v. Florida*, upholding a nearly identical Florida law.

In the *Hoyt* case, the Court ruled that women "are the center of home and family life" and therefore should be allowed to decide for themselves whether jury service was an unreasonable burden. According to the Court's decision in the *Hoyt* case, it is not "constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." Fourteen years later, the Court changed its mind, ruling that "if it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed." Clearly, the Court's interpretation of the requirement that the jury pool must be drawn from a **random cross section of the community**, as well as its view of the role of women, had changed. (See Table 1.2 for examples of other instances in which the Supreme Court overruled its own decisions.)

TABLE 1.2 ■ Examples of Supreme Court Decisions Overruled by Subsequent Decisions

Original Case	Subsequent Decision
Plessy v. Ferguson (1896) Upheld the constitutionality of racial segregation in public accommodations under the "separate but equal" doctrine.	*Brown v. Board of Education* (1954) Struck down a Kansas law that established racially segregated public schools and stated that the doctrine of "separate but equal" has no place in education: "Separate educational facilities are inherently unequal."

(*Continued*)

TABLE 1.2 ■ Examples of Supreme Court Decisions Overruled by Subsequent Decisions (*Continued*)

Original Case	Subsequent Decision
Bowers v. Hardwick (1986) Upheld the constitutionality of a Georgia sodomy law; held that the right to privacy found in the Fourteenth Amendment does not extend to this type of sexual conduct.	*Lawrence v. Texas* (2003) Struck down a Texas sodomy law; held that intimate consensual sexual conduct is protected by the Fourteenth Amendment.
Booth v. Maryland (1987) The Eighth Amendment bars the use of victim impact statements during the penalty phase of a capital case; information provided in them is not relevant to the blameworthiness of the defendant. *South Carolina v. Gathers* (1989) The Eighth Amendment precludes prosecutors from introducing evidence of the victim's character during the penalty phase of a capital case.	*Payne v. Tennessee* (1991) The Eighth Amendment does not bar the admission of victim impact evidence or prosecutorial argument regarding the victim's character during the penalty phase of a capital trial; "a state may legitimately conclude that evidence about the victim and the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."
Arkansas v. Sanders (1979) A police search of personal luggage taken from a lawfully detained vehicle requires a warrant under the Fourth Amendment.	*California v. Acevedo* (1991) Police may search a container in a vehicle without a warrant if they have probable cause to believe that it holds contraband or evidence.

The fact that statutes and constitutional provisions are ambiguous and that judges cannot always look to precedent for guidance in specific cases, then, means that judges are frequently called on to make law. Judges, in other words, do not simply "find the law." As the *Hoyt* and *Taylor* cases reveal, in interpreting the law, they often must choose between competing social, economic, and political values.

Stare Decisis

Stare decisis means "let the decision stand." Under the principle of stare decisis, if there is a prior decision on a legal issue that applies to a current case, the court will be guided by that prior decision and apply the same legal principles in the current case. In situations in which the law is ambiguous and the same issue has come up before, it makes sense to look to past decisions—that is, to precedent—to see how the matter was resolved previously. This approach emphasizes predictability.

For instance, in deciding whether searches are "unreasonable" under the Fourth Amendment, it makes sense for judges to examine past decisions regarding the issue. Stare decisis is thus the judicial practice of looking to the past for pertinent decisions and deferring to them. As Benjamin Cardozo (1974), who was a Supreme Court justice from 1932 to 1939, put it, the first thing a

judge does "is to compare the case before him with the precedents, whether stored in his mind or hidden in books . . . in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins" (p. 26).

Stare decisis, then, is the principle behind establishing the value of prior decisions, or precedent. It is a principle that assures us that if an issue has been decided one way, it will continue to be decided that way in future cases. Through a reliance on precedent and the principle of stare decisis, common-law courts were able to provide litigants with some degree of predictability regarding the courts' decisions.

Precedent establishes a legal principle, but not every pronouncement that a court makes in a ruling establishes precedent. Pronouncements that do are known as **ratio decidendi** ("the reason for the decision"), which is the legal principle or rationale used by the courts to arrive at their decisions. Additional supporting statements are called **obiter dicta** ("things said by the way"), or simply dicta. These statements are other legal or nonlegal arguments used to support the ratio decidendi and do not constitute precedent.

Precedent is not necessarily unchangeable. Judge-made law may be overruled by an act of the legislature if the constitution permits the legislature to do so. In addition, the court that issued the precedent may overrule it, or a higher court may reverse the decision of a lower court. If an intermediate-level appeals court decides an issue one way and the losing party appeals to a higher appeals court (such as a state supreme court), that higher court may reverse the decision of the lower court. Higher-level courts are not bound by the judgments of lower courts. They are bound only by the decisions of courts above them in the court structure.

Stare decisis, then, involves a respect for and belief in the validity of precedent. Precedent is simply the influence of prior cases on current cases. Understandably, courts are reluctant to reverse decisions they made previously because this is a tacit admission of error. Courts do so, however, when presented with a compelling justification. Thus, stare decisis is not an inflexible doctrine but merely the general rule. There are always exceptions, as with most areas of the law.

Alternatively, rather than expressly overrule a prior decision, a court may instead seek to *distinguish* the prior case from the present case on grounds that the facts are slightly different. By doing so, the court can avoid overruling a prior decision while coming to what it considers the proper result in the present case. Until a decision is expressly overruled, it stands as an accurate statement of legal principles, or "good law."

Judicial Review

What happens when two prior decisions are in conflict, and there is no clear precedent? Or when one law comes into conflict with another? In the United States, the answer to that question is the courts, through the power of judicial review. **Judicial review** simply means the court has the power to examine a law and determine whether it is constitutional. To make this determination, judges must examine the law and compare it with the Constitution. This requires them to interpret the language of both the statute and the Constitution. If the judge determines the law is constitutional, they uphold the law; if not, they declare it unconstitutional and therefore void.

For example, the Fourth Amendment prohibits "unreasonable" searches. Suppose a state legislature passes a law allowing police officers to search anyone they encounter on a public street. Is this law constitutional? Or does it violate the prohibition on unreasonable searches? To answer this question, judges must examine the history and meaning of "unreasonable" as contained in the Fourth Amendment. They do this by examining precedent.

Judicial review is not specifically provided for in the Constitution. Rather, judicial review is judge-made law. *Marbury v. Madison* (1803) established the authority of the U.S. Supreme Court to engage in judicial review of the acts of the other branches of government. The Supreme Court stated in *Marbury* that it was the duty of the judiciary (rather than the U.S. president or Congress) to interpret the Constitution and to apply it to particular fact situations. The Court also said that it was the job of the courts to decide when other laws (acts of Congress or state laws) violated the Constitution and to declare these laws null and void if they were. This is the doctrine of judicial review.

Marbury v. Madison, 1803

Marbury v. Madison is perhaps the most important case ever decided by the Supreme Court because it established the authority of the high court. Article III of the Constitution created the Supreme Court, but it did not discuss whether the Supreme Court could review legislation or interpret the Constitution.

At the time of the adoption of the Constitution, there was heated debate concerning which branch of government had the authority to declare an act void. There were three suggestions on how to handle such a situation: (1) Each branch within its sphere of authorized power has the final say; (2) the Supreme Court has the final say, but only as to the parties in cases before the court; and (3) the Supreme Court has the final say. This controversy was finally resolved by the opinion in *Marbury*. An examination of the case provides insight into this controversy and how the Supreme Court handled the situation.

President Adams, a Federalist, appointed 42 of his fellow Federalists as justices of the peace for the District of Columbia just days before turning over the office to incoming President Thomas Jefferson, a Democrat. Adams's secretary of state, John Marshall, delivered most of the commissions to the newly appointed justices of the peace but failed to deliver Marbury's.

The newly elected president's secretary of state, James Madison, refused to deliver Marbury's commission, so Marbury applied directly to the Supreme Court for a **writ of mandamus** (a writ compelling public officials to perform their duty). The Supreme Court was granted original jurisdiction in such matters by the Judiciary Act of 1789. The Supreme Court agreed to hear the case but was unable to hear it for 14 months because Congress passed a law that stopped the Supreme Court from meeting.

In 1803, the Supreme Court reconvened, heard the case, and decided Marbury was entitled to his commission but that the Supreme Court could not issue a writ of mandamus. Chief Justice John Marshall (formerly Adams's secretary of state!) wrote the opinion of the court. Marshall said:

1. Marbury was entitled to his commission because he had a legal right that was not extinguished by the change in office of president or the failure to deliver the already signed commission.

2. A writ of mandamus was a proper legal remedy for enforcing Marbury's right.
3. However, the Supreme Court lacked the constitutional authority to issue such a writ. This was because the Judiciary Act of 1789 gave the Supreme Court original jurisdiction in such cases, but this grant of authority to the Supreme Court was unconstitutional because Article III of the Constitution defined Supreme Court jurisdiction and Congress could not expand this authority through a statute.

The Judiciary Act of 1789 had the effect of changing (by enlarging) the jurisdiction of the Supreme Court, but Congress cannot pass a statute that changes the Constitution. The only way to change the Constitution is through a constitutional amendment. As stated by Chief Justice Marshall, "an act of the legislature, repugnant to the Constitution, is void." In other words, the Constitution is superior to congressional legislation.

Prior to the decision in *Marbury*, Democrats argued that the Supreme Court lacked the authority to declare acts of other branches of the federal government unconstitutional, while Federalists supported judicial review. If the Supreme Court had issued a writ of mandamus, it could not have forced Madison to honor it. The Supreme Court thus was faced with a serious challenge to its authority. Marshall's opinion saved the court's prestige while allowing the Democrats to claim a political victory (not having to appoint any more Federalists as justices of the peace). What was more important in the long term, the decision established as law the idea that the Supreme Court has the authority to review the constitutionality of congressional activity (and presidential acts): This is judicial review.

This was a major victory for the Supreme Court, and although opposed at the time, it was accepted at least in part because the result in the case was satisfactory to opponents of a strong Supreme Court. The Supreme Court did not use the power of judicial review to invalidate congressional legislation again until 1857.

THE ROLE OF COURTS IN THE CRIMINAL JUSTICE SYSTEM

It is misleading to view criminal courts as institutions isolated from the rest of the criminal justice system. Courts, which clearly are integral to the administration of justice, are but one part of the larger criminal justice system. However, the courts play two important and unique roles in the criminal justice system. The first and most common is **adjudication** of criminal offenses. The second is **oversight**.

Adjudication

The primary role played by the courts is to adjudicate criminal offenses—to process defendants who have been arrested by the police and formally charged with criminal offenses. Prosecutors decide who should be charged and then, provided a plea agreement does not circumvent trial, the defendant is brought to court. The state presents its case and so does the defense. The judge decides matters of law, and the judge or jury decides whether the defendant should be held accountable for the crime in question. If the defendant is convicted, the judge also imposes a sentence.

Both law enforcement and corrections officials play supporting roles in the adjudication of criminal offenses. The police determine who will be brought to court, and corrections officials make postsentencing decisions that affect offenders' punishment. However, "the official labeling of someone as a convicted criminal, and the determination of legitimate punishment can be done only by a court" (Eisenstein et al., 1988, p. 9). This adjudication function is most prevalent in limited and general jurisdiction courts at the state level and in U.S. district courts at the federal level. Moreover, adjudication is the most common court function. That is because there are many more trial courts than appellate courts and many more criminal defendants who must be processed than appeals that are filed.

Oversight

Courts, particularly the appellate courts, provide oversight, not just over the lower courts but over the criminal justice system in general. First, when cases are appealed to a higher level, the appellate court decides whether proper procedure was followed at the lower level. The appellate court may be asked to decide whether the procedures used to select the jury were appropriate, whether the defendant was denied effective assistance of counsel, or whether the trial court improperly admitted or excluded items of evidence or witness testimony. The appellate decision may come months or even years after the trial that led to the appeal, but the very ability of the appellate court to influence what can happen or should have happened at the lower level is the essence of oversight.

MOVIES AND THE COURTS

A MAN FOR ALL SEASONS (1966)

The protections that fall under the heading "due process" are now taken for granted in the American court system. But these rights did not always exist, and the early courts were not infrequently used to advance political (and personal) agendas rather than to do justice. An infamous historical example is depicted in *A Man for All Seasons*. This movie tells the story of the conflict between King Henry VIII and Sir Thomas More, the English Lord Chancellor. Henry VIII, a Catholic, seeks a divorce from his first wife, Catherine of Aragon, so that he may marry Anne Boleyn, who, he hopes, will bear his child. Divorce is generally not permitted by the Catholic Church at this time (the 16th century). He seeks the support of Sir Thomas More. More is a devout Catholic and although More does not agree with the King's desire to divorce, he remains silent.

More's principles are further tested, however, when the king is named the head of the Church of England and subsequently when Parliament requires all to take an oath of allegiance to the Church of England or face a charge of treason. An expert in the law, More knows that if he does not state why he is opposed to taking the oath, he cannot be considered a traitor; More refuses to take the oath and is nonetheless arrested and imprisoned in the Tower of London. When More is finally brought to trial, he remains silent until after being convicted of treason on the perjured testimony of Richard Rich. He is then informed that Rich has been promoted to attorney general as a reward for his testimony against More.

More then abandons his silence and denounces the illegal nature of the king's actions, arguing the pope is the only true leader of the Catholic Church, not the king of England. He further declares that the immunity of the Church from State interference is guaranteed by the Magna Carta. More is condemned to death and eventually beheaded.

Appellate courts also oversee the actions of other criminal justice officials. They decide whether the behavior of police, prosecutors, defense attorneys, and corrections officials comports with or violates laws and constitutional provisions. Consider, for instance, the Supreme Court's landmark 1985 decision in *Tennessee v. Garner*. The Court ruled that police officers cannot use deadly force to apprehend unarmed fleeing felons unless it is necessary to prevent the suspect's escape *and* "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." The Court held that the Tennessee statute that permitted officers to use "all the necessary means to effect the arrest" of a fleeing suspect was unconstitutional because using deadly force to effectuate an arrest of a non-dangerous suspect constituted an unreasonable seizure. Because of the Supreme Court's far-reaching jurisdiction, its decision had implications for police officers across the nation. The fact that the appellate courts—and particularly the Supreme Court—can tell criminal justice officials how to behave (to protect people's constitutional rights) is an important element of their oversight function.

SUMMARY

In this chapter, we discussed the meaning of law, the purpose of law, and the judicial function. Law is a written body of rules of conduct applicable to all members of a defined community, society, or culture that emanate from a governing authority and are enforced by its agents by the imposition of penalties for their violation.

We have traced thinking across the centuries about various aspects of the law, from Hammurabi to the present day. The law was relatively well developed in Hammurabi's Code, replacing a system of personal vengeance with a system in which a neutral third party was charged with making decisions in both criminal matters and business transactions.

Most sociological students of the law conduct their analyses from one of the two general sociological models of society: the consensus model or the conflict model. The consensus model views society as an integrated network of institutions held together by a common set of values. The law is seen as a neutral protector of the continuity and stability of these institutions and values. This perspective also views society as basically good and just. The conflict model holds the opposite view: Conflict rather than consensus is the main characteristic of society, and the law serves the purposes of the ruling classes. This view is presented most forcefully in the works of Marx and Engels. We indicated that all societies are characterized by both conflict and consensus, with one process dominating at one time and the other at another time.

In discussing the relationship between law and justice, we noted that it is only through law that justice can be achieved. We began by discussing the role of equity in the evolution of the common law. Separate courts of equity evolved in England in the 13th century because the common law had become overly rigid and often at odds with justice. These courts of equity, or Courts of Chancery, were directed to be flexible and to decide cases based on standards of fairness rather than on rigid rules of law. It is important to note that equity supplemented rather than replaced common law and that both systems benefited by the cross-pollination of ideas over the centuries.

The rule of law is the only way that we can reasonably ensure that we are integrating important aspects of justice into our legal systems. The rule of law contains three irreducible elements: (1) a nation must recognize the supremacy of certain fundamental values and principles, (2) these values must be committed to writing, and (3) a system of procedures holding the government to these principles and values must be in place. The first two principles are relatively unproblematic, but the third, requiring a nation to honor the first two in practice as well as in theory, is much more so. The third principle is best articulated by the concept of due process, which is procedural restitutive justice in practice.

Herbert Packer's (1968) two "ideal-type" models of criminal justice are the *crime control* and *due process* models. The former emphasizes the protection of the community from the criminal, and the latter emphasizes the protection of the accused from the state. No modern legal system completely conforms to either of these ideal types. Rather, each system lies on a continuum somewhere between the extremes. Both models can take their positions too far, requiring some legal adjustment.

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DISCUSSION QUESTIONS

1. What do you think are the main differences between legal rules and other kinds of rules?
2. Give one or two examples of how changing values and/or technology have led to changes in the law.
3. Do you believe that the "ruling class" (decide for yourselves who these people may be) unfairly passes laws favorable to themselves and detrimental to the rest of us? If they do, what can we do about it?
4. In what ways can conflict be beneficial to society? Can conflict actually support consensus?
5. Would you choose to live under a brutal dictator such as Hitler, Stalin, or Saddam Hussein or suffer the chaos of a society without any kind of law?
6. Why is law sometimes at odds with justice? Give an example.

7. Relate the rule of law to Packer's models of criminal justice.
8. Explain the concept of judicial review.
9. Why is *Marbury v. Madison* such an important decision?
10. What are some of the benefits of the common-law approach?

KEY TERMS

Adjudication
Code of Hammurabi
Common law
Conflict theorists
Consensus theorists
Crime control model
Due process
Due process model
Equity
False consciousness
Inquisitorial system
Judicial review
Law
Obiter dicta
Oversight
Precedent
Presumption of guilt
Presumption of innocence
Random cross section of the community
Ratio decidendi
Stare decisis
Writ of mandamus

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2 SOURCES OF LAW

LEARNING OBJECTIVES

2.1 Identify the primary sources of law.

2.2 List the sources of individual rights.

2.3 Explain the different standards of review used by courts when examining individual rights.

2.4 Explain how the process of incorporation of the Bill of Rights into the Fourteenth Amendment works.

INTRODUCTION

In this chapter, we discuss the sources of law and the sources of individual rights. These foundational matters set the stage for our discussion of the criminal court system in the following chapters. Courts serve, at the trial level in particular, as a forum for dispute resolution. But they also serve as interpreters of laws. Without courts to apply and interpret it, the law would be incomplete. The law is a social institution, and to study it is to gain valuable understanding of one's society, its heritage, its values, and its day-to-day functioning.

Law has always been considered of the utmost importance in American life. Law justly promulgated and justly applied is the bedrock of individual liberty and social progress. Law is a written body of rules of conduct applicable to all members of a defined community, society, or culture that emanate from a governing authority and are enforced by its agents by the imposition of penalties for their violation.

Law has several sources, including constitutions, statutes, and judicial opinions (case law). Laws define the appropriate conduct for the members of a society and also provide protections for individuals from interference in their lives by other entities, including other people and the government. Even though legal scholars and philosophers debate endlessly the precise origin of various individual rights, it is clear that in America, a number of individual rights are either created by or enshrined in documents such as the federal and state constitutions and statutes. In this chapter, we examine these documents and some of the most significant individual rights.

SOURCES OF LAW

Primary sources of law include judge-made law (also called common law) and statutory law (this includes the Constitution, statutes, ordinances, and administrative regulations). There are other sources for what constitutes appropriate conduct, such as religion and ethics; these are beyond the scope of this chapter.

Legislation is enacted by the legislature under the authority granted to it by the Constitution. A **constitution** creates a government; it literally *constitutes* the government. Legislatures are

given authority to act in certain areas, and within these areas they may pass legislative enactments or bills, often referred to as statutes, which are collected into codes, such as the criminal code.

Legislators, sometimes referred to as lawmakers, quite literally make law. Acts of the legislature are not, however, lawful per se. In other words, just because a legislature passes a bill does not mean the bill is a lawful exercise of the legislature's authority. Acts of the legislature may not limit the constitution under which the legislation was created. For instance, the U.S. Congress may not lawfully pass legislation that abridges the Fourth Amendment.

Who decides when the legislature has acted beyond the scope of its authority? In the United States, the Supreme Court has the final say as to the constitutionality of statutes passed by either state or federal legislatures—this is the power of judicial review.

Administrative regulations are another form of legislation, which, under certain circumstances, may have the force of law. This means that they will be enforced by the courts just like a statute. Administrative regulations are issued either by agencies of the executive branch, which derive their authority from a delegation of power by the executive, or by independent agencies created through a delegation of power from the legislature. Examples include regulations affecting food and drugs and occupational safety requirements. Both the federal government and state governments issue administrative regulations.

Statutes are frequently written in broad or vague terms, leaving room for interpretation by those who must enforce them. This is also true of the U.S. Constitution. For example, the Eighth Amendment prohibits "cruel and unusual punishment." But what is cruel? What is unusual? What is punishment? There are no clear answers to these questions, and courts are forced to define the terms.

Why are statutes often vague? Why does the legislature not state precisely what it means? There are several reasons. First, it is difficult to clearly articulate in a statute precisely what conduct is or is not permitted, given the complexities of human behavior.

Second, drafting and enacting legislation requires legislators to work together to create a statute that can be supported by a majority. This often occurs when the statute deals with a controversial issue. The legislature may be forced to leave some things undefined, thereby forcing courts to interpret the terms of a statute.

SOURCES OF INDIVIDUAL RIGHTS

There are a number of sources of **individual rights** in the United States. These include the U.S. Constitution and state constitutions, case law, and federal and state statutes. Individual rights are defined as those that protect the individual community member from other members as well as the federal or state government. Examples include the right to due process of law, the right to equal protection of the laws, and the right to be free from unreasonable searches and seizures. The Bill of Rights, which consists of the first ten amendments to the Constitution, provides a number of individual rights. States may provide additional rights in their constitutions, but they cannot restrict the rights provided in the U.S. Constitution.

The Constitution

In 1787, delegates from the 13 original states met in Philadelphia to write a new constitution to replace the Articles of Confederation. The Articles of Confederation, created in 1781, were widely regarded as a failure, as they left virtually all power in the hands of the individual states; as a result, it was difficult to establish a unified national government. The states were more akin to countries, acting in their own self-interest, than states that were part of a union.

The result of the convention was the development of the U.S. Constitution. The Constitution outlined the powers and limits of the federal government. Its focus was on how the new federal government would act, not on the relationship between the government and the individual community member. There are only three individual rights mentioned in the Constitution: (1) the right to seek a **writ of habeas corpus** (a document challenging the legality of a person's detention), (2) the prohibition of **bills of attainder** (legislation imposing punishment without a trial), and (3) the prohibition of **ex post facto laws** (legislation making prior conduct criminal).

COMPARATIVE COURTS

When the Union of Soviet Socialist Republics (USSR) collapsed and was split into separate countries, Russia had to develop a new constitution. This constitution was adopted in 1993. It was the product of a contentious debate between the legislature (Duma) and then-president Boris Yeltsin. Following the adoption of the constitution, many observers predicted Russia would become a dictatorship, as the constitution gave much of the power to the president, at the expense of the legislative branch. As it turned out, however, President Yeltsin never used the power to dissolve the legislature granted to him in the constitution; instead, the branches of government (executive, legislative, and courts) and government agencies have remained in place and intact. In fact, the Russian legislature on several occasions passed laws opposed by President Yeltsin and even voted "no confidence" in the executive branch. Under current President Vladimir Putin, however, the power of the president has grown, and the legislature has grown weaker.

The Russian constitution comprises nine sections; Section 7 contains the powers of the judiciary. The country has a civil law system. There is a Supreme Court, but it lacks the power to issue advisory opinions and can only issue opinions in cases that come before it, similar to the U.S. Supreme Court. Judicial opinions are written down and are generally available for examination, but it is unclear to what degree lower courts are expected to follow them.

When the proposed Constitution was submitted to the 13 states for ratification in 1787, some were unwilling to ratify it without a clear detailing of the rights that individual community members had against the federal government. Many people, remembering the excesses of the king under colonial rule, were afraid the federal government would be able to restrict individual rights such as the freedom of religion. In response to these concerns, 10 amendments, commonly referred to as the Bill of Rights, were added, and the Constitution was eventually ratified in 1791.

The Bill of Rights

The **Bill of Rights** constitutes the first 10 amendments to the Constitution. There are 23 specific individual rights in the Bill of Rights. These rights originally applied only to the federal government, as it was not until the 20th century that the provisions of the Bill of Rights were applied to state governments via the Fourteenth Amendment (discussed later). This was done by the U.S. Supreme Court through a process referred to as incorporation, in a series of decisions stretching over more than 50 years. To comprehend due process and individual rights in a criminal courts context, it is essential to examine the Bill of Rights further to delineate what rights defendants actually have throughout the adjudicative process. These rights, pursuant to some of the amendments within the Bill of Rights, are briefly discussed next.

First Amendment

The First Amendment includes a number of individual rights, among them the freedoms of religion, speech, press, and assembly. Each of these individual rights was very important to colonists, and it was their frequent abridgement by King George III of England that helped precipitate the American Revolution.

The First Amendment

> *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.*

The First Amendment includes two clauses on religion. First, the government is forbidden from creating a state-supported religion. Second, the government is barred from interfering with individuals' religious practices. In essence, the federal government is not supposed to promote a particular religion or prevent the practice of religion. The first clause is known as the Establishment Clause. This creates what the Supreme Court has referred to as a "wall of separation between church and state" (*Everson v. Board of Education,* 1947). According to the Supreme Court, any statute that affects religious practices is valid only if three conditions are met: (1) the statute has a secular (non-religious) purpose, (2) the primary purpose of the statute is neutral (meaning it neither promotes nor interferes with religious practice), and (3) the statute does not result in "excessive" government involvement with religion (*Lemon v. Kurtzman,* 1971).

This does not mean that there are no limitations whatsoever on the freedom of religion. The Supreme Court has held that a statute that incidentally restricts religious practices is constitutional. For example, a state may ban the use of mind-altering substances (including peyote) in prisons, despite the fact that doing so infringes on the legitimate religious practices of some Native American inmates.

MOVIES AND THE COURTS

INHERIT THE WIND (1960)

The First Amendment protects the individual's right to exercise their religious beliefs and forbids the state from either interfering with religion or supporting a particular religion. The debate over the role of religion in American life has gone on since the first colonists arrived. One of the great battles, and one that is still going on in some states, is the role of religious beliefs in public education. If one's religious beliefs include the belief that evolution is not accurate, what is one to do? *Inherit the Wind* is a highly fictionalized account of the infamous Scopes Monkey Trial, as it was referred to, which dealt with the issue of whether a state could criminalize the teaching of evolution in high school. In the movie, set in the 1920s in Tennessee, schoolteacher Bertram Cates is put on trial for violating a state law that prohibits public school teachers from teaching evolution instead of creationism. At the trial, the attorneys for the state and the defense spar over the meaning of the Bible. In real life, the two attorneys were Clarence Darrow (for the defense) and William Jennings Bryan (appearing on behalf of the state as an expert witness).

Freedom of speech is one of the most valued individual rights. The right is not without limitations, however. At times in the past, the Supreme Court has been willing to allow state limitations on a variety of forms of speech. The Supreme Court has held that the government can regulate obscene materials, including books and movies that appeal to a "prurient" interest in sex (meaning an abnormal, as opposed to a "normal" interest in the activity) (*Miller v. California,* 1973). Commercial speech (such as advertising) may be regulated to a greater degree than so-called political speech (*Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.,* 1976).

In the latter part of the 20th century, however, the Court began to provide greater protection of freedom of speech. The Supreme Court has held that the freedom of speech includes the right to say things that may anger others. The Court also has held that the freedom of speech includes not just verbal statements (what we generally think of as "speech") but written statements (such as political protest signs) and some physical acts, such as burning the American flag to protest government intervention in South America (*Texas v. Johnson,* 1988). These acts are termed "symbolic speech" or "expressive conduct."

Second Amendment

The Second Amendment states that community members have the right to "keep and bear arms" and that this right shall not be "infringed." Opponents of gun control legislation argue that this amendment prevents the state from enacting legislation that restricts in any manner the use and possession of firearms. Supporters of gun control legislation assert that the amendment was not intended to create an individual right to possess firearms, but instead to create a right for groups of community members who wanted to form a militia to have firearms to

protect themselves against oppression by the federal government. There was a great concern at the time of the passage of the Bill of Rights that the federal government might become oppressive (similar to the situation under the king of England), and allowing people to form militias would not be of much use if the federal government had outlawed weapons.

The Second Amendment

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.

In *District of Columbia v. Heller* (2008), the U.S. Supreme Court endorsed the view of opponents of gun control legislation, holding that the Second Amendment was intended to provide individual gun owners with a right to own firearms. The decision left some questions unanswered, however, as it appeared to allow for some degree of regulation but set no standard for evaluating that regulation. For example, Justice Scalia's opinion for the Court claimed that the decision was not meant to cast doubt on the constitutionality of "longstanding prohibitions" on gun ownership by felons. It remains to be seen precisely what limitations on firearm possession will withstand constitutional scrutiny.

Third Amendment

The Third Amendment was a product of its times. During the American Revolution, English troops were frequently housed in the homes of community members, against the wishes of the home's owner. The Third Amendment makes such a practice unconstitutional by expressly forbidding the "quartering," or housing, of soldiers in private homes without the permission of the homeowner.

The Third Amendment

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment

The Fourth Amendment forbids "unreasonable" searches and seizures by law enforcement officers and requires the existence of "probable cause" before arrest or search warrants may be issued. Warrants are required to describe the subject of their search with "particularity." The so-called particularity requirement was a response to the British practice in colonial times of issuing general warrants. General warrants allowed British customs inspectors to search without restriction on time or place for evidence of customs violations. Requiring warrant applications to describe precisely what was sought was an attempt to eliminate general warrants.

The Fourth Amendment

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.

In *Manuel v. City of Joliet, Illinois, et al.*, Manuel was found to be in possession of pills during a search incident in the course of a traffic stop. The officers arrested him despite the field test showing that none of the pills tested positive for any illicit drug. The evidence technician at the station found the same results; however, in his report, he claimed that one pill tested positive for ecstasy. Manuel was charged and detained prior to trial. Later, the Illinois police lab found that none of the pills tested positive. Nonetheless, Manuel remained in pretrial detention for 48 days! After his case was eventually dismissed, Manuel filed a lawsuit against the city and the officers, claiming that they had violated his Fourth Amendment rights. The district court argued that the statute of limitation had run out in regard to his unlawful arrest claim and that precedent precluded any Fourth Amendment relief in cases where pretrial detention happened *after* the commencement of legal proceedings (i.e., the judge's determination that probable cause existed in order to detain him). The Seventh Circuit agreed with the lower court. The Supreme Court found to the contrary, that the Fourth Amendment governs pretrial detention as well as arrests. Thus, Manuel could challenge his detention, as the Fourth Amendment covers his arrest *and* detainment. Also, the Court stated that unconstitutional pretrial detention can happen before and after the commencement of legal proceedings. Because probable cause is necessary to detain someone, when that probable cause is predicated on false statements, the individual's Fourth Amendment claims do not go away due to the commencement of the legal process.

Similarly, requiring the police to have probable cause to believe there was something to seize or arrest was intended to limit the ability of the state to interfere at will in the lives of individual community members without some justification. This amount of evidence of wrongdoing is **probable cause**. Probable cause is best defined as a fair probability that a crime has occurred. It is less than proof beyond a reasonable doubt but more than a mere guess.

The Supreme Court has determined that search and arrest warrants are not always required, however. The Reasonableness Clause allows the police to conduct a search or make an arrest so long as it is reasonable to do so. So what is reasonable and what is not? The Supreme Court has issued a number of decisions in an effort to define this phrase, but it remains less than crystal clear.

Fifth Amendment

The Fifth Amendment includes a variety of individual rights, including the right to indictment by a grand jury, the prohibition of double jeopardy, the right to due process of law, and the privilege against self-incrimination. These rights are all related to criminal prosecutions. Many of the provisions of the Fifth Amendment were developed in reaction to brutal investigatory practices developed in Europe, such as torture and forced confessions.

The Fifth Amendment

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

The Fifth Amendment requires that a person be indicted by a grand jury before they may be put on trial. A **grand jury** comprises members of the community who listen to the case presented by a prosecutor and decide whether there exists sufficient evidence to put the defendant on trial. The grand jury is intended to prevent the government from prosecuting people without some proof of guilt. Thus, the grand jury is meant to serve as a barrier between the community member and an overzealous prosecutor.

An **indictment** is a legal document that charges a defendant with a crime. The requirement of an indictment before criminal prosecution is one of a handful of provisions of the Bill of Rights that has not been incorporated into the Fourteenth Amendment and applied to the states. In *Hurtado v. California* (1884), the Supreme Court held that the right does not apply to state criminal trials, and this decision never has been overruled. It is important to note that many states, per statute or state constitution, either require an indictment or give prosecutors the choice of seeking an indictment or proceeding through an information. An **information** is a substitute for an indictment, and it is a legal document filed directly with the court by the prosecutor.

The Fifth Amendment also prohibits putting a person in **double jeopardy**. This means a jurisdiction may not: (a) prosecute someone again for the same crime after the person has been acquitted, (b) prosecute someone again for the same crime after the person has been convicted, or (c) punish someone twice for the same offense. This does not mean a state may not try someone again if the first trial results in a mistrial or a hung jury. A mistrial may be declared if a legal error occurs during a trial that unfairly prejudices the defendant and cannot be cured by the court. A **hung jury** occurs when the jury is unable to reach a unanimous verdict. A unanimous verdict is a constitutional requirement (*Ramos v. Louisiana,* 2020). If the jury cannot reach a unanimous verdict and the judge believes that further deliberations would not change the outcome, they may excuse the jury and order a new trial. When this happens, there has been neither an acquittal nor a conviction. An **acquittal** occurs when a jury votes unanimously that the defendant has not been proven guilty "beyond a reasonable doubt" by the prosecution. An acquittal does not necessarily mean that the jury believes the defendant is innocent of the crime charged; it simply means that the state was unable to meet the high burden of proof necessary for conviction. There is no such thing as a verdict of "innocent." Furthermore, if a conviction is overturned on appeal, the state may retry the person because a reversal on appeal is not an acquittal; it is merely a determination by the appellate court that the defendant did not receive a fair trial and that the trial must be redone.

While the Double Jeopardy Clause bars multiple punishments for the same offense, there are exceptions. Under the **dual-sovereignty doctrine**, a person may be prosecuted in both federal and state court for an act that is a crime under both state and federal law. For instance, if a person kills a postal worker in Missouri, they could be prosecuted in Missouri state court for murder *and* in federal court in Missouri for the murder of a postal worker, which is a federal offense. Here, one act results in a crime in two different jurisdictions.

The Fifth Amendment also provides the privilege against self-incrimination. Although this is referred to as a *privilege* rather than a *right*, courts do not distinguish between the two terms. The privilege against self-incrimination allows a person to refuse to speak to police and to refuse to testify at trial. The individual cannot be compelled to speak if they do not wish to. The intent is to force the state to prove its case against a defendant without the cooperation of the defendant unless the defendant chooses to cooperate. In addition, if a defendant chooses not to testify at trial, the prosecutor cannot comment on the defendant's silence, because doing so would limit the privilege against self-incrimination by suggesting that a defendant's assertion of a constitutional right was somehow evidence of something to hide (*Griffin v. California,* 1965).

The privilege against self-incrimination is not absolute, however. The Supreme Court has held that the privilege only applies to "testimonial communications," or spoken confessions (*Malloy v. Hogan,* 1964). The privilege does not apply to the obtaining of evidence from a suspect by other means, such as taking blood samples or fingerprints.

The Fifth Amendment also provides for due process of law. Exactly what constitutes due process of law is much debated. In general, due process refers to the procedures (such as an indictment or a fair trial) that the state must provide before it may deprive an individual of their life, liberty, or property. This applies not only to criminal trials but to situations where the state seeks to take private property for a public use through the process of condemnation.

Sixth Amendment

The Sixth Amendment contains a number of individual rights associated with the criminal trial. They include the right to a speedy trial, the right to a public trial, the right to a trial by an impartial jury, the right to notice of the charges against oneself, the right to representation by counsel, and the right to confront the witnesses against oneself.

The Sixth Amendment

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 right to a speedy trial means that a defendant must be put on trial without "unnecessary delay" (*Barker v. Wingo,* 1972). In this case, the Supreme Court determined that there is

no precise amount of time that constitutes "speedy" and that this must be determined on a case-by-case basis. In Barker's case, the Court held that a 5-year delay between arrest and trial was not an "unnecessary delay" because Barker had not objected to the delay during the 5 years prior to trial. The U.S. Congress responded to this decision by passing the Speedy Trial Act of 1974, which set a specific time limit of 100 days from arrest to trial. This act only applies to federal cases, but most states have enacted similar legislation.

The right to a public trial means defendants have a right to have the public attend the trial if they so desire. The right to notice of the charges against the defendant means the prosecution must inform the defendant prior to trial precisely what they are accused of so the defendant's attorneys can prepare a defense to the crime charged. This can occur through either an indictment by the grand jury or the filing of an information by the prosecutor.

The right to a trial by an impartial jury means the defendant has a right to a jury that is not predisposed to believe the defendant is guilty. The members of the jury are not expected to be unaware of the events that led to the trial, but they must be able to set aside what they have learned prior to trial and make a determination of the defendant's guilt or innocence based solely on the evidence presented at trial. Trial by jury is an ancient right mentioned in the Magna Carta (1215).

The Sixth Amendment also provides a defendant with the right to the assistance of counsel. The Supreme Court has interpreted this right to include representation not only during the trial but at any pretrial proceeding that is deemed to be a "critical stage" in the fact-finding process (*Kirby v. Illinois,* 1972). Precisely what constitutes a critical stage is subject to some dispute, but it includes the preliminary hearing, the arraignment, the trial itself, and the **right of appeal**.

The **right to counsel** includes the right of indigent persons who cannot afford to hire a lawyer to be provided with a lawyer at the state's expense (*Gideon v. Wainwright,* 1963). The Supreme Court has limited this to situations where the defendant faces the possibility of incarceration for 6 months or more, however (*Argersinger v. Hamlin,* 1972). In addition, the Supreme Court has held that the right to counsel includes the right to the *effective* assistance of counsel (*Strickland v. Washington,* 1984). This means an attorney must not be incompetent and must provide the defendant with an adequate defense. Although this sounds reasonable in theory, in practice the Supreme Court has been very reluctant to find that an attorney's conduct has been so bad as to be legally "ineffective."

Seventh Amendment

The Seventh Amendment provides defendants in civil lawsuits filed in federal court with the right to a trial by jury. This amendment applies only to federal trials; it does not apply to civil lawsuits filed in state courts.

The Seventh Amendment

> *In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.*

Eighth Amendment

The Eighth Amendment bars the state from several actions, including imposing excessive bail on a defendant prior to trial and engaging in cruel and unusual punishment. Both of these prohibitions are written vaguely, and the Supreme Court has at times struggled to interpret them consistently.

The Eighth Amendment

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

What constitutes excessive bail? The Supreme Court has determined that bail should be set at a figure no higher than necessary to ensure the presence of the defendant at trial (*Stack v. Boyle,* 1951). The amount of bail is not supposed to be based on the defendant's income level. The Eighth Amendment does not provide an absolute, unlimited right to bail, but every state provides for a right to bail in most cases. Bail does not have to be granted, and the Supreme Court has held that bail may be denied altogether if a person is found to be a threat to public safety (*United States v. Salerno,* 1987).

The prohibition on cruel and unusual punishment limits the type and method of punishment that may be imposed on a defendant by the state after conviction. It prohibits torture as well as punishment that is disproportionate to the offense (meaning the punishment should, in some sense, fit the crime and not be excessive). What constitutes inappropriate punishment has changed over time. For instance, at one time corporal punishment (such as whipping) was considered an acceptable form of punishment, but no state today allows the practice. The Cruel and Unusual Punishment Clause does not prohibit the death penalty because it is deemed to be in accord with contemporary standards of decency, and the death penalty existed at the time of the passage of the Eighth Amendment (*Gregg v. Georgia,* 1976).

Ninth Amendment

The Ninth Amendment simply states that the listing of some individual rights in the Constitution should not be construed as a listing of the only rights retained by community members. In other words, the rights provided in the Bill of Rights should not be taken as the only rights that members of the community have; they are merely some of the rights retained by the people. The obvious question is this: If the Bill of Rights is not all-inclusive, what exactly are the other rights retained by the people? The Supreme Court has struggled to provide a framework for delineating these rights, as the discussion on incorporation (later in this chapter) indicates.

The Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

In at least one case, the Supreme Court expressly mentioned the Ninth Amendment as providing a basis for giving individual community members other, unenumerated rights, such as a right to privacy (*Griswold v. Connecticut,* 1965). Griswold was the director of the Planned Parenthood League of Connecticut, and he and the league's medical director had been found guilty of dispensing birth control advice and devices (both then illegal in Connecticut) for which they were fined $100 each. In overturning their conviction, the Supreme Court affirmed that the right to privacy is very important while acknowledging that it is not specifically mentioned anywhere in the Constitution. Justice Douglas, who delivered the Court's majority opinion in *Griswold,* stated that the specific constitutional guarantees of the Bill of Rights "have **penumbras** [incompletely lighted areas] formed by emanations from these guarantees that help give them life and substance." In other words, although the right to privacy is not specifically mentioned in the Constitution, such a right can be logically deduced from the rights that are. *Griswold* was a very important step to *Roe v. Wade* (1973), which granted abortion rights to women under the principle of privacy (a right the Supreme Court recently abrogated in *Dobbs v. Jackson Women's Health Organization* (2022)), and to *Lawrence v. Texas* (2003), which outlawed sodomy statutes under the same principle.

Tenth Amendment

The Tenth Amendment states that the rights not delegated to the federal government in the Constitution are reserved for the states or individual community members. This is simply the principle of federalism; the federal government is a government of enumerated (or listed) powers. This means it has no authority to act unless so granted by the Constitution. And where the federal government has no authority, the states and individual community members retain the authority.

The Tenth Amendment

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

The individual rights provided in the Bill of Rights are set forth in Table 2.1.

TABLE 2.1 ■ Individual Rights Contained in the Bill of Rights

Amendment	Rights
First Amendment	Freedom of speech, press, and assembly, freedom of and from religion
Second Amendment	Right to bear arms
Third Amendment	Freedom from quartering soldiers
Fourth Amendment	Freedom from unreasonable searches and seizures; warrants must be based on probable cause and stated with specificity

(*Continued*)

TABLE 2.1 ■ Individual Rights Contained in the Bill of Rights (*Continued*)

Amendment	Rights
Fifth Amendment	Grand jury indictment, freedom from double jeopardy and self-incrimination, rights to due process and just compensation for takings
Sixth Amendment	Rights to speedy trial, to impartial jury, to be informed of charges, to obtain witnesses on one's behalf, to face accusers, and to an attorney
Eighth Amendment	Freedom from excessive bail or fines and cruel and unusual punishment
Ninth Amendment	Listing of rights in the Bill of Rights does not imply the absence of other rights, such as the right to privacy

Due Process and the Fourteenth Amendment

In addition to the individual rights listed in the Bill of Rights, several other amendments include individual rights. These include the so-called Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), which were passed shortly after the Civil War and intended to protect the recently freed slaves from abuse by the Southern states. While initially intended to prevent the Southern states from limiting the rights of the recently freed slaves, today these amendments, particularly the Fourteenth, are used to protect all community members from state actions that impinge on constitutional rights.

Fourteenth Amendment

The Fourteenth Amendment is a very long amendment that has five sections. We include only the first section here, which has to do with individual rights. It is significant because it is the first Amendment that applies to the states, as opposed to the federal government. Where the Bill of Rights was developed out of a fear of how the federal government might mistreat members of the community, after the Civil War Congress recognized that individual states, particularly those in the South that had until recently allowed slavery, were just as capable of oppressing community members as the federal government. Congress responded by enacting the Fourteenth Amendment, which forbids states from denying community members due process of law or equal protection of the laws. These two clauses have dramatically altered the way that states may deal with members of the community.

The Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Due Process Clause of the Fourteenth Amendment is identical to the Due Process Clause in the Fifth Amendment. It has been interpreted by the Supreme Court as incorporating (or applying) the various provisions of the Bill of Rights and making them applicable to the states as well as the federal government. The Equal Protection Clause has been interpreted to prevent states from making unequal, arbitrary distinctions between people. It does not ban all discrimination by the state but requires that when the state treats people differently, it does so on the basis of reasonable classifications. It also bars discrimination on the basis of race, religion, and (in most instances) gender. These are referred to as **suspect classifications**. To put it another way, where the law limits the liberty of *all* persons, due process is involved; where the law treats *certain classes of people* differently, equal protection is involved.

Not all classifications by the state necessarily violate the Equal Protection Clause. States may treat people differently if they have a legitimate reason to do so. Thus, states may limit the practice of medicine to those who have a medical license or limit the age at which a person may lawfully consume alcoholic beverages. Classifications based on age are generally permitted based on the state's interest in the health and welfare of juveniles and because there exists no history of "invidious" discrimination against minors, as exists for minorities and women. Last, it is worth noting that the Equal Protection Clause does not prohibit discrimination of any kind, including discrimination based on race or gender, when the discrimination is practiced by private community members. The Fourteenth Amendment applies only to state action, not to the actions of private members of the community who are not affiliated in any way with the state.

STANDARD OF REVIEW

In constitutional law, the outcome of a case is often determined by the standard of review the court uses. Not all the individual protections set forth in the Bill of Rights are accorded the same level of protection by the courts. There exists a hierarchy of rights. Courts employ either strict scrutiny review or rational basis review, depending on whether a fundamental right is implicated or a suspect classification is affected. We discuss each of these terms here.

Fundamental rights are those individual rights the Supreme Court has determined are "essential to the concept of ordered liberty." By this, the Court means these rights are the most important of all (*Palko v. Connecticut,* 1937). Examples include almost all the individual rights listed in the Bill of Rights, as well as the Fourteenth Amendment guarantees of due process and equal protection. A suspect classification is one that is presumed to be based on an unconstitutional basis. To date, the Supreme Court has held that only race and religion are suspect classifications in all circumstances.

CURRENT RESEARCH

It is one thing to have certain rights, such as the rights to remain silent and to have an attorney. It is another thing altogether to understand and be able to then assert these rights. The American Bar Association has called for **Miranda warnings** that can be understood

by juveniles in police custody. In a study conducted by Rogers and colleagues (2012), the researchers sought to determine the degree to which juveniles understood their rights. In surveying prosecutors and public defenders, the researchers collected 293 juvenile Miranda warnings that were intended specifically for youthful offenders. Length and reading levels were analyzed and compared to an earlier survey. Nearly two thirds (64.9%) of these warnings were very long (>175 words), which hinders Miranda comprehension. In addition, most juvenile warnings (91.6%) required reading comprehension higher than a 6th-grade level; 5.2% exceeded a 12th-grade reading level. More than half of juvenile Miranda warnings were found to be highly problematic because of excessive lengths or difficult reading comprehension. However, simple and easily read Miranda components were identified that could be used to improve juvenile advisements.

Source: "Juvenile Miranda Warnings: Perfunctory Rituals or Procedural Safeguards?" Richard Rogers, Hayley L. Blackwood, Chelsea E. Fiduccia, Jennifer A. Steadham, Eric Y. Drogin, and Jill E. Rogstad. *Criminal Justice and Behavior, 39*(3): 229–249, 2012.

Under **strict scrutiny** review, a statute that abridges a fundamental right or impacts a suspect classification will be determined to be unconstitutional unless: (1) the state has a compelling interest, which justifies restricting a fundamental right, and (2) the legislation restricting that right is "narrowly tailored" so that the right is not limited any more than absolutely necessary to achieve the state's compelling interest. A criminal justice–related example of a compelling interest is the state's interest in the safe and secure operation of prisons—because of this compelling interest, an inmate's Fourth Amendment right to be free from unreasonable searches and seizures is extremely limited.

This standard of review is referred to as strict scrutiny review because the court looks closely at the purpose and effect of the legislation rather than merely accepting the claims of the legislature that the statute is needed. The reason for employing a higher standard of review when a statute affects a fundamental right or suspect classification is that closer analysis is required when important individual rights are affected. The burden of proof is on the state to demonstrate the constitutionality of legislation under strict scrutiny review.

Laws involving quasi-suspect classifications (such as gender, legitimacy, and poverty) are reviewed under the **intermediate scrutiny** standard. A statute will be upheld if the Court finds that it is *substantially related* to an *important* government purpose. The burden of proof lies primarily with the state under this standard of review.

If neither a fundamental right nor a suspect classification is involved, a state may enact legislation abridging that right or affecting that class so long as there is a rational basis for the legislation. This standard of review is referred to as **rational basis** review since, under it, the court will not strike down a statute that appears to have a rational basis. The court does not closely examine the effect of the legislation, unlike under strict scrutiny review. This standard of review is obviously a much easier one for the state to meet. The legislature need not choose the best possible means of achieving its goal; it must simply choose a means that is not entirely unrelated to the achievement of the legislative purpose.

INCORPORATION OF THE BILL OF RIGHTS INTO THE FOURTEENTH AMENDMENT

It was intended by the founding fathers that the Bill of Rights apply only to the federal government because there was a fear of a strong centralized government when the Constitution was adopted. State governments were viewed with much less fear. In *Barron v. Baltimore* (1833), the Supreme Court expressly held that the Bill of Rights applied only to the federal government. The *Barron* case involved the Takings Clause of the Fifth Amendment that forbids governmental taking of private property without just compensation. Barron wanted this clause applied to the states because the city of Baltimore had essentially taken his property without providing him with compensation for it. The Supreme Court dismissed his claim, stating that the amendment did not apply to the states, and therefore the Court lacked jurisdiction in the matter. This case showed that without the application of the Bill of Rights to the states, individuals would have no recourse to higher authority if the states violated their rights.

After the Civil War and the failed attempt by the Southern states to secede from the Union, Congress passed the Fourteenth Amendment in an effort to provide greater protections for individuals from the actions of state governments. There was, in particular, a fear that the Southern states would attempt to limit the ability of the recently freed slaves to become equal citizens. The Fourteenth Amendment contains three clauses: the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause. The essence of each of these clauses is that they bar states, not the federal government, from infringing on individual rights. The amendment was expressly intended to control state action, but it was unclear exactly how far the amendment went. The original spur for it was a desire to protect the rights of the freed slaves, but the language of the amendment was broad and not specifically limited to state actions infringing on the rights of Black people.

An early attempt to apply the language of the Privileges and Immunities Clause to persons other than the recently freed slaves failed in the *Slaughterhouse Cases* (1873). At issue was a Louisiana state statute passed by a highly corrupt state legislature granting one corporation a monopoly on slaughterhouse business. The petitioners (the persons bringing the suit) argued that the Privileges and Immunities Clause should be interpreted as prohibiting unreasonable restrictions on business because the restriction in question deprived them of their right to pursue their lawful trades. The Supreme Court sided with the monopoly, emphasizing that the Due Process Clause should not be a source enabling judges to nullify laws they considered unreasonable.

During the latter part of the 19th century, however, the Supreme Court began to use the Due Process Clause of the Fourteenth Amendment to strike down state action involving economic regulation. Due process rights are said to extend beyond procedural rights to encompass **substantive due process** as well. Under the principle of substantive due process, legislatures cannot pass laws that infringe on substantive rights such as free speech and privacy. (This is the legal theory under which the privacy rights applied in *Griswold v. Connecticut* and *Roe v. Wade* were based.) This sounds all very liberal until we realize that the Supreme Court used the principle to repeatedly hold that states could not impose regulations such as minimum wage laws

and child labor laws on private businesses because doing so violated the "right" of a worker to choose to enter into a contract to work long hours and/or for low wages (as if they had any real choice in the matter).

During the 1930s, the use of the Due Process Clause to protect economic interests fell into disfavor, in part because the Supreme Court used it to strike down much of President Roosevelt's New Deal legislation, which was intended to ease the Great Depression. At the same time, however, the Supreme Court began to use the Due Process Clause of the Fourteenth Amendment to protect individual rights from state action. Beginning in the late 1930s and continuing into the 1960s, the Supreme Court incorporated almost all of the various provisions of the Bill of Rights into the Fourteenth Amendment's Due Process Clause and applied them to the states.

VIEW FROM THE FIELD

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As a public defender with far too many clients and not nearly enough hours in the day, it's all too easy to give up on an argument when, after conducting your legal research, you discover that the U.S. Constitution has been interpreted in a way that is unfavorable to your client. But sometimes, when you just can't seem to get over how fundamentally unfair the existing law seems under the circumstances of your case, devoting some additional time to the issue may pay huge dividends for your client. In some of these cases, you may be able to argue that your state's constitution should be read to provide greater rights to your client than does the U.S. Constitution (even if the two constitutions contain virtually identical language).

The difficulty with these arguments, of course, is that you have to use all your persuasive abilities to overcome the court's inclination to interpret the language of a given constitutional provision exactly as another court, perhaps even the U.S Supreme Court, has interpreted an identical provision, and you also have to use all your creativity to give the court a good reason (or, preferably, a host of good reasons) why, in this instance, the state constitution ought to be interpreted as providing greater protection than the U.S. Constitution. You're not going to win all the time, or hardly at all, but it's a tremendously gratifying experience when you do manage to prevail and improve the law—not just for your client but for everyone in your state.

By **incorporation**, we mean that the justices interpreted the Due Process Clause of the Fourteenth Amendment, which says no state shall deprive a person of life, liberty, or property without "due process of law," as prohibiting states from abridging certain individual rights. Many of these rights are included in the Bill of Rights, and hence these rights were included (or incorporated) in the definition of due process. Several approaches to incorporation are discussed next.

Total Incorporation

Under the **total incorporation** approach, the Due Process Clause of the Fourteenth Amendment made the entire Bill of Rights applicable to the states. In essence, the phrase "due process of law" was interpreted to mean "all of the provisions of the Bill of Rights." Justice Hugo Black advocated for this approach to incorporation, but he had few supporters on the Supreme Court.

Total Incorporation Plus

Under **total incorporation plus**, the Due Process Clause of the Fourteenth Amendment includes all the Bill of Rights as well as other, unspecified rights. One of the first advocates of this approach was Justice William O. Douglas, who claimed that the various provisions of the Bill of Rights limiting the ability of the government to intrude into a person's private life (such as the Fourth Amendment prohibition on unreasonable searches) created a general right to privacy, even though such a right is not expressly mentioned anywhere in the Constitution.

Fundamental Rights

Under the fundamental rights approach, there is no relationship between the Due Process Clause of the Fourteenth Amendment and the Bill of Rights. Rather, there are simply some rights that are essential to "due process" and that must therefore be protected. The Due Process Clause has an independent meaning that prohibits state action that violates rights that are deemed "fundamental" (*Palko v. Connecticut*, 1937). Exactly what constitutes a fundamental right is left to the Supreme Court to figure out. This approach provides justices with greater discretion, and they may interpret it either narrowly or broadly. The primary advocate of this approach was Justice Felix Frankfurter.

Selective Incorporation

The **selective incorporation** approach combines elements of the fundamental rights and total incorporation approaches in a modified form. This approach favors a case-by-case approach. Selective incorporation rejects the notion that all the rights in the Bill of Rights are automatically incorporated in the Due Process Clause of the Fourteenth Amendment, but it looks to the Bill of Rights as a guide to determining the meaning of due process. The best-known advocate of selective incorporation was Justice William Brennan. Although selective incorporation accepted the idea that the Due Process Clause protects only "fundamental rights" and that not every right in the Bill of Rights is necessarily fundamental, over time it has led to the incorporation of virtually every individual right in the Bill of Rights.

It should be noted that because the Supreme Court has deemed incorporation necessary, it does not mean that most of these rights did not already exist in the states. Many states had rights in their state constitutions that were even more protective of individual rights than those in the Bill of Rights. For instance, a number of states had privacy rights in such matters as abortion and search and seizure. Table 2.2 presents a summary of incorporation theories.

TABLE 2.2 ■ Summary of Incorporation Theories

Total Incorporation	Total Incorporation Plus	Selective Incorporation
Intent: To make all provisions of the Bill of Rights applicable to the states.	**Intent:** To protect rights enumerated in the Bill of Rights plus certain unenumerated rights.	**Intent:** To incorporate provisions of the Bill of Rights in a careful and discriminative way.
Justification: Due Process Clause of the Fourteenth Amendment.	**Justification:** The totality of the rights in the Bill of Rights created a penumbra over the law.	**Justification:** Only fundamental rights should be incorporated; nonfundamental rights should be left as state concerns.

SUMMARY

In this chapter, we discussed the sources of law. These include constitutions, statutes, administrative regulations, and case law. It is law that courts apply and, on occasion, interpret. Law serves as the reason for the existence of courts and as the body of rules and principles that courts apply to the infinite variety of human activity and interactions. Individual rights come from many sources. Those rights most applicable to criminal courts are the rights found in the U.S. Constitution, particularly the rights enumerated in the Bill of Rights and applied to the states via the Due Process Clause of the Fourteenth Amendment. Crucial to our understanding of these individual rights is our understanding of how the U.S. Supreme Court applied these rights, originally intended to apply only to the federal government, to the state governments. This was a crucial step since so much of criminal justice and criminal law is handled at the state level.

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DISCUSSION QUESTIONS

1. What are the primary sources of law?
2. How did the Bill of Rights come to be applied to the individual states?
3. Why was the Bill of Rights adopted, and what rights are contained in it?
4. What are the different standards of review in constitutional law, and when are they used?
5. Given the Supreme Court's "discovery" of penumbras in the Bill of Rights such as the right to privacy, should this right be extended to assisted suicide for terminally ill patients and/or access to marijuana for medical purposes? Why or why not?
6. How has the Equal Protection Clause of the Fourteenth Amendment been applied by the Supreme Court?

7. How has the Due Process Clause of the Fourteenth Amendment been applied by the Supreme Court?
8. Using strict scrutiny review, under what circumstances can a state abridge fundamental rights?
9. How has the Supreme Court interpreted the Second Amendment in recent years?
10. Why does the standard of review matter in constitutional law?

KEY TERMS

Acquittal
Administrative regulations
Bill of Rights
Bills of attainder
Constitution
Double jeopardy
Dual-sovereignty doctrine
Ex post facto laws
Fundamental rights
Grand jury
Hung jury
Incorporation
Indictment
Individual rights
Information
Intermediate scrutiny
Legislation
Miranda warnings
Penumbra
Probable cause
Rational basis
Right of appeal
Right to counsel
Selective incorporation
Strict scrutiny
Substantive due process
Suspect classification
Total incorporation
Total incorporation plus
Writ of habeas corpus