



# OVERVIEW OF CRIMINAL LAW

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

## A LONG HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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**Factual guilt:** To commit the elements of a crime.

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

**SCOTUS:** Supreme Court of the United States.

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

## QUESTIONS AND PROBLEMS

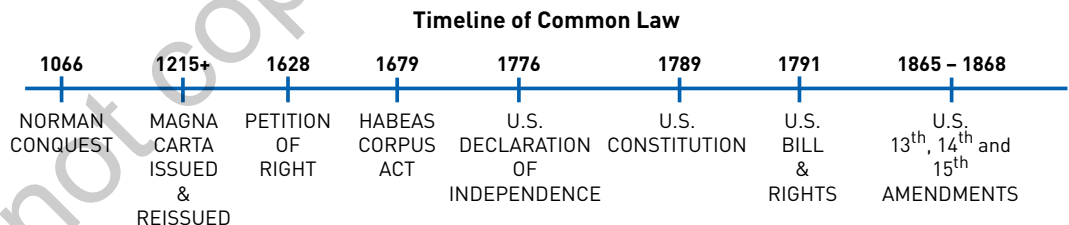
1. What was the Magna Carta, and why is it significant to U.S. law today?
2. Distinguish factual guilt from legal guilt.

## WHAT CRIMINAL LAW IS

### Learning Objective: Define criminal law.

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

**FIGURE 1.1** ■ Timeline of Common Law



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

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

**Norms:** Expected behaviors.

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

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

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

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

## QUESTIONS AND APPLICATIONS

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

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

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

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

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

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

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

## WHAT CRIMINAL LAW ISN'T

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

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

### Criminal Procedure

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

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

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

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

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

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

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

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

## Civil Law

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

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

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

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

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

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

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

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

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

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

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



was *Liebeck v. McDonald's Restaurants*. In 1992, Stella Liebeck put a cup of McDonald's coffee between her legs while sitting in a parked car. As she removed the lid to the coffee to add sugar and cream, coffee spilled out onto her legs and groin. The coffee was so hot that it caused third-degree burns, requiring skin grafts. Attempts to settle with McDonald's for her medical bills were unsuccessful, so she sued. The jury found for Ms. Liebeck; however, it concluded that she was 20% responsible for the accident. Both the high temperature of the coffee and a history of injuries and complaints about the heat of the coffee factored into the jury's deliberations. Actual damages were found to be \$200,000, so the jury awarded \$160,000, or 80%. Additionally, it recommended \$2.7 million in punitive damages. That amount equaled 2 days of McDonald's revenues from coffee sales. Finding it excessive, the trial judge reduced the punitive damages award to \$480,000, and ultimately, the parties settled for about \$500,000.<sup>1</sup> The case garnered international attention and has been used by people of different legal and political perspectives to advance their causes. Tort reform advocates continue to use the case as evidence that civil juries are out of control. On the other side, advocates for using the law to control corporate greed and to increase corporate responsibility see the case as a success. Regardless, it is an illustration of the use of civil law to accomplish what are traditional criminal law objectives. The opposite is also true. There is a feature of criminal law that looks more like civil law. In some cases, the state may request that an offender compensate a victim for actual damages caused by a crime. This is known as restitution. Contrast this with a fine, which an offender pays to the state itself.

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

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**Writ:** A court order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

Photo by VINCE BUCCI/AFP via Getty Images

FIGURE 1.2 ■ Standards of Proof

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

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

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

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

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

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

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

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

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

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

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

## Juvenile Delinquency

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

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

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

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

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

## QUESTIONS AND APPLICATIONS

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

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

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

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

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

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

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



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

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

## WHY PUNISH?

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

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

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

### Deterrence

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

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

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

## Retribution

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

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

## Rehabilitation

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

## Incapacitation

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

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

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

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

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

### Restitution

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

### Restorative Justice

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

**TABLE 1.2** ■ Philosophies, Objectives, and Methods of Punishment

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

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

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

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

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

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

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

## QUESTIONS AND APPLICATIONS

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

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

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

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

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

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

## WHERE DOES CRIMINAL LAW COME FROM?

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

Recall that law is a norm that a collective group of people enforces; they punish individuals who violate the norm. The United States is a constitutional republic. Laws are created by elected government officials, by appointed government officials, and, on occasion, by the people directly. There are several forms of law. In criminal law, the following forms of law declare crimes and defenses to crimes, protect civil liberties, and detail the process that courts use when hearing criminal cases.

### Constitutional Law

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

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

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

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

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

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

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

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

## Statutory Law

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

It is statutory law that declares acts to be crimes and establishes punishments. Occasionally, legislatures also protect liberties. As you will learn later, legislatures may extend individual rights beyond what constitutions protect, but they may not reduce them. When legislatures publish their laws, they group them together by subject matter to make it easier to find specific laws. These groups of statutes are known as codes, so you can find most criminal statutes organized into criminal codes. At the federal level, you can find both criminal law and criminal procedure in Title 18 of the United States Code, “Crimes and Criminal Procedure.”

## Model Penal Code

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

## Referendum

Statutory law is a *republican* method of making law; the people elect representatives to make law. About half of the states also permit the people to directly make law through popular **referendum**, also known as a ballot initiative or ballot question. This is a form of *democracy*, or direct lawmaking by the people. There is no referendum at the federal level; all statutory law is made by Congress. Referenda processes vary between the states. Some states enable referenda to create statutory law, others permit it to be used to amend their constitutions, and many provide for both. In many states, a referendum may be started by the people after a minimum number of signatures have been obtained. In some states, the legislature may place questions on the ballot for popular vote. The referenda process can be powerful. Several states in recent years have decriminalized the use of marijuana through referenda, and in 2018, the people of Florida voted to restore the voting rights of ex-felons who were not convicted of murder or felony sex offenses.<sup>9</sup>

# Idaho COVID-19

coronavirus.idaho.gov



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

Updated March 25, 2020

### Self-isolate

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

Residents can leave homes to obtain or provide essential services.

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

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

### "Essential" facilities & services open

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

### "Non-essential" facilities & services closed

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

### Limit public transit

Only to provide or obtain essential services.

### Limit travel

All non-essential travel must cease.

### No gatherings

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

### Outdoor activity OK

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

### Practice good hygiene

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

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

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

Photo from Idaho governor's office



## Ordinances

**Ordinances** are the local government counterpart of state statutes. They are created by local government lawmaking bodies, such as city and county councils, and occasionally directly by the voters. If properly enacted, ordinances have the authority of a statute. But as a lower form of law, they must not conflict with statutory and constitutional law.

## Administrative Law

Administrative law is a somewhat odd feature of U.S. law. Although administrative agencies fall into the executive branch of government, which doesn't normally make law, they are empowered to "promulgate" (a fancy word for making and announcing to the public) law, commonly known as either rules or **regulations**. Most agency rules are civil or administrative, but sometimes agencies create criminal rules. All of the constitutional limitations that are imposed on statutory law apply administrative rules. Today, there are far more administrative rules than statutes. Administrative rules are organized into codes, in the same manner as statutory law.

## Common Law

The *Common Law* was brought to the United States by our early English colonists. Common Law is judge-made law. In the early years of England, before Parliament existed, judges made most of the law. Eventually, the English Parliament became the primary creator of new law. But the role of courts in interpreting, and occasionally announcing, new law continues today. It is the courts, for example, that are the final word on what law means. Very important to criminal law and procedure, SCOTUS is the final word on the meaning of the Constitution. All of the states have adopted the Common Law to some degree. Louisiana, which was founded by French colonists, more closely follows the French (Civil) law, although it has adopted many features of the Common Law, particularly in the realm of criminal law. Because legal history informs our understanding of modern law, there are references to the old Common Law throughout this book.

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

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**Precedent:** A prior case that is similar in facts.

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

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

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

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

TABLE 1.3 ■ Types of Crimes

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

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

### Executive Orders

The final form of law has been in the news a lot in recent years: **executive orders**. The president of the United States, governors of the states, and other officials issue orders. Most executive orders concern the functioning of government or the execution of the executive’s responsibilities. That is the duty of an executive. Ordering government offices to close during a crisis or to lower flags to half-mast to honor someone who has died are examples of orders that aren’t lawmaking and therefore are valid. Sometimes, these orders are inherent, or they simply come with the executive officer’s job. In other instances, the legislature empowers the executive officer. The recent COVID-19 directives to stay home, close businesses, and socially distance are examples. The states had legislation in place to address emergencies long before COVID-19 was known to the world. Most state statutes specifically empowered governors and health officials to act during public health emergencies. For example, Minnesota’s peacetime emergencies law delegates to the governor the duty to “protect the public peace, health, and safety, and preserve

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

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

the lives and property of the people of the state.” It further provides that the governor may direct and control “the conduct of persons in the state,” “the entrance or exit from any stricken or threatened public place, occupancy of facilities, and the movement and cessation of movement of pedestrians, vehicular traffic,” and “the evacuation, reception, and sheltering of persons.” It was under this law that the governor declared a peacetime emergency and issued stay-at-home, social distancing, and other executive orders.<sup>10</sup> In Photo 1.2, you can read a poster summarizing a similar order by the governor of Idaho.

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

Sometimes, executives issue orders that involve policy, particularly when frustrated with a legislature that won’t act to address a problem; these orders are new law. For example, President Barack Obama issued an executive order known as Deferred Action for Childhood Arrivals, which permitted individuals who were in the nation illegally but who were brought to the country as children, to defer their deportation, and President Donald Trump issued an executive order banning immigrants from specific nations from entering the United States. An executive order that goes too far into the business of the legislature or the courts is unconstitutional. Ultimately, it is the courts that decide if executive orders are constitutional, just as they do with statutes.

## QUESTIONS AND APPLICATIONS

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

## WHAT ARE THE TYPES OF CRIMES?

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

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

### Felony, Misdemeanor, and Infraction

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

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

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

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

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

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



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

Photo by fstockfoto via iStock

### Malum In Se and Malum Prohibitum

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

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

## QUESTIONS AND APPLICATIONS

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

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

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

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

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

### The United States: A Common Law Nation

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

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

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

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

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

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

### Absolute Power Corrupts Absolutely

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

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

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

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

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

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

### Making a Federal Case of It

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



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

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

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

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

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

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

### Prove It!

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

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

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

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

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

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

## QUESTIONS AND APPLICATION

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

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

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

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

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

## IN A NUTSHELL

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

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

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

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

## LEGAL TERMS

accusatorial  
adjudication

adversarial system  
beyond a reasonable doubt

checks and balances  
 Civil Law  
 clear and convincing evidence  
 Common Law  
 Constitutional law  
 Contract law  
 crime  
 Criminal law  
 Criminal procedure  
 defendant  
 defense  
 dual sovereignty  
 executive orders  
 fact finder  
 factual guilt  
 federalism  
 felonies  
 folkway  
 grading  
 infractions  
 inquisitorial system  
 intentional tort  
 judicial review  
 legal guilt  
 Magna Carta  
 malum in se  
 malum prohibitum  
 misdemeanors  
 Model Penal Code  
 more  
 negligent tort  
 norms  
 Ordinance  
 parties  
 plaintiff  
 precedent  
 preponderance of the evidence  
 presumption of innocence doctrine  
 private law  
 Probable cause  
 public law  
 punitive damages  
 reasonable suspicion  
 referendum  
 regulations  
 Rule of Law  
 rule of lenity  
 SCOTUS  
 separation of powers  
 stare decisis  
 state action  
 Statutory law  
 strict liability  
 substantive criminal law  
 supremacy clause  
 tort  
 victim-in-fact  
 victim-in-law  
 writ

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