



*Gary A. Rabe*

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# CRIMINAL COURTS

*Structure, Process, and Issues*

FOURTH EDITION



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# Preface

*Criminal Courts: Structure, Process, and Issues* (fourth edition) is a comprehensive examination of the U.S. Criminal Court systems, to include discussion of actors in the system with decision-making power, and case processing from the point when offenders are arrested and charged with crimes through the sentencing and appeals process. This book also deals with issues confronting the system from historical, philosophical, sociological, and psychological perspectives. Some of these include judicial activism and the Supreme Court, prosecutorial and judicial discretion, the right to legal representation, judicial misconduct, jury nullification, diversion and alternative programs, specialty courts, and the role of plea bargaining in our system of justice. Finally, throughout this work, there are comparisons of court ideals with actual court functioning. This is to give students a more straightforward look at how the courts in our criminal justice system operate as well as how the persons who work in the system sometimes follow the rules, and at other times they bend the rules. This is not to say that our system of laws and justice can be manipulated, even though that sometimes happens, but that much of the law is broad and ambiguous and actors in the system are given discretion to interpret it. The reality of the criminal justice system, including the criminal courts, is that often limited human and financial resources hinder actors' ability to invoke the formal legal system to its full extent. It is through this ideal versus reality lens that students will learn much about the structure and function of the U.S. Criminal Courts.

The opening chapter begins with an examination of law and its social and political origins as well as where and how courts and the legal system fit into the criminal justice system. Despite the different periods or eras into which world history has been divided by scholars, the pervasiveness and continuity of law are apparent. Laws have always existed in some form or another, but largely intended to fulfill the same general purposes regardless of the culture we choose to examine. The major functions of law are social control, dispute resolution, and social change. Over time, technological changes have occurred and social ideas have evolved, and this has contributed to new thinking about how persons should orient themselves to others. The courts have made landmark decisions related to what the constitution guarantees to persons and many social and legal issues have been addressed and restructured via the law; in some instances, liberating persons and their beliefs, and in others restricting previously tolerated behaviors.

Laws can also be differentiated according to whether they pertain to civil or criminal matters. Statements about what the law says and how we should comport ourselves in our daily lives or out in the community in the company of others are referred to as substantive law. In less complex social systems, substantive law tended to be espoused by the courts in the form of common law. Common law is based on traditions, dependent upon the particular needs and desires of groups of people living together in cities or towns. As our social systems have become increasingly complex, we have devised more elaborate legal schemes and more formal mechanisms to maintain the social order and regulate human conduct. How the law should be applied is the province of procedural law. The United States has one of the most complex and contrived legal systems. Today, there are all types of law pertaining to different aspects of our society. These laws are either civil or criminal, and increasingly, a whole body of law focuses upon administrative law.



It is a legal reality that the early applications of the law favored particular interests over others. Some persons believe that our laws have been created to preserve the status quo for those who possess political and economic power. Thus, there have been inherent disparities existing in how the law is applied and for whom it is implemented. Those suffering the most from legal disparities historically have been women, children, and minorities. In recent decades, sociolegal movements have prompted substantial social changes in response to disparate treatment of certain groups, and still there are groups today who believe their interests are not reflected in the current application of the law.

Understanding the laws of the United States begins with a critical examination and description of the dual court system that is present in the United States. The principal components of the dual court system are federal and state court apparatuses. Chapter 2 describes federal and state court organization, and various functions of these different types of courts. There are diverse court systems, and there is little continuity among the states concerning what these different courts should be called. We do not have a universal nomenclature that can be applied to all state and local courts at various levels. However, there is considerable continuity within the federal court system. Federal and state court jurisdictions are distinguished, and the processes and functions of different types of courts are described and discussed.

The court workgroup consists of the same types of actors, regardless of whether we are discussing federal or state jurisdictions. Whenever one or more laws are violated, prosecutors at the state or federal level act against alleged offenders to bring them to justice. Thus, Chapters 3 and 4 examine prosecutors and defense counsels in some detail, identifying their principal functions and duties. The U.S. Constitution and the Bill of Rights have vested all citizens with particular rights to ensure that they will be treated equally under the law. All persons who are charged with a criminal offense are entitled to counsel if they are obligated to appear in court to answer criminal charges. Under particular circumstances, anyone may enjoy the right to a jury trial comprised of one's peers. These are due process rights afforded to those accused of criminal acts. These due process rights and the roles and functions of both prosecutors and defense counsels are examined and discussed.

The judge is often seen as the most important actor in the court system. Judges oversee all court proceedings and make important decisions. Several types of systems are used for judicial selection. These systems are described. While legal backgrounds are strongly recommended for persons functioning as judges, it is not necessarily true that all judges have law degrees or legal training. Thus, different methods for selecting judges are explained, together with the strengths and weaknesses of these methods. Merit selection of judges now seems to be favored in many jurisdictions to try and seat the best qualified candidates as judges. There is still, however, a segment of the judiciary clearly lacking the qualifications and commitment to make good decisions. Judicial misconduct of various kinds will be described, and some of the remedies available to the public for recalling bad judges will be examined.

At the heart of our legal system is the jury process despite the fact that a very small percentage of cases actually result in a jury trial. In fact, juries account for only about 10 percent of all criminal cases that are pursued. Nevertheless, considerable time is devoted to examining the jury process and how jurors are selected. Juries are comprised of persons from the general population. Methods of jury selection vary greatly among jurisdictions. Both prosecutors and defense counsel conduct *voir dire*s or oral questioning of prospective juries from a list of veniremen or a *venire*. Sometimes experts are used to assist as consultants, since some persons believe that jury selection can enhance the chances of a conviction or an acquittal. Various methods for discharging prospective jurors are examined, including challenges for cause and peremptory challenges. Various standards among the states and the federal system are described to show that there are different criteria applied



for determining the appropriate jury size and the process of jury decision making. The decision-making process of juries is examined in some detail, and the important topics of jury nullification and juror misconduct are explored.

For offenders who are prosecuted criminally for violating the law, the arrest and booking process are described in Chapter 7. The issue of bail is also discussed. An overview of bail decision making and bail bondspersons is provided. Bail has always been a controversial issue and critics assert that it is punishment against poor offenders who often cannot afford bail. The purposes and practices of bail, therefore, are also discussed in detail. Changing sentiments in some jurisdictions has led to bail reform in order that bail might be more affordable to all offenders and that jail and detention overcrowding might be alleviated.

The actual trial process is also illustrated. Those charged with crimes may undergo either bench or jury trials, where either a judge will decide their case or a jury will deliberate. The criminal trial process is described in some detail with various fictional scenarios that have paralleled some actual legal cases in the recent past. In any criminal trial, due process requires that we consider any defendant innocent of a crime until proved guilty beyond a reasonable doubt. This is a difficult standard to achieve in many cases. Prosecutors who pursue criminal cases against particular suspects believe that they can convince juries of the defendant's guilt. However, the defendant is represented by counsel who attempts to show that the defendant is innocent. Various witnesses are brought forth and testify, either for or against particular defendants. Some of these witnesses are eyewitnesses, while others are expert witnesses who testify about the quality and significance of collected evidence. Juries deliberate and decide one's guilt or innocence.

One, however, must also keep in mind that the most frequently used resolution strategy for criminal offenders is not a trial but plea bargaining, which is discussed in Chapter 8. Plea bargaining is a preconviction agreement between prosecutors, defense counsels, and their clients where guilty pleas are entered to criminal charges in exchange for some type of leniency. Plea bargaining results in a criminal conviction, but the penalties imposed are often less harsh compared with the penalties imposed through trial convictions. Different types of plea bargaining will be discussed. The pros and cons of plea bargaining are listed. Furthermore, some jurisdictions have abolished plea bargaining, and their reasons for doing so will be examined.

Regardless of whether offenders plead guilty through some type of plea bargain or are found guilty at trial, they will have a sentencing hearing. Sentencing hearings are conducted by trial judges. Sentencing hearings permit victims or relatives of victims to make victim impact statements in either verbal or written form. Others testify on behalf of defendants. Judges are the final arbiters and impose different sentences, depending upon the seriousness of the crime, one's prior record, and other factors. Several different types of sentencing systems that are used by U.S. courts today will be discussed. Chapter 9 examines these systems as well as the goals of punishment. In the event that convicted offenders are dissatisfied with the verdict, they are entitled to appeal their cases to higher courts. Judicial sentencing options, disparity in sentencing, and the appellate process are discussed in Chapter 10. Featured are death penalty cases, which are always automatically appealed. The appeals process is especially lengthy, and even those who are sentenced to death in states with capital punishment laws may not be executed for ten or more years.

A parallel system of justice exists for juvenile offenders. Thus, Chapters 11 and 12 examine the juvenile justice system with particular emphasis upon how the juvenile court system is structured and operated. A different language applies to juvenile processing, and various comparisons are made between the juvenile and criminal justice systems. Several important landmark juvenile cases are cited where they have been granted certain constitutional rights by the U.S. Supreme Court. Over time, juvenile courts have taken on the characteristics of criminal courts. Some persons believe that in several years, the juvenile court may be abolished and that a unified court for both juveniles and adults will emerge.



Not all persons charged with crimes are ultimately processed by the criminal justice system. Chapter 13 discusses how some offenders are diverted to civil courts or into civil dispute resolution programs where their cases can be concluded in noncriminal ways. Victims and offenders are often brought together in alternative dispute resolution actions, where victim compensation and restorative justice are sought as remedies for wrongdoing. In some states, various laws are being scrutinized for the purpose of changing them and causing criminal acts to become decriminalized through legislative changes. Thus, the process of alternative dispute resolution, pretrial diversion, and specialty courts will be examined.

Chapter 14 concludes with an examination of how the court process is influenced by the media. As our society has become increasingly complex in a technological sense, we have mastered ways of delivering information to more people through different mediums such as television and the Internet. At the same time that we have been increasingly exposed to what goes on in the courtroom, a major litigation explosion has occurred, where increasing numbers of lawsuits are filed. We have evolved into a very litigious society. One reason for the great increase in litigation is the great publicity derived from courtroom coverage by the media and the sensationalization of particular cases. Media in the courtroom will be explored, and the pros and cons of media coverage will be examined in terms of how public opinion is shaped.

Ancillaries and desirable features of this book include critical thinking exercises, a case study decision-making exercise, and numerous concept review questions at the end of each chapter. Key terms are boldfaced and listed in the margins throughout the text and revisited again at the end of the chapter; a comprehensive glossary of these and other terms is found in an appendix. Recently published readings are also suggested at the end of each chapter so that those interested in learning more about particular subjects can locate further reading for their edification and education. An up-to-date bibliography of both research publications and legal cases is provided in the end-of-book references to facilitate one's research and general study. A new feature to this edition is the use of boxed sections which discuss key cases and legal issues in each chapter. These are included to feature landmark cases and current issues or events that complement the text itself. Some of these key cases are considered landmark decisions which have had a great impact on criminal justice in action, and the real people and real events that take place in society every day. Chapter openers have also been included to heighten student interest in learning more about our court system and to provide them with real stories or snapshots of important knowledge about courts and the law.

While this book is coauthored, it is acknowledged that the final result is the work of many persons. We wish to thank Gary Bauer, Lynda Cramer and Jennifer Sargunar from Pearson for their patience and help in getting this fourth edition together. We are also indebted to the many reviewers who have made helpful suggestions and constructive criticisms for all editions of this work (Stephen Brodt, Ball State University–Muncie; Kristine Mullendore, Grand Valley State University–Grand Rapids; Timothy Garner, Ball State University–Muncie; Sylvia Blake-Larson, Tarrant County College; Scott Donaldson, Tarrant County College; Robert Greenwood, Madonna University; and Julie Raines, Marist College). Finally, special thanks to Judge Catherine Torres-Stahl for her comments and suggestions on this fourth edition, and UTSA Masters students Michelle Hill, Johannes Laven, and Thomas Garza for their assistance in finding sources, references, and suggested reading materials.

## ► New to the 4th edition

- A revised introductory chapter discusses the criminal courts and their functions in the context of the larger criminal justice system to include a section on the relationship between the courts, and police and corrections agencies.



- Many new chapter openers have been added to introduce students to the main topic of the chapter.
- Boxed items in each chapter have been added under the themes of key cases and legal issues. Key cases succinctly list and describe the most important landmark cases that have been influential to the process and functioning of the courts and its key actors. Legal Issues boxes describe contemporary problems confronting the courts and ask students to opine about the best course of action for both policy and practice.
- Definitions for key terms are now listed in the margins of the chapters.
- Chapter summaries have been reorganized by learning objectives.
- New “What Do You Think” feature in each chapter prompts students to use critical thinking skills with real-world application.
- Policy-oriented critical thinking exercises and case study decision-making exercises have been added to complement the concept review questions at each chapter’s end.
- Findings from contemporary and classic empirical research studies have been interspersed throughout the text to provide students with the knowledge of real-world functioning of courts and the criminal justice system.

—*Richard D. Hartley*  
*Gary A. Rabe*  
*Dean John Champion*



# About the Authors

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**Gary A. Rabe** After serving for five years as the Vice President for Academic Affairs at Minot State University (MSU), Dr. Gary A. Rabe has returned to his academic appointment as a professor within the Department of Criminal Justice.

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Dr. Rabe's professional memberships and services have included the National Consortium for White Collar Crime Research, the American Society of Criminology, the Law and Society Association, and the Academy of Criminal Justice Sciences. Dr. Rabe has served as a consultant to the Federal Law Enforcement Training Center and the National White Collar Crime Center, and served on the editorial board for the *Journal of Crime and Justice*. Dr. Rabe was recently reappointed by the Governor to a second consecutive four-year term on the North Dakota Commission on Alternatives to Incarceration. Dr. Rabe's academic areas of specialization include Criminological Theory, Criminal Justice Policy Evaluation, Rural Crime, Criminology, Corporate Crime and Sentencing, Courts, and Sociology of Law. He has coauthored three books and published several book chapters, articles, and technical reports.



**Dean John Champion** (1940–2009) was Professor of Criminal Justice at several universities, including Texas A&M International University, Minot State University, California State University-Long Beach, and the University of Tennessee-Knoxville. He received his Ph.D. from Purdue University and B.S. and M.A. degrees from Brigham Young University. He also completed several years of law school at the Nashville School of Law. Dr. Champion





was a prolific writer and has over 40 texts and/or edited works to his credit, a few of which were internationally recognized having been translated into Russian, Portuguese, Chinese, and Spanish.

He maintained membership in 11 professional organizations and was a lifetime member of the American Society of Criminology, Academy of Criminal Justice Sciences, and the American Sociological Association. He was a former editor of the Academy of Criminal Justice Sciences/Anderson Publishing Company Series on *Issues in Crime and Justice* and the *Journal of Crime and Justice*, and a contributing author for the *Encarta Encyclopedia 2000* for Microsoft. He was also a former Visiting Scholar for the National Center for Juvenile Justice and president of the Midwestern Criminal Justice Association.

Some of his published books for Prentice-Hall include *Crime Prevention in America* (2007); *Research Methods for Criminal Justice and Criminology 3/e* (2006); *The Juvenile Justice System: Delinquency, Processing, and the Law 5/e* (2007); *Corrections in the United States: A Contemporary Perspective 4/e* (2005); *Probation, Parole, and Community Corrections 5/e* (2008). His specialty interests included juvenile justice, criminal justice administration, corrections, and statistics/methods. Dr. Champion was a great advocate of student education and will be missed by all who knew him. His absence will especially be felt in the classroom and at the association annual meetings.

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# 1 Law

## The Legal Battlefield

### LEARNING OBJECTIVES

As a result of reading this chapter, you will have accomplished the following objectives:

- 1 Apply your knowledge of what the law is and the role that courts play in various facets of our daily lives.
- 2 Compare and contrast the different functions of law, including social control, dispute resolution, and social change.
- 3 Understand the evolution of disputes and the formal resolution of them.
- 4 Identify the difference between substantive law and procedural law.
- 5 Summarize the different types of law, including common law, civil law, and criminal and administrative laws.
- 6 Draw appropriate conclusions about the different sociolegal perspectives on law, such as sociological jurisprudence, legal realism, critical legal studies, and feminist legal theory.



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Recently, a nonprofit organization called the Texas Sons of Confederate Veterans (Texas SCV) applied to the state to make available a specialty license plate that would be issued by the Texas DMV. The state rejected their application because the license plate proposed included confederate flags on it. The Texas DMV had a policy that it can refuse specialty license plates if they might offend some persons. The nonprofit sued, stating that their First Amendment rights were violated. The DMV argued, however, that license plates are considered “government speech,” and therefore, the state can decide what messages to display on license plates. The Fifth Circuit Court of Appeals sided with the Texas SCV, ruling that the DMV discriminated against them by not approving their application to make the license plates available. The Supreme Court weighed in after appeal from the DMV and determined in a 5–4 decision that license plates are government speech, and therefore, the Texas DMV had the right to refuse the design submitted by the Texas SCV. Should states be able to determine what types of license plates they will issue? Does this, in your opinion, violate an individual’s right to free speech? How is it that two different courts could come to two different decisions about this matter? Why did the Supreme Court have to make the decision in this case? What do you think? Was this about the nonprofit’s ability to raise money through the license plate or was it truly that they wanted persons to be able to express their viewpoints through the specialty license plate? Couldn’t the nonprofit sell bumper stickers that individuals could display next to their Texas license plates? Why are license plates regulated by the courts and bumper stickers not?

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## ▶ Introduction

When most persons think of the law, they conjure up ideas about rules of conduct for behavior that have been written down. This is what we would refer to as substantive law. The law, however, also is the structures, procedures, and persons who have the authority to put the law into practice. The law can mean different things for different people. Some might see the law as an avenue for redress of social ills in society. Others might believe that the law is used only as a means to maintain the *status quo* and the power of those in the ruling class. The law is both, and can be viewed in many ways by many different people. The law may be liberating to some and at the same time oppressive to others (Vago 2006). Indeed, in the United States, the law enabled and eliminated slavery, controlled and liberated women, and ruled for and against government control of people’s lives. In the introductory example, the Supreme Court weighed in on what is allowable to be displayed on a state license plate. A Texas nonprofit felt that the state violated their First Amendment rights when it rejected their specialty license plate application because the design included confederate flags on it. The federal courts have the authority to decide disputes between the states as well as between the states and individuals, and private or nonprofit organizations. This example also shows that courts decide not only matters of crime and justice, but also matters about constitutional rights. Remember that the U.S. Constitution is the supreme law of the land, and the federal courts have the right to determine whether the rights and freedoms enumerated in the constitution have been violated by state laws, city and county rules, and even governmental and private institutions’ policies. No matter how one views the law, the criminal courts are both the institution and the structure that bring the law to life, and the courts make important decisions that affect society and the lives of its citizens.

The criminal court system in the United States is very complex and can be a confusing system to study and understand. The federal government and each state have their own court structure and rules of procedure for implementation of the law. There are also



different punishment structures; there are indeterminate and determinate sentencing structures, as well as guideline-based systems, and depending on the court or the crime, there may also be statutes in place that guide punishment, such as habitual offender laws, truth in sentencing, or mandatory minimums. To be even more confusing, criminal courts may not be the only option for administering justice. Throughout the United States, there are also military courts, tribal courts, juvenile courts, and specialty courts such as drug courts or veterans courts. There is no uniformity in the courts and the sentencing structures they employ among the jurisdictions across the country, and therefore, the U.S. criminal court system can sometimes be very confusing.

The functions of criminal courts are more straightforward; most persons believe that the primary function of law is to maintain social order, and indeed, the law and court structure are charged with maintaining order. This is accomplished through the adversary system that characterizes the U.S. courts, and its adjudicative function. Throughout societies, the law vests considerable power in judges to impose punishment on convicted offenders. The instrument of law and punishment is the criminal justice system whose actors are responsible for apprehending offenders, charging them with crimes, ascertaining guilt, and meting out punishments. The adversary system of justice pits the prosecution against the defense in a search for the truth. Some, however, might question whether the system is adversarial as the relationship between the prosecution and defense seems to be more reciprocal than adversarial. In other words, the prosecution, defense, and judge (the courtroom workgroup) have broader common interests to efficiently process the court's caseload than to argue and search for the truth. This is exemplified by the fact that roughly 90 percent of cases are plea bargained rather than settled at trial. This notion of prosecution, defense, and judge being cooperative rather than adversarial is based upon the idea that the actors who practice the law must work together to efficiently process cases. Eisenstein and Jacob (1977) assert that the courtroom workgroup has many shared goals, and thus, working together is incentivized. The courtroom workgroup is more than just prosecution, defense, and judge, however, and includes bailiffs, clerks, and even defendants whose interactions on a daily basis affect court outcomes.

There are two broad philosophies regarding how courts function. One portrays a legal institution that focuses on rules and procedures and where justice is the ultimate goal, and the other depicts a community where interdependent actors rely on one another to perform their roles and where the nature of these relationships will influence processes and practices. Indeed, the formal rules and procedures are in place to guide the administration of justice, but courts are complex political institutions and different courtroom communities may dispense different kinds of justice.

Notwithstanding the manner in which one views the role and function of courts in society, there are several different kinds of laws or rules that attempt to govern our behavior and the way the citizenry conduct their lives. There are laws against many violations we may or may not know exist but are in place to protect us from things that may harm or injure us. Law is dynamic and has many definitions. What is against the law in one place or at one time may not be a violation in another place or at another time. What elements of a crime need to be proved to meet the different evidentiary standards? Different states and the federal government define crimes in particular ways. There is much variation among the states about the nature and seriousness of different types of offenses. There is also variation among different jurisdictions in the application of laws, even if they have the same or similar laws. This is referred to as interdistrict disparity. For example, if two persons commit the same federal narcotics violation and have similar backgrounds, but one is being convicted in district court in Texas and the other in district court in North Dakota, their sentences may be very different because of local court contexts (plea bargaining, departure rates, and prison overcrowding) even though they violated the same federal law.



There are also many definitional differences of criminal law in various places and also at various times. While these definitions are important to learn, it is also important to understand the different functions of law for a society as well as the consistency and inconsistency with which the law is applied. This chapter examines various perspectives regarding the purposes and functions of law. Law can be used as a means to regulate the behavior of society, it can be used to settle disputes between grieving parties, and it can be used to elicit change in current practices or ideas. This chapter also provides a framework for the evolution of disputes and their formal resolution. There are different stages in the evolution of disputes. Persons investigating this evolution are concerned with developing a conceptual framework in order to better understand which disputes will reach the courts for formal resolution. Different types of law are also described—substantive versus procedural law, common law, civil law, administrative law, and criminal law. Another section describes some of the more important contributions of sociolegal scholars like Oliver Wendell Holmes, Roscoe Pound, Karl Llewellyn, and Roberto Unger, as well as some feminist legal theorists who have investigated the interplay between law and society. Finally, some theoretical perspectives related to court decision-making processes and practices are offered.

## ► What Is Law?

**law** the body of rules of specific conduct, prescribed by existing, legitimate authority in a particular jurisdiction and at a particular point in time.

**Law** is a set of rules defining behavior for a particular place and at a particular time. Law has been argued by some as an expression of the needs of the ruling class. Depending on your particular view of the legal system, law might be perceived as either liberating or oppressive, preserving the *status quo*, or providing the means and opportunity to challenge the existing social order. Law has been used to both perpetuate and eliminate slavery, dominate and liberate women, and convict and acquit the innocent. Law is related closely to all of these different definitions (Vago 2006).

## The *Dred Scott* Case and the Law

The role of law was very apparent in the *Dred Scott* case, in which the slavery issue was challenged. This case was more about citizenship than slavery. Dred Scott was the slave of an army officer. The officer took Scott from Missouri, to Wisconsin, and eventually to Illinois. When Scott returned to Missouri, he claimed that he was no longer a slave because slavery was not recognized in either Wisconsin or Illinois. Therefore, an important constitutional question arose as to whether citizenship and freedom were vested in former slaves as the result of their relocating in states where slavery was prohibited. The U.S. Supreme Court heard and decided the case in 1857. Recognizing the rights of individual states, the U.S. Supreme Court held that citizenship was not a federal issue. Rather, the issue of slavery was to be determined by the individual states. Thus, according to this decision, Dred Scott was still considered a slave, since the U.S. Supreme Court chose not to interfere in states' rights. This decision encouraged antislavery activists to make federal citizenship take priority over state citizenship. Subsequently, the efforts of these antislavery activists resulted in the ratification of the Fourteenth Amendment. The Fourteenth Amendment established the primacy of federal citizenship and became the foundation by which many legal and social issues have been addressed by the U.S. Supreme Court (Vago 2006).

## The Courts and the Criminal Justice System

Crime has been considered to be a major problem in society for some time and has been the focus of numerous government efforts throughout the history of the United States.



Even though crime, especially violent crime, has declined in the past three decades, crime and the criminal justice system still eat up a large portion of federal and state budgets. The cost for public safety in communities around the country as well as for incarcerating those who have been convicted of violating the law continues to rise, forcing many jurisdictions around the nation to rethink the administration of justice. Indeed, the criminal justice system is a major institution in society and is generally thought of as being made up of three entities: the police, the courts, and corrections. Of course, many more agencies and entities are involved in criminal justice, from bail bonding companies to substance abuse and mental health treatment providers, who all play important roles in ensuring that the system continues to operate. There is also interdependence among the agencies involved in the criminal justice system even though each entity's goals, objectives, and responsibilities might be different. The courts play a critical role in the criminal justice system because actions by the police and corrections agencies require, or are the result of, actions from the courts. Likewise, actions by the courts may be influenced by processes that the police and corrections undertake or implement. In this sense, the criminal justice system is a system that is codependent on the entities and actors involved for its continued functioning.

On the other hand, one could argue that the criminal justice system is very disjointed. The police, courts, and corrections rely on each other to do their jobs; however, there is no articulated coordination among them, and each has its own large hierarchical organization that is bureaucratic in nature. Each makes decisions that will affect its own workload and implements rules and procedures to achieve its particular goals. Each also competes for resources from the government and local counties and municipalities. Resources are usually in limited supply and each has to justify requests for increasing budgets. Police agencies want more police officers, courts want more prosecutors and judges, and corrections wants more jail and prison guards, and probation and parole officers.

Oftentimes, these fights are more political than logical or need-based. Since the terrorist attacks in 2001, for example, an increasingly larger share of the crime and justice budget has gone to law enforcement to combat terrorism and other crimes that fund criminal organizations. Meanwhile, many districts at the federal level are in need of increased numbers of judges, and many judgeships sit vacant as Congress is not moving to confirm the President's nominations. Funding for prisons and incarceration is also being reduced as many jurisdictions around the country are realizing the effects of an increased incarceration population and lengthy prison sentences. The get-tough movement and crime control era of the late 1980s and 1990s saw increasingly harsh and even draconian sentences meted out by the courts (truth in sentencing, three strikes, mandatory minimums, and habitual offender statutes are just a few of the tools that were enacted and utilized in an effort to curb crime by increasing punishment). This meant an exploding prison population, and now a recognition that incarceration is expensive, and not that effective, with recidivism rates somewhere around 66 percent for those released from prison. Now many jurisdictions are rethinking their responses to certain offenses, and increasingly using diversion, alternative dispute resolution, and treatment for certain offenders. As the focus of how to respond to crime shifts, so do the courts. Many jurisdictions now have several specialty, or problem-solving, courts to process certain types of cases or offenders as an alternative to traditional criminal court case processing.

The public has also become increasingly distrustful of the amount of tax dollars that are being spent by the criminal justice system with seemingly little effect on future crime and public safety. Criticisms of the way the criminal justice system operates and functions are nothing new, and have focused on one or more of the different components at different times. Although the current focus of criticisms is on discretion and its use and misuse and abuse by law enforcement, for the previous 25 years it was focused on the courts. Namely, judges and their wide-ranging discretion to hand out punishments that they deemed appropriate were the focus of major reforms at both the federal and state court levels. Prosecutors have also been the recipients of much scrutiny aimed at the great deal of power they



hold as the gatekeepers of the criminal justice system and their wide-ranging discretion over liberty, and in some cases, life.

Courts have also been a very political subject regarding the extent to which they make decisions that intrude on the lives of the citizenry; critics have accused some judges of legislating from the bench. Some recent SCOTUS (Supreme Court of the United States) decisions give examples of decisions that have an impact on society. For example, in *Evenwel v. Abbott*, the court decided that under the Equal Protection Clause of the Fourteenth Amendment, states can draw their legislative districts based on population, and in *Fischer v. The University of Texas*, the court decided that using race as a factor in the University's admission process did not violate the Fourteenth Amendment's Equal Protection Clause. In *Holt v. Hobbs*, the court decided that a restriction against prisoners growing beards violated inmates' rights to exercise their religion, and in *Obergefell v. Hodges*, the court decided that states were required to license and recognize same-sex marriages under the Fourteenth Amendment. All of these decisions will have some effect on people and what they can and cannot legally do in society. Often, these decisions also affect how some aspect of the criminal justice system will operate.

Determining precisely what the law should and should not be has proved to be elusive. Adamson Hoebel (1954) has said that seeking a precise definition of law is like the quest for the Holy Grail. Legislators, prosecutors, defense attorneys, judges, defendants, businesspersons, consumers, parents, students, priests, the wealthy, and the poor all have different perspectives about what the law is and how it should be applied. Despite these diverse views of the law, there are several fundamental assumptions about the functions of law.

## ► The Functions of Law

Various legal scholars have studied the functions of law in different social systems and at different points in time. Their many observations about the functions of law can be classified as (1) social control, (2) dispute resolution, and (3) social change.

### Social Control

**social control** informal and formal methods of getting members of society to conform to existing norms.

**Social control** consists of efforts by society to regulate the behavior of its members. The most visible form of social control is the application of the law (e.g., being arrested, prosecuted, and sentenced). For most citizens, this method of control is often the subject matter of the evening news and only happens to other people who they believe deserve to be controlled by the state. We seldom realize that we are subject to these same social controls in our daily lives.

Legal scholars distinguish between informal and formal social controls. Informal social controls are an integral feature of the socialization process. From early childhood, we are constantly taught the norms of behavior that our parents and the social world expect of us. These norms are a product of cultural expectations regarding dress, language, and behavior and our biological capacity to comprehend and adapt to these expectations. These informal social controls are effective because we are rewarded or punished by people who are important to us. Such persons are known as significant others in our lives. Parents, teachers, and even friends and acquaintances are essential in developing a person's sense of right or wrong and will ultimately guide and form our future behaviors. It is through a system of rewards and punishments that these informal social controls become the tools that stop most people from engaging in behavior that would require invoking formal social control mechanisms. Formal social controls include the police, the courts, and corrections. The formal social controls most people think of include being arrested by the police and being prosecuted, convicted, and sentenced by the courts. For





most citizens, these formal social control mechanisms will never have to be utilized. This is because informal social controls and the socialization processes they foment are enough to keep most citizens law abiding.

## Dispute Resolution

A second function of law is **dispute resolution**. Persons frequently engage in disputes with others. Spouses might disagree about the division of labor in their household. Employees may disagree with their employers about their work effectiveness and quality. Sometimes, disagreements occur among total strangers about how to drive on the interstate highways or how we or our children should behave in shopping centers or stores. Historically, persons involved in disputes have relied on informal methods for dispute resolution. In colonial times, families or individuals relied on their village elders to settle disputes. Not so long ago, disputes about many issues were considered private matters settled in nonlegal ways. In more recent decades, informal nonlegal resolutions of disputes have changed considerably. Increasingly, **disputants** rely on the legal system to resolve issues that once were settled privately. A major change in our social dynamics is largely responsible for this shift. Informal methods for dispute resolution used to be more effective in small, closely knit homogeneous societies. Often, the members of these communities were more closely related either through family ties or economically. Therefore, disputes were quite disruptive to the stability of the community and had to be resolved quickly. It was not deemed necessary to use legal means for resolving disputes because these disputes rarely rose to such formal levels.

One additional benefit of nonlegal methods to resolve disputes is that agreements are usually reached that are satisfactory to both parties. In traditional courtroom litigation, legal dispute resolution results in winners and losers. One side is usually dissatisfied with whatever decision was rendered, but tradition called for accepting that decision without further argument. However, as social systems became increasingly complex and heterogeneous, informal dispute resolution methods were less effective. There was no clear interdependence among the disputants, and the authority attempting to resolve the dispute was unclear. This social evolution generated more formal methods for dispute resolution, which gradually replaced less formal methods. Although formal, legal methods may settle the disputes to the satisfaction of the legal system, this doesn't necessarily mean that the dispute will never recur. It has been claimed, for instance, that a legal resolution of a conflict does not necessarily result in a reduction of tension or antagonism between the aggrieved parties (Vago 2006, 20). However, it is unlikely that most disputes are ever fully resolved; rather, they are temporarily quelled but eventually are resurrected into new conflicts and disputes.

**dispute resolution** civil action intended to resolve conflicts between two parties.

**disputants** opposing sides in a civil action or case.

## Social Change

**Social change** is another important function of law. Social change is the use of the law to modify ideas and practices, either actively or passively through natural forces or deliberate social actions. Law is the principal avenue through which social ills and biases are resolved. Legislative bodies are responsible for most of the laws that society abides by, but the courts have been the mechanism by which the law is put into practice. In this sense, the judicial branch of the government plays an important part in the functioning of society. Judges decide what evidence will be admissible in court, and whether persons have violated the law. Circuit court and Supreme Court judges also produce social change with their legal decision making. Appellate court decisions decide correct interpretations and applications of the U.S. Constitution and other legal rules. Court rulings therefore sometimes establish precedents to which subsequent decisions must

**social change** process whereby ideas and/or practices are modified either actively or passively or naturally.





adhere. These precedents then become the foundation for establishment or transformation of social policy. Under common law and the principle of *stare decisis*, decisions become law. *Stare decisis* literally means to stand by that which has been decided. This does not mean that all cases will be decided the same way, nor that a higher court cannot overturn the precedent. It simply means that courts will abide by the latest ruling on any given issue.

History is replete with examples of law used to effect social changes of various kinds. State legislatures continually implement new laws to change the existing social order. Legislative actions are diverse and change our lives in various ways. For instance, new laws passed by legislatures may require us to wear seat belts or pay increased taxes, may raise or lower the speed limit, or may declare new national holidays. Judges also create social change through their own interpretations of the law and how it should be applied. Thus, the precedents established by judges have formed the bases of changes in various social policies. These changes are the functional equivalent of law-making. Legislators regard this activity as **judicial activism** and are opposed to it, since they believe that legislatures, not the judiciary, should have the exclusive authority to make law. Beyond this, law is also a method by which to initiate broader societal changes. These processes demonstrate that the relationship between the law and the citizenry is not static but rather dynamic, and that social change arises out of continual iterations of policy and practice.

**judicial activism**  
judges' use of their  
power to accomplish  
social goals.

## ► The Evolution of Disputes

Disputes occur frequently, perhaps many times a day among individuals. We may have disputes with our spouses, children, coworkers, and bosses; however, we rarely rely on the legal system to resolve or settle these types of disputes. It is important to realize that many disputes follow particular patterns, and that a process for seeking legal remedies occurs only when several important factors converge. Some researchers have conceptualized the dispute process as consisting of various stages.

### Naming, Blaming, and Claiming

Felstiner, Abel, and Sarat (1980) identify three stages in the evolution of disputes: (1) naming, (2) blaming, and (3) claiming. These researchers were concerned with developing a conceptual framework to understand the evolution of disputes before they reach the courts for formalized resolution. Their view of disputes starts with classifying injuries into either perceived or unperceived. For instance, sometimes we are victimized or injured but aren't aware that we have been victimized or suffering any loss or injury. If we never realize we have been victimized, then we cannot consider bringing a dispute. Have you ever wondered why all of the gasoline prices are the same in your neighborhood? Perhaps this reflects a free and open market where competition has driven gas prices down as far as the local market forces can sustain. Or maybe, all of the gas station owners have secretly conspired to set fuel prices at fixed levels so that they can all benefit from higher prices. The point is that you never know when this situation actually occurs and whether you are being victimized. Each time you refuel your vehicle, you may be benefitting from the free-market system, or you may be being victimized through price-fixing. Thus, you may be the unwitting victim of a crime. When this occurs, even though you are a victim, no dispute arises. However, when you are able to identify yourself as a victim through **naming**, this is the first stage in formulating a legitimate dispute. The second stage in the dispute process is **blaming**. This stage involves translating your victimization into a formal grievance. In order for this event to occur, you must blame someone else for your victimization. For example, smokers move from naming to

**naming** identifying a  
party in a legal action.

**blaming** a step in the  
dispute process whereby  
the victim singles out  
someone as a potential  
target for legal action.



blaming when they allege that the tobacco companies have failed to inform them about the hazards of smoking. The final stage in the formulation of disputes is **claiming**. This occurs whenever victims believe that they have been injured, have identified a particular victimizer (someone to blame), and formally express a grievance against the person or organization responsible for their victimization. In most cases, victims seek monetary remedies. These claims ultimately evolve into disputes when the claim is initially rejected by another person or an organization. Not surprisingly, most disputes do not result into formal lawsuits. Most injuries are never perceived, and if they are, it is difficult to identify a particular victimizer. Therefore, the courts are faced with and address only a small fraction of the disputes that evolve into formal complaints and where those involved seek legal remedies.

A similar typology of disputes has been developed by Nader and Todd (1978) and Nader (1979). Like Felstiner, Abel, and Sarat (1980), Nader and Todd describe three stages in the dispute process: (1) the grievance or pre-conflict stage, (2) the conflict stage, and (3) the dispute stage. The **grievance** or **pre-conflict stage** requires that individuals or groups must perceive that they have been involved in an unfair or unjust situation. If the grievance is not resolved at this stage, then it progresses to a **conflict stage** where the victims confront the party they believe is the cause of their victimization. The dispute fully evolves when it reaches the **dispute stage** and the dispute is made public.

**claiming** the process in a dispute where a grievance is expressed and a cause of action is cited.

**grievance, grievance procedure** formalized arrangements whereby institutionalized individuals have the opportunity to register complaints about the conditions of their confinement.

**pre-conflict stage** perception by individuals or groups that they are involved in a conflict situation where a legal resolution is sought.

**conflict stage** either a pretrial or an alternative dispute resolution phase where a plaintiff and a defendant confront one another and an accusation is made.

**dispute stage** public revelation of a dispute by filing of a legal action.

**substantive law** body of law that defines and prescribes the rights and obligations of each person in society.

**procedural law** rules that specify how the law should be implemented and applied against those who violate the law.

## ► Types of Law

Typologies of law are both important and necessary. Law varies according to who prosecutes, the nature and types of existing penalties, and a law's particular historical origins. A broadly applicable typology is difficult to develop that includes all types of law. A common distinction is made between **substantive law** and **procedural law**.

### Substantive Law

Substantive law is the law in books. Substantive law is what the law says. Basically, this is the compilation of local, state, and federal laws created by legislatures. A law exists that defines when someone is under the influence of alcohol when operating a motor vehicle. All states now have .08 BAC as the intoxication standard. Thus, if a motorist has a BAC of .08 or higher, then the motorist is legally intoxicated. If the motorist has a BAC level of .07 or lower, then the motorist is not legally intoxicated. Persons who take money from others by force commit robbery. If they use a dangerous weapon in order to take money from others by force, they commit armed robbery. Laws exist that define these and other criminal acts. Many additional laws combine to form the substance of substantive law.

### Procedural Law

Procedural law or the process of law pertains to how the law is applied. Procedural law is also called the law in action. Procedural law specifies how police officers must obtain and execute a search warrant. It also details how witnesses should be sworn when testifying in court, how evidence should be admitted in the courtroom, and how jurors should return their verdicts.

For example, Rule 4(b)(1) of the Federal Rules of Criminal Procedure regarding warrants states that a warrant must:

- (A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;
- (B) describe the offense charged in

