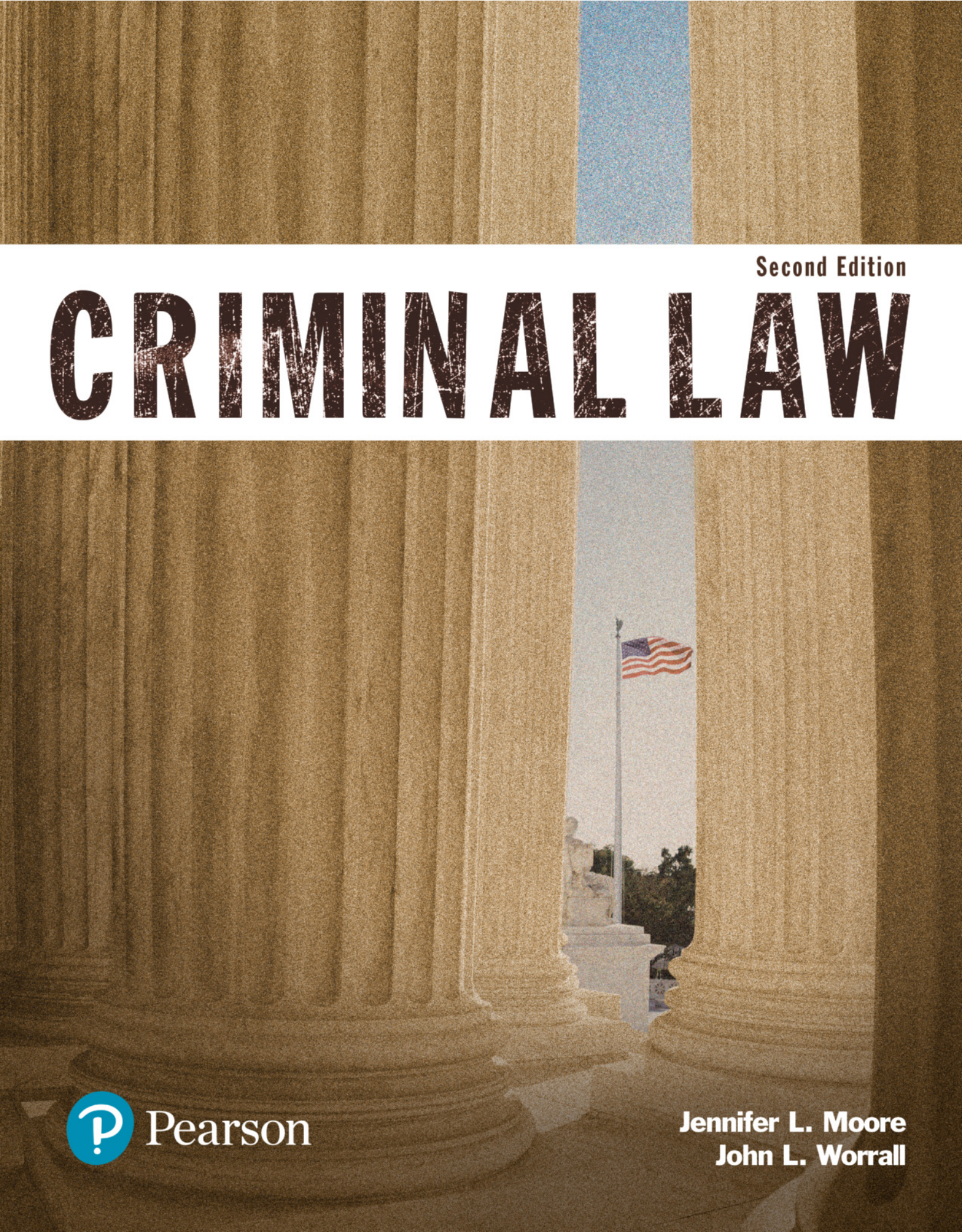
Second Edition

CRIMINAL LAW



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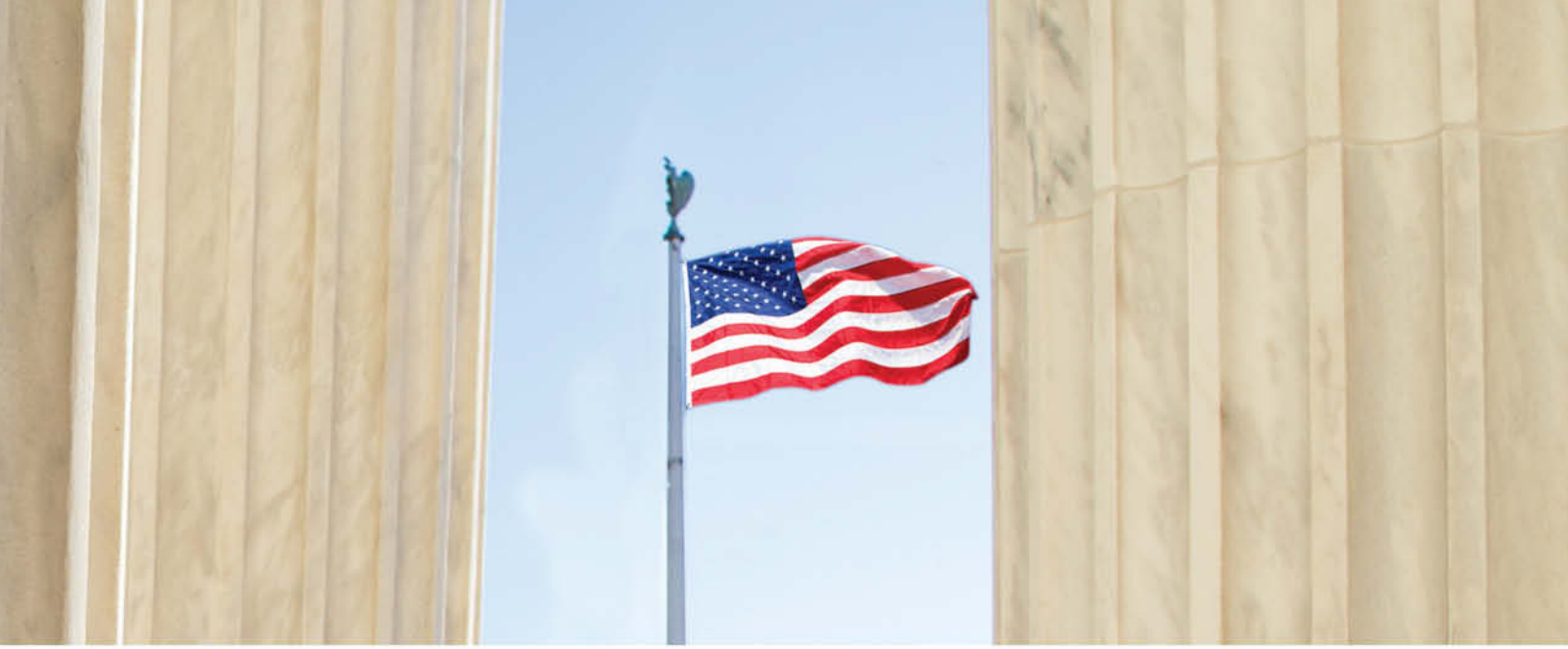

CRIMINAL LAW

Second Edition

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Printer/Bindery: RR Donnelley/Menasha
Cover Printer: Lehigh Phoenix Color
Text Font: Times LT Pro, 10/12

Library of Congress Control Number:

Names: Worrall, John L., author. | Moore, Jennifer L. (Lawyer) author.
Title: Criminal law / Jennifer L. Moore, DeSales University; John L. Worrall, University of Texas at Dallas.
Description: Second edition. | Boaton : Pearson, [2016] | Includes bibliographical references and index.
Identifiers: LCCN 2016031867 | ISBN 9780134559094 | ISBN 0134559096
Subjects: LCSH: Criminal law—United States.
Classification: LCC KF9219 .W67 2016 | DDC 345.73—dc23 LC record available at https://lccn.loc.gov/2016031867

10 9 8 7 6 5 4 3 2 1

ISBN-10: 0-13-455909-6
ISBN-13: 978-0-13-455909-4
SVE ISBN-10: 0-13-455941-X
ISBN-13: 978-0-13-455941-4

For my husband, Brian, my family, and the students who served as my inspiration. ***J.M.***

For my wife, Sabrina, and my kids, Dylan and Jordyn. ***J.W.***

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Preface

Introducing the Justice Series

When best-selling authors and instructional designers come together focused on one goal—to improve student performance across the CJ curriculum—they come away with a groundbreaking series of print and digital content: the *Justice Series*.

Several years ago, we embarked on a journey to create affordable texts that engage students without sacrificing academic rigor. We have now published eight titles in this series (13, counting new editions) and received overwhelming support from students and instructors.

The Justice Series expands this format and philosophy to more core CJ and criminology courses, providing affordable, engaging instructor and student resources across the curriculum. As you flip through the pages, you'll notice that this book doesn't rely on distracting, overly used photos to add visual appeal. Every piece of art serves a purpose—to help students learn. Our authors and instructional designers worked tirelessly to build engaging infographics, flowcharts, and other visuals that flow with the body of the text, provide context and engagement, and promote recall and understanding.

We organized our content around key learning objectives for each chapter, and tied everything together in a new objective-driven end-of-chapter layout. The content not only is engaging to students but also is easy to follow and focuses students on the key learning objectives.

Although brief, affordable, and visually engaging, the Justice Series is no quick, cheap way to appeal to the lowest common denominator. It's a series of texts and support tools that are instructionally sound and student approved.

Changes to the Second Edition

All of the existing Court Decisions were lengthened from the first edition throughout the textbook.

Chapter 1: A new section on the practical meaning of verdicts is included toward the end of the chapter, as is a new section on editing cases for readability.

Chapter 2: A new chapter opening story was added. A new Court Decision, *Glossip* v. *Gross*, was also added, which is the 2015 Supreme Court case in regards to the death penalty. Figure 2.5 was updated with current data on the death penalty.

Chapter 3: A new Court Decision was added on mistake of fact, *People* v. *Lawson*.

Chapter 4: A new chapter opening story features the Michael Brown shooting in Ferguson, Missouri. Two new court decisions were added, one on the castle doctrine and another on the defense of consent. A new section on federal deadly force policy was added. The deadly force section was also expanded in light of recent events.

Chapter 5: The chapter opening story was updated. A new Court Decision on sociological excuse, *United States* v. *Le*, was added. Figure 5.5 was also updated.

Chapter 6: A new figure summarizing modern and common law parties to a crime was included. The Complicity Limitations and Defenses section includes a new subsection on so-called nonproxyable offenses. A new Court Decision box toward the end of the chapter features a corporate vicarious liability case.

Chapter 7: A new Court Decision on conspiracy, *U.S.* v. *Soto*, was added. The Court Decision highlighting *U.S.* v. *Schiro* was removed.

Chapter 8: The section on physician-assisted suicide was updated. A new Court Decision on first-degree murder, *Nibert* v. *Florida*, was added on aggravating and mitigating circumstances.

Chapter 9: A new chapter opening story features allegations of cyberstalking in the scandal involving former CIA director and four-star general, David Petraeus, a case that continues to unfold. Court Decision boxes have been expanded and a new stalking case is featured toward the end of the chapter.

Chapter 10: A new Court Decision was added, *United States* v. *Phillips*, in which a computer science student hacked his own university's computer system.

Chapter 11: A Court Decision on identity theft was added, *U.S.* v. *Zuniga-Arteaga*. Statistics and data in relation to identity theft were also updated.

Chapter 12: In addition to being fully updated, the chapter features two new court cases. The first, *Helms* v. *State*, involves the case of a man who was running an escort service and claimed to have no idea that prostitution was occurring. The second, *United States* v. *Elie*, involves violations of federal gambling laws. A section on gang activity was added to the discussion of group criminality. Sections on sexting, polygamy, gambling, and drug laws have been updated with the most recent developments.

Chapter 13: The chapter begins with a new story featuring the 2015 terror attack in San Bernardino. The PATRIOT Act section has been updated with the latest developments and a new section on the USA FREEDOM Act was added. A new Court Decision box features *United States* v. *Walli*, a sabotage case. A new section on additional methods for targeting offenses against the state is included toward the end of the chapter.

Additional Highlights to the Author's Approach

- Our book offers a contemporary take on criminal law. It covers all the latest hot-button issues in criminal law.
- Each chapter begins with an opening story direct from the headlines. Our goal is to connect chapter material to current events, reinforcing the relevance of criminal law to the real world of criminal justice.
- We make liberal use of interesting, fresh, and controversial cases. A large number of our cases were decided in the last few years, making the material as current as possible. The cases are specifically targeted to engage young students with unique and relatable factual scenarios and encourage lively class discussions. The "Court Decision" feature highlights in depth several of these decisions.
- Students are presented in every chapter with hypothetical scenarios that put them in the position of judge or jury. We call this feature "Your Decision." *Answers are available to instructors in the instructor's resource materials*. This promotes classroom discussion.

▶ Instructor Supplements

Instructor's Manual with Case Briefs. This instructor's manual contains case briefs for all of the Court Decisions in the text prepared directly by the authors. These case briefs essentially serve as a one-page summary of the key elements of the various Court Decisions, similar to the approach used by students in law school. Additionally, the instructor's manual contains answers to the Your Decision scenarios used throughout the text.

TestGen. This computerized test generation system gives you maximum flexibility in creating and administering tests on paper, electronically, or online. It provides state-of-the-art features for viewing and editing test bank questions, dragging a selected question into a test you are creating, and printing sleek, formatted tests in a variety of layouts. Select test items from test banks included with TestGen for quick test creation, or write your own questions from scratch. TestGen's random generator provides the option to display different text or calculated number values each time questions are used.

PowerPoint Presentations. Our presentations offer clear, straightforward outlines and notes to use for class lectures or study materials. Photos, illustrations, charts, and tables from the book are included in the presentations when applicable.

To access supplementary materials online, instructors need to request an instructor access code. Go to **www.pearsonhighered.com/irc**, where you can register for an instructor access code. Within 48 hours after registering, you will receive a confirming email, including an instructor access code. Once you have received your code, go to the site and log on for full instructions on downloading the materials you wish to use.

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eBooks. This text is also available in multiple eBook formats. These are an exciting new choice for students looking to save money. As an alternative to purchasing the printed textbook, students can purchase an electronic version of the same content. With an eTextbook, students can search the text, make notes online, print out reading assignments that incorporate lecture notes, and bookmark important passages for later review. For more information, visit your favorite online eBook reseller or visit www.mypearsonstore.com.

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▶ *REVEL for* Criminal Law, 2e *by Moore and Worrall*

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The REVEL App further empowers students to access their course materials wherever and whenever they want. With the REVEL App, students can access REVEL directly from their iPhone or Android device and receive push notifications on assignments all while not being tethered to an Internet connection. Work done on the REVEL app syncs up to the browser version, ensuring that no one misses a beat.

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▶ *Acknowledgments*

Many people contributed to this project.

The authors would like to thank Gary Bauer and Lynda Cramer at Pearson; Lisa Koepenick and Joy Raj Deori at iEnergizer Aptara; and Susan Hannahs at SPi Global for their support during this edition.

We would also like to thank the reviewers of this edition of *Criminal Law*. They include David Forristal, Brown Mackee College; Howard Henderson, Texas Southern University; Jerry Stinson, Southwest Virginia Community College; and Harrison Watts, Our Lady of the Lake University.

Finally, we would like to thank our families for their continued love and support.

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Jennifer L. Moore is associate professor of criminal justice at DeSales University in Center Valley, Pennsylvania. She obtained her BA in government from Dartmouth College in Hanover, New Hampshire, and her JD with honors from Emory University School of Law in Atlanta, Georgia. Prior to entering academics, Professor Moore practiced at a large law firm in Atlanta, Georgia. Her legal practice included corporate litigation, antitrust litigation, and white-collar criminal defense. Professor Moore has also published articles on a wide range of legal topics, with a specific focus on criminal law and procedure issues. She is also the coauthor of other textbooks, including *Criminal Law and Procedure* (with John L. Worrall, Pearson 2014).

John L. Worrall is professor of criminology at the University of Texas at Dallas. A Seattle native, he received both his MA (criminal justice) and PhD (political science) from Washington State University, where he graduated in 1999. From 1999 to 2006, he was a member of the criminal justice faculty at California State University, San Bernardino. He joined University of Texas at Dallas in the fall of 2006. Dr. Worrall has published articles and book chapters on a variety of topics, ranging from legal issues in policing to crime measurement. He is also the author or coauthor of numerous books, including *Introduction to Criminal Justice* (with Larry J. Siegel, 15th ed., Cengage, 2016) and *Criminal Procedure: From First Contact to Appeal* (5th ed., Prentice Hall, 2015). Dr. Worrall is also editor of the journal *Police Quarterly*.

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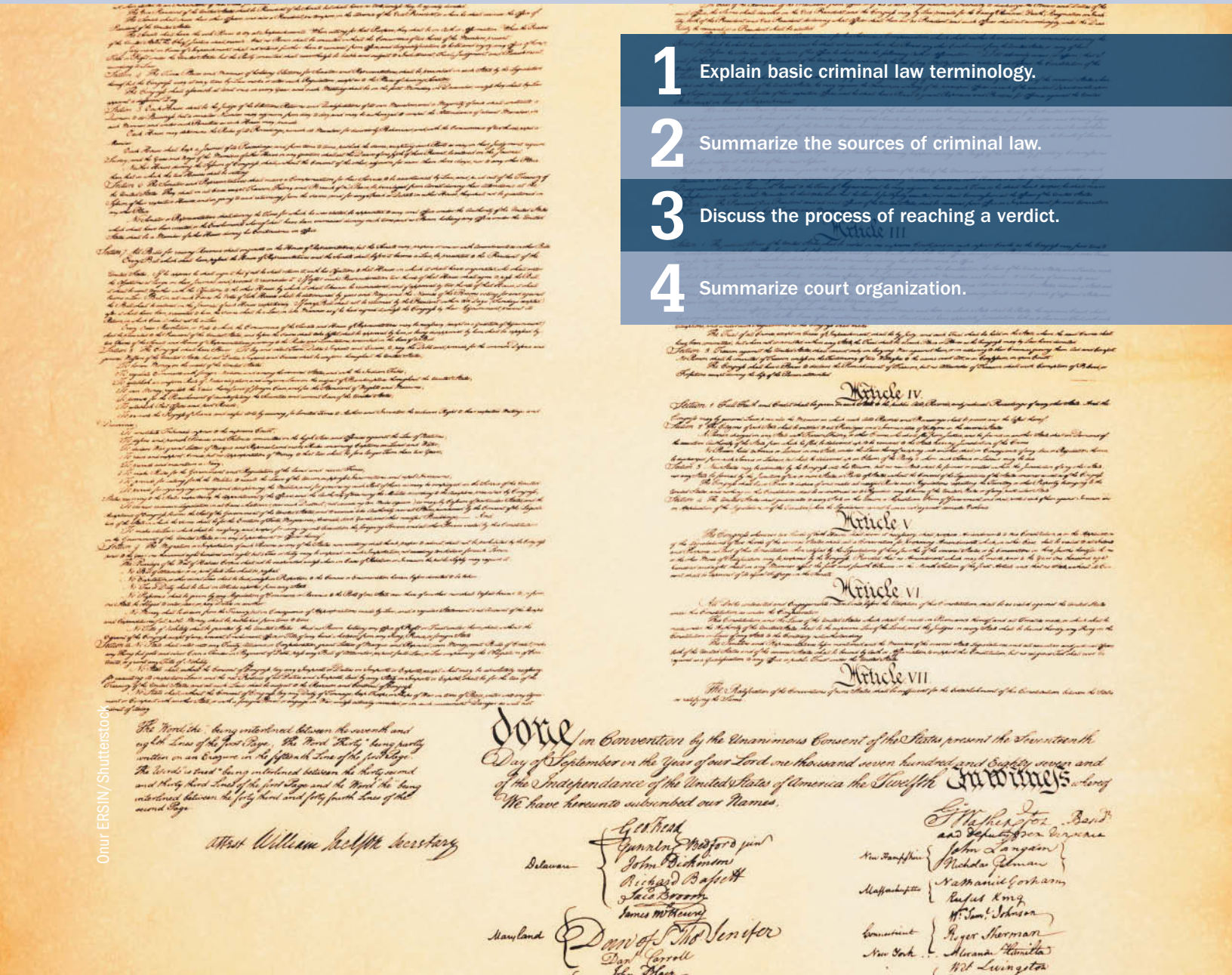
The Foundations of Criminal Law



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1. Explain basic criminal law terminology.
2. Summarize the sources of criminal law.
3. Discuss the process of reaching a verdict.
4. Summarize court organization.

INTRO

THE EVER-CHANGING CRIMINAL LAW

Marijuana, the most prevalent illegal drug in the United States today, remains illegal under federal law and under the laws of most states, but the times are quickly changing. The drug seems to get less illegal every day. Criminal law may not be the best mechanism for dealing with marijuana, people say. Such sentiments have prompted a number of legislative reforms across the country:

- Colorado and Washington voted in 2012 to legalize marijuana for recreational use. They are the first states to move beyond "medical marijuana" and legalize the drug for everyone, at least under their *state* laws. Alaska, Oregon, and the District of Columbia soon followed suit.
- Twenty-five states (as of this writing) authorize the purchase and consumption of marijuana for medical purposes, but a prescription is required.[1]
- According to the Pew Research Center for the People and the Press, for the first time in more than four decades, the *majority* of Americans favor legalization of marijuana in at least some form for personal use.[2]
- The United States Justice Department announced on August 29, 2013, that it would not meddle with state efforts to legalize and regulate the sale of marijuana.[3]
- The Supreme Court declined in 2016 to hear a lawsuit by Oklahoma and Nebraska against Colorado opposing its legalization scheme.

And changes to states' criminal codes are not the only noteworthy developments. California drastically cut the number of prisoners locked up for drug offenses.[4] Many of the inmates were sent under a "realignment" initiative to local jails, but the shift in priorities is noteworthy nonetheless.

What we are witnessing is a groundswell of anti–drug war sentiment—at least as far as marijuana is concerned. This is very significant from a criminal law standpoint because the norm across the United States is for criminal codes to expand by criminalizing an ever-increasing number of behaviors.[5] The marijuana story suggests that an alternative is necessary. At the same time, marijuana remains illegal under federal law, and federal law trumps state law.

DISCUSSION **Are states' efforts to reform their marijuana laws sound crime control policy?**

The Basics of Criminal Law

Criminal law is the bedrock of the American criminal justice system. It specifies what kinds of behavior are illegal, what punishments are available for dealing with offenders, and what defenses can be invoked by individuals who find themselves on the wrong side of the law. Without the criminal law, there would be no crimes, no criminals, and perhaps no means of controlling undesirable behavior. Certainly violence would still exist, property would be stolen, and order would be threatened, but these activities, harmful as they are, would not be considered illegal. Our system of criminal laws ensures that something can be done in response to behaviors that are widely deemed unacceptable.

The study of criminal law forces us to confront some deep and profound questions. Most of us can agree that murdering another human being is wrong. Most of us can agree, too, that harming innocent people, destroying others' property, and breaking into occupied dwellings are not behaviors that society is willing to accept. The list of taboos goes on and on. Yet there are many other activities that are not widely regarded as inappropriate. For example, some people feel that recreational marijuana use should be illegal—and the criminal law reflects this. Others, though, feel that they should be able to use the drug to their heart's content so long as it does not harm others. This poses a question: At what point is the line between legal and illegal behavior drawn? There is no easy answer.

LEARNING OUTCOMES 1 Explain basic criminal law terminology.

There are many other deep questions that arise in the study of criminal law. And they, too, have no easy answers. For example, why is it justifiable for society to punish people for their wrongdoing? At what point is it acceptable for government to take away the life or liberty of a person who does harm to others? Conversely, when is it acceptable for a person to take another's life? Should one individual be held liable for the actions of another? When is an otherwise harmful act acceptable to commit? Can certain individuals be excused for their transgressions? These are the questions that this book sets out to answer.

Comparing Crimes to Civil Wrongs

This book—and the study of criminal law—focuses squarely on the concept of **crime**. Unfortunately, there is no easy way to define crime, other than to say it is anything that lawmakers define as criminal. There is no clear "consensus" in society as to what should be deemed criminal, nor is there any clear underlying moral dimension to what is criminal. Moreover, there is no single value system that prevails. Many crimes are defined as such simply because the overwhelming majority of people feel they should be. Crimes, then, are little more than

Your Decision 1.1

On New Year's Eve, George Schultz was out celebrating with his friends in New York City and drank at least seven mixed cocktails. After the ball dropped in Times Square, George began to drive home while still under the influence of alcohol. Accidentally, he crashed into Janette Lucas, a cocktail waitress who was walking to the subway after work. Janette was killed in the accident. Her family thinks George Schultz should be held to account for his actions. Would they pursue a civil or a criminal case? Why?

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behaviors that lawmakers, who in the United States are our elected representatives, consider illegal.

The concept of crime is perhaps more easily understood by looking to state penal codes and their stated *purpose* for the criminal law. For example, in Pennsylvania, the stated purposes of the criminal law, according to Section 104 of that state's Crimes Code, are as follows:

1. To forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to an individual or public interest.
2. To safeguard conduct that is without fault from condemnation as criminal.
3. To safeguard offenders against excessive, disproportionate, or arbitrary punishment.
4. To give fair warning of the nature of the conduct declared to constitute an offense, and of the sentences that may be imposed on conviction of an offense.
5. To differentiate on reasonable grounds between serious and minor offenses, and to differentiate among offenders with a view to a just individualization in their treatment.

Crimes need to be distinguished from torts. Even though many crimes are committed against other individuals, the criminal law treats them as offenses against society as a whole. This is why most criminal law cases contain the name of the person charged and the governing authority that is tasked with charging the alleged criminal. Cases such as *People* v. *Smith*, *Commonwealth* v. *Jones*, and *State* v. *Wallace* reflect this arrangement. In contrast, a **tort** is a private wrong or injury. In a tort situation, a court will provide a remedy in the form of an "action," or a lawsuit between the two parties, the victim and the so-called **tort-feasor**. Tort actions are brought by victims to compensate them for their injuries. This compensation is usually financial. In contrast, criminal cases are brought for the purpose of punishing wrongdoers.

Goals of the Criminal Law

Some people regard the criminal law as an instrument of oppression. Others are quick to claim that the poor criminal offender stands no chance against the deep pockets of the state. There is a measure of truth to such impressions, as they are closely tied to criminal law's goal of punishing wrongdoers. Yet our system of criminal laws is built on other goals as well. These include community protection and *offender* protection.

Offender Punishment

Punishment is widely considered a key goal of the criminal law. Some even consider it the *only* goal.[6] What is **punishment**? There is no readily agreed-upon definition, but one that suffices is as follows: the infliction of unpleasant consequences on an offender on the grounds that he or she *deserves* it. This definition treats punishment as an end to itself. Sometimes, though, punishment is considered a means to another end, such as deterrence, rehabilitation, or even harm reduction. For example, we might choose to punish an offender not just to prevent him or her from committing additional crimes, but also because we want to send a message to the community that such crimes are not tolerated.

Punishment is most often associated with a retributive theory of punishment, the view that offenders must be made to suffer, whether by confinement, death, or some other method for their indiscretions. A famous Pennsylvania Supreme Court case, *Commonwealth* v. *Ritter*,[7] further described **retribution** in this way:

> This may be regarded as the doctrine of legal revenge, or punishment merely for the sake of punishment. It is to pay back the wrong-doer for his wrong-doing, to make him suffer by way of retaliation even if no benefit result[s] thereby to himself or to others. This theory of punishment looks to the past and not to the future, and rests solely upon the foundation of vindictive justice. It is this idea of punishment that generally prevails, even though those who entertain it may not be fully aware of their so doing. Historically, it may be said that the origin of all legal punishments had its root in the natural impulse of revenge. At first this instinct was gratified by retaliatory measures on the part of the individual who suffered by the crime committed, or, in the case of murder, by his relatives. Later, the state took away the right of retaliation from individuals, and its own assumption of the function of revenge really constituted the beginning of criminal law.

The Old Testament also captures the essence of retributive theory in Leviticus 24:17 and 24:19–20:

> And he that killeth any man shall surely be put to death. . . . And if a man cause a blemish in his neighbor; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth. (King James Version)

Community Protection

Another goal of the criminal law is community protection. This stems from a **utilitarian** perspective. As Jeremy Bentham once argued, the purpose of all criminal laws is the maximization of the net happiness of society.[8] Utilitarianism thus requires that we look beyond the offender and beyond the somewhat limited goal of punishment for punishment's sake. It is concerned with society's interest in protecting itself and providing for the general welfare, or simply with community protection. By what means, then, is community protection a goal of the criminal law? Through incapacitation, deterrence, rehabilitation, restoration, and denunciation (see Figure 1.1).

Incapacitation, or the act of removing an individual from society so he or she can no longer offend, serves an important community protection function. Clearly depriving a person of contact with most, if not all, law-abiding individuals hampers the individual's ability to offend, yet incapacitation is distinct from the "payback" or "eye-for-an-eye" character of retribution. The same Pennsylvania court case elaborated on incapacitation in this way:

> To permit a man of dangerous criminal tendencies to be in a position where he can give indulgence to such propensities would be a folly which no community should suffer itself to commit, any more than it should allow a wild animal to range at will in the city streets. If, therefore, there is danger that a defendant may again commit crime, society should restrain his liberty until such danger be past, and, in cases similar to the present, if reasonably necessary for that purpose, to terminate his life.

When an offender is locked up, he or she cannot commit crimes out in society. This is the concept of **specific deterrence**. Specific deterrence also serves, it is hoped, to discourage the offender from committing additional crimes once he or she is released from confinement (if this ever occurs). It is presumed that the offender's incarceration will cause him or her to "think twice" before offending again. This is the way in which specific deterrence is a utilitarian goal. It, we hope, maximizes the net happiness of society because a dangerous individual either is removed from the community or sees the error of his or her ways on release.

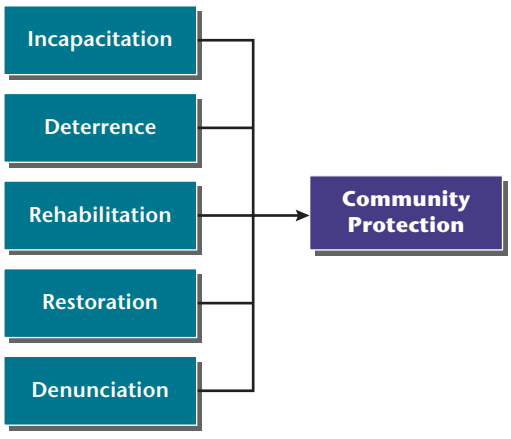

FIGURE 1.1 How Criminal Law Promotes Community Protection

General deterrence also protects society, more so than specific deterrence. General deterrence is concerned not with the offender, but with other would-be offenders. The assumption is that when would-be offenders see a criminal held accountable, they opt to abide by the law for fear of suffering the same fate. Whether general deterrence actually occurs is up for debate. Many offenders are not aware of or do not pay attention to the consequences that other criminals face. General deterrence *assumes* that the criminal law helps protect the community through its ability to *prevent* criminal activity.

While society may benefit from general deterrence, the offender may not. For example, should offenders be locked up for the sole purpose of sending a message to others? U.S. Supreme Court Justice Oliver Wendell Holmes raised this concern:

> If I were having a philosophical talk with a man I was going to have hanged (or electrocuted), I should say, "I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.[9]

The criminal law also protects society via **rehabilitation**. Rehabilitation is typically defined in terms of a "planned intervention that is intended to change offenders for the better."[10] For example, requiring a drug abuser to complete a treatment program may benefit society in the long run because the individual may desist from drug use. Yet incarceration can also serve a rehabilitative function, or so some people think. The logic goes like this: If a criminal is locked up, he or she will have plenty of time to reflect and understand the harm he or she has caused. Rehabilitation can also be considered punishment, as it is not uncommon for a judge to order a convicted criminal to get psychiatric care, participate in vocational training, and/or attend anger management meetings, even though the offender may have no desire to do so.

Restoration is concerned with getting offenders to "face up" to the harm they have caused. Most often, restoration is associated with the practice of **restorative justice**, which has been defined as "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[11] Often, the offender will be brought before the victim in some controlled setting and be made aware of the harm that he or she has caused. Then, typically, an agreement is reached such that the offender can (1) repair the harm he or she inflicted, and then (2) successfully reenter the community. Clearly, there are community protection benefits associated with successfully implemented restorative justice initiatives.

Finally, the criminal law helps ensure community protection via **denunciation**. Denunciation occurs when society expresses its "abhorrence of the crime committed."[12] In democratic societies, criminal laws presumably express the majority's view as to what is and is not acceptable. Elected representatives enact statutes in response to society's preference, which means that the resulting criminal laws serve to express society's condemnation of unacceptable forms of conduct. This

denunciation further serves a community protection function in the sense that would-be offenders come to (hopefully) understand what activities the majority frowns on. Of course, it doesn't always work this way, but the same can be said of restoration, rehabilitation, general deterrence, and even specific deterrence.

Offender Protection

It is tempting to get caught up in the "unpleasant" effects on the offender of the criminal law. Whether offenders are locked up, made to pay for their actions, treated, or shunned by the community, they find themselves on the "losing" side. But it is important to note that the criminal law also serves the important goal of *protecting* offenders. One way this occurs is via the prevention of vigilantism. Having a formal system of criminal laws helps ensure that the *state* seeks justice rather than private individuals. In earlier times, people took matters into their own hands and avenged wrongdoing as they saw fit. Nowadays, such actions are prohibited. Victims still retaliate some of the time and take the law into their own hands, but such actions are uncommon and discouraged in modern society. The criminal law thus protects offenders from the threat of victims coming after them.

The criminal law also protects offenders by ensuring proportionate and non-arbitrary punishment. Statutes spell out the gradations of various crimes (e.g., first-degree murder, second-degree murder), a topic that we will consider in some depth throughout this book. They also spell out the range of acceptable punishments, ensuring at least *some* protection against wildly differing sentences between offenders. There are still examples of unequal treatment that persist, especially pertaining to racial and ethnic disparities in criminal justice,[13] but the criminal law at least *helps* to ensure a measure of equal treatment.

Offenders also benefit from elaborate procedural protections, including the right to counsel, the right to a speedy trial, the right to an impartial jury trial, the right to a public trial, the right to confrontation, the right to compulsory process, and so on. These protections, however, stem more from the rules of **criminal procedure**—and particularly the U.S. Constitution—than they do from the criminal law. In any case, offenders these days rarely find themselves subjected to the arbitrary whims of the state. The opposite is true. The criminal law continues to grow and involve, both in response to new harms and out of concern for protecting those who find themselves charged with law violations.

The Classification of Crimes

We raised two important issues earlier in this chapter. One was that crimes are defined as such by legislative bodies. Another was that while there is no consensus over what should be illegal, there is a certain measure of agreement when it comes to more harmful types of behavior, such as murder. With this backdrop, we can begin to make sense of criminal law by classifying crimes. This classification scheme, though, is somewhat arbitrary and may not reflect the true harms that one crime causes compared to another. For that reason, it is helpful to think of the "evil" that underlies a certain type of activity. Some behaviors are simply more evil than others.

Felonies and Misdemeanors

The classification of crimes into felonies and misdemeanors is age-old, popular, and found in nearly every penal code. In general, a **felony** is a crime punishable by death or confinement in prison for more than 12 months. Obviously, death is reserved for the most serious felonies, such as first-degree murder. Lesser felonies, such as theft of goods valued at a certain amount, result in imprisonment rather than capital punishment. A **misdemeanor**, by contrast, is a crime punishable by a fine or a period of incarceration *less than* 12 months.

Importantly, a crime is defined as a felony or a misdemeanor based on possible, not actual, punishment. For example, in one case, a woman was sentenced to one year in prison for driving under the influence, but the judge "probated" her sentence (which means that he suspended it) and instead required her to serve 120 days in home confinement. She later argued she was a misdemeanant, not a felon, but an appeals court said that "a person whose . . . felony sentence is reduced . . . does not become a misdemeanant by virtue of the reduction but remains a felon."[14]

Why should we care about the distinction between felonies and misdemeanors, other than by the punishments that can be imposed? A key reason is that trial procedures differ for felonies and misdemeanors. For example, jury trials are not required in misdemeanor cases where the punishment does not exceed six months' confinement.[15] Also, felony trials tend to be more drawn-out and elaborate due to the stakes involved, which could include capital punishment for the offender in serious cases. Another reason why it is important to classify crimes in this way is because certain offenses require it. For example, some statutes define burglary in terms of unlawful entry with intent to commit a felony inside. If a misdemeanor is committed inside, then the crime is not burglary. We look at burglary in more detail in Chapter 10.

Malum in Se versus Malum Prohibitum

Malum in se (or the plural form, *mala in se*) is a Latin phrase meaning wrong or evil in itself. In contrast, ***malum prohibitum*** (or *mala prohibita*) means that something is wrong or evil because it is defined as such. This distinction goes back to the criminal law's moral underpinnings that we discussed earlier in this chapter. Certain crimes are simply wrong in themselves. For example, it is all but impossible to convince someone that an unjustified and inexcusable murder is acceptable. Other examples of *mala in se* offenses include robbery, larceny (theft), and rape, among others.

The line between what is wrong in itself and what is wrong because legislators defined it that way is difficult to draw. Is drug possession wrong in itself? What about speeding? Speeding arguably poses risks to other drivers, so is it inherently wrong? If not, could it be wrong once a driver exceeds a certain speed, such as 100 miles per hour? There are no easy answers. The distinction between *malum in se* and *malum prohibitum* is largely academic these days because for the majority of offenses it is difficult to objectively place them in one category over another.

Sources of Criminal Law

We have already offered a definition of "criminal law" and mentioned statutes and penal codes in passing, but we have *not* yet discussed where the criminal law comes from, other than to say that there are some moral underpinnings and that, today, crimes are mostly defined as such by legislatures. What are the origins of the criminal law? There are many of them—some ancient and others more modern. Here we look at five sources of the criminal law: early legal codes, the common law, modern statutes, the Model Penal Code, and constitutional sources. Each is best viewed as a piece of the criminal law puzzle (see Figure 1.2).

LEARNING OUTCOMES 2 Summarize the sources of criminal law.

Early Legal Codes

Perhaps the earliest known example of a formal written legal code was the **Code of Hammurabi**. Also known as Hammurabi's Code and assembled by the sixth Babylonian king, Hammurabi, in 1760 B.C., the code expressed a strong "eye-for-an-eye" philosophy. To illustrate, here is the seventh of the code's "code of laws":

> If anyone buy from the son or the slave of another man, without witnesses or a contract, silver or gold, a male or female slave, an ox or a sheep, an ass or anything, or if he take it in charge, he is considered a thief and shall be put to death.[16]

Roman law provides another example of formally codified legal principles. The so-called **Twelve Tables** (450 B.C.) was the first secular (i.e., not regarded as religious) written legal code.[17] The code was named as such because the laws were literally written onto 12 ivory tablets. The tablets were then posted so that all Romans could read them. The Twelve Tables, like Hammurabi's Code, contained a strong element of retributive justice. One of the laws, "*Si membrum rupsit, ni cum eo pacit, talio esto*," translates as follows: "If one has maimed another and does not buy his peace, let there be retaliation in kind."[18]

Despite their shortcomings and harsh character, these early legal codes are important because they signaled the emergence of formalized "law." And while it is difficult to define the term with precision, **law** generally refers to formal rules, principles, and guidelines enforced by **political authority**. This political authority is what began to take dispute resolution out of the hands of citizens and put it under the control of governments. Legal codes have changed and evolved considerably over the years, but the use of political or governmental authority to enforce such codes has remained pretty constant.

Common Law

After the Norman conquest of England (A.D. 1066), King William and his Norman dukes and barons moved quickly to consolidate their hold over newly won territories. One method was to take control of the preexisting legal and court system. Once they did this, the judges in their courts not only issued decisions but also wrote them down. These decisions were subsequently circulated to other judges. The result was a measure of uniformity from one court to the next. This was literally the law "in common" throughout England, and it came to be known as the **common law**. The United States is a common law country since it inherited its legal system from England.

The common law can be better understood when it is contrasted with **special law**, which refers to the laws of specific villages and localities that were in effect in medieval England and that were often enforced by canonical (i.e., religious) courts. Under the reign of Henry II (1154–1189), national law was introduced, but not through legislative authority as is customary today. Rather, Henry II implemented a system whereby judges from his own central court went out to the countryside to preside over disputes. They resolved these disputes based on what they perceived as custom. The judges effectively created law, as there was no democratic law-forming process in place at the time.

As more and more judges began to record their decisions, the principles of *stare decisis* and precedent were developed. **Precedent** refers, generally, to some prior action that guides current action. In the common law context, this meant that judges' decisions were guided by earlier decisions. Precedent thus ensured continuity and predictability. If decisions changed radically from one judge to the next, from place to place, or both, the "common" law would be anything but common. It was also easier for judges to fall back on earlier decisions; otherwise, they would have to continually reinvent the wheel. ***Stare decisis***, which is Latin for "to stand by things decided," is thus the formal practice of adhering to precedent.

While the common law is usually viewed as a legal concept, it also had social implications: The medieval judge was entrusted with the collective wisdom, values, and morals established by the community and was trusted to apply them to solve disputes between citizens. Even when appointed by the

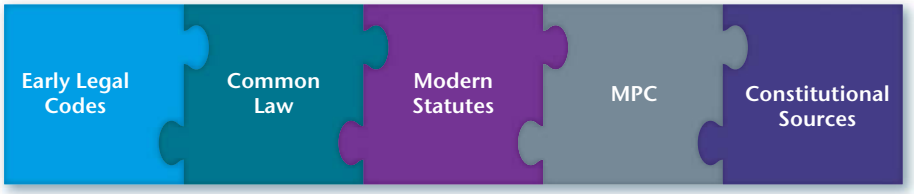

FIGURE 1.2 Sources of the Criminal Law

king, the medieval judge represented the community and applied the community's (not the king's) law, thereby maintaining its age-old customs and values.

Modern Statutes

Modern statutes differ from early legal codes because they exist at different levels of government and come in several different forms. The United States Code contains federal laws, and violations of its provisions can lead to federal prosecution. States have their respective codes. Other units of government, such as counties and cities, often have their own ordinances. These legal codes exist in several varieties. States such as California list criminal offenses in more than one code. There, most crimes are spelled out in the Penal Code, but the Health and Safety Code criminalizes drug law violations. The state has 29 separate legal codes![19]

Who is responsible for modern statutes? Your elected representatives at the state and local levels. Every year, without fail, members of Congress and state legislatures enact laws of all sorts, including those that make criminal offenses of specific behaviors. Sometimes they even *decriminalize* certain actions, as this chapter's opening story discussed with respect to marijuana legalization.

This book cannot thoroughly cover the criminal code of each state, as such information is excessively lengthy. Of course, an attorney who wishes to practice criminal law in a particular state will need to become well versed in the laws of his or her state, but for a general introduction to criminal procedure, we cannot afford to delve too deeply into the laws of any given state. Fortunately, there is considerable overlap in the criminal laws of various jurisdictions.

The Model Penal Code

In our federal system of government, each state is free—within certain constitutional limitations—to develop its own common and statutory law. This led to considerable variation from state to state. In 1962, however, the **American Law Institute**, a private organization of lawyers, judges, and legal scholars, adopted a **Model Penal Code**. The Code was intended to serve as just that, a "model" for states to follow. Since 1962, several states have adopted the Model Penal Code, either in whole or in part. This is beneficial in at least two respects. First, it promotes consistency across the states. Second, it makes the study of the criminal law more manageable. As such, we will, throughout this book, introduce criminal law concepts through the lens of the Model Penal Code. But bear in mind that the federal system has not adopted it, nor has California, the nation's most populous state.

Constitutional Sources

Constitutions are perhaps the most significant source of law. Unlike penal codes, constitutions generally do not prohibit actions on the part of private citizens. Rather, constitutions generally place limits on government authority. They define, in broad terms, government structure and organization; they also spell out various rights that people enjoy, how government officials will be selected, and what roles various government branches will take on.

The U.S. Constitution is so important to the criminal law that we devote all of Chapter 2 to it. In particular, we will look at the Constitution's prohibition against so-called *ex post facto* laws. We will look in detail at the concept of equal protection under the law, and consider issues of vagueness and overbreadth in the criminal law.

The **Bill of Rights** (see Figure 1.3), consisting of the first ten amendments, also announces important limitations on government authority with respect to the investigation and prosecution of crime. The Fourth Amendment, for example, spells out warrant requirements, and the Fifth Amendment protects people, in part, from being forced to incriminate themselves. The Eighth Amendment prohibits cruel and unusual punishment.

While the federal Constitution receives the most attention due to its status as the supreme law of the United States, it is important to note that each state has its own constitution. These often mirror the federal Constitution, but they often go into much more detail. Some states use an initiative process, where every November voters can decide the fate of proposed constitutional amendments. Other states have used their constitutions to more clearly spell out what they consider prohibited actions, whereas a close read of the federal Constitution suggests that the founding fathers intended something different. In any case, constitutions work together with legal codes, administrative regulations, and the common law to provide an interesting basis for criminal justice as we know it.

State constitutions can be more restrictive than the U.S. Constitution, but no state can relax protections spelled out in the U.S. Constitution. For example, the U.S. Constitution's Fourth Amendment spells out search warrant requirements, but is vague in terms of whether a warrant is required in all circumstances. In theory, a state could require warrants for *all* searches, but as a practical matter, most states have followed the U.S. Constitution's lead (and the U.S. Supreme Court's interpretation of it).

Your Decision 1.2

Carrie Raymond is a first-year associate at a large criminal defense law firm in Philadelphia. The firm recently received a new client—a famous football player charged with extortion. The partner on the case has asked you to research Pennsylvania extortion law. Where should you look? What sources should you use?

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Bill of Rights

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

Amendment II
A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

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

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

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

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

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

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

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

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

FIGURE 1.3 **Bill of Rights**

Source: United States Constitution.

Reaching a Verdict

This book, like many other criminal law books, makes extensive use of cases involving actual people charged with and convicted of crimes. The problem is that most published court decisions hail from the appellate courts—after someone has been convicted. This is a critically important point to keep in mind. Nearly every published criminal law case, including those already referenced in this chapter, involves some person who was already convicted of a crime and who decided to appeal that conviction for one reason or another.

LEARNING OUTCOMES 3 Discuss the process of reaching a verdict.

The appellate stage of the criminal process comes *after* adjudication, that is, after the **defendant** (the person charged with the offense) has been tried and convicted in court. It is thus easy to lose sight of some of the important procedures and considerations that lead up to the publishing of a court case. In this section we look at several of them: the adversary system, the burden of proof in criminal trials, presumptions, the roles of the prosecutor and the defense attorney, and the roles of the judge and jury.

Adversary System

Ours is an **adversarial justice system**. It is adversarial because it pits two parties against each other in pursuit of the truth. Our adversarial system is not what it is, though, because attorneys love to hate each other. Rather, adversarialism stems from the many protections that our Constitution and laws afford people.

When criminal defendants assert their rights, this sometimes amounts to one side saying the other is wrong, which ultimately leads to an impasse that must be resolved by a judge. If the defendant's attorney seeks suppression of key evidence that may have been obtained improperly, the prosecutor will probably disagree; after all, such evidence could form the basis of his or her case. The judge must rule to settle the matter. This is the essence of adversarialism—two competing sets of interests (the defendant's and the government's) working against each other.

Why else is ours an adversarial system? One reason is the founding fathers' concerns with oppressive governments. Adversarialism promotes argument, debate, and openness. With no defense attorneys and only prosecutors having any say in a defendant's case, there would be untold numbers of rights violations, rushes to judgment, and so on.

Hollywood loves to make it look like prosecutors and defense attorneys cannot stand each other and are constantly springing surprise witnesses on one another, arguing with each other to the point of fighting, and so on. Some prosecutors were once defense attorneys, and vice versa. These days, collaboration is popular, too, as prosecutors and defense attorneys are coming to realize that the traditional hardline adversarial approach to meting out justice is not always helpful for the accused.

Adversarial justice can be better understood when compared to its opposite, inquisitorial justice, which is characteristic of an **inquisitorial system**. There are several features of inquisitorial systems that differ from those of adversarial systems. First, inquisitorial systems do not provide the same protections to the accused (e.g., the right to counsel); second, inquisitorial systems place decision making in the hands of one or a very few individuals. Third, juries are often the exception in inquisitorial systems. Finally, the attorneys in inquisitorial systems are much more passive than those in adversarial systems, and judges take on a more prominent role in the pursuit of truth.

Burden of Proof

The **burden of proof** in a criminal prosecution first falls on the government. This means that it is the government's responsibility to prove that a person committed a crime. The prosecution must *persuade* the jury that the defendant should be held accountable. This is known as the **burden of persuasion**. Related to the burden of proof is the **burden of production**. The burden of production is one party's (the prosecutor's, in a criminal case) obligation to present sufficient evidence to have the issue decided by a fact finder. The burden of production is a question of law. If the prosecutor does not meet the burden of production, the case may result in a **directed verdict**, which is a judge's order that one side or the other wins without the need to move on to fact finding (in which the defense would introduce evidence, call witnesses, etc.).

In a criminal case, the prosecutor must present **proof beyond a reasonable doubt** that the defendant committed the crime, which is roughly the same as 95 percent certainty. In contrast, the burden of proof in a civil case falls on the plaintiff, the party bringing suit. Also, the standard of proof in a civil trial is lower. It is generally the **preponderance of evidence**, roughly akin to "more certain than not."

If proof beyond a reasonable doubt amounts to 95 percent certainty, then reasonable doubt is that other 5 percent. It is in the defense's interest to exploit that 5 percent, to get members of the jury thinking that there is a *chance* the defendant did not commit the crime. If the defendant chooses to assert a defense, then the burden of proof for doing so falls on him or her. For example, if the defendant in a murder trial claims that he or she was insane at the time of the crime, then it will be the defendant's burden to prove as much. The prosecution's only obligation is to prove each element of the crime charged.

Presumptions

A **presumption** is a fact assumed to be true under the law. In the world of criminal law, there are many types of presumptions. Conclusive presumptions require that all parties agree with something assumed to be true. An example of this would be that a child born to a married couple who live together is the couple's child. It is likely that both parties to a case would agree to this presumption. In contrast to this kind of conclusive presumption, a *rebuttable* presumption is one that could reasonably be disagreed with. Here is an example of a rebuttable presumption: "Because a letter was mailed, it was received by its intended recipient." This is rebuttable because the letter could actually be lost due to a mistake made by the post office.

Every person charged with a crime is assumed, in advance, to be innocent, which is known as the **presumption of innocence**. The presumption of innocence is both a presumption of law (because it is required from the outset) and a rebuttable presumption (because the prosecutor will present evidence to show that the defendant, who is the person charged with the crime, is not guilty). One classic court decision put it this way:

> [The presumption of innocence] is not a mere belief at the beginning of the trial that the accused is probably innocent. It is not a will-o'-the-wisp, which appears and disappears as the trial progresses. It is a legal presumption which the jurors must consider along with the evidence and the inferences arising from the evidence, when they come finally to pass upon the case. In this sense, the presumption of innocence does accompany the accused through every stage of the trial.[20]

Presumptions are essential to the smooth operation of criminal justice. They serve, basically, as substitutes for evidence. Without them, every minute issue that could possibly be disputed would come up during trials. Without presumptions such as these, the process would be slowed down considerably because every minor event, no matter how likely, would have to be proven in court. (Figure 1.4 shows popular presumptions that arise in criminal justice.)