Criminal Law, Procedure, and Evidence

Second Edition

Walter P. Signorelli

SUPPORT MATERIAL

ROUTLEDGE

Criminal Law, Procedure, and Evidence

Providing a complete view of U.S. legal principles, this book addresses distinct issues as well as the overlays and connections between them. It presents as a cohesive whole the interrelationships between constitutional principles, statutory criminal laws, procedural law, and common-law evidentiary doctrines. This fully revised and updated new edition also includes discussion questions and hypothetical scenarios to check learning.

Constitutional principles are the foundation upon which substantive criminal law, criminal procedure law, and evidence laws rely. The concepts of due process, legality, specificity, notice, equality, and fairness are intrinsic to these three disciplines, and a firm understanding of their implications is necessary for a thorough comprehension of the topic. This book examines the tensions produced by balancing the ideals of individual liberty embodied in the Constitution against society's need to enforce criminal laws as a means of achieving social control, order, and safety. Relying on his first-hand experience as a law enforcement official and criminal defense attorney, the author presents issues that highlight the difficulties in applying constitutional principles to specific criminal justice situations. Each chapter of the text contains a realistic problem in the form of a fact pattern that focuses on one or more classic criminal justice issues to which readers can relate. These problems are presented from the points of view of citizens caught up in a police investigation and of police officers attempting to enforce the law within the framework of constitutional protections.

This book is ideal for courses in criminal law and procedure that seek to focus on the philosophical underpinnings of the system.

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This book is dedicated to all my students and colleagues with whom I have had so much fun over the years, and to those who played a part in the development of this book. Thank you, all.

Contents

Preface

Criminal Law, Procedure, and Evidence was published in 2011. It was up-to-date at that time, but society, criminal justice, and the law have continued to evolve. New technologies and developments have generated new issues and controversies for courts and the law to address. By and large, our courts have effectively resolved these new issues, making changes when necessary, but adhering to the fundamental principles of our law, our democratic values, and the spirit of our Constitution.

This edition updates the law, and includes recent important cases that show how our courts have continued to carry the flame of constitutional rights and protections that was lit in earnest a century ago.

Since the spark was lit by the Supreme Court in the early twentieth century, particularly by Justices John Harlan I, Oliver Wendell Holmes, Jr., Louis Brandeis, Benjamin Cardozo, and Hugo Black, the application of constitutional principles to public and private life has continued to grow. Most profound has been the application of constitutional principles to substantive and procedural criminal law—and, in recent years, to evidence law. Consequently, the usually distinct subjects of criminal law, procedure, and evidence can no longer be studied effectively without relating them to the constitutional principles of due process, legality, equality, and fairness.

The goal of this book is to provide a comprehensive understanding of criminal law, procedure, and evidence, with a focus on how constitutional law interacts with and affects these disciplines. The book addresses distinct issues, such as probable cause, search and seizure, stop and frisk, confessions, *Miranda* warnings, the right to counsel, lineups, the exclusionary rule, criminal law principles, proportionate sentencing, competent evidence, standards of proof, and the right to confront accusers, but also the overlays and connections between these issues, thereby providing a complete view of American legal principles.

In our federal system, laws vary from one state to another, and significant differences exist between state and federal law; however, the mandates of the U.S. Constitution impose general principles that each jurisdiction must follow. The challenge for practitioners is to apply these constitutional principles to specific situations in a manner that produces just and fair results. To describe how the process works, this book draws on a wide array of cases and relates those cases to the kind of encounters between citizens and police that regularly occur throughout the nation. While covering the landmark cases, this book emphasizes the cases and issues that are less settled and more pertinent to current conditions; for example, extensive coverage is provided of the various and fluid situations that might arise when the police stop an automobile. In such a situation, it is important for individuals to understand their rights and the powers of the police, while it is equally, or perhaps more, important for the police to understand the limits of their powers. The roles of the police, prosecutors,

defense attorneys, and judges are explained, and critical issues such as false confessions and misidentifications are thoroughly explored.

Most readers have a sense that in our constitutional society individuals have a "right to be let alone," yet they also understand that law enforcement officers must sometimes infringe on that right. The balance between individual rights and police power is a major theme of this book, and, in the context of a society gripped by threats of terrorism, keeping the right balance is crucial. While recognizing the importance of police efficiency and effectiveness, restricting police authority is equally important for a free society. Setting ground rules for police to follow in their routine functions establishes boundaries that tend to prevent extreme police conduct. Limiting police authority creates a bulwark against unlimited police oppression. As Justice Louis Brandeis wrote in a case that involved federal agents breaking state laws:[1]

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Notwithstanding the need for restrictions, law enforcement officers must be granted a substantial degree of discretion to perform their duties. They often face dangerous and quickly changing circumstances that require them to act expeditiously without the benefit of complete information. Substantive and procedural law authorizes officers to act, but then courts review their actions and, if necessary, correct them. An escalating set of standards provides checks and balances at each stage of the criminal justice process. Consequently, an arrest of a particular individual may be justified by circumstances, while a jury acquittal of the same individual for the same conduct may be equally justified.

Each chapter of the text contains a problem in the form of a fact pattern that highlights one or more classic criminal justice issues to which students can relate, such as an automobile stop, a family dispute, or a police interrogation. These problems are presented from the points of view of citizens caught up in a police investigation and of police officers attempting to enforce the law within the framework of constitutional protections. After each problem, questions are posed, and the reader is asked to play the role of a decision-maker—a citizen, police officer, prosecutor, defense attorney, or judge.

Some of the questions have obvious answers; the reader, even without any legal training but just by applying instinct and common sense, should recognize the generally accepted answer. Other questions raise conflicting issues that do not lend themselves to easy answers; there may be diametrically opposed answers for both of which valid and rational supporting arguments are conceivable.

Contradictory answers most often arise because of differences in the weight and credibility given to the specific facts of a case, and differences in the application of general principles to specific facts. Contradictory answers also arise because of the different weight given to competing interests within society. The debate is healthy. Our justice system is alive

and adapts to changing circumstances and persuasive advocacy, and adversarial debate is the process by which our justice system progresses. Because the law is continually changing, readers with an interest in the subject, particularly students and criminal justice practitioners, must do more than memorize the results of a list of cases; they must endeavor to gain an understanding of legal history, principles, and purposes.

Highlighted are the recent right-to-privacy cases—*Riley v. California*, *United States v. Jones*, and *Carpenter v. United States*; the double jeopardy case, *Gamble v. United States*; the unanimous verdict case, *Ramos v. Louisiana*; the right to counsel case, *Maryland v. Shatzer*; the right of confrontation case, *Crawford v. Washington*; and the right to bear arms case, *New York State Rifle and Pistol Association v. Bruen, 597 U.S. … (2022), 142 S.Ct. 2111 (2022)*.

Accounts are included of the widely-publicized trials of the California police officers in the Rodney King case; the confessions of the teenagers in the Central Park jogger case; and the trial of three Florida men accused of the murder of Ahmaud Arbery. These examples illustrate clearly how legal principles were applied to the facts of well-known and complex cases.

Law enforcement officers who study this book will gain a broad working knowledge of criminal law and procedure and the evidentiary standards that will help them to make better decisions and to explain in court the reasons for their decisions. Fully developed and competent explanations by trained officers of their actions help the courts to assess the what, how, and why of police actions and whether they were lawful or justified. The material presented will help students and others assessing police performance and the effectiveness of the criminal justice system to apply a broader perspective to specific situations they may encounter.

The ultimate goal of the book is to educate readers regarding liberty and security issues so that they may apply critical thinking when they are confronted with such issues in life or in the media. With a more developed understanding of criminal justice and constitutional principles, the reader will have the background information to intelligently analyze the issues and to confidently provide valid and reasonable arguments for any positions that they choose to adopt or advocate.

Note

1 Dissenting, *Olmstead v. United States*, 277 U.S. 438 (1928).

Section 1

Overview

Chapter 1

Balancing Law Enforcement and Individual Rights

The American sense of liberty and individual rights springs from the U.S. Constitution and the Bill of Rights. These documents provide the guidelines for all federal, state, and local laws; they guarantee that the United States will remain a nation governed by the rule of law. They also balance society's need to achieve social control, order, and safety against the individual's right to life, liberty, and property. Although, as Americans, we are aware that we have certain rights, we often take those rights for granted. At work and school, and in other endeavors, we generally expect to be treated fairly and equally. However, when we become the subject of a government investigation or the accused in a criminal prosecution, our rights become paramount in our minds, and we fully appreciate their crucial importance and the need for an impartial criminal justice system.

The values of freedom and individual rights emerged early in our nation's history and traditions, and Americans have internalized what Thomas Jefferson expressed in the Declaration of Independence:

> We hold these truths to be self-evident: that all men are created equal, that all men are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

When James Madison wrote the Bill of Rights, he transformed Jefferson's "life, liberty, and the pursuit of happiness" into "No person shall be… deprived of life, liberty, or property, without due process of law." This historic clause can be traced back to the English Magna Carta of 1215. It is contained in the Fifth and Fourteenth Amendments and in state constitutions.

Due process of law encompasses many concepts, including the right to notice of charges and the opportunity to be heard. It requires that a law or regulation imposed on an individual may not be unreasonable, arbitrary, capricious, or *ex post facto* (criminalizing an act after it has been committed), and it requires that the means selected to enforce a law must have a real and substantial relation to the objective of the law.

The Constitution provides that Congress shall make the laws, the executive branch shall enforce the laws, and the judiciary shall interpret the laws. The Bill of Rights is a counterweight and sets forth limitations on the kind of laws that may be enacted and the methods by which laws may be enforced. For example, the First Amendment limits the kind of laws that may be passed. It limits the use of criminal or civil law to abridge the rights of freedom of speech, freedom of religion, and peaceful assembly. The Fourth, Fifth, Sixth, and Eighth

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Amendments limit the methods by which the government may enforce criminal laws. These amendments are the heart of criminal procedure law. They prohibit unreasonable searches and seizures, compelled self-incrimination, unfair trials, cruel and unusual punishments, and other oppressive government conduct.

Criminal procedure law puts into practice the ideals of the Constitution, and safeguards the rights of all persons by defending the rights of suspects and defendants. Because circumstances can make anyone a suspect or a defendant, criminal procedure law protects us all by governing the methods by which law enforcement agencies investigate and prosecute crime. It mandates that law enforcement officers ensure that individuals under investigation or accused of crimes are treated fairly and afforded their rights. The methods and procedures allowed by the law for pursuing criminals determine the nature and tenor of our society and whether we live in a free or an oppressive nation.

The main actors in the criminal justice process are police officers, prosecutors, defense attorneys, judges, and, ultimately, jurors; however, the police play the largest role. Far more crimes are reported to the police than are referred to prosecutors and the court system. The police question, frisk, or search far more people than they arrest, and, when arrests are made, relatively few of these cases progress through the criminal justice process to an actual trial. Therefore, much of criminal procedure law pertains to the conduct of police.

Traditional criminal procedure law developed from many sources, including the common law, the Constitution, statutory law, and customary police practices. In recent decades, however, courts have actively reshaped this area of law. Emphasizing constitutional principles, they have overridden statutes and customary police practices, and judges have become the predominant arbiters of what are acceptable or unacceptable law enforcement practices. For the most part, they have achieved a reasonable balance between the rights of the individual and the needs of the government to control crime and maintain order. This ideal balance might be called "ordered liberty."[1] However, the balance constantly shifts because of the competing interests and opinions of those on the law enforcement side of the scales and those on the individual rights side. Advocates of strict law enforcement generally place a high value on the repression of criminal conduct through aggressive police tactics and the imposition of swift and certain punishments. Conversely, advocates of protection for individual rights place a higher value on due process for the accused and limitations on law enforcement authority. This does not mean that most of those who favor strict law enforcement are against protecting individual rights—in fact, they have often taken the lead in protecting these rights—nor does it mean that most advocates of due process rights are against appropriate punishments when defendants have been fairly convicted of crimes.

Law enforcement officers are charged with the responsibility for investigating crime, apprehending criminals, and obtaining the necessary evidence for a prosecution. These are difficult and formidable tasks and often must be carried out in complex or dangerous circumstances. Nevertheless, they must be accomplished within a framework of established rules. Neither police officers investigating common crimes nor federal investigators pursuing white-collar criminals can arbitrarily make arrests or conduct searches. Moreover, district attorneys cannot continue prosecutions unless they have probable cause and sufficient credible evidence. Law enforcement decisions must be justified on a rational, objective basis and must comport with the rule of law as established by the Constitution, Congress, and the courts.

It is unlikely that most police officers will know all the complexities and nuances of criminal procedure law, but they must possess a substantial working knowledge of its

essential elements so that they can effectively perform their duties without compromising law enforcement objectives. A violation of established criminal procedure rules, whether done willfully or negligently, may have adverse consequences for the individual officer, other officers, and the prosecution of the criminal case. Violations of the rules can result in civil lawsuits against officers for false arrest, assault, trespass, malicious prosecution, or civil rights violations. Occasionally, law enforcement officers who commit serious violations are prosecuted under state or federal criminal laws. More often, violations invoke the exclusionary rule.

The *exclusionary rule* is the primary means by which courts enforce constitutional restraints on law enforcement. The rule prohibits the use in a criminal trial of evidence obtained in violation of constitutional protections. When the police conduct an unlawful arrest, search, or interrogation, any physical evidence, confession, or information directly obtained from the unlawful conduct will be inadmissible against the defendant whose rights were violated. The theory of the rule is that, if the suppression of evidence is the remedy for a police violation, the police will be deterred from committing the same kind of violations in the future. It is not a cost-free remedy. The suppression of evidence can undermine otherwise viable prosecutions and can often result in guilty defendants being released and victims of a crime losing their opportunity for justice. Therefore, it is crucial that law enforcement officers understand the rules and, as far as reasonably possible, perform their functions in accordance with them. They must be aware that handling even the most common police problems can raise serious criminal procedure and exclusionary rule issues.

In our adversarial justice system, defense attorneys, in addition to arguing the guilt or innocence of the defendant, routinely challenge the appropriateness and lawfulness of police actions. The most common challenges to pre-arrest police conduct pertain to probable cause for arrest, unreasonable search and seizure, and identification procedures. The most common challenges to post-arrest police conduct pertain to the right against compelled self-incrimination, the right to counsel, and the right to a fair trial. Judges decide the merits of these challenges. When they deem them meritorious, they decide whether the evidence should be suppressed. The following is a typical problem that arises every day across the nation.

Problem

Officers Able and Barker respond to a 911 call regarding a domestic incident at a private house. They meet Mrs. Warner, a middle-aged woman, in front of the house. Warner tells the officers that her 20-year-old daughter, Joan, who lives in the house off and on with her boyfriend, Charles Samson, called her yesterday and told her that Samson had hit her and threatened to shoot her. Warner says she has not heard from her daughter since and is worried about her. Warner also recounts that Samson, a male of about 40 years of age, 6 feet tall, and weighing 250 pounds, has abused her daughter in the past and threatened that if the daughter ever tried to leave him he would kill her. She also says Samson keeps a gun somewhere in the house; she knows this because she saw him with it once.

The officers knock on the front door, and Samson comes to the door but does not open it. Speaking through the door, Samson denies that he threatened Joan and refuses to allow the officers to enter the residence to search for her. He further states that Joan left the house yesterday and went to her girlfriend's house. He does not know the address, but he gives them Joan's cell phone number.

The officers call the cell phone number, but the line is temporarily disconnected. Again they knock on the door, and when Officer Barker asks Samson whether Joan is inside, he replies, "None of your goddamn business. And get off my property."

Barker shouts, "Open the door, or we'll break it down."

Samson shouts, "Go to hell!"

Questions

1. Do the officers have lawful authority to demand that Samson open the door?
2. Do the officers have a reasonable belief that a life-threatening emergency exists in the house?
3. Should the officers make further efforts to contact Joan before taking further action?
4. Should the officers forcibly enter the house to search for Joan?
5. Should the officers forcibly enter the house to search for the gun?
6. Should they get a search warrant before entering the house to search for Joan?
7. Should they get a search warrant before entering the house to search for the gun?
8. In either case, do they have probable cause to support the issuance of a search warrant?
9. Should they arrest Samson?
10. If they decide to arrest him, should they forcibly enter the house to do so?
11. Should they arrest Samson on the basis of the allegations of past abuse of Joan?
12. If they decide to arrest him, should they get an arrest warrant before entering the house?
13. If they arrest him in the house, should they search the house for Joan?
14. If they arrest him in the house, should they search the house for the gun?

Discussion

In situations such as that in the foregoing problem, whatever actions the officers take will have consequences. They have to make on-the-scene decisions on the basis of incomplete information while balancing safety concerns against civil rights protections. They have to decide whether to forcibly enter the residence, arrest Samson, search the house without a warrant, or obtain a search warrant.

It might seem that a judicious approach would be to continue investigating and, if further evidence develops, apply for a search warrant. Such an approach would clearly avoid violating constitutional rights; however, other considerations are pertinent, such as the possible destruction of evidence or danger to other persons. Depending on their on-the-scene assessment of Mrs. Warner's credibility, the available background information about Samson, or other information from witnesses, the officers will make their decision. What they choose to do and how they proceed might result in a proper adjudication of the matter, or it might result in a miscarriage of justice. If they recover a gun, it might prevent violence and lead to Samson's conviction. On the other hand, the recovered gun might be suppressed at trial because the court determines that the officers' actions violated constitutional rights. A court reviewing the officers' actions will need to hear testimony from witnesses describing the incident in detail and will need to ascertain all the information that the officers possessed at the time they made their decisions.

The officers' decisions and actions are assessed throughout the criminal justice process. In a typical case, after the police make an arrest and the prosecution consents to go forward

by filing a formal complaint with the court, the defendant will be arraigned. At the arraignment, the judge may release the defendant, set bail, or remand into custody without setting bail. When the defendant cannot post bail or has been remanded, the court must conduct a preliminary hearing within five days for a misdemeanor or seven days for a felony (unless waived by the defendant) to determine whether legally sufficient evidence has been presented to hold him for trial. If the prosecution cannot present legally sufficient evidence, the defendant must be released without bail. The prosecution can circumvent this process by obtaining a grand jury indictment.

Most cases are adjudicated by plea bargains in which the defendant enters a plea of guilty to the crime charged or to a lesser charge in exchange for a negotiated sentence. In cases that proceed toward trial, hearings are held regarding the admissibility of evidence and at these hearings judges make decisions that often affect the outcome of the case. Judges have been called gatekeepers: they must decide what evidence will be let through the gate, what will be kept out, and what will go forward to the next gate. The oft-quoted maxim that judges decide questions of law and juries decide questions of fact can be misleading. The maxim may apply to jury trials, but juries are not present at preliminary hearings, and judges must be both fact finders and arbiters of the law. They apply the facts to the legal standards that must be met to justify government actions.

Some of the standards that courts have applied are set forth below. They are not all-inclusive, and some courts have used variations:

Stop and question

Reasonable suspicion—Facts and circumstances that would lead an officer of ordinary intelligence, judgment, and experience to believe that criminal activity is afoot

Arrest

Probable cause—Facts and circumstances to warrant a person of ordinary intelligence, judgment, and experience to believe that an offense has been or is being committed by a particular person

Search with a warrant

Probable cause and particularity—Facts and circumstances to warrant an officer of reasonable intelligence and experience to believe that particular articles subject to seizure are located at a particular location[2]

Search without a warrant

Recognized exception to the warrant requirement—A life-threatening emergency, hot pursuit, or other circumstances requiring urgent action

Prosecution

Legally sufficient evidence—Evidence of a non-hearsay nature supporting each and every element of the crime charged

Prosecution's direct case

Prima facie evidence—Evidence presented in court which, if left unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the charge it supports

Affirmative defenses

Preponderance of the evidence—Evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it

Conviction

Proof beyond a reasonable doubt—Facts and circumstances that would lead a juror of ordinary intelligence, common sense, and experience to be firmly convinced that the defendant is guilty; the juror's conclusion must be based on reason and common sense and must be of such a convincing character that the juror would be willing to rely and act upon it unhesitatingly

Failure to meet one or more of the above standards, depending on the stage of the proceedings, may result in suppression of evidence, dismissal of the charges, a directed verdict of acquittal, or a jury verdict of not guilty. Meeting the above standards may result in a verdict of guilty; however, the proof beyond a reasonable doubt standard for a guilty verdict is the most difficult to meet and, consequently, in a substantial number of cases truly guilty defendants are found not guilty. A not guilty verdict does not necessarily mean that the defendant was innocent; it means that the prosecution did not meet its burden to prove the case and to overcome the defendant's presumption of innocence.

A consensus on an exact definition of proof beyond reasonable doubt has not been reached, and the instructions that judges give to juries about its meaning vary from court to court. The U.S. Supreme Court has not provided a precise definition, and in *Victor v. Nebraska*, 511 U.S. 1 (1994), the Court held only that "taken as a whole, the instructions must properly convey the concept of reasonable doubt." The Court suggested that it would approve the following jury instructions:

> The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Due process of law does not require that a jury acquit a defendant on a mere possibility of doubt, but it requires a higher degree of proof than the preponderance of evidence standard that is used in civil lawsuits.[3] Due process requires jurors to deliberate impartially and in an environment in which coercion is absent.

A jury instruction that violated due process was given in the murder trial of Benjamin Feldman. Regarding reasonable doubt, the trial judge instructed the jury:

> It is not a doubt based upon sympathy or whim or prejudice or bias or a caprice, or a sentimentality, or upon a reluctance of a weak-kneed, timid, jellyfish of a juror who is seeking to avoid the performance of a disagreeable duty, namely, to convict another human being of the commission of a serious crime.

The New York Court of Appeals in *People v. Feldman*, 296 N.Y. 127 (1947), disapproved of the instruction and reversed the defendant's conviction, ruling that the judge's instruction was not conducive to a fair and impartial consideration of the evidence.

Our society adheres to the proof beyond a reasonable doubt standard to reduce the risk of erroneously punishing an innocent person. Simply, our value system holds that we should not condemn a person when there is a reasonable doubt about their guilt: "It is far worse to convict an innocent man than to let a guilty man go free."[4]

The question of how far we should tip the scales of justice in favor of an accused in order to avoid mistakes has been debated ever since Lord Blackstone made his comment, "It is better that ten guilty persons escape, than that one innocent suffer."[5] His comment has raised questions. Is there a point at which too many rights and protections for an accused will make it too difficult to obtain a conviction? At what point will acquittals of too many guilty defendants lead to disorder and unlawfulness? Should we tolerate the possibility of a small percentage of wrongful convictions of innocent persons in order to maintain the ability of the system to convict guilty persons?

The principal questions underlying Blackstone's comment pertain not just to questions of guilt or innocence, but to every stage of the criminal justice process. What should the balance be between police and prosecutorial authority on the one hand and the rights and protections of the individual on the other? At what point will too much police and prosecutorial authority turn our nation into a totalitarian state? At what point will too much support and enforcement of individual liberties prevent law enforcement from effectively performing its functions?

These are but a few of the many questions about our criminal procedure law that are under continual debate. They are the kind of difficult questions that will be asked in the chapters that follow, questions that affect us in important ways both as individuals and as a society.

Notes

1 *Palko v. Connecticut*, 302 U.S. 319 (1937).
2 *Carroll v. United States*, 267 U.S. 132 (1925); *Brinegar v. United States*, 338 U.S. 160 (1949); *Draper v. United States*, 358 U.S. 307 (1959); *Beck v. Ohio*, 379 U.S. 89 (1964).
3 *People v. Sandoval*, 34 N.Y.2d 971 (1974).
4 *In re Winship*, 397 U.S. 358, 90 S.Ct. 692 (1970), J. Harlan, concurrence.
5 Blackstone, *Commentaries on the Laws of England* (1765), 2 Bl.Com.c.27, p.358.

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Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980).
United States v. Matlock, 415 U.S. 164 (1974).

Chapter 2

Social Control in a Free Society

Liberty and freedom are elements of the American national identity, but liberty and freedom require a satisfactory level of order and security. Criminal law, its enforcement, and the threat of its enforcement are the principal means by which the government protects citizens against harm to their persons and property, and thereby provides the necessary environment for the exercise of liberty and freedom. Criminal law sets the outer boundaries of acceptable conduct and draws the line between the individual's exercise of freedom and the infringement of the rights of others. As with all laws, criminal laws tell people what they must or must not do.

Not all antisocial, injurious, or wrongful behavior is criminal; only acts deemed substantially harmful to the foundations of society or detrimental to its efficient functioning are defined as criminal. A crime is a social harm caused by conduct that is defined and made punishable by law.

The social harm caused by a crime justifies the imposition of punishment for the general deterrence of the public and also for the specific deterrence, incapacitation, or rehabilitation of the individual. Moreover, in some particularly heinous cases, arguably, it justifies punishment as a means of retribution. Punishments can include fines, probation, incarceration, and, in some states, execution. While the severity of the harm caused is the primary determinant of the severity of the punishment imposed, the background of the convicted person also influences decisions about punishment. In most cases, a first-time offender will receive a lesser punishment than a repeat offender for the same crime.

Deterrence also arises because of the social stigma attached to a criminal conviction. Crimes are distinguishable from private wrongs not only because of the possibility of state-sanctioned punishment, but also because conviction for a crime is accompanied by community condemnation.

> The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.[1]

The stigma of a criminal conviction can adversely affect the remainder of a person's life by making him or her ineligible for certain jobs, occupations, or licenses. Furthermore, a convicted felon is ineligible to vote.

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Throughout history, and across all societies, some acts have consistently been deemed criminal. Murder, atrocious assault, forcible rape, robbery, burglary, grand larceny, and arson have been considered *malum in se*, or bad in themselves, and every society throughout every era has punished these acts. Other acts have been considered merely *malum prohibitum*, or crimes only because they have been defined by law as such. These have varied from society to society and from era to era. Each society and each generation has reached a judgment that certain kinds of conduct, although not inherently or universally wrong, are detrimental to the public good and should therefore be deterred by the threat of punishment.

An understanding of modern criminal law requires a look back in history at the moral, religious, cultural, economic, and political influences that led to the formation of our present system. In many aspects, the principles of modern criminal law can be traced to the laws of ancient societies; in other aspects, the contrasts between modern criminal law and the laws of earlier societies are striking. Statutory law can be traced to the Code of Hammurabi, a set of laws from the ancient kingdom of Babylon, which thrived for hundreds of years in the area of modern-day Iraq. Named after King Hammurabi, who ruled around 1792 to 1750 B.C., the Code was found inscribed on a stone pillar about eight feet high and five feet in circumference, near the ruins of the city of Susa.[2] It enumerated crimes and punishments for matters pertaining to property, theft, sexual relationships, and violence. Like modern law, the Code provided notices, instructions, and warnings to citizens. In contrast to modern law, the Code dispensed justice in unequal terms, with outcomes and punishments determined by the social status of the violator and the victim. Examples of its pronouncements are as follows:

7. If any one 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.
129. If a man's wife be surprised with another man, both shall be tied and thrown into the water, but the husband may pardon his wife and the king his slaves.
145. If a man takes a wife, and she bear him no children, and he intend to take another wife: if he take this second wife, and bring her into the house, this second wife shall not be allowed equality with his wife.
195. If a son strike his father, his hands shall be hewn off.
196. If a man put out the eye of another man, his eye shall be put out.
198. If he put out the eye of a freed man, or break the bone of a freed man, he shall pay one gold mina.
199. If he put out the eye of a man's slave, or break the bone of a man's slave, he shall pay one-half of its value.
200. If a man knock out the teeth of his equal, his teeth shall be knocked out.[3]

Without more information about the culture of Babylonian society, it is difficult to gauge how strictly the Code and its punishments were enforced. It is also difficult to judge the morality of such laws without a fuller understanding of the circumstances that produced them.

For Greek and Roman laws, we have more information on which to make judgments. In 621 B.C., the first written code of laws for the Greek city-state of Athens was promulgated by Draco, a statesman of Athens. The word "draconian" derives from his name and the severity of the punishments he imposed on his subjects. The Athenian code was liberalized significantly by the statesman Solon (638–558 B.C.), who was appointed chief executive magistrate in the hope that he would reconcile disputes between the nobles and

the commoners. He promulgated laws that gave commoners a greater share of wealth and power, the right to bring lawsuits against nobles, and the right to appeal to the jury-court, which handled both public and private disputes.[4]

> He gave every citizen the privilege of entering suit in behalf of one who had suffered wrong. If a man was assaulted, and suffered violence or injury, it was the privilege of any one who had the ability and the inclination to indict the wrongdoer and prosecute him. The lawgiver in this way rightly accustomed the citizens, as members of one body, to feel and sympathize with one another's wrongs.[5]

Greek philosophers delved into the justification for law and the right to punish. Both Plato and Aristotle pontificated about the nature of law and the imperative that man's laws be based on divine or natural law. In general and abstract terms, they concluded that laws incompatible with divine or natural law were unjust.[6]

It is believed that a commission from Rome traveled to Athens to study the Athenian laws. Early Roman law was memorialized in the Twelve Tables, which set forth basic rules relating to family, religious, and economic life. In about 450 B.C., the Tables were engraved on bronze tablets, which were then erected in the Roman Forum. Although only fragments have survived, much of their contents have been reconstructed from other records. The Tables were comprehensive but required interpretation. Consequently, *pontifices*, or priests, interpreted the Tables for their application to particular cases; for example, the law of arson stated:

> Any person who destroys by burning any building or heap of corn deposited alongside a house shall be bound, scourged, and put to death by burning at the stake, provided that he has committed the said misdeed with malice aforethought.[7]

The term "malice aforethought" had to be interpreted, and defining, applying, and proving it were critical matters that, then as now, required good judgment and understanding.

At a critical time for the Roman Republic, Marcus Tullius Cicero (106–43 B.C.), a powerful statesman, jurist, and philosopher, described the ideals of law. His thoughts were a culmination of Greek and Roman philosophy, and they foreshadowed the natural law tenets of the European Enlightenment and the American revolutionary period:

> True Law is Reason, right and natural, commanding people to fulfill their obligations and prohibiting and deterring them from doing wrong. Its validity is universal; it is immutable and eternal. Its commands and prohibition apply effectively to good men, and those uninfluenced by them are bad. Any attempt to supersede this law, to repeal any part of it, is sinful; to cancel it entirely is impossible. Neither the Senate nor the assembly can exempt us from its demands; we need no interpreter or expounder of it but ourselves. There will not be one law at Rome, one at Athens, or one now and one later, but all nations will be subject all the time to this one changeless and everlasting law.[8]

Near the end of the Roman Empire, from 527 to 565 A.D., the Emperor Justinian I ruled the eastern half of the empire from the capital city of Constantinople (today's Istanbul). The emperor ordered a compilation of Roman law—the *Corpus Juris Civilis*—which came to be known as the Justinian Code. This delineated public law and private law. Public law dealt with the organization of the Roman state, its senate, and government offices; private

law dealt with contracts, property, and the legal status of citizens, free persons, slaves, freedmen, husbands, and wives. It also provided remedies for wrongs and injuries. Written roughly 2000 years after the Code of Hammurabi, the Justinian Code had differences from and similarities with the Code of Hammurabi. Like the Code of Hammurabi, the Justinian Code provides a view of the class structure and inequalities of an ancient society. Unlike the Code of Hammurabi, it places great weight on a potential wrongdoer's state of mind in conjunction with his actions. The emphasis on the actor's state of mind demonstrates the development of social complexity and the advancement of critical legal analysis. The following are examples from Book 4 of the Justinian Code:

Part I, Section 7. A person, however, who borrows a thing, and applies it to a purpose other than that for which it was lent, only commits theft if he knows that he is acting against the wishes of the owner, and that the owner, if he were informed, would not permit it; for if he really thinks the owner would permit it, he does not commit a crime; and this is a very proper distinction, for there is no theft without the intention to commit a theft.

Part I, Section 18. It should be observed that the question has been asked whether, if a person under the age of puberty, takes away the property of another, he commits a theft. The answer is that it is the intention that makes the theft; such a person is only bound by the obligation springing from the delinquency if he is near the age of puberty, and consequently understands that he commits a crime.

Part III, Section 2. To kill wrongfully is to kill without any right; consequently, a person who kills a thief is not liable to this action, that is, if he could not otherwise avoid the danger with which he was threatened.

Part III, Section 3. Nor is a person made liable by this law who has killed by accident, provided there is no fault on his part, for this law punishes fault as well as willful wrong-doing.

"Justice is the constant and perpetual wish to render everyone his due" was a noteworthy pronouncement of the Justinian Code. Though Roman law had merits over and above some other systems, to the modern mind, the Roman idea of justice is critically flawed. Modern democratic values do not countenance qualifying a person's "due" according to his or her social status. The following examples from the Code are illustrative:

Part III, Section 4. Consequently, if anyone playing or practicing with a javelin, pierces with it your slave as he goes by, there is a distinction made; if the accident befalls a soldier while in the camp, or other places appropriate to military exercises, there is no fault in the soldier, but there would be in anyone besides a soldier, and the soldier himself would be in fault if he inflicted such an injury in any other place than one appropriated to military exercises.

Part IV, Section 3. An injury cannot, properly speaking, be done to a slave, but it is the master who, through the slave, is considered to be injured; not, however, in the same way as through a child or wife, but only when the act is of a character grave enough to make it a manifest insult to the master, as if a person has flogged severely the slave of another, in which case this action is given against him. But a master cannot bring an action against a person who has collected a crowd round his slave, or struck him with his fist.

After the fall of Constantinople and the end of the Eastern Roman Empire in 1453 A.D., the Justinian Code lost its authority. However, many of its principles were adopted in the

West by the Holy Roman Empire and later by the monarchies in Austria, Germany, France, and Spain.

In 1791, during the French Revolution, the National Constituent Assembly enacted a new penal code that emphasized the ideals of rationalism. The new penal code eliminated "phony offenses, created by superstition, feudalism, the tax system, and despotism," including such offenses as blasphemy, heresy, sacrilege, and witchcraft. The Assembly also eliminated the disparate criminal punishments imposed due to a person's status. In keeping with its motto of liberty, fraternity, and equality, and also in keeping with those stark and brutal times, the Assembly ruled that all citizens would be entitled to the same method of execution. No longer would aristocrats have the benefit of being beheaded while peasants suffered crueler forms of death: all condemned citizens would be guillotined, not only the aristocrats.

In 1804, Napoleon Bonaparte ordered the writing of a new Civil Code that followed the traditional Roman civil law traditions but also reflected the egalitarian principles of revolutionary France. Known as the Napoleonic Code, the new law was designed to reduce the power and independence of judges, who in pre-revolutionary France were arms of the king. Statutory law would be primary, and judges were only to discover the applicable statutes and apply them to cases without interposing their own opinions. However, the reality has always been that a code cannot predict every problem, and judges invariably must interpret the law and express opinions in order to apply a statute correctly.

In England, judges not only interpreted the law but also made the law. In early English history, Anglo-Saxon tribal leaders and judges settled disputes, and as a result wide variations among localities militated against uniformity in the law. Then, in 1066, William the Conqueror, the Norman king, invaded England from Normandy in France and defeated the Anglo-Saxons at the Battle of Hastings. To consolidate his rule, he sent commissioners to ascertain the varying judge-made laws and rulings of the local communities and to consolidate the best of these into a single body of general principles. These principles and decisions have come to be known as the common law.

Although England did not adopt the Roman civil law model, the Normans integrated some concepts of Roman law into English common law, and this is the source of the extensive use of Latin phrases in English law. The Latin rubric *stare decisis et non quieta movere*, or "stand by the decision and do not disturb what is settled," is an important principle of common law.

Under the common-law system, decided cases became precedents for subsequent cases that had similar facts or issues, and, in order to promote uniformity and stability in the law, judges bound themselves to decide cases according to the established precedents. To facilitate adherence to precedents, the decisions of judges were written and compiled in source books. In 1765, William Blackstone published *Commentaries on the Laws of England*, the most comprehensive written source of common law, and this became the primary sourcebook for subsequent English and American law.

American courts follow the common-law procedure of adherence to precedents. For state and non-federal issues, American state courts are only bound by decisions within the state jurisdiction. Thus, a Texas court is not bound by a California court opinion, although the Texas court could voluntarily adopt the reasoning of the California opinion. For federal issues, state courts have to follow the precedents of the U.S. Supreme Court and the federal Circuit Courts of Appeal.

Although the common-law system provides uniformity and stability, it is flexible enough to adapt to changing circumstances and evolving standards and values. A court may overrule its own precedent, or a higher court may reverse a lower court. More often, rather than