



This is “Introduction to Criminal Law”, chapter 1 from the book [Introduction to Criminal Law \(index.html\)](#) (v. 1.0).

This book is licensed under a [Creative Commons by-nc-sa 3.0](http://creativecommons.org/licenses/by-nc-sa/3.0/) license. See the license for more details, but that basically means you can share this book as long as you credit the author (but see below), don't make money from it, and do make it available to everyone else under the same terms.

This content was accessible as of December 29, 2012, and it was downloaded then by [Andy Schmitz](#) (<http://lardbucket.org>) in an effort to preserve the availability of this book.

Normally, the author and publisher would be credited here. However, the publisher has asked for the customary Creative Commons attribution to the original publisher, authors, title, and book URI to be removed. Additionally, per the publisher's request, their name has been removed in some passages. More information is available on this project's [attribution page](http://2012books.lardbucket.org/attribution.html?utm_source=header).

For more information on the source of this book, or why it is available for free, please see [the project's home page](#) (<http://2012books.lardbucket.org/>). You can browse or download additional books there.

# Chapter 1

---

## Introduction to Criminal Law

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.

- *BMW of North America, Inc. v. Gore*, cited in Section 1 "Damages"



Source: Image courtesy of Tara Storm.

---

## 1.1 Introduction

### LEARNING OBJECTIVE

1. Define a crime.

This textbook introduces you to our legal system in the United States, the basic elements of a crime, the specific elements of commonly encountered crimes, and most criminal defenses. Criminal law always involves the government and government action, so you will also review the pertinent sections of the United States Constitution and its principles as they apply to criminal law. By the end of the book, you will be comfortable with the legal framework that governs the careers of criminal justice professionals.

### Definition of a Crime

Let's begin at the beginning by defining a **crime**<sup>1</sup>. The most basic definition of a crime is "an act committed in violation of a law prohibiting it, or omitted in violation of a law ordering it." Yourdictionary.com, "Definition of Crime," accessed August 15, 2010, <http://www.yourdictionary.com/crime>. You learn about criminal act and omission to act in **Chapter 4 "The Elements of a Crime"**. For now, it is important to understand that criminal act, omission to act, and criminal intent are **elements** or parts of every crime. **Illegality** is also an element of every crime. Generally, the *government* must enact a *criminal law* specifying a crime and its elements before it can punish an individual for criminal behavior. Criminal laws are the primary focus of this book. As you slowly start to build your knowledge and understanding of criminal law, you will notice some unique characteristics of the United States' legal system.

Laws differ significantly from state to state. Throughout the United States, each state and the federal government criminalize different behaviors. Although this plethora of laws makes American legal studies more complicated for teachers and students, the size, cultural makeup, and geographic variety of our country demand this type of legal system.

1. An act committed in violation of a law prohibiting it or omitted in violation of a law ordering it.

Laws in a democratic society, unlike laws of nature, are created by *people* and are founded in religious, cultural, and historical value systems. People from varying backgrounds live in different regions of this country. Thus you will see that different people enact distinct laws that best suit their needs. This book is intended

for use in all states. However, the bulk of any criminal law overview is an examination of different crimes and their elements. To be accurate and representative, this book focuses on *general* principles that *many* states follow and provides frequent references to specific state laws for illustrative purposes. Always check the most current version of your state's law because it may vary from the law presented in this book.

Laws are not *static*. As society changes, so do the laws that govern behavior. Evolving value systems naturally lead to new laws and regulations supporting modern beliefs. Although a certain stability is essential to the enforcement of rules, occasionally the rules must change.

Try to maintain an open mind when reviewing the different and often contradictory laws set forth in this book. Law is not exact, like science or math. Also try to become comfortable with the gray area, rather than viewing situations as black or white.

#### KEY TAKEAWAY

- A crime is an act committed in violation of a law prohibiting it or omitted in violation of a law ordering it. In general, the criminal law must be enacted before the crime is committed.

#### EXERCISE

Answer the following question. Check your answer using the answer key at the end of the chapter.

1. Read *Gonzales v. Oregon*, 546 U.S. 243 (2006). Did the US Supreme Court preserve Oregon's right to legalize physician-assisted suicide? The case is available at this link: <http://www.law.cornell.edu/supct/html/04-623.ZS.html>.

## 1.2 Criminal Law and Criminal Procedure

### LEARNING OBJECTIVE

1. Compare criminal law and criminal procedure.

This book focuses on **criminal law**<sup>2</sup>, but it occasionally touches on issues of **criminal procedure**<sup>3</sup>, so it is important to differentiate between the two.

Criminal law generally defines the *rights* and *obligations* of individuals in society. Some common issues in criminal law are the elements of specific crimes and the elements of various criminal defenses. Criminal procedure generally concerns the *enforcement* of individuals' rights during the criminal process. Examples of procedural issues are individuals' rights during law enforcement investigation, arrest, filing of charges, trial, and appeal.

### Example of Criminal Law Issues

Clara and Linda go on a shopping spree. Linda insists that they browse an expensive department store. Moments after they enter the lingerie department, Linda surreptitiously places a bra in her purse. Clara watches, horrified, but does not say anything, even though a security guard is standing nearby. This example illustrates two issues of criminal law: (1) Which crime did Linda commit when she shoplifted the bra? (2) Did Clara commit a crime when she failed to alert the security guard to Linda's shoplifting? You learn the answer to issue (1) in [Chapter 11 "Crimes against Property"](#) and issue (2) in [Chapter 4 "The Elements of a Crime"](#) and [Chapter 7 "Parties to Crime"](#).

### Example of Criminal Procedure Issues

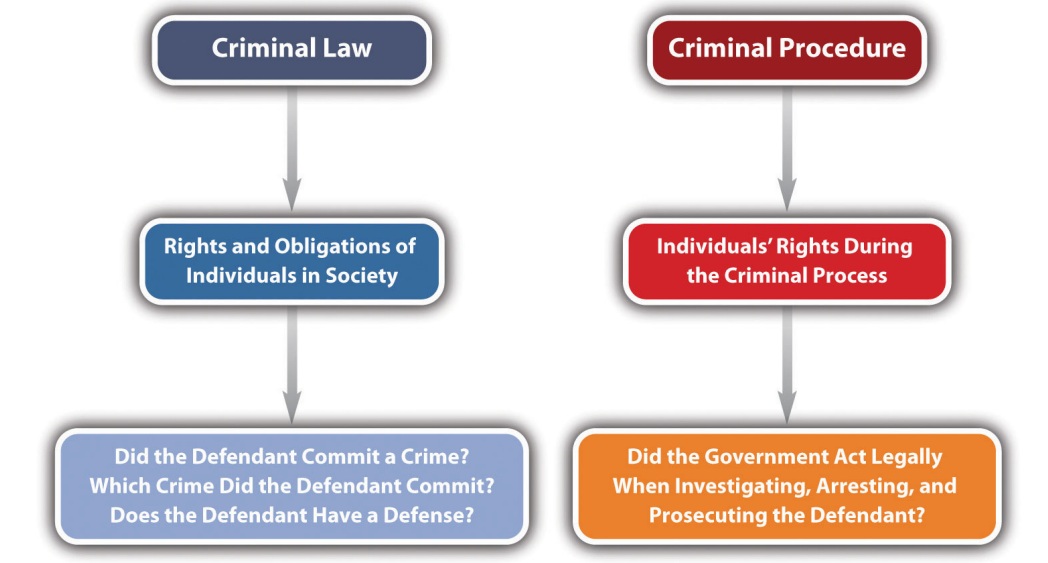
Review the example in [Section 1.2.1 "Example of Criminal Law Issues"](#). Assume that Linda and Clara attempt to leave the store and an alarm is activated. Linda begins sprinting down the street. Colin, a police officer, just happens to be driving by with the window of his patrol car open. He hears the store alarm, sees Linda running, and begins shooting at Linda from the car. Linda is shot in the leg and collapses. Linda is treated at the hospital for her injury, and when she is released, Colin arrests her and transports her to the police station. He brings her to an isolated room and leaves her there alone. Twelve hours later, he reenters the room and begins questioning Linda. Linda immediately requests an attorney. Colin ignores

2. A body of law defining the rights and obligations of individuals in society.

3. A body of law relating to the enforcement of individuals' rights during the criminal process.

this request and continues to question Linda about the reason the department store alarm went off. Whether Colin properly arrested and interrogated Linda are **criminal procedure** issues beyond the scope of this book. However, this example does illustrate one criminal law issue: did Colin *commit a crime* when he shot Linda in the leg? You learn the answer to this question in Chapter 5 "Criminal Defenses, Part 1".

Figure 1.1 *Criminal Law and Criminal Procedure*



### KEY TAKEAWAY

- Criminal law generally defines the rights and obligations of individuals in society. Criminal procedure generally concerns the enforcement of individuals' rights during the criminal process.

## EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Paul, a law enforcement officer, arrests Barney for creating a disturbance at a subway station. While Barney is handcuffed facedown on the ground, Paul shoots and kills him. Paul claims that he accidentally grabbed his gun instead of his Taser. Is this an issue of criminal law or criminal procedure?
2. Read *Payton v. New York*, 445 U.S. 573 (1980). In *Payton*, the US Supreme Court held a New York statute unconstitutional under the Fourth Amendment. Did the *Payton* ruling focus on criminal law or criminal procedure? The case is available at this link: <http://supreme.justia.com/us/445/573>.

## 1.3 The Difference between Civil and Criminal Law

### LEARNING OBJECTIVES

1. Compare civil and criminal law.
2. Ascertain the primary differences between civil litigation and a criminal prosecution.

Law can be classified in a variety of ways. One of the most general classifications divides law into civil and criminal. A basic definition of civil law is “the body of law having to do with the private rights of individuals.” Yourdictionary.com, “Definition of Civil Law,” accessed August 16, 2010, <http://www.yourdictionary.com/civil-law>. As this definition indicates, civil law is between individuals, not *the government*. Criminal law involves regulations enacted and enforced by government action, while civil law provides a remedy for individuals who need to enforce private rights against other individuals. Some examples of civil law are family law, wills and trusts, and contract law. If individuals need to resolve a *civil dispute*, this is called **civil litigation**<sup>4</sup>, or a civil lawsuit. When the type of civil litigation involves an injury, the injury action is called a **tort**<sup>5</sup>.

### Characteristics of Civil Litigation

It is important to distinguish between civil litigation and **criminal prosecution**<sup>6</sup>. Civil and criminal cases share the same courts, but they have very different goals, purposes, and results. Sometimes, one set of facts gives way to a civil lawsuit *and* a criminal prosecution. This does not violate double jeopardy and is actually quite common.

4. A legal action between individuals to resolve a civil dispute.
5. A civil litigation matter that seeks to compensate a victim for an injury.
6. A legal action where the government prosecutes a defendant to protect the public.
7. The individual suing in a civil litigation matter.

### Parties in Civil Litigation

In civil litigation, an injured party sues to receive a court-ordered remedy, such as money, property, or some sort of performance. Anyone who is injured—an individual, corporation, or other business entity—can sue civilly. In a civil litigation matter, the injured party that is suing is called the **plaintiff**<sup>7</sup>. A plaintiff must hire and pay for an attorney or represent himself or herself. Hiring an attorney is one of the many costs of litigation and should be carefully contemplated before jumping into a lawsuit.



The alleged wrongdoer and the person or entity being sued are called the **defendant**<sup>8</sup>. While the term *plaintiff* is always associated with civil litigation, the wrongdoer is called a defendant in *both* civil litigation and a criminal prosecution, so this can be confusing. The defendant can be any person or thing that has caused harm, including an individual, corporation, or other business entity. A defendant in a civil litigation matter must hire and pay for an attorney *even if that defendant did nothing wrong*. The right to a free attorney does not apply in civil litigation, so a defendant who cannot afford an attorney must represent himself or herself.

### Goal of Civil Litigation

The *goal* of civil litigation is to *compensate the plaintiff* for any injuries and to put the plaintiff back in the position that person held before the injury occurred. This goal produces interesting results. It occasionally creates liability or an obligation to pay when there is no fault on behalf of the defendant. The goal is to make the plaintiff whole, not to punish, so *fault* is not really an issue. If the defendant has the resources to pay, sometimes the law requires the defendant to pay so that society does not bear the cost of the plaintiff's injury.

A defendant may be liable without fault in two situations. First, the law that the defendant violated may not require fault. Usually, this is referred to as **strict liability**<sup>9</sup>. Strict liability torts do not require fault because they do not include an intent component. Strict liability and other intent issues are discussed in detail in Chapter 4 "The Elements of a Crime". Another situation where the defendant may be liable without fault is if the defendant did not actually commit any act but is associated with the acting defendant through a *special relationship*. The policy of holding a separate entity or individual liable for the defendant's action is called **vicarious liability**<sup>10</sup>. An example of vicarious liability is employer-employee liability, also referred to as **respondeat superior**<sup>11</sup>. If an employee injures a plaintiff while on the job, the *employer* may be liable for the plaintiff's injuries, whether or not the employer is at fault. Clearly, between the employer and the employee, the employer generally has the better ability to pay.

8. The alleged wrongdoer in a civil litigation matter and a criminal prosecution.
9. Liability without intent.
10. The transfer of a defendant's liability based upon a special relationship.
11. A doctrine that holds the employer civilly liable for an employee's conduct while on the job.

### Example of Respondeat Superior

Chris begins the first day at his new job as a cashier at a local McDonald's restaurant. Chris attempts to multitask and pour hot coffee while simultaneously handing out change. He loses his grip on the coffee pot and spills steaming-hot coffee on his customer Geoff's hand. In this case, Geoff can sue *McDonald's and Chris* if he sustains injuries. McDonald's is not technically at fault, but it may be liable for Geoff's injuries under a theory of respondeat superior.

## Harm Requirement

The goal of civil litigation is to compensate the plaintiff for injuries, so the plaintiff must be a bona fide **victim** that can prove **harm**. If there is no evidence of harm, the plaintiff has no basis for the civil litigation matter. An example would be when a defendant rear-ends a plaintiff in an automobile accident without causing damage to the vehicle (property damage) or physical injury. Even if the defendant is at fault for the automobile accident, the plaintiff cannot sue because the plaintiff does not need compensation for any injuries or losses.

## Damages

Often the plaintiff sues the defendant for money rather than a different, performance-oriented remedy. In a civil litigation matter, any money the court awards to the plaintiff is called **damages**<sup>12</sup>. Several kinds of damages may be appropriate. The plaintiff can sue for **compensatory damages**<sup>13</sup>, which compensate for injuries, **costs**<sup>14</sup>, which repay the lawsuit expenses, and in some cases, **punitive damages**<sup>15</sup>. Punitive damages, also referred to as **exemplary damages**, are *not* designed to compensate the plaintiff but instead focus on *punishing* the defendant for causing the injury. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), accessed February 13, 2010, <http://www.law.cornell.edu/supct/html/94-896.ZO.html>.

## Characteristics of a Criminal Prosecution

A criminal prosecution takes place after a defendant violates a federal or state criminal statute, or in some jurisdictions, after a defendant commits a common-law crime. Statutes and common-law crimes are discussed in Section 1.6 "Sources of Law".

### Parties in a Criminal Prosecution

The government institutes the criminal prosecution, rather than an individual plaintiff. If the defendant commits a federal crime, **the United States of America** pursues the criminal prosecution. If the defendant commits a state crime, the state government, often called the **People of the State** pursues the criminal prosecution. As in a civil lawsuit, the alleged wrongdoer is called the **defendant** and can be an individual, corporation, or other business entity.

The *attorney* who represents the government controls the criminal prosecution. In a federal criminal prosecution, this is the **United States Attorney**<sup>16</sup>. United States Department of Justice, "United States Attorneys," accessed February 15, 2010, <http://www.justice.gov/usao>. In a state criminal prosecution, this is generally a

12. Money the court awards the plaintiff in a civil litigation matter.
13. Damages that compensate the plaintiff for injury.
14. Damages that reimburse the plaintiff for money spent on the civil lawsuit.
15. Damages designed to punish the defendant.
16. The attorney representing the federal government in a federal criminal prosecution.

**state prosecutor**<sup>17</sup> or a **district attorney**. “United States’ Prosecuting Attorneys,” Galaxy.com website, accessed February 15, 2010, [http://www.galaxy.com/dir968533/United\\_States.htm](http://www.galaxy.com/dir968533/United_States.htm). A state prosecutor works for the state but is typically an elected official who represents the county where the defendant allegedly committed the crime.

### Applicability of the Constitution in a Criminal Prosecution

The defendant in a criminal prosecution can be represented by a private attorney or a *free* attorney paid for by the state or federal government if he or she is *unable to afford attorney’s fees* and *facing incarceration*. *Alabama v. Shelton*, 535 U.S. 654 (2002), accessed August 16, 2010, <http://www.law.cornell.edu/supct/html/00-1214.ZO.html>. Attorneys provided by the government are called **public defenders**<sup>18</sup>. 18 U.S.C. § 3006A, accessed February 15, 2010, <http://www.law.cornell.edu/uscode/18/3006A.html>. This is a significant difference from a civil litigation matter, where both the plaintiff and the defendant must hire and pay for their own private attorneys. The court appoints a free attorney to represent the defendant in a criminal prosecution because *the Constitution is in effect* in any criminal proceeding. The Constitution provides for the assistance of counsel in the Sixth Amendment, so *every* criminal defendant facing incarceration has the right to legal representation, regardless of wealth.

The presence of the Constitution at every phase of a criminal prosecution changes the proceedings significantly from the civil lawsuit. The criminal defendant receives many constitutional *protections*, including the right to remain silent, the right to due process of law, the freedom from double jeopardy, and the right to a jury trial, among others.

### Goal of a Criminal Prosecution

Another substantial difference between civil litigation and criminal prosecution is the *goal*. Recall that the goal of civil litigation is to compensate the plaintiff for injuries. In contrast, the goal of a criminal prosecution is to *punish* the defendant.

One consequence of the goal of punishment in a criminal prosecution is that *fault* is almost always an element in any criminal proceeding. This is unlike civil litigation, where the ability to pay is a priority consideration. Clearly, it is unfair to punish a defendant who did nothing wrong. This makes criminal law justice oriented and very satisfying for most students.

Injury and a victim are *not* necessary components of a criminal prosecution because punishment is the objective, and there is no plaintiff. Thus behavior can be criminal

17. The attorney representing the state government in a state criminal prosecution.

18. A government attorney who represents criminal defendants who cannot afford attorney’s fees and are facing incarceration.

even if it is essentially harmless. Society does not condone or pardon conduct simply because it fails to produce a tangible loss.

**Examples of Victimless and Harmless Crimes**

Steven is angry because his friend Bob broke his skateboard. Steven gets his gun, which has a silencer on it, and puts it in the glove compartment of his car. He then begins driving to Bob’s house. While Steven is driving, he exceeds the speed limit on three different occasions. Steven arrives at Bob’s house and then he hides in the bushes by the mailbox and waits. After an hour, Bob opens the front door and walks to the mailbox. Bob gets his mail, turns around, and begins walking back to the house. Steven shoots at Bob three different times but misses, and the bullets end up landing in the dirt. Bob does not notice the shots because of the silencer.

In this example, Steven has committed several crimes: (1) If Steven does not have a special permit to carry a concealed weapon, putting the gun in his glove compartment is probably a crime in most states. (2) If Steven does not have a special permit to own a silencer for his gun, this is probably a crime in most states. (3) If Steven does not put the gun in a locked container when he transports it, this is probably a crime in most states. (4) Steven committed a crime each time he exceeded the speed limit. (5) Each time Steven shot at Bob and missed, he probably committed the crime of attempted murder or assault with a deadly weapon in most states. Notice that none of the crimes Steven committed caused any discernible harm. However, common sense dictates that Steven should be punished so he does not commit a criminal act in the future that *may* result in harm.

Table 1.1 Comparison of Criminal Prosecution and Civil Litigation

Feature	Criminal Prosecution	Civil Litigation
Victim	No	Yes. This is the plaintiff.
Harm	No	Yes. This is the basis for damages.
Initiator of lawsuit	Federal or state government	Plaintiff
Attorney for the initiator	US Attorney or state prosecutor	Private attorney
Attorney for the defendant	Private attorney or public defender	Private attorney
Constitutional protections	Yes	No

Figure 1.2 *Crack the Code*

**Crack the Code**

**Compare the following state laws:**

**Fla.Stat.Ann. §768.19:**

**768.19 Right of action.**—When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

**Fla.Stat.Ann. §782.04:**

Murder. (1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; ...
2. is murder in the first degree and constitutes a capital felony, punishable as provided in §775.082.

**Comparison of civil wrongful death with criminal murder**

## LAW AND ETHICS: THE O. J. SIMPSON CASE

### Two Different Trials—Two Different Results

O. J. Simpson was prosecuted criminally and sued civilly for the murder and wrongful death of victims Ron Goldman and his ex-wife, Nicole Brown Simpson. In the criminal prosecution, which came first, the US Constitution provided O. J. Simpson with the right to a fair trial (due process) and the right to remain silent (privilege against self-incrimination). Thus the burden of proof was beyond a reasonable doubt, and O. J. Simpson did *not* have to testify. O. J. Simpson was acquitted, or found *not guilty*, in the criminal trial. Doug Linder, “The Trial of Orenthal James Simpson,” UMKC website, accessed August 18, 2010, <http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonaccount.htm>.

In the subsequent civil lawsuit, the burden of proof was preponderance of evidence, which is 51–49 percent, and O. J. Simpson was forced to testify. O. J. Simpson was found *liable* in the civil lawsuit. The jury awarded \$8.5 million in compensatory damages to Fred Goldman (Ron Goldman’s father) and his ex-wife Sharon Rufo. A few days later, the jury awarded punitive damages of \$25 million to be shared between Nicole Brown Simpson’s children and Fred Goldman. Thomas L. Jones, “Justice for the Dead,” TruTV website, accessed August 18, 2010, [http://www.trutv.com/library/crime/notorious\\_murders/famous/simpson/dead\\_16.html](http://www.trutv.com/library/crime/notorious_murders/famous/simpson/dead_16.html).

1. Do you think it is ethical to give criminal defendants more legal protection than civil defendants? Why or why not?
2. Why do you think the criminal trial of O. J. Simpson took place before the civil trial? Check your answers to both questions using the answer key at the end of the chapter.

### Johnny Cochran Video

Johnny Cochran: If the Gloves Don’t Fit...

This video presents defense attorney Johnny Cochran’s closing argument in the O. J. Simpson criminal prosecution:

[\(click to see video\)](#)

### KEY TAKEAWAYS

- Civil law regulates the private rights of individuals. Criminal law regulates individuals' conduct to protect the public.
- Civil litigation is a legal action between individuals to resolve a civil dispute. Criminal prosecution is when the government prosecutes a defendant to punish illegal conduct.

### EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Jerry, a law enforcement officer, pulls Juanita over for speeding. When Jerry begins writing Juanita's traffic ticket, she starts to berate him and accuse him of racial profiling. Jerry surreptitiously reaches into his pocket and activates a tape recorder. Juanita later calls the highway patrol where Jerry works and files a false complaint against Jerry. Jerry sues Juanita for \$500 in small claims court for filing the false report. He uses the tape recording as evidence. Is this a **civil litigation matter** or a **criminal prosecution**?
2. Read *Johnson v. Pearce*, 148 N.C.App. 199 (2001). In this case, the plaintiff sued the defendant for **criminal conversation**. Is this a civil litigation matter or a criminal prosecution? The case is available at this link: [http://scholar.google.com/scholar\\_case?case=10159013992593966605&q=Johnson+v.+Pearce&hl=en&as\\_sdt=2,5](http://scholar.google.com/scholar_case?case=10159013992593966605&q=Johnson+v.+Pearce&hl=en&as_sdt=2,5).

## 1.4 Classification of Crimes

### LEARNING OBJECTIVES

1. Ascertain the basis for grading.
2. Compare malum in se and malum prohibitum crimes.
3. Compare the punishment options for felonies, misdemeanors, felony-misdemeanors, and infractions.
4. Compare jail and prison.

Crimes can be classified in many ways. Crimes also can be grouped by subject matter. For example, a crime like assault, battery, or rape tends to injure another person's body, so it can be classified as a "crime against the person." If a crime tends to injure a person by depriving him or her of property or by damaging property, it can be classified as a "crime against property." These classifications are basically for convenience and are not imperative to the study of criminal law.

More important and substantive is the classification of crimes according to the severity of punishment. This is called **grading**<sup>19</sup>. Crimes are generally graded into four categories: **felonies**<sup>20</sup>, **misdemeanors**<sup>21</sup>, **felony-misdemeanors**<sup>22</sup>, and **infractions**<sup>23</sup>. Often the criminal intent element affects a crime's grading. **Malum in se**<sup>24</sup> crimes, murder, for example, are evil in their nature and are generally graded higher than **malum prohibitum**<sup>25</sup> crimes, which are regulatory, like a failure to pay income taxes.

### Felonies

**Felonies** are the *most serious* crimes. They are either supported by a heinous intent, like the intent to kill, or accompanied by an extremely serious result, such as loss of life, grievous injury, or destruction of property. Felonies are serious, so they are graded the highest, and all sentencing options are available. Depending on the jurisdiction and the crime, the sentence could be execution, **prison**<sup>26</sup> time, a fine, or alternative sentencing such as probation, rehabilitation, and home confinement. Potential consequences of a felony conviction also include the inability to vote, own a weapon, or even participate in certain careers.

19. Classification of crimes by the severity of punishment.
20. The most serious crimes, which are graded the highest.
21. Crimes that are graded lower than felonies but higher than infractions.
22. Crimes that can be prosecuted as a felony or a misdemeanor, depending on the circumstances.
23. The least serious crimes, which are graded the lowest. Also called violations.
24. Crimes that are evil in nature.
25. Crimes that are regulatory in nature.
26. Incarceration facility appropriate for felonies and operated by the state or federal government.



## Misdemeanors

**Misdemeanors** are *less serious* than felonies, either because the intent requirement is of a lower level or because the result is less extreme. Misdemeanors are usually punishable by **jail**<sup>27</sup> time of one year or less per misdemeanor, a fine, or alternative sentencing like probation, rehabilitation, or community service. Note that incarceration for a misdemeanor is in jail rather than prison. The difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement also differs between jail and prison. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

## Felony-Misdemeanors

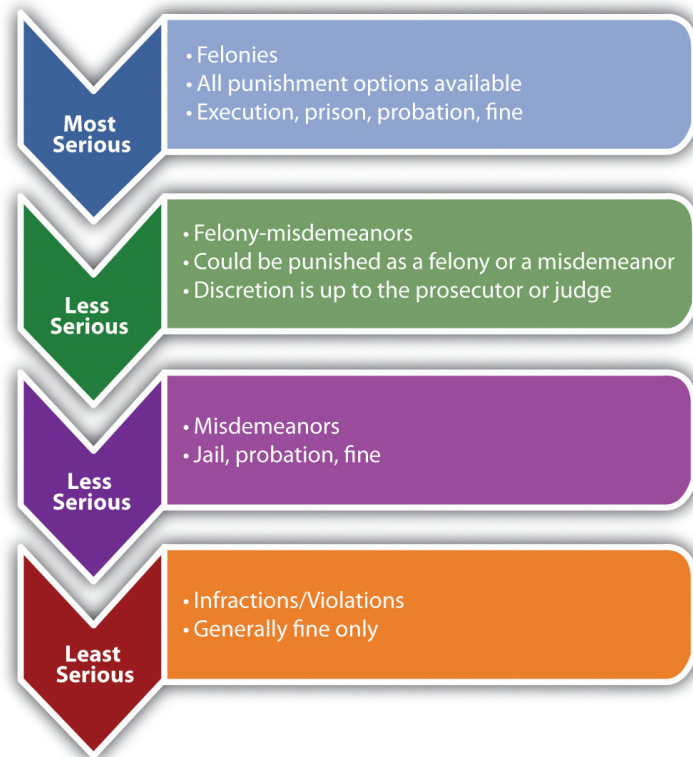
**Felony-misdemeanors** are crimes that the government can prosecute and punish as *either* a felony or a misdemeanor, depending on the particular circumstances accompanying the offense. The discretion whether to prosecute the crime as a felony or misdemeanor usually belongs to the *judge*, but in some instances the *prosecutor* can make the decision.

## Infractions

**Infractions**, which can also be called **violations**, are the least serious crimes and include minor offenses such as jaywalking and motor vehicle offenses that result in a simple traffic ticket. Infractions are generally punishable by a fine or alternative sentencing such as traffic school.

27. Incarceration facility appropriate for misdemeanors and operated by a city or county.

Figure 1.3 *Diagram of Grading*



## KEY TAKEAWAYS

- Grading is based on the severity of punishment.
- Malum in se crimes are evil in their nature, like murder. Malum prohibitum crimes are regulatory, like a failure to pay income taxes.
- Felonies are graded the highest. Punishment options for felonies include the following:
  - Execution
  - Prison time
  - Fines
  - Alternative sentencing such as probation, rehabilitation, and home confinement
- Misdemeanors are graded lower than felonies. Punishment options for misdemeanors include the following:
  - Jail time of one year or less per misdemeanor
  - Fines
  - Alternative sentencing such as probation, rehabilitation, and community service
- Felony-misdemeanors are punished as either a felony or a misdemeanor.
- Infractions, also called violations, are graded lower than misdemeanors and have less severe punishment options:
  - Fines
  - Alternative sentencing, such as traffic school
- One difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement is another difference. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

## EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Harrison kills Calista and is prosecuted and sentenced to one year in jail. Did Harrison commit a felony or a misdemeanor?
2. Read *State v. Gillison*, 766 N.W. 2d 649 (2009). In *Gillison*, why did the Iowa Court of Appeals rule that the defendant's prior convictions were felony convictions? What impact did this ruling have on the defendant's sentence? The case is available at this link: [http://scholar.google.com/scholar\\_case?case=8913791129507413362&q=State+v.+Gillison&hl=en&as\\_sdt=2,5&as\\_vis=1](http://scholar.google.com/scholar_case?case=8913791129507413362&q=State+v.+Gillison&hl=en&as_sdt=2,5&as_vis=1).

## 1.5 The Purposes of Punishment

### LEARNING OBJECTIVE

1. Ascertain the effects of specific and general deterrence, incapacitation, rehabilitation, retribution, and restitution.

Punishment has five recognized purposes: *deterrence*, *incapacitation*, *rehabilitation*, *retribution*, and *restitution*.

### Specific and General Deterrence

Deterrence prevents future crime by frightening the *defendant* or the *public*. The two types of deterrence are **specific**<sup>28</sup> and **general deterrence**<sup>29</sup>. Specific deterrence applies to an *individual defendant*. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment. General deterrence applies to the *public* at large. When the public learns of an individual defendant's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. When the public learns, for example, that an individual defendant was severely punished by a sentence of life in prison or the death penalty, this knowledge can inspire a deep fear of criminal prosecution.

### Incapacitation

**Incapacitation**<sup>30</sup> prevents future crime by removing the defendant from society. Examples of incapacitation are incarceration, house arrest, or execution pursuant to the death penalty.

### Rehabilitation

**Rehabilitation**<sup>31</sup> prevents future crime by altering a defendant's behavior. Examples of rehabilitation include educational and vocational programs, treatment center placement, and counseling. The court can combine rehabilitation with incarceration or with probation or parole. In some states, for example, nonviolent drug offenders must participate in rehabilitation in combination with probation, rather than submitting to incarceration. Ariz. Rev. Stat. §13-901.01, accessed February 15, 2010, <http://law.justia.com/arizona/codes/title13/00901-01.html>. This

28. Prevents crime by frightening an individual defendant.

29. Prevents crime by frightening society with an individual defendant's punishment.

30. Prevents crime by removing a defendant from society.

31. Prevents crime by altering a defendant's behavior.

lightens the load of jails and prisons while lowering **recidivism**<sup>32</sup>, which means reoffending.

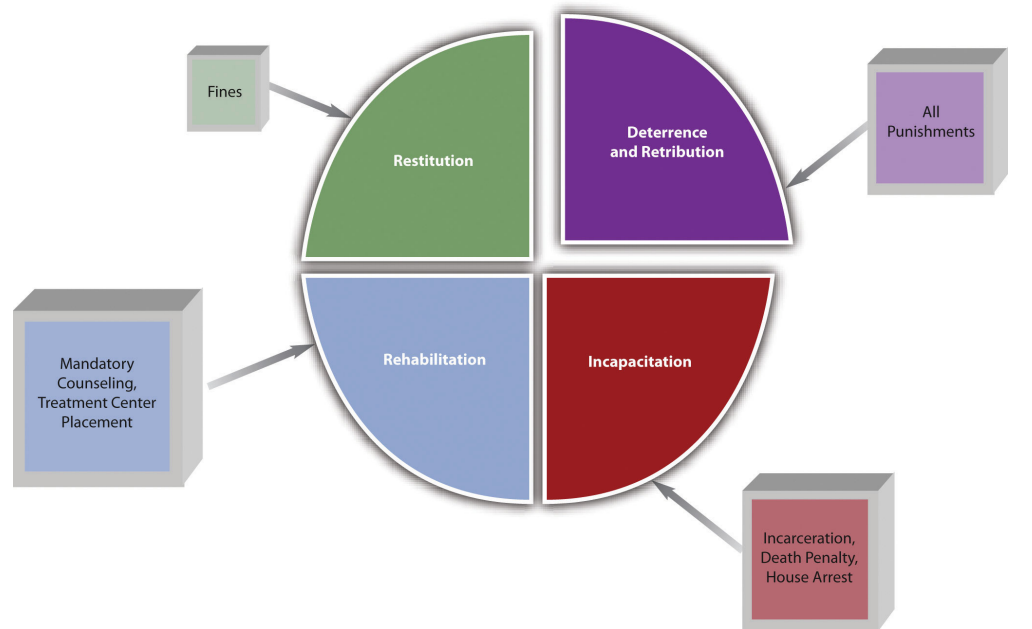
### Retribution

**Retribution**<sup>33</sup> prevents future crime by removing the desire for *personal* avengement (in the form of assault, battery, and criminal homicide, for example) against the defendant. When victims or society discover that the defendant has been adequately punished for a crime, they achieve a certain satisfaction that our criminal procedure is working effectively, which enhances faith in law enforcement and our government.

### Restitution

**Restitution**<sup>34</sup> prevents future crime by punishing the defendant *financially*. Restitution is when the court orders the criminal defendant to pay the victim for any harm and resembles a civil litigation damages award. Restitution can be for physical injuries, loss of property or money, and rarely, emotional distress. It can also be a *fine* that covers some of the costs of the criminal prosecution and punishment.

Figure 1.4 Different Punishments and Their Purpose



- 32. A defendant's tendency to reoffend.
- 33. Prevents crime by giving victims and society a feeling of avengement.
- 34. A court order forcing the criminal defendant to pay for harm or the costs of criminal prosecution.

### KEY TAKEAWAYS

- Specific deterrence prevents crime by frightening an individual defendant with punishment. General deterrence prevents crime by frightening the public with the punishment of an individual defendant.
- Incapacitation prevents crime by removing a defendant from society.
- Rehabilitation prevents crime by altering a defendant's behavior.
- Retribution prevents crime by giving victims or society a feeling of avengement.
- Restitution prevents crime by punishing the defendant financially.

### EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. What is one difference between criminal victims' restitution and civil damages?
2. Read *Campbell v. State*, 5 S.W.3d 693 (1999). Why did the defendant in this case claim that the restitution award was too high? Did the Texas Court of Criminal Appeals agree with the defendant's claim? The case is available at this link: [http://scholar.google.com/scholar\\_case?case=11316909200521760089&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholarr](http://scholar.google.com/scholar_case?case=11316909200521760089&hl=en&as_sdt=2&as_vis=1&oi=scholarr).

## 1.6 Sources of Law

### LEARNING OBJECTIVES

1. Identify the three sources of law.
2. Rank the three sources of law, from highest to lowest.
3. Ascertain the purpose of the US and state constitutions.
4. Ascertain one purpose of statutory law.
5. Ascertain the purpose of case law.
6. Define judicial review.
7. Diagram and explain the components of a case brief.

Law comes from three places, which are referred to as the **sources of law**.

### Constitutional Law

The first source of law is **constitutional law**. Two constitutions are applicable in every state: the federal or US Constitution, which is in force throughout the United States of America, and the state's constitution. The US Constitution created our legal system, as is discussed in [Chapter 2 "The Legal System in the United States"](#). States' constitutions typically focus on issues of local concern.

The purpose of federal and state constitutions is to *regulate government action*. Private individuals are protected by the Constitution, but they do not have to follow it themselves.

### Example of Government and Private Action

Cora stands on a public sidewalk and criticizes President Obama's health-care plan. Although other individuals may be annoyed by Cora's words, the government *cannot* arrest or criminally prosecute Cora for her speech because the First Amendment of the US Constitution guarantees each individual the right to speak freely. On the other hand, if Cora walks into a Macy's department store and criticizes the owner of Macy's, Macy's could eject Cora immediately. Macy's and its personnel are *private*, not government, and they *do not* have to abide by the Constitution.



## Exceptions to the Constitution

The federal and state constitutions are both written with words that can be subject to more than one interpretation. Thus there are many *exceptions* to any constitution's protections. Constitutional protections and exceptions are discussed in detail in Chapter 3 "Constitutional Protections".

For safety and security reasons, we see more exceptions to constitutional protections in *public schools* and *prisons*. For example, public schools and prisons can mandate a certain style of dress for the purpose of ensuring safety. Technically, forcing an individual to dress a specific way could violate the right to self-expression, which the First Amendment guarantees. However, if wearing a uniform can lower gang-related conflicts in school and prevent prisoners from successfully escaping, the government can constitutionally suppress free speech in these locations.

## Superiority of the Constitution

Of the three sources of law, constitutional law is considered the *highest* and should not be supplanted by either of the other two sources of law. Pursuant to principles of federal supremacy, the *federal* or US Constitution is the most preeminent source of law, and state constitutions cannot supersede it. Federal constitutional protections and federal supremacy are discussed in Chapter 2 "The Legal System in the United States" and Chapter 3 "Constitutional Protections".

## Statutory Law

The second source of law is **statutory law**. While the Constitution applies to government action, statutes apply to and regulate *individual* or *private* action. A **statute** is a written (and published) law that can be enacted in one of two ways. Most statutes are written and voted into law by the *legislative* branch of government. This is simply a group of individuals elected for this purpose. The US legislative branch is called **Congress**<sup>35</sup>, and Congress votes federal statutes into law. Every state has a legislative branch as well, called a **state legislature**<sup>36</sup>, and a state legislature votes state statutes into law. Often, states codify their *criminal* statutes into a **penal code**<sup>37</sup>.

35. The federal legislative branch of government, responsible for enacting federal statutes.

36. The state legislative branch of government, responsible for enacting state statutes.

37. State criminal statutes.

State citizens can also vote state statutes into law. Although a state legislature adopts *most* state statutes, citizens voting on a ballot can enact some very important statutes. For example, a majority of California's citizens voted to enact California's medicinal marijuana law. California Compassionate Use Act of 1996, Cal. Health and Safety Code § 11362.5, accessed February 15, 2010, <http://www.cdph.ca.gov/>

[programs/mmp/Pages/Medical%20Marijuana%20Program.aspx](http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm). California's three-strikes law was voted into law by both the state legislature and California's citizens and actually appears in the California Penal Code in two separate places. Brian Brown and Greg Jolivette, "A Primer: Three Strikes—The Impact after More Than a Decade," Legislative Analyst's Office website, accessed February 15, 2010, [http://www.lao.ca.gov/2005/3\\_strikes/3\\_strikes\\_102005.htm](http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm).

### Statutory Law's Inferiority

**Statutory law** is inferior to **constitutional law**, which means that a statute cannot conflict with or attempt to supersede constitutional rights. If a conflict exists between constitutional and statutory law, the courts must resolve the conflict. Courts can invalidate unconstitutional statutes pursuant to their power of **judicial review**, which is discussed in an upcoming section.

### Administrative Laws and Ordinances

Other written and published laws that apply to individuals are **administrative laws**<sup>38</sup> and **ordinances**<sup>39</sup>. Administrative laws and ordinances should not supersede or conflict with statutory law.

Administrative laws are enacted by **administrative agencies**<sup>40</sup>, which are governmental agencies designed to regulate in specific areas. Administrative agencies can be federal or state and contain not only a legislative branch but also an executive (enforcement) branch and judicial (court) branch. The Food and Drug Administration (FDA) is an example of a federal administrative agency. The FDA regulates any food products or drugs produced and marketed in the United States.

Ordinances are similar to statutes, except that *cities* and *counties* vote them into law, rather than a state's legislature or a state's citizens. Ordinances usually relate to health, safety, or welfare, and violations of them are typically classified as **infractions** or **misdemeanors**, rather than **felonies**. A written law prohibiting jaywalking within a city's or county's limits is an example of an ordinance.

38. Written, published law that an administrative agency enacts.

39. Written, published law that a city or county enacts.

40. A government agency that regulates in a specific area.

41. Sample criminal statutes written by legal scholars, lawyers, and judges.

### Model Penal Code

State criminal laws differ significantly, so in the early 1960s a group of legal scholars, lawyers, and judges who were members of the American Law Institute drafted a set of suggested criminal statutes called the **Model Penal Code**<sup>41</sup>. The intent of the Model Penal Code was to provide a standardized set of criminal statutes that all states could adopt, thus simplifying the diversity effect of the United States' legal system. While the Model Penal Code has not been universally

adopted, a majority of the states have incorporated portions of it into their penal codes, and the Model Penal Code survives as a guideline and focal point for discussion when state legislatures modify their criminal statutes.

## Case Law

The third source of law is **case law**. When judges rule on the facts of a particular case, they create case law. *Federal* case law comes from federal courts, and *state* case law comes from state courts. Case law has its origins in English common law.

## English Common Law

In Old England, before the settlement of the United States, case law was the most prevalent source of law. This was in contrast to countries that followed the Roman Law system, which primarily relied on written codes of conduct enacted by legislature. Case law in England was mired in tradition and local customs. Societal principles of law and equity were the guidelines when courts issued their rulings. In an effort to be consistent, English judges made it a policy to follow previous judicial decisions, thereby creating a uniform system of laws throughout the country for the first time. Case law was named **common law**<sup>42</sup> because it was common to the entire nation. Lloyd Duhaime, “Common Law Definition,” Duhaime.org website, accessed September 26, 2010, <http://www.duhaime.org/LegalDictionary/C/CommonLaw.aspx>.

The English system of jurisprudence made its way to the United States with the original colonists. Initially, the thirteen colonies unanimously adopted common law as the law of the land. All crimes were common-law crimes, and cases determined criminal elements, defenses, and punishment schemes. Gradually, after the Revolutionary War, hostility toward England and modern reform led to the erosion of common-law crimes and a movement toward codification. States began replacing common-law crimes with statutes enacted by state legislatures. Oxford professor Sir William Blackstone’s *Commentaries on the Law of England*, which interpreted and summarized English common law, became an essential reference as the nation began the process of converting common-law principles into written statutes, ordinances, and penal codes. Lloyd Duhaime, “Common Law Definition,” Duhaime.org website, accessed September 26, 2010, <http://www.duhaime.org/LegalDictionary/C/CommonLaw.aspx>.

## Limitations on Common-Law Crimes

42. Case law of England that migrated to the United States.

In modern society, in many states and the federal government, *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812), accessed September 24, 2010,

<http://openjurist.org/11/us/32/the-united-states-v-hudson-and-goodwin>. judges *cannot* create crimes. This violates notions of fairness. Making up a new crime and punishing the defendant for it does not provide consistency or predictability to our legal system. It also violates the principle of legality, a core concept of American criminal justice embodied in this phrase: “Nullum crimen sine lege, nulla poena sine crimen” (No crime without law, no punishment without crime).

In states that do not allow common-law crimes, **statutes** must define criminal conduct. If no statute exists to criminalize the defendant’s behavior, the defendant *cannot be criminally prosecuted*, even if the behavior is abhorrent. As the Model Penal Code states, “[n]o conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State” (Model Penal Code § 1.05(1)).

The common law still plays an important role in criminal lawmaking, even though most crimes are now embodied in statutes. Classification of crimes as felonies and misdemeanors is a reflection of English common law. Legislatures often create statutes out of former common-law crimes. Judges look to the common law when defining statutory terms, establishing criminal procedure, and creating defenses to crimes. The United States is considered a common-law country. Every state except Louisiana, which is based on the French Civil Code, adopts the common law as the law of the state *except* where a statute provides otherwise. Legal Definition, “Common Law,” Lectlaw.com website, accessed September 26, 2010, <http://www.lectlaw.com/def/c070.htm>.

### **Example of a Court’s Refusal to Create a Common-Law Crime**

Read *Keeler v. Superior Court*, 470 P.2d 617 (1970). In *Keeler*, the defendant attacked his pregnant ex-wife, and her baby was thereafter stillborn. The California Supreme Court disallowed a murder charge against Keeler under California Penal Code § 187 because the statute criminalized only the malicious killing of a “human being.” The court reached its decision after examining the common-law definition of human being and determining that the definition did not include a fetus. The court reasoned that it *could not create a new crime* without violating the due process clause, separation of powers, and California Penal Code § 6, which prohibits the creation of common-law crimes. After the *Keeler* decision, the California Legislature changed Penal Code § 187 to include a fetus, excepting abortion. Cal. Penal Code § 187, accessed August 23, 2010, <http://codes.lp.findlaw.com/cacode/PEN/3/1/8/1/s187>.

### **Powerful Nature of Case Law**

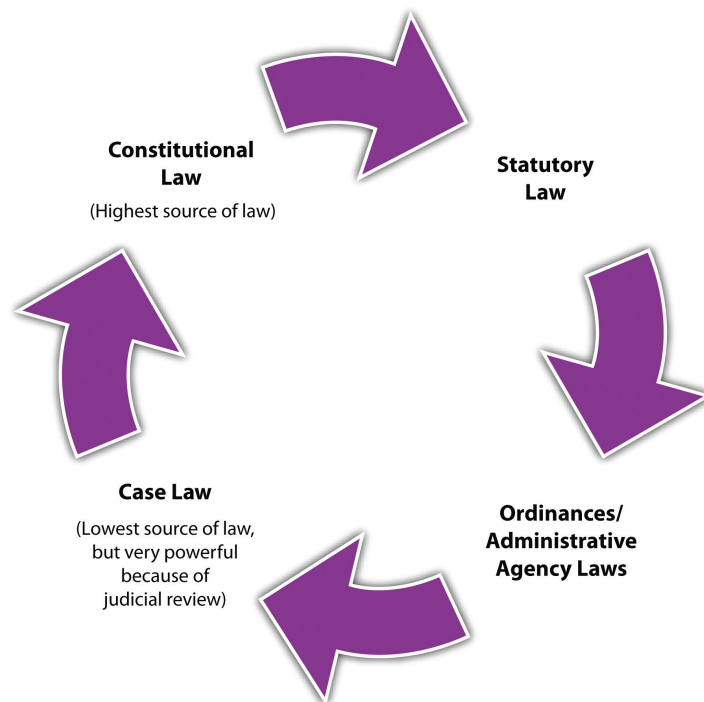
Generally, if there is a statute on an issue, the statute is *superior* to case law, just as the Constitution is superior to statutory law. However, judges *interpret*

constitutional and statutory law, making case law a *powerful* source of law. A judge can interpret a constitution in a way that adds or creates exceptions to its protections. A judge can also interpret a statute in a way that makes it unconstitutional and unenforceable. This is called the power of **judicial review**<sup>43</sup>. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), accessed February 15, 2010, [http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0005\\_0137\\_ZS.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0005_0137_ZS.html).

### Example of Judicial Review

An example of judicial review is set forth in *Texas v. Johnson*, 491 U.S. 397 (1989). In *Johnson*, the US Supreme Court ruled that burning a flag is protected self-expression under the First Amendment to the US Constitution. Thus the Court reversed the defendant's conviction under a Texas statute that criminalized the desecration of a venerated object. Note how *Johnson* not only *invalidates* a state statute as being inferior to the US Constitution but also *changes* the US Constitution by adding flag burning to the First Amendment's protection of speech.

Figure 1.5 *Diagram and Hierarchy of the Sources of Law*



43. A court's power to invalidate a statute as unconstitutional.

## Stare Decisis and Precedent

Cases are diverse, and case law is not really *law* until the judge rules on the case, so there must be a way to ensure case law's *predictability*. It would not be fair to punish someone for conduct that is not yet illegal. Thus judges adhere to a policy called **stare decisis**<sup>44</sup>. Stare decisis is derived from English common law and compels judges to follow rulings in previous cases. A previous case is called **precedent**<sup>45</sup>. Once judges have issued a ruling on a particular case, the public can be assured that the resulting precedent will continue to be followed by other judges. Stare decisis is not absolute; judges can deviate from it to update the law to conform to society's modern expectations.

## Rules of Stare Decisis and Use of Precedent

Case precedent is generally an *appeal* rather than a *trial*. There is often more than one level of appeal, so some appeals come from higher courts than others. This book discusses the court system, including the appellate courts, in [Chapter 2 "The Legal System in the United States"](#).

Many complex rules govern the use of **precedent**. Lawyers primarily use precedent in their arguments, rather than **statutes** or the **Constitution**, because it is so specific. With proper research, lawyers can usually find precedent that matches or comes very close to matching the facts of any particular case. In the most general sense, judges tend to follow precedent that is *newer*, from a *high court*, and from the *same court system*, either federal or state.

## Example of Stare Decisis and Use of Precedent

Geoffrey is a defense attorney for Conrad, who is on trial for first-degree murder. The murder prosecution is taking place in New Mexico. Geoffrey finds case precedent from a New York Court of Appeals, dated 1999, indicating that Conrad should have been prosecuted for *voluntary manslaughter*, not first-degree murder. Brandon, the prosecuting attorney, finds case precedent from the *New Mexico Supreme Court*, dated 2008, indicating that a first-degree murder prosecution is appropriate. The trial court will probably follow the precedent submitted by Brandon because it is newer, from a higher court, and from the same court system as the trial.

44. A court's policy of following previous court decisions.

45. A previous court decision followed in stare decisis.

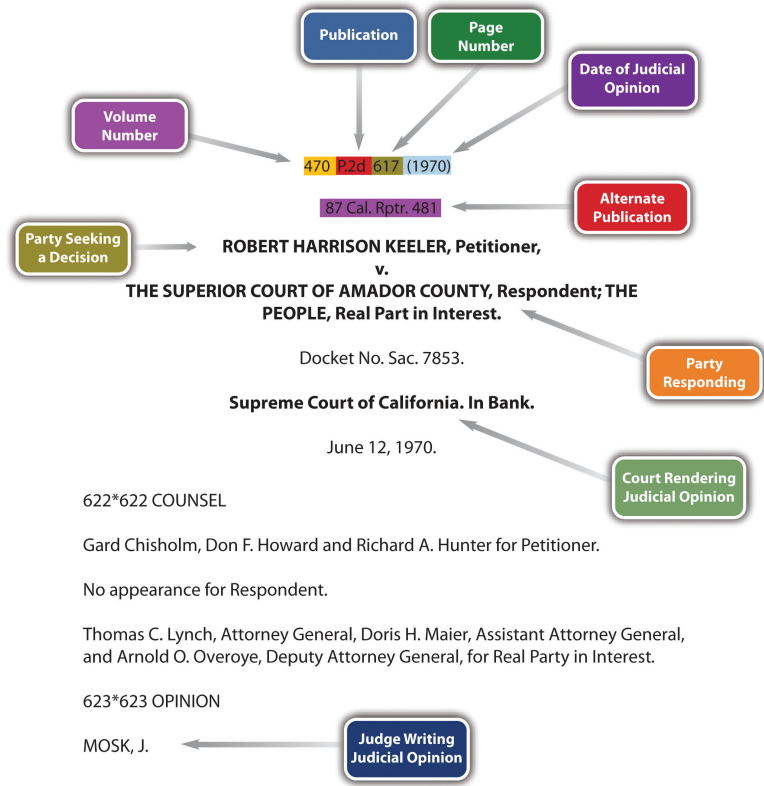
46. Case law that has been written and published.

### Case Citation

Cases must be *published* to become case law. A published case is also called a **judicial opinion**<sup>46</sup>. This book exposes you to many judicial opinions that you have the option of reading on the Internet. It is essential to understand the meaning of the

**case citation**<sup>47</sup>. The case citation is the series of numbers and letters after the title of the case and it denotes the case’s published location. For example, let’s analyze the case citation for *Keeler v. Superior Court*, 470 P.2d 617 (1970).

Figure 1.6 *Keeler Case Citation*



As you can see from the diagram, the number 470 is the volume number of the book that published the *Keeler* case. The name of that book is “P.2d” (this is an abbreviation for *Pacific Reports, 2d Series*). The number 617 is the page number of the *Keeler* case. The date (1970) is the date the California Supreme Court ruled on the case.

### Case Briefing

It is useful to condense judicial opinions into **case brief format**<sup>48</sup>. The *Keeler* case brief is shown in Figure 1.7 "Keeler Case Brief".

47. Information that identifies the location of a published judicial opinion.

48. A way to reduce a judicial opinion to its essential components.

Figure 1.7 *Keeler Case Brief*

1. *Keeler v. Superior Court*, 470 P.2d 617 (1970).
2. A. (**Procedural Facts**) The defendant seeks a writ of prohibition, CA Supreme Court.  
B. (**Substantive Facts**) The defendant became upset when he saw that his ex-wife was pregnant. After stating "I'm going to stomp it out of you," he kned his ex-wife in the abdomen. She survived, but the baby was stillborn, the cause of death a fractured skull. The defendant was charged with murder under Cal. Penal Code § 187, which defined murder as the malicious and unlawful killing of a human being. The defendant sought a writ of prohibition to disallow the murder charge, because he killed a fetus.
3. (**Issue**) Can a defendant be charged with murder for killing a fetus in a state that statutorily defines murder as the malicious and unlawful killing of a human being?
4. A. (**Substantive Holding**) A defendant cannot be charged with murder for killing a fetus in a state that statutorily defines murder as the malicious and unlawful killing of a human being.  
B. (**Procedural Holding**) Writ of prohibition granted, murder charge disallowed.
6. (**Rationale**) The Court examined the common-law definition of human being, and held that it did not include a fetus. Charging the defendant with murder of a fetus, when the murder statute criminalizes only murder of a human being born alive, would violate: due process by not giving the defendant notice of what is criminal, separation of powers by allowing a court to create crimes, which is the legislature's responsibility, and California Penal Code §6, which specifically prohibits common-law crimes.

Read this case at the following link: [http://scholar.google.com/scholar\\_case?case=2140632244672927312&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=2140632244672927312&hl=en&as_sdt=2&as_vis=1&oi=scholar).

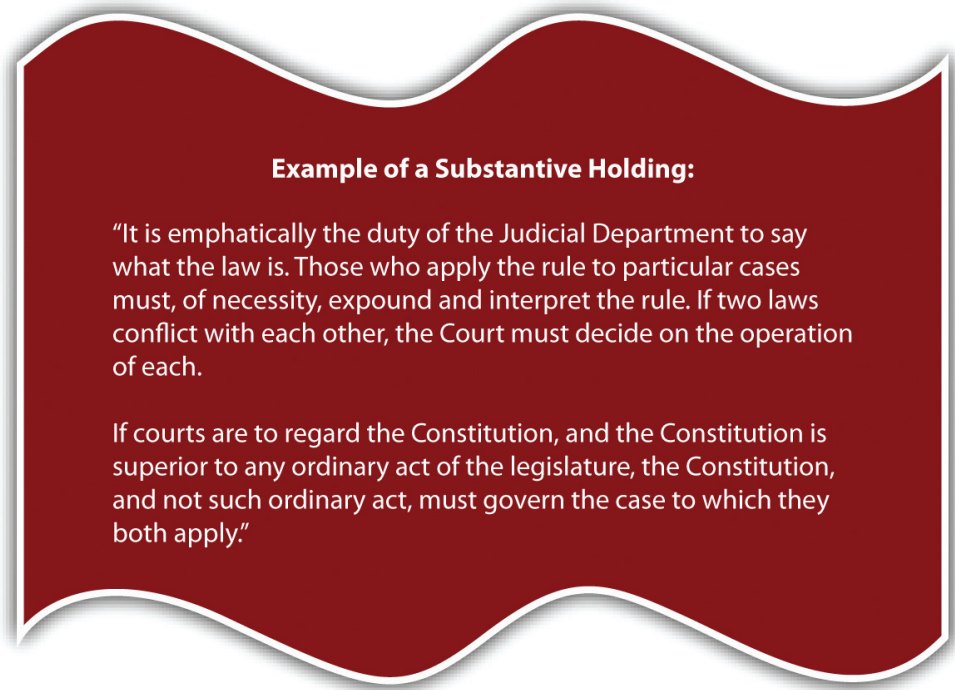
Published judicial opinions are written by judges and can be lengthy. They can also contain more than one case law, depending on the number of issues addressed. Case briefs reduce a judicial opinion to its essentials and can be instrumental in understanding the most important aspects of the case. Standard case brief formats can differ, but one format that attorneys and paralegals commonly use is explained in the following paragraph.

Review the *Keeler* case brief. The case brief should begin with the **title of the case**, including the **citation**. The next component of the case brief should be the **procedural facts**. The procedural facts should include two pieces of information: *who is appealing* and *which court* the case is in. As you can see from the *Keeler* case brief, Keeler brought an application for a writ of prohibition, and the court is the California Supreme Court. Following the procedural facts are the **substantive facts**, which should be a short description of the facts that instigated the court trial and appeal. The procedural and substantive facts are followed by the **issue**. The issue is the question the court is examining, which is usually the grounds for appeal. The case brief should phrase the issue as a question. Cases usually have more than one



issue. The case brief can state all the issues or only the issue that is most important. The **substantive holding** comes after the issue, is *actually the case law*, and answers the issue question. If more than one issue is presented in the case brief, a substantive holding should address each issue.

Figure 1.8 Example of a Substantive Holding



*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), [http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0005\\_0137\\_ZS.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0005_0137_ZS.html).

A **procedural holding** should follow the substantive holding. The procedural holding discusses what the court did procedurally with the case. This could include reversing the lower court's ruling, affirming the lower court's ruling, or *adjusting a sentence* issued by the lower court. This book discusses court procedure in detail in [Chapter 2 "The Legal System in the United States"](#). Last, but still vital to the case brief, is the **rationale**. The rationale discusses the *reasoning* of the judges when ruling on the case. Rationales can *set policy*, which is not technically case law but can still be used as precedent in certain instances.

One judge writes the judicial opinion. Judges vote how to rule, and not all cases are supported by a unanimous ruling. Occasionally, other judges will want to add to the judicial opinion. If a judge agrees with the judicial opinion, the judge could write a

**concurring opinion**, which explains why the judge agrees. If a judge disagrees with the judicial opinion, the judge could write a **dissenting opinion** explaining why the judge disagrees. The dissenting opinion will not change the judicial opinion, but it may also be used as precedent in a future case if there are grounds for changing the law.

### KEY TAKEAWAYS

- The three sources of law are constitutional, statutory, and case law.
- The sources of law are ranked as follows: first, constitutional; second, statutory; and third, case law. Although it is technically ranked the lowest, judicial review makes case law an extremely powerful source of law.
- The purpose of the US and state constitutions is to regulate government action.
- One purpose of statutory law is to regulate individual or private action.
- The purpose of case law is to supplement the law when there is no statute on point and also to interpret statutes and the constitution(s).
- The court's power to invalidate statutes as unconstitutional is called judicial review.
  
- The components of a case brief are the following:
  - The title, plus citation. The citation indicates where to find the case.
  - The procedural facts of the case. The procedural facts discuss who is appealing and in which court the case is located.
  - The substantive facts. The substantive facts discuss what happened to instigate the case.
  - The issue. The issue is the question the court is examining.
  - The substantive holding. The substantive holding answers the issue question and is the case law.
  - The procedural holding. The procedural holding discusses what the court did procedurally with the case.
  - The rationale. The rationale is the reason the court held the way it did.

## EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Hal invents a new drug that creates a state of euphoria when ingested. Can Hal be criminally prosecuted for ingesting his new drug?
2. Read *Shaw v. Murphy*, 532 U.S. 223 (2001). Did the US Supreme Court allow prison inmates the First Amendment right to give other inmates legal advice? Why or why not? The case is available at this link: [http://scholar.google.com/scholar\\_case?case=9536800826824133166&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholarr](http://scholar.google.com/scholar_case?case=9536800826824133166&hl=en&as_sdt=2&as_vis=1&oi=scholarr).
3. Read Justice Scalia's dissenting opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003). What is the *primary* reason Justice Scalia dissented to the US Supreme Court's opinion in *Lawrence*? The dissenting opinion is available at this link: <http://www.law.cornell.edu/supct/html/02-102.ZD.html>. The judicial opinion in *Lawrence v. Texas* is available at this link: <http://www.law.cornell.edu/supct/html/02-102.ZS.html>.

## **1.7 End-of-Chapter Material**

## Summary

A crime is action or inaction in violation of a criminal law. Criminal laws vary from state to state and from state to federal.

The study of criminal law defines crimes and defenses to crimes. The study of criminal procedure focuses on the enforcement of rights by individuals while submitting to government investigation, arrest, interrogation, trial, and appeal.

A civil lawsuit or civil litigation matter resolves a dispute between individuals, called a plaintiff (the injured party) and defendant (the alleged wrongdoer). Every civil litigation matter includes a victim (the plaintiff), which has suffered harm. The goal of the civil litigation matter is to compensate the plaintiff for injury. The court can compensate the plaintiff by awarding money, which is called damages. Both parties in a civil litigation matter must represent themselves or hire private attorneys.

A criminal prosecution takes place when the government, represented by a prosecutor, takes legal action against the defendant (the alleged wrongdoer) for committing a crime. Some criminal prosecutions do not include a victim, or harm, because the goal of the criminal prosecution is punishment, not compensation. Every criminal prosecution involves the government, so the US and state constitutions provide the criminal defendant with extra protections not present in a civil lawsuit, such as free counsel when the defendant is indigent and facing incarceration.

Crimes can be classified according to the severity of punishment. The most serious crimes with the entire range of sentencing options available are felonies. Misdemeanors are less serious than felonies and have less severe sentencing options. Felony-misdemeanors can be prosecuted and punished as a felony or a misdemeanor, depending on the circumstances. Infractions, also called violations, are the least serious crimes and generally do not involve incarceration. The purposes of punishing a criminal defendant are both specific and general deterrence, incapacitation, rehabilitation, retribution, and restitution.

Law comes from three sources: the Constitution, a statute, or a case. The Constitution is the highest source of law but is only applicable when there is government action. Statutory law applies to individuals but is inferior to constitutional law. Case law is law made by judges when they rule on the facts of a case. Although case law is technically inferior to statutory law, judges must interpret statutes and the Constitution, so case law can be the most powerful source of law. When a case invalidates a statute as unconstitutional, this action is called judicial review. Case law stays consistent because judges follow previous court decisions, called precedent. This policy, called stare decisis, lends predictability to case law but is not absolute, and courts can deviate from it to update the law.

## YOU BE THE LAWYER

Read the prompt, review the case, and then decide whether you would accept or reject the case if you were the lawyer. Check your answers using the answer key at the end of the chapter.

1. You are an expert in *criminal law*, not *civil litigation*. Would you **accept** or **reject** this case? Read *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004). The case is available at this link: [http://scholar.google.com/scholar\\_case?case=14748284771413043760&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholarr](http://scholar.google.com/scholar_case?case=14748284771413043760&hl=en&as_sdt=2&as_vis=1&oi=scholarr).
2. You are an expert in *criminal law*, not *criminal procedure*. Would you **accept** or **reject** this case? Read *People v. Wrotten*, 2010 N.Y. Slip Op 04501 (2010). The case is available at this link: <http://law.justia.com/cases/new-york/appellate-division-first-department/2010/2010-04501.html>
3. You are an expert in *constitutional law*. Would you **accept** or **reject** this case? Read *Wilson v. Layne*, 526 U.S. 603 (1999). The case is available at this link: <http://www.law.cornell.edu/supct/html/98-83.ZS.html>.
4. Reread question 3. Change your expertise to constitutional law as it applies to *criminal prosecutions*. Would you **accept** or **reject** the *Wilson* case?

### Cases of Interest

- *Padilla v. Gonzales*, 397 F.3d 1016 (2005), discusses malum in se and malum prohibitum crimes: [http://scholar.google.com/scholar\\_case?case=5187582705718052419&q=malum+in+se+malum+in+prohibitum&hl=en&as\\_sdt=2,5&as\\_ylo=2004&as\\_vis=1](http://scholar.google.com/scholar_case?case=5187582705718052419&q=malum+in+se+malum+in+prohibitum&hl=en&as_sdt=2,5&as_ylo=2004&as_vis=1).
- *Rogers v. Tennessee*, 532 U.S. 451 (2001), discusses a state's ability to create a common-law crime: <http://www.law.cornell.edu/supct/html/99-6218.ZS.html>.
- *Roe v. Wade*, 410 U.S. 113 (1973), is the case in which the US Supreme Court invalidates a state statute criminalizing abortion: [http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0410\\_0113\\_ZO.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0410_0113_ZO.html).

### Articles of Interest

- Model Penal Code: <http://legal-dictionary.thefreedictionary.com/Model+Penal+Code>
- Stare decisis: [http://civilliberty.about.com/od/historyprofiles/g/stare\\_decisis.htm](http://civilliberty.about.com/od/historyprofiles/g/stare_decisis.htm)

### Websites of Interest

- Federal criminal statutes: <http://www.law.cornell.edu/uscode/18>
- State criminal statutes: [http://www.legallawhelp.com/state\\_law.html](http://www.legallawhelp.com/state_law.html)
- Government agencies in alphabetical order: [http://www.usa.gov/Agencies/Federal/All\\_Agencies/index.shtml](http://www.usa.gov/Agencies/Federal/All_Agencies/index.shtml)
- Complete federal Constitution: <http://topics.law.cornell.edu/constitution>
- State constitutions: <http://www.findlaw.com/11stategov/indexconst.html>

### Statistics of Interest

- State prosecutors in the United States: <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=9>
- Felony convictions in the US state courts: <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2152>
- Estimated crime statistics in the United States: <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm>

### Answer to Exercise

From Section 1.1 "Introduction"

1. The US Supreme Court held that the attorney general cannot criminalize the use of drugs under Oregon's Death With Dignity Act by enforcing the Controlled Substances Act. The Controlled Substances Act is targeted at preventing recreational drug use, and, therefore, the Court upheld Oregon's ability to legalize assisted suicide.

### Answers to Exercises

From Section 1.2 "Criminal Law and Criminal Procedure"

1. This is an issue of *criminal law*. Although Paul is a law enforcement officer, when he shoots Barney while he is facedown in handcuffs, he may be committing a crime. The question in this case is not whether the arrest was executed properly, but whether a *crime was committed* after the arrest.
2. *Payton* reviews a New York statute allowing law enforcement to arrest a defendant in the home without a warrant. This case focuses on law enforcement *arrest*, so it examines an issue of criminal procedure.



## Answers to Exercises

From Section 1.3 "The Difference between Civil and Criminal Law"

1. This is a *civil litigation* matter. Although the incident involves Jerry, who is a law enforcement officer, and it takes place while Jerry is writing a traffic ticket, Jerry is suing Juanita for *damages*. Thus this is civil litigation, not criminal prosecution. If Juanita is *prosecuted* for the crime of filing a false police report, then this would be a criminal prosecution.
2. The *Johnson* case reviews an award of damages and is thus a *civil litigation* matter. Criminal conversation is the tort of adultery in North Carolina.

## Answers to Exercises

From Section 1.4 "Classification of Crimes"

1. This crime is probably a *misdemeanor* because Harrison was sentenced to one year in *jail*, rather than prison. Although the result, Calista's death, is very serious, the method of killing may have been accidental. Criminal homicide is discussed in Chapter 9 "Criminal Homicide".
2. The Iowa Court of Appeals based its ruling on New Jersey law. Although New Jersey named the offenses "high misdemeanors," New Jersey case law indicates that any offense with a sentence of one year or more incarceration is a common-law *felony*. This triggered a sentencing enhancement increasing the defendant's sentence to an indeterminate sentence of incarceration not to exceed fifteen years.

## Answers to Exercises

From Section 1.5 "The Purposes of Punishment"

1. The court awards criminal restitution to the victim after a state or federal prosecutor is successful in a criminal trial. Thus the victim receives the restitution award *without paying* for a private attorney. A plaintiff that receives damages has to pay a private attorney to win the civil litigation matter.
2. In *Campbell*, the defendant entered a plea agreement specifying that he had committed theft in an amount *under* \$100,000. The trial court determined that the defendant had *actually* stolen \$100,000 and awarded restitution of \$100,000 to various victims. The defendant claimed that this amount was excessive because it exceeded the parameters of the theft statute he was convicted of violating. The Texas Court of Criminal Appeals *disagreed* and held that the discretion of how much restitution to award belongs to the judge. As long as the judge properly ascertained this amount based on the facts, restitution could exceed the amount specified in the criminal statute the defendant was convicted of violating.

## Answers to Exercises

From Section 1.6 "Sources of Law"

1. Hal can be prosecuted for ingesting his new drug only if he is in a state that allows for common-law crimes. The *drug is new*, so the state legislature will probably *not* have criminalized it by enacting a statute.
2. The US Supreme Court held that inmates do not have the First Amendment right to give other inmates legal advice. The Court based its ruling on the prison's interest in ensuring prison order, security, and inmate rehabilitation. The Court stated, "We nonetheless have maintained that the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), accessed October 4, 2010, [http://scholar.google.com/scholar\\_case?case=9536800826824133166&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=9536800826824133166&hl=en&as_sdt=2&as_vis=1&oi=scholar).
3. Justice Scalia criticized the US Supreme Court majority for not adhering to stare decisis. According to Justice Scalia, the Court did not follow a recent (seventeen-year-old) precedent set in *Bowers v. Hardwick*.

### Answers to Law and Ethics Questions

1. The reason criminal defendants get special protections not extended to civil litigation defendants is the harshness of the *punishment* and the *inequality* of the criminal prosecution itself. Criminal defendants may lose their life or their liberty. Civil litigation defendants risk only a loss of *money*. In addition, criminal defendants face the intimidating prospect of fighting the government and all its vast resources. Civil litigation defendants are squaring off against *another individual*. As a society, we believe that there is nothing as unjust as punishing an innocent person. Thus we give criminal defendants special protections to level the playing field.
2. The criminal trial took place first because O. J. Simpson was a criminal defendant and therefore had the benefit of the Sixth Amendment right to a *speedy trial*. Constitutional protections are discussed in Chapter 3 "Constitutional Protections".

### Answers to You Be the Lawyer

1. In this case, the *plaintiffs* are seeking an *injunction*. The plaintiffs are not the *government*; they are a group of fish. They are not suing for the goal of punishment, but rather to compel the president of the United States and the secretary of defense to review the use of certain naval equipment. Thus this is a *civil litigation* matter and you should **reject** the case.
2. The Court is reviewing the Sixth Amendment right to confront accusers. In this case, a witness who was too ill to travel was permitted to testify via live, two-way video instead of testifying in the courtroom in front of the defendant. The New York Supreme Court held that under the circumstances, this testimony complied with the Sixth Amendment. This case focuses on the defendant's constitutional rights *during his criminal trial*, so this is a *criminal procedure* issue and you should **reject** the case.
3. The US Supreme Court held that it is unconstitutional under the Fourth Amendment when law enforcement brings media along while executing a search. Thus this is a federal constitutional issue and you should **accept** the case.
4. In *Wilson*, the Court decided that the plaintiff was not entitled to damages when suing law enforcement under 42 U.S.C. § 1983. Thus although this case involves the Fourth Amendment, it is essentially a *civil litigation* matter, and you should **reject** the case.