The Nature and History of Criminal Law

Law is the art of the good and the fair.
—Ulpian, Roman judge (circa A.D. 200)

Due process . . . embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just.
—Justice Hugo Black (1886–1971)

The law is that which protects everybody who can afford a good lawyer.
—Anonymous

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INTRODUCTION

In June 2000 Larico Garrett, 22, of Manchester, Connecticut, was arrested for car theft after he pulled the stolen vehicle he was driving into a convenience store parking lot to ask a police officer for directions to a nearby street. Although he answered the man’s questions, Officer Robert Johnson found the 2 A.M. encounter suspicious and ran a radio check of the license plate on the Cadillac that Garrett was driving. When dispatchers reported the vehicle stolen, Johnson summoned help and drove to the street where Garrett was headed. Garrett was arrested and charged under Connecticut law with taking a vehicle without the owner’s permission, a misdemeanor punishable by less than a year in jail.

WHAT IS CRIMINAL LAW?

Although most people would agree that it is not very smart for a car thief to ask directions from a police officer, it is not a crime to be stupid. Car theft, of course, is another matter, and most forms of theft (which are discussed in greater detail in
that which is laid down, ordained, or established . . . a body of rules of action or conduct prescribed by controlling authority, and having binding legal force.

However, not all rules are laws, fewer still are criminal laws, and not all have "binding legal force." Sociologists, for example, distinguish between norms and mores, while philosophers and ethicists talk of morals and morality. Morals are ethical principles, and moral behavior is that which conforms to some ethical principle or moral code. Norms refer to rules that underlie and are inherent in the fabric of society. So, for example, it is regarded as inappropriate to belch in public. Anyone who intentionally violates a social norm may be seen as inadequately socialized (others might call them "uncivilized"), offensive, and even dangerous (if the violation is a serious one) to an accepted way of life. When social norms are unintentionally violated (as may be the case with a belch at the dinner table), a mere request to be excused generally allows social interaction to proceed with little or no interruption. Mores, on the other hand, are rules that govern serious violations of the social code, including what social scientists call "taboos." For example, during the 1995 criminal trial of former football superstar O. J. Simpson, defense attorneys believed it necessary to describe the language Los Angeles police detective Mark Fuhrman was known to have frequently used in describing black people. Although witnesses testified that Fuhrman had voiced the word "nigger" on many occasions, attorneys called the word an "epithet" and would themselves not pronounce it in court—preferring to use the phrase "the N-word" in its place. Members on both sides of the case apparently considered the "N-word" itself taboo—especially in open court
(where the proceedings were being nationally televised). No doubt they also feared that use of the word “nigger” might offend jurors, most of whom were black.

Violations of both mores and norms are forms of deviance and can properly be called “deviant behavior.” Even so, few violations of social norms are illegal, and fewer still are crimes. Since laws have not been enacted against quite a large number of generally recognized taboos, it is possible for behavior to be contrary to accepted principles of social interaction and even immoral—but still legal. As you read through this book, it is important to remember that only human conduct that violates the criminal law can properly be called “criminal.” While other forms of nonconformist behavior may be undesirable or even reprehensible, they are not crimes.5

The practice of law depends on the application of clear and concise definitions. Hence, before proceeding further, it is appropriate that the notion of “crime” be clarified. An early, but influential, definition of crime read as follows: “A crime or misdemeanor is an act committed or omitted, in violation of a public law either forbidding or commanding it.”6 The Model Penal Code, an important document intended to guide state legislators in formulating statutory provisions, defines the term crime as “[a]n offense defined by this Code or by any other statute of this State, for which a sentence of [death or of] imprisonment is authorized.”7 A popular criminal law textbook of a few years ago offered this definition of crime: “Crime is any social harm defined and made punishable by law.”8 All three definitions, while their emphases vary, implicitly recognize the role played by government in defining exactly what a crime is. Hence, a more useful (and comprehensive) definition of the word crime (and the one we use in this book) might be “any act or omission in violation of penal law, committed without defense or justification, and made punishable by the state in a judicial proceeding.”

Crimes can be distinguished from other legal transgressions by the fact that they are essentially offenses against the community or the public. Edwin Sutherland, a famous criminologist of the early twentieth century, put it this way: “the essential characteristic of crime is that it is behavior which is prohibited by the State as an injury to the State and against which the State may react, at least as the last resort, by punishment.”9 Sir William Blackstone (1723–1780), the great British jurist, described the principles of the common law in his voluminous Commentaries on the Laws of England, published in 1769. Blackstone’s Commentaries, which was to guide American judges and lawyers struggling to build an American legal system after the Revolution, described the “public” feature of crimes in this now famous passage: “The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist of this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community . . . treason, murder, and robbery are properly ranked among crimes; since besides the injury done the individual, they strike at the very being of society; which cannot possibly subsist where actions of this sort are suffered to escape with impunity.10

Criminal law can be understood, then, as that body of rules and regulations that defines and specifies punishments for offenses of a public nature, or for wrongs committed against the state or society. Criminal law is also called penal law and is usually embodied in the penal codes of various jurisdictions. In short, criminal law defines certain activities as illegal, and violations of the criminal law are referred to as crimes.

Types of Crime

Further distinctions can be drawn between types of crimes, such as (in descending order of seriousness) treason, felonies, misdemeanors, and infractions.11 A crucial feature that distinguishes one type of crime from another is the degree of punishment.

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**What Is Criminal Law?**

Law is whatever is boldly asserted and plausibly maintained.
—Aaron Burr (1756-1836)

The criminal law . . . is an expression of the moral sense of the community.
—United States v. Freeman, 357 F.2d 606 (2d Cir. 1966)

**WebExtra**

1–1 Criminal Law

**MODEL PENAL CODE**

a model code of criminal laws intended to standardize general provisions of criminal liability, sentencing, defenses, and the definitions of specific crimes between and among the states. The Model Penal Code was developed by the American Law Institute.

**CRIME**

any act or omission in violation of penal law, committed without defense or justification, and made punishable by the state in a judicial proceeding.

Law is born from despair of human nature.
—José Ortega y Gasset

**WebExtra**

1–2 Crime

**CRIMINAL LAW**

that body of rules and regulations that defines and specifies punishments for offenses of a public nature, or for wrongs committed against the state or society; also called penal law.
violation of allegiance toward one’s country or sovereign, esp. the betrayal of one’s own country by waging war against it or by consciously and purposely acting to aid its enemies.

MISDEMEANOR
a minor crime; an offense punishable by incarceration, usually in a local confinement facility, for a period of which the upper limit is prescribed by statute in a given jurisdiction, typically limited to a year or less.

The purpose of all law, and the criminal law in particular, is to conform conduct to the norms expressed in that law.

—United States v. Granada, 565 F.2d 922, 926 (5th Cir. 1978)

MALA IN SE
acts that are regarded, by tradition and convention, as wrong in themselves.

MALA PROHIBITA
acts that are considered “wrongs” only because there is a law against them.

Hence, treason and felonies are thought of as serious crimes for which at least a year in prison is a possible punishment. Misdemeanors are less serious offenses, generally thought of as punishable by less than a year’s incarceration. The Texas Penal Code, for example, defines a felony as “an offense so designated by law or punishable by death or confinement in a penitentiary.” A misdemeanor, according to the Texas Code, “means an offense so designated by law or punishable by fine, by confinement in jail, or by both fine and confinement in jail.”

Other states use similar definitions. The California Penal Code describes a felony as “a crime which is punishable with death or by imprisonment in the state prison.” “Every other crime,” reads the California Code, “or public offense is a misdemeanor except those offenses that are classified as infractions.” Continuing with its emphasis on degree of punishment as a distinguishing feature between felonies and misdemeanors, California law reads: “Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both.” In California, “[a]n infraction is not punishable by imprisonment.” Some jurisdictions refer to infractions as “ticketable offenses,” to indicate that such minor crimes usually result in the issuance of citations, which are often payable through the mail.

Another important distinction can be drawn between crimes that are completed and those that are attempted or are still in the planning stage. The term “inchoate,” which means partial or unfinished, is applied to crimes such as conspiracy to commit a criminal act, solicitation of others to engage in criminal acts, and attempts to commit crimes. Inchoate crimes are discussed in greater detail later in this book.

Crimes can also be classified as either mala in se or mala prohibita. Mala in se crimes are those that are regarded, by tradition and convention, as wrong in themselves. Such acts are said to be inherently evil and immoral and are sometimes called “acts against conscience.” Mala in se crimes, such as murder, rape, and other serious offenses, are almost universally condemned and probably would be so even if strictures against such behaviors were not specified in the criminal law.13 Clarence Ray Jeffery, a sociologist of law, says that just as there is a natural law, there are also “natural crimes.” “The notion of natural crime,” says Jeffery, as “a crime against a law of nature rather than against a legal law, was present in the criminal law at its inception. This led to the definition of crimes as mala in se, acts bad in themselves, and mala prohibita, acts which are crimes mainly because they are prohibited by positive law.”14

As Jeffery observed, mala prohibita crimes (malum prohibitum) is the singular term that refers to one such crime) are considered “wrongs” only because there is a law against them. Without a statute specifically proscribing them, mala prohibita offenses might not be regarded as “wrong” by a large number of people. Mala prohibita offenses often include the category of “victimless crimes,” such as prostitution, drug use, and gambling, in which a clear-cut victim is difficult to identify, and whose commission rarely leads to complaints from the parties directly involved in the offense.

Many other distinctions can be drawn between types of crimes, but space does not permit discussion of them all. One final division should be mentioned however—the traditional classification of offenses into four types: (1) property crimes, (2) personal crimes, (3) public order offenses, and (4) morals offenses. The distinction between property and personal crimes is of special importance in most state penal codes, and official reports on the incidence of crime, such as the FBI’s Uniform Crime Reports (UCR), are structured along such a division. Crimes against property (which are discussed in Chapter 10) include burglary, larceny, arson, criminal mischief (vandalism), property damage, motor vehicle theft, passing bad checks, commission of fraud or forgery, and so on. Personal crimes, or offenses against persons (discussed in Chapters 8 and 9), include criminal homicide, kidnapping and false imprisonment, various forms of assault, and rape. Personal crimes are also termed
“violent crimes.” Public order offenses (discussed in Chapter 11) are sometimes called “crimes against the public order” and include offenses such as fighting, breach of peace, disorderly conduct, vagrancy, loitering, unlawful assembly, public intoxication, obstructing public passage, and (illegally) carrying weapons. Finally, morals offenses (discussed in Chapter 12) denote a category of unlawful conduct that was criminalized originally to protect the family and related social institutions. The “morals offense” category includes lewdness, indecency, sodomy, and other sex-related offenses, such as seduction, fornication, adultery, bigamy, pornography, obscenity, cohabitation, and prostitution.

Types of Law

Just as distinctions can be drawn between types of crime, so too can various kinds of law be described. Criminal law is just one type of law, although it is the form of law with which this book is primarily concerned. Useful distinctions can be drawn between other major categories of law, such as substantive law and procedural law; case law and statutory law; and civil law and criminal law.

Substantive law refers to that part of the law that creates and defines fundamental rights and duties. Substantive law includes criminal law as well as contract law, tort law, and other forms of the law that specify rules which must be followed in social life. Substantive criminal law, which defines crimes and specifies punishments, can be found in the penal codes of the various states and the federal government. Procedural law, on the other hand, specifies the methods to be used in enforcing substantive law. Laws of criminal procedure enumerate acceptable steps to be undertaken during the investigation, arrest, trial, and sentencing of criminal defendants. One judge described the difference between substantive and procedural criminal law this way: “Substantive law is that which declares what acts are crimes and describes the punishment therefor; whereas procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.”

Most procedural laws in jurisdictions within the United States today are statutory in nature—that is, they are formal written rules of procedure. Hence, another major distinction is that made between case law and statutory law. Statutory law exists in the form of statutes or formal written codes and is made by a legislature or governing body with the power to make law. Case law is sometimes called “judge-made law” and refers to the body of previous decisions, or precedents, that have accumulated over time and to which attorneys refer when arguing cases and that judges use in deciding the merits of new cases. Central to case law is the principle of stare decisis. Stare decisis literally means “standing by decided matters” and forms the basis of our modern law of precedent. The principle of stare decisis requires that courts be bound by their own earlier decisions, and by those of higher courts having jurisdiction over them, regarding subsequent cases on similar issues of law and fact. The U.S. Supreme Court has ruled that “Stare decisis is of fundamental importance to the rule of law.”

Case law and statutory law make for predictability in the law. Criminal defendants and their attorneys entering a modern courtroom can generally gauge with a fair degree of accuracy what the law will expect of them. In the words of the Court: “acknowledgments of precedent serve the principal purposes of stare decisis, which are to protect reliance interests and to foster stability in the law.” In a strongly worded acknowledgment of the importance of stare decisis, the majority opinion of the U.S. Supreme Court in the 1986 case of Vasquez v. Hillary says that stare decisis “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our
Courts of law follow precedent, on the general theory that experience is more than just individual decision. Precedent, however, tends to carry forward the ignorance and injustice of the past. Mankind is constantly learning, getting new views of truth, seeing new values in social justice. Precedent eols this advance.

—Frank Crane (1919)

DISTINGUISH

to argue or to find that a rule established by an earlier appellate court decision does apply to a case currently under consideration even though an apparent similarity exists between the cases.

CIVIL LAW

that form of the law that governs relationships between parties.

TORT

a private or civil wrong or injury. The unlawful violation of a private legal right other than a mere breach of contract, express or implied. A tort may also be the violation of a public duty if, as a result of the violation, some special damage accrues to the individual. An individual or business that commits a tort is called a tort-feasor.

TORT-FEASOR

an individual, business, or other legally recognized entity that commits a tort.

Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many.


While Justice Cardozo pointed out with great accuracy that the power of the precedent is only ‘the power of the beaten track’, still the mere fact that a path is a beaten one is a persuasive reason for following it.

—Robert H. Jackson (1945)

constitutional system of government, both in appearance and in fact.” Even so, a number of justices have, in various cases, recognized that stare decisis “is not an imprisonment of reason.” In other words, while stare decisis is a central guiding principle in Western law, it does not dictate blind obedience to precedent.

Many cases, of course, are not subject to stare decisis because they are unlike previous cases. They may deal with new subject matter or novel situations, raise unusual legal questions, or fall outside of the principles established by earlier decisions. Even when cases are apparently similar, it is possible for courts to distinguish a new case from earlier ones. When a case is distinguished, a court finds that prior cases are sufficiently dissimilar to the one under review that previous precedents do not apply.

Criminal law, which was defined earlier as that form of law whose violation is an offense against the state or against the nation, must be distinguished from civil law. Civil law governs relationships between parties. Civil codes regulate contracts of all sorts, including marriages, divorces, and many other forms of personal and business relationships, such as inheritance and adoption. A private or civil wrong or injury is referred to as a tort. A tort can be more formally defined as “the unlawful violation of a private legal right other than a mere breach of contract, express or implied. A tort may also be the violation of a public duty if, as a result of the violation, some special damage accrues to the individual.” An individual or business that commits a tort is called a tort-feasor.

A tort may give rise to civil liability, under which the injured party may sue the person or entity who caused the injury and ask that the offending party be ordered to pay damages directly to them. Civil law, however, is more concerned with assessing liability than it is with intent. Accidents, as in cases of airline or automobile crashes, may result in huge civil settlements, even though the defendant did not intend the crash to occur.

Parties to a civil suit are referred to as the plaintiff and the defendant and, as with criminal cases, the names of civil suits take the form Named Plaintiff v. Named Defendant. Unlike criminal cases, in which the state routinely prosecutes wrongdoers, most civil suits are brought by individuals. On occasion, however, the plaintiff in a civil suit may be the state or a government office or agency. Hence, the state may bring a suit to revoke an attorney’s right to practice law or a doctor’s right to practice medicine. Similarly, the state may bring antitrust cases and initiate other types of civil action. In contrast to the criminal law, however, no civil action will be undertaken that is not initiated by the injured party.

Damage awards in civil cases, when they occur, may be both compensatory—in which the amount to be paid directly compensates the injured party for the amount of damage incurred—and punitive—in which the award serves to punish the defendant for some especially wrongful or treacherous act. In 1996, for example, thirtysix-year-old Alex Hardy, an Alabama man who had been seriously injured when his Chevrolet Blazer flipped over, received a $150 million award from a civil jury. One-third of the award, or $50 million, was in the form of compensatory damages intended to provide medical care for Hardy, who was left partially paralyzed. The other $100 million came in the form of punitive damages, with the jury accepting Hardy’s claim that General Motors knew that the door latches on Blazers were defective and that the latches might allow the doors to open in crashes. Although Hardy had been thrown from his vehicle, GM claimed the door latches were safe and that Hardy had fallen asleep and was not wearing a seat belt at the time of the accident.

It is important to realize that violations of the criminal law can also lead to civil actions—even though the defendant may not be convicted of the criminal charges. In 1996, for example, Bernhard Goetz, also known as the “subway vigilante,” was ordered to pay $43 million in damages to Darrell Cabey, one of four young black men he shot on a New York City subway train in 1984. Goetz did not
deny that he shot the men, but claimed that they were trying to rob him. After the shooting, Goetz was acquitted of attempted murder and assault charges at a criminal trial, but served eight months in prison on weapons charges. Immediately after the civil award Goetz filed for bankruptcy, listing $17,000 in assets and $60 million in liabilities.

Perhaps the most famous example of such an instance, however, was the 1995 wrongful death suit filed against O. J. Simpson by Fredric Goldman, father of murder victim Ronald Goldman, and Kimberly Goldman (Ronald’s sister). The suit demanded monetary damages for what the plaintiffs claimed was Simpson’s role in the wrongful death of Ronald Goldman, and it alleged that Simpson (and possibly other unknown defendants) caused Goldman’s death. In 1997 Simpson was ordered to pay $33.5 million to the family of Ron Goldman and to Nicole Simpson’s estate, after a California civil jury found that he was responsible for their deaths. An appeal of the award was denied by California Superior Court Judge Hiroshi Fujisaki—who had also presided over the trial.

Because criminal law and civil law are conceptually distinct, both in function and process, a person can be held accountable under both types of law for the same instance of misbehavior without violating constitutional guarantees of double jeopardy.

Some state and federal laws may limit civil liability. The Support Antiterrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), for example, which is part of the Homeland Security Act, limits liability claims stemming from acts of terrorism when those claims are brought against certain manufacturers of antiterrorism technologies that have been deployed. Protected products must be designated as qualified antiterrorism technologies (QATTs) by the Secretary for Homeland Security.

As this book goes to press, four antiterrorism technologies have already won designation and certification under the legislation.

**THE PURPOSE OF LAW**

Max Weber (1864–1920), an eminent sociologist of the early twentieth century, said that the primary purpose of law is to regulate the flow of human interaction. Without laws of some sort modern society probably could not exist, and social organization would be unable to rise above the level found in primitive societies (where mores and norms are the primary regulatory forces). Laws make for predictability in human events by using the authority of government to ensure that socially agreed-on standards of behavior will be followed and enforced. They allow people to plan their lives by guaranteeing a relative degree of safety to well-intentioned individuals, while constraining the behavior of those who would unfairly victimize others. Laws provide a stable foundation for individuals wishing to join together in a legitimate undertaking by enforcing rights over the control and ownership of property. They also provide for individual freedoms and personal safety by sanctioning the conduct of anyone who violates the legitimate expectations of others. Hence, the first, and most significant, purpose of the law can be simply stated: laws support social order.

To many people, a society without laws is unthinkable. Were such a society to exist, however, it would doubtless be ruled by individuals and groups powerful enough to usurp control over others. The personal whims of the powerful would rule, and less powerful persons would live in constant fear of attack. The closest we have come in modern times to lawlessness can be seen in war-torn regions of the world. The genocidal activities of warring parties in Bosnia-Herzegovina, Croatia, and Rwanda, and the wholesale looting of homes, offices, and businesses, and the frequent sexual attacks on Kuwaiti women by Iraqi troops during the Gulf War provide a glimpse of what can happen when the rule of law breaks down.
Moral Enterprise

Because the law can exert powerful control over human conduct, some have suggested that it can be purposefully used as a tool to intentionally shape society. This approach, known as “social engineering,” found its best expression in the writings of Roscoe Pound (1870–1964). Pound served as dean of Harvard Law School from 1916 to 1936 and authored a number of influential works on the law, including the book, *Spirit of the Common Law* (1921). Pound distilled his ideas into a set of jural postulates, or rules. Such postulates, claimed Pound, form the basis of all law, because they reflect shared needs. In 1942 Pound published his postulates in the form of five propositions, as follows:

1. In civilized society, men [and women] must be able to assume that others will commit no intentional aggressions upon them.
2. In civilized society, men [and women] must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.
3. In civilized society, men [and women] must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence:
   
   Will make good reasonable expectations which their promises or other conduct will reasonably create;
   Will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto;
   Will restore specifically or by equivalent what comes to them by mistake or unanticipated or [via a] not fully intended situation whereby they receive at another’s expense what they could not reasonably have expected to receive under the circumstances.
4. In civilized society, men [and women] must be able to assume that those who are engaged in some course of conduct will act with due care not to cause an unreasonable risk of injury upon others.
5. In civilized society, men [and women] must be able to assume that those who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds.

In later writings, Pound modified his concept of jural postulates to reflect the fact that laws cannot equally meet the interests of all social groups in any particular society—especially one as diverse as the United States. Pound used the concept of a “jurisprudence of interest” to show that one of the basic purposes of law in a free society is to satisfy as many claims or demands of as many people as possible.

Other writers have gone beyond Pound in showing that laws are the result of active enterprise, and they reflect the philosophical, moral, and economic perspectives of their creators. As such, laws enforce the values of the powerful and uphold established patterns of social privilege. In 1963 Howard Becker used the term moral enterprise to refer to the activities of moral crusaders through which new laws are created, and he used the phrase moral entrepreneurs to refer to those who work to enact desired legislation. In Becker’s words: “Rules are not made automatically. Even though a practice may be harmful in an objective sense to the group in which it occurs, the harm needs to be discovered and pointed out. People must be made to feel that something ought to be done about it. Someone must call the public’s attention to these matters, supply the push necessary to get things done, and direct such energies as are aroused in the proper direction to get a rule created.”

Examples of contemporary moral enterprise can be seen in the activities of interest groups that have influenced recent passage of three-strikes legislation and specific statutes, such as “Megan’s Law.” Three-strikes legislation, which was passed in California in 1994 amid much fanfare, and since has been enacted in various forms...
in a number of other states, requires criminal offenders to be sentenced to lengthy prison terms after their third felony conviction. California’s law, which is retroactive (in that it counts offenses committed before the date the legislation was signed), requires a twenty-five-year-to-life sentence for three-time felons with convictions for two or more serious or violent prior offenses. Criminal offenders facing a “second strike” can receive up to double the normal sentence for their most recent offense. Parole consideration is not available until at least 80 percent of the sentence has been served. (Chapter 14 discusses the California three-strikes law in greater detail.) Three-strikes provisions continue to find much public support, and the federal Violent Crime Control and Law Enforcement Act of 1994 also contains a three-strikes provision, which mandates life imprisonment for federal criminals convicted of three violent felonies or drug offenses.

Megan’s Laws, first enacted in New Jersey, require public notification whenever previously convicted sex offenders move into neighborhoods. The 1994 rape and murder of Megan Kanka, a seven-year-old New Jersey girl, by Jesse K. Timmendequas, a twice-convicted sex offender living across the street from her home, provided the impetus for the New Jersey legislation. Timmendequas, whose criminal history had been unknown to the Kankas, was sentenced to death on June 20, 1997, for Megan’s murder. Long before sentence was imposed on Timmendequas, however, Megan’s case had attracted national attention. On May 17, 1996, President Clinton signed into law a federal version of Megan’s Law. The legislation requires federal criminal justice agencies to notify local law enforcement officials and members of the public when known sex offenders move into their communities. As of this writing, forty-five states and the federal government have enacted Megan’s Laws.

An entrepreneurial organization that has had a considerable amount of impact on recent legislation is Handgun Control Inc. (HCI), founded in 1974 by Republican businessman Pete Shields (whose twenty-three-year-old son was murdered that year) and others. HCI began in partnership with the National Coalition to Ban Handguns (NCBH), which was formed about the same time. The NCBH changed its name to the Coalition to Stop Gun Violence in 1990. In the early 1980s, the murder of John Lennon helped spark interest in gun control and led to substantial success in fund-raising activities for most gun control organizations.

Since starting operations, HCI has been primarily involved in national and state lobbying efforts to control the sale and spread of handguns. Sarah Brady, wife of James Brady, Ronald Reagan’s press secretary, who was seriously injured in the 1981 assassination attempt against the president, has headed HCI since 1989. HCI, affiliated with the Center to Prevent Handgun Violence, has been successful in the enactment of gun control measures in Congress and in many states. HCI’s major victory to date came in the form of the so-called “Brady Law,” formally known as the Brady Handgun Violence Prevention Act, which was signed into law by President Clinton in 1994. The Brady Law provided for a five-day waiting period before the purchase of a handgun and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any handgun.

The Role of Criminal Law

Like laws in general, the criminal law has a variety of purposes. Some say that the primary purpose of the criminal law is to “make society safe for its members, and to punish and rehabilitate those who commit offenses.” Others contend that the basic purpose of the criminal law is “to declare public disapproval of an offender’s conduct by means of public trial and conviction and to punish the offender by imposing a penal sanction.”
The criminal law also serves to restrain those whom society considers dangerous, often through imprisonment, home confinement, or other means. It deters potential offenders through examples of punishments applied to those found guilty of crimes, and it protects honest and innocent citizens by removing society’s most threatening members. In short, criminal law protects law-abiding individuals while maintaining social order through the conviction and sentencing of criminals. A more complete list shows that criminal law functions to:

- Protect members of the public from harm
- Preserve and maintain social order
- Support fundamental social values
- Distinguish criminal wrongs from civil wrongs
- Express communal condemnation of criminal behavior
- Deter people from criminal activity
- Stipulate the degree of seriousness of criminal conduct
- Establish criteria for the clear determination of guilt or innocence at trial
- Punish those who commit crimes
- Rehabilitate offenders
- Assuage victims of crime.

Before the law can do any of these things, however, it must first identify those to whom it most intimately applies. That is, the criminal law has the job of defining precisely what may not be done, by whom, and of imposing penalties on those who do that which it prohibits.

Once a criminal law has been enacted, and crimes defined, the criminal justice system comes into play. The justice system emphasizes crime reporting, criminal investigation, the apprehension and arrest of suspects, trials and plea bargaining with the resulting conviction or acquittal of suspects, and, finally, punishment and sentencing. Punishment is intricately tied to criminal sentencing, and the imposition of punishments on those convicted of violating the criminal law is discussed in considerable detail in Chapter 14.

The Rule of Law

In 1739, David Hume asked the following question:

Here are two persons who dispute for an estate; of whom one is rich, a fool, and a bachelor; the other poor, a man of sense, and has a numerous family. The first is my enemy; the second my friend. To whom should the estate be awarded?

To Hume, the morally correct decision would have been to award the estate based on principles of law without regard to personal passions, individual motives, or the economic power or social positions of those involved. By following this course of action, we are adhering to the “rule of law,” not the “rule of man.”

The “rule of law,” sometimes also referred to as “the supremacy of law,” involves the belief that an orderly society must be governed by established principles and known codes, which are applied uniformly and fairly to all of its members. Under the rule of law no one is above the law, and those who enforce the law must abide by it.

The rule of law has been called “the greatest political achievement of our culture,” for without it few other human achievements—especially those that require the efforts of a large number of people working together—would be possible. The American Bar Association (ABA) defines the rule of law to include the following:
The Purpose of Law

- Freedom from private lawlessness provided by the legal system of a politically organized society
- A relatively high degree of objectivity in the formulation of legal norms and a like degree of evenhandedness in their application
- Legal ideas and juristic devices for the attainment of individual and group objectives within the bounds of ordered liberty
- Substantive and procedural limitations on governmental power in the interest of the individual for the enforcement of which there are appropriate legal institutions and machinery.

As the ABA definition indicates, the rule of law also includes the notion that due process of law, or those procedures that effectively guarantee individual rights in the face of criminal prosecution, is necessary prior to the imposition of any punishments on law breakers. Due process of law can be defined as “the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights,” or as formal adherence to fundamental rules for fair and orderly legal proceedings. Due process means that laws may not be created or enforced in arbitrary or unreasonable fashion.

Due process guarantees are found in the Fifth, Sixth, and Fourteenth amendments to the U.S. Constitution. The Fourteenth Amendment states the due process requirement of the rule of law rather succinctly in these words: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Although that amendment applies primarily to
FLANDREAU, S.D. (AP)—Bill Janklow, who prosecuted criminals as attorney general and helped build prisons as governor, will himself serve jail time for a crash that killed a motorcyclist.

A judge sentenced Janklow on Thursday to 100 days in jail after the former congressman apologized, his voice choking at the end of his statement.

“If I could change places with him, I would. It’s easy for me to say that, but I would,” he said Thursday. “All I can say, judge, is I’m sorry for what happened and I wish I could change it.”

A jury convicted Janklow on December 8, 2003, of second-degree manslaughter, speeding and running a stop sign for a collision that killed Randy Scott, 55, on August 16.

Janklow, 64, said he never made up any stories or excuses about the accident. And he said he got a lot of traffic tickets before he became governor again in 1995, but not after.

The Scott family said before the sentencing that no one from the family would have any comment. A message left on the answering machine of Marcella Scott, the victim’s mother, was not immediately returned.

Janklow also was fined $5,700 and was ordered to pay $50 a day for the cost of his 100 days in jail, for another $5,000. He will not be allowed to drive while on probation for three years.

After 30 days, Janklow can leave jail for up to 10 hours a day to perform community service. He was ordered to report to the Sioux Falls jail February 7.

South Dakota does not require minimum sentences, so the judge was free to impose anything from no jail time and no fines to a total of more than 11 years behind bars and $11,400 in fines.

The defense argued that Janklow, a diabetic, was suffering from low blood sugar Aug. 16 because he had not eaten for 18 hours. The prosecution, however, said Janklow concocted the story as an excuse for his reckless driving.

Prosecutor Roger Ellyson said he believes Janklow is remorseful but made up a story about avoiding another vehicle and then blamed the accident on a medical condition. He said Janklow has a “horrific” driving record and ignored traffic laws even after warnings, tickets, accidents and an earlier close call at the same intersection.

Janklow, a Republican, was the state attorney general for four years in the 1970s before serving 16 years as governor and being elected to the state’s lone House seat in 2002. During his four terms as governor, Janklow won over legions of voters in heavily conservative South Dakota with his tough-talking, maverick style.

Janklow would have been up for re-election next November. His resignation from Congress became effective Tuesday.

A special election will be held June 1 to fill the remainder of his term, giving Democrats an early chance to pick up a seat in the narrowly divided House. The seat will remain vacant until then.

Republicans will gather Friday and Saturday to select a candidate. Democrats will meet March 6 and are expected to tap Stephanie Herseth, who narrowly lost to Janklow in 2002.

state governments, the Fifth Amendment imposes due process requirements upon the federal government as well. The Fifth Amendment reads: “No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ”

**HISTORICAL SOURCES OF TODAY’S LAW**

Criminal laws in the United States have been shaped by a number of historical antecedents and philosophical perspectives (Table 1.1). Important roots of the law include arguments from nature (natural law), the Old and New Testaments, religious belief and practice, early Roman law, English common law, and our nation’s Constitution and Bill of Rights. Each of these important historical sources is discussed in the pages that follow. Other sources of the criminal law include constitutions (state and federal), executive orders, quasi-legislative administrative rules and regulations, court precedent, opinions of attorneys general, and various historical treaties and codes.

**Natural Law**

One historical source of today’s law is natural law. Natural law adherents claim that some laws are fundamental to human nature and discoverable by human reason, intuition, or inspiration, without the need for reference to man-made laws. Such people believe that an intuitive and rational basis for many of our criminal laws can be found in immutable moral principles or some identifiable aspects of the natural order.

One authoritative source has this to say about natural law: “This expression, ‘natural law,’ or *jus naturale*, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral, and physical constitution.”

Ideally, say natural law advocates, man-made laws should conform to principles inherent in natural law. The great theologian Thomas Aquinas (1225–1274), for example, wrote in his *Summa Theologica* that any man-made law that contradicts natural law is corrupt in the eyes of God.

**TABLE 1.1**

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<th>HISTORICAL SOURCES OF TODAY’S LAW</th>
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<td>Nature (natural law)</td>
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<td>The Old and New Testaments</td>
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<td>Religious belief and practice</td>
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<td>Early Roman law</td>
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<td>English common law</td>
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<td>U.S. Constitution and Bill of Rights</td>
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Natural law principles continue to be influential in many spheres. The modern debate over abortion, for example, relies on the use of natural law arguments to support both sides in the dispute. Prior to the 1973 U.S. Supreme Court decision of Roe v. Wade, abortion was a crime in most states (although abortions were sometimes permitted in cases of rape or incest or when the mother’s life was in danger). In Roe the Justices held that: “State criminal abortion laws . . . that except from criminality only a life-saving procedure on the mother’s behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman’s qualified right to terminate her pregnancy.” The Court set limits on the availability of abortion, however, when it said that although “the State cannot override that right, it has legitimate interests in protecting both the pregnant woman’s health and the potentiality of human life, each of which interests grows and reaches a ‘compelling’ point at various stages of the woman’s approach to term.” Natural law supporters of the Roe standard argue that abortion must remain a “right” of any woman because she is naturally entitled to be in control of her own body. “Pro-choice” advocates claim that the legal system must continue to protect this “natural right” of women.

In contrast, antiabortion forces—sometimes called “pro-lifers”—claim that the unborn fetus is a person and that he or she is entitled to all the protections that can reasonably and ethically be given to any living human being. Such protection, they suggest, is basic and humane and lies in the natural relationship of one human being to another. If antiabortion forces have their way, abortion will one day again be outlawed.

Natural law became an issue in confirmation hearings conducted for U.S. Supreme Court Justice nominee Clarence Thomas in 1991. Because then-judge Thomas had mentioned natural law and natural rights in speeches given prior to his nomination to the Court, Senate Judiciary Committee Chairman Joseph Biden (and others) grilled him about the concept. Biden suggested that natural law was a defunct philosophical perspective, no longer worthy of serious consideration, and said that the duty of a U.S. Supreme Court Justice was to follow the American Constitution. Thomas responded by pointing out that natural law concepts contributed greatly to the principles underlying the Constitution. It was the natural law writing of John Locke,
U.S. Threatens Veto of Iraqi Islamic Law

KARBALA, Iraq (AP) — The top U.S. administrator in Iraq suggested Monday he would block any interim constitution that would make Islam the chief source of law, as some members of the Iraqi Governing Council have sought.

L. Paul Bremer said the current draft of the constitution would make Islam the state religion of Iraq and “a source of inspiration for the law”—as opposed to the main source.

Many Iraqi women have expressed fears that the rights they hold under Iraq’s longtime secular system would be rolled back in the interim constitution being written by U.S.-picked Iraqi leaders and their advisers, many of them Americans. U.S. lawmakers have urged the White House to prevent Islamic restrictions on Iraqi women.

 Asked what would happen if Iraqi leaders wrote into the constitution that Islamic sharia law is the principal basis of the law, Bremer suggested he would wield his veto. “Our position is clear. It can’t be law until I sign it,” he said.

Bremer must sign into law all measures passed by the 25-member council, including the interim constitution. Iraq’s powerful Shiite clergy, however, has demanded the document be approved by an elected legislature. Under U.S. plans, a permanent constitution would not be drawn up and voted on until 2005.

Bremer used the inauguration ceremony at a women’s center in the southern city of Karbala to argue for more than “token” women’s representation in the transitional government due to take power June 30.

“I think it is very important that women be represented in all the political bodies,” Bremer said.

“Women are the majority in this country, in this area probably a substantial majority,” he said, referring to the Saddam Hussein’s 1991 purges of Shiite Muslim men. Those killings left the holy city of Karbala and other Shiite cities dotted with mass graves and brimming with thousands of widows.

Bremer and an entourage of reporters flew from Baghdad into this Shiite holy city in a pair of U.S. Army Black Hawk helicopters. He toured a women’s center renovated by U.S. and seized Iraqi funds, pausing to chat with women and girls who were sewing curtains and surfing the Internet.

In a speech to about 100 women—most dressed in flowing black abayas and some with tattooed chins—Bremer cited a 2003 United Nations report that found that productivity in Arab countries was being strangled because women had been kept out of the work force. Bremer suggested that women’s participation did not run counter to Muslim values.

“Women who can read and write and understand mathematics are not prevented from being good mothers. Quite the opposite,” Bremer told the gathering. “No son is better off because his mother and sisters cannot read.”

Nawal Jabar, 44, whose husband was killed in the Iran-Iraq war in the 1980s, said she joined the women’s center to learn a trade.

“Either my mother or my brother has supported me from time to time since my husband died,” Jabar said. “It’s a very bad situation. But I am hoping I can get a job here so that I can support my kids.”

Enshrining women’s rights in a constitution could be difficult. U.S. observers have predicted liberal reforms introduced in the transitional law could well be rolled back in a future constitution. Bremer acknowledged that U.S. influence on an Iraqi constitution would fade after the June 30 handover.

“There will be a sovereign government here in June. The Iraqis will then have responsibility for their own country,” Bremer said. “There’s a real hunger for democracy in this country. It may not look like American democracy, but there’s a real hunger for it and we’re encouraging that.”

There are three women on the Governing Council.

Mohsen Abdel-Hamid, the current council president and a member of a committee drafting the interim constitution, has proposed making Islamic sharia law the “principal basis” of legislation.

The phrasing could have broad effects on secular Iraq. In particular, it would likely make moot much of Iraq’s 1959 Law of Personal Status, which grants uniform rights to husband and wife to divorce and inheritance, and governs related issues like child support.

Under most interpretations of Islamic law, women’s rights to seek divorce are strictly limited and they only receive half the inheritance of men. Islamic law also allows for polygamy and often permits marriage of girls at a younger age than secular law.

In December, the council passed a decision abolishing the 1959 law and allowing each of the main religious groups to apply its own tradition—including Islamic law. Many Iraqi women expressed alarm at the decision, and Bremer has not signed it into law.

Earlier this month, 45 members of the U.S. House of Representatives signed a letter to President Bush urging him to preserve women’s rights.

“It would be a tragedy beyond words if Iraqi women lost the rights they had under Saddam Hussein, especially when the purpose of our mission in Iraq was to make life better for the Iraqi people,” the letter read.

During the 1991 U.S. Senate confirmation hearings for Supreme Court Justice Clarence Thomas (a Bush nominee), natural law became a critical issue. Thomas’s opponents claimed that his adherence to a natural law philosophy indicated a judge who was out of step with the times and dangerously independent from accepted forms of legal reasoning. Reproduced below is a portion of a statement made during the hearings by Representative Craig Washington (D.—Texas):

Thursday, September 19, 1991,
Afternoon Session

REP. WASHINGTON: Mr. Chairman and members, I thank you for the privilege and honor of speaking before you today. We truly appreciate this opportunity to express our views on a vitally important nomination. I speak in opposition to the nomination of Judge Clarence Thomas. My opposition to Judge Thomas has nothing at all to do with his personal political views. It has nothing at all to do with the politics that results in his nomination, but rather is based upon a scientific objective reason and calm analysis of Judge Thomas’ legal writings, legal opinions, editorial opinions, remarks, and speeches.

I have concluded at least the following: Judge Thomas has a disturbingly paradigmatic disdain and disregard for legal precedents and stare decisis. In fact, I don’t think he knows what “stare decisis” means. Judge Thomas has shown a previous long-standing disrespect for the civil liberties of groups. Judge Thomas has espoused as a fulcrum of his legal thought the concept of natural law, and Judge Thomas has shown a lack of respect for the rule of law.

We have reached these and other conclusions only after much research and analysis. As you know, it is often difficult to take a stand that would seem to be unpopular. It is our duty, however, as elected officials to speak against the nomination of Judge Clarence Thomas based upon the facts. Our position is clearly based upon just that: the fact that the elevation of Judge Clarence Thomas to the Supreme Court of the United States is dangerous for all Americans.

The quintessential underpinning of Anglo-Saxon jurisprudence is that if you have a case with similar facts, similar evidence, and similar legal predicates, you should reach a similar outcome. Stare decisis, which in Latin, as you know, means “standing by decided matters,” is a doctrine of following rules of principles laid down in previous judicial decisions. . . .

The most blatant example of Judge Thomas’ disregard for legal precedent came when Judge Thomas was Chairman of the Equal Employment Opportunity Commission. As Chairman of the EEOC, Judge Thomas spoke out against the Supreme Court’s approval of racially and sexually defined employment goals and time tables. Judge Thomas states that he considered those goals and time tables to be a weak and limited weapon against forms of discrimination. There have been Thomas suggested, that inspired the Framers to declare: “All men are created equal.” A brief portion of Thomas’s confirmation hearing, highlighting the role natural law played in them, is reproduced in the accompanying Law in Practice feature.

Early Codes

Early criminal codes provide another source of contemporary law. The development of criminal codes can be traced to the Code of Hammurabi, an ancient set of laws inscribed on a stone pillar near the ancient city of Susa around the year 1750 B.C. The Hammurabi Code, named after the Babylonian King Hammurabi (1792–1750 B.C.), specified a number of property rights and crimes and associated punishments.
at least four Supreme Court decisions on race-conscious remedies in which the Supreme Court has approved them. They are, as you know:
United States v. Paradise; Local 28 Sheetmetal Workers v. the EEOC; Local 93 Firefighters v. Cleveland; and Johnson v. Transportation Agency Santa Clara County, California.

There are times when we all disagree with the law. Rules and regulations make our society stable. If we all agree that, for better or worse, the rule is that privates salute generals and that we should drive the speed limit as established by the legislatures of our various states, then we should obey those rules and regulations. I might not like the person wearing the uniform of the general, but if I'm a private and he or she is a general, I am bound to respect the rank of the general....

Moreover, the Bill of Rights and other amendments were intended to protect those who are similarly situated from the tyranny of government. Natural law has as much to do with judicial opinion as voodoo has to do with the practice of medicine. An example of the application of natural law would be to take the example I used earlier about driving the speed limit. Under the theory of natural law, the majority of the people have agreed that we should drive the speed limit. If one were to adhere to a natural law philosophy, however, one could state: Since I’ve paid for my car and I’ve paid part of the taxes to build this highway, I can drive as fast as I wish. I’m not bound by mere legal opinion; I’m bound only by myself. The logical extension to such a philosophy is that we would have no law, no order, no rules to govern our society.

During Judge Thomas’ tenure at the EEOC, he refused to process cases of age discrimination in spite of the fact he had been ordered to do so by several governmental bodies. Instead, Judge Thomas allowed 13,000 age discrimination cases to expire and go unresolved. It was Judge Thomas’ duty to file these cases. It did not matter that he disagreed with the law. He, like others, was bound to respect and follow the law regardless of whether he liked it or not. I oppose Judge Thomas based upon these aforementioned facts. Choice based upon my evidence and that of Congressional Black Caucus colleagues is that Judge Thomas is not a worthy successor to Justice Marshall. The difference that we have is that Judge Thomas’ [decisions] did not stem from merely reasonable and understandable differences over particular cases or remedies. Rather, Judge Thomas repudiates the fundamental role of the Supreme Court as a guardian of the constitutional freedoms and rejects the legacy of Judge Marshall.

On behalf of twenty-five of the twenty-six members of the Congressional Black Caucus, we respectfully urge you to reject the nomination of Judge Clarence Thomas. At the appropriate time, I’ll be happy to respond to your questions.

What do you think?


2. How does Rep. Washington’s interpretation of stare decisis compare to Justice Marshall’s position, cited earlier in this chapter, that stare decisis “is not an imprisonment of reason”?

Hammurabi’s laws spoke to issues of ownership, theft, sexual relationships, and interpersonal violence. Although Hammurabi’s code specified a variety of corporal punishments, and even death, for named offenses, its major contribution was that it routinized the practice of justice in Babylonian society by lending predictability to punishments. Prior to the code, captured offenders often faced the most barbarous and capricious of punishments, frequently at the hands of revenge-seeking victims, no matter how minor their offenses had been. As Marvin Wolfgang has observed, “In its day, 1700 B.C., the Hammurabi Code, with its emphasis on retribution, amounted to a brilliant advance in penal philosophy mainly because it represented an attempt to keep cruelty within bounds.”

Although it is of considerable archeological importance, the Code of Hammurabi probably had little impact on the development of Western legal traditions. Roman
Common law is an especially important historical source of many of our modern laws. English legal practices prior to A.D. 1000 were influenced by both Roman legal principles and the laws of invading Germanic tribes, known as Anglo-Saxons, who conquered England around the year A.D. 400. When William the Conqueror invaded England in 1066, he declared Saxon law absolute and announced that he was “the guardian of the laws of Edward,” his English predecessor. William, however, in seeking to add uniformity to the law, lent impetus to the development of common law by ordering that judicial decisions be recorded and disseminated. Under William’s decrees, significant decisions were distributed to judges throughout the country, leading to the development and application of common principles of jurisprudence. Enumeration of the various kinds of offenses for which punishment could be meted out led to acknowledgment of “common law crimes” throughout England. Eventually, a common law arose out of prevailing customs, rules, and social practices that found support in an ever-evolving body of judicial decisions. Common law was the result of precedent and tradition, and its authority rested primarily on usage and custom rather than on any official decree or statutory enactment. As Clarence Ray Jeffery observes, “It was during the reign of Henry II (1154–1189) that the old tribal-feudal system of law disappeared and a new system of common law emerged in England.”

By the year 1200, common law was firmly entrenched in England. Because it depended so heavily on judicial interpretation, common law has often been referred to as “judge-made” law. As Howard Abadinsky observed, “Common law involved the transformation of community rules into a national legal system. The controlling element (was) precedent.”

Common law crimes and the common law legal tradition were transferred to the English colonies in North America, and today they form the basis of much statutory and case law in this country. The influence of common law on contemporary criminal law is so great that it has often been called the major source of modern criminal law. The American frontier provided an especially fertile ground for the acceptance of common law principles. The scarcity of churches and infrequent visits by traveling ministers prompted many territories to recognize common law marriages and to recognize that a meeting of minds constituted a valid contract in most areas of human endeavor.
The strength of the common law tradition in early America was highlighted in 1811, when the famous English prison reformer and jurist Jeremy Bentham wrote a letter to President James Madison in which he offered to codify the law of the United States in its entirety. Bentham told Madison that the case-by-case approach of the common law, based solely on precedent, was too “fragmented, flexible, and uncertain” to support the continued economic and social development of the country. Madison, however, rejected the offer and directed John Quincy Adams to reply to Bentham, telling him “[e]ither I greatly overrate or [Bentham] greatly underrates the task . . . not only of digesting our Statutes into a concise and clear system, but [of reducing] our unwritten to a text law.” A short time later Madison also rejected federal use of the written legal code developed by the American Benthamite Edward Livingston.35

By the late 1800s, however, common law principles were giving way across America to written civil and penal codes. The Married Women’s Property Act of 1875, for example, which provided a model for state legislatures of the period, gave married women control over wages earned independently of husbands. The act effectively dissolved the older common law doctrine of unity of husband and wife, a principle that had given husbands control over their wives’ wages and property. About the same time the nineteenth-century jurist David Dudley Field drafted what came to be known as the “Field Code”—a set of proposed standardized criminal and civil procedures and uniform criminal statutes that were adopted by the state of New York and served as a model for other states seeking to codify their laws.

Although modern American substantive and procedural criminal law is largely codified, some states still explicitly acknowledge the common law roots of contemporary penal legislation. The Florida Criminal Code, for example, provides that “The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.”46 With regard to “punishment of common law offenses,” the Florida Code says “When there exists no such provision by statute, the court shall proceed to punish such offense by fine or imprisonment, but the fine shall not exceed $500, nor the imprisonment 12 months.”47 Arizona Revised Statutes contain a similar provision, which reads “The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.”

Occasionally individuals are arrested and tried under common law when appropriate statutory provisions are not in place. In 1996, for example, euthanasia advocate Dr. Jack Kevorkian was arrested and tried in Michigan on charges of violating the state’s common law against suicide. After Kevorkian was acquitted, jury foreman Dean Gauthier told reporters, “We felt there was a lack of evidence regarding the interpretation of the common law.”48 In 1999, however, after Michigan enacted statutory legislation outlawing physician-assisted suicide, Kevorkian was convicted of a number of crimes and sentenced to ten to twenty-five years in prison. Evidence against Kevorkian came largely from a videotape aired on CBS’s 60 Minutes, showing the doctor giving a lethal injection to fifty-two-year-old Thomas Youk, who suffered from Lou Gehrig’s disease.

While Florida and a few other states have passed legislation officially institutionalizing common law principles, most states today—even those that have not done so—remain common law states. Common law states are jurisdictions in which the principles and precedents of common law continue to hold sway, although they have been greatly augmented with many statutory provisions. In contrast, a handful of states, called code jurisdictions, have enacted legislation that says something to the effect that “no conduct constitutes an offense unless it is a crime or violation
LAW ON THE BOOKS

COMMON LAW REFERENCES IN STATE CRIMINAL CODES
Compare with Model Penal Code, Section 1.05.

FLORIDA CRIMINAL CODE
Chapter 775, Section 1. The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.

ARIZONA REVISED STATUTES
Title 1, Section 201. Adoption of common law; exceptions.
The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.

UTAH CODE ANNOTATED
Section 76–1–105. Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance.

under this Code or another statute of this State.”49 Even in most code jurisdictions, however, the principles and strictures of common law are generally reflected in statutes. Similarly, code jurisdictions continue to accept defenses that were traditionally available at common law.

Although common law crimes that have not been codified may be difficult to successfully prosecute today, the American legal system still bears many important characteristics of English common law. Among them are (1) application of the common law
principle of *stare decisis*, (2) guarantees of “due process of law,” (3) recognition of “the
rule of law,” and (4) the use of juries in important cases in most jurisdictions. Given the
continuing significance of each of these principles in the legal system of the United
States, our nation remains, in many significant ways, a common law country.

**The U.S. Constitution**

The U.S. Constitution and *Bill of Rights* provide other important sources of today’s
laws. Because it embodies many of the ideals, principles, and beliefs on which
American society is based, the spirit of the Constitution has frequently guided and
shaped the creation of today’s statutory law.

The Constitution, however, is not so much a source of specific laws or criminal
prohibitions (although it does define treason as a crime), as it is a constraint on gov-
ernment *police powers*. The Constitution sets limits on the nature and extent of
criminal law that the government can enact. It guards personal liberties by restrict-
ing undue government interference in the lives of individuals and by ensuring per-
sonal privacy.

The Constitution can be seen as the sole piece of legislation by which all other
laws and legislation are judged acceptable or nonacceptable. For example, the Con-
stitution enshrines the notion that persons should only be held accountable for that
which they do or do not do (omissions), rather than for what they think or believe.
Hence, if a state legislature were to enact a law prohibiting thoughts of a seditious
Criminal Law Today  Chapter 1

or carnal nature, such a law would likely be overturned should it ever come before the U.S. Supreme Court, which serves as our nation’s constitutional interpreter.

Constitutional provisions determine the nature of criminal law by setting limits on just what can be criminalized, or made illegal. Generally speaking, constitutional requirements hold that criminal laws can only be enacted where there is a compelling public need to regulate conduct. The U.S. Supreme Court has held that “to justify the exercise of police power the public interest must require the interference, and the measures adopted must be reasonably necessary for the accomplishment of the purpose.”

As mentioned earlier in this chapter, the Constitution also demands that anyone accused of criminal activity be accorded due process. Similarly, the Constitution helps ensure that accused persons are provided with the opportunity to offer a well-crafted defense.

The Constitution imposes a number of specific requirements and restrictions on both the state and federal governments, and it protects individual rights in the area of criminal law. Most of the restrictions, requirements, protections, and rights inherent in the Constitution, as they relate to criminal law, are discussed elsewhere in this textbook. For now, we should recognize that they include:

• Limits on the government’s police power
• Limits on strict liability crimes
• Protection against ex post facto laws
• Protection against laws that are vague and unclear
• Protection of free thought and free speech
• Protection of the right to keep and bear arms
• Freedom of religion
• Freedom of the press
• Freedom to assemble peaceably
• Due process requirements
• Prohibitions against unreasonable searches and seizures
• Protection against warrants issued without probable cause
• Protection against double jeopardy in criminal proceedings

Criminalize

to make criminal. To declare an act or omission to be criminal or in violation of a law making it so.
The Federal System

- Privilege against self-incrimination
- Right to a speedy and public trial before an impartial jury
- Right to be informed of the nature of the charges
- Right to confront witnesses
- Right to the assistance of defense counsel
- Prohibition of excessive bail
- Prohibition of excessive fines
- Prohibition against cruel and unusual punishments
- Guarantees of equal protection of the laws.

THE FEDERAL SYSTEM

The U.S. Constitution provides the basis of a federal system of government with significant implications for American criminal law. The system is known as federalism. Unfortunately, however, when federalism is discussed confusion frequently arises over use of the term “federal government.” Federalism embraces both national and state governments, and under a federal system of government both state and national governments are technically part of “federal government.” The fact that our nation’s central government is popularly referred to as the “federal government” appears to be largely the result of historical accident. To avoid confusion, in this brief section we will use the terms “national government” or “central government” rather than “federal government.”

“A federal system of government is one in which two governments have jurisdiction over the inhabitants.” Under federalism a central government coexists with various state and local governments. Each governing body has control over activities that occur within its legal sphere of influence. The Constitution gives our national government control over activities such as interstate and international commerce, foreign relations, warfare, immigration, bankruptcies, and certain crimes committed on the high seas and against the “law of nations” (or international law). Individual states are prohibited from entering into treaties with foreign governments, from printing their own money, from granting titles of nobility (as is the central government), and various other things. States retain the power, however, to make laws regulating or criminalizing activity within their boundaries. Like the national government, states may also levy sanctions against those who violate the laws they create. This system is sometimes referred to as dual sovereignty, although the phrase can be misleading since under American federalism the Constitution imposes limits on both forms of government and therefore neither is truly “sovereign.” The Tenth Amendment makes clear the very precise limits on the powers of both national and state governments. It reads “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

One way to distinguish between state and national governments is to recognize that the most important responsibility of the national government is to ensure that the rights guaranteed to the people under the Constitution are not curtailed by the states. States, on the other hand, have an interest in protecting their powers (sometimes called “states’ rights”) and in keeping the national government from unlawfully interfering in their activities.

Limits on the federal power to criminalize what might otherwise be undesirable activity can be seen in the 1995 U.S. Supreme Court case of U.S. v. Lopez. In Lopez, the Court held that Congress had overstepped its bounds in passing the 1990 Gun-Free School Zones Act. The legislation made it a crime to possess a firearm in a school zone. Congressional authority for the legislation was said to reside in the Commerce Clause of the Constitution, which gives Congress the authority to regulate interstate commerce.
commerce. Attorneys for the government defended the act, arguing that, among other things, guns in schools have a negative impact on education, which in turn has an adverse effect on citizens’ productivity. Hence, they claimed, interstate commerce would be negatively affected by allowing guns to be carried in school zones. The Supreme Court disagreed and invalidated the law, finding that the legislation exceeded Congress’s authority to regulate commerce among the states.

Similarly, in 2000, the U.S. Supreme Court overturned the federal arson conviction of a man who had firebombed his cousin’s home. The defendant had been arrested and prosecuted under Section 844 of Title 18 of the United States Code, which makes it a federal crime to maliciously damage or destroy, by means of fire or an explosive, any building used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. The Court found that this particular instance of arson could not be prosecuted under the law because the residence was not used in interstate or foreign commerce. In its ruling, the Court rejected the government’s argument that the Indiana residence involved in this case was constantly used in at least three activities affecting commerce: (1) it was “used” as collateral to obtain and secure a mortgage from an Oklahoma lender, who, in turn, “used” it as security for the loan; (2) it was “used” to obtain from a Wisconsin insurer a casualty insurance policy, which safeguarded the interests of the homeowner and the mortgagee; and (3) it was “used” to receive natural gas from sources outside Indiana.

Practically speaking, American federalism has resulted in the creation of fifty state criminal codes, the creation of a separate U.S. criminal code, and numerous city and local ordinances detailing many types of violations. As a consequence, crimes can have different descriptions and associated penalties depending on the jurisdiction involved. Still, considerable commonality exists in practice, because all state codes criminalize serious misconduct such as murder, rape, robbery, assault and battery, burglary, and theft. Although statutory terminology may differ from state to state, and although particular crimes themselves may even be given different names, commonalities can be found among almost all of the states in terms of the types of behavior they define as criminal. The Model Penal Code, discussed in the next section, represents one attempt to standardize American criminal law between jurisdictions.

**THE MODEL PENAL CODE**

The Model Penal Code (MPC), referred to briefly earlier in this chapter, deserves special mention. The MPC is not law, but a proposed model, which states can use in developing or revising their statutory codes. The MPC was published as a “Proposed Official Draft” by the American Law Institute (ALI) in 1962, after having undergone thirteen previous revisions and represented the culmination of efforts that had been ongoing since the ALI’s inception.

The American Law Institute was organized in 1923, after a study was conducted by a group of prominent American judges, lawyers, and teachers who were known as “The Committee on the Establishment of a Permanent Organization for the Improvement of the Law.” A report of the committee highlighted two chief defects in American law—uncertainty and complexity—which had combined to produce a “general dissatisfaction with the administration of justice” throughout the country. According to the committee, uncertainty of the law, as it then existed, was due to:

1. A lack of agreement among the fundamental principles of the common law
2. A “lack of precision in the use of legal terms”
3. “Conflicting and badly drawn statutory provisions”
4. “The great volume of recorded decisions” and
5. “The number and nature of novel legal questions.”
The law’s complexity, on the other hand, was attributed in significant part to its “lack of systematic development” and to its numerous variations within the different jurisdictions of the United States.

The committee recommended that a lawyers’ organization be formed to improve the law and its administration. That recommendation led to the creation of the ALI. The institute’s charter stated its purpose to be “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” ALI founders included Chief Justice and former President William Howard Taft, future Chief Justice Charles Evans Hughes, and former Secretary of State Elihu Root; Judges Benjamin N. Cardozo and Learned Hand were among its early leaders. The ALI remains active today, with 3,000 elected members including judges, lawyers, and law professors from all areas of the United States as well as some foreign countries.

Although just one of many projects of the ALI, the Model Penal Code remains one of its most significant. The MPC had many contributors, but its leading author was Herbert Weschsler, a prominent legal theorist of the first half of the twentieth century. Weschsler was a prominent figure in the ALI and focused much of his effort on attempts to standardize the laws of the fifty states and other U.S. jurisdictions.

The MPC serves today as a suggested model for the creation and revision of state criminal laws. It is divided into four parts: general provisions, definitions of specific crimes, treatment and correction, and the organization of correction. A fundamental standard underlying the MPC is “the principle that the sole purpose of the criminal law [is] the control of harmful conduct . . .” instead of punishment, as many had previously believed. Because the code’s authors believed that “faultless conduct should be shielded from punishment,” the MPC limited criminal liability for a number of law violators—especially those who served merely as accomplices or who acted without an accompanying culpable mental state.

Although no state has adopted the MPC in its entirety, aspects of the MPC have been incorporated into the penal codes of nearly all the states. Moreover, in 1966, the U.S. Congress established the National Commission on Reform of Federal Criminal Laws. The commission eventually produced a recommended revision of Title 18 of the United States Code (which contains the bulk of federal criminal laws), in part based on MPC provisions. A number of recommended revisions have since been enacted into law. As the great legal scholar Sanford Kadish once said, the MPC has “permeated and transformed” the body of American criminal law.

The MPC is an important document, not only because it attempts to achieve standardization in American criminal law and has served as a model for many state criminal statutes, but also because it contains legal formulations created by some of the most cogent thinkers in American jurisprudence. As a consequence, we frequently contrast MPC provisions with existing state statutes throughout the various chapters of this book—presenting opportunities for comparison in a variety of “Law on the Books” boxes. One area in which such a contrast is not possible, however, is the area of high-technology and computer crimes. The MPC, originally drafted more than thirty years ago, makes no specific mention of high-technology crime, crimes committed with the use of computers, and other crimes involving advanced technology.
common law is the principle of *stare decisis*, which demands that judges recognize precedents, or earlier decisions, in their rulings.

- While much contemporary criminal law can be found in the form of statutes or penal codes, the principle of *stare decisis* continues to influence the interpretation of written codes by the courts.
- Criminal law is but one type of law. It can be distinguished from other forms of the law in that violations of the criminal law are considered to be offenses against the state, the community, and the public. Moreover, it is the power of the state that is brought to bear against criminal offenders when crimes are investigated, when suspected offenders are tried, and when those convicted of violating criminal statutes are punished.
- Criminal law defines crimes according to the nature of the proscribed conduct and distinguishes among crimes by degree of seriousness. Felonies are serious crimes for which offenders may be sentenced to lengthy prison terms or (for crimes such as murder) may be put to death. Misdemeanors are less serious offenses for which offenders may be fined, placed on probation, or sentenced to brief terms of incarceration.
- Two important forms of the criminal law are substantive and procedural. Substantive criminal law defines crimes and specifies punishments for violations of the law. Procedural criminal law specifies the methods to be used in enforcing substantive law.
- Another major category of the law is civil law. Civil laws regulate private relations among individuals, businesses, and other legal entities, such as corporations.
- All laws, including criminal and civil law, facilitate predictable social interaction and guarantee a relative degree of safety to members of society.
- Laws of all kinds can be used as tools to build a given vision of society, and laws are often the result of efforts by organized groups to have their interests and moral sense formally legislated.

**QUESTIONS FOR DISCUSSION**

1. What is the purpose of law? What is the purpose of criminal law? What would a society without laws be like?
2. What is the difference between criminal law and other forms of the law? How do laws of criminal procedure differ from substantive criminal laws?
3. What is *stare decisis*? From where does the principle of *stare decisis* derive?
4. What is “judge-made law”? How does judge-made law differ from other types of law?
5. How can the law be used as a tool for social engineering? If you were in a position to enact laws, what kind of social engineering might you undertake? Why?
6. What is meant by the “rule of law”? Why is due process an integral part of the rule of law?

**LEGAL RESOURCES ON THE WORLD WIDE WEB**

To access sites and links that are related to the material covered in this chapter, point your Web browser at [http://www.prenhall.com/schmalleger](http://www.prenhall.com/schmalleger). Once there, you can click on the cover of your textbook, then “chapters,” then “Chapter 1,” to explore...
Legal research involves the ability to fully and authoritatively explore all aspects of a question of law. It includes ascertaining the current status of relevant law in the proper jurisdiction, finding all cross-references and parallel case citations necessary to properly analyze a question as well as to analyze the arguments of the opposing side, finding relevant law in the proper format and context—including annotations and history, and verifying that the law the researcher has uncovered is still valid and has not been replaced or overruled. Proprietary electronic databases, which are available either online or as stand-alone software tools, offer fantastic and complete resources for legal research. Primary among such databases are LexisNexis™ and Westlaw®, both of which are available on a fee-paid basis. For anyone undertaking serious legal research, a subscription to one or both of those services (or others like them) is probably mandatory.

The World Wide Web, which is expanding at a phenomenal rate, now offers a limited ability to perform some aspects of legal research—although the quality and availability of free materials on the Web may never be a replacement for proprietary legal databases. This is so because most free Web-based materials are not subject to peer review and may contain gaps and delays in the availability of crucial subject matter. Similarly, few free materials allow for easy cross-referencing and comprehensive analysis.

Nonetheless, a number of readily available Web-based resources in the legal area can give students of the law a sense of the issues involved in legal research, and they permit anyone with the requisite computer equipment and necessary skills to access a wealth of potentially useful information. To build on those resources, each chapter in this book contains a section like this one titled “Legal Resources on the World Wide Web.” A variety of Web-based legal resources and law-related services are highlighted in the chapters that follow, and issues pertaining to Web-based legal resources are discussed. A number of legal research links that you may find useful as starting points in any research effort include the following:

**Cornell University’s Legal Information Institute**
http://www.law.cornell.edu
An excellent starting point for online legal research.

**FedLaw**
http://www.thecre.com/fedlaw/default.htm
Outstanding resource for online legal research. Though available to the public, the site was developed “to see if legal resources on the Internet could be a useful and cost-effective research tool for federal lawyers.”

**FindLaw.com**
http://www.findlaw.com
Extensive collection of legal information. Ranges from links to state and federal court cases and statutes, to analysis of the U.S. Constitution and Bill of Rights with case law annotations.

**Legal Research Using the Internet**
http://www.law.uchicago.edu/~llou/mpoctalk.html
Overview of Internet legal research with links to useful sites.

**Lexis One**
http://www.lexisone.com
A free resource from the Lexis-Nexis Group. Lexis One provides free case law research, free legal forms, the Legal Internet Guide, and more.
Mega Law
http://www.megalaw.com
A rich resource; useful as a starting point for Web-based legal research.

Nolo’s Legal Encyclopedia
http://www.nolo.com/encyclopedia
Excellent resource for lawyers and nonlawyers alike.

Virtual Chase
http://www.virtualchase.com
An online legal research site that began as an effort to disseminate articles and teaching aids to law librarians and other instructors of Internet research. Today the site offers more than 500 pages of information pertaining to Internet resources and research strategies.

The Virtual Chase Legal Research Guide
http://www.virtualchase.com/resources
Excellent resource for those involved in Web-based legal research.

World Wide Web Virtual Law Library
http://www.law.indiana.edu/v-lib
A searchable site run by the Indiana University School of Law–Bloomington.

SUGGESTED READINGS AND CLASSIC WORKS


HOW TO BRIEF A CASE

Most of the chapters in this book conclude with “Capstone Cases.” Capstone Cases, as the term is used here, are actual court opinions that bring to life the concepts discussed in the chapters where they are found. Your professor may ask that you prepare a brief of any or all of the Capstone Cases, or that you brief other cases that may be assigned—including those found on the Criminal Law Today Web site.

Generally speaking, two types of briefs are used within the legal profession. The first is an extensive kind that summarizes cases, statutes, regulations, and related legal materials that are pertinent to a legal issue that is under consideration. It is usually offered to a judge or to the court in support of the position of the submitting party.

A second type of brief—the kind with which we are concerned here—is simply a concise summary of the relevant facts of a single case. A brief of this sort is prepared in order to analyze a case and to present needed information in an abbreviated format that is convenient for use in class or as part of legal research. To prepare a brief for use in class, you need to read the court’s written opinion and take notes on the case, being careful to arrange them in a certain format. A case brief, which may be only one or two pages in length, generally includes seven parts: (1) the case citation, (2) a short statement of the facts of the case, (3) a brief procedural history of the case, (4) a summation of the issue or issues involved, (5) the court’s decision, (6) an overview of the rationale provided by the court for its decision, and (7) notes to yourself about the case. Each of these parts is briefly discussed below.

CITATION: The citation includes the name of the case (usually found italicized or underlined at the top of the page in a case reporter or in large boldfaced type at the beginning of an opinion published online), conventional information needed to find the case through legal research, a reference to the court that issued the opinion, and the date the case was decided. A typical citation might look like this:


In this instance “58” refers to the volume number of the reporter in which the case is published, while “So. 2d” is the name of the reporter—in this case the second series of the Southern Reporter. The number “853” refers to the page number in the reporter where the decision begins; “Ala. Crim. App.” references the court issuing the decision (in this case, the Alabama Court of Criminal Appeals); and “1997” refers to the year in which the case was decided. Often court names are not given, since one familiar with legal citation can deduce the court from the name of the reporter. In that case, a citation may look like this:

*People v. Versaggi*, 83 N.Y.2d 123 (1994)

Practiced legal researchers will probably understand that “N.Y.” in this citation refers to the New York Court of Appeals. Anyone not sure can check the reporter referenced by the citation, in which the court’s entire name is given.

The citation format used in this book follows the convention of italicizing the names of the plaintiff (in this case the state, or the “People”) and the defendant. Note that the “v.” which appears between the names of the parties (and stands for “versus”) is not italicized. Other formats may differ. If you want to learn more about legal citations, you might want to consult a printed guide, such as *A Uniform System of Citation*, known in the legal profession as the “Bluebook.” The Bluebook is the result of the collaborative efforts of The Columbia Law Review Association, The Harvard Law Review Association, The University of Pennsylvania Law Review, and the Yale Law Review. As an alternative, you might also survey the appropriate format for legal citations through an online service, such as Boston College’s Law Library (http://www.bc.edu/schools/law/library/).
Relational electronic databases now under development will soon allow rapid online retrieval of case opinions by employing technologically advanced computerized search capabilities. Newly emerging citation styles, necessary to take full advantage of the capabilities of such electronic case databases, may augment the standard citation format in years to come.

In recognition of just such a possibility, the seventeenth edition of the Bluebook addresses citability of opinions found on the Internet. It suggests that “When citing the materials found on the Internet, provide . . . the title or top level heading of the material being cited, and the Uniform Resource Locator (URL). The URL is the electronic Internet address of the material and should be given in brackets. . . . Point citations should refer to the paragraph number if available.” An example might be:

LLR No. 9405161.PA, P10 [http://www.versuslaw.com]

In this example, from the Versus Law site on the World Wide Web, “LLR” refers to “Lawyer’s Legal Research”—an electronic citation format created by the Versus Law staff. The number after the LLR designator refers to a specific case (in this instance, a 1994 Pennsylvania Supreme Court case, Commonwealth v. Berkowitz), and the letters after the period reference the jurisdiction (Pennsylvania). “P10” refers to the fact that the tenth paragraph in the case is being referred to, and the URL for Versus Law is provided in brackets.

On August 6, 1996, in an effort to further standardize case citations, the ABA’s House of Delegates passed a motion to recommend a universal citation system to the courts. The resolution recommends that courts adopt a universal citation system using sequential decision numbers for each year and internal paragraph numbers within the decision. The numbers should be assigned by the court and included in the decision at the time it is made publicly available by the court. The standard form of citation, shown for a decision in a federal court of appeals, would be:

Smith v. Jones, 1996 5Cir 15, ¶ 18, 22 F.3d 955

“1996” is the year of the decision; “5Cir” refers to the United States Court of Appeals for the 5th Circuit; “15” indicates that this citation is to the fifteenth decision released by the court in the year; “18” is the paragraph number where the material referred to is located, and the remainder is the parallel citation to the volume and page in the printed case report, where the decision may also be found.

FACTS: The facts of a case, for purposes of a legal brief, refer to only those facts that are essential to the court’s decision. Facts should be presented in the form of a story and should relate what happened that led to the arrest of the defendant(s).

The defendant, Robert Versaggi, who worked for Eastman Kodak Corporation as a computer technician at the time of his arrest, was charged with two counts of computer tampering in the second degree (under New York Penal Law § 156.20). Authorities alleged that Versaggi intentionally altered two computer programs designed to provide uninterrupted telephone service to the offices of Eastman Kodak Corporation. It was also alleged that, as a result of Versaggi’s actions, approximately 2,560 of the lines at the Kodak Park Complex were shut down and use of another 1,920 impaired for approximately an hour and a half on October 10, 1986, before company employees were able to restore service. As a result, a substantial number of the employees working at that large industrial complex, with the potential for dangerous chemical spills and accidents, were unable to receive calls, to call outside the complex, or to call 911 or similar emergency services. On November 19, 1986, a second interruption occurred. Essentially all service at the State Street office of Kodak was shut down for four minutes before the computer reactivated itself. As a result all outside telephone calls, from the company’s customers and offices worldwide, were disconnected. Evidence against Versaggi consisted of telephone company and computer records.
showing that he accessed Kodak computers from his home computer at the
time of both incidents and had instructed them to shut down.

**HISTORY:** The legal history of a case describes what has already happened before
the case reached its current level. Legal history should consist of a rendering of who
was arrested, what they were charged with, and the findings of trial and appellate
courts. In the case cited above, for example, the words of the New York Court of Ap-
peals provide a concise legal history:

> Charged with two counts of computer tampering, [the defendant was found
guilty by] Rochester City Court . . . of two counts of computer tampering in the
second degree. [The court determined] that [the defendant] intentionally altered
two computer programs designed to provide uninterrupted telephone service to
the offices of the Eastman Kodak Corporation. The County Court affirmed.

**ISSUE:** The question before the court, or the legal issue that the court is being
asked to resolve, should be plainly stated. It will always be a question about the law,
application of a specific law, or a general legal principle. Sometimes there is more
than one issue. Even so, the issue can often be stated in one or two sentences, al-
though occasionally a statement of the issue (or issues) requires more detail. Keep
in mind that questions have been concisely stated if they can be answered with a
“yes” or a “no.” Frequently, the court states the issue itself in language such as “the
issue before the court is . . .” and such a statement can be incorporated directly into
the brief. Continuing with the case of *People v. Versaggi*, for example, we might say:

> Does merely entering commands without changing any programs or
code constitute tampering or altering within the meaning of
the statute? The defendant argued that he could not be guilty under New York
law of tampering with a computer program because he did not alter or change
any programs. He claimed that he merely entered commands, which allowed
the disconnect instructions of each program to function. Hence, the issue for
the court became deciding whether the defendant’s conduct was encompassed
within the language of the tampering statute.

One trick you can use to easily spot issues is to look for the word “whether.” The
issue usually follows.

**DECISION (OR HOLDING):** What did the court rule? How did it answer the
question before it? You should remember that the decision of the court can always
be stated in “yes” or “no” fashion and that an appellate court may affirm or reverse
the decision of a lower court. Appellate courts may also send a case back to a lower
court for review or retrial. In the case we have been using as an example:

> Yes. The appellate court affirmed the judgment of the lower court and upheld
the defendant’s conviction.

**RATIONALE:** In their written opinions, courts explain the reasons they had for
reaching their decision. It may be that the court applied or interpreted a particular
statute, that it analyzed previous cases and decided the present one within the con-
text of such historical decisions, or that the court chose to create a new precedent
based on the majority’s sense of justice and fairness. Summaries of such rationales,
especially as they are stated in the written opinion of the court, should be contained
in your brief. Hence, an analysis of this case might conclude:

> The court reasoned that although the word “alter,” as contained within the
New York computer tampering statute means “to change or modify,” the leg-
islature had “attached expansive language to the verb” stating that the crime
consisted of altering a computer program “in any manner.” The term “com-
puter program” had not been defined by the statute, but the court reasoned
that a “computer program” consists of “an ordered set of instructions” given
to a computer telling it how to function. Hence, according to the court’s in-
terpretation, the defendant modified the computer’s programming by sending
it instructions via his modem and thereby violated the computer tampering
statute.

NOTES: For purposes of further study you should take notes for your own use.
You might want to outline what you think about the case. Do you agree or disagree
with the conclusion reached by the court? Why? Might the court have used a differ-
ent rationale in reaching its decision? If so, what might it have been? Perhaps you
will want to make note of dissenting or concurring opinions. Finally, you might
want to note what lessons you learned from a review of the case.

In 1986, the New York state legislature modified the state penal code to include
five new crimes: unauthorized use of a computer (Penal Law § 156.05); com-
puter trespass (Penal Law § 156.10); computer tampering (Penal Law §§
156.20 and 156.25); unlawful duplication of computer-related material (Penal
Law § 156.30); and criminal possession of computer-related material (Penal
Law § 156.35). Versaggi could not logically be indicted for the crimes of unau-
thorized use of a computer, since he had lawful access to the computer whose
services he disrupted. Moreover, he had not duplicated any computer-related
materials, nor had he in his possession any computer-related materials that he
had not been authorized to possess. Hence, he was charged with the crime of
“computer trespass.”

IS STARE DECISIS AN INEXORABLE COMMAND?

Payne v. Tennessee
U.S. Supreme Court, 1991
501 U.S. 808

CHIEF JUSTICE REHNQUIST delivered the opinion of the court.
In this case we reconsider our holdings in Booth v. Maryland, 482 U.S. 496 (1987),
and South Carolina v. Gathers, 490 U.S. 805 (1989), that the Eighth Amendment bars
the admission of victim impact evidence during the penalty phase of a capital trial.
The petitioner, Pervis Tyrone Payne, was convicted by a jury on two counts of
first-degree murder and one count of assault with intent to commit murder in the
first degree. He was sentenced to death for each of the murders, and to 30 years in
prison for the assault.
The victims of Payne’s offenses were 28-year-old Charisse Christopher, her
2-year-old daughter Lacie, and her 3-year old son Nicholas. The three lived together
in an apartment in Millington, Tennessee, across the hall from Payne’s girl friend,
Bobbie Thomas. On Saturday, June 27, 1987, Payne visited Thomas’ apartment sev-
eral times in expectation of her return from her mother’s house in Arkansas, but
found no one at home. On one visit, he left his overnight bag, containing clothes and
other items for his weekend stay, in the hallway outside Thomas’ apartment. With
the bag were three cans of malt liquor.
Payne passed the morning and early afternoon injecting cocaine and drinking
beer. Later, he drove around the town with a friend in the friend’s car, each of them
taking turns reading a pornographic magazine. Sometime around 3 P.M., Payne re-
turned to the apartment complex, entered the Christophers’ apartment, and began
making sexual advances towards Charisse. Charisse resisted and Payne became vi-
olen. A neighbor who resided in the apartment directly beneath the Christophers,
heard Charisse screaming, “‘Get out, get out,’ as if she were telling the children to
The noise briefly subsided and then began, “horribly loud.” The neighbor called the police after she heard a “blood curdling scream” from the Christopher apartment. Brief for Respondent.

When the first police officer arrived at the scene, he immediately encountered Payne who was leaving the apartment building, so covered with blood that he appeared to be “sweating blood.” The officer confronted Payne, who responded, “I’m the complainant.” Id., at 3–4. When the officer asked, “What’s going on up there?” Payne struck the officer with the overnight bag, dropped his tennis shoes, and fled.

Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1700 cc’s of blood—400 to 500 cc’s more than his estimated normal blood volume. Charisse and Lacie were dead.

Charisse’s body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.

Lacie’s body was on the kitchen floor near her mother. She had suffered stab wounds to the chest, abdomen, back, and head. The murder weapon, a butcher knife, was found at her feet. Payne’s baseball cap was snapped on her arm near her elbow. Three cans of malt liquor bearing Payne’s fingerprints were found on a table near her body, and a fourth empty one was on the landing outside the apartment door.

Payne was apprehended later that day hiding in the attic of the home of a former girlfriend. As he descended the stairs of the attic, he stated to the arresting officers, “Man, I ain’t killed no woman.” According to one of the officers, Payne had “a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid.” He had blood on his body and clothes and several scratches across his chest. It was later determined that the blood stains matched the victims’ blood types. A search of his pockets revealed a packet containing cocaine residue, a hypodermic syringe wrapper, and a cap from a hypodermic syringe. His overnight bag, containing a bloody white shirt, was found in a nearby dumpster.

At trial, Payne took the stand and, despite the overwhelming and relatively uncontested evidence against him, testified that he had not harmed any of the Christophers. Rather, he asserted that another man had raced by him as he was walking up the stairs to the floor where the Christophers lived. He stated that he had gotten blood on himself when, after hearing moans from the Christophers’ apartment, he had tried to help the victims. According to his testimony, he panicked and fled when he heard police sirens and noticed the blood on his clothes. The jury returned guilty verdicts against Payne on all counts.

During the sentencing phase of the trial, Payne presented the testimony of four witnesses: his mother and father, Bobbie Thomas, and Dr. John T. Huston, a clinical psychologist specializing in criminal court evaluation work. Bobbie Thomas testified that she met Payne at church, during a time when she was being abused by her husband. She stated that Payne was a very caring person, and that he devoted much time and attention to her three children, who were being affected by her marital difficulties. She said that the children had come to love him very much and would miss him, and that he “behaved just like a father that loved his kids.” She asserted that he did not drink, nor did he use drugs, and that it was generally inconsistent with Payne’s character to have committed these crimes.
Dr. Huston testified that based on Payne’s low score on an IQ test, Payne was “mentally handicapped.” Huston also said that Payne was neither psychotic nor schizophrenic, and that Payne was the most polite prisoner he had ever met. Payne’s parents testified that their son had no prior criminal record and had never been arrested. They also stated that Payne had no history of alcohol or drug abuse, he worked with his father as a painter, he was good with children, and that he was a good son.

The State presented the testimony of Charisse’s mother, Mary Zvolanek. When asked how Nicholas had been affected by the murders of his mother and sister, she responded:

“He cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I’m worried about my Lacie.” App. 30.

In arguing for the death penalty during closing argument, the prosecutor commented on the continuing effects of Nicholas’ experience, stating:

“But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.” Id., at 9.

“There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that’s a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that’s a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.

“Somewhere down the road Nicholas is going to grow up, hopefully. He’s going to want to know what happened. And he is going to want to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.” Id., at 12.

In the rebuttal to Payne’s closing argument, the prosecutor stated:

“You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives.

“... No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won’t be a high school principal to talk about Lacie Jo Christopher, and there won’t be anybody to take her to her high school prom. And there won’t be anybody there—there won’t be her mother there or Nicholas’ mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.

“... [Petitioner’s attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn’t want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn’t have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.” Id., at 13–15.

The jury sentenced Payne to death on each of the murder counts.

The Supreme Court of Tennessee affirmed the conviction and sentence. 791 S. W. 2d 10 (1990). The court rejected Payne’s contention that the admission of the grand-
mother’s testimony and the State’s closing argument constituted prejudicial violations of his rights under the Eighth Amendment as applied in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989). The court characterized the grandmother’s testimony as “technically irrelevant,” but concluded that it “did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt.” 791 S. W. 2d, at 18.

The court determined that the prosecutor’s comments during closing argument were “relevant to [Payne’s] personal responsibility and moral guilt.” Id., at 19. The court explained that “when a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two-and-one-half-year-old daughter and her three-and-one-half-year-old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his ‘blameworthiness.’” The court concluded that any violation of Payne’s rights under *Booth* and *Gathers* “was harmless beyond a reasonable doubt.” Ibid.

We granted certiorari, 498 U.S. (1991), to reconsider our holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering “victim impact” evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family.

In *Booth* the defendant robbed and murdered an elderly couple. As required by a state statute, a victim impact statement was prepared based on interviews with the victims’ son, daughter, son-in-law, and granddaughter. The statement, which described the personal characteristics of the victims, the emotional impact of the crimes on the family, and set forth the family members’ opinions and characterizations of the crimes and the defendant, was submitted to the jury at sentencing. The jury imposed the death penalty. The conviction and sentence were affirmed on appeal by the State’s highest court.

This Court held by a 5-to-4 vote that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial. The Court made clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was per se inadmissible in the sentencing phase of a capital case except to the extent that it “related directly to the circumstances of the crime.” 482 U.S., at 507, n. 10. In *Gathers*, decided two years later, the Court extended the rule announced in *Booth* to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

The *Booth* Court began its analysis with the observation that the capital defendant must be treated as a “‘uniquely individual human being,’” 482 U.S., at 504 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)), and therefore the Constitution requires the jury to make an individualized determination as to whether the defendant should be executed based on the “‘character of the individual and the circumstances of the crime.’” 482 U.S., at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)). The Court concluded that while no prior decision of this Court had mandated that only the defendant’s character and immediate characteristics of the crime may constitutionally be considered, other factors are irrelevant to the capital sentencing decision unless they have “some bearing on the defendant’s ‘personal responsibility and moral guilt.’” 482 U.S., at 502 (quoting *Edmund v. Florida*, 458 U.S. 782, 801 (1982)). To the extent that victim impact evidence presents “factors about which the defendant was unaware, and that were irrelevant to the decision to kill,” the Court concluded, it has nothing to do with the “blameworthiness of a particular defendant.” 482 U.S., at 504, 505. Evidence of the victim’s character, the Court observed, “could well distract the sentencing jury from its constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.” The Court concluded that, except to the extent that victim impact evidence relates “directly to the circumstances of the crime,” id., at 507, and n. 10, the prosecution...
may not introduce such evidence at a capital sentencing hearing because “it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner.” Id., at 505.

*Booth* and *Gathers* were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim’s family do not in general reflect on the defendant’s “blameworthiness,” and that only evidence relating to “blameworthiness” is relevant to the capital sentencing decision. However, the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. “If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.” *Booth*, 482 U.S., at 519 (SCALIA, J., dissenting). The same is true with respect to two defendants, each of whom participates in a robbery, and each of whom acts with reckless disregard for human life; if the robbery in which the first defendant participated results in the death of a victim, he may be subjected to the death penalty, but if the robbery in which the second defendant participates does not result in the death of a victim, the death penalty may not be imposed. *Tison v. Arizona*, 481 U.S. 137, 148 (1987).

The principles which have guided criminal sentencing—as opposed to criminal liability—have varied with the times. The book of Exodus prescribes the *Lex talionis*. “An eye for an eye, a tooth for a tooth.” Exodus 21: 22–23. In England and on the continent of Europe, as recently as the 18th century crimes which would be regarded as quite minor today were capital offenses. Writing in the 18th century, the Italian criminologist Cesare Beccaria advocated the idea that “the punishment should fit the crime.” He said that “we have seen that the true measure of crimes is the injury done to society.” J. Farrer, Crimes and Punishments, 199 (London, 1880).

Gradually the list of crimes punishable by death diminished, and legislatures began grading the severity of crimes in accordance with the harm done by the criminal. The sentence for a given offense, rather than being precisely fixed by the legislature, was prescribed in terms of a minimum and a maximum, with the actual sentence to be decided by the judge. With the increasing importance of probation, as opposed to imprisonment, as a part of the penological process, some States such as California developed the “indeterminate sentence,” where the time of incarceration was left almost entirely to the penological authorities rather than to the courts. But more recently the pendulum has swung back. The Federal Sentencing Guidelines, which went into effect in 1987, provided for very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his acts.

Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion:

“The first significance of harm in Anglo-American jurisprudence is, then, as a prerequisite to the criminal sanction. The second significance of harm—one no less important to judges—is as a measure of the seriousness of the offense and therefore as a standard for determining the severity of the sentence that will be meted out.” S. Wheeler, K. Mann, and A. Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals 56 (1988).

Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material. *Williams v. New York*, 337 U.S. 241 (1949). In the federal system, we observed that “a judge may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come.” *United States v. Tucker*, 404 U.S.
443, 446 (1972). Even in the context of capital sentencing, prior to Booth the joint opinion of Justices Stewart, Powell, and STEVENS in Gregg v. Georgia, 428 U.S. 153, 203–204 (1976), had rejected petitioner’s attack on the Georgia statute because of the “wide scope of evidence and argument allowed at presentence hearings.” The joint opinion stated:

“We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.”

The Maryland statute involved in Booth required that the presentence report in all felony cases include a “victim impact statement” which would describe the effect of the crime on the victim and his family. Booth, supra, at 498. Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. The evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect was much the same as if it had been. While the admission of this particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional. Williams v. Florida, 399 U.S. 78 (1970) (upholding the constitutionality of a notice-of-alibi statute, of a kind enacted by at least 15 states dating from 1927); United States v. DiFrancesco, 449 U.S. 117, 142 (1980) (upholding against a double jeopardy challenge an Act of Congress representing “a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges ‘to mete out light sentences in cases involving organized crime management personnel’”).

“We have held that a State cannot preclude the sentencer from considering ‘any relevant mitigating evidence’ that the defendant proffers in support of a sentence less than death.” Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). See also Skipper v. South Carolina, 476 U.S. 1 (1986). Thus we have, as the Court observed in Booth, required that the capital defendant be treated as a “‘uniquely individual human being,’” 482 U.S., at 504 (quoting Woodson v. North Carolina, 428 U.S., at 304). But it was never held or even suggested in any of our cases preceding Booth that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed. The language quoted from Woodson in the Booth opinion was not intended to describe a class of evidence that could not be received, but a class of evidence which must be received. Any doubt on the matter is dispelled by comparing the language in Woodson with the language from Gregg v. Georgia, quoted above, which was handed down the same day as Woodson. This misreading of precedent in Booth has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering “a glimpse of the life” which a defendant “chose to extinguish,” Mills, 486 U.S., at 397, (REHNQUIST, C. J., dissenting), or demonstrating the loss to the victim’s family and to society which have resulted from the defendant’s homicide.

Booth reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a “‘mini-trial’ on the victim’s character.” Booth, supra, at 506–507. In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial. But even as to additional evidence admitted at the sentencing phase, the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different
than others in which a party is faced with this sort of a dilemma. As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, “the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross examination and contrary evidence by the opposing party.” *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983).

Payne echoes the concern voiced in *Booth’s* case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment that those whose victims are perceived to be less worthy. *Booth*, supra, at 506, n. 8. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim’s “uniqueness as an individual human being,” whatever the jury might think the loss to the community resulting from his death might be. The facts of *Gathers* are an excellent illustration of this: the evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States. The state laws respecting crimes, punishments, and criminal procedure are of course subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process.

“First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker’s judgment as to whether the circumstances of a particular defendant’s case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer’s discretion, but must allow it to consider any relevant information offered by the defendant.” *McCleskey v. Kemp*, 481 U.S. 279, 305–306 (1987).

But, as we noted in *California v. Ramos*, 463 U.S. 992, 1001 (1983), “beyond these limitations . . . the Court has deferred to the State’s choice of substantive factors relevant to the penalty determination.”

“Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished.” *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See *Darden v. Wainwright*, 477 U.S. 168, 179–183 (1986). Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne’s double murder.
We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. “The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.” Booth, 482 U.S., at 517 (WHITE, J., dissenting) (citation omitted). By turning the victim into a “faceless stranger at the penalty phase of a capital trial,” Gathers, 490 U.S., at 821 (O’CONNOR, J., dissenting), Booth deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

The present case is an example of the potential for such unfairness. The capital sentencing jury heard testimony from Payne’s girlfriend that they met at church; that he was affectionate, caring, kind to her children; that he was not an abuser of drugs or alcohol; and that it was inconsistent with his character to have committed the murders. Payne’s parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ. None of this testimony was related to the circumstances of Payne’s brutal crimes. In contrast, the only evidence of the impact of Payne’s offenses during the sentencing phase was Nicholas’ grandmother’s description—in response to a single question—that the child misses his mother and baby sister. Payne argues that the Eighth Amendment commands that the jury’s death sentence must be set aside because the jury heard this testimony. But the testimony illustrated quite poignantly some of the harm that Payne’s killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant. The Supreme Court of Tennessee in this case obviously felt the unfairness of the rule pronounced by Booth when it said “it is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevance, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.” 791 S. W. 2d, at 19.

In Gathers, as indicated above, we extended the holding of Booth barring victim impact evidence to the prosecutor’s argument to the jury. Human nature being what it is, capable lawyers trying cases to juries try to convey to the jurors that the people involved in the underlying events are, or were, living human beings, with something to be gained or lost from the jury’s verdict. Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality, and the defendant’s attorney may argue that evidence to the jury. Petitioner’s attorney in this case did just that. For the reasons discussed above, we now reject the view—expressed in Gathers—that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted. We reaffirm the view expressed by Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934): “justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne and his amicus argue that despite these numerous infirmities in the rule created by Booth and Gathers, we should adhere to the doctrine of stare decisis and
stop short of overruling those cases. *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez v. Hillery*, 474 U.S. 254, 265–266 (1986). Adhering to precedent “is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, “this Court has never felt constrained to follow precedent.” *Smith v. Allwright*, 321 U.S. 649, 665 (1944). *Stare decisis* is not an inexorable command; rather, it “is a principle of policy and not a mechanical formula of adherence to the latest decision.” *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This is particularly true in constitutional cases, because in such cases “correction through legislative action is practically impossible.” *Burnet v. Coronado Oil & Gas Co.*, supra, at 407 (Brandeis, J., dissenting).

Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . .

The opposite is true in cases such as the present one involving procedural and evidentiary rules. Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions. *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by members of the Court in later decisions, and have defied consistent application by the lower courts. See *Gathers*, 490 U.S., at 813 (O’CONNOR, J., dissenting); *Mills v. Maryland*, 486 U.S. 367, 395–396 (1988) (REHNQUIST, C. J., dissenting). See also *State v. Huertas*, 51 Ohio St. 3d 22, 33, 553 N. E. 2d 1058, 1070 (1990) (“The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area”) (Moyer, C. J., concurring).

Reconsidering these decisions now, we conclude for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled. We accordingly affirm the judgment of the Supreme Court of Tennessee.

**WHAT DO YOU THINK?**

1. What does the Court mean when it says “*Stare decisis* is not an inexorable command; rather it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision’”?

2. What would it mean for the American system of criminal justice if *stare decisis* actually was an “inexorable command” or “a mechanical formula of adherence to the latest decision”?

**NOTES**

4. Ibid.
5. Although they may be subject to civil, administrative, and other sanctions.
11. “Infractions” are not considered crimes under the Model Penal Code.
21. Ibid.
29. The five-day waiting period was phased out after a national instant background checking system became fully operational.
30. A portion of the Brady Handgun Violence Prevention Act, requiring the “chief law enforcement officer” of each local jurisdiction to conduct background checks and perform related tasks on an interim basis until a national checking system became operative, was struck down by the U.S. Supreme Court as unconstitutional in 1997. The Court, in Printz-Mack v. United States, 521 U.S. 98 (1997), held that the constitutional principle of “dual sovereignty” prohibited direct federal control over state officers.
41. Marvin Wolfgang, The Key Reporter (Phi Beta Kappa), Vol. 52, No. 1.
46. Florida Criminal Code, Chapter 775, Section 1.
47. Ibid, Section 2.
49. Model Penal Code, Section 1.05(1).
54. Some of the material in this section, as well as wording, is taken from “About the American Law Institute,” at the American Law Institute’s home page on the World Wide Web.
56. Ibid.
58. Bluebook format requires that the “v.” between parties be italicized.
59. A Uniform System of Citation, Section 17.3.3.