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SOURCES OF LAW

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INTRODUCTION

In this chapter, we discuss the sources of the law and the sources of individual rights. These foundational matters set the stage for our discussion of the criminal court system in following chapters. Courts serve, at the trial level in particular, as a forum for dispute resolution. But they also serve as interpreters of laws. Without courts to apply and interpret it, the law would be incomplete. The law is a social institution, and to study it is to gain valuable understanding of one's society, its heritage, its values, and its day-to-day functioning.

Law has always been considered of the utmost importance in American life. Law justly promulgated and justly applied is the bedrock of individual liberty and social progress. Law is a written body of rules of conduct applicable to all members of a defined community, society, or culture that emanate from a governing authority and are enforced by its agents by the imposition of penalties for their violation.

Law has several sources, including constitutions, statutes, and judicial opinions, or case law. Laws define the appropriate conduct for the members of a society and also provide protections for individuals from interference in their lives by other entities, including other people and the government. Even though legal scholars and philosophers debate endlessly the precise origin of various individual rights, it is clear that in America, a number of individual rights are either created by or enshrined in documents such as the federal and state constitutions and statutes. In this chapter we examine these documents and some of the most significant individual rights.

SOURCES OF LAW

Primary sources of law include judge-made law (also called common law) and statutory law (this includes the Constitution, statutes, ordinances, and administrative regulations). There are other sources for what constitutes appropriate conduct, such as religion and ethics; these are beyond the scope of this chapter.

Legislation is enacted by the legislature under the authority granted to it by the Constitution. A **constitution** creates a government; it literally *constitutes* the government. Legislatures are given authority to act in certain areas, and within these areas they may pass legislative enactments or bills, often referred to as statutes, which are collected into codes, such as the criminal code.

Legislators, sometimes referred to as lawmakers, quite literally make law. Acts of the legislature are not, however, lawful per se. In other words, just because a legislature passes a bill does not mean the bill is a lawful exercise of the legislature's authority. Acts of the legislature may not limit the constitution under which the legislation was created. For instance, the U.S. Congress may not lawfully pass legislation that abridges the Fourth Amendment.

Who decides when the legislature has acted beyond the scope of its authority? In the United States, the Supreme Court has the final say as to the constitutionality of statutes passed by either state or federal legislatures.

Administrative regulations are another form of legislation, which, under certain circumstances, may have the force of law. This means that they will be enforced by

the courts just like a statute. Administrative regulations are issued either by agencies of the executive branch, which derive their authority from a delegation of power by the executive, or by independent agencies, created through a delegation of power from the legislature. Examples include regulations affecting food and drugs and occupational safety requirements. Both the federal government and state governments issue administrative regulations.

Statutes are frequently written in broad terms, leaving room for interpretation by those who must enforce them. This is also true of the U.S. Constitution. For example, the Eighth Amendment prohibits "cruel and unusual punishment." But what is cruel? What is unusual? There are no clear answers to these questions, and courts are forced to define the terms.

Why are statutes often vague? Why does the legislature not state precisely what it means? There are several reasons. First, it is difficult to clearly articulate in a statute precisely what conduct is or is not permitted, given the complexities of human behavior.

Second, drafting and enacting legislation requires legislators to work together to create a statute that can be supported by a majority. This often occurs when the statute deals with a controversial issue. The legislature may be forced to leave some things undefined, thereby forcing courts to interpret the terms of a statute.

SOURCES OF INDIVIDUAL RIGHTS

There are a number of sources of **individual rights** in the United States. These include the U.S. Constitution and state constitutions, case law, and federal and state statutes. Individual rights are defined as those that protect the individual citizen from other citizens as well as the federal or state government. Examples include the right to due process of law, the right to equal protections of the laws, and the right to be free from unreasonable searches and seizures. The Bill of Rights, which consists of the first ten amendments to the Constitution, provides a number of individual rights. States may provide additional rights in their constitutions, but they cannot restrict the rights provided in the U.S. Constitution.

The Constitution

In 1787, delegates from the 13 original states met in Philadelphia to write a new constitution to replace the Articles of Confederation. The Articles of Confederation, created in 1781, were widely regarded as a failure, as they left virtually all power in the hands of the individual states; as a result, it was difficult to establish a unified national government. The states were more akin to countries, acting in their own self-interest, than states that were part of a union.

The result of the convention was the development of the U.S. Constitution. The Constitution outlined the powers and limits of the federal government. Its focus was on how the new federal government would act, not on the relationship between the government and the individual citizen. There are only three individual rights mentioned in the Constitution: (1) the right to seek a **writ of habeas corpus** (a document challenging

COMPARATIVE COURTS

When the Union of Soviet Socialist Republics (USSR) collapsed and was split into separate countries, Russia had to develop a new constitution. This constitution was adopted in December 1993. It was the product of a contentious debate between the legislature (Duma) and then-president Boris Yeltsin. Following the adoption of the constitution, many observers predicted Russia would become a dictatorship, as the constitution gave much of the power to the president, at the expense of the legislative branch. As it turned out, however, President Yeltsin never used the power to dissolve the legislature granted to him in the constitution, and instead the branches of government (executive, legislative, and courts) and government agencies have remained in place and intact. In fact, the Russian legislature on several occasions passed laws opposed by President Yeltsin and even voted "no confidence" in the executive branch.

The Russian constitution comprises nine sections; Section 7 contains the powers of the judiciary. The country has a civil law system. There is a Supreme Court, but it lacks the power to issue advisory opinions and can only issue opinions in cases that come before it, similar to the U.S. Supreme Court. Judicial opinions are written down and are generally available for examination, but it is unclear to what degree lower courts are expected to follow them.

the legality of a person's detention), (2) the prohibition of **bills of attainder** (legislation imposing punishment without a trial), and (3) the prohibition of **ex post facto laws** (legislation making prior conduct criminal).

When the proposed Constitution was submitted to the 13 states for ratification, a number of states were unwilling to ratify it without a clear detailing of the rights that individual citizens had against the federal government. Many people, remembering the excesses of the king under colonial rule, were afraid the federal government would be able to restrict individual rights such as the freedom of religion. In response to these concerns, 10 amendments, commonly referred to as the Bill of Rights, were added, and the Constitution was ratified in 1791.

The Bill of Rights

The **Bill of Rights** constitutes the first 10 amendments to the Constitution. There are 23 specific individual rights in the Bill of Rights. These rights originally applied only to the federal government, as it was not until the 20th century that the provisions of the Bill of Rights were applied to state governments via the Fourteenth Amendment (discussed later). This was done by the U.S. Supreme Court through a process referred to as incorporation, in a series of decisions stretching over a period of more than 50 years. To comprehend due process and individual rights in a criminal courts context, it is essential to examine the Bill of Rights further to delineate what rights defendants actually have throughout the adjudicative process. These rights, pursuant to some of the amendments within the Bill of Rights, are briefly discussed next.

First Amendment

The First Amendment includes a number of individual rights, among them the freedoms of religion, speech, press, and assembly. Each of these individual rights were very

important to colonists, and it was their frequent abridgement by King George III of England that helped precipitate the American Revolution.

The First Amendment includes two clauses on religion. First, the government is forbidden from creating a state-supported religion. Second, the government is barred from interfering with individuals' religious practices. In essence, the federal government is not supposed to promote a particular religion or prevent the practice of religion.

The first clause is known as the Establishment Clause. This creates what the Supreme Court has referred to as a "wall of separation between church and state" (*Everson v. Board of Education,* 1947). According to the Supreme Court, any statute that affects religious practices is valid only if three conditions are met: (1) the statute has a secular (nonreligious) purpose, (2) the primary purpose of the statute is neutral (meaning it neither promotes nor interferes with religious practice), and (3) the statute does not result in "excessive" government involvement with religion (*Lemon v. Kurtzman,* 1971).

This does not mean that there are no limitations whatsoever on the freedom of religion. The Supreme Court has held that a statute that incidentally restricts religious practices is constitutional. For example, a state may ban the use of mind-altering substances (including peyote) in prisons, despite the fact that doing so infringes on the legitimate religious practices of some Native American inmates.

Freedom of speech is one of the most valued individual rights. The right is not without limitations, however. At times in the past the Supreme Court has been willing to allow state limitations on a variety of forms of speech. The Supreme Court has held that the government can regulate obscene materials, including books and movies that

The First Amendment

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

MOVIES AND THE COURTS

Inherit the Wind (1960)

The First Amendment protects the individual's right to exercise his or her religious beliefs and forbids the state from either interfering with religion or supporting a particular religion. The debate over the role of religion in American life has gone on since the first colonists arrived. One of the great battles, and one that is still going on in some states, is the role of religious beliefs in public education. If one's religious beliefs include the belief that evolution is not accurate, what is one to do? *Inherit the Wind* is a highly fictionalized account of the infamous Scopes Monkey Trial, as it was referred to, which dealt with the issue of whether a state could criminalize the teaching of evolution in high school. In the movie, set in the 1920s in Tennessee, schoolteacher Bertram Cates is put on trial for violating a state law that prohibits public school teachers from teaching evolution instead of creationism. At the trial, the attorneys for the state and for the defense spar over the meaning of the Bible. In real life, the two attorneys were Clarence Darrow (for the defense) and William Jennings Bryan (appearing on behalf of the state as an expert witness).

appeal to a "prurient" interest in sex (meaning an abnormal, as opposed to a "normal" interest in the activity) (*Miller v. California,* 1973). Commercial speech (such as advertising) may be regulated to a greater degree than so-called political speech (*Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.,* 1976).

In the latter part of the 20th century, however, the Court began to provide greater protection of freedom of speech. The Supreme Court has held that the freedom of speech includes the right to say things that may anger others. The Court also has held that the freedom of speech includes not just verbal statements (what we generally think of as "speech") but written statements (such as political protest signs) and some physical acts, such as burning the American flag to protest government intervention in South America (*Texas v. Johnson,* 1988). These acts are termed "symbolic speech" or "expressive conduct."

Second Amendment

The Second Amendment states that citizens have the right to "keep and bear arms" and that this right shall not be "infringed." Opponents of gun control legislation argue that this amendment prevents the state from enacting legislation that restricts in any manner the use and possession of firearms. Supporters of gun control legislation assert that the amendment was not intended to create an individual right to possess firearms, but instead to create a right for groups of citizens who wanted to form a militia to have firearms to protect themselves against oppression by the federal government. There was a great concern at the time of the passage of the Bill of Rights that the federal government might become oppressive (similar to the situation under the king of England), and allowing people to form militias would not be of much use if the federal government had outlawed weapons.

The Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

In *District of Columbia v. Heller* (2008), the U.S. Supreme Court endorsed the view of opponents of gun control legislation, holding that the Second Amendment was intended to provide individual gun owners with a right to own firearms. The decision left some questions unanswered, however, as it appeared to allow for some degree of regulation but set no standard for evaluating that regulation. For example, Justice Scalia's opinion for the Court claimed that the decision was not meant to cast doubt on the constitutionality of "longstanding prohibitions" on gun ownership by felons. It remains to be seen precisely what limitations on firearm possession will withstand constitutional scrutiny.

Third Amendment

The Third Amendment was a product of its times. During the American Revolution, English troops were frequently housed in the homes of citizens, against the wishes of the home's owner. The Third Amendment makes such a practice unconstitutional by expressly forbidding the "quartering," or housing, of soldiers in private homes without the permission of the homeowner.

The Third Amendment

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

Fourth Amendment

The Fourth Amendment forbids "unreasonable" searches and seizures by law enforcement officers and requires the existence of "probable cause" before arrest or search warrants may be issued. Warrants are required to describe the subject of their search with "particularity." The so-called particularity requirement was a response to the British practice in colonial times of issuing general warrants. General warrants allowed British customs inspectors to search without restriction on time or place for evidence of customs violations. Requiring warrant applications to describe precisely what was sought was an attempt to eliminate general warrants.

Similarly, requiring the police to have probable cause to believe there was something to seize or arrest was intended to limit the ability of the state to interfere at will in the lives of individual citizens without some justification. This amount of evidence of wrongdoing is **probable cause**. Probable cause is best defined as a fair probability that a crime has occurred. It is less than proof beyond a reasonable doubt but more than a mere guess.

The Supreme Court has determined that search and arrest warrants are not always required, however. The Reasonableness Clause allows the police to conduct a search or make an arrest so long as it is reasonable to do so. So what is reasonable and what is not? The Supreme Court has issued a number of decisions in an effort to define this phrase, but it remains less than crystal clear.

The Fourth Amendment

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

KEY CASES

MANUEL V. CITY OF JOLIET, ILLINOIS, ET AL. (2017)

In *Manuel v. City of Joliet, Illinois, et al.,* Manuel was found to be in possession of pills during a search incident to a traffic stop. The officers arrested him despite the field test showing that none of the pills tested positive for any illicit drug. The evidence technician at the station found the same results; however, in his report he claimed that one pill tested positive for ecstasy, which confirmed one of the officer's unfounded statements about the nature of the pills. Manuel was charged and detained prior to trial. Later, the Illinois police lab found that none of the pills tested positive. Nonetheless, Manuel remained in pretrial detention for 48 days! After his case was eventually dismissed, Manuel filed a lawsuit against the city and the officers, claiming that they violated his Fourth Amendment rights. The district court argued that the statute of limitation had run out in regard to his unlawful arrest claim and that precedent precluded any Fourth Amendment relief in cases where pretrial detention happened *after* the commencement of legal proceedings (i.e., the judge's determination that probable cause existed in order to detain him). The Seventh Circuit agreed with the lower court. The Supreme Court argued to the contrary, that the Fourth Amendment governs pretrial detention as well as arrests. Thus, Manuel could challenge his detention, as the Fourth Amendment covers his arrest *and* detainment. Also, the Court stated that unconstitutional pretrial detention can happen before and after the commencement of legal proceedings. Because probable cause is necessary to detain someone, when that probable cause is predicated on false statements, the individual's Fourth Amendment claims do not go away due to the commencement of the legal process.

The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same 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; nor shall private property be taken for public use, without just compensation.

Fifth Amendment

The Fifth Amendment includes a variety of individual rights, including the right to indictment by a grand jury, the prohibition of double jeopardy, the right to due process of law, and the privilege against self-incrimination. These rights are all related to criminal prosecutions. Many of the provisions of the Fifth Amendment were developed in reaction to brutal investigatory practices developed in Europe, such as torture and forced confessions.

The Fifth Amendment requires that a person be indicted by a grand jury before he or she may be put on trial. A **grand jury** comprises citizens who listen to the case presented by a prosecutor and decide whether there exists sufficient evidence to put the defendant on trial. The grand jury is intended to prevent the government from prosecuting people without some proof of guilt. Thus, the grand jury is meant to serve as a barrier between the citizen and an overzealous prosecutor.

An **indictment** is a legal document that charges a defendant with a crime. The requirement of an indictment before criminal prosecution is one of a handful of provisions of the Bill of Rights that has not been incorporated into the Fourteenth Amendment and applied to the states. In *Hurtado v. California* (1884), the Supreme Court held that the right does not apply to state criminal trials, and this decision never has been overruled. It is important to note that many states, per statute or state constitution, either require an indictment or give prosecutors the choice of seeking an indictment or proceeding through an information. An **information** is a substitute for an indictment, and it is a legal document filed directly with the court by the prosecutor.

The Fifth Amendment also prohibits putting a person in **double jeopardy**. This means a jurisdiction may not (a) prosecute someone again for the same crime after the person has been acquitted, (b) prosecute someone again for the same crime after the person has been convicted, or (c) punish someone twice for the same offense. This does not mean a state may not try someone again if the first trial results in a mistrial or a hung jury. A mistrial may be declared if a legal error occurs during a trial that unfairly prejudices the defendant and cannot be cured by the court. A **hung jury** occurs when the jury is unable to reach a unanimous verdict. A unanimous verdict is not a constitutional requirement (*Duncan v. Louisiana,* 1968), but most states still require it. In those states where a unanimous verdict is required, if the jury is deadlocked and the judge believes that further deliberations would not change the outcome, he or she may excuse the jury and order a new trial. When this happens, there has been neither an acquittal nor a conviction. An **acquittal** occurs when a jury votes unanimously that the defendant has not been proven guilty "beyond a reasonable doubt" by the prosecution. An acquittal does not necessarily mean that the jury believes the defendant is innocent of the crime charged; it simply means that the state was unable to meet the high burden of proof necessary for conviction. There is no

such thing as a verdict of "innocent." Furthermore, if a conviction is overturned on appeal, the state may retry the person because a reversal on appeal is not an acquittal; it is merely a determination by the appellate court that the defendant did not receive a fair trial and that the trial must be redone.

While the Double Jeopardy Clause bars multiple punishments for the same offense, there are exceptions. Under the **dual-sovereignty doctrine**, a person may be prosecuted in both federal and state court for an act that is a crime under both state and federal law. For instance, if a person kills a postal worker in Idaho, he or she could be prosecuted in Idaho state court for murder or in federal court for the murder of a postal worker, which is a federal offense. Here, one act results in a crime in two different jurisdictions.

The Fifth Amendment also provides the privilege against self-incrimination. Although this is referred to as a *privilege* rather than a *right*, courts do not distinguish between the two terms. The privilege against self-incrimination allows a person to refuse to speak to police and to refuse to testify at trial. The individual cannot be compelled to speak if he or she does not wish to. The intent is to force the state to prove its case against a citizen without the cooperation of the citizen, unless the citizen chooses to cooperate. In addition, if a defendant chooses not to testify at trial, the prosecutor cannot comment on the defendant's silence, because doing so would limit the privilege against self-incrimination by suggesting that a defendant's assertion of a constitutional right was somehow evidence of something to hide (*Griffin v. California,* 1965).

The privilege against self-incrimination is not absolute, however. The Supreme Court has held that the privilege only applies to "testimonial communications," or spoken confessions (*Malloy v. Hogan,* 1964). The privilege does not apply to the obtaining of evidence from a suspect by other means, such as taking blood samples or fingerprints.

The Fifth Amendment also provides for due process of law. Exactly what constitutes due process of law is much debated. In general, due process refers to the procedures (such as an indictment or a fair trial) that the state must provide before it may deprive an individual of his or her life, liberty, or property. This applies not only to criminal trial but to situations where the state seeks to take private property for a public use through the process of condemnation.

Sixth Amendment

The Sixth Amendment contains a number of individual rights associated with the criminal trial. They include the right to a speedy trial, the right to a public trial, the right to a trial by an impartial jury, the right to notice of the charges against oneself, the right to representation by counsel, and the right to confront the witnesses against oneself.

The Sixth Amendment

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

The right to a speedy trial means that a defendant must be put on trial without "unnecessary delay" (*Barker v. Wingo,* 1972). In this case, the Supreme Court determined that there is no precise amount of time that constitutes "speedy" and that this must be determined on a case-by-case basis. In Barker's case, the Court held that a 5-year delay between arrest and trial was not an "unnecessary delay" because Barker had not objected to the delay during the 5 years prior to trial. The U.S. Congress responded to this decision by passing the Speedy Trial Act of 1974, which set a specific time limit of 100 days from arrest to trial. This act only applies to federal cases, but most states have enacted similar legislation.

The right to a public trial means defendants have a right to have the public attend the trial if they so desire. The right to notice of the charges against the defendant means the prosecution must inform the defendant prior to trial precisely what he or she is accused of so the defendant's attorneys can prepare a defense to the crime charged. This can occur through either an indictment by the grand jury or the filing of an information by the prosecutor. Both of these rights emanate from the traditional Anglo-Saxon distrust of secrecy in government as a menace to liberty.

The right to a trial by an impartial jury means the defendant has a right to a jury that is not predisposed to believe the defendant is guilty. The members of the jury are not expected to be unaware of the events that led to the trial, but they must be able to set aside what they have learned prior to trial and make a determination of the defendant's guilt or innocence based solely on the evidence presented at trial. Trial by jury is an ancient right mentioned in the Magna Carta (1215).

The Sixth Amendment also provides a defendant with the right to the assistance of counsel. The Supreme Court has interpreted this right to include representation not only during the trial but at any pretrial proceeding that is deemed to be a "critical stage" in the fact-finding process (*Kirby v. Illinois,* 1972). Precisely what constitutes a critical stage is subject to some dispute, but it includes the preliminary hearing, the arraignment, the trial itself, and the **right of appeal**.

The **right to counsel** includes the right of indigent persons who cannot afford to hire a lawyer to be provided with a lawyer at the state's expense (*Gideon v. Wainwright,* 1963). The Supreme Court has limited this to situations where the defendant faces the possibility of incarceration for 6 months or more, however (*Argersinger v. Hamlin,* 1972). In addition, the Supreme Court has held that the right to counsel includes the right to the *effective* assistance of counsel (*Strickland v. Washington,* 1984). This means an attorney must not be incompetent and must provide the defendant with an adequate defense. Although this sounds reasonable in theory, in practice the Supreme Court has been very reluctant to find that an attorney's conduct has been so bad as to be legally "ineffective."

The Seventh Amendment

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

Seventh Amendment

The Seventh Amendment provides defendants in civil lawsuits filed in federal court with the right to a trial by jury. This amendment applies only to federal trials; it does not apply to civil lawsuits filed in state courts.

Eighth Amendment

The Eighth Amendment

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

The Eighth Amendment bars the state from several actions, including imposing excessive bail on a defendant prior to trial and engaging in cruel and unusual punishment. Both of these prohibitions are written vaguely, and the Supreme Court has at times struggled to interpret them in a consistent fashion.

What constitutes excessive bail? The Supreme Court has determined that bail should be set at a figure no higher than necessary to ensure the presence of the defendant at trial (*Stack v. Boyle,* 1951). The amount of bail is not supposed to be based on the defendant's income level. The Eighth Amendment does not provide an absolute, unlimited right to bail, but every state provides for a right to bail in most cases. Bail does not have to be granted, and the Supreme Court has held that bail may be denied altogether if a person is found to be a threat to public safety (*United States v. Salerno,* 1987).

The prohibition on cruel and unusual punishment limits the type and method of punishment that may be imposed on a defendant by the state after conviction. It prohibits torture as well as punishment that is disproportionate to the offense (meaning the punishment should, in some sense, fit the crime and not be excessive). What constitutes inappropriate punishment has changed over time. For instance, at one time corporal punishment (such as whipping) was considered an acceptable form of punishment, but no state today allows the practice. The Cruel and Unusual Punishment Clause does not prohibit the death penalty because it is deemed to be in accord with contemporary standards of decency, and the death penalty existed at the time of the passage of the Eighth Amendment (*Gregg v. Georgia,* 1976).

Ninth Amendment

The Ninth Amendment

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

The Ninth Amendment simply states that the listing of some individual rights in the Constitution should not be construed as a listing of the only rights retained by citizens. In other words, the rights provided in the Bill of Rights should not be taken as the only rights that citizens have; they are merely some of the rights retained by the people. The obvious question is this: If the Bill of Rights is not all-inclusive, what exactly are the other rights retained by the people? The Supreme Court has struggled to provide a framework for delineating these rights, as the discussion on incorporation (later in this chapter) indicates.

In at least one case, the Supreme Court expressly mentioned the Ninth Amendment as providing a basis for giving individual citizens other, unenumerated rights, such as a right to privacy (*Griswold v. Connecticut,* 1965). Griswold was the director of the Planned Parenthood League of Connecticut, and he and the league's medical director had been found guilty of dispensing birth control advice and devices

(both then illegal in Connecticut) for which they were fined $100 each. In overturning their conviction, the Supreme Court affirmed that the right to privacy is a very important right while acknowledging that it is not specifically mentioned anywhere in the Constitution. Justice Douglas, who delivered the Court's majority opinion in *Griswold,* stated that the specific constitutional guarantees of the Bill of Rights "have **penumbras** [incompletely lighted areas] formed by emanations from these guarantees that help give them life and substance." In other words, although the right to privacy is not specifically mentioned in the Constitution, such a right can be logically deduced from the rights that are. *Griswold* was a very important step to *Roe v. Wade* (1973), which granted abortion rights to women under the principle of privacy, and to *Lawrence v. Texas* (2003), which outlawed sodomy statutes under the same principle.

The Tenth Amendment

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.

Tenth Amendment

The Tenth Amendment states that the rights not delegated to the federal government in the Constitution are reserved for the states or individual citizens. This is simply the principle of federalism; the federal government is a government of enumerated (or listed) powers. This means it has no authority to act unless so granted by the Constitution. And where the federal government has no authority, the states and individual citizens retain the authority.

The individual rights provided in the Bill of Rights are set forth in Table 2.1.

TABLE 2.1 ■ Individual Rights Contained in the Bill of Rights

Amendment	Rights
First Amendment	Freedom of speech, press, and assembly, freedom of and from religion
Second Amendment	Right to bear arms
Third Amendment	Freedom from quartering soldiers
Fourth Amendment	Freedom from unreasonable searches and seizures; warrants must be based on probable cause and stated with specificity
Fifth Amendment	Grand jury indictment, freedom from double jeopardy and self-incrimination, rights to due process and to just compensation for takings
Sixth Amendment	Rights to speedy trial, to impartial jury, to be informed of charges, to obtain witnesses on one's behalf, to face accusers, and to an attorney
Eighth Amendment	Freedom from excessive bail or fines and from cruel and unusual punishment
Ninth Amendment	Listing of rights in the Bill of Rights does not imply the absence of other rights, such as the right to privacy

Due Process and the Fourteenth Amendment

In addition to the individual rights listed in the Bill of Rights, several other amendments include individual rights. These include the so-called Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), which were passed shortly after the Civil War and intended to protect the recently freed slaves from abuse by the Southern states. While initially intended to prevent the Southern states from limiting the rights of the recently freed slaves, today these amendments, particularly the Fourteenth, are used to protect all citizens from state actions that impinge on constitutional rights.

Fourteenth Amendment

The Fourteenth Amendment is a very long amendment that has five sections. We include only the first section here, which has to do with individual rights. It is significant because it is the first amendment that applies to the states, as opposed to the federal government. Whereas the Bill of Rights was developed out of a fear of how the federal government might mistreat citizens, after the Civil War Congress recognized that individual states, particularly those in the South that had until recently allowed slavery, were just as capable of oppressing citizens as the federal government. Congress responded by enacting the Fourteenth Amendment, which forbids states from denying citizens due process of law or equal protection of the laws. These two clauses have dramatically altered the way that states may deal with citizens.

The Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

The Due Process Clause of the Fourteenth Amendment is identical to the Due Process Clause in the Fifth Amendment. It has been interpreted by the Supreme Court as incorporating (or applying) the various provisions of the Bill of Rights and making them applicable to the states. The Equal Protection Clause has been interpreted to prevent states from making unequal, arbitrary distinctions between people. It does not ban all discrimination by the state but requires that when the state treats people differently, it does so on the basis of reasonable classifications. It also bars discrimination on the basis of race, religion, or (in most instances) gender. These are referred to as **suspect classifications**. To put it another way, where the law limits the liberty of *all* persons, due process is involved; where the law treats *certain classes of people* differently, equal protection is involved.

Not all classifications by the state necessarily violate the Equal Protection Clause. States may treat people differently if they have a legitimate reason to do so. Thus, states may limit the practice of medicine to those who have a license or limit the age at which a person may lawfully consume alcoholic beverages. Classifications based on age are

generally permitted based on the state's interest in the health and welfare of juveniles and because there exists no history of "invidious" discrimination against minors, as exists for minorities and women. Last, it is worth noting that the Equal Protection Clause does not prohibit discrimination of any kind, including discrimination based on race or gender, when the discrimination is practiced by private citizens. The Fourteenth Amendment applies only to state action, not to the actions of private citizens who are not affiliated in any way with the state.

STANDARD OF REVIEW

In constitutional law, the outcome of a case is often determined by the standard of review the court uses. Not all the individual protections set forth in the Bill of Rights are accorded the same level of protection by the courts. There exists a hierarchy of rights. Courts employ either strict scrutiny review or rational basis review, depending on whether a fundamental right is implicated or a suspect classification is affected. We discuss each of these terms here.

Fundamental rights are those individual rights the Supreme Court has determined are "essential to the concept of ordered liberty." By this the Court means these rights are the most important of all (*Palko v. Connecticut,* 1937). Examples include almost all the individual rights listed in the Bill of Rights, as well as the Fourteenth Amendment guarantees of due process and equal protection. A suspect classification is one that is presumed to be based on an unconstitutional basis. To date, the Supreme Court has held that only race and religion are suspect classifications in all circumstances.

CURRENT RESEARCH

It is one thing to have certain rights, such as the rights to remain silent and to have an attorney. It is another thing altogether to understand and be able to then assert these rights. The American Bar Association has called for **Miranda warnings** that can be understood by juveniles in police custody. In a study conducted by Rogers and colleagues (2012), the researchers sought to determine the degree to which juveniles understood their rights. In surveying prosecutors and public defenders, the researchers collected 293 juvenile Miranda warnings that were intended specifically for youthful offenders. Length and reading levels were analyzed and compared to an earlier survey. Nearly two thirds (64.9%) of these warnings were very long (→175 words), which hinders Miranda comprehension. In addition, most juvenile warnings (91.6%) required reading comprehension higher than a 6th-grade level; 5.2% exceeded a 12th-grade reading level. More than half of juvenile Miranda warnings were found to be highly problematic because of excessive lengths or difficult reading comprehension. However, simple and easily read Miranda components were identified that could be used to improve juvenile advisements.

Source: "Juvenile Miranda Warnings: Perfunctory Rituals or Procedural Safeguards?" Richard Rogers, Hayley L. Blackwood, Chelsea E. Fiduccia, Jennifer A. Steadham, Eric Y. Drogin, and Jill E. Rogstad. *Criminal Justice and Behavior*, 39(3): 229–249, 2012.

Under **strict scrutiny** review, a statute that abridges a fundamental right or impacts a suspect classification will be determined to be unconstitutional unless (a) the state has a compelling interest, which justifies restricting a fundamental right, and (b) the legislation restricting that right is "narrowly tailored" so that the right is not limited any more than absolutely necessary to achieve the state's compelling interest. A criminal justice–related example of a compelling interest is the state's interest in the safe and secure operation of prisons.

This standard of review is referred to as strict scrutiny review because the court looks closely at the purpose and effect of the legislation rather than merely accepting the claims of the legislature that the statute is needed. The reason for employing a higher standard of review when a statute affects a fundamental right or suspect classification is that closer analysis is required when important individual rights are affected. The burden of proof is on the state to demonstrate the constitutionality of legislation under strict scrutiny review.

Laws involving quasi–suspect classifications (such as gender, legitimacy, and poverty) are reviewed under the **intermediate scrutiny** standard. A statute will be upheld if the Court finds that it is *substantially related* to an *important* government purpose. The burden of proof lies primarily with the state under this standard of review.

If neither a fundamental right nor a suspect classification is involved, a state may enact legislation abridging that right or affecting that class so long as there is a rational basis for the legislation. This standard of review is referred to as **rational basis** review since under it, the court will not strike down a statute that appears to have a rational basis. The court does not closely examine the effect of the legislation, unlike under strict scrutiny review. This standard of review is obviously a much easier one for the state to meet. The legislature need not choose the best possible means of achieving its goal; it must simply choose a means that is not entirely unrelated to the achievement of the legislative purpose.

INCORPORATION OF THE BILL OF RIGHTS INTO THE FOURTEENTH AMENDMENT

It was intended by the founding fathers that the Bill of Rights apply only to the federal government, because there was a fear of a strong centralized government when the Constitution was adopted. State governments were viewed with much less fear. In *Barron v. Baltimore* (1833), the Supreme Court expressly held that the Bill of Rights applied only to the federal government. The *Barron* case involved the Takings Clause of the Fifth Amendment that forbids governmental taking of private property without just compensation. Barron wanted this clause applied to the states because the city of Baltimore had essentially taken his property without providing him with compensation for it. The Supreme Court dismissed his claim, stating that the amendment did not apply to the states, and therefore the Court lacked jurisdiction in the matter. This case showed that without the application of the Bill of Rights to the states, individuals would have no recourse to higher authority if the states violated their rights.

After the Civil War and the failed attempt by the Southern states to secede from the Union, Congress passed the Fourteenth Amendment, in an effort to provide greater protections for individuals from the actions of state governments. There was in particular a

fear that the Southern states would attempt to limit the ability of the recently freed slaves to become equal citizens. The Fourteenth Amendment contains three clauses: the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause. The essence of each of these clauses is that they bar states, not the federal government, from infringing on individual rights. The amendment was expressly intended to control state action, but it was unclear exactly how far the amendment went. The original spur for it was a desire to protect the rights of the freed slaves, but the language of the amendment was broad and not specifically limited to state actions infringing on the rights of Blacks.

An early attempt to apply the language of the Privileges and Immunities Clause to persons other than the recently freed slaves failed in the *Slaughterhouse Cases* (1873). At issue was a Louisiana state statute passed by a highly corrupt state legislature granting one corporation a monopoly on slaughterhouse business. The petitioners (the person or persons bringing the suit) argued that the Privileges and Immunities Clause should be interpreted as prohibiting unreasonable restrictions on business because the restriction in question deprived them of their right to pursue their lawful trades. The Supreme Court sided with the monopoly, emphasizing that the Due Process Clause should not be a source enabling judges to nullify laws they considered unreasonable. (Despite the financial gain some legislators realized from the monopoly, there were genuine public health concerns involved.)

During the latter part of the 19th century, however, the Supreme Court began to use the Due Process Clause of the Fourteenth Amendment to strike down state action involving economic regulation. Due process rights are said to extend beyond procedural rights to encompass **substantive due process** as well. Under the principle of substantive due process, legislatures cannot pass laws that infringe on substantive rights such as free speech and privacy. (This is the legal theory under which the privacy rights applied in *Griswold v. Connecticut* and *Roe v. Wade* were based.) This sounds all very liberal

VIEW FROM THE FIELD

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As a public defender with far too many clients and not nearly enough hours in the day, it's all too easy to give up on an argument when, after conducting your legal research, you discover that the U.S. Constitution has been interpreted in a way that is unfavorable to your client. But sometimes, when you just can't seem to get over how fundamentally unfair the existing law seems under the circumstances of your case, devoting some additional time to the issue may pay huge dividends for your client. In some of these cases, you may be able to argue that your state's constitution should be read to provide greater rights to your client than does the U.S. Constitution (even if the two constitutions contain virtually identical language).

The difficulty with these arguments, of course, is that you have to use all your persuasive abilities to overcome the court's inclination to interpret the language of a given constitutional provision exactly as another court, perhaps even the U.S Supreme Court, has interpreted an identical provision, and you also have to use all your creativity to give the court a good reason (or, preferably, a host of good reasons) why, in this instance, the state constitution ought to be interpreted as providing greater protection than the U.S. Constitution. You're not going to win all the time, or hardly at all, but it's a tremendously gratifying experience when you do manage to prevail and improve the law—not just for your client but for everyone in your state.

until we realize that the Supreme Court used the principle to repeatedly hold that states could not impose regulations such as minimum wage laws and child labor laws on private businesses because doing so violated due process. The violation of due process consisted of the regulation or taking of a right such as the right to work or to enter into a contract (even if the "right" meant having to work long hours for low wages).

During the 1930s, the use of the Due Process Clause to protect economic interests fell into disfavor, in part because the Supreme Court used it to strike down much of President Roosevelt's New Deal legislation, which was intended to ease the Great Depression. At the same time, however, the Supreme Court began to use the Due Process Clause of the Fourteenth Amendment to protect individual rights from state action. Beginning in the late 1930s and continuing into the 1960s, the Supreme Court incorporated most of the various provisions of the Bill of Rights into the Fourteenth Amendment's Due Process Clause and applied them to the states.

By **incorporation**, we mean that the justices interpreted the Due Process Clause of the Fourteenth Amendment, which says no state shall deprive a person of life, liberty, or property without "due process of law," as prohibiting states from abridging certain individual rights. Many of these rights are included in the Bill of Rights, and hence these rights were included (or incorporated) in the definition of due process. Several approaches to incorporation are discussed next.

Total Incorporation

Under the **total incorporation** approach, the Due Process Clause of the Fourteenth Amendment made the entire Bill of Rights applicable to the states. In essence, the phrase "due process of law" was interpreted to mean "all of the provisions of the Bill of Rights." Justice Hugo Black advocated for this approach to incorporation, but he had few supporters on the Court.

Total Incorporation Plus

Under **total incorporation plus**, the Due Process Clause of the Fourteenth Amendment includes all the Bill of Rights as well as other, unspecified rights. One of the first advocates of this approach was Justice William Douglas, who claimed that the various provisions of the Bill of Rights limiting the ability of the government to intrude into a person's private life (such as the Fourth Amendment prohibition on unreasonable searches) created a general right to privacy, even though such a right is not expressly mentioned anywhere in the Constitution.

Fundamental Rights

Under the fundamental rights approach, there is no relationship between the Due Process Clause of the Fourteenth Amendment and the Bill of Rights. Rather, there are simply some rights that are essential to "due process" and that must therefore be protected. The Due Process Clause has an independent meaning that prohibits state action that violates rights that are deemed "fundamental" (*Palko v. Connecticut,* 1937). Exactly what constitutes a fundamental right is left to the Supreme Court to figure out. This approach provides justices with greater discretion, and they may interpret it either narrowly or broadly. The primary advocate of this approach was Justice Felix Frankfurter.

Selective Incorporation

The **selective incorporation** approach combines elements of the fundamental rights and total incorporation approaches in modified form. This approach favors a case-by-case approach. Selective incorporation rejects the notion that all the rights in the Bill of Rights are automatically incorporated in the Due Process Clause of the Fourteenth Amendment, but it looks to the Bill of Rights as a guide to determining the meaning of due process. The best-known advocate of selective incorporation was Justice William Brennan. Although selective incorporation accepted the idea that the Due Process Clause protects only "fundamental rights" and that not every right in the Bill of Rights is necessarily fundamental, over time it has led to the incorporation of virtually every individual right in the Bill of Rights.

It should be noted that because the Supreme Court has deemed incorporation necessary, it does not mean that most of these rights did not already exist in the states. Many states had rights in their state constitutions that were even more protective of individual rights than those in the Bill of Rights. For instance, a number of states had privacy rights in such matters as abortion and the bearing of arms long before the Court's "discovery" of "penumbras." Table 2.2 presents a summary of incorporation theories.

TABLE 2.2 ■ Summary of Incorporation Theories

Total Incorporation	Total Incorporation Plus	Selective Incorporation
Intent: To make all provisions of the Bill of Rights applicable to the states.	**Intent:** To protect rights enumerated in the Bill of Rights plus certain unenumerated rights.	**Intent:** To incorporate provisions of the Bill of Rights in a careful and discriminative way.
Justification: Due Process Clause of the Fourteenth Amendment.	**Justification:** The totality of the rights in the Bill of Rights created a penumbra over the law.	**Justification:** Only fundamental rights should be incorporated; nonfundamental rights should be left as state concerns.

SUMMARY

In this chapter, we discussed the sources of law. These include constitutions, statutes, administrative regulations, and case law. It is law that courts apply and, on occasion, interpret. Law serves as the reason for the existence of courts and as the body of rules and principles that courts apply to the infinite variety of human activity and interactions.

Individual rights come from many sources. Those rights most applicable to criminal courts are the rights found in the U.S. Constitution, particularly the rights enumerated in the Bill of Rights and applied to the states via the Due Process Clause of the Fourteenth Amendment. Crucial to our understanding of these individual rights is our understanding of how the U.S. Supreme Court applied these rights, originally intended to apply only to the federal government, to the state governments. This was a crucial step since so much of criminal justice and criminal law is handled at the state level.

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DISCUSSION QUESTIONS

1. What are the primary sources of law?
2. How did the Bill of Rights come to be applied to the individual states?
3. Why was the Bill of Rights adopted, and what rights are contained in it?
4. What are the different standards of review in constitutional law, and when are they used?
5. Given the Supreme Court's "discovery" of penumbras in the Bill of Rights such as the right to privacy, should this right be extended to assisted suicide for terminally ill patients and/or access to marijuana for medical purposes? Why or why not?
6. How has the Equal Protection Clause of the Fourteenth Amendment been applied by the Supreme Court?
7. How has the Due Process Clause of the Fourteenth Amendment been applied by the Supreme Court?
8. Using strict scrutiny review, under what circumstances can a state abridge fundamental rights?
9. How has the Supreme Court interpreted the Second Amendment in recent years?
10. Why does the standard of review matter in constitutional law?

KEY TERMS

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INTERNET SITES

The Bill of Rights: www.archives.gov/exhibits/charters/bill_of_rights.html

Federal Judicial Center: www.fjc.gov

Fourteenth Amendment: www.usconstitution.net/xconst_Am14.html

Incorporation Doctrine: www.law.cornell.edu/wex/incorporation_doctrine

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