

## 1.6: Sources of Law

### Learning Objectives

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

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

### Constitutional Law

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

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

#### Example of Government and Private Action

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

### Exceptions to the Constitutional Protections

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

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

### Superiority of the Constitution

Of the three sources of law, constitutional law is considered the *highest* and should not be supplanted by either of the other two sources of law. Pursuant to principles of federal supremacy, the *federal* or US Constitution is the most preeminent source of law, and state constitutions cannot supersede it. Federal constitutional protections and federal supremacy are discussed in [Chapter 2](#) and [Chapter 3](#).

### Statutory Law

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

## Statutory Law's Inferiority

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

## Administrative Laws and Ordinances

Other written and published laws that apply to individuals are **administrative laws** (officially known as **administrative rules**, but commonly referred to as **regulations**) and **ordinances**. Administrative laws and ordinances should not supersede or conflict with statutory law.

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

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

## Model Penal Code

State criminal laws differ significantly, so in the early 1960s, a group of legal scholars, lawyers, and judges who were members of the American Law Institute drafted a set of suggested criminal statutes called the **Model Penal Code**. The intent of the Model Penal Code was to provide a standardized set of criminal statutes that all states could adopt, thus simplifying the diversity effect of the United States legal system. While the Model Penal Code has not been universally adopted, a majority of the states have incorporated portions of it into their penal codes, and the Model Penal Code survives as a guideline and focal point for discussion when state legislatures modify their criminal statutes.

## Case Law

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

### English Common Law

In Old England, before the settlement of the United States, case law was the most prevalent source of law. This was in contrast to countries that followed the Roman Law system, which primarily relied on written codes of conduct enacted by a legislature. Case law in England was mired in tradition and local customs. Societal principles of law and equity were the guidelines when courts issued their rulings. In an effort to be consistent, English judges made it a policy to follow previous judicial decisions, thereby creating a uniform system of laws throughout the country for the first time. Case law was named **common law** because it was viewed as customary law throughout the country.<sup>1</sup>

The English system of jurisprudence made its way to the United States with the original colonists. Initially, the thirteen colonies unanimously adopted common law as the law of the land. All crimes were common-law crimes, and cases determined criminal elements, defenses, and punishment schemes. Gradually, after the Revolutionary War, hostility toward England and modern reform led to the erosion of common-law crimes and a movement toward codification. States began replacing common-law crimes with statutes enacted by state legislatures. Oxford professor Sir William Blackstone's *Commentaries on the Law of England*, which interpreted and summarized English common law, became an essential reference as American law and legal education developed.<sup>2</sup>

### Limitations on Common Law Crimes

In modern society, a general rule is that judges *cannot* create crimes.<sup>3</sup> To do so would violate notions of fairness. Making up a new crime and punishing the defendant for it does not provide consistency or predictability to our legal system. It also violates the principle of legality, a core concept of American criminal justice embodied in this phrase: "*Nullum crimen sine lege, nulla poena sine crimen*" (No crime without law, no punishment without crime).

Generally, **statutes** (products of legislatures) must define criminal conduct. If no statute exists to criminalize the defendant's behavior, the defendant *cannot be criminally prosecuted*, even if the behavior is abhorrent. As the Model Penal Code states, "[n]o conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State" Model Penal Code § 1.05(1). Also, it should be noted that although traditional criminal statutes designate particular conduct (such as intentionally causing another's death) as criminal, statutes may also declare that violating **administrative laws** can result in criminal punishment. For example, via [18 U.S.C. § 1520\(b\)](#), Congress declared that violations of certain provisions of the Securities and Exchange Act of 1934 may result in imprisonment.

The common law still plays an important role in criminal lawmaking, even though most crimes are now embodied in statutes. Classification of crimes as felonies and misdemeanors is a reflection of English common law. Legislatures often create statutes out of former common law crimes. Judges look to the common law when defining statutory terms, establishing criminal procedure, and creating defenses to crimes. The United States is considered a common law country. Every state except Louisiana, which is influenced by the Napoleonic French Civil Code (and possibly Spanish Civil Code) adopts the common law as the law of the state *except* where a statute provides otherwise.<sup>4</sup>

### Example of a Court's Refusal to Create a Common Law Crime

Read [Keeler v. Superior Court](#), 470 P.2d 617 (1970). In *Keeler*, the defendant attacked his pregnant ex-wife, and her baby was thereafter stillborn. The California Supreme Court disallowed a murder charge against Keeler under California Penal Code § 187 because the statute criminalized only the malicious killing of a "human being." The court reached its decision after examining the common-law definition of human being and determining that the definition did not include a fetus. The court reasoned that it *could not create a new crime* without violating the due process clause, separation of powers, and California Penal Code § 6, which prohibits the creation of common-law crimes. After the *Keeler* decision, the California Legislature changed [Penal Code § 187](#) to include a fetus, excepting abortion.

### Powerful Nature of Case Law

Generally, if there is a statute on an issue, the statute is *superior* to case law, just as the Constitution is superior to statutory law. However, judges *interpret* constitutional and statutory law, making case law a *powerful* source of law. A judge can interpret a constitution in a way that adds or creates exceptions to its protections. A judge can also interpret a statute in a way that makes it unconstitutional and unenforceable. This is called the power of **judicial review**. [Marbury v. Madison](#), 5 U.S. (1 Cranch) 137 (1803).

### Example of Judicial Review

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

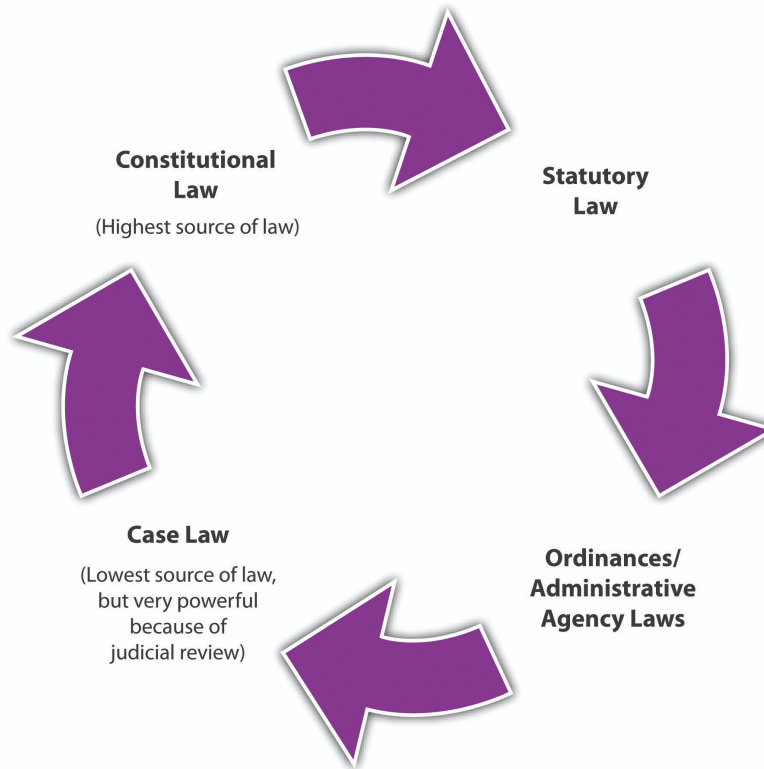


Figure 1.6.1 Diagram and Hierarchy of the Sources of Law

### Stare Decisis and Precedent

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

### Rules of Stare Decisis and Use of Precedent

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

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

### Example of Stare Decisis and Use of Precedent

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

## Case Citation

Cases must be *published* to become case law. A published case is also called a **judicial opinion**. This book exposes you to many judicial opinions that you have the option of reading on the Internet. It is essential to understand the meaning of the **case citation**. The case citation is the series of numbers and letters after the title of the case and it denotes the case's published location. For example, let's analyze the case citation for *Keeler v. Superior Court*, 470 P.2d 617 (1970).

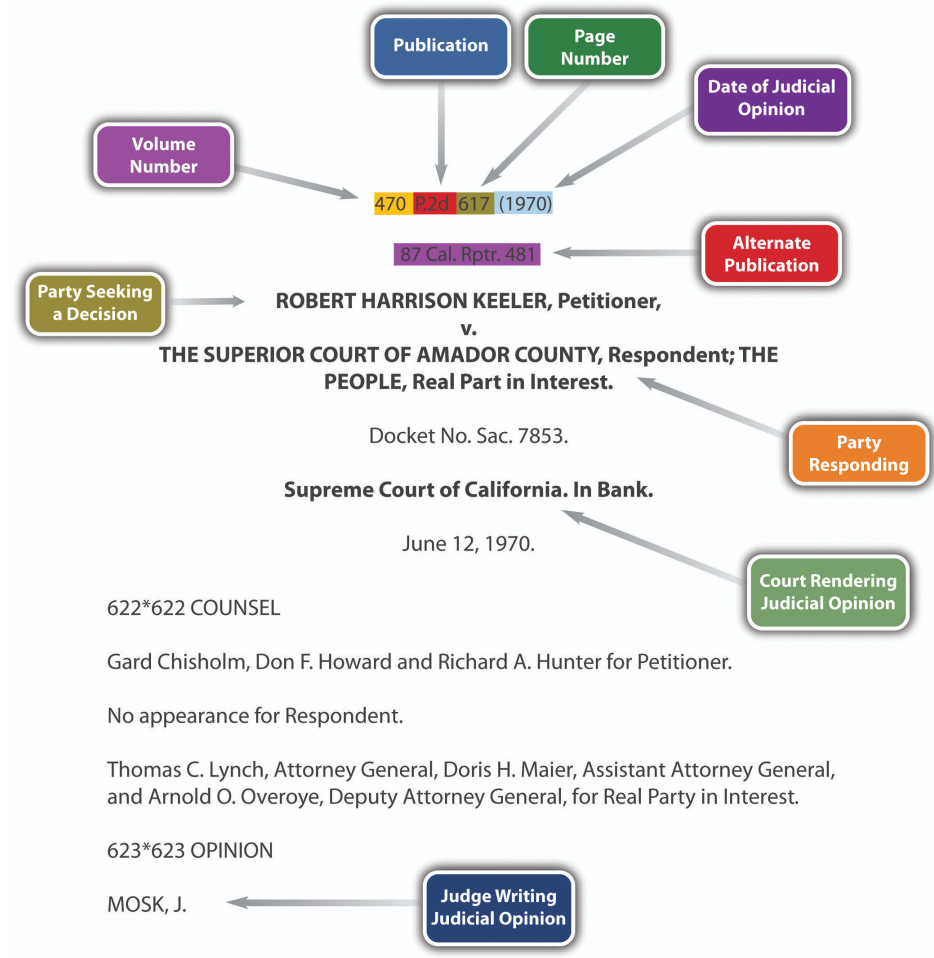


Figure 1.6.2 Keeler Case Citation

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

## Case Briefing

It is useful to condense judicial opinions into **case brief format**. The *Keeler* case brief is shown in Figure 1.6.3 below.



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

Figure 1.6.3 Keeler Case Brief

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

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

### Example of a Substantive Holding:

"It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.

If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

Figure 1.6.4 Example of a Substantive Holding

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

One judge writes the judicial opinion. Judges vote on how to rule, and not all cases are supported by a unanimous ruling. Occasionally, other judges will want to add to the judicial opinion. If a judge agrees with the judicial opinion, the judge could write a **concurring opinion**, which explains why the judge agrees. If a judge disagrees with the judicial opinion, the judge could write a **dissenting opinion** explaining why the judge disagrees. The dissenting opinion will not change the judicial opinion, but it may also be used as precedent in a future case if there are grounds for changing the law.

### Key Takeaways

- The three sources of law are constitutional, statutory, and case law.
- The sources of law are ranked as follows: first, constitutional; second, statutory; and third, case law. Although it is technically ranked the lowest, judicial review makes case law an extremely powerful source of law.
- The purpose of the US and state constitutions is to regulate government action.
- One purpose of statutory law is to regulate individual or private action.
- The purpose of case law is to supplement the law when there is no statute on point and also to interpret statutes and the constitution(s).
- The court's power to invalidate statutes as unconstitutional is called judicial review.
- The components of a case brief are the following:

- The title, plus citation. The citation indicates where to find the case.
- The procedural facts of the case. The procedural facts discuss who is appealing and in which court the case is located.
- The substantive facts. The substantive facts discuss what happened to instigate the case.
- The issue. The issue is the question the court is examining.
- The substantive holding. The substantive holding answers the issue question and is the case law.
- The procedural holding. The procedural holding discusses what the court did procedurally with the case.
- The rationale. The rationale is the reason the court held the way it did.

## Exercises

### ? Exercise 1.6.1

Hal invents a *new* drug that creates a state of euphoria when ingested. Could Hal be criminally prosecuted for ingesting his new drug if there is no criminal statute that has been passed yet that would prohibit it?

#### Answer

Hal could be prosecuted for ingesting his new drug only if he is in a state that allows for common-law crimes. The *drug* is *new*, so the state legislature will probably *not* have criminalized it by enacting a statute.

### ? Exercise 1.6.2

Read [Shaw v. Murphy](#), 532 U.S. 223 (2001). Did the US Supreme Court allow prison inmates the First Amendment right to give other inmates legal advice? Why or why not?

#### Answer

The US Supreme Court held that inmates do not have the First Amendment right to give other inmates legal advice. The Court based its ruling on the prison's interest in ensuring prison order, security, and inmate rehabilitation. The Court stated, "We nonetheless have maintained that the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large." [Shaw v. Murphy](#), 532 U.S. 223, 229 (2001).

### ? Exercise 1.6.3

Read Justice Scalia's [dissenting opinion in Lawrence v. Texas](#), 539 U.S. 558 (2003). What is the *primary* reason Justice Scalia dissented from the U.S. Supreme Court's opinion in *Lawrence*? (Here is the full judicial opinion in [Lawrence v. Texas](#).)

#### Answer

Justice Scalia criticized the US Supreme Court majority for not adhering to *stare decisis*. According to Justice Scalia, the Court did not follow a recent (seventeen-year-old) precedent set in [Bowers v. Hardwick](#), 478 U.S. 186 (1986).

## Footnotes

1. Keyser, n.d., [British History, 2: The Origins of Common Law](#). ↩
2. Kitchel, 2007, [William Blackstone's Enduring Legacy](#). ↩
3. See, e.g., [United States v. Hudson & Goodwin](#), 11 U.S. 32 (1812). ↩
4. State of Louisiana, n.d., [About Louisiana](#). ↩

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