

## 3.5: Sources of Law - Administrative Law, Common Law, Case Law and Court Rules

### Administrative Law—Agency-Made Law

State and federal legislatures cannot keep up with the task of enacting legislation on all the myriad subjects that must be regulated by law. In each branch of government, various administrative agencies exist with authority to create administrative law. At the federal level, for example, the Environmental Protection Agency enacts regulations against environmental crimes. At the state level, the Department of Motor Vehicles enacts laws concerning drivers' license suspension. Administrative regulations are enforceable by the courts provided that the agency has acted within the scope of its delegated authority from the legislature.

### Common Law

One important source of criminal law in the United States is common law. English law developed over centuries and, generally, when we refer to American common law, we are referring to the common law rules brought over from England to the United States when we became a nation. However, this is not necessarily always clear. <sup>[1]</sup> LaFave describes the process by which common law was derived in England.

“... Although there were some early criminal statutes [in England], in the main the criminal law was originally common law. Thus by the 1600s the judges, not the legislature, had created and defined the felonies of murder, suicide, manslaughter, burglary, arson, robbery, larceny rape, sodomy and mayhem; and such misdemeanors as assault, battery, false imprisonment, libel, perjury, and intimidation of jurors. During the period from 1660 . . . to 1860 the process continued with the judges creating new crimes when the need arose and punishing those who committed them: blasphemy (1676), conspiracy (1664), sedition (18th century), forgery (1727), attempt (1784), solicitation (1801). From time to time the judges, when creating new misdemeanors, spoke of the court's power to declare criminal any conduct tending to “outrage decency” or “corrupt public morals.” or to punish conduct *contra bonos mores*: thus they found running naked in the streets, publishing an obscene book, and grave-snatching to be common law crimes.

Of course, sometimes the courts refused to denote as criminal some forms of anti-social conduct. At times their refusal seemed irrational, causing the legislature to step in and enact a statute: thus false pretenses, embezzlement, incest and other matters became statutory crimes in England. ... Some immoral conduct, mostly of a sexual nature (such as private acts of adultery or fornication, and seduction without conspiracy) was punished by ecclesiastical courts in England. The common law courts never punished these activities as criminal, and thus, they never became English common law crimes.

At the same time that judges were developing new crimes, they were also developing new common law defenses to crime, such as self-defense, insanity, infancy, and coercion. ...

About the middle of the nineteenth century, the process of creating new crimes almost came to a standstill in England.” <sup>[2]</sup>

American courts originally relied on the decisions of the English Courts, but Kerper (1979, p. 27) notes that

“as the number of American decisions grew, the American courts began to rely more and more on their own decisions. At the same times, differences in social and economic conditions (and to some extent, differences in the personalities of the judges) led the courts in different states to take different views of the common law. As a result, while the English tradition produced a core of similarity, there developed significant differences in common law rules in the various states. Thus, the common law standard governing an officer's authority to arrest for minor crimes might be substantially different in Ohio and New York, although the general framework of the common law governing arrests was likely to be similar in both states.” <sup>[3]</sup>

In order to understand the limitations of common law, it is helpful to understand the difference between the common law tradition followed by the United States, and other nations that follow the English model and the civil law tradition which developed in Europe. The civil law tradition uses legislative codes as the primary source of law. Under the civil law tradition, new substantive law replaces, rather than supplements, old substantive law. Thus, judges in the civil law tradition are not bound by prior interpretations of legislative codes, and all courts are free to interpret the codes according to generally accepted principles of legal interpretation. *Stare decisis*, discussed below, plays no persuasive or binding role in the civil law tradition. Under the common law tradition though, new substantive law generally adds to, rather than replaces, old substantive law.

Kerper notes that our common law tradition is not purely one of common law, and that common law is displaced by statutes, case law, and the constitution.

“Though the description of the Anglo-American system as a “common law legal system” notes an important distinction between it and the civil law system, that description should not lead one to ignore the fact that legislation also constitutes an important source

of law in the Anglo-American system. That system is actually a mixed system of common law rules and statutory rules. The common law rules established by American and English courts have always been subject to displacement by legislative enactments. Indeed, the courts have the authority to develop common law standards only where the legislatures have not sought to provide legislative solutions. ... In our country, the common law also is subject to the legal limitations imposed by federal and state constitutions. The supremacy of the constitutions extends over all forms of law, including the common law. Just as legislation cannot violate a constitutional limitation, neither can a common law rule.”<sup>[4]</sup>

Common law is a source of both substantive and procedural law (discussed below), but it is important to note that there are no federal common law crimes. If Congress has not enacted legislation to make certain conduct criminal, that conduct cannot constitute a federal crime.

## Judge-Made Law: Case Law

The term **case law** refers to legal rules announced in opinions written by appellate judges when deciding appellate cases before them. Judicial decisions reflect the court’s interpretation of constitutions, statutes, common law, or administrative regulations. When the court interprets a statute, the statute, as well as its interpretation, control how the law will be enforced and applied in the future. The same is true when a court interprets federal and state constitutions. When deciding cases and interpreting the law, judges are bound by precedent.

### ***Stare Decisis* and Precedent: Been There, Done (must do) That.**

The **doctrine of *stare decisis*** comes from a Latin phrase that states, “to stand by the decisions and not disturb settled points”. It tells the court that if the decisions in the past have held that a particular rule governs a certain fact situation, that rule should govern all later cases presenting the same fact situation. Under the doctrine of *stare decisis*, past appellate court decisions form precedent, that judge must follow in similar subsequent cases. *Stare decisis* permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contribute to the integrity of our constitutional system of government, both in appearance and fact.”<sup>[5]</sup> Trial courts and appellate courts must follow the controlling case law that has already been announced in appellate court decisions from their own jurisdiction. Trial courts must follow precedent when they decide questions of law. [Questions of law include what a statute means, what the law states, how the constitution should be interpreted, whether a particular law even applies under the facts in the case before them. On the other hand, **questions of fact** are decided by jurors (or judges in bench trials) and include, for example, how fast was the defendant driving, what color hat the defendant was wearing, or whether the gun went off accidentally.] One way courts get around precedent is to distinguish the facts in the case before them as much different than the facts in the earlier case. For example, if the court may decide that the fact that the defendant was running away from the scene, in this case, is so different from the earlier case in which the defendant was merely walking away from the scene that there is no precedent it must follow.

The advantages of *stare decisis* include efficiency, equality, predictability, the wisdom of past experience, and the image of limited authority.<sup>[6]</sup> Efficiency occurs because each trial judge and the appellate judge does not have to work out a solution to every legal question. Equality results when one rule of law is applied to all persons in the same setting. “Identical cases brought before different judges should, to the extent humanly possible, produce identical results. ... *Stare decisis* assists in providing uniform standards of law for similar cases decided in the same state. It provides a common grounding used by all judges throughout the jurisdiction.”<sup>[7]</sup> *Stare decisis* provides stability in allowing individuals to count on the rules of law that have been applied in the past. Kerper’s example is a police officer’s reliance on past decisions to help determine the legality of a pending arrest. “Without regard to past decisions, the conduct of a wide variety of activities would take on an added hazard of unpredictable legality. Without stability, the law could well lose (sic) its effectiveness in maintaining social control.”<sup>[8]</sup> *Stare decisis* also ensures proper recognition of the wisdom and experience of the past. Justice Cardozo observed that “no single judge is likely to have ‘a vision at once so keen and so broad’ as to ensure that his new ideas of wise policy are indeed the most beneficial for society.”<sup>[9]</sup> Finally, *stare decisis* enhances the image of the courts as the impartial interpreter of the law.

“*Stare decisis* decreases the leeway granted to the individual judge to settle controversies in accordance with his own personal desires. ... Indeed, the doctrine of *stare decisis* indirectly serves to restrict the law-making role of the judge even in those cases presenting “open issues” not resolved by past precedent. ... A sudden change in the composition of the judiciary, even at the highest level, should not present an equally sudden change in the substance of the law.”<sup>[10]</sup>

In the federal system, all federal courts must follow the decisions of the Supreme Court as it is the final interpreter of the federal constitution and federal statutes. If, however, the Supreme Court has not ruled on an issue, then the federal trial courts (U.S. District Courts and U.S. Magistrate Courts) and federal appellate courts (Circuit Courts of Appeals) must follow

decisions from their own circuit. Each circuit is treated, in effect, as its own jurisdiction, and the court of appeals for the various circuits are free to disagree with each other.

Because *stare decisis* is not an absolute rule, courts may reject precedent by overruling earlier decisions. One factor that courts will consider before overruling earlier case law is the strength of the precedent. Another factor is the field of law involved. Courts seem to be more reluctant to override precedents governing property or trade where commercial enterprises are more likely to have relied quite heavily on the precedent. Courts also consider the initial source of precedent, such as statutory interpretation. For example, if the courts decided in 1950 that the statute meant that individuals could graze their cattle on federal lands without being in violation of any trespass laws, and then the federal government did not subsequently change the law, the legislature's inaction indicates the interpretation was probably right. The most compelling basis upon which a court will overturn precedent, however, is if it perceives the presence or absence of changed circumstances. For example, scientific or technological developments may warrant the application of new rules. Consider the common law **year and a day rule** which required the government, in a murder prosecution, prove that the victim died within one year and a day of the attack. The rule is premised on the idea that there needed to be some showing that the defendant's act caused the death. Medical science now makes it possible to trace the source of fatal blow, so murder statutes no longer include the year and a day rule. One final ground for overruling a prior decision is general changes in the spirit of the times. For example, in *Trop v. Dulles*, 356 U.S. 86 (1958), the Court looked to "evolving standards of decency" in deciding whether the defendant's punishment was cruel and unusual and thus violated the Eighth Amendment.

### Matters of First Impression or "Wow, this is new territory, what should we do now?"

If a court is dealing with a legal issue for the first time, there is no precedent to follow, and it cannot then be bound by *stare decisis*. The court may look to other states to see if there is any persuasive case authority on the matter, but state courts do not have to follow established law from other states. When there is no precedent or controlling cases, the case or issue is referred to as a **matter of the first impression**. In cases of the first impression, courts get to decide what the relevant rule should be. In deciding cases of the first impression, judges will look to relevant statutes, legislative history, and cases involving similar situations

"The situation may be a new one. ... Yet the judges do not throw up their hands and say the case may not be decided; they decide it. Maybe they can use some settled law in an analogous situation. ... Even if there is no available analogy, or if there are competing analogies, the judge will make (some prefer to say discover) the law to apply to the new situation. The new law will be decided according to the judges' ideas (ideas they acquire as members of society) of what is moral, right, just; of what will further sound public policy, in light of customs and traditions of the people of which the judges are members." LaFave, W. *Criminal Law*, 69(3d. ed., 2000)."

It is not necessarily easy, to interpret the law and apply it to the facts of a case. Facts can be "messy", the law can be less than clear, and not everyone will agree on the appropriate meaning of the law's mandate. Judges, therefore, rely on several tools or approaches when interpreting the language of a statute. LaFave has identified various approaches used by judges to interpret the law. <sup>[11]</sup> First, judges will look at the plain meaning of the statute and rely on dictionary-like tools to discover the meaning of the words. According to the Court in *Caminetti v. United States*, 242 U.S. 470 (1917), "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise." Even under this **strict constructionist approach**, judges can still disagree whether the language of the statute is plain. Also, there is a danger with this plain meaning approach, and courts will not follow a statute though apparently plain language when strict application results in injustice, oppression or even an absurd consequence.

Second, judges will look to the drafter's intent revealed in the **legislative history**, or records of legislative hearings and floor debates, when it exists. LaFave notes that sometimes it is easier to figure out the framer's intent than other times. Moreover, different lawmakers may have had different intents when they cast their votes enacting the law. Additionally, sometimes legislators never considered the specific factual scenario facing the court.

"It should be noted also that not all judges are enamored of the use of legislative history in interpreting ambiguous statutes. And in any event, the legislative history is less likely to be controlling in construing criminal statutes than civil statutes. If one purpose of a criminal statute is to warn the public of what conduct will get them into criminal trouble, that is, if prospective criminals are entitled to a fair warning—then the public should be able to ascertain the line between permitted and prohibited conduct from the statute itself." <sup>[12]</sup>

Third, judges may try to focus on the original understanding or original meaning of the law. Under this approach, the court asks itself how a common person reading the law when it was enacted, would have understood the law. For example, when looking at a statute written in 1972, the court would ask itself how the common person in 1972 would have understood the statute. This approach is problematic because not all people living in 1972 would have interpreted the law in the same way.

Fourth, as discussed above, judges may interpret the law based on precedent. One drawback to this approach is that facts of the earlier cases will always differ somewhat from the facts in the new case the court is trying to interpret. Another difficulty occurs when the court is faced with a new situation or a new law and there is no precedent to guide the court. LaFave identified the difficulty in adhering too closely to precedent:

“Sometimes a court, having earlier construed a criminal statute strictly in favor of the defendant, later decides that its earlier construction was wrong. ... Obviously, other things being equal, courts should interpret statutes correctly, regardless of past mistakes. On the other hand, it may not be fair to . . . change the rule now. The difficulty lies in the Anglo-American theory of precedents that case law operates retroactively, and in particular that case law which overrules earlier precedents operates retroactively. When faced with this problem—that of overruling or following an earlier erroneous interpretation . . . [one] court felt obliged to follow case precedent with an invitation to the legislature to change the rule of for the future; but [another court overruled the precedent.]

The choice, however, is not necessarily between following the precedent (thus letting a defendant off but perpetuating a bad decision) and retroactively overruling it (thus eliminating a bad precedent but putting the defendant behind bars). There are two techniques by which the defendant may go free even if the precedent is overruled. It is not impossible for the court to overrule for the future only, letting the defendant go but stating in the opinion that anyone who from now on conducts himself the way this defendant did will be guilty of the crime. The second method is to overrule the erroneous precedent but to give the defendant the defense of mistake of law induced by an appellate court. ... Some courts have gone so far as to say that the adoption of a new interpretation of an old statute is forbidden by ex post facto constitutional provision if the new interpretation is harder on the defendant than the old.” <sup>[13]</sup>

Finally, there are common law doctrines which direct the court to interpret ambiguous terms in a specific way. For example, the **rule of lenity** tells the court to interpret the statute in the light that is most favorable to the defendant. Another rule, *expressio unius est exclusion alteris*, meaning the inclusion of one is the exclusion of all others, holds that when a legislative body includes specific items within a statute, the assumption is that it intends to exclude all other terms. Another doctrine of *in pari materia*, meaning on the same matter or subject, directs the court to interpret an ambiguous statute in a light most consistent with other statutes on the same subject. Finally, there is a general maxim that special language controls over general language, and later statutes control over earlier statutes.

## Court Rules of Procedure

The U.S. Supreme Court and state supreme courts make a law that regulates the procedures followed in the lower courts- both appellate and trial courts- in that jurisdiction. These court rules, adopted by the courts to facilitate the administration and processing of cases, are generally limited in scope, but they may nevertheless provide significant rights for the defendant. For example, the rules governing speedy trials may be governed generally by the Constitution, but very specifically by court rules in a particular jurisdiction.

Local courts may also pass local court rules that govern the day-to-day practice of law in these lower courts. For example, a local court rule may dictate when and how cases are to be filed in that jurisdiction. Generally, the local bar (all the attorneys in the jurisdiction) are consulted, and a workforce consisting of judges, trial court administrators, and representatives from district attorney's office, the public defender's office, assigned counsel consortiums, and private attorneys will meet every few years to decide on the local rules.

### Okay, so where do I look to see if my behavior is prohibited?

Because criminal law has many sources—constitutions, legislative enactments, administrative rules, case law, and common law—it is not necessarily an easy task to determine whether your behavior or the way government responds to your behavior, is lawful. First, it is always advisable to know your rights under the federal constitution and your state constitution and understand what limits the constitution places on legislative enactments and law enforcement actions. Still, even assuming that laws have been properly enacted and that police have followed proper procedure, it may be difficult to determine whether your behavior is prohibited. Because most states now codifying their criminal laws by enacting statutes, start there. Then look to any

case law which may interpret these statutes. Since courts generally follow precedent due to the doctrine of *stare decisis*, one red flag that your behavior may be unlawful is that, in the past, the courts have found behavior similar to yours to be unlawful.

## References

1. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 27). West Publishing Company. ↩
2. LaFave, W. R. (2000). *Criminal law* (3rd ed., pp. 70). St. Paul, Minn: West Group. ↩
3. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 27). West Publishing Company. ↩
4. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 28-29). West Publishing Company. ↩
5. *Vasquez v. Hillery*, 474 U.S. 254 (1986) ↩
6. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 47-49). West Publishing Company. ↩
7. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 49). West Publishing Company. ↩
8. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 49). West Publishing Company. ↩
9. Cardozo, B. N. (1924). *The Growth of the Law*. New Haven, CT: Yale University Press. ↩
10. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 51-52). West Publishing Company. ↩
11. LaFave, W. R. (2000). *Criminal law* (3rd ed., pp. 86-89). St. Paul, Minn: West Group. ↩
12. LaFave, W. R. (2000). *Criminal law* (3rd ed., pp. 89). St. Paul, Minn: West Group. ↩
13. LaFave, W. R. (2000). *Criminal law* (3rd ed., pp. 96-97). St. Paul, Minn: West Group. ↩

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