

3.4: Sources of Criminal Law - Statutes, Ordinances, and Other Legislative Enactments

Most substantive criminal law is legislative law. State legislatures and Congress enact laws which take the form of statutes or congressional acts. Statutes are written statements, enacted into law by an affirmative vote of both chambers of the legislature and accepted (or not vetoed) by the governor of the state or the president of the United States. State legislatures may also create legislative law by participating in **interstate compacts**, or multi-state legal agreements. An example of this includes the Uniform Extradition Act, or the Uniform Fresh Pursuit Act. Congress makes federal law by passing acts and approving treaties between the United States and other nation states. Local legislators, city and town councilors, and county commissioners also make laws through the enactment of local ordinances.

Controversial Issue: Ballot Measures, Initiatives, and Referendums—Direct Democracy and Law Making

In several states, citizens have the power to enact laws through direct democracy by putting “ballot measures” or “propositions” up for a vote. This type of lawmaking by the people started primarily in the Western states around the turn of the 20th century. Initiatives, referendums, and referrals have some slight differences, but generally, these ballot measures ultimately find their way into either statutes or the constitution, and so they are included in this section on legislative law. For example, Oregon Ballot Measure 11, establishing minimum mandatory sentences for 17 person felonies, was voted on in November 1994 and took effect April 1, 1995. It is now found in the Oregon Revised Statutes as ORS 137.700. Proposition 36, approved by Californians in 2012, significantly amended the “three strikes” sentencing laws approved in 1994. Initiatives, referendums, and referrals can be effective in quickly changing the criminal law, like the mandatory sentencing in the 1980s, and is a way to circumvent what can be a contentious legislative process. An example is the decriminalization of marijuana in Washington, Oregon, Colorado, and Alaska.

States’ Authority to Pass Criminal Laws

States are sovereign and autonomous, and unless the Constitution takes away state power, the states have broad authority to regulate activity within the state. Most criminal laws at the state level are derived from the states’ general police powers, or authority, to make and enforce criminal law within their geographic boundaries. **Police power** is the power to control any harmful act that may affect the general well being of citizens within the geographical jurisdiction of the state. A state code, or state statutes, may regulate any harmful activity done in the state or whose harm occurs within the state.

Congress’s Authority to Pass Laws

Federal lawmakers do not possess police power. Instead, Congress must draw its authority to enact criminal statutes from particular legislative powers and responsibilities assigned to it in the Constitution. Congress’s legislative authority may be either enumerated in the Constitution or implied from its provisions, but if Congress cannot tie its exercise of authority to one of those powers, the legislation may be declared invalid.

Enumerated powers, for example, the power to regulate interstate commerce, are those that are specifically mentioned in Article I Section 8 of the Constitution. Over the years, however, courts have broadly interpreted the term “interstate commerce” to mean more than just goods and services traveling between and among the states. Instead, interstate commerce includes any activity—including purely local or intrastate activity—that affects interstate commerce. The affectation doctrine maintains that congressional authority includes the right to regulate all matters having a close and substantial relation to interstate commerce. Although the Court has found limits on what affects interstate commerce, Congress has used its broad power to regulate interstate commerce to criminalize a wide range of offenses including carjacking, kidnapping, wire fraud, and a variety of environmental crimes.

The implied powers of Congress are those that are deemed to be necessary and proper for carrying out all the enumerated powers. Article I Section 8 of the Constitution states, “Congress shall have Power . . . to make laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution.” The implied powers doctrine expands legislative power of Congress, and for that reason, the Necessary and Proper Clause has often been called the “expansion clause.” Due to the implied powers found in the Necessary and Proper Clause, Congress has authority to pass legislation and regulate a wide variety of activity to the extent that it is able to show that the law furthers one of the enumerated powers. Nevertheless, the Court will overturn acts of Congress when it believes Congress has overstepped its constitutional authority. So, despite the broad expanse of implied powers, Congress’s authority is still limited and by no means is as vast as the states’ police powers.

Conflicting State and Federal Statutes

Sometimes substantive federal law conflicts with state laws or policies, and sometimes the federal government's interest in prosecuting cases in federal court conflicts with competing interests of the states. One recent conflict between federal interests and state interests involves Oregon's physician-assisted suicide law, the "Death with Dignity Act". See, *Gonzales v. Oregon*, 646 U.S. 243 (2006)(upholding Oregon's law by deciding that the United States Attorney General could not enforce the national controlled substance act against Oregon physicians). Another debate surrounds the conflicting federal and state laws governing marijuana use. Between 1996 and 2018, thirty states and the District of Columbia passed laws legalizing the possession of small quantities of marijuana for medicinal purposes for state residents. Since 2012, Colorado, Washington, Oregon, Alaska, California, Nevada, Massachusetts, and Maine have passed laws through the initiative process legalizing recreational use and possession of small amounts of marijuana by adults. In the 2018 elections, even more, states passed laws allowing for medical use, recreational use. See, <https://www.forbes.com/sites/tomangell/2018/12/06/marijuanas-ten-biggest-victories-of-2018/#7ca0dd5232df>. These popular initiatives conflict directly with the federal Controlled Substance Act, 21 U.S.C. 13, § 841, (CSA) which holds that any use or possession of marijuana is a federal crime. In January 2018, the Trump administration through the U.S. Department of Justice, under Attorney General Sessions rescinded the Obama-era restraint policies on marijuana prosecutions and indicated the desire to fully enforce the CSA. However, in April 2018, President Trump announced he was backing down on the crackdown on recreational use of marijuana that had been announced in January 2018.

Movement Towards Codification: The American Institute and the Model Penal Code

By the 1960s and 1970s, all states had begun codifying their criminal laws. These codifications would likely not have taken place if not for the **American Law Institute** (ALI) and the publication of its **Model Penal Code** (MPC). Established in 1923, the ALI is an organization of judges, lawyers, and academics that draft model codes and laws. Its most important work in the criminal justice realm is the Model Penal Code. The ALI began working on the MPC in 1951, and it proposed several tentative drafts over the next decade. In 1962 the Model Penal Code was finally published. It consists of general provisions concerning: criminal liability, definitions of specific crimes, defenses, and sentences. The MPC has had a significant impact on legislative drafting of criminal statutes. Every state has adopted at least some provisions, or at least the approach, of the MPC, and some **code states** have adopted many or most of the provisions in the MPC. No state has adopted the MPC in its entirety.

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