

3.3: Sources of Criminal Law - Federal and State Constitutions

Where do you look to see if something you want to do violates some criminal law? The answer is “in many places.” Criminal law originates from many sources. Some criminal law is the result of constitutional conventions, so you would need to review federal and state constitutions. Other criminal laws result from the legislative or initiative process, so you will need to review state statutes or congressional acts. Other criminal law results from the work of administrative agencies, so you need to review state and federal administrative rules. Other criminal law, called case law, originates from appellate court opinions written by judges. These court opinions, called “decisions”, are published in both official and unofficial reporters, but thanks to the Internet, they are now easy to find if you know the parties’ names. Much of our criminal law descended from the English common law. This law developed over time, through custom and tradition, and it is a bit more difficult to locate, but it is mentioned in treatises and legal “hornbooks” (like legal encyclopedias) and is often referred to in case decisions.

The federal constitution—The Constitution of the United States

Although the United States Constitution recognizes only three crimes (counterfeiting, piracy, and treason), it nevertheless plays a significant role in the American criminal justice system. Most importantly, the Constitution establishes limits on certain types of legislation or substantive law, and it provides significant procedural constraints on the government when it seeks to prosecute individuals for crimes. The Constitution also establishes **federalism** (the relationship between the federal government and state governments), requires the **separation of powers** between the three branches of government (the judicial branch, the legislative branch, and the executive branch), and limits Congress’s authority to pass laws not directly related to either its **enumerated powers** (listed in the Constitution) or **implied powers** (inferred because they intertwined with the enumerated powers).

Constitutional Limitations on Criminal Law and Procedure

The drafters of the federal Constitution were so concerned about two historic cases of abuse by English Parliament (ex post facto laws and bills of attainder) that they prohibited Congress from passing these types of laws in the original body of the Constitution. (See, Article I Section 9 of the Constitution.) **Ex post facto laws** are laws that are retroactively applied, or punishments retroactively increased, or changes in the amount and types of evidence that is required of the government in order to successfully prosecute an individual. **Bills of attainders** are laws that are directed at named individual or group of individuals and has the effect of declaring them guilty without a trial.

Most of the other limitations are found within the Bill of Rights, the first ten amendments to the U.S. Constitution. The states adopted the Bill of Rights in 1791. The statesmen had opposing viewpoints concerning how strong the national government should be and how strong state governments should be. Even as the original federal constitution was being circulated and ratified, the framers were thinking about the provisions that became known as the Bill of Rights.

Music & Law Exercise

For a novel way to explore this dispute, listen to the soundtrack from Alexander Hamilton, the Broadway Musical composed by Lin-Manuel Miranda.

The First Amendment limits Congress’s ability to pass laws that limit free speech, freedom of religion, freedom of assembly and association. The Second Amendment limits Congress’s ability to outlaw the personal possession of firearms. The Fourth, Fifth, Sixth and Eighth Amendments have provisions that govern criminal procedure during the investigative, pretrial, and trial phases. The Eighth Amendment sets limits on the government’s ability to impose certain types of punishments, impose excessive fines, and set excessive bail. The Due Process Clauses of the Fifth and Fourteenth Amendment require that criminal justice procedures be fundamentally fair. The Fourteenth Amendment’s Equal Protection Clause requires that, at a minimum, there be some rational reason for treating people differently. For example, states can pass laws prohibiting minors from purchasing and consuming alcohol because states have a reasonable interest in protecting the health and welfare of its citizens. These amendments discussed more fully below, added several constraints on Congress. The impact of the Bill of Rights was to place substantial checks on the federal government’s ability to define crimes.

The Incorporation Debate

When drafted and passed, the U.S. Constitution and the Bill of Rights applied only to the federal government. Individual states each had their own guarantees and protections of individuals’ rights found in the state constitutions. (See below.) Since 1868, the Fourteenth Amendment has become an important tool for making states also follow the provisions of the Bill of the Rights.

It was drafted to enforce the Civil Rights Act passed in 1866 in the post-Civil War states. Section 1 of the Fourteenth Amendment enjoins the states from depriving any person of life, liberty, or property, without due process of law. It prohibits states from adopting any laws that abridge the privileges and immunities of the citizens of the United States and requires that states not deny any person equal protection under the law. U.S. Const. amend. XIV, § 2.

The practice of making the states follow provisions of the Bill of Rights is known as incorporation. Over decades, the Supreme Court debated whether the Bill of Rights should be incorporated all together, in one-fell-swoop, called total incorporation, or piece-by-piece, called selective incorporation. The case-by-case, bit-by-bit approach won. In a series of decisions, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment makes enforceable against the states those provisions of the Bill of Rights that are “implicit in the concept of ordered liberty.” ^[1] For example, in 1925 the Court recognized that the First Amendment protections of free speech and free press apply to states as well as to the federal government. ^[2] In the 1960s, the Court selectively incorporated many of the procedural guarantees of the Bill of Rights. The Court also used the Fourteenth Amendment to extend substantive guarantees of the Bill of Rights to the states. Most recently, on February 20th, 2019 the Court incorporated the right to be free from excessive fines guarantee found in the Eighth Amendment to the states in *Timbs v. Indiana*, ___ U.S. ___ (2019).

First Amendment Limitations

Under the First Amendment, Congress cannot create laws that limit individuals’ speech. The Court has recognized symbolic speech (for example, wearing black armbands) and expressive conduct (for example, picketing) as protected under the First Amendment’s guarantee that Congress shall not abridge freedom of speech. The Court struck down a law banning flag burning. *Texas v. Johnson*, 491 U.S. 397 (1989). The Court upheld a local ordinance prohibiting public indecency when applied to business establishment wishing to provide totally nude dancing. *Barnes v. Glen Theater*, 501 U.S. 560 (1991). The Court has recognized political speech and commercial speech as protected by the First Amendment as well. See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The Court has, however, deemed some speech not worthy of protection, and consequently may be limited. According to the Court, non-protected speech includes libel and slander, fighting words, words that present a clear and present danger when spoken, obscenity and profanity. See, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) “There are certain well-defined and narrowly limited classes of speech, the prevention, and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace.” Similarly, the Court has said anti-hate crime statutes permissibly limit individuals’ speech to the extent they are directed at conduct rather than the content of the speech. See, e.g., *Rav v. City of St. Paul*, 505 U.S. 377 (1992) and *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

The First Amendment limits Congress’s authority to legislate in the realm of religion as well. Congress cannot make laws that either create a religion (these violate the Establishment Clause) or target and interfere with a person’s exercise of their own religion (these violate the Free Exercise Clause). Finally, the First Amendment guarantees that people have the right to freely associate and assemble with others. Thus, Congress cannot make laws that completely limit people’s ability to gather together peaceably. However, the Court has indicated that the government can place reasonable time and manner limitations based on the location in which the gathering is to take place. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965).

Second Amendment Limitations

Legislatures can place restrictions on weapons and ammunition purchase and possession, but they cannot completely restrict people’s ability to possess guns for the purpose of self-defense. See, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (an individual’s right to possess a weapon is unconnected with service in the military). According to the Court, the Second Amendments’ protections apply equally to the states. See, *McDonald v. Chicago*, 561 U.S. 742 (2010).

Fourth Amendment Limitations

The Fourth Amendment limits the government’s ability to engage in searches and seizures. Under the least restrictive interpretation, the Amendment requires that, at a minimum, searches and seizures be reasonable. Under the most restrictive interpretation, the Amendment requires that government officers need a warrant any time they do a search or a seizure. The Court has interpreted the Fourth Amendment in many cases and, the doctrine of *stare decisis* notwithstanding, search and

seizure law is subject to the Court's constant refinement and revision. One thing is clear, the Court has never embraced the most restrictive interpretation of the Fourth requiring a warrant for every search and seizure conducted.

Fifth Amendment Limitations

The Fifth Amendment protects against self-incrimination (having to disclose information that could ultimately harm you) in that it states that no person "shall be compelled in a criminal case to be a witness against himself." Defendants have the right to not testify at trial and the right to remain silent during a custodial interrogation. See, *Miranda v. Arizona*, 384 U.S. 436 (1966). The Fifth Amendment also provides for a grand jury in federal criminal prosecutions, prohibits double jeopardy, demands due process of law, and prohibits taking private property for public use (a civil action). The Court has incorporated the double jeopardy provision through the Fourteenth Amendment, making states also prohibited from subjecting a person to double jeopardy. However, it has not held that states must provide a grand jury review. The Fifth Amendment's grand jury provision is one of two clauses of the Bill of Rights that has not been incorporated to the states, but most states do use the grand jury at least for some types of cases. The Fifth Amendment also entitled citizens prosecuted by the federal government to the due process of law. This is discussed more fully below as a Fourteenth Amendment right.

Sixth Amendment Limitations

The Sixth Amendment guarantees a criminal defendant: the right to a speedy trial, the right to a public trial, the right to a jury trial, the right to have his or her trial in the district where the crime took place, the right to be told what charges have been filed, the right to confront witnesses at trial, the right to compel witnesses to testify at trial, and the right to assistance of counsel. This Amendment governs the federal court process, but because of the Fourteenth Amendment's Due Process Clause, these rights also apply to defendants in state criminal cases.

Eighth Amendment Limitations

Legislatures cannot make laws that make the punishment for a crime "cruel or unusual." This means that punishments cannot be either **barbaric** (causing needless pain) or **disproportionate** (i.e., too severe to fit the crime). In addition to the prohibition against cruel and unusual punishment, the Eighth Amendment also prohibits the imposition of excessive bail and excessive fines. The Court has dealt with excessive fines in terms of whether the fine is disproportionate to the crime. See, e.g., *Timbs v. Indiana* (above) (forfeiting defendant's \$42,000 land rover was excessive compared to the maximum fine he could get for his crime (\$10,000.)) The prohibition against excessive bail does not mean that courts must set bail in every case, but rather, when courts do set bail, it must not be excessive. Bail is excessive when it is an amount more than necessary to assure the defendant's reappearance. *Stack v. Boyle*, 342 U.S. 1 (1951). *

Fourteenth Amendment limitations

The Fourteenth Amendment mandates that states do not deny their citizen's due process of law. Due process can be summarized as making sure that the government treats people fairly. Part of fairness is giving people fair warning as to what behaviors are permitted and what behaviors are not permitted—putting people on notice of what the law is. Thus, legislators must be very careful when making new laws. They cannot make laws that are so poorly drafted such that a person of ordinary intelligence would not understand the law or that would allow police too much discretion in how they will interpret and apply the law because such a law would be considered void for vagueness.

The Fourteenth Amendment also guarantees equal protection of the law. Generally, legislatures cannot make laws that treat people differently unless the laws are rationally related to a legitimate government interest. When legislatures attempt to pass laws that treat people differently based on sex, then the court reviews the law with heightened scrutiny — the law must be designed to achieve an important government interest and the differential treatment must be based on an actual physiological difference between the sexes and not based on archaic stereotypes. When legislatures attempt to pass laws that treat people differently based upon their race or ethnicity, then they have to have even a more compelling reason to do so, and even then, the courts, employing "strict scrutiny" are likely to declare such laws unconstitutional.

Limitations Found in the "Penumbra" of the Constitution

Sometimes the Constitution doesn't explicitly state protection or right that the courts have nevertheless found to be inherent or found within the Constitution. Justice Douglas, writing the majority opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965),

stated

“[The] . . . specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’

The Fourth and Fifth Amendments were described . . . as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’ We recently referred in *Mapp v. Ohio*, 367 U. S. 643, 656, to the Fourth Amendment as creating a ‘right to privacy, no less important than any other right carefully and particularly reserved to the people.’ (Footnote omitted).” 381 U.S. at 484-485.

Thus, legislatures cannot make laws that allow the government to invade people’s privacy, even though no specific amendment can be pointed to. The constitutional right to privacy must often be balanced against the state’s compelling interests such as promoting public safety. The courts have found the right to privacy in the context of reproductive freedom (See, e.g., *Roe v. Wade*, 410 U.S. 113 (1972) (right to abortion), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (the right of married persons to possess contraceptives), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (declaring invalid the ban on contraceptives), *Stanley v. Georgia*, 394 U.S. 557 (1969) (the right to view and possess adult pornography), and the right of adults to engage in consensual sexual contact), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (the right of adults to engage in consensual sexual contact).

State Constitutions

States’ constitutions, similar to the federal constitution, set forth the general organization of state government and basic standards governing the use of governmental authority. Although the federal constitution is preeminent because of the Supremacy Clause, state constitutions are still significant. State constitutional rules are supreme as compared to any other rules coming from all other state legal sources (statutes, ordinances, administrative rules) and prevail over such laws in cases of conflict. The federal constitution sets the floor of individual rights, but states are free to provide more individual freedoms and protections that are granted by the federal constitution. State constitutions are defined and interpreted by state courts, and even identical provisions in both the state and federal constitution may be interpreted differently. For example, the state constitution’s guarantee to be free from unreasonable searches and seizures may mean that, under state law, roadblocks established to identify impaired, intoxicated drivers are impermissible, but under the federal constitution, these roadblocks are permitted and are not deemed to be unreasonable seizures.

Comparing Cases Exercise

Compare the U.S. Supreme Court holding in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) to the Michigan Supreme Court holding interpreting the same case under Michigan Constitution, 506 N.W.2d 209 (Mich. 1993).

Rule of Law, Constitutions and Judicial Review

One of the key features of the American legal system has been its commitment to the **rule of law**. Rule of law has been defined as a “belief that an orderly society must be governed by established principles and known standards that are uniformly and fairly applied.” ^[3] Reichel identified a three-step process by which countries can achieve rule of law. ^[4] The first step is that a country must identify core, fundamental values. The second step is for the values to be reduced to writing and written somewhere that people can point to them. The final step is to establish a process or mechanism whereby laws or governmental actions are tested to see if they are consistent with the fundamental values. When laws or actions embrace the fundamental values, they are considered valid, and when the laws or actions conflict with the fundamental values, they are invalid.

Applying this three-step process to America’s approach to law one can see that Americans have recognized fundamental values, such as the right to freedom of speech, the right to privacy, and the right to assemble. Second, we have reduced these fundamental values to writing and, for the most part, have compiled them in our constitutions (both federal and state). Third, we have a mechanism, that of **judicial review**, by which we judge whether our laws and our government actions comply with

or violate our fundamental values found within our constitutions. Judicial review is the authority of the courts to determine whether a law (a legislative action) or action (an executive or judicial action) conflicts with the Constitution. Judicial review can be traced to the case of *Marbury v. Madison*, 5 U.S. 137 (1803), in which Chief Justice John Marshall wrote, “It is emphatically the province and 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 that rule. If two laws conflict with each other, the courts must decide on the operation of each.”

1. *Palko v. Connecticut*, 302 U.S. 319 (1937). ↩
2. *Gitlow v. New York*, 268 U.S. 652 (1925) ↩
3. Feldmeier, J. P., & Schmalleger, F. (2012). *Criminal Law and Procedure for Legal Professionals*. Prenice Hall. ↩
4. Reichel, P. (2018) *Comparative Criminal Justice Systems: A Topical Approach*. New York, NY: Pearson. ↩

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