

# *The* ADMINISTRATION OF *Justice*

AN INTRODUCTION TO THE  
CRIMINAL JUSTICE SYSTEM IN AMERICA

*people*

*of the United States, in order to  
equity, provide for the common  
liberty to ourselves and our pos-  
the of America.*



ROBERT ABERLE

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# THE CONSTITUTION: THE BASIS OF CRIMINAL JUSTICE IN AMERICA

## Chapter 1

### CHAPTER OVERVIEW

The United States Constitution is the basis of all laws in this country, and therefore is the basis of our entire criminal justice system. It is only appropriate that any textbook that is intended to give an overview of the criminal justice system in America begin with a discussion about the U.S. Constitution and its applications to justice.

A student of Criminal Justice needs to have a working knowledge of how the government is set up, how this structure directly affects how our laws are made, how society influences our laws, and how our individual rights shape our society.

This chapter provides a summary and analysis of the first ten amendments to the U.S. Constitution, commonly referred to as the Bill of Rights. The majority of citizens are at least familiar with most of the rights afforded to them under these amendments, but this chapter will look at how they are applied to the administration of justice. We will also discover that none of these rights are absolute; there are exceptions and limitations to each of them. One of the primary functions of the United States Supreme Court is to interpret the U.S. Constitution, and over the course of the past 220 years the Court has interpreted it in a variety of ways. These interpretations change with each session of the Court, and criminal justice professionals need to stay abreast with these changes because many of the rulings from this Court have a direct effect on, and constantly change, the procedures for each of the three sub-sections of criminal justice: police, courts, and corrections.



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## CHAPTER LEARNING OBJECTIVES

After reading this chapter you will be able to:

1. Describe the three branches of government and their relation to the criminal justice system.
2. Understand the system of checks and balances within our system of government.
3. List the individual rights associated with the proper amendments of the Bill of Rights.
4. Understand the function of the United States Supreme Court in the interpretation of the U.S. Constitution and the Bill of Rights.
5. Explain why the rights afforded by the U.S. Constitution are not absolute and why their interpretations change over time.

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### KEYWORDS

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United States Constitution  
 Legislative Branch  
 Judicial Branch  
 Bill of Rights  
 Capital Crime

Amendment Process  
 Executive Branch  
 Checks and Balances  
 Exceptions and Limitations

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### THE PREAMBLE TO THE UNITED STATES CONSTITUTION

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*We the People of the United States, In Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

---

## INTRODUCTION

The **United States Constitution** is the basis of criminal justice in America. This remarkable document was completed on September 12, 1787 and was ratified and became the law of the land on June 21, 1788. The U.S. Constitution has become one of the most important and influential government documents ever written.

The original United States Constitution is a hand written document that consists of seven Articles (or sections). Since its ratification, the Constitution has been modified and added to, by the use of the **amendment process**. Article V of the Constitution provides that an amendment may be proposed either by the Congress with a two-thirds majority vote in both the House of Representatives and the Senate or by a constitutional convention called for by two-thirds of the State legislatures. None of the twenty-seven amendments to the Constitution have been proposed by constitutional convention. The Constitution currently contains twenty-seven amendments.

### United States Constitution

The United States Constitution is the basis of all laws in the United States and was ratified and became the law of the land on June 21, 1788. The Constitution also set up the framework of our government and defined the roles of the three separate branches.

### Amendment process

The amendment process is the procedure used to modify or add to the United States Constitution. The Constitution has been amended twenty-seven times since its inception.

## BRANCHES OF GOVERNMENT



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## CHECKS AND BALANCES

The United States is divided into three branches of government: legislative, executive, and judicial. These branches were set up by the United States Constitution. Article I established the legislative branch, Article II established the executive branch, and Article III established the judicial branch.

The **legislative branch** of government is responsible for making the laws of the country. The legislature of the United States is housed in The United States

### Legislative branch

The legislative branch of government is responsible for writing and passing all laws. Each level of government (federal, state, and local) has a legislative branch. The United States Congress makes the laws on the federal level. Each state has a legislature that makes the laws for each state. Local governments have a legislative process which is typically comprised of a city council or county commission.



### Executive branch

The executive branch of government is responsible for carrying out or enforcing the laws that have been passed by the legislative branch. Each level of government (federal, state, and local) has an executive branch. The President of the United States heads the executive branch of the federal government. Governors run the executive branch of the states, and mayors run the executive branch of cities.

### Judicial branch

The judicial branch of government consists of the courts at each governmental level. The court systems of the federal, state, and local governments are responsible for interpreting the laws passed by the legislative branch and enforced by the executive branch. The United States Supreme Court is the highest court in the country.

### Checks and balances

Checks and balances is the system set up by the United States Constitution to ensure that none of the branches becomes too powerful. Each branch holds certain powers that can keep each of the other two branches in check.

Congress, which is made up of the House of Representatives and the Senate. There are 435 members of the House of Representatives and one hundred senators in the Senate. The **executive branch** of government is responsible for carrying out the laws; and the **judicial branch** of government is responsible for interpreting the laws, and the highest court is the United States Supreme Court which has the authority as the interpreter of last resort.

The framers of the Constitution wanted each of these branches to work equally and in concert with each other and did not want any one branch to become more powerful than another. It was for this reason that a system of **checks and balances** was built into the Constitution itself. Each of the independent branches of government has the power and responsibility to keep the other two branches in check.

The legislative branch of government has the power to override any vetoes that the President may place on laws that it has passed (with two-thirds majority). They also have the power to control the spending of the government and, in extreme cases, have the ability to impeach and remove the President from office. The Senate must also approve presidential appointments, which is one of the checks the legislative branch has over the judicial branch since it also approves the appointment of all federal judges.

The executive branch has the power and authority to check the legislative branch by vetoing laws that they have passed. The check of this branch over the judiciary is that they appoint all federal judges, including those who serve on the Supreme Court.

The most powerful check of the judicial branch is the ability to interpret the laws passed by the legislative branch and declare them to be unconstitutional.

## APPLICATIONS TO THE CRIMINAL JUSTICE SYSTEM

To put the branches of government into perspective within the Criminal Justice System, the legislature makes the laws that the police and courts must enforce. The police fall under the executive branch and enforce those laws, and the judicial branch tries the cases that the police initiate through arrest.

This separation of powers applies to all levels of government: federal, state, and local. On the state level, the governor oversees the executive branch and controls the state public safety functions. The legislative branch makes the state laws; and the judicial branch is responsible for interpretation of the state constitution, and the trial of offenders who violate the laws and are apprehended by the police.

On a local level the legislative function is performed by city councils and county commissions which are responsible for making local laws (or ordinances). The executive branch is headed by a mayor, city or county manager, or other elected official who is responsible to the community for running the government. The judicial role is assumed by the local court system, whether it is city (municipal) or county (justice court or equivalent).



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## THE BILL OF RIGHTS

The **Bill of Rights** is the common name given to the first ten Amendments to the United States Constitution. These amendments establish the basic rights and liberties that all citizens of the United States enjoy.<sup>1</sup> The Bill of Rights was ratified on December 15, 1791, three years after the U.S. Constitution. The actual amendments contained in the Bill of Rights contain only 462 words, yet thousands of volumes of court decisions over the past 220 years have been based on these words. These decisions make it clear that none of these rights are absolute since the courts have applied many **exceptions and limitations** to them and some of these exceptions are discussed in the following section.

The United States Supreme Court (see Chapter 8 for a comprehensive discussion on the workings of the court) has never applied the rights of the first eight amendments<sup>2</sup> uniformly to the states. When it was ratified, the individual rights afforded by the Bill of Rights (arguably) applied only to the federal courts, not the state courts. To put this simply, this means that a person charged with a federal crime would have been granted all of the rights enumerated in the Bill of Rights while a person charged with a state crime would not necessarily be given the same rights. The person charged in the state court would be granted those rights as adopted by the individual state.

The United States Supreme Court has adopted a process of “selective incorporation” of the rights afforded under the Bill of Rights to the individual states.<sup>3</sup> The dates and the U.S. Supreme Court cases that applied each of the individual rights to the states, and therefore to everyone under every circumstance, are cited in the discussions of the selected amendments which follow. It is important to note that four of the rights stated in the Bill of Rights have never been fully incorporated or specifically applied to the states:

1. The Third Amendment’s protection against quartering of soldiers.
2. The Fifth Amendment’s grand jury indictment requirement.
3. The Seventh Amendment’s right to a jury trial in civil cases.
4. The Eighth Amendment’s prohibition on excessive fines.

---

### FIRST AMENDMENT

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*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.*

---

#### Bill of Rights

The Bill of Rights is the common name given to the first ten amendments of the United States Constitution. The Bill of Rights was ratified on December 15, 1791, three years after the Constitution was ratified.

#### Exceptions and limitations

The rights afforded all Americans by the Bill of Rights are not absolute. Over the past 220 years, the United States Supreme Court has recognized the need to apply exceptions and impose certain limitations on the constitutional rights granted by amendments to the United States Constitution. The court has the power to do this through its use of judicial review and its authority to interpret the Constitution.

### OVERVIEW AND RELEVANCE TO THE CRIMINAL JUSTICE SYSTEM:

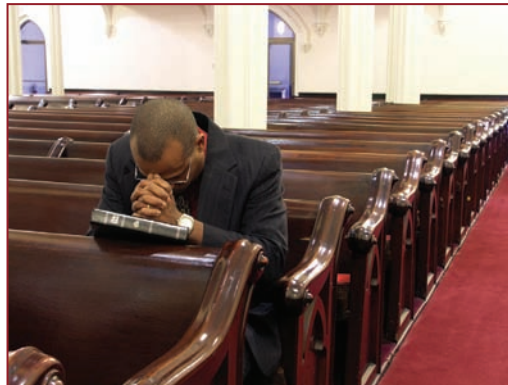
The First Amendment contains some of the most basic rights that all persons in the United States enjoy. The rights to express ourselves in our speech, our writings, and our religion are so basic to Americans that we tend to take them for granted.

### RIGHTS AFFORDED UNDER THE FIRST AMENDMENT:

1. Establishment of religion and not prohibiting the free exercise of it.
2. Freedom of speech and of the press.
3. Right to peaceably assemble and to petition the government for a redress of grievances.

### EXCEPTIONS AND LIMITATIONS OF THE RIGHTS AFFORDED UNDER THE FIRST AMENDMENT:

1. Establishment of religion and not prohibiting the free exercise of it.



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The courts have consistently affirmed that the Free Exercise Clause of the First Amendment protects religious beliefs<sup>4</sup>. This means that Americans are free to *maintain* their religious beliefs without interference by state or federal legislation, or other authority. How you think and what you believe is a basic freedom. There are no ‘thought’ police. This freedom is not always extended to how we act on these thoughts and beliefs. The courts have stepped in and limited some conduct that has been associated with religious beliefs. They have ruled that some religious practices so patently violate the standards of conduct in our society that they have taken action to restrict them.

One of the first and most famous of these restrictions involved the Mormon Church and its practice of polygamy. The U.S. Supreme Court, in the 1890 case of *Davis v. Beason*, stated that “Bigamy and polygamy are crimes by the laws of all civilized and Christian countries.” The Court went on to say that “To call their advocacy a tenet of religion is to offend the common sense of mankind.”<sup>5</sup>

The ‘Establishment Clause’ which allowed for the establishment of religions, was applied to the states in 1947.<sup>6</sup> The ‘Free Exercise Clause’ which gives us the right to worship whatever way we want, was applied in 1940.<sup>7</sup>

## 2. Freedom of speech and of the press.

The right to express ourselves both orally and in the written word is one of the basic freedoms that separate the United States from much of the rest of the world. Americans can be rightfully proud of their ability to express their feelings without fear of governmental reprisal. Over the years, the U.S. Supreme Court has been very cautious when facing challenges to these basic freedoms. The Court takes many factors into consideration when limiting these rights, including the vagueness of the individual laws and the impact that any restriction will have on our society as a whole. The Court has stated that the government may not restrict speech “because of its message, its ideas, its subject matter, or its content.”<sup>8</sup>

There are situations where the courts have imposed restrictions on these basic freedoms. “The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.”<sup>9</sup> The Court has also ruled that a person cannot use “fighting words,”<sup>10</sup> which are “words . . . [which] have a direct tendency to cause acts of violence by the person to whom, individually, the remark was addressed.”<sup>11</sup> Restrictions have also been imposed on the use of libelous statements<sup>12</sup> (libel is the making of false or malicious statements published to hurt or damage a person’s reputation). The U.S. Supreme Court has also held “. . . that obscenity is not within the area of constitutionally protected free speech or press.”<sup>13</sup>

While the United States Supreme Court has ruled that there are compelling exceptions to the First Amendment freedom of expression, it has consistently stated that some acts, even some that offend many people, are not prohibited. “While flag desecration . . . like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures . . . is deeply offensive to many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>14</sup>

Freedom of speech was applied to the states in 1925<sup>15</sup> and the freedom of the press was applied in 1931.<sup>16</sup>

## 3. Right to peaceably assemble and to petition the government for a redress of grievances.

The rights to peaceably assemble and to petition the government have been merged over the years into the basic First Amendment right to freedom of expression. The courts have not interfered very often in this area except to allow for governmental regulations related to obtaining permits and restricting specific areas that may not be used for demonstrations.<sup>17</sup>

The right to peaceably assemble was applied to the states in 1937.<sup>18</sup>

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## SECOND AMENDMENT

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*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.*

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### OVERVIEW AND RELEVANCE TO THE CRIMINAL JUSTICE SYSTEM:

Probably one of the most controversial amendments in recent years has been the Second Amendment right to bear arms. There has been heated debate on both sides of this issue. Gun rights advocates argue that individuals have the absolute right to own guns without restrictions imposed by the federal or individual state governments. Opponents argue that the government has the right to regulate all weapons. The debate has also focused on the wording of the amendment and its reference to “a well regulated Militia” and the implications in a modern society.

This amendment is of particular importance to the police throughout the United States. The police are the ones who must regulate firearm laws in this country and must be thoroughly versed in the laws that govern firearms within their jurisdictions. The police must also be aware at all times that, while law-abiding citizens have a right to possess and carry weapons, so do the not so law-abiding. What makes this even more concerning to police is the fact that, according to the National Rifle Association, there are about 300 million legal firearms in this country and about 100 million of these are handguns.<sup>19</sup>

### RIGHTS AFFORDED UNDER THE SECOND AMENDMENT:

1. The right to bear arms.



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### EXCEPTIONS AND LIMITATIONS OF THE RIGHTS AFFORDED UNDER THE SECOND AMENDMENT:

Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld



under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. The U.S. Supreme Court has held that the sorts of weapons protected are those "in common use at the time" and finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons.<sup>20</sup> Private citizens may not possess most military weapons such as hand grenades, bombs, and cannons. It has also been well established that the government can regulate such things as fully automatic guns as well as sawed-off shotguns.<sup>21</sup>

The United States Supreme Court did not apply the rights afforded under the Second Amendment to the states until 2010.<sup>22</sup>

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#### FOURTH AMENDMENT

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*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.*

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#### OVERVIEW AND RELEVANCE TO THE CRIMINAL JUSTICE SYSTEM:

A thorough understanding of the Fourth Amendment is essential to all police officers (as well as prosecutors, judges, criminal defense attorneys, and almost all criminal justice practitioners) in the United States. This is the basis of all searches and seizures conducted by the police and includes the laws of arrest. Police officers at every level receive extensive training concerning this amendment and all of the exceptions that have been associated with it.

This amendment includes the provisions for an arrest. An arrest is a seizure of a person and must be based on probable cause (see Chapter 5 for definitions). An arrest can be made with a warrant or without a warrant if it is based upon probable cause, or if the suspected criminal act occurred in the officer's presence. The Fourth Amendment does not allow warrantless arrests of persons within their own home unless there is some exigent (emergency) circumstance that would make the obtaining of a warrant unreasonable.<sup>23</sup>

#### RIGHTS AFFORDED UNDER THE FOURTH AMENDMENT:

1. Right against unreasonable searches and seizures.

## EXCEPTIONS AND LIMITATIONS OF THE RIGHTS AFFORDED UNDER THE FOURTH AMENDMENT:

1. Right against unreasonable searches and seizures.

There are probably more Supreme Court and other appellate court decisions dealing with the Fourth Amendment than all of the other amendments combined. The United States Supreme Court has decided many cases that have expanded the interpretation of this amendment. Below is a list of some of the exceptions that have been decided (these will be examined in more detail in Chapter 5).

Exceptions to this amendment include:

2. Consent searches
3. Vehicular searches
4. Border searches
5. “Open Fields” searches
6. Abandoned property searches
7. “Plain View” searches
8. Public school searches
9. Prison searches
10. Searches incident to arrest
11. Probation and parole searches
12. Detention and “Stop-and-Frisk”

The United States Supreme Court applied the freedom from unreasonable searches and seizures to the states in 1949<sup>24</sup> and applied the warrant requirement in 1964.<sup>25</sup>

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## FIFTH AMENDMENT

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*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a 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.*

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## OVERVIEW AND RELEVANCE TO THE CRIMINAL JUSTICE SYSTEM:

The Fifth Amendment contains the rights of persons and is broken into several different categories of rights, and includes one that deals with the non-criminal right of the government to take your property for eminent domain<sup>26</sup>. The amendment also contains some language that needs explanation in today’s terms.

“No person shall be held to answer for a capital, or otherwise infamous crime . . .” A **capital crime** is a crime for which the accused could get the death penalty if convicted (capital punishment). An “infamous” crime is generally accepted as a crime for which the punishment would be imprisonment in a state prison or penitentiary.<sup>27</sup> Today, this category of crimes is called felonies.

One of the most well known U.S. Supreme Court cases is based, in part, on the Fifth Amendment right against self-incrimination. The *Miranda* decision in 1966<sup>28</sup> has had far-reaching effects on the criminal justice system. One of the foremost changes involves the procedures that police officers use when interrogating suspects and obtaining confessions.<sup>29</sup>

The concept of double jeopardy is also addressed in this amendment. This right is one that prosecutors and the courts must be aware of at all times in criminal cases.

### Capital crime

A capital crime is any crime for which the penalty can be death.

## RIGHTS AFFORDED UNDER THE FIFTH AMENDMENT:

1. Right to a Grand Jury hearing.
2. Right against double jeopardy.
3. Right against self-incrimination.

## EXCEPTIONS AND LIMITATIONS OF THE RIGHTS AFFORDED UNDER THE FIFTH AMENDMENT:

1. Right to a grand jury hearing.

“The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges. . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.”<sup>30</sup>

The grand jury is generally comprised of twenty-three citizens who are subpoenaed for jury duty and serve for a designated amount of time on the jury. Unlike a criminal trial jury, these jurors hear evidence presented by witnesses called by the prosecuting attorney to establish whether or not probable cause exists to prosecute a defendant or to issue a warrant of arrest. The actual procedures vary from jurisdiction to jurisdiction but in most cases the defendant is not even present for the hearing.<sup>31</sup>



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The right of a defendant to have a grand jury indictment has never been incorporated or applied by the courts to the states. This constitutional right remains a requirement within the Federal Court System but not a requirement for the individual States. Many of the States have adopted the grand jury system of indictments for felony cases; however, some have adopted other procedures in its place (see Chapter 7).

## 2. Right against double jeopardy.

*“... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;”*

The concept of double jeopardy protects individuals from being convicted twice for the same crime. Once an individual is prosecuted for a criminal offence, this Fifth Amendment right guarantees that the government cannot prosecute the person again for the same criminal act.

To put this constitutional right in perspective, if a person is tried for burglary in a state court and found not guilty, the state is barred from prosecuting the person again for that same crime.<sup>32</sup> This would be true even if additional evidence is later discovered that would tend to prove that the person was guilty of that crime.

The right of double jeopardy, like all rights, is for the benefit of the accused, not the prosecution. The prosecution is not permitted to appeal an acquittal (a verdict of not guilty).<sup>33</sup> Once a person is found to be not guilty in a criminal court, the prosecution is barred from appealing the decision. On the other hand, if the defendant is found guilty in court, they have the right to appeal the decision to a higher court. This is true even though one of the results of that appeal could be a retrial on the same charges. This is not double jeopardy because the defendant is the one who initiates the request for appeal and therefore is constructively waiving their right to another trial if they win their appeal.<sup>34</sup>

There have been many instances of a person being found not guilty in a criminal court and then being sued in civil court using the same witnesses and evidence and subsequently having the civil court finding against them.<sup>35</sup> The language of the Amendment states that a person cannot be put in “jeopardy of life or limb.” Since

a person is not put in jeopardy of criminal punishment (capital punishment, imprisonment, or punitive fines), the courts have held that double jeopardy does not apply in noncriminal proceedings.<sup>36</sup>

The double jeopardy clause was applied to the states in 1969.<sup>37</sup>

## 3. Right against self-incrimination.

*“... nor shall be compelled in any criminal case to be a witness against himself...”*



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The right against self-incrimination means that a person cannot be forced or required to make any statements that could be used against them in any criminal proceeding (present or future) or to be used as a basis to discover any other incriminating evidence against them. This privilege is applicable in criminal court proceedings, as well as while being questioned by the police in an interrogation situation.

A defendant is not required to take the stand and testify in their own behalf in a criminal proceeding or trial and the prosecution is prohibited from commenting to the jury on this lack of testimony.<sup>38</sup> If the defendant does take the stand and testify, they then waive their right against self-incrimination and are required to answer questions under cross-examination. The defendant can be impeached when they take the stand because the courts will then allow the prosecution to introduce any prior criminal record and can comment on the defendant's prior silence during police questioning.<sup>39</sup>

The right does not apply to "routine" booking questions. When a person is arrested, the police (and/or the jail) may ask questions required to properly book the person without asking for a waiver and are not violating this right. Such questions include asking the suspect their name, address, date of birth, and other identifiers.<sup>40</sup> The court has also determined that requiring a person to submit to a blood alcohol test is not a violation of this right, even though refusal to submit to the test may be used as evidence against them.<sup>41</sup>

Probation revocation hearings have also been ruled by the courts to not be criminal proceedings, so a probationer is required to answer questions during the hearing even though the questions may be incriminating in nature and may result in the revocation of probation.<sup>42</sup>

This right is the basis of the *Miranda* decision, where suspects must be advised that they have the right to remain silent (the right against self-incrimination) and that if they do waive this right, that anything they say can be used against them in court.

This right does not, however, apply in civil cases or in situations where a person does not face criminal or other significant penalties (other than just monetary).

The privilege against self-incrimination was applied to the states in 1964.<sup>43</sup>

#### 4. Due process of law in criminal prosecutions.

This right guarantees that a person who is accused of a crime will be given the opportunity to have their case heard in a court of law, and will be afforded all of the constitutional rights that are applicable to their case and situation. The Fifth Amendment originally applied this right to those cases that were in Federal Court and it was applied to everyone in all cases with the adoption of the Fourteenth Amendment.



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## SIXTH AMENDMENT

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*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 defence.*

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### OVERVIEW AND RELEVANCE TO THE CRIMINAL JUSTICE SYSTEM:

The Sixth Amendment encompasses those rights that a person has when they are accused of a crime and formally enter the criminal justice system. While all persons in the United States have the rights afforded under this amendment, they do not become applicable until a person is actually accused of a criminal offense. Once accused, a person enters the court system of the United States, whether it is on a federal, state, or local level. The Sixth Amendment protects the accused throughout this process. The amendment guarantees that the process will be fair and impartial and is the basis of due process. The Sixth Amendment rights are read to the accused in court as a part of the arraignment process.<sup>44</sup>

### RIGHTS AFFORDED UNDER THE SIXTH AMENDMENT:

1. Right to a speedy trial.
2. Right to a public trial.
3. Right to a trial by an impartial jury.
4. Right to be informed of the charges against you.
5. Right to confront witnesses against you.
6. Right to have compulsory process for obtaining witnesses in your favor.
7. Right to have an attorney.

### EXCEPTIONS AND LIMITATIONS OF THE RIGHTS AFFORDED UNDER THE SIXTH AMENDMENT:

1. Right to a speedy trial.

The right to a speedy trial “is one of the most basic rights preserved by our Constitution.”<sup>45</sup> The purpose of this guarantee is to prevent long delays before trial for an accused person who may have to remain in custody before going to trial. It



also affords the defendant with the opportunity to go to trial without the concern that witnesses may not be available to come to court or that their memory may not be as fresh if there is a long delay.

While the constitution does guarantee a “speedy” trial, it does not specify a specific time frame in which it must take place. Title 1 of the Speedy Trial Act of 1974<sup>46</sup> (amended in 1979) specifies the time restrictions that must be followed in criminal proceedings in Federal Court. This statute states the information (or indictment from the grand jury) must be filed within thirty days from the date of arrest or service of the summons. The trial must then begin within seventy days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later.

States do not have to establish a firm time line; however, most states have adopted time frames that are similar to those established by the federal Speedy Trial Act.

This right was applied to the states in 1967.<sup>47</sup>

## 2. Right to a public trial.

With very few exceptions,<sup>48</sup> court hearings and trials are open to the public. The openness of our trial system is a safeguard against any attempt to employ our courts as instruments of persecution.<sup>49</sup> Open trials also assure that the criminal defendant receives a fair and accurate adjudication of guilt or innocence. It also provides a public demonstration of fairness and discourages perjury. The Court has also stated that open trials enable the public to see justice done and the fulfillment of the urge for retribution that people feel upon the commission of some kinds of crimes.<sup>50</sup>

The right to a public trial was applied to the states in 1948.<sup>51</sup>

## 3. Right to a trial by an impartial jury.

The Sixth Amendment gives us the right to a trial by an impartial jury. Originally, this meant that a person accused of any crime had the right to have their case heard before a jury comprised of twelve impartial citizens. Over the years, the Court has reexamined this right and has limited the requirement to serious crimes (generally felonies) and has stated that juries can be comprised of less than twelve jurors,<sup>52</sup> but had to be made up of more than five.<sup>53</sup>

While the Court applied this right to the states in 1968,<sup>54</sup> the individual states are still free to limit jury trials to felonies only and can reduce the size of the jury from the traditional twelve to six.

## 4. Right to be informed of the charges against you.

Every defendant who is accused of a criminal offense has the Sixth Amendment right to have the charges against them be properly explained and given to them.

This allows the defendant to be able to prepare a proper defense to the charges and to protect them once a judgment has been rendered against any additional prosecution on the same charge (double jeopardy).<sup>55</sup>

It is important to note that the charges that the defendant is informed of under this amendment are not necessarily the same charges that the person was arrested for. A person could be arrested by the police and charged with the crime of burglary. After review by the prosecutor, the charge may be reduced prior to trial to the crime of grand larceny. The person would then be informed in court (usually during the arraignment) of the charge of grand larceny, not burglary, and this would meet the Sixth Amendment requirement.

#### 5. Right to confront witnesses against you.

This constitutional provision was included to give assurance to defendants that they may question anyone who accuses them of a crime. The U.S. Supreme court has said criminal accusations should not be by written affidavits (sworn documents) only. They further stated that an affidavit is not to be used "... in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."<sup>56</sup>

Most of the exceptions to this right deal with the testimony of child witnesses when the welfare of the child outweighs the right of the defendant to confront them in court.<sup>57</sup> The U.S. Supreme Court has also made exceptions when dealing with child sex crime victims.<sup>58</sup>

The right to confront witnesses was applied to the states in 1965.<sup>59</sup>

#### 6. Right to have compulsory process for obtaining witnesses in your favor.

Every defendant in a criminal trial has the right to present a defense. Part of this defense may be the presentation of testimony from witnesses who may have evidence favorable for the defendant. Many defendants do not have the money or resources to find and subpoena these witnesses and get them into court. This constitutional right guarantees that these witnesses will be brought to court (if applicable) even when the defendants cannot afford to do so for themselves.<sup>60</sup>

This part of the Sixth Amendment was applied to the states in (1967).<sup>61</sup>

#### 7. Right to have an attorney.

The Sixth Amendment gives all persons in the United States who are charged with a criminal offense the right to have an attorney represent them at every stage of the criminal process. This premise was solidified in the landmark U.S. Supreme Court decision in *Gideon v. Wainwright*.<sup>62</sup> The Court stated in this case "that in our adversary system of criminal justice, any person haled [sic] into court, who is



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too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Gideon v. Wainwright* is also the case that applied this right to the states.

The assistance of counsel applies to all criminal defendants who potentially face imprisonment for the crime they are charged with, even if the charge is a misdemeanor.<sup>63</sup> This right has also been extended to juveniles.<sup>64</sup>

If a person accused of a criminal offense cannot afford to hire an attorney themselves, then the government entity that is prosecuting the case must provide an attorney for them at no cost to the defendant.<sup>65,66</sup> This Court has also gone so far as to say that the counsel appointed must be “effective” counsel.<sup>67</sup>

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## EIGHTH AMENDMENT

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

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### OVERVIEW AND RELEVANCE TO THE CRIMINAL JUSTICE SYSTEM:

The Eighth Amendment is a continuation of the rights given to defendants, and subsequently to those convicted of a crime, who become a part of the court and correctional systems. Although this is the shortest Amendment to the U.S. Constitution, it has far-reaching implications, particularly the right against cruel and unusual punishments.

### RIGHTS AFFORDED UNDER THE EIGHTH AMENDMENT:

1. Right against excessive bail.
2. Right against excessive fines.
3. Right against cruel and unusual punishments inflicted.

### EXCEPTIONS AND LIMITATIONS OF THE RIGHTS AFFORDED UNDER THE EIGHTH AMENDMENT:

1. Right against excessive bail.

One of the most important legal premises in a free society is the presumption of innocence. In our system of justice, just because a person is arrested and brought to trial on a criminal charge does not mean that they are guilty of that crime. The presumption is that the person is innocent of the charge and will be afforded full due process of law. The burden of proof to prove guilt rests firmly on the shoulders of the prosecution. With this in mind, it would be unfair to keep the accused in jail while awaiting trial. We do not incarcerate innocent people. The right to reasonable bail insures that the accused has an opportunity to be free prior to conviction. The Court has said that: “Unless this right to bail before trial is preserved, the

presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>68</sup>

There are times when the safety of society outweighs the need to offer bail to a suspect. Certain crimes have been deemed to be so serious, that even the presumption of innocence does not allow the person arrested to be granted bail. Murder, sexual assaults, high level drug trafficking, and crimes involving serious bodily injury are all examples of crimes that the courts have determined (on a case by case basis) that the assignment of no bail may be warranted. The courts may also consider such variables as flight risk and possible attempts by the suspect to commit additional serious crimes.

Excessive bail has been held to be an amount that is higher than what would be “reasonable” for the circumstances.<sup>69</sup> The term “reasonable” is one that the courts have intentionally left vague. It would be unreasonable to set a bail of one million dollars for a person who has been arrested for shoplifting, but it may not be considered unreasonable for a person who was arrested for smuggling twenty million dollars’ worth of drugs into the United States.

The right against excessive bail was applied to the states in 1971.<sup>70</sup>

## 2. Right against excessive fines.

The United States Supreme Court has had very little to say about this clause to the Eighth Amendment. The Court has ruled, however, that a person who does not have the ability to pay a fine because they are indigent cannot be given a jail or prison sentence because of this inability.<sup>71</sup> The Court has never applied this constitutional right to the states.

## 3. Right against cruel and unusual punishments inflicted.

The Court has never given a precise definition of what “cruel and unusual” actually is. In the 1800s the Court did give some insight by stating: “. . . it is safe to affirm that punishments of torture [such as drawing and quartering, embowelling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution”[sic].<sup>72</sup>

The Court has, over the past two hundred years, ruled that the various techniques used to legally carry out the death penalty in the United States have passed the legal scrutiny and have been ruled not to be cruel and unusual. Firing squads<sup>73</sup> and electrocution<sup>74</sup> are examples of types of executions that have been ruled acceptable. The Court even went so far as to rule that it was not cruel and unusual when the State of Louisiana had to electrocute a man a second time when a mechanical failure during the first execution only injured but did not kill the condemned man.<sup>75</sup>

In 1972 the Court, in the landmark case of *Furman v. Georgia*, looked at the way the death penalty was administered (as opposed to the actual mechanisms of putting a person to death) and ruled that the death penalty violated the cruel and unusual clause of the Eighth Amendment.<sup>76</sup> This



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decision effectively suspended executions in the United States for several years. Following this ruling, thirty-five states redid their death penalty statutes to conform to the *Furman* decision, and resumed executions in their respective states.

Since the *Furman* decision, the Court has made several rulings that have put limits on who may be executed. In 1977, in *Coker v. Georgia*, the Court held that rapists could not be executed if they did not take the victims life during the commission of the crime.<sup>77</sup> The Court stated that “. . . rape cannot compare with murder in terms of moral depravity and of injury to the person and the public.”<sup>78</sup>

The Court has also ruled that the Eighth Amendment prohibits the execution of a person who is insane,<sup>79</sup> but does not specifically prohibit the execution of juveniles who commit crimes when sixteen or seventeen years of age<sup>80</sup> who have been certified as adults (but does prohibit the execution of fifteen year olds<sup>81</sup>).

The cruel and unusual punishment clause of the Eighth Amendment was applied to the states in 1962.<sup>82</sup>

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#### FOURTEENTH AMENDMENT

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*Section. 1. 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.*

*Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.*

*Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.*

*Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.*

*Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*

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#### OVERVIEW AND RELEVANCE TO THE CRIMINAL JUSTICE SYSTEM:



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The Fourteenth Amendment to the United States Constitution was ratified on July 9, 1868. The amendment is divided into five sections but Section 1 is the one that is most applicable to the criminal justice system. Together with the Fifth Amendment, the Fourteenth guarantees all persons in the United States the right to due process of law in all criminal proceedings.<sup>83</sup> Section 1 of the Fourteenth Amendment has been commonly referred to as the “due process clause” and the amendment is referred to as the “equal rights amendment.”

**REVIEW QUESTIONS:**

1. The basis of all laws in the United States is the \_\_\_\_\_.
2. The three branches of government are: \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.
3. The first ten amendments to the U.S. Constitution are commonly called the \_\_\_\_\_.
4. The system of \_\_\_\_\_ and \_\_\_\_\_ within the government keeps each branch from becoming too powerful.
5. The “right of the people to keep and bear arms” is found in the \_\_\_\_\_ Amendment.
6. The right against self incrimination is found in the \_\_\_\_\_ Amendment.
7. “Freedom of speech” is found in the \_\_\_\_\_ Amendment.
8. The right “against unreasonable searches and seizures” is found in the \_\_\_\_\_ Amendment.
9. The right “to be confronted with the witnesses against him” is found in the \_\_\_\_\_ Amendment.
10. The right protecting us against “cruel and unusual punishments” is found in the \_\_\_\_\_ Amendment.

**CRITICAL THINKING QUESTIONS:**

1. Discuss in your own words the concept of checks and balances, and how it is used in the United States. Make sure you include all three branches of government in your discussion.
2. Explain why there are so many exceptions to the rights that are afforded us by the Bill of Rights. How did these exceptions come about?
3. Select one of the amendments from the Bill of Rights that was NOT discussed in this chapter (see Appendix A) and discuss the rights or guarantees that are presented in it.
4. Discuss the importance of the Fourteenth Amendment and explain how it applies to the criminal justice system.



## NOTES

## CHAPTER 1

- <sup>1</sup> It should be noted that the Fourteenth Amendment (see later in this chapter) guarantees that all “persons” shall be denied neither due process nor equal protection of the law. There has been some controversy as to whether this includes every person who is in the United States (visitors, persons on visas, and illegal aliens) or to just “citizens” of the country. The practice of our courts has, at least over the recent past, been to grant all of these rights to all persons regardless of their status.
- <sup>2</sup> Some scholars attribute the Bill of Rights to the first eight amendments only. The Ninth and Tenth Amendments do not establish any individual rights. See Appendix A for the full text of the U.S. Constitution and all twenty-seven of the amendments.
- <sup>3</sup> *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).
- <sup>4</sup> Findlaw, “Free Exercise of Religion.” Accessed 2010 at <http://caselaw.lp.findlaw.com/data/constitution/amendment01/05.html#2>.
- <sup>5</sup> *Davis v. Beason*, 133 U.S. 333 (1890).
- <sup>6</sup> *Everson v. Board of Education*, 330 U.S. 1 (1947).
- <sup>7</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
- <sup>8</sup> *Police Department v. Mosley*, 408 U.S. 92, 95 (1972).
- <sup>9</sup> *Schenck v. U.S.*, 249 U.S. 47 (1919).
- <sup>10</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
- <sup>11</sup> *Ibid.* at 573.
- <sup>12</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952).
- <sup>13</sup> *Roth v. United States*, 354 U.S. 476 (1957).
- <sup>14</sup> *United States v. Eichman*, 496 U.S. 310, 313-319 (1990).
- <sup>15</sup> *Gitlow v. New York*, 268 U.S. 562 (1925).
- <sup>16</sup> *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).
- <sup>17</sup> *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).
- <sup>18</sup> *De Jonge v. York*, 299 U.S. 353 (1937).
- <sup>19</sup> National Rifle Association, “Firearms Fact Card, 2011.” Posted January 20, 2011, accessed July, 18, 2011 at <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID583>.
- <sup>20</sup> *District of Columbia et al. v. Heller*, 554 U.S. 290 (2008).
- <sup>21</sup> *United States v. Miller*, 307 U.S. 174 (1939).
- <sup>22</sup> *McDonald et al. v. City of Chicago, Illinois, et al.*, 561 U.S. \_\_\_\_\_ (2010).
- <sup>23</sup> *Payton v. New York*, 445 U.S. 573 (1980).
- <sup>24</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).
- <sup>25</sup> *Aguilar v. Texas*, 378 U.S. 108 (1964).
- <sup>26</sup> “... nor shall private property be taken for public use, without just compensation.” Whenever lands in a State are needed for a public purpose, Congress may authorize that they be taken, either by proceedings in the courts of the State, with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State (*Chappell v. United States*, 160 U.S. 499 (1896)). In simple terms, this means that if the government decides that it needs to put a freeway through your home, it can condemn your house and force you to give it up, but they have to give you fair market value for it.
- <sup>27</sup> *Mackin v. United States*, 117 U.S. 348 (1886).
- <sup>28</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).
- <sup>29</sup> A full discussion of the *Miranda* case will be presented in Chapter 5.
- <sup>30</sup> *United States v. Mandujano*, 425 U.S. 564 (1976).
- <sup>31</sup> For a more detailed explanation of the grand jury process see Chapter 7.
- <sup>32</sup> *United States v. Martin Linen Co.*, 430 U.S. 564 (1977).
- <sup>33</sup> *Burks v. United States*, 437 U.S. 1 (1978).
- <sup>34</sup> A full explanation of the possible outcomes of an appeal is explained in Chapter 8.
- <sup>35</sup> Probably the most famous case involved O. J. Simpson. On October 3, 1995, O. J. Simpson was found not guilty in a criminal court in Los Angeles, California of two counts of murder. The family of one of the victims then sued Mr. Simpson in civil court for the wrongful death of their son, Ronald Goldman, who was one of the victims that he was found not guilty of killing. The civil jury, hearing the same evidence from the murder trial, found against Mr. Simpson and ordered him to pay \$33,500,000 in damages on February 5, 1997.
- <sup>36</sup> *Helvering v. Mitchell*, 303 U.S. 391 (1938).
- <sup>37</sup> *Benton v. Maryland*, 395 U.S. 794 (1969).



- <sup>38</sup> Griffin v. California, 380 U.S. 609 (1965).
- <sup>39</sup> Jenkins v. Anderson, 447 U.S. 231 (1980).
- <sup>40</sup> Pennsylvania v. Muniz, 496 U.S. 582 (1990).
- <sup>41</sup> South Dakota v. Neville, 459 U.S. 553 (1983).
- <sup>42</sup> Minnesota v. Murphy, 465 U.S. 420 (1984).
- <sup>43</sup> Mallory v. Hogan, 378 U.S. 1 (1964).
- <sup>44</sup> The arraignment will be discussed in detail in Chapter 8.
- <sup>45</sup> Klopfer v. North Carolina, 386 U.S. 213 (1967).
- <sup>46</sup> 18 U.S.C. §§ 3161\_3174.
- <sup>47</sup> Klopfer v. North Carolina, 386 U.S. 213 (1967).
- <sup>48</sup> Some of the exceptions include juvenile proceedings, grand jury hearings, and times when the judge may declare the need for closure of the court (child witnesses, confidential information disclosed, etc.).
- <sup>49</sup> In re Oliver, 333 U.S. 257 (1948).
- <sup>50</sup> Estes v. Texas, 381 U.S. 532, 538 (1965).
- <sup>51</sup> In re Oliver, 333 U.S. 257 (1948).
- <sup>52</sup> Williams v. Florida, 399 U.S. 78 (1970).
- <sup>53</sup> Ballew v. Georgia, 435 U.S. 223 (1978).
- <sup>54</sup> Duncan v. Louisiana, 391 U.S. 145 (1968).
- <sup>55</sup> United States v. Cruikshank, 92 U.S. 542 (1875).
- <sup>56</sup> Mattox v. United States, 156 U.S. 237 (1985).
- <sup>57</sup> Maryland v. Craig, 497 U.S. 836 (1990).
- <sup>58</sup> Kentucky v. Stincer, 482 U.S. 730 (1987).
- <sup>59</sup> Pointer v. Texas, 380 U.S. 400 (1965).
- <sup>60</sup> United States v. Cooper, 4 U.S. (4 Dall.) 341 (C. C. Pa. 1800).
- <sup>61</sup> Washington v. Texas, 388 U.S. 14 (1967).
- <sup>62</sup> Gideon v. Wainwright, 372 U.S. 335 (1963).
- <sup>63</sup> Argersinger v. Hamlin, 407 U.S. 25 (1972).
- <sup>64</sup> In re Gault, 387 U.S. 1 (1967).
- <sup>65</sup> Powell v. Alabama, 287 U.S. 45 (1932).
- <sup>66</sup> The standard used by most of the courts in the United States to determine if a person is indigent (lacking the necessities of life and therefore unable to afford an attorney on their own) is based on the poverty level for the circumstances of the individual defendant.
- <sup>67</sup> McMann v. Richardson, 397 U.S. 759 (1970).
- <sup>68</sup> Stack v. Boyle, 342 U.S. 1 (1951).
- <sup>69</sup> Ibid. at 4.
- <sup>70</sup> Schilb v. Kuebel, 404 U.S. 357 (1971).
- <sup>71</sup> Tate v. Short, 401 U.S. 395 (1971).
- <sup>72</sup> Wilkerson v. Utah, 99 U.S. 135 (1878).
- <sup>73</sup> Ibid.
- <sup>74</sup> In re Kemmler, 136 U.S. 436 (1890).
- <sup>75</sup> Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).
- <sup>76</sup> Furman v. Georgia, 408 U.S. 238 (1972).
- <sup>77</sup> Coker v. Georgia, 433 U.S. 584 (1977).
- <sup>78</sup> Ibid. at 598.
- <sup>79</sup> Ford v. Wainwright, 477 U.S. 399 (1986).
- <sup>80</sup> Thompson v. Oklahoma, 487 U.S. 815 (1988).
- <sup>81</sup> Ibid. at 849.
- <sup>82</sup> Robinson v. California, 370 U.S. 660 (1962).
- <sup>83</sup> Due process will be discussed in detail in Chapter 2.



# INTRODUCTION TO THE JUSTICE SYSTEM

## Chapter 2

### CHAPTER OVERVIEW

The criminal justice system in the United States is built upon the concept of justice. The notion of justice will be looked at from several different perspectives. This chapter will discuss justice in terms of the traditional way that it is applied to our overall justice system. We will also look at the concept of social justice and how it affects the different societies that we all live in. The principle of the social contract will also be discussed in this chapter.

There are two models that help explain the differences in ideologies within the criminal justice process in the United States. These models, which were developed in 1964 by Herbert L. Packer,<sup>1</sup> are the due process model and the crime control model. We will see that there are strong advocates and opponents for both of these models and we will look at the positions of both. The chapter will also give a brief overview of the three components of the criminal justice system: the police, corrections, and the courts.



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## CHAPTER LEARNING OBJECTIVES

After reading this chapter you will be able to:

1. Understand the concept of justice as it applies to the criminal justice system in America.
2. Explain the notion of social justice and how it varies within the different societies in which we live.
3. Explain what the social contract is.
4. Compare and contrast the due process model and the crime control model.
5. List the basic components of the criminal justice system.

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### KEYWORDS

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Justice  
Society  
Herbert L. Packer  
Due Process Model  
Law Enforcement  
Jails

Social Justice  
Social Contract  
Crime Control Model  
Police  
Corrections  
Prisons

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## THE CONCEPT OF JUSTICE

### Justice

While the term justice can have a variety of meanings, for criminal justice it is best described as fundamental fairness.

A discussion about the criminal justice system must start with a basic understanding of the term **justice**. Justice has come to have different meanings depending on how it is used and what it is associated with. The New Oxford American Dictionary<sup>2</sup> defines justice as “the quality of being fair and reasonable.” Justice can also be described as fundamental fairness. Aristotle said that justice is equality for equals and wrote that: “Injustice arises when equals are treated unequally and also when



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unequals are treated equally.”<sup>3</sup> President Theodore Roosevelt gave a very good summary of the term justice when he said:

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*“No man is above the law and no man is below it; nor do we ask any man’s permission when we require him to obey it.”*

PRESIDENT THEODORE ROOSEVELT—1903<sup>4</sup>

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Theodore Roosevelt

What President Roosevelt was saying was that all persons, regardless of their status in society, are expected to obey all of the laws within our society. In order to have true justice, it must be administered fairly and equally to everyone.

**Social justice** is more of a concept than an actual occurrence. Social justice varies from **society** to society depending on the perception of what constitutes right from wrong within that society. Social justice can also change over time within the same society as the mores and moral values change. Since social justice deals with the fundamental notion of right and wrong as defined by a society, it can also vary within a society.

We all live in several different societies simultaneously, each with their own set of values. We all live in the global society of the world where the most basic values of right and wrong are universal. This would include such things as murder and the stealing of property that belongs to others. We also live in the society of the United States, which is one of the most multi-cultural societies in the world. Since our country is represented by so many different cultural and ethnic backgrounds, it can arguably be said that we cannot come to a consensus on very many important issues. The federal government, through our legislative branch (the House of Representatives and the Senate), makes the criminal laws that affect everyone in the country. These laws, at least theoretically, reflect a consensus of the moral values of all of our citizens because they are written by elected officials who represent the populace. The moral values of the country change over time and are reflected by changes in our laws. It should be noted that the values of individual political parties have a direct influence on the types of laws that are passed, but again, the party in power changes as the values of the country change and new representatives are elected.

We also live within the society of the individual State that we reside in. Although the overall

**Social Justice**

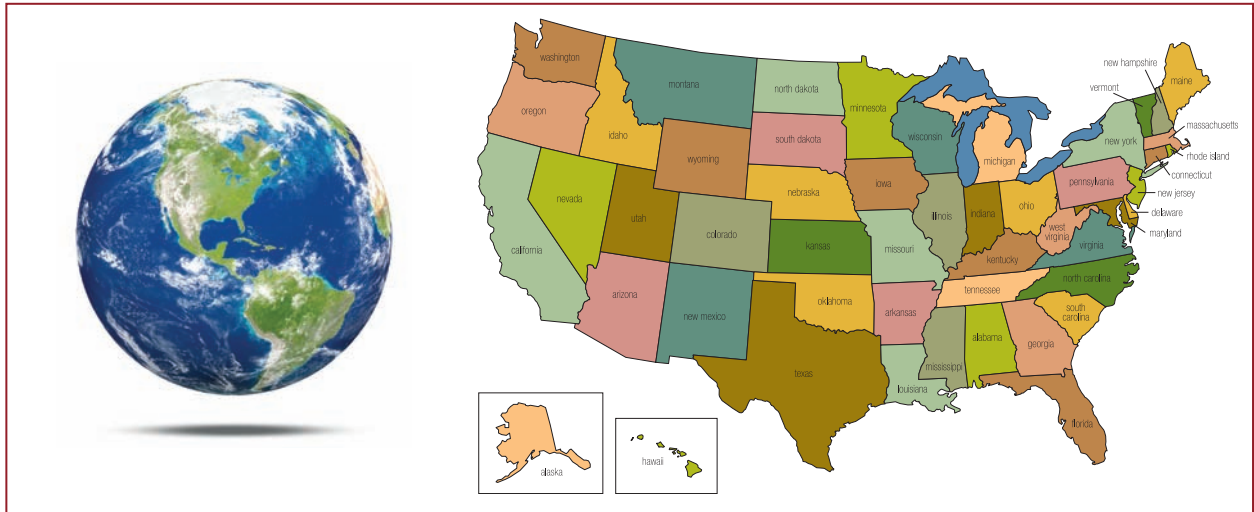
The concept of social justice varies from society to society and deals with the perception of what constitutes right from wrong within that society.

**Society**

A society is a structured group of people with similar traits (traditions, culture, nationality, moral values). We all live in several different societies at the same time.



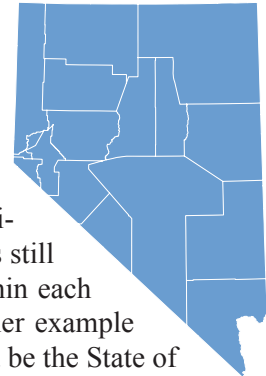
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moral values of each state generally reflect the values of the United States as a whole, there are distinctive differences that can be found. What may be legal in one state may be illegal in another. Marijuana laws are one example of this concept because they vary tremendously in different parts of the country. Possession of small amounts of marijuana is legal in some states, a citation offense in some, a misdemeanor in others, and is still a felony in several. The consensus of the citizens within each state is what motivates differences in the laws. Another example of how moral values can vary from state to state would be the State of Nevada. Nevada is the only state that allows for legalized prostitution in the form of brothels in some parts of the state. All of the other forty-nine states have laws making all forms of prostitution illegal.

The smaller the society that we are a part of, the more agreement there is in relation to our moral values. The society of our local community is more harmonized as to our moral values than the larger societies, and local laws reflect this consistency. The smallest society that we are a part of is the most influential and generally the most cohesive when it comes to our moral values. This is the society of our family. The family is where we shape our individual values and they are influenced by the way we are raised. Our overall perception of what constitutes right and wrong is fashioned and reinforced by our parents or guardians as we grow up. While these values can change over time, they influence the decisions we make throughout our lives and ultimately become an integral part of the larger societies that we become a component of.



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To summarize, we can see that the notion of justice in the United States is greatly influenced by the diverse ideals that make up the social justice concepts within the various societies that we live. It is therefore critical that our criminal justice system remain fluid and adaptable to keep up with the changes that take place within the different levels of the societies in which we all live.



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## SOCIAL CONTRACT

The term **social contract** refers to an implied agreement between citizens and their government as a way of maintaining social order. The people make a trade-off by giving up some of their rights to a government in return for being able to benefit from a greater social order. The concept of the social contract provides the rationale behind the historically important notion that legitimate state authority must be derived from the consent of the governed.<sup>5</sup> To put this in simple terms, the concept of social justice means that all of the citizens of a society agree to allow

### Social Contract

The social contract is an implied agreement between citizens and their government as a way of maintaining social order.

the government to represent them and to make the laws of that society. In return, each citizen is expected to obey those laws in order to obtain the benefits provided by the formation of social structures.

The government establishes laws that represent the norms of the society, and any person who violates any of these laws violates the social contract and must be punished in order to restore order.

## DUE PROCESS VS. CRIME CONTROL



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VERSUS



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### Herbert L. Packer

Herbert L. Packer (1925–1972) was a Professor of Law at Stanford University who wrote the paper “Two Models of the Criminal Process” in 1964.

### Crime Control Model

This model is based on the proposition that crime must be controlled at all cost in order to have a safe society. In this model the rights of the many (society) outweigh the rights of the few (those who are accused of crime).

In 1964, **Herbert L. Packer** published a paper entitled “Two Models of the Criminal Process.”<sup>6</sup> This paper has become a standard among criminal justice scholars and students in the debate over the best way to control crime and criminals within our society. The two models are called the “crime control model” and the “due process model.” The **crime control model** is based on the proposition that crime must be controlled at all costs in order to have a safe society. Packer says of this model that: “The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom.”<sup>7</sup> The **due process model** is designed to protect the rights of the individual who is accused of a crime and make sure that all legal resources and protections are available and utilized. These rights and protections are designed to present a formidable obstacle to the government and the criminal justice system when trying to prosecute those charged with a criminal act.

The basic premise of the crime control model is speed and efficiency. This model says that it is more important to protect society as a whole against the injury caused by criminals than to protect the single person who committed that injury. Society must be able to live in safety and in order to do this we must effectively