Chapter 4

The Rule of Law
Chapter Objectives

After completing this chapter, you should be able to:

- Distinguish between criminal law and civil law.
- Distinguish between substantive law and procedural law.
- List five features of “good” criminal laws.
- Explain why criminal law is a political phenomenon.
Chapter Objectives

- Summarize the origins of American criminal law.
- Describe the procedural rights in the Fourth Amendment.
- Describe the procedural rights in the Fifth Amendment.
- Describe the procedural rights in the Sixth Amendment.
- Describe the procedural rights in the Eighth Amendment.
- Explain why procedural rights are important to those accused of crimes.
There are two types of law practiced in the United States:

- Criminal law
- Civil law
A crime is a violation of the penal code.  
- **Penal Code**: The criminal law of a political jurisdiction.

A tort is a violation of the civil law.  
- **Tort**: A violation of the civil law.  
- **Civil Law**: A means of resolving conflicts between individuals. It includes:
  - personal injury claims (torts)  
  - the law of contracts and property  
  - subjects such as administrative law and the regulation of public utilities
Substantive versus Procedural Law

There are two types of criminal law:

- **Substantive law**
  - laws that prohibit and penalize murder, rape, robbery, and other crimes

- **Procedural law**
  - laws that are concerned with due process of law
Substantive Law, Procedural Law and Due Process of Law

- **Substantive Law**: The body of law that defines criminal offenses and their penalties.

- **Procedural Law**: The body of law that governs the ways in which the substantive laws are to be administered; it is sometimes called adjective or remedial law.

- **Due Process of Law**: The rights of people suspected of or charged with crimes.
Legal scholars identify five features that all “good” criminal laws ideally ought to possess.

- **Politcality**: Violations of rules made by the state.
- **Specificity**: Providing strict definitions of specific acts.
- **Regularity**: Applied to all persons regardless of social status.
- **Uniformity**: Enforced against any violators regardless of social status.
- **Penal Sanction**: And subject to punishment or threatened punishment by the state.
### Table 4.1 Five General Types of Penal Sanctions

<table>
<thead>
<tr>
<th>Type</th>
<th>Purpose</th>
<th>Focus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Punishment</td>
<td>Prevent undesired conduct. Provide retribution (“an eye for an eye”).</td>
<td>Offending conduct</td>
</tr>
<tr>
<td>Restitution</td>
<td>Make the victim “whole again” by having the offender directly or indirectly pay the victim.</td>
<td>Crime victim</td>
</tr>
<tr>
<td>Compensation</td>
<td>Make the victim “whole again” by having the state pay for damages to the victim.</td>
<td>Crime victim</td>
</tr>
<tr>
<td>Regulation</td>
<td>Control future conduct toward the best interests of the community (e.g., making it a crime or traffic violation to operate a motor vehicle with a blood alcohol content higher than a specified level).</td>
<td>The entire community</td>
</tr>
<tr>
<td>Treatment or rehabilitation</td>
<td>Change the offender’s behavior and, perhaps, personality.</td>
<td>Criminal offender</td>
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Criminal law is a political phenomenon, created by human beings to regulate the behavior of other human beings. Nothing is criminal or delinquent in and of itself; only the response of the state makes it so.
Origins of Laws

- Written laws are only about 5,000 years old.

- Prior to that, societies were governed by rigid customs, and crimes of violence were resolved through bloody personal revenge.

- The first known written laws have been found on clay tablets among the ruins of Ur, one of the city-states of Sumeria.

- The laws attempted to free poor people from abuse by the rich, and everybody from abuse by the priests.
Origins of Laws

- Around 2200 B.C.E., the Babylonian king **Hammurabi** created the first great code of laws, with 285 laws.

- After the Norman conquest of England in 1066, William I proclaimed himself king and declared that all land, land-based rights, and the administration of justice were vested in the king.
England’s Contribution to American Criminal Law

- The eyre was created in the 12th century
  - A group of traveling judges who ensured the king received his portion of property forfeited as punishment.
  - The eyre heard *common pleas*—disputes between citizens.
  - The common-plea decisions formed the body of legal precedent that became known as common law.
  - Common law became the basis of statutory law in England and later in the United States.
England’s Contribution to American Criminal Law

- In 1215, powerful nobles forced King John to sign the Magna Carta (the Great Charter), which subjected the king to the nation’s laws.

- The Magna Carta not only created the idea of the rule of law, but also formed the basis of what would later be called due process of law.
Creating Criminal Laws in the United States

- In the United States, criminal laws are
  - created by legislative bodies
  - affected by common law or case law interpretation by courts, and by administrative or regulatory agency decisions
Constitutions and Legislative Bodies

- The U.S. Constitution created Congress and gave it lawmaking power.

- The Bill of Rights describes procedural laws that dictate how substantive laws are to be administered.
Constitutions and Legislative Bodies

- Congress enacts federal statutes.
- State legislatures enact state statutes.
- Municipalities, such as cities, enact laws generally called ordinances.
- Statutes and ordinances apply only in the particular jurisdiction in which they were enacted.
Common Law

- Common law, also called case law, is a by product of decisions made by trial and appellate court judges, who produce case law whenever they render a decision in a particular case, creating **precedent**.

- **Precedent**: A decision that forms a potential basis for deciding the outcomes of similar cases in the future.
Because of the principle of *stare decisis*, much of the time criminal lawyers spend preparing for a case is devoted to finding legal precedent for their arguments.
Administrative or or Regulatory Agency Decisions

- Administrative or regulatory agencies are created by lawmaking bodies and in turn create rules and regulations that have the force of law.

- Violations are generally handled through civil law proceedings.
Although federal and state criminal statutes are essentially independent of one another, provisions of the Constitution always take precedence over state statutes.
Most of the procedural rights given to criminal suspects or defendants in the United States are found in the Bill of Rights.

Others are found in:
- Federal and state statutes
- State constitutions
- Federal or state rules of criminal procedure
The Bill of Rights

- The ink was barely dry on the new Constitution before critics attacked it for not protecting the rights of the people.

- The first Congress quickly proposed a set of 12 amendments, 10 of which were ratified by the states and became known as the Bill of Rights.
The 12 Provisions in the Bill of Rights Applicable to the Criminal Justice Process

<table>
<thead>
<tr>
<th>Procedural Right</th>
<th>Amendment</th>
</tr>
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<tbody>
<tr>
<td>1. Freedom from unreasonable searches and seizures</td>
<td>Fourth</td>
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<tr>
<td>2. Grand jury indictment in felony cases*</td>
<td>Fifth</td>
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<tr>
<td>3. No double jeopardy</td>
<td>Fifth</td>
</tr>
<tr>
<td>4. No compelled self-incrimination</td>
<td>Fifth</td>
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<tr>
<td>5. Speedy and public trial</td>
<td>Sixth</td>
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<td>6. Impartial jury of the state and district where crime occurred</td>
<td>Sixth</td>
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<td>7. Notice of nature and cause of accusation</td>
<td>Sixth</td>
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<td>8. Confront opposing witnesses</td>
<td>Sixth</td>
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<tr>
<td>9. Compulsory process for obtaining favorable witnesses</td>
<td>Sixth</td>
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<tr>
<td>10. Counsel</td>
<td>Sixth</td>
</tr>
<tr>
<td>11. No excessive bail and fines*</td>
<td>Eighth</td>
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<tr>
<td>12. No cruel and unusual punishment</td>
<td>Eighth</td>
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The Fourteenth Amendment and the Selective Incorporation of the Bill of Rights

The Fourteenth Amendment was ratified in 1868. It reads in part:

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.
Before the passage of the Fourteenth Amendment, the Bill of Rights applied only to people charged with federal crimes.

In the early 1960s, the Supreme Court, headed by Chief Justice Earl Warren, began making the procedural safeguards of the Bill of Rights applicable to the states.

The Supreme Courts of the 1970s, 1980s, 1990s and the first few years of the twenty-first century have gradually reversed or altered those decisions.
The Fourth Amendment

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 person or things to be seized.
The Fourth Amendment protects individual privacy against certain types of governmental interference.

It does not provide a general “right to privacy.”

The procedural rights in the Fourth Amendment concern the legality of searches and seizures and the question of what to do with evidence that is illegally obtained.
Searches and Seizures

- **Searches**: Explorations or inspections, by law enforcement officers, of homes, premises, vehicles, or persons, for the purpose of discovering evidence of crimes or persons who are accused of crimes.

- **Seizures**: The taking of persons or property into custody in response to violations of the criminal law.
According to the Supreme Court, the Fourth Amendment allows two kinds of searches and seizures:

- Those made with a warrant.
- Those made without a warrant.

**Warrant:** A written order from a court directing law enforcement officers to conduct a search or to arrest a person.
Arrest

The seizure of a person or the taking of a person into custody, either actual physical custody, as when a suspect is handcuffed by a police officer, or constructive custody, as when a person peacefully submits to a police officer’s control.
Searches and seizures conducted with a legal warrant are generally considered reasonable under the Fourth Amendment.

What is “reasonable” in a warrantless search did not become clear until the 1960s.
Probable cause for a search warrant requires substantial and trustworthy evidence to support two conclusions:

1. That the specific objects to be searched for are connected with criminal activity; and
2. that the objects will be found in the place to be searched.
The Fourth Amendment requires that a search warrant contain a particular description of the place to be searched and the person or things to be seized.

Search warrants are required to be executed in a reasonable amount of time, and in some jurisdictions during certain hours of the day.
Generally, before law enforcement officers may enter a place to conduct a search, they must first announce that:

- They are law enforcement officers
- They possess a warrant
- They are there to execute the warrant
If in the course of conducting a legal search, officers discover *contraband* or evidence of a crime not covered by the warrant, they may seize it without getting a new warrant.

*Contraband*: An illegal substance or object.
Arrests With a Warrant

- Generally, an arrest warrant is legally required when law enforcement officers want to enter private premises to make an arrest.

- An arrest warrant is issued if substantial and trustworthy evidence supports two conclusions:
  - A violation of the law has been committed.
  - The person to be arrested committed the violation.
The Supreme Court has allowed warrantless searches in some circumstances:

- Incident to an arrest, police may search the area within the suspect’s immediate control, including an automobile, and may seize contraband or evidence in plain view.
- In emergency situations.
- If a suspect consents to a search.
Arrests Without a Warrant

- Officers may enter a private home to make a warrantless arrest only if the offense is serious and there are exigent circumstances, such as:
  - Likely destruction of evidence
  - Hot pursuit
Standards of Proof

- Probable cause is one among a number of standards of proof for various criminal justice activities.

- The amount of proof necessary depends on the activity in question.
**Standards of Proof**

- **Mere suspicion** is the standard of proof with least certainty.
  - A “gut feeling.” With mere suspicion, a law enforcement officer cannot legally even stop a suspect.

- **Reasonable suspicion** has greater certainty.
  - With reasonable suspicion, a law enforcement officer is legally permitted to stop and frisk a suspect.
Reasonable Suspicion
Frisk

- **Reasonable Suspicion:** A standard of proof that is more than a gut feeling.
  - It includes the ability to articulate reasons for the suspicion.

- **Frisk:** Conducting a search for weapons by lightly patting the outside of a suspect’s clothing, feeling for hard objects that might be weapons.
Standards of Proof

**Probable Cause:** The amount of proof necessary for a reasonably intelligent person to suspect that a crime has been committed or that items connected with criminal activity can be found in a particular place.

- Law enforcement officers must have some tangible evidence that a crime has been committed.
The line between probable cause and reasonable suspicion, or even mere suspicion, is a fine one and a matter of interpretation.

Responsibility for determining whether a standard of proof has been met lies with criminal courts and judicial officers.
Standards of Proof

**Preponderance of Evidence:** Evidence that outweighs the opposing evidence, or sufficient evidence to overcome doubt or speculation.

- This is the standard of proof required in a civil lawsuit.
- It is used in determining whether the inevitable-discovery rule applies.
Standards of Proof

Clear and Convincing Evidence: The standard of proof required in some civil cases and, in federal courts, the standard of proof necessary for a defendant to make a successful claim of insanity.

Beyond a Reasonable Doubt: The standard of proof necessary to find a defendant guilty in a criminal trial.
The Exclusionary Rule

- The exclusionary rule was created by the Supreme Court in 1914, and extended to state courts in 1961.

- The rule that illegally seized evidence must be excluded from trials in federal courts.

- The exclusionary rule originally had three purposes:
  - To protect individual rights from police misconduct.
  - To prevent police misconduct.
  - To maintain judicial integrity.
In the late 1970s, as Americans became alarmed about what they perceived as a substantial number of criminals escaping punishment because of technicalities, the exclusionary rule was weakened.

The **good faith exception** states that as long as the police act in good faith when they request a warrant, the evidence they collect may be used in court, even if the warrant is illegal or defective.

The **inevitable-discovery exception** states that evidence obtained illegally can be used at trial if the information inevitably would have been discovered by lawful means.
The PATRIOT Act

- The PATRIOT Act gives broad new powers to the FBI, CIA, and other United States foreign intelligence agencies.

- The law eliminates checks and balances on those powers such as judicial oversight, public accountability, and the ability to challenge government searches in court.

- Under the act, the FBI no longer needs probable cause to conduct wiretaps of criminal suspects when a “significant purpose” is gathering intelligence.
The Fifth Amendment

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 offense 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.
The right to a grand jury indictment in felony cases is one of two Bill of Rights guarantees that has not yet been extended to the states.

The protection against double jeopardy has been extended to the states.

The trying of a defendant for a second time for the same offense when jeopardy attached in the first trial and a mistrial was not declared.
Protection Against Compelled Self-Incrimination

Arguably the most important procedural safeguard in the Fifth Amendment is the protection against compelled self-incrimination.

The protection is based on the belief that confessions made involuntarily may not be truthful.
Self-incrimination and Confessions

- **Self-Incrimination**: Being a witness against oneself.
  - If forced, it is a violation of the Fifth Amendment.

- **Confessions**: An admission by a person accused of a crime that he or she committed the offense charged.
Protection Against Compelled Self-Incricimation

- The protection also expresses an intolerance for certain methods used to extract confessions.

- This is based on the Supreme Court’s **doctrine of fundamental fairness**.
  
  **Doctrine of Fundamental Fairness:** The rule that makes confessions inadmissible in criminal trials if they were obtained by means of either psychological manipulation or “third-degree” methods.
In *Miranda v. Arizona* (1966) the Court broadened the protection against compelled self-incrimination to cover nearly all custodial police interrogations. Suspects must be notified of their specific rights or their confessions will not be admissible.
The Miranda ruling guaranteed that a suspect in custody must be warned prior to questioning that:

- He has the right to remain silent.
- Anything he says can be used against him in a court of law.
- He has the right to the presence of an attorney.
- If he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.
Protection Against Compelled Self-Incrimination

- The Fifth Amendment further applies to trial procedures:
  - A defendant does not have to answer any questions put to him by the prosecution during a trial.
  - A defendant does not have to take the witness stand in a trial.
  - The prosecution is forbidden from commenting on the defendant’s silence or refusal to take the stand.
The Sixth Amendment

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 defense.
The Sixth Amendment

Right to a Speedy and Public Trial

In determining what constitutes a speedy trial, the Supreme Court has created a balancing test that weighs both the defendant’s and the prosecution’s behavior.

The length of delay depends partly on the nature of the charge; a longer delay may be tolerated in more complex cases.
The Sixth Amendment

- **Right to a Speedy and Public Trial**
  - A public trial must be open to the public, but not necessarily to all who want to attend.
  - A trial may be closed to the public if the defendant’s right to a public trial is outweighed by “a compelling state interest.”
The Sixth Amendment

- Right to Impartial Jury of the State and District Wherein the Crime Shall Have Been Committed

- The right to an impartial jury promises:
  - That the jury will be unbiased.
  - That there will be a jury trial.

- The Supreme Court has interpreted this to mean that defendants charged with felonies or with misdemeanors punishable by more than six months’ imprisonment are entitled to a jury trial.
The Sixth Amendment

- Right to Impartial Jury of the State and District Wherein the Crime Shall Have Been Committed
  - The Sixth Amendment guarantees the trial’s venue.
  - A defendant can ask for a change of venue, for example, because of adverse publicity.
The Sixth Amendment

- Right to be Informed of the Nature and Cause of the Accusation
  - The right to notice and a hearing is the very core of what is meant by due process.
  - This right prevents the practice, common in some countries, of holding suspects indefinitely without telling them why they are being held.
Right to Confront Opposing Witnesses

- Defendants have the right to:
  - Be present during their trials, and
  - Cross-examine witnesses against them.
- Defendants can forfeit this right by disrupting the trial.
Right to Compulsory Process for Obtaining Favorable Witnesses

Defendants have the right to use the subpoena power of the court to compel the testimony of any witnesses who may have information useful to the defense.

**Subpoena:** A written order issued by a court that requires a person to appear at a certain time and place to give testimony.

It can also require that documents and objects be made available for examination by the court.
Right to Counsel

- The right to hire a privately retained lawyer did not exist in state courts until 1954.
- In federal courts, defendants who could not afford an attorney went without until 1938 when the Supreme Court first required the government to provide an attorney for a defendant facing felony charges.
- The right to an attorney paid for by the government was extended to state courts in 1963.
The Sixth Amendment

Right to Counsel

- The Sixth Amendment also guarantees the right to the “effective assistance of counsel.”

- Two facts must be proved to show counsel was ineffective:
  - That counsel’s performance was “deficient”
  - That the deficiencies in the attorney’s performance were prejudicial to the defense

- The right to counsel can be waived, but only if the waiver is made “knowingly, intelligently, and voluntarily.”
The Eighth Amendment

- Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
The Eighth Amendment

- Protection Against Excessive Bail and Fines
  - The protection against excessive bail and fines is the second Bill of Rights guarantee that has not been extended to the states.
  - The Eight Amendment does not require that bail be granted to all suspects or defendants.
Protection Against Excessive Bail and Fines

What constitutes excessive bail is determined by:

- The nature and circumstances of the offense.
- The weight of evidence against the suspect or defendant.
- The character of the suspect or defendant.
- The ability of the suspect or defendant to pay bail.

The seriousness of the crime determines whether a fine is excessive.
The Eighth Amendment

- Protection Against Cruel and Unusual Punishments
  - For about 120 years after the adoption of the Bill of Rights, the Supreme Court interpreted “cruel and unusual punishments” based on practices that were authorized when the amendment was adopted (1791).
  - Punishments that were prohibited involved torture, unnecessary cruelty, and lingering death.
The Eighth Amendment

- **Protection Against Cruel and Unusual Punishments**
  - The definition of cruel and unusual punishment was changed in 1910.
  - The Supreme Court determined that:
    - The meaning of the Eighth Amendment is not restricted to the intent of the Framers.
    - The Eight Amendment bars punishments that are excessive.
    - What is excessive is not fixed in time but changes with evolving social conditions.
The legal system of the United States is unique in the world in the number of procedural rights that it provides people suspected or accused of crimes.

However, people continue to be victims of miscarriages of justice.
A study of wrongful conviction determined that 0.5% of all felony convictions were in error.

Consider that in 2009, approximately 7 million people were arrested in the U.S. That could mean 35,000 people wrongfully convicted.
The most important factors contributing to wrongful convictions are:

- Eyewitness misidentification.
- Police errors.
- Prosecutorial errors.
- Guilty pleas made by innocent defendants who are offered plea bargains or are mentally incompetent.
Despite wrongful convictions, many people still resent the provision of procedural safeguards to criminal suspects, particularly the exclusionary rule.

A study by the National Institute of Justice found that:

- Fewer than 0.5% of felony cases reaching the courts were dismissed because of the exclusionary rule.
- Less than 1% of cases were dropped before trial.
Many people resent the Miranda mandates, and think that many guilty criminals are allowed to escape punishment.

A large study found that fewer than 1% of all cases were thrown out because of confessions illegally obtained.