

# Chapter 1

## Sources of Criminal Law

### CHAPTER OBJECTIVES

**Upon completion of this chapter, you will be able to:**

- Understand the origins of criminal law.
- Explain the differences between civil and criminal law.
- Define the term *crime* and the theories of punishment associated with it.
- Identify the classifications of crimes.
- Discuss jurisdiction in criminal law.

Criminal law is the area of law that is perhaps most familiar to the layperson. Television shows that are based in criminal law blanket the television networks. Salacious criminal trials such as those for O.J. Simpson and Michael Jackson are plastered across the news. Ordinary citizens are asked to serve on jury trials that deal with people being tried for committing crimes. With this exposure, people have become familiar with the basic aspects of criminal law. This chapter will seek to supplement the paralegal student's basic knowledge of criminal law and provide an overview of this important area of the law.



### A DAY IN THE LIFE OF A REAL PARALEGAL

Tony is a public defender who is working for the county. Sarah is Tony's paralegal. Tony does not know what he would do without Sarah's assistance. She is invaluable to him not just for her expertise, but also because she works well with his style of practicing law. For example, Tony was just in trial in the county courthouse on a fairly well-publicized murder case. Tony was arguing a point of law that had recently been cited in the Supreme Court and Tony felt that he was making his point to the judge. He was caught up in the heat of his argument when the judge interrupted him to inquire if Tony had a copy of the case that he was arguing. Tony explained to the judge that he did not but that he could get one. The judge recessed the trial for lunch and told Tony to bring a copy of the case back with him after lunch. Tony did not panic. He knew that Sarah would be there for him. Tony called Sarah on his cell phone. Sarah knew the case that Tony was referring to as she had just helped him research it a couple of days before. Sarah asked Tony, "When do you need this by?" Tony told her 20 minutes and that she needed to bring a copy of the case to the courthouse. After uttering some expletives, Sarah said she would see him in a few minutes. Sarah proceeded to rapidly pull the case up on her computer and print it out. She made several copies just in case Tony needed them, got in her car, and raced to the courthouse. Sarah arrived just as the judge was calling the court into session. Tony was relieved. He handed the judge and the opposing party the case. The next day, when the judge made her ruling, she stated that she was basing her ruling on the precedent set by the case that Tony had been arguing. Thanks to Sarah's fast reaction to Tony's request, Tony was successful in court.

## ORIGINS OF CRIMINAL LAW

Criminal law develops from the customs and traditions of people in a society. Those customs and traditions represent the behavior that is considered acceptable for that society. Each society develops its own norms of behavior based on the customs and traditions of its people. Over time, these customs and traditions became more formalized as rules, and from these widely recognized rules developed **common law**. A common law **crime** is one that was defined and enforced by the judicial system of a society when there were no statutes to define the crime.

### common law

Judge-made law; the ruling in a judicial opinion.

### crime

Any act done in violation of those duties that an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public.

In the United States, most criminal law principles can trace their origins back to English common law (except in the state of Louisiana, where many of the state laws were based on French or Spanish legal concepts as a large proportion of the settlers in Louisiana were from those two countries). The State of Louisiana practices Napoleonic codified law. The English colonists brought their common laws with them when they came to the Americas. After the American Revolution, the initial 13 states adopted some of the English common laws, but most of the states enacted statutes that defined criminal acts and established criminal procedures. The statutes enacted by state legislatures have their roots in common law and form the basis of state statutes. A murder is still a murder; a burglary is still a burglary. However, the state legislatures codified and added elements to the state statutes in order to modernize them to fit the public need in that state. Criminal statutes and codes that have been enacted by the legislatures are referred to as **statutory law**. The United States also has enacted criminal statutes and these statutes can be located under the U.S. Criminal Code. Therefore, statutory law exists both at the state and federal levels.

### statutory law

Derived from the Constitution in statutes enacted by the legislative branch of state or federal government; primary source of law consisting of the body of legislative law.

Since the enactment of statutes by the initial 13 states, there are essentially no common law crimes in the United States. Federal criminal law is governed entirely by statute. All states have statutes, ordinances, or regulations that prohibit some type of action and label it criminal. State statutes are the primary source of criminal law and are usually referred to as penal codes.

### Constitution

The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, regulating functions of departments, and prescribing the extent to which a nation or state can exercise its powers.

### Bill of Rights

Set forth the fundamental individual rights government and law function to preserve and protect; the first ten amendments to the Constitution of the United States.

### case law

Published court opinions of federal and state appellate courts; judge-created law in deciding cases, set forth in court opinions.



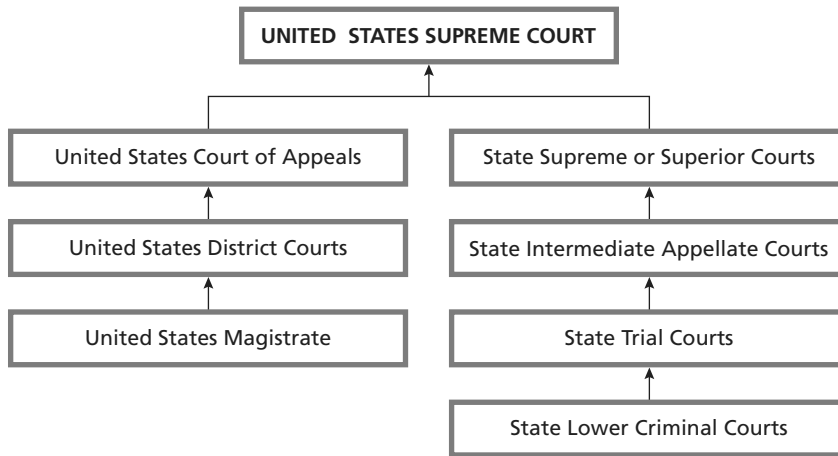
### RESEARCH THIS

The codification of criminal law has been present for thousands of centuries. One of the first known criminal codes was known as the Code of

Hammurabi. Research the Code of Hammurabi. What areas of law are covered in the code? How are victims addressed under the Code?

Statutory law is not the only law that governs criminal law. Both the U.S. **Constitution** as well as state constitutions set forth basic liberties to which all citizens are entitled. For example, the Sixth Amendment of the **Bill of Rights** guarantees a person who has been accused of a crime the right to a speedy trial. These rights as they are enumerated in the U.S. Constitution are available to all citizens of the United States. State constitutions also exist and the rights stated in each state's constitution are available to citizens of that particular state.

Another important area of criminal law is that of judiciary opinions or **case law**. Case law is law that is made based on the decisions of the court, usually the appellate or supreme courts of a state or of the federal government. A substantial portion of law is case law. Court or judiciary opinions are interpretations by the court of the meaning of constitutional provisions or statutes as they pertain to a particular case



**FIGURE 1.1**  
Criminal Court  
Structure



**PRACTICE  
TIP**

In 1962, the American Law Institute completed the Model Penal Code. The Model Penal Code was developed by a group of judges, lawyers, and scholars and was designed to codify as a single compilation the general criminal law of the United States. Since 1962, approximately two-thirds of the states have adopted criminal codes that reflect the guidelines set forth in the Model Penal Code. The Model Penal Code used now was last updated in 1981. It provides information on areas of criminal law and can be a great resource. However, the Model Penal Code is just that—a model. It is not to be cited as authority when writing legal documents or making legal arguments. It should be viewed as a reference and a guide.

being heard before them in court. Courts may be asked to interpret the meaning of the words in a code, the relationship between various codes as they pertain to the matter at hand, the legislative intent at the time the code was enacted, as well as whether or not a constitutional provision is violated by applying the code. The court will implement the doctrine of *stare decisis* when ruling on a particular matter. It will attempt to follow the decisions of higher courts that have ruled in similar matters. The doctrine of *stare decisis* advocates that accepting and applying established legal principles of cases that have been decided previously will help to provide security and certainty to the legal system. See Figure 1.1 for a Typical Criminal Law Structure.

**Administrative law** provides another source of criminal law. Administrative law is the body of law that regulates bureaucratic managerial procedures and is administered by the administrative agencies of the government. Administrative law defines the powers that are given to administrative agencies. This type of law will generally govern areas such as international trade, pollution, and taxation. For example, the Internal Revenue Service is an administrative agency that has been formed to govern the area of federal taxation. If you fail to pay your taxes, you have violated the administrative law as regulated by the IRS and you can be criminally prosecuted.

**Court rules** are used to provide standard procedures for handling the administration of cases as they proceed through the court system. They were developed to regulate processes in the court system that are not regulated by other types of law. Court rules regulate such items as how a case may be brought to court, the type of paperwork required during particular court processes as well as how a jury is selected. For most areas of court administration, a court rule exists to regulate it.

## DIFFERENCES BETWEEN CRIMINAL AND CIVIL

Criminal law differs from civil law in many ways. The most important difference is that crimes involve acts that are considered public wrongs. Criminal acts violate the norms of socially acceptable behavior and, therefore, are considered to be acts against the public even if the act was committed against an individual. In civil law, a violation is considered a private wrong. A private wrong deals with a violation of relationships between people. In a criminal case, a jury must determine an accused's guilt or innocence. The jury determines if the accused is guilty of the crime **beyond a reasonable doubt** before rendering a verdict. The burden of proof is on the prosecutor to prove the guilt of the defendant. In a civil matter, a jury or judge may determine whether or not a defendant is liable for the **damages** or injuries sustained by the injured party.

***stare decisis***

From the Latin, "stand by the decision." The judicial process of adhering to prior case decisions.

**FIGURE 1.2**  
**Criminal and Civil**  
**Law Comparison**

	<b>Criminal</b>	<b>Civil</b>
Type of violation	Public wrong	Private wrong
Category of responsibility	Guilt	Liability
Standard of proof	Beyond a reasonable doubt	By a preponderance of the evidence
Burden of proof	State/prosecutor	Plaintiff
Legal action initiation	Booking/arrest, complaint	Filing of a lawsuit
Initiator	People/public	Private individual/entity
Resolution	Dismissal, judgment/sentence	Judgment, settlement, dismissal
Remedy	Punishment	Money judgment

#### administrative law

The body of law governing administrative agencies, that is, those agencies created by Congress or state legislatures, such as the Social Security Administration.

#### court rules

Regulations with the force of law governing practice and procedure in the various courts.

#### beyond a

#### reasonable doubt

The requirement for the level of proof in a criminal matter in order to convict or find the defendant guilty. It is a substantially higher and more-difficult-to-prove criminal matter standard.

#### damages

Money paid to compensate for loss or injury.

#### preponderance of the evidence

The weight or level of persuasion of evidence needed to find the defendant liable as alleged by the plaintiff in a civil matter.

#### arrest

The formal taking of a person, usually by a police officer, to answer criminal charges.

#### booking

Administrative step taken after an arrested person is brought to the police station that involves entry of the person's name, the crime for which the arrest was made, and other relevant facts on the police blotter.

#### arraignment

A court hearing where the information contained in an indictment is read to the defendant.

#### defendant

The party against whom a lawsuit is brought.

The jury will determine liability by a **preponderance of the evidence**. It is up to the plaintiff in a civil action to prove that the defendant is liable.

In order to end up in court, a criminal law action must be initiated by an **arrest**, **booking**, charging, and **arraignment** of the accused person. A civil law action is initiated by the filing of a lawsuit in the court. In criminal law, the **defendant** always has to show up in court. In a civil action, the defendant might never show up in court.

Criminal actions are brought against the accused by the People. For example, criminal actions could be brought by the People of the State of California or the People of the United States. The action is brought by the People as it represents a wrong against the public and the public is referred to as *the People*. This differs from civil actions that are brought by private individuals and entities against other private individuals or entities, for example, *John Smith v. Ted Anderson* or *Mildred McConogue v. Bright Corporation*.

The attorney who is prosecuting a criminal action is called a prosecutor, district attorney, or attorney general, or has some other similar title as a person who represents the public interest. In a civil action, the prosecuting attorney is called the attorney for the **plaintiff**.

The attorney for the defendant in a criminal action can be a private attorney or a public defender. The attorney for the defendant in a civil action is usually a private attorney and is referred to as the attorney for the defendant.

In criminal law, the resolution of the action ends with a **dismissal**, **conviction**, **sentencing**, or **plea bargain**. In civil law, the resolution of the action is by **judgment**, **settlement**, or dismissal.

In a criminal action, the defendant faces some type of punishment, be it jail time, community service, or probation. In a civil action, the defendant usually faces a money judgment. (See Figure 1.2.)

## TORT VERSUS CRIME

A crime is not a tort. A crime is considered an offense against society as a whole. When a person is punished for committing a crime, he is punished for committing a wrong against society. For example, a person is being tried in state court for committing a murder. The prosecutor works for the state. The state represents the people or the public at large, not an individual. The interests of society are served when the offending person is punished for committing the crime. When a criminal case is being prosecuted, the rules of criminal procedure dictate how the case is to proceed. As stated previously, the burden of proof in a criminal case is on the prosecutor to prove the guilt of the defendant beyond a reasonable doubt. In a tort action, the burden of proof is the responsibility of the plaintiff and is by a preponderance of the evidence. The plaintiff must prove that the defendant is liable for their damage or injury.

A tort does have some similarities to crimes. For example, both are considered to be actions against societal utility or public policy. The intention of the perpetrator is

	<b>Torts</b>	<b>Crimes</b>
Purpose	To restore the victim back to whole/compensation	Punishment
Theory of offense	Offense to individual	Offense to society
Initiating party	The victim	The state
Verb/noun	Sue/suit	Try/trial
Category of responsibility	Liability	Guilt
Standard of proof	By a preponderance of evidence	Beyond a reasonable doubt
Procedural rules	Civil rules	Criminal rules
Domain of law	Civil	Criminal

**FIGURE 1.3**  
Torts versus Crimes

**plaintiff**  
The party initiating legal action.

**dismissal**  
An order or judgment finally disposing of an action, suit, motion, or other without trial of the issues involved.

**conviction**  
Results from a guilty finding by the jury in a criminal trial.

**sentencing**  
The post-conviction stage of the criminal justice process in which the defendant is brought before the court for imposition of sentence.

**plea bargain**  
The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval.

**judgment**  
The court's final decision regarding the rights and claims of the parties.

**settlement**  
A negotiated termination of a case prior to a trial or jury verdict.

at the heart of an action for both crimes and torts. In a crime, the question is whether the intent was malicious. In a tort, the intent is looked at slightly differently to determine if it is blameworthy. (See Figure 1.3.)

## DEFINING CRIME AND PUNISHMENT

Criminal law defines what constitutes a crime. Criminal law establishes what type of conduct is prohibited and what punishment may be imposed for violating its mandates. Criminal law establishes what degree of intent is required for criminal liability. In addition, criminal law sets out the defenses to criminal charges that may be asserted by the accused.

*Crime* is a broad term for violations of the law, punishable by the state, and codified by the legislatures. Crimes are typically distinguished by the following:

- A crime is an offense against society as a whole.
- Criminal defendants are prosecuted by the state, not by private parties.
- The penalties include fines, imprisonment, and, in some cases, death.
- Criminal law is primarily statutory law.
- A criminal act does not necessarily involve a specific victim.

It is possible for the same act to constitute both a crime and a civil action.

### CASE FACT PATTERN



O.J. Simpson used to be an all-star football player for the Buffalo Bills. He was beloved by millions of fans for his skill on the football field and his apparent image as a good guy. After his professional football career had ended, O.J. became a sportscaster as well as a spokesperson for many companies. O.J. was married to Nicole Simpson, and together they had two children. O.J. and Nicole's marriage became stormy, and eventually they divorced. There were rumors of abusive behavior toward Nicole by O.J. One night, Nicole Simpson and her friend, Ron Goldman, were brutally murdered on the front steps of Nicole's home in Brentwood, California. After an infamous low-speed chase down the freeways of Southern California, O.J. Simpson turned himself in to the police and was arrested for the murders. What followed was one of the most widely publicized court trials in California history, consummating in the acquittal of O.J. Simpson for the murders. However, once Simpson was acquitted at the criminal trial, the families of Nicole Simpson and Ron Goldman sued O.J. Simpson in civil court

for their wrongful deaths. After having been tried and acquitted in a criminal court, O.J. now faced similar charges in a civil court. In the criminal court, the jury could not find O.J. guilty beyond a reasonable doubt. Who could forget the famous line of Johnny Cochran, O.J.'s defense attorney, "If it doesn't fit, you must acquit," when referencing the fact that O.J.'s hand did not fit into the glove that was allegedly worn by the killer. In civil court, however, O.J.'s liability would be determined based on a different standard of proof: by a preponderance of the evidence. Under this standard, the jury had to determine if the evidence led them to conclude that it was more probable than not that O.J. committed the murders. O.J. was found liable by a preponderance of the evidence. The families of Nicole Simpson and Ron Goldman won a civil judgment against Simpson for millions of dollars for the wrongful deaths of Nicole and Ron. In the case of O.J., the same act led to both a crime and a civil action, but the two actions concluded very differently.

## THEORIES AND JUSTIFICATIONS OF PUNISHMENT

### deter

To turn aside, discourage, or prevent from acting.

The criminal law justice system uses punishment as a preventative tool. That is, it is hoped that the prospect of punishment (imprisonment, fines, even death) will **deter** criminal action. Several theories of punishment are used to penalize criminal behavior. Some of those theories are the following:

### incapacitation

Punishment by imprisonment, mutilation, or death.

- Specific deterrence seeks to discourage individuals already convicted of crimes from committing future crimes. The arrest and conviction of an individual shows that individual that society has the capability to detect when a crime has been committed and is willing to punish those who commit crimes.
- General deterrence attempts to deter all members of society from engaging in criminal activity. A general deterrence punishment may deter persons other than the criminal from committing similar crimes because they would be in fear of incurring the same type of punishment.

### rehabilitation

Restoring a person to his or her former capacity.

- **Incapacitation**, also referred to as restraint, serves to prevent criminal conduct by restraining those who have committed crimes. Criminals are restrained in jail or prison or are sometimes executed. Criminals who are restrained are incapable of causing harm to the general public due to the restraint. This theory is often the rationale for long-term imprisonment of individuals who are believed to be beyond **rehabilitation**.
- Rehabilitation is the theory that if society provides the opportunity, a criminal can be reformed into a person who, if returned to society, will conform his behavior to societal norms. The belief is that if the criminal is exposed to educational and vocational programs, treatment, counseling, and other measures, it is possible to alter the individual's behavior to conform to societal norms.

### retribution

Punishment based on just deserts.

- **Retribution** is yet another method of punishing criminals. Punishment through the criminal justice system is society's method of avenging a wrong. The idea that one who commits a wrong must be punished has been handed down from ancient times. Therefore, punishing those who harm others has the effect of promoting social order by preventing undesirable conduct.

In the United States, more than one million people each year are arrested for crimes and enter the criminal justice system. Paralegals specializing in criminal law may work for prosecutors, public defenders, private law firms, or attorneys specializing in criminal defense.

## CLASSIFICATION OF CRIMES

### malum in se

An act that is prohibited because it is "evil in itself."

Crimes can be classified by the type of conduct that is involved. Crimes that are classified by conduct fall into one of two categories: **malum in se** or **malum prohibitum**.

### malum prohibitum

An act that is prohibited by a rule of law.

Crimes that are considered malum in se are those crimes that are considered inherently evil. They are inherently evil either because they involve criminal intent as an element of the criminal action or because they involve a criminal action of **moral turpitude**. Examples of crimes that would be considered malum in se are murder, rape, robbery, burglary, arson, and larceny; they would be considered evils by society even if no law had been passed by the legislature making them prohibited.

### moral turpitude

An act or behavior that gravely violates the sentiment or accepted standard of the community.

That a crime is considered malum prohibitum means that the conduct is prohibited, but not necessarily inherently evil. The action is wrong only because the law prohibits it. For example, it is against the law to fail to pay money into a parking meter, but the act is not inherently evil.

Crimes also can be categorized by the punishment that the accused faces if convicted of the crime. When crime based on punishment is categorized, the various crimes fall into the following classifications:

- **Capital Felony**—the penalty for a capital felony is death in states that have a death penalty statute or life in prison with or without the possibility of parole in states that do not have a death penalty statute.
- **Felony**—a serious crime that carries a penalty of imprisonment for more than one year in a state prison and/or the assessment of fines.
- **Gross misdemeanor**—crimes that are punishable by imprisonment for six months to one year in a state jail and/or a fine.
- **Misdemeanor**—a less serious crime for which the penalty includes imprisonment for a period of less than one year and/or a fine.
- **Petty misdemeanor**—also known as a violation or an infraction, usually not considered crimes and are punishable by fines. Petty offenses or **infractions** are the least serious kind of criminal or quasi-criminal wrong and include offenses such as running a stop sign or a building code violation.

#### **felony**

A crime punishable by more than a year in prison or death.

#### **misdemeanor**

A lesser crime punishable by less than a year in jail and/or a fine.

#### **infraction**

A violation of a statute for which the only sentence authorized is a fine and for which violation is expressly designated as an infraction.

## JURISDICTION

### Federal

Jurisdiction is the power of a court to exercise its authority over a person or the subject matter of a particular case. Jurisdiction over the subject matter refers to the authority that a court has to decide matters of that type. For example, tax courts have jurisdiction over cases that have the subject matter of taxes. If a court does not have jurisdiction, then it has no authority to act on the matter. Federal **jurisdiction** is limited to certain types of crimes. If a federal law defines a certain type of action as a crime, then it is a federal crime.

Generally, criminal jurisdiction exists in federal courts for crimes that occur outside the jurisdiction of a state, crimes involving interstate commerce or communications, crimes interfering with the operation of the federal government or its agents, and crimes directed at citizens or property located outside of the United States. The federal government has extensive power to enact criminal codes that govern conduct in the District of Columbia, the territories, and federal courthouses, national parks, and other areas controlled by the federal government. The federal government also has the power to criminalize conduct by U.S. citizens abroad such as for treason. The federal government's authority to criminalize conduct also extends to ships and airplanes. For example, after the September 11, 2001, terrorist attacks on the World Trade Center and the

#### **jurisdiction**

The power or authority of the court to hear a particular classification of case.



### EYE ON ETHICS

Ethics is a very important part of law. As a legal assistant, you are an extension of the attorney who is your supervisor. It is always important to conduct yourself in the most ethical manner possible. Although unethical conduct by a legal assistant does not necessarily result in punishment to the legal assistant, it can lead to disbarment or other disciplinary action of the supervising attorney. Always conduct yourself under the same codes of ethical conduct that

apply to the attorneys for whom you work. For example, it is unethical for a paralegal to discuss the facts or nature of the cases that they are working on. This is especially true in the area of criminal law. Why? Because information of potential crime(s) that a client may or may not have committed is private information and could prejudice the client's case. It is important to keep all information confidential.



## SURF'S UP

The Internet provides a wealth of information concerning criminal law. There are many legal Web sites where you can find criminal law information. Some of these sites include

- [www.findlaw.com](http://www.findlaw.com).
- [www.alllaw.com](http://www.alllaw.com).
- [www.megalaw.com](http://www.megalaw.com).

Pentagon, the federal government began to place air marshals on airlines in order to arrest and prosecute persons who violate federal statutes while in the air.

## State

Every state has an inherent authority to promote and protect the health, safety, and welfare of its citizens. Typically, the state in which the crime was committed assumes jurisdiction over the accused and prosecutes the accused within its court system. The following are instances in which a state can assume jurisdiction over an accused:

- The offense is committed wholly or partly within the state.
- The conduct outside the state constitutes an attempt or conspiracy to commit an offense within the state, plus the offense is inside the state.
- The conduct within the state constitutes an attempt, solicitation, or conspiracy to commit, in another jurisdiction, an offense under the laws of both the state and such other jurisdiction.
- An offense based on the omission of performance of a duty imposed by the law of a state is committed within the state, regardless of the location of the accused at the time of the omission of the act.



## A DAY IN THE LIFE OF A REAL PARALEGAL

Paralegals who have knowledge of criminal law can find employment in a variety of capacities. Many work for private attorneys who are hired by their clients to represent them in criminal matters. District attorneys, prosecuting attorneys, and attorney general offices all hire paralegals to assist with legal work. A typical job duties description for a criminal paralegal might look like the following:

### PRIMARY DUTIES AND RESPONSIBILITIES

- Provides assistance in interviewing and research for attorneys.
- Conducts interviews with witnesses to prepare them for testifying in court.
- Compiles list of witnesses and submits for subpoenas to ensure appropriate witnesses are present at next hearing.
- Contacts witnesses to ensure attendance in court.
- Attends court hearings to assist attorneys with research and witnesses.
- Assists in drafting pleadings to have appropriate orders and documents ready for hearing.
- Coordinates the scheduling of expert witnesses to ensure testimony of appropriate experts at hearing.
- Performs preliminary screening and review of criminal complaints to prepare criminal charges in cases.

### SUPERVISORY RESPONSIBILITIES

This job has limited supervisory responsibilities. Provides work direction, training, and work oversight to law interns and clerical staff.



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## Summary

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Criminal law developed from the customs and traditions of people in a society. The customs and traditions represented the behavior that was considered acceptable for that society. Each society developed its own norms of behavior based on the customs and traditions of the people. Over time, these customs and traditions became more formalized rules and from these widely recognized rules developed common law. A common law crime is one that was created and enforced by the judicial system of a society when there were no statutes that defined the crime.

Criminal law differs from civil law in many ways. The most important distinction is that crimes involve acts that are considered public wrongs. Criminal acts violate the norms of socially acceptable behavior and, therefore, are considered to be acts against the public even if the act was committed against an individual. In civil law, a violation is considered a private wrong. A private wrong deals with a violation of relationships between people. In a criminal case, a jury must determine an accused's guilt or innocence. The jury determines if the accused is guilty of the crime "beyond a reasonable doubt" before rendering a verdict. In a civil matter, a jury or judge may determine whether or not a defendant is liable for the damages or injuries sustained by the injured party. The jury will determine liability by a "preponderance of the evidence."

Criminal law defines what constitutes a crime. Criminal law establishes what type of conduct is prohibited and what punishment may be imposed for violating its mandates. Criminal law establishes what degree of intent is required for criminal liability. In addition, criminal law sets out the defenses to criminal charges that may be asserted by the accused.

Specific deterrence seeks to discourage individuals already convicted of crimes from committing future crimes. The arrest and conviction of an individual show that individual that society has the capability to detect when a crime has been committed and is willing to punish those who commit crimes.

General deterrence attempts to deter all members of society from engaging in criminal activity. A general deterrence punishment may deter persons other than the criminal from committing similar crimes because they would be in fear of incurring the same type of punishment.

Incapacitation, also referred to as restraint, serves to prevent criminal conduct by restraining those who have committed crimes. Criminals are restrained in jail or prison or are sometimes executed. Criminals who are restrained are incapable of causing harm to the general public due to the restraint. This theory is often the rationale for long-term imprisonment of individuals who are believed to be beyond rehabilitation.

Rehabilitation is the theory that if society provides the opportunity, a criminal can be reformed into a person who, if returned to society, will conform her behavior to societal norms. The belief is that if the criminal is exposed to educational and vocational programs, treatment, counseling, and other measures, it is possible to alter the individual's behavior to conform to societal norms.

Retribution is yet another method of punishing criminals. Punishment through the criminal justice system is society's method of avenging a wrong. The idea that one who commits a wrong must be punished has been handed down from ancient times. Therefore, punishing those who harm others has the effect of promoting social order by preventing undesirable conduct.

Malum in se crimes are those crimes that are considered inherently evil either because they involve criminal intent as an element of the criminal action or because they involve a criminal action of moral turpitude. Examples of crimes that would be considered malum in se are murder, rape, robbery, burglary, arson, and larceny. They

would be considered evils by society even if no law had been passed by the legislature making them prohibited.

Malum prohibitum crimes involve conduct that is prohibited, but not necessarily inherently evil. The action is wrong only because the law prohibits it. For example, it is against the law to fail to pay money into a parking meter, but the act is not inherently evil.

A capital felony is a crime for which the penalty is death in states that have a death penalty statute or life in prison without the possibility of parole in states that do not have a death penalty statute.

A felony is a serious crime that carries a penalty of imprisonment for more than one year in a state prison and/or the assessment of fines.

A gross misdemeanor is a crime that is punishable by imprisonment for six months to one year in a state jail and/or a fine.

A misdemeanor is a less serious crime for which the penalty includes imprisonment for a period of up to six months and/or a fine.

A petty misdemeanor, also known as a violation or an infraction, is not usually considered a crime and is punishable by fines. Petty offenses or infractions are the least serious kind of criminal or quasi-criminal wrong and include offenses such as a traffic ticket or building code violation.

Generally, criminal jurisdiction exists in federal courts for crimes that occur outside the jurisdiction of a state, crimes involving interstate commerce or communications, crimes interfering with the operation of the federal government or its agents, and crimes directed at citizens or property located outside of the United States. The federal government has extensive power to enact criminal codes that govern conduct in the District of Columbia, the territories, and federal courthouses, national parks, and other areas controlled by the federal government. The federal government also has the power to criminalize conduct by U.S. citizens abroad such as for treason. The federal government's authority to criminalize conduct also extends to ships and airplanes.

Every state has an inherent authority to promote and protect the health, safety, and welfare of its citizens. Typically, the state in which the crime was committed assumes jurisdiction over the accused and prosecutes the accused within its court system.

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## Key Terms

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Administrative law	Incapacitation
Arraignment	Infraction
Arrest	Judgment
Beyond a reasonable doubt	Jurisdiction
Bill of Rights	Malum in se
Booking	Malum prohibitum
Case law	Misdemeanor
Common law	Moral turpitude
Constitution	Plaintiff
Conviction	Plea bargain
Court rules	Preponderance of the evidence
Crime	Rehabilitation
Damages	Retribution
Defendant	Sentencing
Deter	Settlement
Dismissal	<i>Stare decisis</i>
Felony	Statutory law

1. Where did common law criminal law first originate?
2. What is the function of criminal law in society?
3. List two types of crimes, not referenced in the text, that are *malum prohibitum*.
4. What is a crime?
5. What are the differences between a felony and a misdemeanor?
6. Define retribution and give an example.
7. What is the difference between general deterrence and specific deterrence?
8. What does the standard “beyond a reasonable doubt” mean? Provide an example.
9. How does the standard of proof of preponderance of the evidence differ from beyond a reasonable doubt?
10. List three job titles of attorneys who might prosecute a criminal case.

## Review Questions

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1. The Model Penal Code is not a source of law but a guide to criminal law. Locate the Model Penal Code. Research the definitions of a crime, murder, and sentencing in the Model Penal Code. Cite the sections of the Model Penal Code where you find those definitions.
2. You have learned how some actions can lead to both a criminal and a civil action against the defendant. Using whatever source available to you, locate another case that led to both a criminal prosecution and a civil action against the accused. Prepare an outline regarding the facts and findings of your case.
3. Locate the state statute in your state that imposes the strictest penalty for a criminal crime. Cite the statute and write a brief analysis of what it says.
4. Why is prosecuting the police officers in the Rodney King case in both federal and state court not double jeopardy? What U.S. constitutional amendment addresses the issue of double jeopardy?
5. Research three examples as to what may constitute a case belonging in federal court/jurisdiction rather than state jurisdiction.
6. Name three crimes that would belong to the classification of statutory criminals? What makes them statutory crimes?
7. Are criminals imprisoned for punishment or for rehabilitation? Explain your answer with supporting information.
8. What is malice aforethought? What is a layman’s explanation for what malice means?

## Exercises

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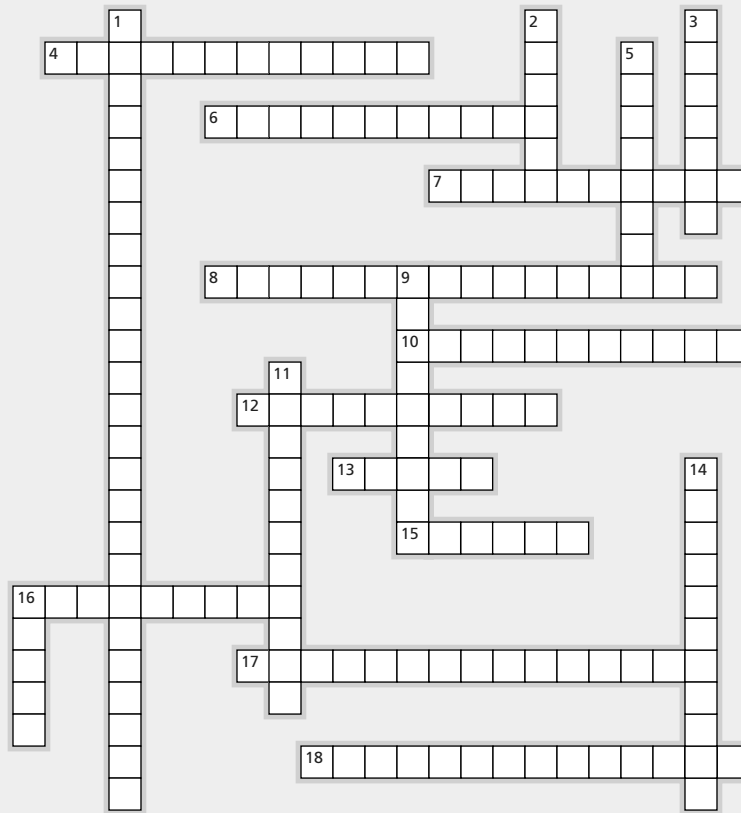


### PORTFOLIO ASSIGNMENT

The punishment set forth for a given crime is different in each state. One of the most heinous of crimes is murder with special circumstances, meaning a grievous murder that carries the harshest penalty. Some states punish this type of criminal with life imprisonment without the possibility of parole. Some states are death penalty states and will put this type of criminal to death. Research your state. Is your state one that imposes capital punishment?



## Vocabulary Builders



### Instructions

Use the key terms from this chapter to fill in the answers to the crossword puzzle.

NOTE: When the answer is more than one word, leave a blank space between the words.

### ACROSS

4. – the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval.
6. a wrong in itself, an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law.
7. an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to another.
8. a wrong prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law.
10. – procedure whereby the accused is brought before the court to plead to the criminal charge against him in the indictment or information.
12. the post-conviction stage of the criminal justice process in which the defendant is brought before the court for imposition of sentence.
13. a positive or negative act in violation of penal law.
15. a crime of a graver or more serious nature than those designated as misdemeanors.
16. the accused in a criminal case.
17. an act or behavior that gravely violates the sentiment or accepted standard of the community.
18. restoring a person to his or her former capacity.

### DOWN

1. the facts proven, must by virtue of their probative force, establish guilt.
2. to deprive a person of his liberty by legal authority.
3. – administrative step taken after an arrested person is brought to the police station, which involves entry of the person's name, the crime for which the arrest was made, and other relevant facts on the police blotter.
5. the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.
9. a person who brings an action
11. punishment based on just deserts
14. offenses lower than felonies and generally those punishable by fine, penalty, forfeiture or imprisonment otherwise than in penitentiary.
16. to turn aside, discourage, or prevent from acting.



## GIDEON V. WAINWRIGHT, 372 U.S. 335 (1963)

GIDEON v. WAINWRIGHT, CORRECTIONS DIRECTOR.  
CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 155.

Argued January 15, 1963.

Decided March 18, 1963.

Charged in a Florida State Court with a noncapital felony, petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him; but this was denied on the ground that the state law permitted appointment of counsel for indigent defendants in capital cases only. Petitioner conducted his own defense about as well as could be expected of a layman; but he was convicted and sentenced to imprisonment. Subsequently, he applied to the State Supreme Court for a writ of habeas corpus, on the ground that his conviction violated his rights under the Federal Constitution. The State Supreme Court denied all relief. Held: The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment. *Betts v. Brady*, 316 U.S. 455, overruled. Pp. 336–345.

Reversed and cause remanded.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under [372 U.S. 335, 337] Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill

of Rights by the United States Government." Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when *Betts v. Brady*, 316 U.S. 455, was decided by a divided [372 U.S. 335, 338] Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari. 370 U.S. 908. Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?"

### I.

The facts upon which *Betts* claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. *Betts* was indicated [sic] for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. *Betts* was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison. [372 U.S. 335, 339] Like Gideon, *Betts* sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. *Betts* was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. The Court said:

"Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." 316 U.S., at 462.

Treating due process as “a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,” the Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so “offensive to the common and fundamental ideas of fairness” as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts v. Brady* holding if left standing would require us to reject Gideon’s claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that *Betts v. Brady* should be overruled.

## II.

The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” We have construed [372 U.S. 335, 340] this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. *Betts* argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down “no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.” 316 U.S., at 465. In order to decide whether the Sixth Amendment’s guarantee of counsel is of this fundamental nature, the Court in *Betts* set out and considered “[r]elevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date.” 316 U.S., at 465. On the basis of this historical data the Court concluded that “appointment of counsel is not a fundamental right, essential to a fair trial.” 316 U.S., at 471. It was for this reason the *Betts* Court refused to accept the contention that the Sixth Amendment’s guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, “made obligatory upon the States by the Fourteenth Amendment.” Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was “a fundamental right, essential to a fair trial,” it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court. [372 U.S. 335, 341]

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in *Powell v. Alabama*, 287 U.S. 45 (1932), a case upholding the right of counsel, where the Court held that despite sweeping language to the contrary in *Hurtado v. California*, 110 U.S. 516 (1884), the Fourteenth Amendment “embraced” those “fundamental principles of liberty and justice which lie at the base of all our

civil and political institutions;” even though they had been “specifically dealt with in another part of the federal Constitution.” 287 U.S., at 67. In many cases other than *Powell* and *Betts*, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this “fundamental nature” and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment’s freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment’s command that [372 U.S. 335, 342] private property shall not be taken for public use without just compensation, the Fourth Amendment’s prohibition of unreasonable searches and seizures, and the Eighth’s ban on cruel and unusual punishment. On the other hand, this Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that “immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states” and that guarantees “in their origin . . . effective against the federal government alone” had by prior cases “been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption.” 302 U.S., at 324–325, 326.

We accept *Betts v. Brady*’s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is “fundamental and essential to a fair trial” is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that “the right to the aid of [372 U.S. 335, 343] counsel is of this fundamental character.” *Powell v. Alabama*, 287 U.S. 45, 68 (1932). While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

“We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.” *Grosjean v. American Press Co.*, 297 U.S. 233, 243–244 (1936).

And again in 1938 this Court said:

“[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure

fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). To the same effect, see *Avery v. Alabama*, 308 U.S. 444 (1940), and *Smith v. O'Grady*, 312 U.S. 329 (1941).

In light of these and many other prior decisions of this Court, it is not surprising that the *Betts* Court, when faced with the contention that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," conceded that "[e]xpressions in the opinions of this court lend color to the argument. . . ." 316 U.S., at 462–463. The fact is that in deciding as it did—that "appointment of counsel is not a fundamental right, [372 U.S. 335, 344] essential to a fair trial"—the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural

and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be [372 U.S. 335, 345] heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S., at 68–69.

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

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