

## CRMJ 2020 The American Legal System Spring 2018 Reaction Paper 2

**The reaction paper is due on Dropbox by 11:59PM on April 14, 2018.** Please write a reaction paper to the question below.

Formatting/general nature of the paper:

- Word document 4–5 pages long.
- At the top of the first page, indicate your name
- Double-spaced Times New Roman 12-point font with standard margins
- Pages numbered
- This involves research outside of the course materials. You must read the entirety of the opinions you reference and look up publications/articles commenting on the cases
- Use APA citation style. Look up APA citation style. **DO NOT USE** MLA or any style other than APA! Failure to abide by these instructions will severely hurt your grade. The minimum page length count is exclusive of the references page

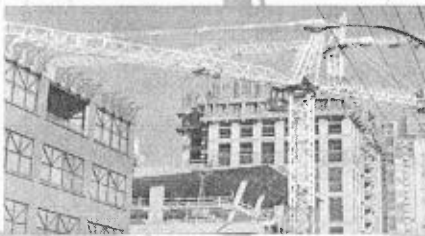
You have been taking this course for the past 14 Weeks. Please identify the pros and cons of the American legal system. How would you improve it? What would you drop or amend in the current legal system? What, if anything, would you borrow from other legal systems? Answering this course involves the material covered in the course and material from outside the course. Your answer (excluding title and reference pages) should not be shorter than 4 pages long. Do not manipulate the fonts or margins.

# CRMJ 2020

## The American Law & Legal Systems

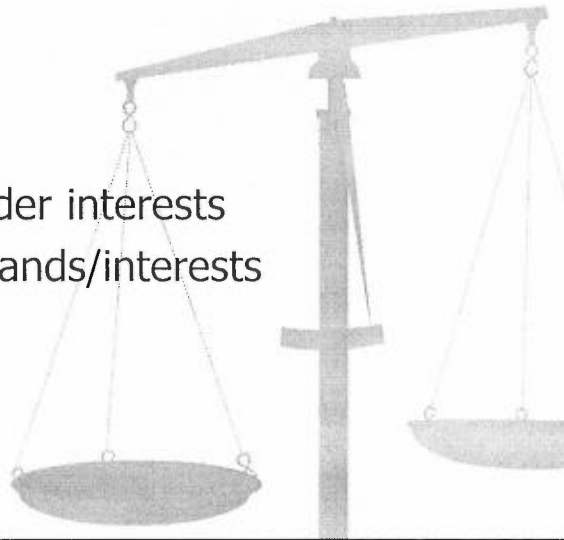
Chapter 1 Introduction  
Law in our Lives

### The function of Law in our Lives



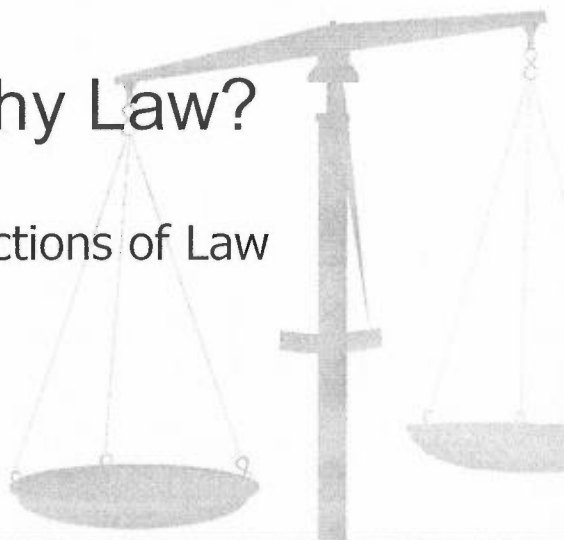
## Benefits

- Who gets what
- When
- How
- To advance/hinder interests
- competing demands/interests



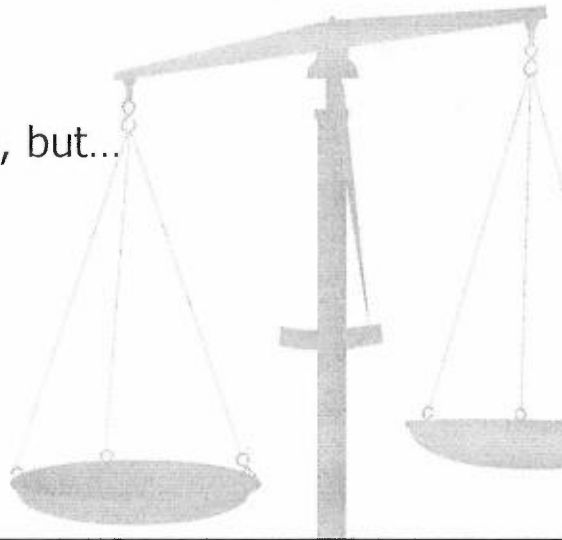
## Why Law?

Functions of Law



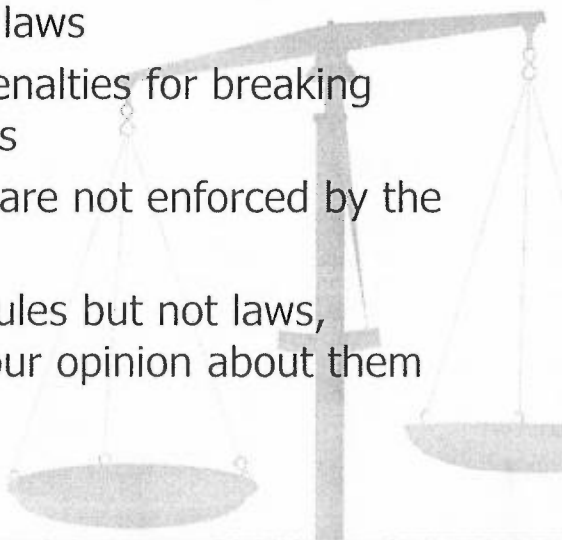
## Create New Programs

- Programs
- Bureaucracies
- General welfare, but...



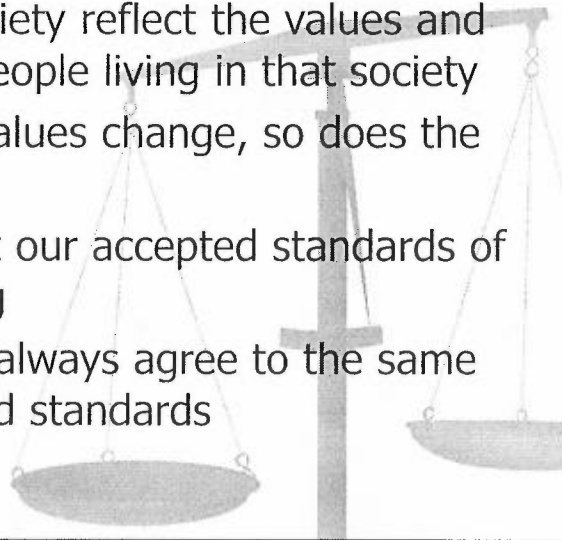
## Rules versus Laws

- Rules resemble laws
- There can be penalties for breaking established rules
- Rules however, are not enforced by the courts
- You can avoid rules but not laws, regardless of your opinion about them



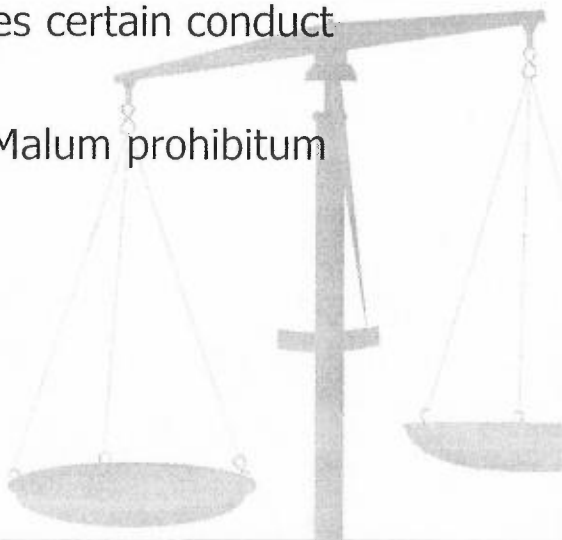
## Law and Morality

- The laws of society reflect the values and beliefs of the people living in that society
- As a society's values change, so does the law
- Our laws reflect our accepted standards of right and wrong
- Society cannot always agree to the same moral codes and standards



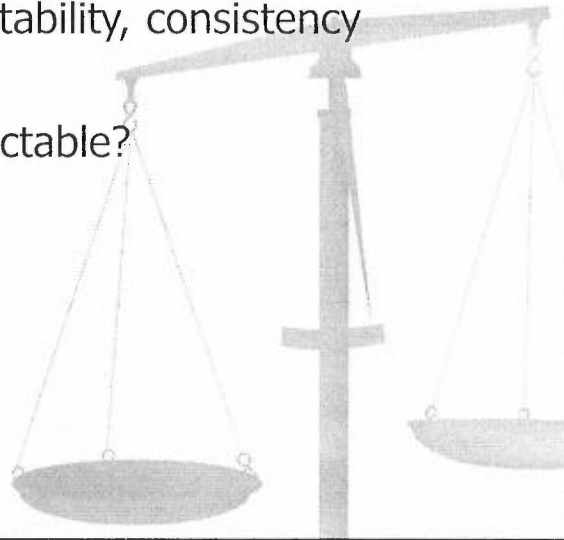
## Proscribes activities

- Bans/discourages certain conduct
- Malum in se v. Malum prohibitum



## Predictability

- Society needs stability, consistency
- Does it, really?
- Is the law Predictable?



## Sources of law

Natural Law



## Positive Law

Pure democracy  
Will of the people

## Sociological approach

- Reflects values, mores, culture
- These change over time

## Kinds of law

Substantive vs. Procedural  
Criminal vs Civil

## Constitutional Law

- A good constitution provides for
- Structure of gov't
- Place limitations
- List gov'tal powers
- Provide for amending process
  - But, there's one problem. What is it?



## Kinds of law (continued)

- Statutory
- Administrative
- Case
- Common

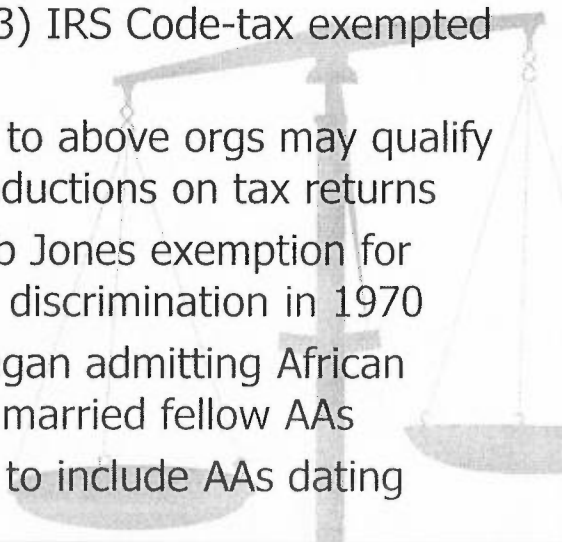


## Bob Jones University

v.

## United States

- Section 501(c)(3) IRS Code-tax exempted orgs
- S170 donations to above orgs may qualify as charitable deductions on tax returns
- IRS revoked Bob Jones exemption for practicing racial discrimination in 1970
- 1971-75 BJU began admitting African Americans who married fellow AAs
- 1975 expanded to include AAs dating other AAs



## BJU v US (continued)

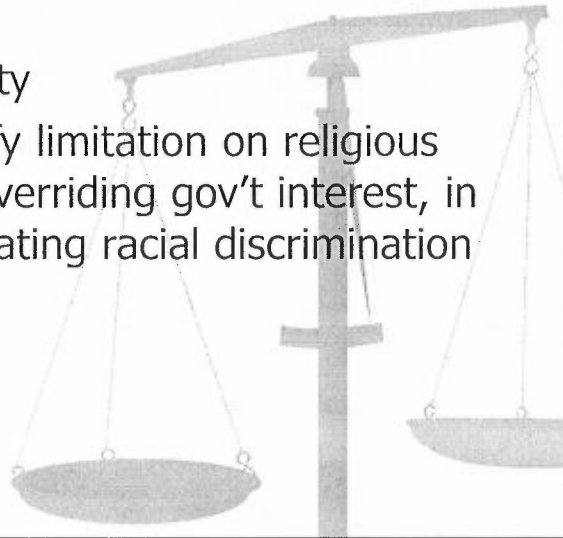
- BJU claims IRS had no authority to make the rule
- Also, BJU said S501 allowed tax exemption for orgs that operate for religious, charitable, scientific..OR educational purposes. And ruling violated First Amendment
- SCOTUS ruling: NO
- It would be against public policy

## BJU case

- Involved constitutional, statutory, regulatory, administrative, case, and common law

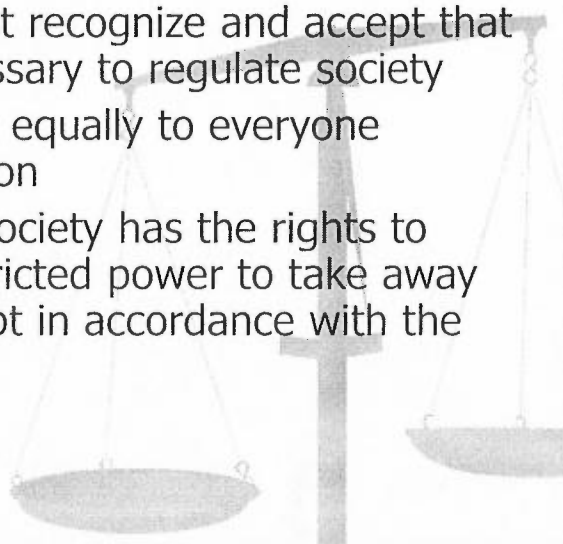
## BJU v US

- SCOTUS :
- IRS has authority
- Gov't may justify limitation on religious liberty due to overriding gov't interest, in this case eliminating racial discrimination in education



## Rule of Law

- Individuals must recognize and accept that the law is necessary to regulate society
- The law applies equally to everyone without exception
- No one in our society has the rights to exercise unrestricted power to take away our rights except in accordance with the law



## Law and Justice

- The ultimate goal of law is justice for all
- Ensuring equality for all may actually be unjust
- To ensure justice the idea is to treat like cases alike and different cases differently
- We consider a law unjust if it discriminates on the basis of irrelevant characteristics
- Justice is impartial

## Law and Justice

- We consider a law unjust if it discriminates on the basis of irrelevant characteristics
- Justice is impartial regardless of people's status
- The law itself should conform to society's values and beliefs

# CRMJ 2020

## Chapter 2 HISTORY AND THE LAW

### Introduction

- History of law-Law does not follow a straight chronological development
- Borrowing and adaptation

## Law through the ages

- Code of Hamurabi—2000 BCE

- Criminal law, law of contract

Egypt (3000-2500 BCE)-Centralized, judges, civil trials

### Hebrew Law

Based on concept of divine law, God being the source

The Talmud-an eye for an eye

No attorneys-parties conducted the trial

Judges presided

## Law Through The Ages

- Greeks 500-400 BCE

- Law was flexible to fit the situation
- Trial before the King
- Aristotle and Plato-role of law to maintain order and status quo
- Draco-all law should be punished alike

## Law through the ages

- Romans
  - Twelve Tables (450 BCE)
  - Elementary principles of dispute resolution
  - Disputes decided by patricians
  - Access controlled
  - Screening process later abolished
  - Cicero-Natural law,
  - 3 elements: legislation, administrative edicts, judicial reasoning
  - Justinian Code..Civil law
  - Canon law

## Civil Law countries

- Law intensely codified
- Decisions based on code
- Inquisitorial system-Judges active participants
- Judges specifically trained, not elevated from practicing attorneys
- Judges scour the legislation for governing principles
- Minimal oral arguments

## Other legal systems

- Socialist-- .eg PRC, (People's Republic of China) influenced by other systems
  - National security, economics, educate about the law
  - Mediation (China)
  - diminished
- Customary law
  - Includes international-
  - Sense of obligation
- Religious-no national boundaries; moral codes
  - Sharia-different forms, based on natural law
  - Canon
  - Hebrew
  - Hindu

## Other systems

- Hybrid systems-
  - EU
  - Louisiana
  - Quebec



## The Common Law

- Norman conquest of England ushered in a new legal system
- Move from self-help to organized systems
  - Public courts, oaths, decided by lords.
  - Criminal cases-12 freemen, trials by compurgation, ordeal
- The King's Court-Centralized legal system
  - Crimes became wrongs against the King
  - Fee system
  - Circuit judges

## Further Developments

- Ecclesiastical Courts
  - inheritance, marital issues
- The Exchequer
  - Taxation, revenue
- Court of Common Pleas
  - Mainly civil matters
- Court of the King's Bench
  - Criminal matters & Appeals from Court of Common Pleas
- The Chancery:
  - Headed by Chancellor, typically a cleric, initially merely did paper work for the government, including writs for courts
  - Writs-gave access to (common law) courts for a fee, selected appropriate court, directed the sheriff to summon defendant
  - evolved to supplement the law, where common law was inadequate, (e.g. damages were not the right remedy), Plaintiff couldn't afford writ fee, etc
  - It appealed to the Chancellor's conscience
  - Therefore became itself a Court of Equity, sufficiently flexible to provide fair remedies not available under the rigid common law structure
  - Injunction, new tool, along with specific performance, etc
- Ultimately, after 400 years, Common law and Equity Courts merged

## Coming to America

- Hodge podge laws from original countries of colonists and home grown over 400 years
- Common law dominated initially, but later all things British resented by colonists
- Revolution, Constitution, Bill of Rights
  - Provided for separation of powers
- Legislatures, instead of governors or judges, now became primary law makers
- Codes, rather than common law, began in the 1800s
  - But...judges still important figure in legal system
  - *Stare Decisis* is enduring legal principle inherited from the English common law
  - However, adversarial system means lawyers for both sides control the litigation
  - Judge more like a referee

## American Legal Profession

- Judges: selection
- Public/lawyers love-hate relationship
- Most lawyers have undergraduate degree preceding law degree
- Legal training mainly Socratic
- Legal system considered aloof
- No specialized training track

## Chapter 3

### Court Organization

#### Federalism

- 51 different court systems
  - Federal plus the 50 States
  - Variations allow the legislatures to structure their courts to meet their needs
  - Impacts substantive and procedural law

## Federal Court System

- Constitutional (Article III) Courts
- Life time appointments
- President appoints, Senate approves/rejects
- More prestige, higher pay
- Gen/specialized jurisdiction
- Currently 94 federal district courts
- 3 tiers
- Legislative Courts-
  - Created under other legislative powers of Congress
  - Mostly under Article 1
- Created by Congress-e.g. Bankruptcy, FISC
  - Judges have fixed appointment terms
  - Salary not protected

## State Court Systems

- Not uniform but some commonalities
- Court of limited jurisdiction
- Courts of general jurisdiction
- Appellate Courts

## Judicial Selection-Federal Courts

- POTUS nominates prospective appointee under Appointments Clause of Article II of the US Constitution
  - No constitutional or legal qualifications
  - President (informally) takes into account a number of factors
    - Gender, religion, ethnicity, region, race, ideology/philosophy
    - May consider Senator (Senatorial courtesy) at district court level & ABA views
  - Once candidate identified, subjected to background check by FBI and financial info review by Office of Government Ethics to screen for disqualifying info
  - Senate Judiciary Committee (18 members) holds confirmation hearings
  - Entire Senate votes on the candidate on a yes/no basis to confirm or reject the nominee under the “advise and consent” provision
  - Justice takes office only after President prepares and signs a commission and a seal of the DOJ is affixed to document

## State Courts

- Three Main Methods
  - Election-(1/2 of States) Partisan/Non-Partisan
    - Loophole-Governor appoints judge to replace retiring/resigning judge, who serves out remainder of term then runs as incumbent in subsequent election
  - Appointment
  - Merit Selection (Missouri Plan)
- However some states have mixed system
  - Appointment or election depending on level: Trial/Appeal Court

## Removal of Judges

- Judges typically removed for
  1. Illegal acts before/after taking office
    - simple: treated like any other defendant
  2. Abuse of office
  3. Senility or incompetence
    - More difficult situation

## Removal of Judges-Federal

- Article III Judges—Impeachment in House+Trial Conviction in Senate (only method to remove Art III judge)
  - Must fit under “Treason, Bribery, or other high crimes & misdemeanors”
- Requires simple majority in House & 2/3 in Senate
- Removal from Office & no federal employment
  - 15 Impeachment proceedings: 8 convictions, 4 acquittals, 3 resigned before proceedings completed (see Table 3.4)
  - Cumbersome process, especially trial in Senate
    - Judicial Councils Reform & Judicial Conduct & Disability Act 1980 provides for investigation of allegations against judges by committee of fed judges which may recommend actions by Judicial Council including Council removal of magistrate judges & Bankruptcy judges
- Does Impeachment threaten Judicial Independence?

## Methods of Removal of State Judges

- Impeachment-45 States
- Legislative address-incompetence, senility
- Recall
- Judicial Conduct Board/Commission
- *Williams-Yulee v. Florida Bar* (2015)



# CRMJ 2020 The American Legal System

## Chapter 4 Procedure and Evidence

### Civil Procedure

- Rule 1 Federal Rules of Civil Procedure
  - To secure the just, speedy and inexpensive determination of every action and proceeding
  - ADR-utilizing neutral 3<sup>rd</sup> parties to settle disputes outside litigation
  - Mediation-Court may mandate
  - Arbitration-Parties must agree. Decision is binding
  - ADR pros-reduces court burden; expeditious
  - ADR Criticisms-Limits access to courts; lower predictability



## Civil Procedure-the formal process

- Plaintiff files suit through a Complaint.
- Usually seeks damages-General/punitive
- May hire attorney on contingency fee basis
- Defendant is served with summons and copy of complaint
- Defendant files an Answer—demurrer
- Discovery-deposition/interrogatory/subpoena to produce physical evidence

## Procedure (slide 2)

- Motion for summary judgment where facts not in dispute
- Jury selection
  - Venire
  - Voir dire
  - Challenges: for cause/peremptory
- Trial commences
  - Standard: Preponderance
  - Opening statements
  - Plaintiff examines own witnesses
  - X-examination
  - Redirect
  - Defendant's turn
  - Closing statements

## Civil Procedure (slide 3)

- Rules
  - Hearsay
  - Leading questions
  - Objections, ruled upon
- Strategies
  - Plaintiff's role
  - Voluntary assumption of risk

## Procedure-Final Actions

- Motions-directed verdict
- Judge's charge to the jury-instructions
- Jury should be impartial;
  - Jury conduct/misconduct
- Verdict
  - General
  - Special issues

## Appeals

- Strict rules
  - Loser usually right to one appeal
  - Reversible v harmless error
  - Timely appeal
  - Notice-fees, service
  - Appellant files Principal brief
  - Appellee files their brief
  - Appellant may file reply brief
  - Optional: prehearing conference
  - Oral arguments-unless issues are very clear

## SCOTUS

- Original and appellate jurisdiction
  - Appellate-
    - Appeal of right
    - Writ of certiorari
    - Certification
- Opinions
  - Majority
  - Dissenting
  - Concurring
  - plurality

## Criminal Procedure

- Arrest
- Initial Appearance
- Preliminary Hearing/Grand jury/Information
- Arraignment-Pleas
- Trial-Standard of Proof
- Verdicts
- Appeal
- Habeas Corpus

## Rules of Evidence

- Adversarial
  - Judge/Jury
- Direct/Circumstantial
- Forms of evidence
  - Tangible evidence/oral testimony
- Witnesses-Competency
  - Experts-credibility
- Privilege-Spouse
- Hearsay-Exceptions
- Exclusionary Rule
- Scientific evidence: possibility of error, etc DNA

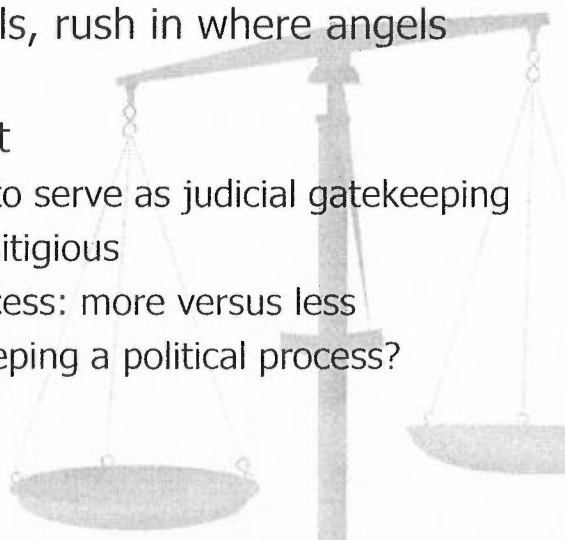
# The American Law & Legal Systems

## Chapter 5-Limitations



## Limitations

- Judges, like fools, rush in where angels fear to tread?
- Judicial restraint
  - Use discretion to serve as judicial gatekeeping
  - Americans are litigious
  - Question of access: more versus less
  - Judicial gatekeeping a political process?



## Standing

- Right to appear before court
  - Taxpayers' suits
  - *Frothingham v. Mellon*(1923)
  - However, *Flast v. Cohen*(1968) sufficient personal stake in outcome may satisfy requirement of adversariness by showing link between taxpayer status & congressional taxing& spending powers PLUS link between taxpayer status & specific constitutional limitation on congressional powers

## Mootness and Ripeness

- Courts tend to avoid controversial issues
- *DeFunis v.Odegaard*(1974) affirmative action case- Scotus avoided it by claiming mootness
- However in *Roe v.Wade*(1973) Court applied the "capable of repetition, yet evading review standard". This was an exception

## Ripeness

- SCOTUS prefers issues to be resolved by lower courts or alternative avenues
- Does not want to hear a case too soon
- Exceptions
  - Fit-factual facts developed
  - Would failure to review cause undue hardship on one of the parties
  - *Abbot Laboratories v. Gardner*

## Political question doctrine

- Courts defer resolution of political questions to executive or legislative branches
- Hands off policy tends to support the status quo

## Question political if

- Constitution clearly left issue to a coequal branch of government
- Judicial decision would embarrass nation diplomatically
- Court lacks manageable judicial standards to decide
- Court's decision would disrespect coequal branch
- Need to adhere to prior decision
- Issue involves policy decision properly belonging to non-judicial policy-makers

## Is it a Political Question?

- US v. Nixon-SC ruled that President use of "executive privilege" NOT Political Q
- However, in Massachusetts v Laird ruled that constitutionality of the Vietnam War was a PQ
- Powell v. McCormack-Congress refusal to seat House Rep not political
- Nixon v. U.S.-Senate's procedure in removing impeached judge was political



## Legal Limitations

### ■ Jurisdiction

- Geographic
  - Territory-municipal, county, state, circuit, etc
- Subject matter-types, pecuniary
- Personal or *in rem*
  - *In rem* jurisdiction-where property in question physically located
  - *In personum*-if party resides, is present, consents to be bound by laws of, (including conducting business in jurisdiction)
  - Quasi *in rem*-court may use assets (*in rem*) to satisfy personal obligations

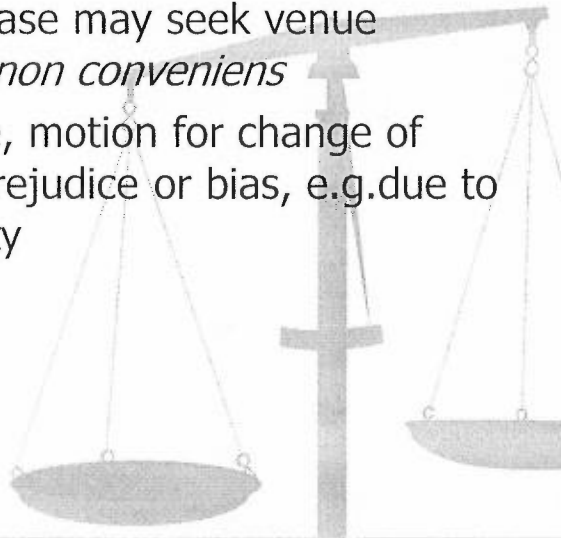
## Venue

### ■ Physical Location of trial

- Trial of all crimes...shall be held in state where crime shall have been committed –Art. III, S.2 US constitution
- Defendant must be tried in community where crime occurred because
  - D entitled to jury of peers applying community stds
  - Community has vested interest in crimes committed within
- Venue governed by statute

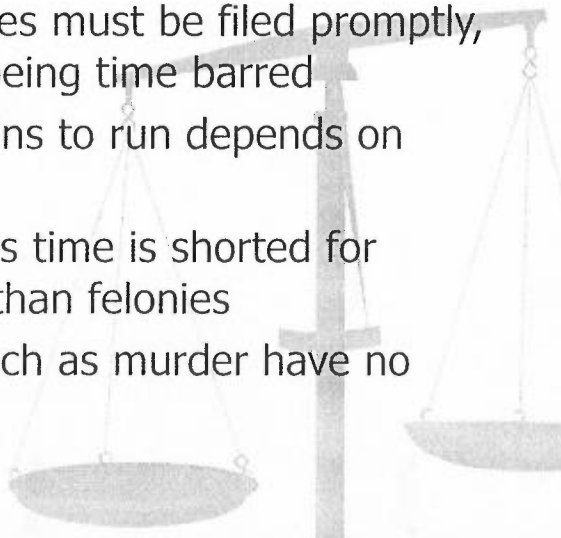
## Venue 2

- Parties in civil case may seek venue transfer-*forum non conveniens*
- In criminal case, motion for change of venue due to prejudice or bias, e.g. due to pre-trial publicity



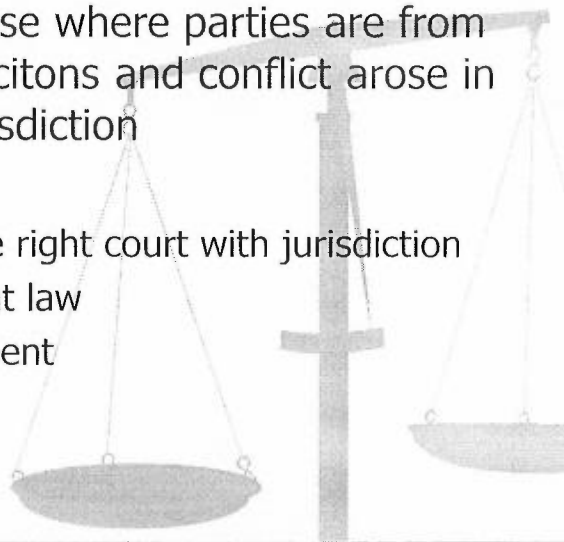
## Statute of Limitations

- Suits and charges must be filed promptly, otherwise risk being time barred
- When time begins to run depends on subject matter
- In criminal cases time is shorter for misdemeanors than felonies
- Some crimes such as murder have no limitation



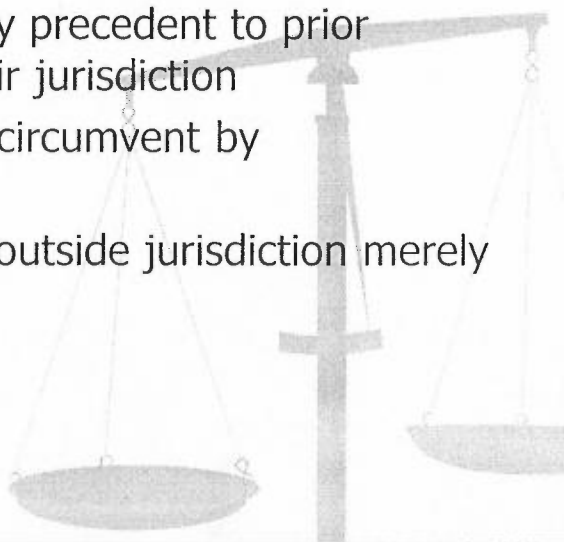
## Conflict of Laws

- Conflict may arise where parties are from different jurisdictions and conflict arose in yet another jurisdiction
- Issues
  - Selection of the right court with jurisdiction
  - Picking the right law
  - Effect of judgment



## *Stare Decisis*

- Courts bound by precedent to prior decisions in their jurisdiction
- However, may circumvent by distinguishing
- Decisions from outside jurisdiction merely persuasive



# CRMJ 2020 American Legal Systems

## Chapter 6 CONSTITUTIONAL LAW

### Judicial Review

- Justice Roberts in *U.S v. Butler* (1936): where statute's constitutionality challenged, Court has duty to lay article of Constitution invoked beside challenged statute and decide whether latter squares with former
- Marbury v. Madison (again)
- Marbury filed action under SCOTUS original jurisdiction conferred under Judicature Act to issue writ of Mandamus directing government agency (here Secretary of State Madison) to perform his job/duty & deliver his Justice of the Peace commission
- By then the former Secretary of State under President John Adams (Marshall) had become the Chief Justice, hearing a case about a commission he had failed to deliver in time before Adam's administration relinquished power

## CJ Marshall's Dilemma

- He was the one who failed to deliver Marbury's commission in time
- His own appointment to the SCOTUS was shady
- Partisanship threatened the integrity of the Court
- President Adams was clear that he would defy any Mandamus order from SCOTUS

## Marshall's Legal Masterpiece

- Answered 3 legal questions
  1. Did Marbury have right to commission he demands?
    - Answer: Yes
  2. If Marbury's Right violated, does the law offer a remedy?
    - Answer: Yes. Right is redundant if no remedy available. Here Mandamus correct remedy
  3. If law offers Marbury a legal remedy, is it a mandamus from SCOTUS?
 

Answer: No. SCOTUS does not have powers under the constitution to issue Mandamus under its original jurisdiction. In order to grant that power to the Court, the Constitution would have to be amended in the appropriate manner prescribed in the constitution itself. Using an ordinary statute of congress to change the constitution would defeat the purpose of having a written constitution as fundamental law.

## Marshall's *Marbury* Masterpiece 2

- He established that
  - That acts that violate the constitution are invalid
  - That courts have the power to determine whether statutes or other government actions violated the constitution and to declare those that did invalid
- He extricated himself from the dilemma he had caused
- He avoided confrontation with the executive branch
- He berated the President for denying a lawful commission
- He increased the prestige of SCOTUS as being above politics
- He secured for SCOTUS thenceforth the power of judicial review

## How the Court Works

- Cannot issue advisory opinions
- Constitutional law evolves, not static
- E.g., development of right to counsel
  - *Powell v. Alabama* → *Betts v. Brady* → *Gideon v. Wainwright*
- Resolution of constitutional issues rarely final

## Theories of Constitutional Interpretation

- Original Intent of framers: using plain language or their debates and writings
    - Supporters' reasons
      - Makes sense
      - Constrains abuse of judicial discretion
      - Provides long term consistency
    - Criticisms
      - May not address modern day problems
      - It is not possible to discover original intention
      - Who constitutes Framers?
      - Too narrow
- Response: in that case legislature should pass appropriate laws

## Interpretivism

- There are fundamental principles embedded in the constitution
- Judge must apply fixed & binding principles to new facts
- Personal views of judge not permissible
- However, does not necessarily defer to legislative bodies if original intent cannot be determined.
- Looks at spirit of the constitutional provision
- Major criticism of judicial review-inherently democratic for 9 justices to strike decision of the people's elected representatives

## Non-Interpretivism

- Framers never intended to freeze Constitution in the 18<sup>th</sup> Century
- Framers intended a “living Constitution” to meet needs of current generation of Americans
- Constitution has to meet the needs of the current generation
  - E.g. 14<sup>th</sup> Amendment (14A)

### Critiques:

This allows practice of pulling constitutional rabbits out of hat  
e.g. *Griswold v. Connecticut*(1965)—*right to privacy*

## Major Doctrines

- Federalism
- Separation of powers
- Due process
- Equal protection
- Civil liberties



## Federalism

- Dual
- cooperative

## Separation of powers

- Goes hand in glove with checks and balances
- Presidential veto
- Executive privilege issues
  - Nixon v U.S
  - Line-item veto
  - Whether sitting President may be sued
  - Recess appointments

## Due Process

- Definition
  - Highly subjective
- Applicability
- Procedural Due Process
  - Fairness of policies or procedures
- Substantive Due Process
  - Fairness of proceeding or law
- Incorporation (14A)
  - Total/Absorption
  - Selective
  - Due Process Plus

## Equal Protection

1. Nature of Classifications
  - Suspect Classifications
  - Near-suspect Classifications
  - Non-suspect Classifications
- 2. Whether challenge concerns a fundamental right or interest
- Issue: what is a fundamental right or interest?
- State may prevail by showing a compelling in passing/retaining the law/practice

## Resolution of classification schemes v Fundamental interests

- Two Tier Approach
  - Where suspect class or/and fundamental interest involved: Strict Scrutiny
    - Burden on state
  - Where none of the above: Reasonable/Rational Basis Analysis
    - Burden on challenger
- Third middle approach also proposed between Strict Scrutiny & Rational Basis

## Civil Liberties

- Tension between Rights of Individual and Rights of Society
- Striking the balance not easy
- Civil Rights are rights held against authorities, limiting interference with activities worthy of special protection
- E.g. First Amendment (1A) Rights re Religion
  - Establishment Clause
    - Theory 1: Must maintain high wall between church & state. State may not promote any religion
    - Theory 2: All religions must receive equal treatment from state
  - Cases:
    - (a): Financial aid—*Lemon Test* (1971)
    - (b) challenge of religious practice involving state

## 1A Religion cases (continued)

- Free Exercise Clause
  - Should individual/group be exempt from obligation for religious reasons?
  - SCOTUS—IT DEPENDS
    - Reynolds v. U.S. (1879) -ruled against allowed polygamy among Mormons
    - SCOTUS ruled against peyote
    - SCOTUS ruled for Amish challenging mandatory high school education
  - Burdens on the free exercise of religion
    - In 1993, Congress overruled SCOTUS decision in *Employment Division, Department of Human Resource of Oregon v. Smith (1990)* by passing RFRA, requiring a compelling reason for the state for placing a burden on free exercise of religion
    - RFRA and similar state statutes have created controversy and new area of litigation

## 1A & Freedom of Speech

- Types of Speech
  - A. Pure
  - B. Symbolic
  - C. Speech plus action
- Emerging Areas
  - 1A & The internet--- *Reno v. UCLA(1997)*
  - Holding: CDA vague &
    - was regulating on the basis of content with potential of chilling effect
    - CDA is criminal statute with accompanying stigma for violators deters 1A rights
    - More likely to discourage than encourage free speech

## Freedom of the Press

- Vital in a democratic Society
  - Consider current emergence of attempts to suppress press on allegations of “Fake News”
- Problems with Freedom of Press
  - i. prior restraint-----pre publishing clearance requirement. May be justified
    - *Hazelwood School District v. Kuhlmeier (1988)*
  - ii. Libel—Harm to person’s reputation. Public official/figure must meet higher standard of malice than private person to prevail *Time Inc v. Firestone (1976)*
  - iii. Obscenity- *Roth v. U.S(1957)*: obscenity has no redeeming social importance
    - Nailing down definition of obscenity and scope of freedom of expression has been elusive

# CRMJ 2020 American Legal Systems

1

Chapter 7  
Criminal Law

## Criminal Law

2

- Most controversial branch of law
- Both substantive and procedural create issues
- Substantive-what behaviors should be criminalized & Why?
  - Some are inherently evil but others are suspect
    - Eg drug laws, gambling laws, lotteries
- Procedural laws
  - Presumption of innocence
  - Onus of proof on state
  - Protections against self-incrimination

## Criminal Liability

3

- ✎ 1. Actus reus (*criminal act*).
  - ✎ We punish people for what they *do*, not for what they *intend* to do or for who they are.
- ✎ 2. Mens rea (*criminal intent*).
- ✎ Punishment
  - ✎ (at least for serious crimes) depends on the blameworthiness of the intent that triggers the criminal act.

Who can or cannot be liable for crime?


4


- ✎ Persons that **CANNOT** be held liable for a crime include:
  - ✎ The insane
  - ✎ The very young-under 14

## WHY!?! 5

 *Because*


 *....*


 *The law says that because of those prior issues...*


 *the person is not capable of, or has not made a conscious choice (mens rea) to commit a crime! I.e., too young, too mentally incapacitated, a mistake, accident, unconscious, or under "duress!"*

## PRINCIPLE OF CAUSATION 6

 **1. Factual cause**

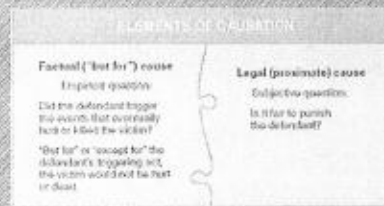
 (also called "but for" cause of death or other bodily harm)

 **2. Legal cause**

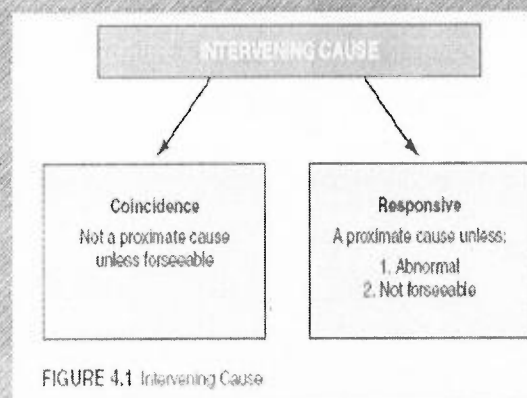
 (also called **proximate cause** of death or other bodily harm)



7



8



## “Voluntary Acts” & Mens Rea

9

- 1. Criminal law punishes people.
- 2. We can only punish people we can blame.
- 3. We can only blame people who are responsible for their actions.
- 4. People are only responsible for their voluntary actions.

## Culpability

10

- Related to criminal responsibility or liability
  - Also who deserves to be punished for a crime
  - Under common law 4 categories of culpability
    1. Principal in the first degree
    2. Principal in the second degree
    3. Accessory before the fact
    4. Accessory after the fact
- Modern/current position: 1<sup>st</sup> three are classified Principals  
The fourth unchanged (now just Accessory)

## Defenses

11

- In addition to youth, mistake, and insanity discussed earlier
  - Involuntary intoxication
  - Duress
  - Choice of evils
  - Self defense/defense of others

These are essentially justifications, where the defendant admits the (illegal act) but claims that in the circumstances, his act was reasonable and legally acceptable

Additional defenses:

Consent

Alibi

Unconstitutionality of relevant statute

## Standard of Proof

12

- Civil law: Preponderance of the evidence standard
- Criminal Law: Proof beyond reasonable doubt
  - Standard higher because stakes are higher
  - Possible deprivation of freedom, even life
  - Does not mean beyond shadow of doubt

## Procedural Criminal law

13

- Search & seizure
- Fourth Amendment (4A)

## What is a search?

### 4th 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 persons or things to be seized."



## A man's home is his castle?

15

- The 4<sup>th</sup> Amendment prohibits unreasonable searches, not all searches

## Purpose of the Fourth Amendment

16

- **1. Searches and seizures were aimed originally at sedition** (*criticism of English monarchs*) and tax evasions, not crimes against persons (like murder) and their property (theft), although also for indication of support for patriots/rebels such as gunpowder
- **2. Balance government power and individual rights**
  - a. Give government enough power to control crimes
  - b. Protect individuals' right to be let alone by the government (not by private individuals)

## Purposes of Searches continued

17

- 3. Ensure only “reasonable” searches and seizures take place
- 4. “Reasonable” limit meant to protect individuals’ rights to
  - a. Locomotion—come and go as they please
  - b. Privacy

## Defining “search”

18

- A. Definition—government actions that invade a person’s expectation of privacy
- B. Becomes a search when it invades a reasonable expectation of privacy (when society is prepared to recognize the expectation as reasonable)

## Categories of items subject to seizure

19

### 1. Contraband

- Something that government has forbidden the possession of-e.g., drugs, explosives, obscene materials, such as child pornography

### 2. Fruits of crime-

e.g. cash, stolen goods

### 3. Instrumentalities of crime

- Tools, weapons used in commission of a crime-e.g., house breaking equipment, gun, getaway car

Another category added later

### 4. Mere evidence--Re *Warden v. Hayden*-

4A protects privacy, not property

## Then along came *Weeks v. U.S.* (1914)

20

- Court: Evidence obtained in violation of person's constitutional rights must be excluded from the trial.
- This was the birth of the Exclusionary Rule
  - "If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy...."  
--Justice Louis Brandeis

## The exclusionary rule

21

- A. U.S. has the only criminal justice system in the world where courts throw out “good evidence” because government used “bad methods” to get it
- 1. “Good evidence” means evidence that can help prove defendant’s guilt
- 2. “Bad methods” means conduct that violates
  - a. Fourth Amendment ban on unreasonable searches and seizures
  - b. Fifth Amendment right against self-incrimination
  - c. Sixth Amendment right to counsel
  - d. Fifth and Fourteenth Amendment rights to due process of law

## *The Exclusionary Rule*

22

- Rule Requires the Exclusion of Any Evidence Obtained by Police Where Police Have Used Methods Which Violate A Person’s Constitutional Rights
  - Rationale: To Deter Police Misconduct
  - Preserve integrity of the Court
  - 4A would be meaningless if evidence violating it is admissible
- Alternatives to Exclusion of Evidence
  - Officer May Be Subject to Agency Sanctions and Discipline
  - Possible Civil Liability: Lawsuits Against Officer
  - “Good Faith” Claim of Officer



## Criticism of the Rule

23

- If illegally seized evidence is reliable, shouldn't matter how obtained
- Rule does not protect privacy that has already been violated
- Does not deter officer who believed search was legal, and made good faith error
- Punishes society when it frees factually guilty
- Breeds contempt of the law by protecting law breakers

## When is a search "Reasonable"?

24

- Search pursuant to valid warrant
- Pursuant to lawful arrest
- Consent search
  - Issues-
    - is consent an intelligent waiver of rights?
    - Does suspect believe they can refuse?
    - Does consenting party have authority to do so? *Warden v. Hayden*
- Stop and frisk searches- *Terry v. Ohio*
- Automobile/RVs etc. search- *Carroll v U.S.*
  - Probable cause to stop and search
  - Search pursuant to arrest for traffic violations
  - Inventory search of impounded vehicles
  - Sobriety checkpoints OK if

## Search & Seizure (Contd)

25

- Plain view-*Harris v U.S.*
  - Police not required to close their eyes to clear evidence of crime

However emerging technology poses new challenges

- *Katz*-wiretap on outside of phone booth-4A violation
- *Kyllo v U.S.*-Police may not use thermal imagers to detect heat lamps used to grow weed illegally
- Cell phone search pursuant to arrest-warrant required
- Drone recording of illegal conduct-OK

## Mapp v. Ohio (1961)

26

- Reversed an earlier decision in *Wolf v Colorado* (1949) and declared that the Exclusionary Rule applied also to the states

## Stop and Frisk

27

### **What Is A Stop?**

- Stop: Least Intrusive Type of Seizure
- U.S. v. Mendenhall Sets the Standard for A "Stop"
  - In View of All Surrounding Circumstances, Would A Reasonable Person Have Believed He/She Was Not Free to Go?
  - Authority to Stop: Reasonable Suspicion Supported by Articulable Facts That Criminal Activity "May Be Afoot"
- Officer Must Be Able to Give Reasons for the Stop Based Upon This Assessment
  - Would The Facts Available to the Officer at the Moment of Seizure or Search "Warrant A Man of Reasonable Caution in the Belief" That the Action Taken Was Appropriate?

# Terry v. Ohio

- Facts: Officer with 39 Years of Experience Became Suspicious of Terry & Chilton. Officer conducted "Pat Down" Search & Found Weapons

- Rule: Pat Down Search Found Valid

- Officer in Fear of Life Can Conduct A Carefully Limited Search of Outer Clothing of Person To Discover Weapons.

- Pat Down Also Known As A Frisk



Would This Man Appear to Be Engaging in Criminal Activity To A Police Officer?

Authority to Conduct Pat Down is Based Upon The Standard of "Reasonable Suspicion". It is Based Upon A Police Officer, Based Upon His/Her Experience, Being Able to Point to "Articulate Facts" Which Lead Him/Her To Believe that "Criminal Activity Is Afoot"

## Scope of reasonable frisk

- Outer clothing only
- Light touch only
- Brief once over lightly in the area where weapons are likely to be carried



## Right to Attorney

31

- The right accrues when investigation zeroes in on a particular person and he becomes a suspect-*Escobedo v. Illinois*
- *Miranda v. Arizona*-when person arrested or no longer free to leave, must be informed of his rights BEFORE questioning him
  - Right to remain silent
  - Right to an attorney
  - Warning that own words may be used against him
  - If not under arrest/in custody, confession without Miranda warning is OK-*Oregon v. Mathiason*
  - Questioning at one's home can be deemed coercive
    - *Orozco v. Texas*

## Privilege against self-incrimination

32

- Rationale-
  - in accusatory system, suspect should not be forced to assist the state in making case against her
  - Questions reliability of confessions
  - Silence or failure to take stand in own defense should not enable a negative inference against defendant
- Privilege does not extend to evidence not of communicative nature (e.g. blood test, [*Schmerber v. California*] urine test, hair follicles)..
- except where police action shocks the conscience-*Rochin v. California* (stomach pumping)

## Theories of Punishment

33

- Retribution-Lex talionis (an eye for an eye)
- Deterrence
- Rehabilitation

## Types of Punishment

34

- Fines through Death Penalty
- Most frequent-Probation/Community service
  - Defendant remains in community with conditions, supervision
  - May be revoked for non-compliance
- Suspended sentence/deferred adjudication
  - No conviction on record, or sentence set but not carried out
- Parole-reduction/early release
  - Good time
  - Mandatory release
- Determinate sentencing

## Inmate Rights

35

- Initially, considered “slaves of the state”
- Civil Rights Movement & Prison riots
- Inmates have sued for many violations, through appeals and writs of habeas corpus, including
  - Eighth Amendment (8A)
  - First Amendment (1A)
  - Prisons must enable access to courts-
  - Legal services granted: state provided attorneys, law students, jailhouse lawyers, etc
  - Mail to/from attorneys/Courts normally confidential

## Other Issues

36

- Capital Punishment
  - Permissible execution methods
    - Drug cocktails, execution personnel
  - Racially discriminatory use of peremptory challenges
  - Disproportionate application of penalty on racial minorities
  - SCOTUS has gradually narrowed down the application of capital punishment
    - E.g, inapplicable for rape -*Kennedy v. Louisiana*

## Juvenile Justice

37

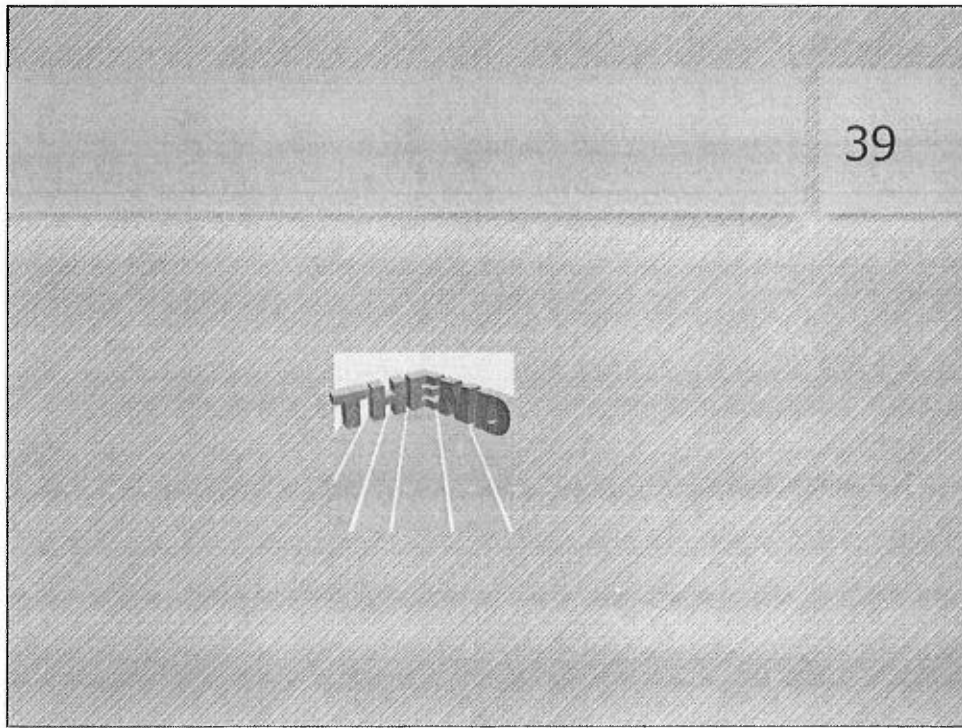
- Roman Law- *Patria Potestas*
  - *Paterfamilias* exercised life and death authority over own children
- Current US Law
  - *Parens Patriae*-affirmative duty on state to intervene to protect life and well being of children
  - However, doctrine led to ambivalent treatment of children
  - Children were denied procedural safeguards that adults enjoyed
  - In *Re Gault*, Court pointed this out, and subsequently improvements were made, including proof beyond reasonable doubt standard in juvenile proceedings
  - Procedural law:
    - Juveniles still lack some rights accorded to adult
      - Eg no right to jury trial, school searches need only reasonable suspicion, may be detained pre-trial where adults would be entitled to pre-trial liberty.
  - Substantive Law:
    - should children be punished? If so, when?
      - Most states set 10 as age for criminal liability
    - What type of punishment permissible?
      - Certification

## Case Studies

38

- *Rummel v. Estelle (1980)*
  - When does the punishment fit the crime?
- *Brewer v. Williams (1977)*
  - How does one protect constitutional rights of factually guilty person?





# CRMJ 2020 American Legal Systems

## Chapter 8 Administrative Law

1

### Need for Administrative Bodies

#### Expertise

- Private sector focused on profit, could not be trusted to take affirmative steps to protect the public

#### Efficiency

- Expertise increases efficiency
- Highly trained personnel needed to deal with hundreds of thousands of applications etc. for their services. Need to be efficient to handle the load

Admin law developed to prevent abuse of official power and overstepping of official authority

## Rise of Bureaucratic Organizations

- Increasing complexity of US economy in 20<sup>th</sup> Century required more expertise in management of the economic system
- Victims of abuse of unregulated economic power (Railroads, etc.) turned to gov't for relief
- Interstate Commerce Commission (ICC) estb 1887
- National Labor Relations Board (NLRB)
- Regulation of complex activities(banking, monopolies, stocks, etc. required expertise
- Congress had to create bodies of people better suited than itself to handle problems of modern industrial society

## Delegation Theory

- Federal bureaucracy-Fourth Branch of Gov't?
- The people vested authority in the 3 branches of government
- Thus gov't has been delegated these powers, which are separate
- *Delegatus non potest delegare*
  - Congress may not re-delegate their delegated powers
  - However, Congress cannot carry out all these daily duties that have to be done
  - Hence, created legal fiction-no delegation:
    - created administrative bodies to act on its behalf to "fill in the details" of a general law

## Delegation Theory

- Modern constitutional approach
  - Delegation OK if not excessive
  - SCOTUS decides whether delegation excessive on case by case
- These administrative bodies have two constraints:
  1. Are subject to same constitutional restraints as other gov't bodies
  2. May only exercise those powers granted it by Congress
    - E.g. Last night (10/24/17) Senate voted against rule created by Consumer Financial Protection Bureau allowing consumers to file class action suits in court & banning mandatory arbitration clauses imposed by financial institutions
    - if acting Ultra vires may be subject to challenge through judicial review

## Delegation

- Delegation expressed in 3 forms
  - Rulemaking
  - Rule enforcement
  - adjudication

## Rulemaking

- Admin bodies create thousands of new rules every year
  - E.g. IRS, OSHA, FDA, FCC
  - Rules have same power as statutes created by congress
- Admin law develops in 2 ways
  1. Court must ascertain if agency acting within its powers
  2. Whether procedures for enacting rules followed
    - Publication of proposed rules
    - Interested parties allowed to comment
    - Decision on rule based on whole record
      - Negotiated Rulemaking Act 1990 encourages consensus with interested parties

## Rule Enforcement

- As in Rulemaking, Agency enforcement rules must be within agency's power and be constitutional
- Enforcement rules may vary. However
  - Where record making required, records must
    - Be of a kind customarily kept
    - Be reasonably related to public concern
    - Pertain to a non-criminal area of activity
  - Administrative agencies not subject to stringent probable cause requirements for search warrants
  - However, individuals still retain privacy rights although a middle course adopted by courts allows them to obtain search warrants with less than probable cause
  - Courts are continually required to weigh individuals rights against societal rights

## Administrative Adjudication

- Administrative agencies also serve a quasi-judicial functions
  - Administrative law requires agencies to observe fair rules of procedure in settling disputes that arise under their jurisdiction
    - Due process “explosion”
- *Goldsberg v. Kelly*-identified 10 ingredients to meet minimum due process standards.
  1. adequate & timely notice
  2. Right to confront adverse witnesses
  3. Right to Cross-examine adverse witnesses
  4. Right to present arguments orally
  5. Right to present evidence orally

## Administrative Adjudication Goldberg ingredients (continued)

6. Disclosure of opposing evidence
7. Right to retain an attorney
8. Right to an impartial decision maker
9. Determination on the record
10. An explanation of the decision

## Issues unique to judicial review of administrative agency decisions

- Administrative bodies are highly specialized, and their personnel have expertise that is beyond ability of judges to second guess
- Administrative bodies deal with huge volume of applications and decisions- excessive judicial interference might hamper efficiency
- However:
  - Public administrators equally susceptible to abuse of discretion as other public officials
  - Administrative bodies often “captured” by clientele group
  - Bureaucrats tend to have narrow view while judges look at big picture

## Preclusion of Judicial Review

- Congress has from time to time precluded courts from reviewing certain decisions of certain administrative bodies
  - E.g. court expressly precluded from review of denial of veteran benefits
- However, SCOTUS has often found ways to get around most preclusion language
  - E.g., *Johnson v. Robinson*-SCOTUS ruled that jurisdiction not precluded because challenge was against entire statute denying benefits to all conscientious objectors, not the decision of the Veteran Affairs Administrator
  - In *Traynor v. Turnage*, Court held that judicial review of administrative action is favored unless there is “clear and convincing evidence otherwise”

## Judicial Restraint

- Courts tend to be reluctant to review administrative body decisions, and when they do, show great deference to administrative expertise
- Traditional methods of ripeness, mootness, and standing applied frequently.
- Additional methods to avoid judicial review include:
  - Exhaustion of administrative remedies doctrine
  - Primary jurisdiction method
  - Substantial evidence rule



# Torts

CRMJ 2020—Chapter 10

## Tort

- A private/civil wrong where the Defendant's actions injure a person or property
- Tort lawsuit involves only the parties involved in the tort
- State is neutral, unlike a criminal case
- Tort law aims to return the plaintiff victim (as close as possible) to the position they were in before the tort
- Typical remedy is damages

## Tort Law

- Establishes legal standards of conduct for all members of society to abide by and provides remedy for violation. Violator known as tortfeasor
- Aims to protect three types of interests
  1. The person.
  2. Tangible property
  3. Intangible interests

## Theories of tort recovery: Negligence

- Negligence is reckless/careless failure of tortfeasor to exercise the appropriate degree of care expected under the law
- Plaintiff (P, *pi*, Π) must prove each of the following, that:
  1. The Defendant (D, *delta*, Δ) owed a duty of care to the Plaintiff
  2. The standard of care was breached
  3. D's action was the proximate cause of the injury
  4. P suffered compensable damage arising from D's actions

## Duty of care

- P must first show was owed a legally recognizable duty of care by D
- General test for appropriate level of care:
  - Under the circumstances of the case, did D act as a *reasonably prudent person* would have done to prevent the injury?
- Who is this “reasonably prudent person”?
- Fact finder considers the facts and decides whether D exhibited the due care that a person of ordinary intelligence or if a skilled person plying a trade/practice/profession whether s/he exercised the due standard of care required from a reasonably prudent skilled person in that field
- Traditionally, relationship between the parties determines the standard of care required. Whether special relationship e.g. doctor/patient, attorney/client, parent/child, or if invitee, licensee, trespasser, etc
- Many courts now require duty of ordinary care to all groups

## Breach of duty of care

- Plaintiff must establish
  1. that act/omission occurred
  2. That the act/omission was a breach of duty of care owed to this particular P

How?

Courts have provided some shortcuts

- Negligence *per se*
- *Res ipsa loquitur*-the thing speaks for itself

## Proximate cause

- P must prove logical connection between negligent action of D and P's injury
- The P must establish not only that D's action was factually one of the cause of the injury but also that D should be held legally responsible
- The connection must be reasonably foreseeable, not some far off connection
- Occasionally more than one party contributed to the injury. This may result in shared liability among the tortfeasors

## Damages

P must establish nature of injury and an amount that fairly compensates for the injury

- The goal is to return the P to their pre-injury position
- It is difficult to assess appropriate damages for pain and suffering, loss of limb or body part, and mental distress and anguish.
- It is easier to put a monetary value on property such as vehicles, buildings etc

## Defenses

- Voluntary assumption of risk
  - E.g participating in or attending a (dangerous?) sports event
- Contributory/comparative negligence
 

Negligence apportioned between the parties based on three approaches

  - The pure approach
  - The greater than approach
  - The equal to approach

## Intentional Torts

Are based on willful & knowing misconduct

### Assault & Battery

- Assault: apprehension of unwanted contact
- Battery: Harmful or offensive contact
- Defenses to A&B
  - Consent

## Intentional Torts

### Infliction of mental distress

Where one intentionally or recklessly causes serious mental distress on another

Usually limited to extreme misconduct

### False Imprisonment

Where D intentionally restrained P's freedom against P's will and P was aware of such restraint

### Invasion of Privacy

2 related concepts: Invasion of privacy & defamation

Invasion of privacy:

1. Intentional invasion
2. Appropriation of P's likeness or name without her assent
3. Unwanted publication of info about P's private life that is not legitimate public concern
4. Publication of negative info about P that D knew to be untrue or with reckless disregard as to its truth

Defamation:

Injuring a person's reputation orally or in permanent form

## Intentional Torts (slide 2)

### Intentional torts against Property

1. Conversion
2. Trespass
3. Nuisance

## Intentional Torts

### Against Property

1. Trespass to land
2. Conversion
3. Nuisance

Unfair competition or interference with commercial or economic relations

- D's Intentional & unjustified interference with P's business or economic relations with a third party

## Other types of liability

### Strict Liability

- Liability without fault
- "Deep pockets"

### Product Liability

Manufacturer, seller, or supplier of defective product or instrumentality may be held liable for injury caused by product to others

P must prove:

1. defect in product
2. Defect could have been reduced by reasonable alternative design
3. Ultimate purchaser was not warned about inherent dangers in the product



## General Tort Defenses

- Liability may be moved to third (innocent) party based on relationship with the party that injured P
- This vicarious liability may hold liable parents, employers etc., for acts of those under their charge
- Shifting of liability operates under theory of *Respondeat Superior* and is a rule of policy allocating risk to a third party with ability to pay (deep pockets)

However, US government is shielded from liability for acts of its employees under traditional concept of sovereign immunity, except for certain situations expressly permitted by statute

Additionally, certain government officials such as judges and government attorneys are immune from tortious liability if harm arising from acts done within the scope of their job responsibilities



# CONTRACTS

CRMJ 2020 CHAPTER 11

## Contracts Defined

- Binding agreements that have legal consequences and can be enforced in court
- “ a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”
- Contracts provide certainty and stability

## Terms of Art

- Express contract
- Implied contract
- Bilateral contract
- Unilateral contract
- Executory contract
- Executed contract
- Void contract
- Voidable contract
- Unenforceable contract

## Elements of a contract

- Agreement
- Between two or more parties
- Based on genuine assent
- Supported by consideration
- Does not contravene principles of law
- In writing if required by the Statute of Frauds

## Breach of Contract

Is a failure to perform a contractual duty

- Defenses/Excuses
  - Contract violates Statute of Frauds
  - contract is for illegal purposes
  - Repudiation
  - Impossibility
  - Lack of mutual assent-e.g. inadvertent, material mistake of fact
    - Where no negligence on P's part, or other party is not innocent and not changed position on reliance on the contract

## Remedies for Breach

- Damages—most common
  - Compensatory
  - Punitive
- P may recover damages that may reasonably be considered...  
“arising naturally..according to the usual course of things, from such breach of contract” as well as damages as “may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach..”

## Rules of Construction-Tools

- Written contracts required in certain situations
- UCC
- Parole evidence rule

## Types of business relationships

- Sole proprietorships
- Partnerships
- Limited liability companies
- Corporations

# CRJU 2020

## Chapter 13- Family Law

### Role of the state in family relationships

- Has strong historical roots, and for several centuries recognized as between opposite sexes
- "Marriage ..is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. TIt is regulated and controlled by law based on principles of public policy affecting the welfare of the people of the state."

--*Fearon v. Treanor*, 272 N.Y. 268 (1936)

## Marriage

- Founded on contract law in American Jurisprudence
- States have created governing rules and regs:
  - Partners must have legal capacity to enter into the marriage e.g. age, sound mind
  - Mutual assent to the marriage
- Two methods for a valid marriage
  - Informal/common law where recognized by law
  - Formal-where officiated by person legally authorized to do so
- Rules vary across states but across all states, prohibition against
  - Having more than one spouse (Bigamy/Polygamy)
  - Marriage between stipulated categories of relatives by blood or affinity

## Same-Sex Marriage

- Efforts seeking legal recognition of same-sex marriages started in the 1970s by challenging state laws denying marriage rights as contravening state constitutions
- However, even in the rare cases when the courts gave a nod in that direction, states were quick to overturn them through constitutional amendments (e.g. Hawaii, Alaska, Vermont) or through state statutes, stipulating marriage as being only between one man and one woman
- 35 states declared void any same-sex marriages created elsewhere
- Federal government's DOMA defined marriage for purposes of federal benefits as being between opposite sexes and allowed states to reject marriages recognized in other states, thereby upsetting comity
- SCOTUS nullified the part of DOMA regarding federal benefits, where same-sex marriages were recognized by state law
- Finally, in *Obergefell v. Hodges* (2015) SCOTUS held that all states must issue marriage licenses to same-sex couples and recognize valid marriages from other states

### *Obergefell* Decision Rationale

Same sex marriage bans are unconstitutional under both 14A's Due Process and Equal Protection Clauses because

1. Rights to personal choice in selection of life partner inherent in concept of individual autonomy and dignity
2. Marriage is union of commitment unlike any other and should be available to same-sex couples
3. The protection of parental marriage preserves the status of the children and the families, and marriage no less meaningful for individuals or couples who cannot or choose not to procreate
4. States have contributed to the fundamental character of marriage by placing it at the center of..the legal and social order. There's no difference between same- and opposite-sex couples with respect to the principle, yet same-sex couples denied..benefits that states have linked to marriage

### Questions left unanswered by *Obergefell*

- Will it open doors for underage marriages, plural marriages, marriages between first cousins
- Is decision retroactive or prospective?
  - Affects eligibility for pensions and other benefits such as Social Security and other issues such as marital privilege in rules of evidence
- Did not address discrimination actions by private employers, but subsequently EEOC stated that work-place discrimination based on sexual orientation violates Title VII and therefore is prohibited under federal law
- Many state laws still permit discrimination in employment, public accommodations, etc

## Dissolution of Marriage

Marriage may be dissolved through

1. Divorce: Marriage can be dissolved by divorce only through judicial action

Most states allow no-fault grounds for divorce and parties may execute agreements on division of matrimonial property and child custody to expedite the process

2. Annulment: very limited grounds such as

- Lack of competency to marry because of age or mental incompetence
- Parties belong to prohibited categories of relatives
- Fraud
- Duress
- Involuntary intoxication

## Procedural Aspects of Divorce

- Court must have jurisdiction to grant divorce, and determine property settlement and child custody
- Typically require one or both parties to meet residency requirements, which vary among states. Spouse must be served with divorce papers
- Petition must allege grounds, typically no-fault grounds, such as incompatibility, irreconcilable differences, living apart, to avoid protracted and embarrassing trial
- Recent development of Collaborative Law, a form of ADR, allows amicable, quick and less expensive dissolution of marriages



## Property Division

- At divorce hearing, assets (properties) and liabilities (debts) are divided among the spouses. This may be subject to (written) prearranged property settlement or prenuptial agreements between the parties. These and Cohabitation agreements are scrutinized by the courts to ensure legal and equitable remedies for the parties
- Marital property-property acquired during the marriage by either spouse, other than gifts or inheritance-belongs equally to both in community property states. In common law states, each party owns their own property and the other party has no right to it unless specifically vested in both (e.g., the owning party adds their name to the title of a particular property)
- In both types of states, the courts will consider age, health, occupation, other assets, earning capacity etc., of both parties , along with debt allocation and child custody in property settlement and determining spousal support

## Custody and Support of Children

The current standard of awarding custody is “best interest of the child”

Factors considered:

- Parental skills of person seeking custody
- Physical safety of the child
- Stability of home & parent
- Present and future emotional & physical needs of the child
- Present and future plans for the child
- Acts/omissions of the parents that would affect parenting performance
- The child’s preference (not binding on court)

## Parent-Child Relationship

- Is both legal and biological
- Legal relationship may be created (and terminated) by
  - Operation of the law e.g. the Uniform Parentage Act, paternity statutes
  - Contract, e.g., surrogacy, artificial insemination
  - Court order-e.g. illegitimate children now entitled to paternal support  
*Gomez v. Perez (1973)*; adoption