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Issues in Policing PROFESSIONAL, SOCIAL, AND LEGAL

Following several high-profile police shootings of unarmed African American suspects, law enforcement is under the microscope. Protests and calls for reform have made an already difficult job even harder. What do police think of the heightened scrutiny? A recent national survey of 8,000 police officers conducted by the Pew Research Center offers some interesting insights.¹ Fatal encounters between police and African Americans (which include citizen *and* officer killings) have resulted in:

- 90 percent of officers reporting that their jobs are now harder.
- 93 percent of officers becoming more concerned about their safety.
- 76 percent of officers reporting reluctance to use force in certain situations.
- 75 percent of interactions between officers and African Americans becoming more tense than before.
- 72 percent of officers becoming less willing to engage in stop and frisk tactics.

REALITYCHECK

Myth or Reality?

- **Male** police officers believe that female police officers can perform the job just as well as they can.
- Police officers feel that no one else understands what they do for a living.
- Veteran police officers receive the most citizen complaints.
- Thousands of people are fatally shot by police each year.
- The police are not required to advise all arrestees of their *Miranda* rights.
- Some warrantless searches are permissible as long as the police have probable cause.
- Legal loopholes enable guilty criminals to go free in alarming numbers.

Other findings from the survey reveal the duality of the police role. Nearly 8 in 10 officers reported receiving thanks for their service, but two-thirds reported being verbally abused during the same period. Nearly as many officers who say their jobs make them feel proud (58 percent) also say their jobs make them feel frustrated (51 percent) and callous (58 percent). And unfortunately, there are no signs that matters are improving. The survey also revealed that officers remain deeply skeptical of the protests that have followed certain deadly encounters. Only 14 percent of officers felt that the public understands the risks they face while on duty, and more officers than ever report the need for aggressive tactics in certain situations. All in all, the survey revealed that:

Exposure to the dark side of life, coupled with the stress that officers encounter working in high-pressure situations or with hostile individuals, means that many officers may pay an emotional price for their service.²

The police have always been put in a difficult spot when it comes to enforcing the law and, at the same time, preventing unnecessary loss of life. Many people feel the police should control and prevent crime, even if doing so requires a no-nonsense, heavy-handed approach. Supporters of "get-tough" law enforcement feel that if the greater good is served, then occasional injuries and deaths go with the territory. On the other hand, police do not work in a vacuum. They work in a very visible, politically contentious, media-driven world. Anything that even *possibly* results in unnecessary injury or death places the police in the hot seat, forcing them to defend their public image.

Protests and calls for reform raise important questions about the problems that police departments face while interacting with the society they are entrusted with supervising: Are police officers too forceful and brutal, and do they discriminate in their use of deadly force? When officers need to use force, what options are available to them? Which option should they pursue and under what circumstances? Are police too quick to resort to force? How many officers are deviant, and to what extent can deviance be controlled? This chapter focuses on these and other questions facing police officers in contemporary society. This chapter also focuses on a number of other social and professional issues facing police officers in the modern world. It begins by examining issues police face on the job, in court, and in society. Topics covered include diversity, police discretion, stress, fatigue, and use of force. This chapter concludes with a look at law enforcement's legal environment. We begin with a discussion of the makeup of the police and the police profession.

Who Are the Police?

The composition of the nation's police forces is changing. Less than 50 years ago, police agencies were composed primarily of white males with a high school education who viewed policing as a secure position that brought them the respect of family and friends and took them a step up the social ladder. It was not uncommon to see police families in which one member of each new generation would enter the force. This picture has been changing and will continue to change. As criminal justice programs turn out thousands of graduates every year, an increasing number of police officers have at least some college education. In addition, affirmative action programs have slowly helped change the racial and gender composition of police departments to reflect community makeup. The following sections explore these changes in detail.

Demographic Makeup

With few exceptions, the personnel in most early police departments were white and male, a condition that persisted through most of the twentieth century. However, in most regions, the image of the police department as a bastion of white male dominance is either obsolete or rapidly changing. For more than 30 years, US police departments have made a concerted effort to attract women and minority police officers, and there have been some impressive gains.³ Today, about 13 percent of all officers are female, and about 27 percent are members of minority groups.⁴

The reasons behind this effort are varied. Viewed in its most positive light, diversity initiatives by police departments are intended to field a more balanced force that truly represents the communities they serve. A heterogeneous police force can be instrumental in gaining the confidence of the community by helping dispel the view that police departments are generally bigoted or biased organizations.⁵ Furthermore, women and minority police officers possess special qualities that can serve to improve police performance. Spanish-speaking officers can facilitate investigations in Hispanic neighborhoods, and Asian officers are essential for undercover or surveillance work with Asian gangs and drug importers.

Minority Police Officers

The earliest known date of when an African American was hired as a police officer was 1861 in Washington, DC; Chicago hired its first African American officer in 1872.⁶ By

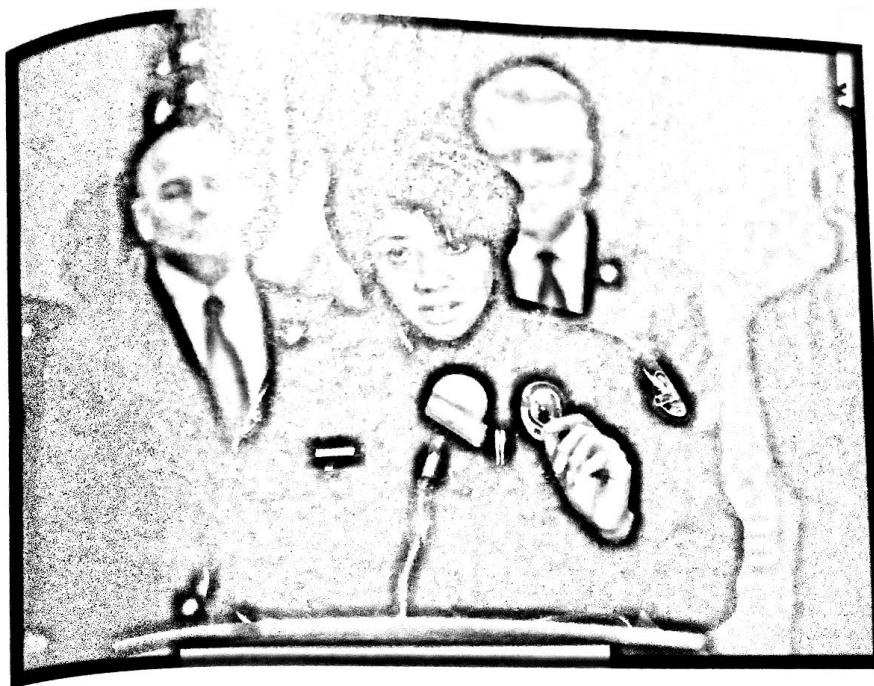
L01 Summarize demographic trends in policing

L02 Explain how minority and female officers act and are treated

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Phoenix Police Chief Jeri L. Williams announces the arrest of 23-year-old Aaron Juan Saucedo in connection with the serial street shootings that terrorized the Phoenix area over four months in 2016. Williams was appointed chief on October 28, 2016, and oversees a department with nearly 2,900 officers and 900 civilian personnel. Her prior position was chief of the Oxnard (California) Police Department.

AP Images/Matt York

1890, an estimated 2,000 minority police officers were employed in the United States. At first, African American officers suffered a great deal of discrimination. Their work assignments were restricted, as were their chances for promotion. Minority officers were often assigned solely to patrolling African American neighborhoods, and, in some cities, they were required to call a white officer to make an arrest. Racial prejudice was common among white officers, and as late as the 1950s, some refused to ride with African Americans in patrol cars.⁷

The experience of African American police officers has not been an easy one. In his classic 1969 book *Black in Blue*, Nicholas Alex pointed out that African American officers of the time suffered from what he called **double marginality**.⁸ On the one hand, African American officers had to deal with the expectation that they would give members of their own race preferential treatment. On the other hand, black officers were the target of institutional racism. Alex found that African American officers adapted to these pressures in a range of ways, from denying that African American suspects should be treated differently from whites, to treating African American offenders more harshly than white offenders in order to prove their lack of bias.

Much has changed over the years. Minority police officers are now well integrated in America's police departments; many large agencies are quite diverse. What is more, research suggests that the representation of minorities in political office and police leadership positions is a strong predictor of diversity within the ranks.⁹ Unfortunately, though, minority officers experience some of the same problems and issues encountered by white officers.¹⁰ They report feeling similar rates of job-related stress and strain stemming from the same types of stressors, such as family conflict.¹¹ What is more, minority officers do report more stress when they consider themselves "tokens" or marginalized within the department.¹²

Women in Policing

In 1910, in Los Angeles, Alice Stebbins Wells became the first woman to hold the title of police officer and to have arrest powers.¹³ For more than half a century, female officers endured separate criteria for selection, were assigned menial tasks, and were denied the opportunity for advancement.¹⁴ Some relief was gained with the passage of the 1964 Civil Rights Act and its subsequent amendments. Courts have consistently supported

double marginality The social burden African American police officers carry by virtue of being both minority group members and law enforcement officers.

REALITYCHECK

Myth or Reality?

Male police officers believe that female police officers can perform the job just as well as they can.

MYTH. Although there are certainly exceptions, survey research reveals that male officers tend to view policing as mainly a masculine profession.

Are these perceptions changing? What positive traits and characteristics do female officers bring to the job that male officers may not?

the addition of women to police forces by striking down entrance requirements that eliminated almost all female candidates but could not be proved to predict job performance, such as criteria involving height and upper-body strength.¹⁵ (Women do not do as well as men on strength tests and are much more likely to fail the entrance physical than male recruits; critics contend that many of these tests do not reflect the actual tasks of police on the job.¹⁶) Nonetheless, the role of women in police work is still restricted by



CAREERS IN CRIMINAL JUSTICE POLICE OFFICER

Duties and Characteristics of the Job

- Police officers are responsible for enforcing the written laws and ordinances of their jurisdiction.
- Police officers patrol within their jurisdiction and respond to calls whenever police attention is needed.
- Duties can be routine, such as writing a speeding ticket, or more involved, such as responding to a domestic disturbance or investigating a robbery.
- Nonpatrol duties include testifying in court and writing reports of their law enforcement actions.
- Some officers will choose or be chosen to work in specialized units such as the well-known special weapons and tactics (SWAT) or canine corps (K9).
- Police officers patrol jurisdictions of various sizes and have varying duties based on the nature of their jurisdiction. For example, sheriffs and their deputies enforce the laws within a county. State police primarily patrol state highways and respond to calls for backup from police units across their respective state. Institutions such as colleges and universities often have their own police forces as well, which enforce laws and rules in this specific area.

Job Outlook

- Government spending ultimately determines how many officers a department has.
- Overall opportunities in local police departments will be good for individuals who meet the psychological, personal, and physical qualifications. In addition to openings from employment growth, many openings will be created by the need to replace workers who retire and those who leave local agencies for federal jobs and private-sector security jobs.
- Police work is appealing to many because of the good benefits and retirement policies.
- For the better-paying positions, there may be more applicants than available positions. This competition means those with qualifications such as a college education will have better chances of being hired.
- After several years, those with a reputation for good work as well as the proper education can rise in the ranks of their department or be assigned to other desirable positions such as detective or investigator.
- Generally more opportunities for employment are available in larger departments, usually in larger urban or suburban areas.
- Not surprisingly, most opportunities exist in areas with comparatively higher crime rates or lower salaries.

Salary

- Police patrol officers have median annual wages of approximately \$60,000. The lowest 10 percent earned less than \$34,000, and the highest 10 percent earned \$100,000 and beyond.

- The median annual wage for detectives and investigators is \$77,210. Chiefs and those in administrative posts make more money, often well in excess of six figures in larger cities. Among the lower paid law enforcement officers are fish and game wardens, with a median salary of \$52,780.

Qualifications

- To be a police officer, you must be in good shape mentally and physically, as well as meet certain education requirements and pass written tests.
- New police officers go through rigorous training and testing—normally in the form of a local police academy for 12 to 14 weeks—before they go out on the streets.
- During training, new officers learn diverse skills that will be necessary for their job, such as knowledge of laws and individual rights, self-defense, and first aid. Applicants can also expect to be asked to pass lie detector and drug tests.
- Because of the enormous responsibility associated with being a police officer, certain personal qualities are considered key for future officers, such as responsibility, good communication skills, good judgment, and the ability to make quick decisions.

Education and Training

- In most cases, a high school diploma is required to be a police officer, but more and more jurisdictions are requiring at least some college education.
- Although some college credits are enough to obtain a position on the police force, more education (generally in the form of a bachelor's degree in a relevant field, especially criminal justice) is necessary to be promoted and move up in rank.

Reality Check

- Police work can be an intense and stressful job; it sometimes entails encounters with hostile and potentially violent people. Police are asked to put their lives on the line to preserve order and safety. Their actions are watched closely and reflect upon their entire department.
- Because the places that police protect must be watched at all times, police work shifts that may fall on weekends and holidays. Quite often, it is the younger police officers who take these less desirable shifts. Additionally, police officers will often have to work overtime; 45-hour workweeks are common.

Sources: Bureau of Labor Statistics, US Department of Labor, "Police and Detectives," *Occupational Outlook Handbook*, <https://www.bls.gov/ooh/protective-service/police-and-detectives.htm>; *Princeton Review*, "Police Officer/Manager," <https://www.princetonreview.com/careers/120/police-officer-manager> (URLs accessed April 2017).

social and administrative barriers that have been difficult to remove. According to the most recent data, as we have noted, women make up more than 11 percent of officers, up from 7.6 percent in 1987.¹⁷

Studies of policewomen indicate that many are still struggling for acceptance, believe that they do not receive equal credit for their job performance, and even report sexual harassment by their coworkers.¹⁸ One reason for this may be that many male police officers tend to view policing as an overtly masculine profession that is not appropriate for women. Surveys of male officers show that many do not think women can handle the physical requirements of the job as well as men can.¹⁹ Female police officers may also be targeted for more disciplinary action by administrators and, if cited, are more likely to receive harsher punishments than male officers—that is, a greater percentage receive punishments more severe than a reprimand.²⁰ Considering the sometimes-hostile reception they get from male colleagues and supervisors, it may not come as a surprise that female officers report significantly higher levels of job-related stress than male officers.²¹

Despite these problems, the future of women in policing grows brighter every year.²² Female officers want to remain in policing because it pays a good salary, offers job security, and is a challenging and exciting occupation.²³ These factors should continue to bring women to policing for years to come, but it is doubtful that we will see gender parity any time soon.²⁴

Educational Characteristics

Even though most law enforcement agencies still do not require recruits to have a college degree, the number of agencies that require advanced education in the hiring and promotion process is growing. Today, about one-third of all police departments require at least some type of college for new recruits, more than three times the number in 1990.²⁵

What type of major are police departments looking for? About half the surveyed departments expressed a preference for criminal justice majors, most often because of their enhanced knowledge of the entire criminal justice system and of issues that arise in policing. What are the benefits of higher education for police officers? Better communication with the public, especially minority and ethnic groups, is believed to be one benefit. Educated officers write better and more clearly and are more likely to be promoted. Police administrators believe that education enables officers to perform more effectively, generate fewer citizen complaints, show more initiative in performing police tasks, and generally act more professionally.²⁶ In addition, educated officers are less likely to have disciplinary problems and are viewed as better decision makers.²⁷ Higher education is also associated with greater self-confidence.²⁸

The Police Profession

All professions have unique characteristics that distinguish them from other occupations and institutions. Policing is no exception. Police experts have long sought to understand the unique nature of the police experience and to determine how the challenges of police work shape the field and its employees. In this section, some of the factors that make policing unique are discussed in detail.

Police Culture

Police experts have found that the experience of becoming a police officer and the nature of the job itself cause most officers to band together in a police subculture, characterized by **cynicism**, clannishness, secrecy, and insulation from others in society—the so-called **blue curtain**. Police officers tend to socialize with one another and believe that their occupation cuts them off from relationships with civilians. Joining the police subculture means always having to stick up for fellow officers and behavior of outsiders.²⁹ The code of silence demands that officers never turn in their peers, even if they engage in corrupt or illegal practices.³⁰

L03 Explain police culture and personality

cynicism The belief that most people's actions are motivated solely by personal needs and selfishness.

blue curtain The secretive, insulated police culture that isolates officers from the rest of society.

REALITYCHECK

Myth or Reality?

Police officers feel that no one else understands what they do for a living.

REALITY. Many officers feel that the public neither understands nor fully appreciates what they do. There are exceptions to this view, but it remains a fairly common characteristic of police culture.

Police officers tend to move in the same circles. What are the implications of this for relations between police and the public and for policing effectiveness?

Some police experts have described the following core beliefs as the heart of the police culture today:

- *Police are the only real crime fighters.* The public wants the police officer to fight crime; other agencies, both public and private, only play at crime fighting.
- *No one else understands the real nature of police work.* Lawyers, academics, politicians, and the public in general have little concept of what it means to be a police officer.
- *Loyalty to colleagues counts above everything else.* Police officers have to stick together because everyone is out to get the police and make the job more difficult.
- *It is impossible to win the war against crime without bending the rules.* Courts have awarded criminal defendants too many civil rights.
- *Members of the public are basically unsupportive and unreasonably demanding.* People are quick to criticize police unless they themselves need police help.
- *Patrol work is unpleasant.* Detective work is glamorous and exciting.³¹

The forces that support a police culture are generally believed to develop out of on-the-job experiences. Most officers, both male and female, originally join police forces because they want to help people, fight crime, and have an interesting, exciting, prestigious career with a high degree of job security.³² Recruits often find that the social reality of police work does not mesh with their original career goals. They are unprepared for the emotional turmoil and conflict that accompany police work today.

Some experts fear that the police culture divides officers from the people they serve and creates an "us against the world" mentality, an independent police culture in which violations of the law may result in stigmatization of offenders and lead to a leveling of sanctions against those who occupy the "other" status.³³ Criminals are referred to as "terrorists" and "predators," terms that suggest they are evil individuals eager to prey upon the poor and vulnerable. This vision may encourage and promote violence and brutality.

At first glance, the existence of an independent police subculture seems damaging, but it may also have some benefits. Membership in the police culture helps recruits adjust to the rigors of police work and provides the emotional support needed for survival.³⁴ The culture encourages decisiveness in the face of uncertainty and the ability to make split-second judgments that may later be subject to extreme criticism. Officers who view themselves as crime fighters are the ones most likely to value solidarity and depend on the support and camaraderie of their fellow officers.³⁵ The police subculture encourages its members to draw a sharp distinction between good and evil. Officers, more than mere enforcers of the law, are warriors in the age-old battle between right and wrong.³⁶ Police officers perceive their working environment to be rife with danger, an outlook that reinforces cohesion among officers.³⁷ And because criminals—"predators"—represent a real danger, the police culture demands that its members be both competent and concerned with the safety of their peers and partners.³⁸

In sum, the police culture has developed in response to the insulated, dangerous lifestyle of police officers. Policing is a dangerous occupation, and the unquestioned support and loyalty of their peers is not something officers could readily do without.³⁹ Although it is feared that an independent police culture may isolate police officers from the community and make them suspicious and mistrustful of the public they serve, it may also unify the police and improve the camaraderie and solidarity among fellow officers.

The Police Personality

To some commentators, the typical police personality can be described as dogmatic, authoritarian, and suspicious.⁴⁰ Cynicism has been found at all levels of policing (including chiefs of police) and throughout all stages of a police career.⁴¹ These negative values and attitudes are believed to cause police officers to be secretive and isolated from the rest of society, weaving the blue curtain.⁴²

How does cynicism develop? The police officer's working personality is shaped by constant exposure to danger and the need to use force and authority to defuse and control threatening situations.⁴³ Police feel suspicious of the public they serve and defensive about the actions of their fellow officers. There are two opposing viewpoints on the

cause of this phenomenon. One is that police departments attract recruits who are by nature cynical, authoritarian, secretive, and so on.⁴⁴ Other experts maintain that socialization and experience on the police force itself cause these character traits to develop in officers. According to this view, as their experiences in the separate police culture develops, officers eventually embrace a unique set of personality traits that distinguishes them from the average citizen.⁴⁵

Despite popular belief and some research support, efforts to find and identify a classic "police personality" have had mixed results. Although some research concludes that police values are different from those of the general adult population, other efforts reach an opposite conclusion: some have found that police officers are actually more psychologically healthy than the general population, less depressed and anxious, and more social and assertive.⁴⁶ Police officers have been found to value such personality traits as warmth, flexibility, and emotion; these qualities are far removed from rigidity and cynicism.⁴⁷ Because research has found evidence supportive of both viewpoints, it is not possible to determine how the police personality develops—or even whether one actually exists.

Policing Style

Part of the socialization of a police officer is developing a working attitude, or style, through which to approach policing. For example, some police officers may view the job as a well-paid civil service position that emphasizes careful compliance with written departmental rules and procedures. Other officers may see themselves as part of the "thin blue line" that protects the public from wrongdoers. They will use any means to get the culprit, even if it involves planting evidence on an obviously guilty person who has so far escaped arrest.

Several studies have attempted to define and classify police styles into behavioral clusters. An examination of this literature suggests that four styles of police work seem to fit the current behavior patterns of most police agents: the crime fighter, the social agent, the law enforcer, and the watchman (all described in Exhibit 6.1). Although

L04 Identify distinct policing styles

EXHIBIT 6.1 The Four Basic Styles of Policing

The Crime Fighter To the crime fighter, the most important aspects of police work are investigating serious crimes and apprehending criminals. Crime fighters focus on the victim and view effective police work as the only force that can keep society's "dangerous classes" in check. They are the thin blue line protecting society from murderers and rapists. They consider property crimes to be less significant and believe that such matters as misdemeanors, traffic control, and social service functions would be better handled by other agencies of government. The ability to investigate criminal behavior that poses a serious threat to life and safety, combined with the power to arrest criminals, separates a police department from other municipal agencies. Crime fighters see diluting these functions with minor social service and nonenforcement duties as harmful to police efforts to create a secure society.

The Social Agent The social agent believes that police should be involved in a wide range of activities without regard for their connection to law enforcement. Rather than viewing themselves as "criminal catchers," the social agents consider themselves as community problem solvers. They are trouble-shooters who patch the holes that appear where the social fabric wears thin. They are happy to work with special-needs populations, such as the homeless, school kids, and those in need of emergency services. The social agent fits well in a community policing unit.

The Law Enforcer According to this view, duty is clearly set out in law. Law enforcers stress playing it "by the book." Because the police are specifically

charged with apprehending all types of lawbreakers, they see themselves as generalized law enforcement agents. Although law enforcers may prefer working on serious crimes—because they are more intriguing and rewarding in terms of achievement, prestige, and status—they see the police role as one of enforcing all statutes and ordinances. They perceive themselves neither as community social workers nor as vengeance-seeking vigilantes: quite simply, they are professional law enforcement officers who perform the functions of detecting violations, identifying culprits, and taking the lawbreakers before a court. The law enforcer is devoted to the profession of police work and is the officer most likely to aspire to command rank.

The Watchman The watchman style is characterized by an emphasis on maintaining public order as the police goal, rather than law enforcement or general service. Watchmen choose to ignore many infractions and requests for service unless they believe that the social or political order is jeopardized. Juveniles are "expected" to misbehave and are best ignored or treated informally. Motorists will often be left alone if their driving does not endanger or annoy others. Vice and gambling are problems only when the currently accepted standards of public order are violated. Like the watchman of old, this officer takes action only when and if a problem arises. The watchman is the most passive officer, more concerned with retirement benefits than crime rates.

Sources: William Muir, *Police: Streetcorner Politicians* (Chicago: University of Chicago Press, 1977); James Q. Wilson, *Varieties of Police Behavior* (Cambridge, MA: Harvard University Press, 1968).

officers who embrace a particular style of policing may emphasize one area of law enforcement over another, their daily activities are likely to require them to engage in some police duties they consider trivial or unimportant.

L05 Describe factors that affect police discretion

discretion The use of personal decision making and choice in carrying out operations in the criminal justice system. For example, police discretion can involve deciding whether to make an arrest; prosecutorial discretion can involve deciding whether to accept a plea bargain.

emotional intelligence The capability of monitoring one's own feelings and actions in order to guide action.

Police Discretion

Police have the ability to deprive people of their liberty, arrest them and take them away in handcuffs, and even use deadly force to subdue them. A critical aspect of this professional responsibility is the personal **discretion** each officer has in carrying out his or her responsibilities. Discretion can involve selective enforcement of the law—as occurs, for instance, when a vice squad plainclothes officer decides not to take action against a tavern that is serving drinks after hours. Patrol officers use discretion when they decide to arrest one suspect for disorderly conduct but to escort another home.

The majority of police officers use a high degree of personal discretion in carrying out daily tasks, sometimes referred to as “low-visibility decision making” in criminal justice.⁴⁸ This terminology suggests that, unlike members of almost every other criminal justice agency, police are neither regulated in their daily procedures by administrative scrutiny nor subject to judicial review (except when their behavior clearly violates an offender's constitutional rights). The public recognizes the right of police to exercise discretion, even if it means using force to control an unruly suspect while treating a more cooperative one with deference and respect.⁴⁹

The concept of **emotional intelligence** has important implications for the study of police discretion. Defined as the “ability to monitor one's own and others' feelings and emotions, to discriminate among them and to use this information to guide one's thinking and actions,”⁵⁰ emotional intelligence is critically important for police officers. Being aware of one's emotions, being able to act in an emotionally mature fashion, and managing one's own mental state during difficult encounters can make all the difference in responding to the many situations that make policing a unique profession. Only recently emotional intelligence training has begun working its way into police training curricula.⁵¹

Researchers have identified a number of factors that affect police decision making.⁵² The following sections describe the factors that influence police discretion and review suggestions for its control.

Legal Factors

Police discretion is inversely related to the severity of the offense. This means police have far less personal discretion when they confront a suspect in a case involving murder or rape than when the offense is a simple assault or trespass.⁵³ For example, if a weapon is brandished or used, police are much more likely to respond with a formal arrest.⁵⁴ The likelihood of a police officer taking legal action, then, partly depends on how the individual officer views the severity of the offense.

Environmental Factors

The degree of discretion an officer will exercise is at least partially defined by the officer's living and working environment.⁵⁵ Police officers may work or dwell in a community culture that either tolerates eccentricities and personal freedoms or expects extremely conservative, professional, no-nonsense behavior on the part of its civil servants. Communities that are proactive and include progressive governmental institutions also may influence a police officer's discretion. Police officers in communities that provide training in domestic violence prevention and maintain local shelters for battered women are more likely to take action in cases involving spousal abuse.⁵⁶

Departmental Factors

Where and how the department operates also shape police practices. For example, officers are more likely to be proactive and use their arrest powers when they work in

departments that are located in high-crime areas but have relatively few personnel.⁵⁷ In these departments, individual officers may believe they have to be proactive to compensate for the lack of resources. Departments also issue directives intended to influence police conduct, such as mandatory arrest policies for certain crimes. These often have more of an effect on officer behavior than individual attitudes.⁵⁸

Peer Factors

Police discretion is also subject to peer influence.⁵⁹ Police officers turn to their peers for both on-the-job advice and off-the-job companionship, essentially forming a subculture to provide a source of status, prestige, and reward. The peer group affects how police officers exercise discretion on two distinct levels. In an obvious, direct manner, other police officers dictate acceptable responses to street-level problems by providing or withholding approval in office discussions. Second, officers who take their job seriously and desire the respect and friendship of others will take their advice, abide by their norms, and seek out the most experienced and influential patrol officers on the force to adopt as behavior models.

Situational Factors

Some research efforts find that police officers rely on **demeanor** (the attitude and appearance of the offender) in making decisions.⁶⁰ That is, if an offender is surly, talks back, or otherwise challenges the officer's authority, formal action is more likely to be taken.⁶¹ Not everyone agrees, however. David Klinger, a police officer turned criminologist, maintains that demeanor may not be as much of a factor in shaping discretion as most others believe. Klinger believes that the average officer becomes used to surly demeanor and uncivil behavior, so it takes more than that to influence discretion.⁶²

The way a crime or situation is encountered may also influence discretion. When a police officer happens upon an altercation or break-in, the discretionary response may be different from the response when the officer is summoned by police radio. If an act has received official police recognition, such as the dispatch of a patrol car, police action must be taken or an explanation made as to why it was not. If a matter is brought to an officer's attention by a citizen observer, the officer can ignore the request and risk a complaint or take discretionary action.

demeanor The way in which a person outwardly manifests his or her personality.



Police arrest protesters in New York City during a rally against the US missile strikes on Syria on April 7, 2017. Hundreds of demonstrators took to the streets, chanting "Hands off Syria!" and "Money for jobs and education, not for war and occupation!" The United States fired a barrage of cruise missiles into Syria in retaliation for a chemical weapons attack against civilians earlier in the week.

Extralegal Factors

One oft-debated issue is whether police take race, class, and gender into account when making arrest decisions. Research results are mixed: Some studies show that the offender's age, gender, and racial characteristics are key determinants that shape the arrest process.⁶³ Others find that this unequal treatment is not a serious problem. For example, the gender gap in police arrests is closing; women are getting arrested for certain offenses (such as drunk driving) more than they ever have been in the past.⁶⁴

Victim characteristics also appear to influence police action. For example, police are more willing to make an arrest when the victim is older, white, or affluent.⁶⁵ Neighborhood factors matter, as well. Related to this is the relationship between the parties. If the victim and the offender know one another, there is less of a chance that an arrest will be made.⁶⁶

One significant issue is whether race plays a role in the decision to stop, question, and search motorists, a practice referred to as **racial profiling**. There is evidence that minorities are searched more often than whites.⁶⁷ Yet a number of researchers have found little to no evidence of racial profiling.⁶⁸ Some argue that it can even be beneficial. How could profiling be beneficial? Two Harvard scholars, Mathias Risse and Richard Zeckhauser, have argued that a significant correlation exists between membership in certain racial groups and the propensity to commit certain crimes.⁶⁹

racial profiling The practice of police targeting minority groups because of a belief that they are more likely to be engaged in criminal activity.

Problems of Policing

Law enforcement is not an easy job. The role ambiguity, social isolation, and threat of danger present in "working the street" are the police officer's constant companions. What effects do these strains have on police? This section discusses four of the most significant problems: job stress, fatigue, violence, and corruption.

Job Stress

The complexity of their role, the need to exercise prudent discretion, the threat of having to use violence and of having violence used against them, and isolation from the rest of society all take a toll on law enforcement officers. It is not surprising, then, that police officers experience tremendous stress, a factor that leads some to alcoholism, depression, and even suicide. Evidence shows that police officers are all too often involved in marital disputes and even incidents of domestic violence that may be linked to stress.⁷⁰ These job-related stress, a condition that may undermine their enthusiasm and commitment.⁷¹ Stress and burnout become part of the job. Stress may not be constant, but at some time during their career (usually the middle years), most officers will feel the effects of stress.⁷²

CAUSES OF STRESS A number of factors have been associated with job stress.⁷³ The pressure of being on duty 24 hours a day leads to stress and emotional detachment from both work and public needs. Policing is a dangerous profession, and officers are at risk for many forms of job-related accidental deaths. Stress has been related to internal conflict with administrative policies that deny officers support and a meaningful role in decision making. Some officers may become stressed when they are forced to adapt to the demands of community-oriented policing but are skeptical about the utility or effectiveness of this change in policy.⁷⁴ In addition, police suffer stress in their personal lives when they "bring the job home" or when their work hours are shifted, causing family disruptions.⁷⁵ Those who feel alienated from family and friends at home are more likely to feel stress on the job.⁷⁶

Other stressors include poor training, substandard equipment, inadequate pay, lack of opportunity, job dissatisfaction, role conflict, exposure to brutality, and fears about competence, success, and safety.⁷⁷ Some officers may feel stress because they believe that the court system favors the rights of the criminal and handcuffs the police; others may be sensitive to a perceived lack of support from governmental officials and the general public.⁷⁸ Some officers even believe that their superiors care little about their welfare.⁷⁹

L06 Discuss four major problems of policing

WEB APP 6.1 Visit this website to read about issues associated with police stress: <http://www.lawenforcementsurvivalinstitute.org/>. To read more, visit its sister site, <http://www.copsalive.com>.

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The effects of stress can be shocking. Police work has been related to both physical and psychological ailments.⁸⁰ Police have a high rate of premature death caused by such conditions as heart disease and diabetes. They also experience a disproportionate number of divorces and other marital problems. Research indicates that police officers in some departments, but not all, have higher suicide rates than the general public.⁸¹ Police who feel stress may not be open to adopting new ideas and programs such as community policing.⁸²

COMBATING STRESS Research efforts have shown that the more support police officers get in the workplace, the lower their feelings of stress and anxiety.⁸³ Consequently, departments have attempted to fight job-related stress by training officers to cope with its effects. Today stress training includes diet information, biofeedback, relaxation and meditation, and exercise. Many departments include stress management as part of an overall wellness program also designed to promote physical and mental health, fitness, and good nutrition.⁸⁴ Some programs have included family members; they may be better able to help the officer cope if they fully understand the difficulties of police work. Total wellness programming enhances the physical and emotional well-being of officers by emphasizing preventive physical and psychological measures.⁸⁵ And because police are aware of the many benefits of their job and enjoy the quality of life it provides, stress-reduction programs can help officers focus on the positive aspects of police work.⁸⁶

Fatigue

Nearly everyone has been tired at work from time to time. But whereas on-the-job sleepiness is inconsequential for many workers, it can lead to disaster for others. No one wants airline pilots to fall asleep, and the prospect of a truck driver sleeping behind the wheel is equally disturbing. What about a police officer? A police officer who is overly tired may be at a higher risk of acting inappropriately or being injured on the job.⁸⁷

The problem of "tired cops"⁸⁸ has largely been overlooked, but it should not be.⁸⁹ Police officers often work lengthy shifts with unpredictable hours. The *Boston Globe* investigated one agency and found that 16 officers worked more than 80 hours in a week. One even worked 130 hours! Although it is difficult to fault anyone for seeking overtime pay, too much work can lead to disaster. Here are some examples:

- A Michigan police officer working nearly 24 hours straight crashes his cruiser while chasing a fleeing motorist. He is critically injured.



New York City police officers embrace outside of Christ Tabernacle Church, in the Glendale section of Queens, before funeral services for officer Rafael Ramos, in New York. Ramos and his partner, officer Wenjian Liu, were killed on December 20, 2014, as they sat in their patrol car on a Brooklyn street. The shooter, Ismaaiyl Brinsley, later killed himself.

WEB APP
6.2

Read the report *Tired Cops: The Prevalence and Potential Consequences of Police Fatigue* at <https://www.ncjrs.gov/pdffiles1/jr000248d.pdf>. What else besides what is briefly discussed in this chapter can be done to control the problem of fatigue in law enforcement? Also visit the National Sleep Foundation site at <https://sleepfoundation.org/sleep-topics/shift-work-and-sleep>, and research the effects of shift work on sleep-related issues and fatigue.

REALITYCHECK

Myth or Reality?

Veteran police officers receive the most citizen complaints.

MYTH. Younger and less-experienced officers receive the most complaints.

Why do younger and less-experienced officers receive the most complaints? Can training solve the problem? If so, what kind of training: academy or on-the-job?

police brutality Usually involves such actions as the use of abusive language, the unnecessary use of force or coercion, threats, prodding with nightsticks, stopping and searching people to harass them, and so on.

corruption Exercising legitimate discretion for improper reasons or using illegal means to achieve approved goals.

- In California, a sheriff's deputy working alone drifts off a deserted highway and is killed instantly when his patrol car crashes into a tree.
- An officer in Florida, who has had trouble staying awake, runs a red light in her patrol car and crashes into a van driven by a deputy sheriff, injuring him severely.
- A police officer driving home from working in Ohio nods off at the wheel, begins swerving in and out of traffic, and runs off the road, striking and killing a man jogging down the sidewalk.

CONTROLLING FATIGUE What can be done to control police fatigue? One option is for administrators to make special efforts during scheduling to ensure that officers do not work too much overtime. Another is for administrators to adopt policies that place limitations on second jobs. Many officers moonlight as security guards, which may affect their on-the-job performance. A recent government report offered several other recommendations for limiting fatigue.

Violence and Brutality

Evidence shows that only a small proportion of officers are continually involved in use-of-force incidents. Why do these cops continually get involved in violent confrontations? Aggressive cops may overreact to the stress of police work and at the same time feel socially isolated. They believe that the true source of their frustration is beyond their reach, so they take their frustrations out on readily available targets: vulnerable people in their immediate environment.⁹⁰

What kind of police officer gets involved in problem behavior? Are some officers "chronic offenders"? Research seems to show that a few officers are in fact chronic offenders who account for a significant portion of all citizen complaints. The officers receiving the bulk of complaints tend to be young and less experienced.⁹¹ Efforts to deal with these "problem cops" are now being undertaken in police departments around the nation.

CURBING VIOLENCE Because incidents of brutality undermine efforts to build a bridge between police and the public, police departments around the United States have instituted specialized training programs to reduce them. A number of larger departments are instituting early warning systems to change the behavior of individual officers who have been identified as having performance problems. In most systems, problem officers are identified by their behavior profiles: citizen complaints, firearm discharge and use-of-force reports, civil litigation, incidents of resisting arrest, and high-speed pursuits and vehicular damage. The initial intervention generally consists of a review by the officer's immediate supervisor, who advises the officer of the sanctions he faces if problems continue; some cases are referred to counseling, training, or police psychologists. Evaluations of early warning programs indicate that they are quite successful.⁹² Some departments have developed administrative policies that emphasize limiting the use of force and containing armed offenders until specially trained backup teams are sent to take charge of the situation. Administrative policies have been found to be an effective control on use of deadly force, and their influence can be enhanced if they are clearly supported by the chief of police.⁹³

Perhaps the greatest factors in controlling the use of **police brutality** are the threat of civil judgments against individual officers who use excessive force, police chiefs who ignore or condone violent behavior, and the expectations that prevail in the cities and towns in which they are employed.

Corruption

Ever since their creation, US police departments have wrestled with the problem of controlling illegal and unprofessional behavior by their officers. **Corruption** pervaded the American police when the early departments were first formed. In the nineteenth century, police officers systematically ignored violations of laws related to drinking,

gambling, and prostitution in return for regular payoffs. Some actually entered into relationships with professional criminals, especially pickpockets. Illegal behavior was tolerated in return for goods or information. Police officers helped politicians gain office by allowing electoral fraud to flourish; some senior officers sold promotions to higher rank in the department.⁹⁴ Although most police officers are not corrupt, the few who are dishonest bring discredit to the entire profession.

VARIETIES OF CORRUPTION Police deviance can include a number of activities. In a general sense, it involves misuse of authority by police officers in a manner designed to yield personal gain for themselves or others.⁹⁵

However, debate continues over whether a desire for personal gain is an essential part of corruption. Some experts argue that police misconduct also involves such issues as the unnecessary use of force, unreasonable searches, or an immoral personal life and that these should be considered just as serious as corruption motivated by economic gain.

Scholars have attempted to create typologies categorizing the forms that the abuse of police powers can take. When investigating corruption among police officers in New York City, the **Knapp Commission** classified abusers into two categories: **meat eaters** and **grass eaters**. Meat eaters aggressively misuse police power for personal gain by demanding bribes, threatening legal action, or cooperating with criminals. In contrast, grass eaters accept payoffs when their everyday duties place them in a position to "look the other way."

Other police experts have attempted to create models to better understand police corruption. It may be possible to divide police corruption into four major categories, as depicted in Exhibit 6.2.

CAUSES OF CORRUPTION No single explanation satisfactorily accounts for the various forms the abuse of power takes. One view holds that policing tends to attract individuals who do not have the financial means to maintain a coveted middle-class lifestyle. As they develop the cynical, authoritarian police personality, accepting graft seems an all-too-easy method of achieving financial security. A second view is that the wide discretion police enjoy, coupled with low visibility among the public and their own supervisors, makes them likely candidates for corruption. A third perspective holds that corruption is a function of society's ambivalence toward many forms of vice-related criminal behavior that police officers are sworn to control. Unenforceable laws governing moral standards promote corruption because they create large groups with an interest in undermining law enforcement. These include consumers who do not want to be deprived of their chosen form of recreation—people who gamble, want to drink after the legal closing hour, or patronize prostitutes.

CONTROL OF CORRUPTION How can police misconduct be controlled? One approach is to strengthen the internal administrative review process in police departments. A strong and well-supported internal affairs division has been linked to lowered corruption rates.⁹⁶ Another approach, instituted by then New York Commissioner Patrick Murphy in the wake of the Knapp Commission, is the accountability system. This holds that supervisors at each level are directly accountable for the illegal behaviors of the

EXHIBIT 6.2 Varieties of Police Corruption

- **Internal corruption.** This corruption takes place among police officers themselves, involving both the bending of departmental rules and the outright performance of illegal acts.
- **Selective enforcement or nonenforcement.** This occurs when police abuse or exploit their discretion. If an officer frees a drug dealer in return for valuable information, that is considered a legitimate use of discretion; if the officer does so for money, that is an abuse of police power.
- **Active criminality.** This is participation by police in serious criminal behavior. Police may use their positions of trust and power to commit the very crimes they are entrusted with controlling.
- **Bribery and extortion.** This includes practices in which law enforcement roles are exploited specifically to raise money. Bribery is initiated by the citizen; extortion is initiated by the officer.

Source: Michael Johnston, *Political Corruption and Public Policy in America* (Monterey, CA: Brooks/Cole, 1982), p. 75.

Knapp Commission A public body that led an investigation into police corruption in New York and uncovered a widespread network of payoffs and bribes.

meat eaters A term for police officers who actively solicit bribes and vigorously engage in corrupt practices.

grass eaters A term for police officers who accept payoffs when everyday duties place them in a position to "look the other way."



Reuters

Chicago police officer Lowell Houser, 57, was charged with first-degree murder for killing a man when he was off duty. Houser allegedly got into an argument with Jose Nieves as he was moving into a house in northwest Chicago. Nieves was unarmed.

REALITYCHECK

Myth or Reality?

Thousands of people are fatally shot by police each year.

MYTH. Fatal police shootings are very rare. On the order of 350 to 400 people are fatally shot each year.

Media portrayals in the news and on television make it seem that police shootings are more common. Why? What are the implications for police work of a view that police shootings are more common than they really are?

L07 Distinguish between deadly and nondeadly force—and methods for controlling each

deadly force Force that is likely to cause death or bodily harm.

suicide by cop A form of suicide in which a person acts in an aggressive manner with police officers in order to induce them to shoot to kill.

TABLE 6.1 Police Response in Encounters with Citizens in Which Use of Force Was Reported

Types of Force Used or Threatened by Police	Percent
Pushed or grabbed	53.5
Kicked or hit	12.6
Sprayed chemical/pepper spray	4.9
Electroshock weapon (stun gun)	4.1
Pointed gun	25.6
Threatened force	76.6
Shouted at resident	75.5
Cursed at resident	39.1
Number (in thousands)	547

Source: Christine Eith and Matthew R. Durose, *Contacts Between Police and the Public, 2008* (Bureau of Justice Statistics, 2011), p. 13, <http://www.bjs.gov/content/pub/pdf/cp08.pdf>. Percentages do not sum to 100 because some people reported, in cases where force was used, that officers used more than one type of force.

officers under them. Consequently, a commander can be demoted or forced to resign if someone under his or her command is found guilty of corruption.⁹⁷ Close scrutiny by a department, however, can lower officer morale and create the impression that the officers' own supervisors distrust them.

Another approach is to create outside review boards or special prosecutors, such as the Mollen Commission in New York and the Christopher Commission in Los Angeles, to investigate reported incidents of corruption. However, outside investigators and special prosecutors are often limited by their lack of intimate knowledge of day-to-day operations. As a result, they depend on the testimony of a few officers who are willing to cooperate, either to save themselves from prosecution or because they have a compelling moral commitment. Outside evaluators also face the problem of the blue curtain, which is quickly drawn when police officers feel their department is under scrutiny.

Some jurisdictions have even developed review boards that monitor police behavior and tactics and investigate civilian complaints. Although police agencies in some communities have embraced citizen reviews, others find them troublesome. Departmental opposition is most likely when oversight procedures represent outside interference, oversight staff lack experience with and understanding of police work, and/or oversight processes are unfair. Despite serious reservations about citizen oversight, many law enforcement administrators have identified positive outcomes from having a review board in place. These include improving community relations, enhancing an agency's ability to police itself, and (most important) improving an agency's policies and procedures. Citizen oversight bodies can recommend changes in the way the department conducts its internal investigations into alleged misconduct and can also suggest ways to improve department policies governing officer behavior.⁹⁸

Use of Force

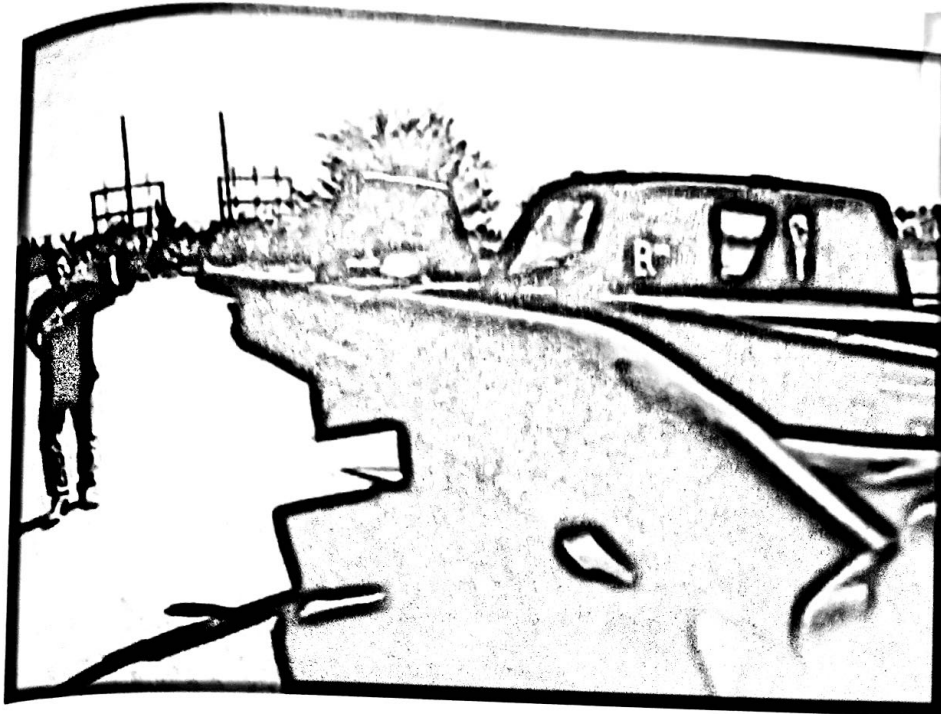
How much force is being used by the police in the United States today? Despite some highly publicized incidents that get a lot of media attention, research reveals that the use of force is not very common. A national survey on police contacts with civilians, sponsored by the federal government, sheds some light on this issue.⁹⁹ The following are among the survey's most important findings:

- An estimated 17 percent of US residents age 16 or older had a face-to-face contact with a police officer.
- Contact between police and the public was more common among males, whites, and younger residents.
- Overall, about 9 out of 10 persons who had contact with police felt officers acted properly.
- An estimated 1.4 percent of people stopped by police had force used or threatened against them during their most recent contact.
- Blacks and Hispanics were two to three more times likely than whites to be searched during traffic stops.¹⁰⁰

The data indicate that (1) relatively few contacts with police and the public involve physical force, but (2) there seem to be race and ethnic differences in the rate at which force is applied. As Table 6.1 shows, half of the force incidents involved more than scuffling or shouting. And even though African Americans (82 percent) were less likely than whites (91 percent) to feel that the police acted properly during a contact, the great majority of citizens of all races considered police behavior to be appropriate given the circumstances of the contact.

Deadly Force

As it is commonly used, the term **deadly force** refers to the actions of a police officer who shoots and kills a suspect who flees from arrest, assaults a victim, or attacks an officer.¹⁰¹ The justification for the use of deadly force can be traced to English common



Dylan Noble, 19, is pictured moments before being killed by police in Fresno, California, in 2016. Two officers stopped Noble's truck while searching for an armed suspect. Video captured by officers' body cameras shows Noble refusing repeated warnings to show both of his hands or be shot. An autopsy revealed Noble was drunk at the time of the shooting and had traces of cocaine in his body.

AP Images, Uncredited

law, in which almost every criminal offense was a felony and bore the death penalty. The use of deadly force in the course of arresting a felon was considered expedient, saving the state the trouble of conducting a trial (the "fleeing-felon rule").¹⁰²

Although the entertainment media depict hero cops in a constant stream of deadly shootouts in which scores of bad guys are killed, the actual number of people killed by the police each year is usually around 400, although that number is disputed by some (see accompanying Contemporary Issues in Criminal Justice box).¹⁰³ And some of these shootings may even be precipitated by the target as a form of suicide.¹⁰⁴ This tragic event has become so common that the term **suicide by cop** has been coined to denote victim-precipitated killings by police.¹⁰⁵

CONTROLLING DEADLY FORCE Because the police use of deadly force is such a serious issue, ongoing efforts have been made to control it. One of the most difficult issues in controlling the problem was the continued use of the fleeing-felon rule in a number of states. In 1985, the Supreme Court outlawed the indiscriminate use of deadly force with its decision in *Tennessee v. Garner*. In this case, the Court ruled that the use of deadly force against apparently unarmed and nondangerous fleeing felons is an illegal seizure of their person under the Fourth Amendment. Deadly force may not be used unless it is necessary to prevent an escape, and the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others. The majority opinion stated that where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend the suspect does not justify the use of deadly force to do so: "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."¹⁰⁶

Individual state jurisdictions still control police shooting policy. Some states have adopted statutory policies that restrict the police use of violence. Others have upgraded training in the use of force. So-called "force continuums" have been adopted by a number of police departments, but they are gradually giving way to an "objective reasonableness" standard, which is discussed further in the nondeadly force section below. Also see Figure 6.1 for a "ranking" of types of force, from least to most serious.

Another way to control police shootings is through internal review and policy making by police administrative review boards. For example, since 1972, the New York City Police Department has conducted an internal investigation any time an officer's

Types of force

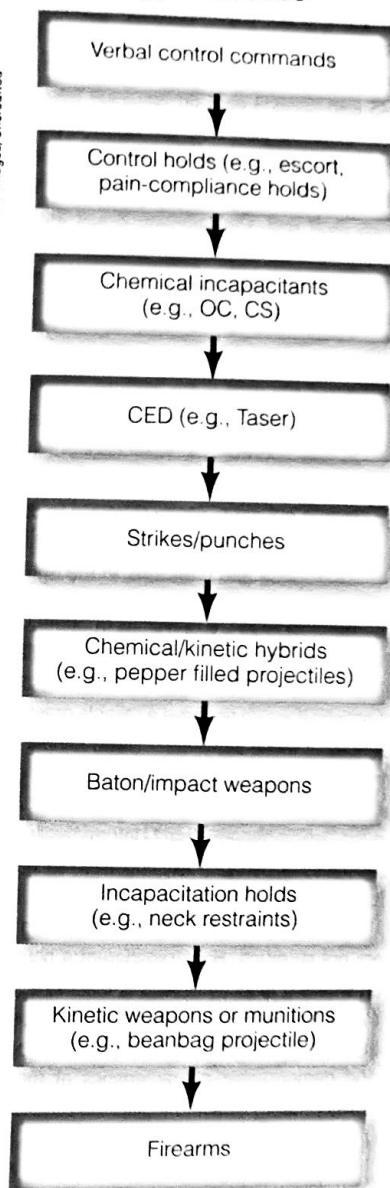


FIGURE 6.1 Relative Ranking of Force Types

Source: Adapted from Michael R. Smith, Robert J. Kaminski, Geoffrey P. Alpert, Lorie A. Fridell, John MacDonald, and Bruce Kubu, *A Multi-Method Evaluation of Police Use of Force Outcomes: Final Report to the National Institute of Justice* (Washington, DC: National Institute of Justice, 2010), Table 3-13, p. 3-22, <https://www.ncjrs.gov/pdffiles1/nij/grants/231176.pdf>



Getting at the Dark Figure of Police Shootings

As you know by now, there is a dark figure of crime in America. Every data source we covered in Chapter 2 is limited: official data don't include those who fail to report crime, some people fail to fully disclose their experiences in victimization surveys, and self-reports require that people tell the truth. Crime continues to evolve, too, and data collection instruments often fail to keep pace. What you may *not* know is that there is also a dark figure of police shootings. How often do police shoot and injure or kill? Surprisingly, data are in short supply, and they suffer from the same limitations as our best crime data.

The Bureau of Justice Statistics (BJS) collects data on contacts between the police and the public, including information about use-of-force, but the most recent survey is from 2008. Cuts to federal funding for research, even federal government research, have made it difficult to collect current data. BJS also collects data on homicide trends in the United States, including information on justifiable killings. It is possible to extract from those data some estimates for the incidence of police shootings. We used the same data to arrive at our estimate of approximately 400 justifiable police homicides each year. Our estimate is just that: an *estimate*. Available data are simply inadequate.

In a February 2015 speech, not long after Ferguson, FBI Director James Comey expressed dismay over the lack of police shooting data:

Not long after riots broke out in Ferguson late last summer, I asked my staff to tell me how many people shot by police were African-American in this country. I wanted to see trends. I wanted to see information. They couldn't give it to me, and it wasn't their fault. Demographic data regarding officer-involved shootings is not consistently reported to us through our Uniform Crime Reporting Program. Because reporting is voluntary, our data is incomplete and therefore, in the aggregate, unreliable.

Geoffrey Alpert, a University of South Carolina professor and police force expert, is also frustrated by the lack of data: "How can we address concerns about 'use of force,' and how can we address concerns about officer-involved shootings if we do not have a reliable grasp on the demographics and circumstances of those incidents?" David Klinger and his colleagues also lamented the "paltry" state of data on police shootings: "How often do American police officers use deadly force against citizens? And what is the role of citizen race in the deadly force picture? Unfortunately, neither question can be answered satisfactorily because existing national data on police use of deadly force have critical limitations..."

Some agencies are very forthcoming with their use-of-force data, others not so much. How transparent a police department is depends largely on where it is located, who is leading it, and even what the legal requirements are. In Dallas, for example, an "open data portal" publishes detailed information on police shootings going back to 2003, including the names and demographic characteristics of the officers and suspects involved. Texas recently enacted legislation requiring all agencies in the state to do

more or less the same. The state's attorney general now publishes police shooting data on its website.

Strangely enough, the best data we have are generated by the media. Crowdsourcing is also becoming a popular method of measuring police shootings. Following is a quick summary of the more well-known alternatives to official reporting.

Washington Post

The *Washington Post* maintains a comprehensive listing of police shootings going back to 2015. The database, which is based on news reports, public records, Internet searches, and original reporting, reported 990 fatal police shootings in 2015 and 963 in 2016. That is more than double the federal government's estimate. Unfortunately, the *Post's* data do not go back before 2015.

Deadspin

The website *Deadspin* claims to be compiling information on every police-involved shooting in America, going back to at least 2011. The site set up an open submission form so members of the public could submit reports. This crowdsourcing approach is designed to cast as wide a net as possible. It is not clear if data are still being collected, but between August 20, 2014, and December 7, 2015, 2,181 fatal police shootings were reported.

Fatal Encounters

The website *Fatal Encounters*, maintained by D. Brian Burghart, the editor and publisher of the *Reno News & Review*, uses several data sources to count police shootings. Paid researchers tally shootings from such sites as *Killed By Police* and *The Homicide Report*, published by the *Los Angeles Times*. Public records requests are also submitted, and the site also relies on crowdsourcing. As of early 2017, the site has cataloged more than 18,000 records of people killed by police, going back to January 1, 2000.

Whose numbers should be believed? It is tough to say. At least the future holds a measure of promise. On December 18, 2014, President Barack Obama signed into law the Death in Custody Reporting Act of 2013. The law requires states that receive certain federal justice-related funds report to the US attorney general on a quarterly basis information concerning "the death of any person who is detained, arrested, en route to incarceration, or incarcerated in state or local facilities or a boot camp prison."

Sources: Dallas OpenData, <https://www.dallasopendata.com/>; Attorney General of Texas, "Police Officer Involved Shooting Reports," <https://www.texasattorneygeneral.gov/cj/peace-officer-involved-shooting-report>; G.P. Alpert, "Toward a National Database of Officer-Involved Shootings," *Criminology and Public Policy* 15 (2016): 237–242, p. 239; D. Klinger, R. Rosenfeld, D. Isom, and M. Deckard, "Race, Crime, and the Micro-Ecology of Deadly Force," *Criminology and Public Policy* 15 (2016): 193–222, at 194; *Washington Post*, "Fatal Force," <https://www.washingtonpost.com/graphics/national/police-shootings-2016/>; *Deadspin*, <http://deadspin.com/deadspin-police-shooting-database-update-were-still-go-1627414202>; *Fatal Encounters*, <http://www.fatalencounters.org/>. (URLs accessed April 2017.)

weapon is discharged (within the exception of training situations). Several dispositions are possible. These can range from a conclusion that the shooting was in accordance with law and policy, all the way to termination and even criminal prosecution (if the prosecutor feels criminal charges are merited). The review board approach is controversial because it can mean that the department recommends that one of its own officers be turned over for criminal prosecution.¹⁰⁷



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AP Images/Al Hartmann

Kristine Biggs Johnson breaks down as her attorney, Bob Sykes, plays a YouTube video from a law enforcement dash camera when she was shot in the eye. She filed a lawsuit against a Morgan County Sheriff's (Utah) deputy for improper use of deadly force against her. The shooting was deemed unjustified by Davis County Attorney Troy Rawlings, but no charges were filed against the deputy.

Nondeadly Force

Nondeadly force is force that is unlikely to cause death or significant bodily harm. Nondeadly force can range from the use of handcuffs and suspect compliance techniques to rubber bullets and stun guns. Officers resort to nondeadly force in a number of circumstances. They may begin with verbal commands and then escalate the force used when confronted with a resistant suspect. Researchers have found that the crime in question is strongly linked to the type of nondeadly force used and that officers are also influenced by past experience, the presence of other officers, and the presence and behavior of bystanders.¹⁰⁸ And even though nondeadly force is used more often than deadly force, it is still relatively rare—and at the lower end of the severity scale (e.g., grabbed by officer instead of hit). Researchers have estimated that police use or threaten to use nondeadly force in only 1.7 percent of all contacts and 20 percent of all arrests.¹⁰⁹

nondeadly force Force that is unlikely to cause death or significant bodily harm.

CONTROLLING NONDEADLY FORCE In *Graham v. Connor*, the Supreme Court ruled that issues related to nondeadly force must be judged from the standpoint of a reasonable officer (formally called “objective reasonableness”).¹¹⁰ For example, say an officer is approached in a threatening manner by someone wielding a knife. The assailant fails to stop when warned and is killed by the officer, but it turns out later that the shooting victim was deaf and could not hear the officer’s command. The officer would not be held liable if, at the time of the incident, he had no way of knowing the person’s disability.

L08 Explain the importance of less-lethal weapons

Less-Lethal Weapons

In the past few years, about a thousand local police forces have started using so-called **less-lethal weapons** to subdue certain suspects. By far the most popular are Tasers, which deliver electric shocks with long wire tentacles, producing intense muscle spasms. Other technologies include guns that shoot giant nets, guns that shoot rubber bullets, and lights that can temporarily blind a suspect, among many others.

less-lethal weapons Weapons designed to disable or immobilize rather than kill criminal suspects.

Research suggests less-lethal weapons may help reduce police use of force.¹¹¹ They may also reduce suspect resistance, but they can be limited in certain situations, such as when suspects are under the influence of drugs or are in very close proximity (e.g., less than three feet) to officers.¹¹² See the accompanying Focus on Effectiveness box for another possible limitation of Taser use.

Tasers and Cognitive Impairment

Suspects who are subjected to "custodial interrogation" must be advised of the familiar *Miranda* rights ("you have the right to remain silent," etc.). *Miranda* rights, which stem from the US Supreme Court's 1966 decision in *Miranda v. Arizona*, are intended to protect people from incriminating themselves, which is an important Fifth Amendment privilege. Recently, some have expressed concern that Taser exposure may affect suspects' willingness to share information with the police. They assume that a person who is "tased" during an altercation with officers could have his or her cognitive abilities impaired. Such an assumption indeed has merit. After all, Tasers cause uncontrollable muscle contractions that result in immediate loss of neuromuscular control. Why would the brain not also be affected?

In a creative study, Robert Kane and Michael White solicited student volunteers and randomly assigned them to four different groups. In one group, subjects were tased with no other intervention on the researchers' part. In another group, participants vigorously punched a heavy bag for 30 seconds before being tased. The exertion was used to simulate physical altercations with police officers. The participants in the remaining two groups served as controls and were not tased. All participants then completed a number of cognitive tests. Interestingly, Kane and White found that Taser exposure led to "short-term auditory recall" problems. Also, tased individuals temporarily had trouble assimilating new information through the auditory process. The effects lasted approximately 60 seconds after Taser exposure.

Effects on Crime/Recidivism

Would Taser exposure have any effect on crime? Perhaps not directly, but the Taser could conceivably create a loophole that makes it difficult for prosecutors to secure convictions. Assume, for example, that a suspect

is tased, arrested, and then interrogated. Even if the police advise the individual of his *Miranda* rights, what if he decides to waive those rights and offers up an incriminating statement? Would he have made that statement but for the Taser? Perhaps not. In looking at existing case law, only a handful of suspects have challenged their confessions on the grounds that they had been tased and were not in full control of their faculties, but none have succeeded thus far.

Thinking Critically About Research

The Kane and White study is important because it was an experiment. Experiments (with random assignment to treatment and control conditions) are exceptionally rare in criminal justice. They are even less common when they involve controversial activities like shocking participants with Tasers! The researchers had to jump through a number of hoops to secure permission from their university's Institutional Review Board, which is designed to ensure that human subjects are protected from potentially harmful research projects.

QUESTIONS

1. Do Tasers open a potential loophole in the criminal process?
2. What other potential loopholes exist?

Sources: *Miranda v. Arizona*, 384 US 436 (1966); Robert J. Kane and Michael D. White, "Taser Exposure and Cognitive Impairment: Implications for Valid *Miranda* Waivers and the Timing of Police Custodial Interrogations," *Criminology and Public Policy* 15 (2016): 79–107.

WEB APP
6.3

Visit the National Institute of Justice's website on the Taser at <https://www.nij.gov/topics/technology/less-lethal/pages/conducted-energy-devices.aspx>. Carefully read the section on "Safety of Conducted Energy Devices." Write an essay that answers the following question: Are Tasers safe? Be sure to explain what "weight" should be assigned to reporting from the National Institute of Justice relative to other organizations, such as Taser International, the device's manufacturer.

L09 Analyze the Supreme Court's involvement with the police through its effort to control search and seizure and interrogation, and through establishment of the exclusionary rule

Police Searches and Interrogations

The police are charged with preventing crime and, when crime does occur, with investigating the case, identifying the culprit, and making an arrest. To carry out these tasks, police officers need to be able to search for evidence, to seize items such as guns and drugs, and to question suspects, witnesses, and victims, because at trial, they must provide prosecutors with sufficient evidence to prove guilt "beyond a reasonable doubt." This requirement means that soon after a crime is committed, they must make every effort to gather physical evidence, obtain confessions, and take witness statements that will stand up in court. Police officers also realize that evidence such as the testimony of a witness or a coconspirator may evaporate before the trial begins. Then the outcome of the case may depend on some piece of physical evidence or a suspect's statement taken early in the investigation.

The need for police officers to gather evidence can conflict with the constitutional rights of citizens. For example, although police might prefer a free hand to search homes and cars for evidence, the Fourth Amendment restricts police activities by limiting searches and seizures to those deemed "reasonable." Likewise, when police want to vigorously interrogate a suspect, they must honor the Fifth Amendment's prohibition against forcing people to incriminate themselves. The following sections address some key areas in which police operations have been restricted or curtailed by the courts.

Interrogation and Confessions

After an arrest is made, police want to interrogate suspects, hoping they will confess to the crime, name coconspirators, or make incriminating statements that can be used

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against them in court. But the Fifth Amendment guarantees people the right to be free from self-incrimination. The courts have used this phrase to prohibit law enforcement agents from using physical or psychological coercion while interrogating suspects to get them to confess or give information. Confessions obtained from defendants through coercion, force, trickery, or promises of leniency are inadmissible because their trustworthiness is questionable.

THE MIRANDA WARNING In 1966, in the case of *Miranda v. Arizona*, the Supreme Court created objective standards for questioning by police after a defendant has been taken into custody.¹¹³ Custody occurs when a person is not free to walk away, such as when an individual is arrested. The Court maintained that before the police can question a person who has been arrested or is in custody, they must inform the individual of his or her Fifth Amendment right to be free from self-incrimination. This is accomplished by the police issuing what is known as the *Miranda* warning, which informs the suspect of the following:

- He has the right to remain silent.
- If he makes a statement, it can be used against him in court.
- He has the right to consult an attorney and to have the attorney present at the time of the interrogation.
- If he cannot afford an attorney, one will be appointed by the state.

If the defendant is not given the *Miranda* warning before the investigation, the evidence obtained from the interrogation cannot be admitted at trial. An accused person can waive his or her *Miranda* rights at any time. For the waiver to be effective, however, the state must first show that the defendant was aware of all the *Miranda* rights and must then prove that the waiver was made with the full knowledge of constitutional rights. People who cannot understand the *Miranda* warning because of their age, mental handicaps, or language problems cannot be legally questioned without their attorney present; if they *can* understand their rights and then waive them, they may be questioned.¹¹⁴ The Supreme Court has decided a number of *Miranda*-related cases over the years. The key cases are summarized in Exhibit 6.3.

Miranda is now a police (and a prime-time television) institution. It is not surprising that today police administrators who in the past might have been wary of the restrictions forced by *Miranda* now actually favor its use.¹¹⁵ Yet in spite of its acceptance, critics have called the *Miranda* decision incomprehensible and difficult to administer. How can one tell when a confession is truly voluntary or when it has been produced by pressure and coercion? Aren't all police interrogations essentially coercive?¹¹⁶ To ensure that *Miranda* rules are being followed, many departments now routinely videotape interrogations.¹¹⁷ Nonetheless, the *Miranda* decision continues to be an important one.

Search and Seizure

When conducting investigations, police officers want to collect evidence, seize it, and carry it away. They may want to enter a suspect's home; look for evidence of a crime, such as bloody clothes, drugs, missing money, or a weapon; seize the evidence; and store it in the evidence room so it can later be used at trial. The manner in which police may seize evidence is governed by the search-and-seizure requirements of the Fourth Amendment of the US Constitution, which was designed by the framers to protect a criminal suspect from unreasonable searches and seizures. Under normal circumstances, no search or seizure undertaken without a search warrant is lawful.

A **search warrant** is a court order authorizing and directing the police to search a designated place for evidence of a crime. To obtain a search warrant, the following procedural requirements must be met: (1) the police officer must request the warrant from the court; (2) the officer must submit an affidavit establishing the proper grounds for the warrant; and (3) the affidavit must state the place to be searched and the property to be seized.

Miranda warning The requirement that police officers inform suspects subjected to custodial interrogation that they have a constitutional right to remain silent, that their statements can later be used against them in court, that they can have an attorney present to help them, and that the state will pay for an attorney if they cannot afford to hire one.

REALITYCHECK

Myth or Reality?

The police are not required to advise all arrestees of their *Miranda* rights.

REALITY. *Miranda* rights need be read only when custody (such as arrest) is coupled with interrogation.

Police departments may adopt more restrictive policies, however, requiring *Miranda* warnings any time a person is arrested. Should the *Miranda* warnings be read every time a person is arrested?

search warrant An order issued by a judge, directing officers to conduct a search of specified premises for specified objects or persons and bring them before the court.

EXHIBIT 6.3 Important *Miranda*-Related Decisions over the Years

Fare v. Michael C. (1978) The *Miranda* warning applies only to the right to have an attorney present. The suspect cannot demand to speak to a priest, a probation officer, or any other official.¹¹⁸

New York v. Quarles (1984) A suspect can be questioned in the field without a *Miranda* warning if the information the police seek is needed to protect public safety. For example, in an emergency, suspects can be asked where they hid their weapons.¹¹⁹ This is known as the public safety doctrine.

Oregon v. Elstad (1985) Admissions made in the absence of *Miranda* warnings are not admissible at trial, but post-*Miranda* voluntary statements (those made after the warnings are read) are admissible. A post-*Miranda* voluntary statement is admissible even if an initial incriminating statement was made in the absence of *Miranda* warnings.¹²⁰

Colorado v. Connelly (1986) The admissions of mentally impaired defendants can be admitted in evidence as long as the police acted properly, and there is a preponderance of evidence that the defendants understood the meaning of *Miranda*.¹²¹

Moran v. Burbine (1986) An attorney's request to see the defendant does not affect the validity of the defendant's waiver of the right to counsel. Police misinformation to an attorney does not affect waiver of *Miranda* rights.¹²² For example, a suspect's statements may be used if they are given voluntarily, even though his family has hired an attorney and the statements were made before the attorney arrived. Only the suspect can request an attorney, not his friends or family.

Colorado v. Spring (1987) Suspects need not be aware of all the possible outcomes of waiving their rights for the *Miranda* warning to be considered properly given.¹²³

Minnick v. Mississippi (1990) When counsel is requested, interrogation must cease and cannot be resumed until an attorney is present.¹²⁴

Arizona v. Fulminante (1991) The erroneous admission of a coerced confession at trial can be ruled a harmless error that would not automatically result in overturning a conviction.¹²⁵

Davis v. United States (1994) A suspect who makes an ambiguous reference to an attorney during questioning, such as "Maybe I should talk to

an attorney," is not protected under *Miranda*. The police may continue their questioning.¹²⁶

Chavez v. Martinez (2003) Failure to give a suspect a *Miranda* warning is not illegal unless the case becomes a criminal issue.¹²⁷

United States v. Patane (2004) A voluntary statement given in the absence of a *Miranda* warning can be used to obtain evidence that can be used at trial. Failure to give the warning does not make seizure of evidence illegal per se.¹²⁸

Missouri v. Seibert (2004) *Miranda* warnings must be given before interrogation begins. The accused in this case was interrogated and confessed in the absence of *Miranda* warnings. *Miranda* rights were then read, at which point the accused "re-confessed." The pre-*Miranda* questioning was improper.¹²⁹

Maryland v. Shatzer (2010) *Miranda* protections do not apply if a suspect is released from police custody for at least 14 days and then questioned. However, if the suspect is rearrested, then *Miranda* warnings must be read.¹³⁰

Florida v. Powell (2010) The *Miranda* warnings do not require that the suspect be advised that he or she has the right to have an attorney present during questioning. It is sufficient to advise the suspect that he or she has the right to talk with a lawyer before questioning and to consult a lawyer at any time during questioning.¹³¹

Berghuis v. Thompkins (2010) Unless a suspect asserts his or her *Miranda* rights, any subsequent voluntary statements given after the warnings are admissible in court. Simply remaining silent does not imply that a suspect has invoked *Miranda* protection.¹³²

J.D.B. v. North Carolina (2011) Children may be more prone to confessing to crimes they did not commit, and this needs to be taken into consideration in deciding whether a police interrogation is also custodial. In other words, the suspect's age factors into the *Miranda* custody analysis.¹³³

Howes v. Fields (2012) A prisoner questioned about events that occurred prior to his or her incarceration is not considered "in custody" for *Miranda* purposes. In this case, Fields, the inmate, was free to walk away from questioning and go back to his cell.¹³⁴

Protester Peter Weston is searched by police after being arrested for declining to leave a demonstration in Seattle on May 8, 2017. Climate activists opposed to oil pipeline projects demonstrated at several JPMorgan Chase bank locations, calling on the bank not to do business with TransCanada, the company pushing for the Keystone XL oil pipeline.



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Through-Wall Radar

Back in 2001, the US Supreme Court decided on the role of thermal imaging (heat sensing) devices in law enforcement. The case, *Kyllo v. United States*, involved a man who had been growing marijuana in his home. Police used a handheld thermal imager to detect heat escaping Kyllo's house. The scan showed that the roof over the garage and one side of the house was relatively warm compared to the rest of the home—and much warmer than neighboring homes. Based on that and other information, a search warrant was obtained. More than 100 marijuana plants and growing equipment were found. Kyllo sought to have the evidence excluded from his trial, arguing that police use of a thermal imager without a warrant was itself a search and therefore in violation of the Fourth Amendment. The Supreme Court agreed. Now law enforcement officials must first secure a search warrant before being able to conduct thermal imager scans.

Fast forward to the present. A new technology, through-wall radar, can reveal even more detail than thermal imagers. Although thermal imagers reveal only escaping heat and cannot see *inside* buildings, through-wall radar permits police to learn where and how many people are inside a building, at distances of up to 50 feet. The handheld Range-R, manufactured by CyTerra Corporation, looks a lot like an ordinary stud finder. It is designed to be held up against the wall outside a room of interest, then, like a finely tuned motion detector, it sends radio waves through the wall designed to detect the smallest of human movements, even a person's breathing. Importantly, it does not show a *picture* of what is inside, only information on a digital readout about how many people are inside and how far away they are.

The benefits of through-wall radar are obvious; knowing who, if anyone, is behind closed doors can go a long way toward protecting officer safety and needless loss of life. CyTerra says its device is "[d]esigned to increase situation awareness in urban environments [and] provides its users with vital intelligence necessary to safely undertake a variety of law enforcement and search and rescue operations." Of course, though, through-wall radar raises constitutional concerns. If thermal imager use constitutes a search, then why would

the same rule not apply to through-wall radar? Indeed, this issue came up in a recent federal court case. Officers used a through-wall radar device, but the court decided not to reverse Steven Denson's conviction for firearm-related offenses because it concluded the officers had other information to believe their man was hiding inside the home. Nevertheless, the court took care to emphasize that through-wall radar will face additional legal challenges:

It's obvious to us and everyone else in this case that the government's warrantless use of such a powerful tool to search inside homes poses grave Fourth Amendment questions. New technologies bring with them not only new opportunities for law enforcement to catch criminals but also new risks for abuse and new ways to invade constitutional rights. . . . Unlawful searches can give rise not only to civil claims but may require the suppression of evidence in criminal proceedings. We have little doubt that the radar device deployed here will soon generate many questions for this court and others along both of these axes.

Denson petitioned the Supreme Court for review, but it denied certiorari. For the time being, the Tenth Circuit's decision officers the only guidance in this interesting area of Fourth Amendment jurisprudence.

CRITICAL THINKING

1. Should through-wall radar be used more often in policing?
2. What other technological advances in law enforcement raise Fourth Amendment questions? Why?

Sources: *Kyllo v. United States*, 533 US 27 (2001); Brad Heath, "New Police Radars Can 'See' Inside Homes," *USA Today*, January 20, 2015, <http://www.usatoday.com/story/news/2015/01/19/police-radar-see-through-walls/22007615/>; L3 Communications CyTerra, *Range-R*, <http://www.cytterra.com/products/ranger.htm>; *United States v. Denson*, 775 F.3d 1214 (Tenth Cir. 2014). (URLs accessed April 2017.)

A warrant cannot be issued unless the presiding magistrate is presented with sufficient evidence to conclude that an offense has been or is being committed and that the suspect is the one who committed the offense; this is referred to as the **probable cause** requirement. In other words, the presiding judge must conclude from the facts presented by the police that there is probable cause a crime has been committed and that the person or place to be searched is materially involved in that crime; there must be solid evidence of criminal involvement.

Searches must also be reasonable under the circumstances of the crime. Police would not be able to get a warrant to search a suspect's desk drawer for a missing piano! Nor could police obtain a warrant that allows them to tear down the walls of a person's house because it is suspected that they contain drugs. A search is considered unreasonable when it exceeds the scope of police authority or is highly invasive of personal privacy, even if it reveals incriminating evidence. For more on the privacy issue, see the accompanying Criminal Justice and Technology box.

WARRANTLESS SEARCHES To make it easier for police to conduct investigations and to protect public safety, the Supreme Court has ruled that under certain circumstances, a valid search may be conducted without a search warrant. The six major exceptions are:

- **Search incident to a valid arrest.** A warrantless search is valid if it is made incident to a lawful arrest. The reason for this exception is that the arresting officer must

probable cause The evidentiary criterion necessary to sustain an arrest or the issuance of an arrest or search warrant; less than absolute certainty or "beyond a reasonable doubt," but greater than mere suspicion or "hunch."

REALITYCHECK

Myth or Reality?

Some warrantless searches are permissible as long as the police have probable cause.

REALITY. Certain types of warrantless searches are permissible, but not all of them. For example, it is never permissible for an officer, with probable cause but no warrant, to enter a private residence in the absence of exigent circumstances.

Has the Supreme Court created enough exceptions to the Fourth Amendment warrant requirement? Why or why not?

stop and frisk The situation when police officers who are suspicious of an individual run their hands lightly over the suspect's outer garments to determine whether the person is carrying a concealed weapon. Also called a patdown or threshold inquiry, a stop and frisk is intended to stop short of any activity that could be considered a violation of Fourth Amendment rights.

have the power to disarm the accused, protect himself or herself, preserve the evidence of the crime, and prevent the accused from escaping from custody. Because the search is lawful, the officer retains what he or she finds if it is connected with a crime. The officer is permitted to search only the defendant's person and the areas in the defendant's immediate physical surroundings that are under his or her control.¹³⁵ Interestingly, the Supreme Court recently decided that officers cannot, without a warrant, search digital information on a cell phone following a person's arrest.¹³⁶

- **Stop and frisk.** In the landmark *Terry v. Ohio* decision, the Supreme Court held that police officers can perform a **stop and frisk** when they have reasonable suspicion to believe criminal activity is afoot. For example, say the individual is seen lurking outside a closed store and peering through the windows. In such a case, the officer has a right to stop and question the individual and, if the officer has reason to believe that the person is carrying a concealed weapon, may frisk the subject—that is, pat down the person's outer clothing for the purpose of finding a concealed weapon. If an illegal weapon is found, then an arrest can be made and a search incident to the arrest performed.¹³⁷ Would it be legal to pat down a person merely because that person is standing in a high-crime neighborhood? Probably not. The Supreme Court suggests that an officer would need more suspicion—for example, if the person ran away when he spotted the police approaching.¹³⁸
- **Automobile search.** An automobile may be searched without a warrant if there is probable cause to believe the car was involved in a crime.¹³⁹ Because automobiles are inherently mobile, there is a significant chance that evidence will be lost if the search is not conducted immediately; also, people should not expect as much privacy in their cars as in their homes.¹⁴⁰ Police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere inside it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant.

Because traffic stops can be dangerous, the Court has ruled that if a police officer perceives danger during a routine traffic stop, he can order the driver and passengers from the car without suspicion and conduct a limited search of their persons to ensure police officer safety.¹⁴¹ Police officers can search the car and passengers after a traffic stop, as long as the search is reasonable and related to officer safety.¹⁴² Usually, the search must be limited to the area under the driver's control or reach. Also, if someone in the vehicle is arrested, officers can only then search the vehicle for objects related to the offense of arrest, as the Supreme Court announced in *Arizona v. Gant*.¹⁴³

- **Consent search.** In a consent search, individuals waive their constitutional rights; therefore, neither a warrant nor probable cause need exist. For a consent search to be legal, the consent must be given voluntarily; threat or compulsion invalidates the search.¹⁴⁴ Although it has been held that voluntary consent is required, it has also been maintained that the police are under no obligation to inform individuals of their right to refuse the search.¹⁴⁵
- **Plain-view search.** Even when an object is in a house or other areas involving an expectation of privacy, the object can be freely inspected if it can be seen by the general public. If a police officer looks through a fence and sees marijuana growing in a suspect's fields, no search warrant is needed for the property to be seized. The articles are considered to be in plain view, and therefore a search warrant need not be obtained to seize them.¹⁴⁶
- **Exigent circumstances.** The Supreme Court has identified a number of exigent, or emergency, circumstances in which a search warrant might normally have been required, but because of some immediate emergency, police officers can search suspects and places without benefit of a warrant. These circumstances include hot pursuit, danger of escape, threats to evidence, and threats to others. In each situation, officers must have probable cause.¹⁴⁷ For example, as the Supreme Court recently

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decided in *Kentucky v. King*, it is constitutionally permissible for officers to forcibly enter a residence if they have probable cause that evidence is being destroyed within.¹⁴⁸ They can also use deadly force to terminate car chases that pose grave public safety risks, as was decided in 2014.¹⁴⁹

The Exclusionary Rule

The **exclusionary rule** provides that all evidence obtained by unreasonable searches and seizures is inadmissible in criminal trials. Similarly, it excludes the use of illegal confessions under Fifth Amendment prohibitions.

After police agencies were created in the mid-nineteenth century, evidence obtained by unreasonable searches and seizures was admitted by state and federal governments in criminal trials. The only criteria for admissibility were whether the evidence was incriminating and whether it would help the judge or jury reach a verdict. Then, in 1914, the US Supreme Court established the exclusionary rule in the case of *Weeks v. United States*, when it ruled that evidence obtained by unreasonable search and seizure must be excluded from a federal criminal trial.¹⁵⁰ In 1961, the Supreme Court made the exclusionary rule applicable to state courts in the landmark decision of *Mapp v. Ohio*.¹⁵¹

CONTROVERSY AND CURRENT STATUS When the exclusionary rule applies, valuable evidence may not be usable at trial because the police made an error or failed to obtain a proper warrant. This means that guilty defendants can go free when the police make mistakes, intentional or otherwise. What's more, because courts frequently decide in many types of cases (particularly those involving victimless offenses, such as gambling and drug use) that certain evidence should be excluded, the rule is believed to result in excessive court delays and to affect plea-bargaining negotiations negatively. In fact, however, the rule appears to result in relatively few case dismissals. Research efforts show that prosecutions are lost because of suppression rulings less than 1 percent of the time.¹⁵²

Over time, the Supreme Court has been diminishing the scope of the exclusionary rule. For example, evidence is admissible in court if the police officers acted in good faith by first obtaining court approval for their search, even if the warrant they received was deficient or faulty.¹⁵³ This has come to be known as the **good faith exception**.

ETHICAL REFLECTION

Think back to this chapter's section on less-lethal weapons. As Tasers have found their way into mainstream law enforcement use, researchers have been drawn to the question of whether they present an effective alternative to conventional use-of-force measures. This research has yielded a wide range of conclusions, ranging from very supportive to very critical. Staunch advocates of Tasers include the manufacturer and much of the law enforcement community. Critics include most notably human rights organization Amnesty International. It has been especially critical of Taser deaths. Most research findings fall somewhere between these extremes.

For example, research has shown that Tasers are more effective at incapacitating suspects than pepper spray. And as Eugene Paoline and his colleagues found, Taser use reduces officer injury compared to other force measures.¹⁵⁴ Dozens of studies have also concluded that Tasers pose minimal risk of death or serious injury, but much of the research has been conducted in laboratory settings on animals and healthy human volunteers. In response to this limitation, Michael White and Justin Ready compared news reports of fatal and nonfatal Taser incidents. They found that suspect drug use, mental illness, and continued resistance were associated with Taser deaths, but they concluded that more research is necessary if we are ever to know for sure.¹⁵⁵ In the meantime, they suggest the development of model policy guidelines because of potential unanticipated consequences associated with Taser use.

Writing Challenge Write an essay that lays out a set of guidelines for proper Taser use. When should Tasers be used? When should they *not* be used? Consult the links at the following URL for a wealth of information and suggestions: <http://www.aele.org/law/Digests/ECWarticles.html>.

REALITYCHECK

Myth or Reality?

Legal loopholes enable guilty criminals to go free in alarming numbers.

MYTH. One of the supposed loopholes is the exclusionary rule, discussed in this section. Although it can result in the guilty going free, it is rarely invoked. Police mistakes and misconduct that lead to the exclusion of evidence are extremely rare. And many suspects in custodial interrogation situations waive their rights and agree to talk with police, contrary to movie and television depictions.

Despite the evidence, many people still feel that the exclusionary rule is a loophole. Why do such perceptions persist?

exclusionary rule Evidence seized in violation of the Fourth Amendment cannot be used in a court of law.

good faith exception The principle that evidence may be used in a criminal trial, even though the search warrant used to obtain it is technically faulty, if the police acted in good faith and to the best of their ability when they sought to obtain it from a judge.

Courts and Adjudication

PART

3

On February 13, 2016, US Supreme Court Justice Antonin Scalia died of natural causes at a resort outside Marfa, Texas. He was 79. Appointed to the Court by President Ronald Reagan in 1986, Scalia was known for his wit and intellect, both of which came through in caustic legal opinions. He was conservative but also somewhat unpredictable. Some of his opinions sided squarely with criminal defendants when he felt government power was too overreaching. For example, in *Maryland v. King*, a case which permitted police to take and analyze DNA cheek swabs from arrestees as part of the normal booking procedure, Scalia wrote: "I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."

Scalia was also an "originalist," meaning he interpreted the Constitution as it was originally written. He defined originalism in this way: "The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted."¹ Scalia would also let it be known, in a particularly eloquent manner, when he felt an issue and/or case was "beneath" the Supreme Court. This came out loud and clear in his dissent in *PGA Tour, Inc. v. Martin*, a case in which the Court decided whether a disabled professional golfer could use a motorized cart during play:

It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power "[t]o regulate Commerce with foreign Nations, and among the several States," to decide *What Is Golf*. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer?

Part 3 of this text covers courts and adjudication. Chapter 7 provides an introduction to the court system as well as the roles of the prosecution and the defense. Chapter 8 covers pretrial and trial procedures. Pretrial topics include bail, charging the defendant, plea bargaining, and diversion. The trial section of Chapter 8 summarizes the trial process and the legal rights defendants enjoy. Chapter 9 looks at punishment and sentencing. The chapter begins with the history and goals of punishment, and then it moves into specific types of sentences. Chapter 9 wraps up with a review of capital punishment and the controversies surrounding it.

Chapter 7 Courts, Prosecution, and the Defense

Chapter 8 Pretrial and Trial Procedures

Chapter 9 Punishment and Sentencing

7

Courts, Prosecution, and the Defense

Prosecutors are powerful actors in the criminal process. They enjoy enormous discretion in deciding whether to bring charges against criminal suspects. Like policing, prosecution is mostly a “public,” or government function. Police officers are “commissioned” by the states in which they work; prosecutors are typically county employees authorized to practice law in their respective states. But as we discussed back in Chapter 4, law enforcement is increasingly becoming privatized. Police officers can’t be everywhere, so businesses, communities, and other stakeholders have taken it upon themselves to pay for their own security. There are signs that prosecution might be headed in the same direction.

Most large jurisdictions have both the financial means and the workload to justify employment for several full-time government prosecutors. In smaller jurisdictions, however, it is often cost prohibitive to hire and retain such employees. How, then, do these less populous areas ensure they will have prosecutors to bring cases against suspected criminals? Many have started to outsource prosecution through a system of competitive bidding. The process goes like this: A local government will issue a request for proposals, or RFP, asking local attorneys to submit proposals to assume prosecution functions. Once they are received, each proposal is reviewed to evaluate issues of experience, qualifications, and of course cost. Ideally, the best and most cost-effective proposal will be granted the contract.

There are benefits and drawbacks to this approach. On the one hand, it is not that outsourcing fully turns prosecution over to the private sector. The attorneys who bid must be authorized to practice law in the jurisdiction seeking proposals. Moreover, it is quite common for local governments to outsource services, both in and out of criminal justice. On the other hand, could financial motives take precedence over promoting justice? Critics of outsourcing prosecution answer with a resounding “yes.” In a recent study

REALITYCHECK

Myth or Reality?

- Every state has just one court of last resort.
- There are almost no formal qualifications for federal judges.
- Elected state judges can be affiliated with a political party.
- Prosecutors base their charging decisions solely on legal factors, such as the seriousness of the offense.
- Privately retained defense attorneys are more effective than court-appointed defense attorneys.

of the competitive bidding process for prosecution, law professor Maybell Romero cited this concern:

While “[e]fficiency gains are the major reason that governments enter into privatization agreements,”...the use of outsourced prosecution services, particularly those hired through an RFP/competitive bidding process is dangerous, subjecting the hired prosecutors to much of the same political pressure as elected officials while also generating unusual and outsized pressures to prioritize budgets and fine/fee generation.²

Questions of how efficiently use government resources and ensure justice are not easily answered. Whether it is for prosecution, defense, the judiciary, or even court structure, people have a wide range of ideas for how best to promote fair and cost-effective criminal justice operations. This chapter considers a number of such proposals, beginning with the courts.

The criminal court is the setting in which many of the most important decisions in the criminal justice system are made. Eyewitness identification, bail, trial, plea negotiations, and sentencing all involve court decisions. The criminal court is a complex social agency with many independent but interrelated subsystems: administrator, prosecutor, defense attorney, judge, and probation department. The entire process—from filing of the initial complaint to final sentencing of the defendant—is governed by precise rules of law designed to ensure fairness. However, in today’s crowded court system, such abstract goals are often impossible to achieve. The nation’s court system is chronically underfunded, and recent economic downturns have not helped matters.

These constraints have a significant impact on the way courts carry out justice. Quite often, the US court system is the scene of accommodation and “working things out,” rather than an arena for a vigorous criminal defense. Plea negotiations and other nonjudicial alternatives, such as diversion, are far more common than the formal trial process. Consequently, US criminal justice can be selective. Discretion accompanies defendants through every step of the process, determining what will happen to them and how their cases will be resolved. “Discretion” means that two people committing similar crimes may receive highly dissimilar treatment. Most people convicted of homicide receive a prison sentence, but about 5 percent receive probation as a sole sentence; indeed, more murderers get probation than the death penalty.³

In this chapter, we examine the structure and function of the court system. The US court system has evolved over the years into an intricately balanced legal process. To carry out this complex process, each state maintains its own state court organization and structure, and the federal court has an independent trial court system. These are described next.

State Courts

L01 Describe the varying structures of state court systems

Every state maintains its own court system. States are free to create as many courts as they wish, to name courts what they like (in New York, felony courts are known as supreme courts!), and to establish specialized courts that handle a single type of legal matter, such as drug courts and domestic courts. Consequently, no two court organizations are exactly alike. State courts handle a wide variety of cases and regulate numerous personal behaviors ranging from homicide to property maintenance.

Courts of Limited Jurisdiction

Depending on the jurisdiction in which they are located, **state courts of limited jurisdiction** are known by a variety of names—municipal courts, county courts, district courts, and metropolitan courts, to mention just a few. They are known as courts

state courts of limited jurisdiction

Courts that have jurisdiction over misdemeanors and conduct preliminary investigations of felony charges.

of limited jurisdiction because they are restricted to hearing minor or less serious civil and criminal cases.

Usually, courts of limited jurisdiction handle misdemeanor criminal infractions, violations of municipal ordinances, traffic violations, and civil suits where the damages involve less than a certain amount of money (usually \$1,000 or less). In criminal matters, they hear cases involving misdemeanors such as shoplifting, disorderly conduct, and simple assault. Their sanctioning power is also limited. In criminal matters, punishments may be limited to fines, community sentencing, or incarceration in the county jail for up to a year. In addition to their trial work, limited jurisdiction courts conduct arraignments, preliminary hearings, and bail hearings in felony cases (before they are transferred to superior courts).

The nation's approximately 13,500 independent courts of limited jurisdiction are the ones most often accused of providing assembly-line justice. Because the matters they decide involve minor personal confrontations and conflicts—family disputes, divorces, landlord-tenant conflicts, barroom brawls—the rule of the day is “handling the situation” and resolving the dispute.

SPECIALIZED COURTS A growing phenomenon in the United States is the creation of specialty courts that focus on one type of criminal act, such as drug courts and mental health courts.⁴ All cases within the jurisdiction that involve this particular type of crime



FOCUS ON EFFECTIVENESS

The Queens (New York) Treatment Court

The Queens Treatment Court (QTC) is a drug court designed for first-time nonviolent drug offenders. Participants who meet eligibility requirements are typically given the option, in the form of a plea agreement, to either join the QTC program or receive felony probation (cases could also go to trial if no plea agreement is reached). The court seeks to reduce recidivism by providing a range of services, including treatment, to offenders who are arrested in Queens County, New York. The mission of the QTC is “to provide offenders with the tools necessary for long-term sobriety, using court-supervised treatment and case management services as an alternative to incarceration.”

The QTC uses a postplea adjudication model. This means defendants start by pleading guilty to a drug charge. They also agree to serve out a term of incarceration if they fail out of the drug treatment program. Participation runs for 12 months, divided into three treatment phases. Each phase requires four consecutive sanctionless months before participants can move to the next phase. All participants appear in drug court each week at the start of the program, with gradual phase-out of court appearances in later stages of treatment. Treatment is individually tailored to the needs of each defendant.

Effects on Crime/Recidivism

Researchers compared QTC participants to similar defendants who had been arrested before the court was in operation. Formal steps (known as propensity score matching) were taken to ensure comparability of the treatment (those individuals who went through the QTC program) and control (offenders who would have been eligible for the QTC program were it around at the time of their arrests). Recidivism data were collected from the New York State Division of Criminal Justice Services. The researchers then tracked both treatment and control group members over time. They found that after one year, only 10 percent of QTC participants had a new arrest compared to 31 percent in the control group. After two years, the difference was 18 percent for the treatment group, 42 percent for the control group. Indeed, according to CrimeSolutions.gov, “the QTC program produced one

of the largest recidivism impacts of any drug court nationwide that has been evaluated...”

Thinking Critically About Research

The researchers who evaluated the QTC could not use an experimental research design, as doing so would raise serious ethical questions. In other words, it would not be fair to randomly assign participants to treatment and control conditions (why should some people benefit from treatment and others not benefit?). They *did*, however, conduct a rigorous quasi-experimental design that ensured comparability of treatment and control groups. Also, they evaluated a large sample of individuals and tracked their behavior over time. Finally, recall that offenders who refuse to participate likely receive several years of felony probation or take their chances at trial. This means there was minimal potential in the study for what researchers call a “selection effect,” or the idea that those who volunteer to participate are the most likely to succeed anyway. QTC participants arguably chose treatment to avoid harsh penalties, not because they were amenable to treatment in the first place.

QUESTIONS

1. Should specialized courts require up-front guilty pleas for participation? Is such a plea a strong motivator for completion?
2. Is it fair for prosecutors to present plea agreements similar to those used in the QTC? In other words, is it fair to offer defendants an opportunity to participate in treatment or face a felony probation sentence?

Source: CrimeSolutions.gov, “Program Profile: Queens (NY) Treatment Court,” <https://www.crimesolutions.gov/ProgramDetails.aspx?ID=93> (accessed February 2017); Michael Rempel, Dana Fox-Kralstein, Amanda Cissner, Robyn Cohen, Melissa Labriola, Donald Farole, Ann Bader, and Michael Magnani, *The New York State Adult Court Evaluation: Policies, Participants, and Impacts* (New York: Center for Court Innovation, 2003).



Specialized Courts

Drug Courts

The drug court movement began in Florida to address the growing problem of prison overcrowding due in large part to an influx of drug-involved offenders. Drug courts were created to have primary jurisdiction over cases involving substance abuse and drug trafficking. The aim is to place nonviolent first offenders into intensive treatment programs rather than in jail or prison. Today, nearly 3,000 drug courts operate across the United States. Drug courts address the overlap between the public health threats of drug abuse and crime: crimes are often drug-related, and drug abusers are frequently involved with the criminal justice system. Drug courts provide an ideal setting to address these problems by linking the justice system with health services and drug treatment providers, while easing the burden on the already over-taxed correctional system.

Mental Health Courts

Based largely on the organization of drug courts, mental health courts focus their attention on mental health treatment to help people with emotional problems reduce their chances of reoffending. By focusing on the need for treatment, along with providing supervision and support from the community, mental health courts provide a venue for those dealing with mental health issues to avoid the trauma of jail or prison, where they will have little if any access to treatment.

Community Courts

Community courts are also becoming popular. Rather than targeting specific types of problems such as drugs or mental health, these courts take a more generalized focus. The main concern with community courts is providing "accessible justice" for residents who cannot easily get to downtown courthouses and focusing on quality-of-life offenses that may not be seen as top priority in traditional criminal courts. Community courts often have several on-site services available, as well. The first community court was Manhattan's Midtown Community Court.

Domestic Violence Courts

Several jurisdictions across the country have created their own domestic violence courts. Brian Ostrom described domestic violence courts in this way: They "seek to coordinate with medical, social service, and treatment providers and establish special procedures and alternative sentencing options

to promote effective outcomes. Success necessitates systemwide collaboration and the ongoing commitment of judges, health care professionals, the police, prosecution, and citizens who witness violent acts." Today, some 300 domestic violence courts are in operation nationwide. Given how new they are, however, not many of them have been evaluated.

Gun Courts

Rhode Island created the nation's first gun court in 1994. Unlike some of the other specialized courts, this gun court was concerned mainly with minimizing delay and ensuring that gun offenders received the toughest penalties the law allows. Other gun courts emphasize educating defendants about gun violence and safety. Many such courts have focused their efforts on juvenile gun offenders.

Other Specialized Courts

There are specialized courts for many different types of crime and social problems. In addition to targeting the preceding crimes, specialized courts have been formed to deal with everything from homelessness and sex offenses to parole reentry and teen bullying. We have moved well beyond the world of the traditional limited jurisdiction court. Limited jurisdiction courts still exist, but these are often being supplanted by courts whose jurisdiction is not only limited but also very narrow.

CRITICAL THINKING

1. Do you believe that specialized courts are needed for other types of crimes, such as sex offenses?
2. Should a judge preside over a specialized court, or should it be administered by treatment personnel?

Sources: US Department of Justice, "Drug Courts," <http://www.ncjrs.gov/pdffiles1/nij/238527.pdf>; Shelli Rossman et al., *Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York* (Washington, DC: US Department of Justice, National Institute of Justice, 2012); Brian J. Ostrom, "Domestic Violence Courts: Editorial Introduction," *Criminology and Public Policy* 3 (2003): 105–108; Office of Juvenile Justice and Delinquency Prevention, "Gun Court—Providence, RI, Profile No. 37," http://www.ojjdp.gov/pubs/gun_violence/profile37.html; Greg Berman, John Feinblatt, and Sarah Glazer, *Good Courts: The Case for Problem-Solving Justice* (New York: New Press, 2005) (URLs accessed April 2017).

are funneled to the specialty court, where presumably they will be resolved promptly. Examples of such courts are featured in the accompanying Contemporary Issues in Criminal Justice box. Also see the accompanying Focus on Effectiveness box for a discussion of the Queens (New York) Treatment Court.

What makes specialized courts different from traditional courts? According to the Center for Court Innovation, specialized courts have these six features:

- *Outcomes are elevated above process.* The main concern is reducing recidivism.
- *Judicial monitoring is critical.* Judges closely monitor offenders.
- *Informed decision making is necessary.* Judges hand down sentences with more information about offenders' backgrounds than may be available in traditional sentencing contexts.
- *Collaboration.* Specialized courts typically collaborate with other public and private agencies, many of which are housed in the courthouse.

George Brady gets a high five from Shari Lewinski, program administrator of behavioral health courts, in Denver, Colorado. George, a client in Denver's Court to Community program, was commended by Judge Johnny Barajas for keeping all his appointments for the second week in a row. The Court to Community program is a jail diversion initiative designed to help keep people with mental illness out of jail.

Craig F. Walker/Getty Images News/Getty Images

- **Nontraditional roles.** Specialized court personnel often assume different roles. For example, prosecutors in specialized courts are more interested in helping defendants than in seeing that they are convicted or punished.
- **Systemic change.** Specialized courts try to change the way the criminal justice system works.⁵

Courts of General Jurisdiction

Approximately 2,000 **courts of general jurisdiction** exist in the United States; they are variously called felony, superior, supreme, county, and circuit courts. Courts of general jurisdiction handle the more serious felony cases, such as murder, rape, and robbery, and civil cases where damages are over a specified amount, such as \$10,000. Courts of general jurisdiction may also be responsible for reviewing cases on appeal from courts of limited jurisdiction.

Courts of general jurisdiction are typically organized in judicial districts or circuits, based on a political division such as a county or a group of counties. They then receive cases from the various limited courts located within the county or jurisdiction. Some general courts separate criminal and civil cases so that some specialize in civil matters while others maintain a caseload that is exclusively criminal.

State court systems now handle about 94 million new cases each year, a number that has decreased more than 10 percent in the past decade. The great majority of these cases are traffic related, and about 20 million involve some form of criminal conduct.⁶

Appellate Courts

If defendants believe that the procedures used were in violation of their constitutional rights, they may ask an **appellate court** to review the trial process. Appellate courts do not try cases; they review the procedures of the case to determine whether an error was made by judicial authorities. In some instances, defendants can file an appeal if they believe that the law they were tried under was in violation of constitutional standards (e.g., the crime they were charged with—say, “being a public nuisance”—was vague and ill defined) or if the procedures used in the case contravened principles of due process and equal protection or were in direct opposition to a constitutional guarantee (e.g., they were denied the right to have competent legal representation).

It is the role of the appellate court to decide whether the trial judge made a legal error that influenced the outcome of the case, thereby denying the defendant a fair trial.

REALITYCHECK

Myth or Reality?

Every state has just one court of last resort.

MYTH. Most states have just one, but Oklahoma and Texas have two courts of last resort.

In Texas, the Court of Criminal Appeals is the highest court for criminal cases. The Texas Supreme Court is the court of last resort for juvenile and civil cases. Is this a favorable arrangement? Why do Texas and Oklahoma's courts of last resort differ in their structure from the rest of the nation?

courts of general jurisdiction State or federal courts that have jurisdiction over felony offenses and more serious civil cases (i.e., cases involving more than a dollar amount set by the legislature).

appellate court A court that reconsiders a case that has already been tried to determine whether the measures used complied with accepted rules of criminal procedure and were in accordance with constitutional doctrines.

court of last resort A court that handles the final appeal on a matter. The US Supreme Court is the official court of last resort for criminal matters.

Judicial error can include admitting into evidence illegally seized material, improperly charging a jury, allowing a prosecutor to ask witnesses improper questions, and so on. If, upon review, the appellate court decides that an error has been made, it can order a new trial or even allow the defendant to go free.

State criminal appeals are heard in one of the appellate courts in the 50 states and the District of Columbia. Each state has at least one **court of last resort**, usually called a state supreme court, which reviews issues of law and fact appealed from the trial courts; a few states have two high courts, one for civil appeals and the other for criminal cases.

Many people believe that criminal appeals clog the nation's court system because so many convicted criminals try to "beat the rap" on a technicality. In fact, criminal appeals represent a small percentage of the total number of cases processed by the nation's appellate courts. All types of appeals, including criminal ones, continue to inundate the courts, so most courts are having problems processing cases expeditiously.

Figure 7.1 illustrates the interrelationship of appellate and trial courts in a model state court structure. Each state's court organization, of course, may vary from this

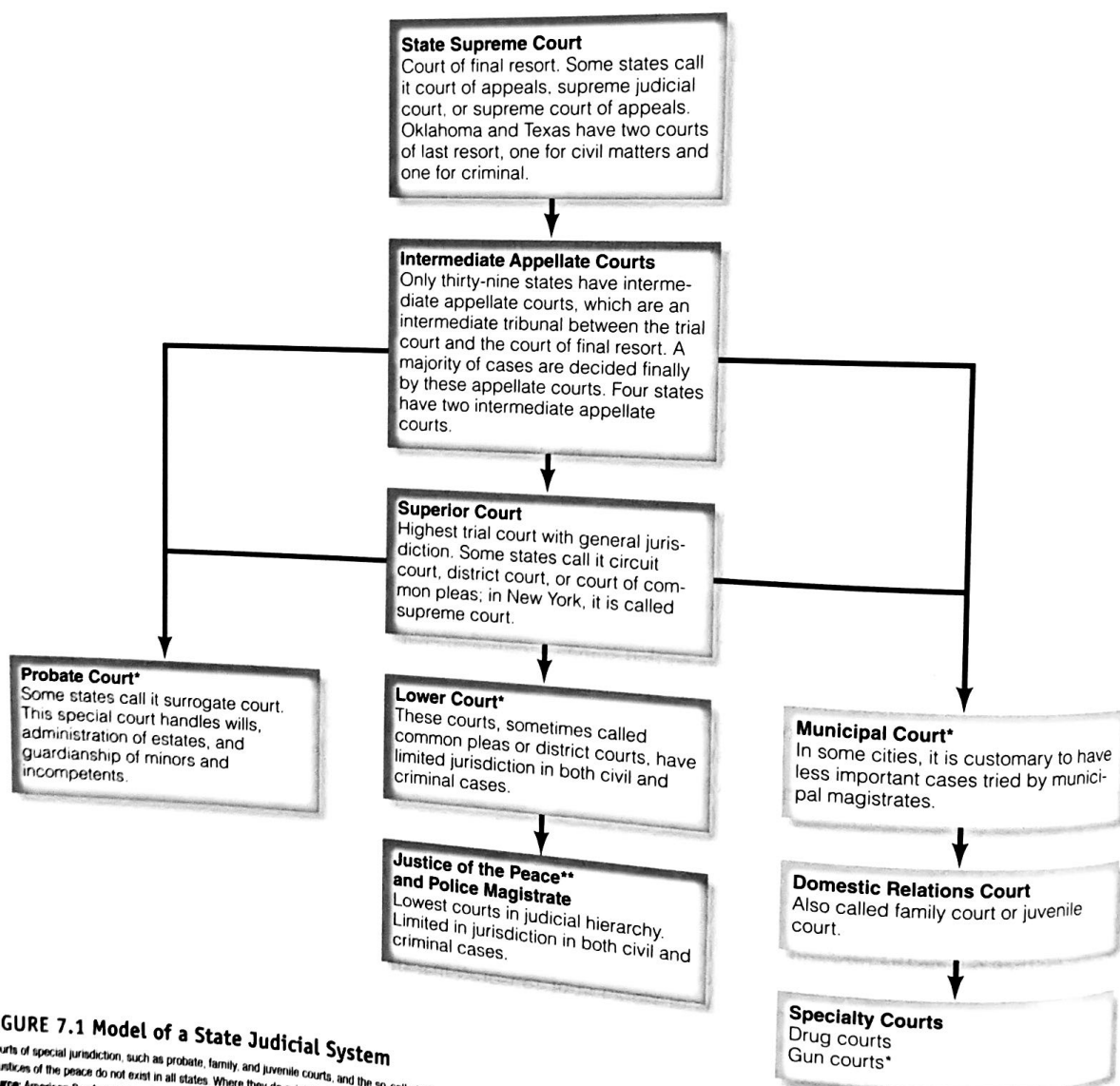


FIGURE 7.1 Model of a State Judicial System

*Courts of special jurisdiction, such as probate, family, and juvenile courts, and the so-called inferior courts, such as common pleas and municipal courts, may be separate courts or part of the trial court of general jurisdiction.

**Justices of the peace do not exist in all states. Where they do exist, their jurisdictions vary greatly from state to state.

Source: American Bar Association, *Law and the Courts* (Chicago: ABA, 1974), p. 20; Bureau of Justice Statistics, *State Court Organization—1998* (Washington, DC: Department of Justice, 2000).

standard pattern. Although most states have a tiered court organization (lower, upper, and appellate courts), all vary in the way they delegate responsibility to a particular court system, and some have consolidated their courts into a single, unified system.

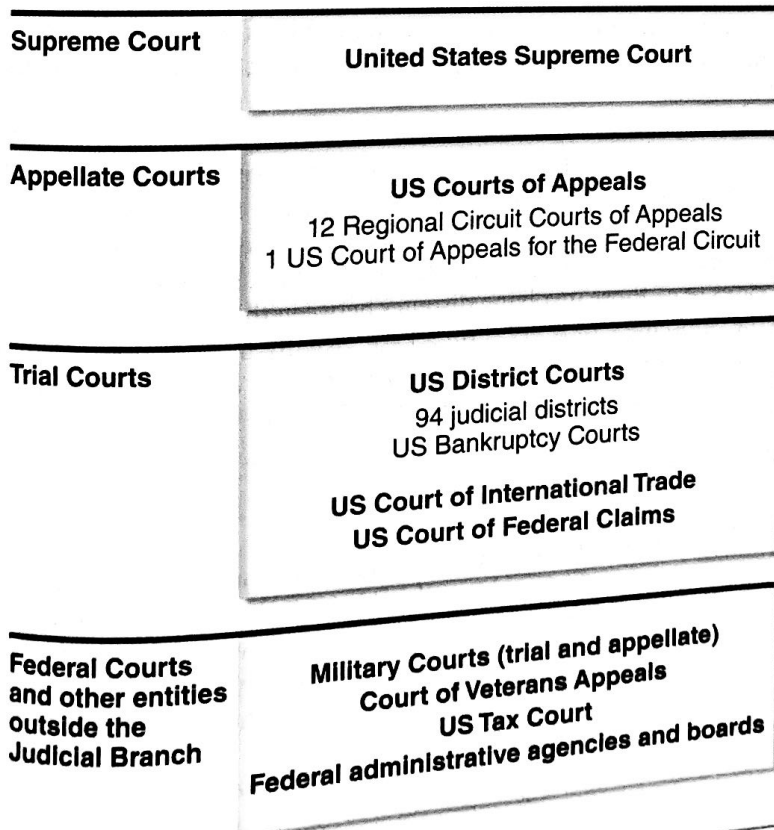
Federal Courts

The legal basis for an independent federal court system is contained in Article 3, Section 1, of the US Constitution, which provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." The important clauses in Article 3 indicate that the federal courts have jurisdiction over the laws of the United States and over treaties and cases involving admiralty and maritime jurisdiction, as well as over controversies between two or more states and citizens of different states.⁷ This complex language generally means that state courts have jurisdiction over most common-law crimes but that the federal system maintains jurisdiction over violations of federal criminal statutes, civil suits between citizens of different states, and suits between a citizen and an agency of the federal government.

Within this authority, the federal government has established a three-tiered hierarchy of court jurisdiction that, in order of ascendancy, consists of the (1) US district courts, (2) US courts of appeals (circuit courts), and (3) the US Supreme Court (see Figure 7.2).

US District Courts

The US district courts serve as the trial courts of the federal system and were organized by Congress in the Judicial Act of 1789. Today, 94 independent courts are in operation. Originally, each state was allowed one court; as the population grew, however, so did the need for courts, so now some states have multiple jurisdictions.



WEB APP 7.1 Visit the Court Statistics Project website and examine the court system structure in the state in which you reside at <http://www.courtstatistics.org/other-pages/state-court-structure-charts.aspx>. Compare and contrast your state's court system structure with that of a neighboring state.

L02 Describe the federal court system

FIGURE 7.2 The Federal Judicial System

US district courts have jurisdiction over cases involving violations of federal laws, including civil rights abuses, interstate transportation of stolen vehicles, and kidnappings. They may also hear cases on questions involving citizenship and the rights of aliens. The jurisdiction of the US district court will occasionally overlap that of state courts. Citizens who reside in separate states and are involved in litigation of an amount in excess of \$10,000 may choose to have their cases heard in either of the states or in the federal district court. Finally, federal district courts hear cases where one state sues a resident (or firm) in another state, where one state sues another, or where the federal government is a party in a suit.

US Courts of Appeals

There are 13 judicial circuits, each with a court of appeals. Each circuit's court of appeals (formally called the "Court of Appeals for the [number] Circuit") is empowered to review federal and state appellate court cases on substantive and procedural issues involving rights guaranteed by the Constitution. Circuit courts do not actually retry cases, nor do they determine whether the facts brought out during trial support conviction or dismissal. Instead, they analyze judicial interpretations of the law, such as the charge (or instructions) to the jury, and reflect on the constitutional issues involved in each case they hear.

Although federal court criminal cases make up only a small percentage of appellate cases, they are still of concern to the judiciary. Steps have been taken to make appealing more difficult. The US Supreme Court has tried to limit the number of appeals being filed by prison inmates, which often represent a significant number of cases appealed in the federal criminal justice system.

The US Supreme Court

The Supreme Court is the nation's highest appellate body and the court of last resort for all cases tried in the various federal and state courts. The Court is composed of nine members appointed for lifetime terms by the president, with the approval of Congress. The Court has discretion over most of the cases it will consider and may choose to hear only those it deems important, appropriate, and worthy of its attention. The Court chooses some 300 of the 5,000 cases appealed each year, and only about 100 of these receive full opinions.

When the Supreme Court decides to hear a case, it grants a **writ of certiorari**, requesting a transcript of the proceedings of the case for review. At least four of the nine justices sitting on the Court must vote to grant the writ of certiorari even before the case can be considered for review. More than 90 percent of the cases heard by the Court are brought by petition for a writ of certiorari. The Court has original jurisdiction for the remaining cases (e.g., those involving disputes between the states).

When the Supreme Court rules on a case, usually by majority decision (at least five votes), its rule becomes a precedent, or **landmark decision**, that must be honored by all lower courts. If, for example, the Court grants a particular litigant the right to counsel at a police lineup, all similarly situated clients must be given the same right.

SUPREME COURT PROCEDURE After the Supreme Court decides to hear a case, it reviews written arguments (referred to as legal briefs) outlining the case and the points of law to be considered. After the written material is reviewed, attorneys for each side in the case are allowed 30 minutes to present an oral argument before the court members. Then the justices normally meet in what is known as a "case conference" to discuss the case and vote to reach a decision (see Figure 7.3).

In reaching a decision, the Supreme Court reevaluates and reinterprets state statutes, the US Constitution, and previous case decisions. On the basis of its review of the case, the Court either affirms or reverses the decision of the lower court. When

writ of certiorari An order of a superior court requesting that the record of an inferior court (or administrative body) be brought forward for review or inspection.

landmark decision A decision handed down by the US Supreme Court that becomes the law of the land and serves as a precedent for resolving similar legal issues.

Full judicial decision by the U.S. Supreme Court
(majority and dissenting opinions)
The Court affirms or reverses lower-court decisions. (Exception: The decision is not always a final judicial action. Lower courts may try the case again or, as in civil litigation, the case may be retried.) There is no appeal process beyond the US Supreme Court.

Decision-making conferences by the justices
Four votes govern the acceptance or rejection of a case: (1) a decision and full opinion; (2) if the case is accepted, there may be a summary decision of a dismissal or affirmation of a lower-court decision (per curiam); (3) if the case is rejected, no explanation (reconsideration is possible); and (4) a rehearing after an unfavorable decision is possible.

Prescreening
(discussion of the case list)
The chief justice places cases on a list, including in forma pauperis petitions.

Discretionary decisions
(special circumstances)
A writ of certiorari or a writ of habeas corpus.

Mandatory decisions
Hears direct statutory appeals in which the state is in conflict with the federal law or Constitution, and original jurisdiction disputes between states.

Decision making

Federal courts
(US appellate courts)
The US Court of Appeals, the US Court of Claims, and the US Customs Court.

State Supreme Court
(State court of last resort)
State supreme court cases that are not an issue of federal law are ineligible for hearing by the Court.

Federal or state trial court cases
(processing of case through federal or state court systems)

FIGURE 7.3 Tracing the Course of a Case to the US Supreme Court

the justices reach a decision, and in the event that the Court's decision is split, the chief justice of the Court assigns a member of the majority group to write the opinion. Another justice normally writes a dissent, or minority, opinion; a single opinion may be written if the decision is unanimous. When the case is finished, it is submitted to the public and becomes the law of the land. The decision represents the legal precedents that add to the existing body of law on a given subject, change it, and guide its future development.

Faith and Freedom Coalition chairman Ralph Reed speaks during a rally in front of the US Supreme Court on April 19, 2017. The Court was hearing oral arguments in *Trinity Lutheran Church v. Comer*, a case about a religious preschool that was rejected from a state program that provides reimbursement grants to purchase rubberized surface material for children's playgrounds.



The Judiciary

The judge is the senior officer in a court of criminal law. Judges' duties are quite varied and far more extensive than might be expected:

- Their primary duty is to oversee the trial process. This means that during trials, judges control the appropriateness of conduct, settle questions of evidence and procedure, and guide the questioning of witnesses.
- In a **jury trial**, the judge must instruct jurors on which evidence it is proper to examine and which should be ignored. The judge also formally charges the jury by instructing its members on what points of law and evidence they must consider to reach a decision of either guilty or not guilty.
- When a jury trial is waived, in a bench trial, the judge must decide whether the defendant is guilty as charged. If a defendant is found guilty, the judge must decide on the sentence (in some cases, this is legislatively determined), which includes choosing the type of sentence, its length, and, in the case of probation, the conditions under which it may be revoked.
- The judge controls and influences court agencies: probation, the court clerk, the police, and the district attorney's office. Probation and the clerk may be under the judge's explicit control. In some courts, the operations, philosophy, and procedures of these agencies are within the magistrate's administrative domain. In others—where a state agency controls the probation department—the attitudes of the county or district court judge greatly influence the way a probation department is run and how its decisions are made.

While carrying out their duties, judges must be wary of the legal controls placed on the trial process by the appellate court system. If an error is made, the judge's decision may be reversed, causing (at the very least) personal embarrassment. Some experts believe that fear of reversal may shape judicial decision making, but research shows that judges may be more independent than previously believed.

Of course, judges do not wield their power in isolation. They work together with prosecutors and defense attorneys, whose work is featured shortly. They are also assisted by a number of courtroom personnel, including clerks, court administrators, security personnel, court reporters, and other support staff. See Exhibit 7.1 for additional details.

jury trial The process of deciding a case by a group of persons selected and sworn in to serve as jurors at a criminal trial, often as a 6- or 12-person jury.

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US Supreme Court Associate Justice Anthony Kennedy administers the judicial oath to Judge Neil Gorsuch as his wife, Marie Louise Gorsuch, holds a bible and President Donald Trump looks on. The ceremony took place in the Rose Garden at the White House on April 10, 2017. Earlier in the day Gorsuch, 49, was sworn in as the 113th Associate Justice in a private ceremony at the Supreme Court.

The Alamy/Shutterstock/Getty Images

EXHIBIT 7.1 Court Staff

The most visible courtroom personnel include the judge, the prosecutor, and the defense attorney. However, many other important court personnel and staff persons are involved as well. The typical large jurisdiction probably has a mix of the following personnel working in the courtroom or courthouse at any given time.

Clerk Court clerks are responsible for a wide range of duties. Their main responsibilities include maintaining court records; receiving, processing, and maintaining judgments; issuing process, such as summonses, subpoenas, and wage garnishments; preserving the court seal; swearing in witnesses, jurors, and grand jurors; collecting fees and fines; handling inquiries from attorneys and other parties; and printing and distributing opinions of the court.

Court Administrator There are two general types of court administrators. The first is a state employee. In each state, these individuals are part of the state administrative office of the court, which is usually under the direction of the state supreme court. Court administrators help develop and implement policies and services for the judicial branch throughout the state. They also conduct research and determine whether judicial needs are identified and incorporated into long-term plans. They establish priorities for the courts, address financial problems and budgeting issues, and manage the use of technology within a state's judicial branch. The second type of court administrator is a local court administrator. These individuals manage the daily operations of the court, usually under the direction of the presiding judge. They provide administrative support for court programs, help the court establish new programs and evaluate them, and manage purchasing and accounts payable, among other responsibilities.

Court Security The marshal or bailiff for the court is responsible for courthouse security. In some states, such as California, court security is provided by sheriff's deputies who screen people entering the building, provide security during trials, and transport suspects to court from jail. Depending on the jurisdiction, court security personnel may take on additional responsibilities, including some investigation, bond supervising, community service monitoring, and making arrests as needed.

Legal Staff The larger and more powerful the court, the more likely it will have a variety of legal staff. These personnel can include legal counsel (prosecutors and defense attorneys), staff attorneys, research attorneys, and law clerks. Law clerks are not to be confused with court clerks. Unlike court clerks, law clerks are often recent law school graduates who assist judges with researching issues before the courts and with writing opinions. US Supreme Court law clerks are the cream of the crop, having graduated from many of the nation's top law schools.

Judicial Support Staff A judge's support staff may include executive assistants, administrative assistants, secretaries, or a mix of all three. Support staff members edit and type judicial opinions, create and arrange files, coordinate meetings, coordinate travel arrangements, answer telephone and e-mail inquiries, mail correspondence, and serve as an intermediary between the judge and other outside parties.

Court Reporter The court reporter records judicial proceedings word for word. See the Careers in Criminal Justice feature in Chapter 8 for more on court reporters.

Jury Staff Many courts have dedicated jury personnel who maintain and review lists of prospective jurors. They may also determine who is eligible to serve, determine the number of jurors needed, issue summonses for jury service, and handle requests by jurors for dismissal, exemption, or disqualification. These individuals may also meet with prospective jurors to explain the process, tell them where to go, and dismiss them from service at the end of the day.

Other Officers Many courts have representatives on site from other criminal justice agencies. Juvenile court officers may be present who are vested with the authority to take charge of children who come under the jurisdiction of the juvenile or family court. Representatives from probation may assist judges by performing presentence investigations that can be used during sentencing. In some states, the probation department is part of the judiciary and is thus more closely connected with the court than probation departments in other states.

The Judge and the Justice System

Judicial attitudes and philosophy have a major impact on how the justice system operates. Judicial attitudes may extend way beyond the courtroom. Police policies may be directly influenced by the judge, whose sentencing discretion affects the arrest process. If a local judge usually imposes minimal sentences—such as a fine—for a particular offense, the police may be reluctant to arrest offenders for that crime, knowing that doing so will basically be a waste of time. Similarly, if a judge is known to have a liberal attitude toward police discretion, the local department may be more inclined to engage in practices that border on entrapment or to pursue cases through easily obtained wire-taps. However, a magistrate oriented toward strict use of due process guarantees would stifle such activities by dismissing all cases involving apparent police abuses of personal freedoms.

The district attorney's office may also be sensitive to judicial attitudes. The district attorney might forgo indictments in cases that the presiding magistrate expressly considers trivial or quasi-criminal and in which the judge has been known to take only token action, such as the prosecution of pornographers.

Finally, the judge considers requests by prosecutors for leniency (or severity) in sentencing. The judge's reaction to these requests is important if the police and the district attorney are to honor the bargains they may have made with defendants to secure information, cooperation, or guilty pleas. When police tell informers that they will try to convince the judge to go easy on them to secure required information, they will often discuss the terms of the promised leniency with representatives of the court. If a judge ignores police demands, the department's bargaining power is severely diminished, and communication within the criminal justice system is impaired.

L03 Summarize the selection procedure for and duties of the trial judge

US magistrate judge A federal trial judge who is appointed by a district court judge and who presides over various civil cases with the consent of the parties and over certain misdemeanor cases.

Judicial Qualifications and Selection

Judicial qualifications and selection vary between the federal and state levels. In general, the federal level has fewer formal qualifications and more informal qualifications. The opposite is often true at the state level.

FEDERAL LEVEL Federal judges are appointed by the president with the advice and consent of the Senate. Senate confirmation of federal judiciary appointees, especially those chosen to serve on the US Supreme Court, can be a contentious process. One exception to this process exists for the appointment of a **US magistrate judge**. Magistrate judges are federal trial judges appointed by district court judges who preside over various civil cases with the consent of the parties and over certain misdemeanor cases.

Interestingly, there are almost no formal qualifications for federal judges. The Constitution and federal law are silent on judicial qualifications. Potential federal judges do not have to pass any exams or even be a lawyer for that matter. Even so, positions in the federal judiciary are very prestigious and sought after. They thus attract highly qualified, seasoned attorneys.

STATE LEVEL The qualifications for appointment to one of the existing 30,000 judgeships vary from state to state and court to court. Most often, the potential judge must be a resident of the state, licensed to practice law, a member of the state bar association, and at least 25 years and less than 70 years of age. However, a significant degree of diversity exists in the basic qualifications, depending on the level of court jurisdiction. Although almost every state requires judges to have a law degree if they are to serve on appellate courts or courts of general jurisdiction, it is not uncommon for municipal or town court judges to lack a legal background, even though they have the power to incarcerate criminal defendants for petty crimes such as vandalism.

Many methods are used to select judges, depending on the level of court jurisdiction. In some jurisdictions, judges are appointed officials, most often appointed by the state

REALITYCHECK

Myth or Reality?

There are almost no formal qualifications for federal judges.

REALITY. It is true that there are almost no formal qualifications for federal judges.

There are no exams, no age requirements, and no requirements that a federal judge be a US citizen. There is not even a law degree requirement! Even so, the federal judiciary attracts highly qualified people. Why do you suppose there are almost no formal qualifications for federal judges?

governor. In some states, in an effort to remove politics from judicial appointments, the governor's recommendations must be confirmed by the state senate, the governor's council, a special confirmation committee, an executive council elected by the state assembly, or an elected review board. Some states employ a judicial nominating commission that submits names to the governor for approval.

Another form of judicial selection is popular election. Judges may run as members of the Republican, Democratic, or other parties, or without party affiliation. Although this practice is used in a majority of states, each state sets its own terms of appointment. In some states, judges are elected to 15-year terms and in others to 4-year terms.⁸ See Figure 7.4 for a map of judicial selection methods by state.

The state of Missouri pioneered a nonpartisan method of selecting judges. This **Missouri Plan** is now used in some manner in the majority of states. The plan consists of three parts:

1. A judicial nominating commission selects and nominates potential candidates for the bench. In Missouri, the judicial commission is composed of the chief justice of the state supreme court, three lawyers elected by the Missouri bar (the organization of all lawyers licensed in this state), and three citizens selected by the governor.
2. An elected official (usually from the executive branch, such as the governor) makes appointments from the list submitted by the commission.
3. Subsequent nonpartisan and noncompetitive elections take place, in which incumbent judges run on their records and voters can choose either to retain or to dismiss them.⁹

The quality of the judiciary is a concern. Although merit plans, screening committees, and popular elections are designed to ensure a competent judiciary, it has often been charged that many judicial appointments are made to pay off political debts or to reward cronies and loyal friends. Also not uncommon are charges that those who want to be nominated for judgeships are required to make significant political contributions.

Missouri Plan A method of picking judges through nonpartisan elections as a way to ensure that judges adhere to high standards of judicial performance.

WEB APP 7.2

Visit the website of the Center for American Progress, an independent and nonpartisan educational institute, and read its article on partisan judicial elections at <https://www.americanprogress.org/issues/courts/reports/2012/10/25/42895/partisan-judicial-elections-and-the-distorting-influence-of-campaign-cash/>. Do you agree with the article's viewpoint? Why or why not? For a contrasting viewpoint, read the article "The Case for Partisan Judicial Elections," available at the Federalist Society's website: <http://www.fed-soc.org/publications/detail/the-case-for-partisan-judicial-elections>.

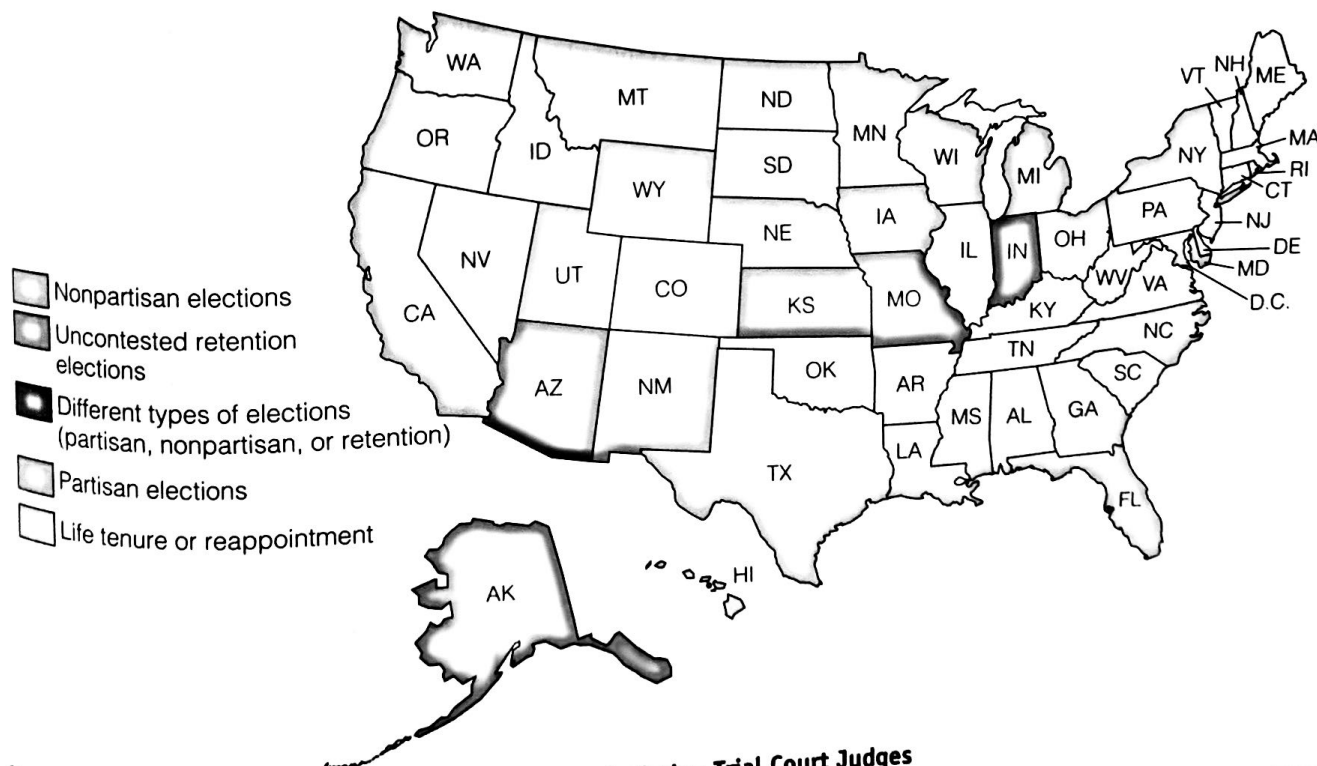


FIGURE 7.4 Selection Methods by State for General Jurisdiction Trial Court Judges

Source: American Bar Association, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet_authcheckdam.pdf.

L04 Explain the role of the prosecutor

prosecutor Representative of the state (executive branch) in criminal proceedings; advocate for the state's case—the charge—in the adversary trial. Examples include the attorney general of the United States, US attorneys, the attorneys general of the states, district attorneys, and police prosecutors.

REALITYCHECK

Myth or Reality?

Elected state judges can be affiliated with a political party.

REALITY. This is not true in all states, but some states permit partisan judicial elections. This means a judge can run as a Democrat, a Republican, an independent, or a member of any other political party.

Should judges be allowed to run on political platforms? Why or why not?

The Prosecutor

Depending on the level of government and the jurisdiction in which he or she functions, the prosecutor may be known as a district attorney, county attorney, state's attorney, or US attorney. Whatever the title, the **prosecutor** is the people's attorney, who is responsible for representing the public in criminal matters. The prosecutor participates in investigations both before and after arrest, prepares legal documents, participates in obtaining arrest or search warrants, and decides whether to charge a suspect and, if so, with which offense. The prosecutor argues the state's case at trial, advises the police, participates in plea negotiations, and makes sentencing recommendations.

Because they are the chief law enforcement officers of a particular jurisdiction, their jurisdiction spans the entire justice system process from the time when search and arrest warrants are issued or a grand jury is impaneled to the final sentencing decision and appeal. Following are some of the general duties of a prosecutor:

- Provides advice to law enforcement officers during investigation to determine whether criminal charges should be filed
- Represents the state in plea negotiations, pretrial motions, and bail hearings during the pretrial stage
- Represents the state at hearings, criminal trials, and appeals
- Acts as legal advisor to county commissioners and other elected officials

In addition to these duties, local jurisdictions may create specific programs directed by local prosecutors. One example is career-criminal prosecution programs, which involve identifying dangerous adult and juvenile offenders who commit a high number of crimes, so that prosecutors can target them for swift prosecution. Many jurisdictions have developed protection programs so that victims of domestic violence can obtain temporary court orders (and, after a hearing, more long-term court orders) protecting them from an abusive spouse; research indicates that protection orders can reduce the incidence of repeat violence.¹⁰

Types of Prosecutors

In the federal system, prosecutors are known as US attorneys and are appointed by the president. They are responsible for representing the government in federal district

During the second day of testimony in the capital murder trial of F. Glenn Miller Jr., at the Johnson County Court House in Olathe, Kansas, District Attorney Steve Howe gives evidence bags gathered at the scene to police officer Nicholas Berkland to review. An avowed anti-Semite and former leader of the White Patriot Party, Miller was sentenced to death for the April 2014 slayings of three people at two suburban Kansas City Jewish centers.



courts. The chief prosecutor is usually an administrator, and assistants normally handle the actual preparation and trial work. Federal prosecutors are professional civil service employees with reasonable salaries and job security.

On the state and county levels, the attorney general and the district attorney, respectively, are the chief prosecutorial officers. Again, the bulk of the criminal prosecution and staff work is performed by scores of full- and part-time attorneys, police investigators, and clerical personnel. Most attorneys who work for prosecutors at the state and county levels are political appointees who earn low salaries, handle many cases, and (in some jurisdictions) maintain private law practices. Many young lawyers take these staff positions to gain the trial experience that will qualify them for better opportunities.

In urban jurisdictions, the structure of the district attorney's office is often specialized, with separate divisions for felonies, misdemeanors, and trial and appeal assignments. In rural offices, chief prosecutors handle many of the criminal cases themselves. Where assistant prosecutors are employed, they often work part time, have limited professional opportunities, and depend on the political patronage of chief prosecutors for their positions.

The personnel practices, organizational structures, and political atmosphere of many prosecutors' offices often restrict their effectiveness in investigating and prosecuting criminal offenses. For many years, prosecutors have been criticized for bargaining justice away, using their positions as stepping-stones to higher political office, and often failing to investigate or simply dismissing criminal cases. Lately, however,



CAREERS IN CRIMINAL JUSTICE PARALEGAL

Duties and Characteristics of the Job

- Paralegals assist lawyers by conducting much of the preparation for trials.
- A paralegal's exact duties vary according to the needs of the office for which he or she works. However, a paralegal's work typically includes assisting with or carrying out client interviews, drafting legal documents, reviewing pertinent case law, summarizing legal proceedings, and doing some standard office work.
- Paralegals do much of the same work as a lawyer but within definite limits. For example, paralegals cannot advise on legal issues.
- Although most paralegals have general legal knowledge, it is becoming more common, especially for long-term or career paralegals, to choose a field of specialization.

Job Outlook

- The paralegal profession is expected to grow rapidly in the near future for several reasons, most prominently the fact that some organizations need legal expertise but do not want the extra expense of hiring a lawyer.
- Opportunities for advancement are available in larger offices, especially in urban areas.
- Ultimately, many paralegals use their knowledge and skills to earn a law degree and become a lawyer or judge. They can also move on to better-paying careers where legal experience is useful, such as insurance claims adjuster.

Salary

- The median (half earn above the amount, half earn below it) annual salary for paralegals is \$48,800
- The lowest 10 percent earned less than \$30,600, but the top 10 percent earned almost \$80,000.
- The best paid paralegals work for the federal government.

Qualifications

- Much of a paralegal's work is focused on conducting legal research, so skills that aid this process are critical.
- There is something of a political aspect to gaining this position because in some areas, one must be elected or appointed to it.

Education and Training

- A bachelor's degree with an emphasis on writing, analytical, and research skills is necessary.
- Because much of this research can now be done using computer programs, databases, and the Internet, up-to-date computer skills confer a distinct advantage.
- Most paralegals enter their profession with training from a two-year paralegal program approved by the American Bar Association. However, it is possible for people with a liberal arts degree to enter the field by working in legal offices and learning skills on the job.

Reality Check

- Relevant educational experience and certification are useful for gaining employment.
- Paralegal work involves a great deal of behind-the-scenes office work and research, so applicants need to be comfortable with both.
- Jobs with the most potential for upward mobility will be found in urban settings.
- Paralegals must always keep up with changes in the law in their areas of specialization.

Sources: Bureau of Labor Statistics, US Department of Labor, "Paralegals and Legal Assistants," *Occupational Outlook Handbook*, <http://www.bls.gov/oooh/legal/Paralegals-and-legal-assistants.htm>; *Princeton Review*, "A Day in the Life of a Paralegal," <http://www.princetonreview.com/careers/105/paralegal> (URLs accessed April 2017).

the prosecutor's public image has improved. Violations of federal laws, such as white-collar crime, drug peddling, and corruption, are being more aggressively investigated by the 94 US attorneys and the nearly 2,000 assistant US attorneys. Aggressive federal prosecutors have also made extraordinary progress in the war against insider trading and securities fraud on Wall Street. There have been a number of highly publicized indictments alleging that some corporate managers abused their power to loot company assets.

Today, about 2,400 state court prosecutors' offices are in operation, which employ about 79,000 attorneys, investigators, and support staff to handle felony cases in the state trial courts.¹¹ Usually, the most active prosecutors are employed in larger counties with populations of more than 500,000.

Prosecutors, like other justice system professionals, are now confronting issues related to cyber crime and terrorism and the use of technology both to commit crimes and to solve them after they occur. According to the most recent federal survey of prosecutors:

- At least two-thirds of state court prosecutors had litigated a computer-related crime such as credit card fraud (80 percent), identity theft (69 percent), or transmission of child pornography (67 percent).
- About one-quarter (24 percent) of the offices participated in a state or local task force for homeland security; one-third reported that an office member attended training on homeland security issues.
- Most prosecutors (95 percent) relied on state-operated forensic laboratories to perform DNA analysis, with about a third (34 percent) also using privately operated DNA labs.¹²

Prosecutorial Discretion

The prosecutor decides whether to bring a case to trial or to dismiss it outright. Even if the prosecutor decides to pursue a case, the charges may later be dropped if conditions are not favorable for a conviction; this is referred to as *nolle prosequi*.

The courts have protected the prosecutor's right to exercise discretion over processing of legal cases, maintaining that prosecutorial decision making can be controlled or overturned only if a defendant can prove that the prosecutor let discrimination guide his or her decision making.¹³ Even in felony cases, the prosecutor ordinarily exercises much discretion in deciding whether to charge the accused with a crime.¹⁴ After a police investigation, the prosecutor may be asked to review the sufficiency of the evidence to determine whether a criminal complaint should be filed. In some jurisdictions, this may involve presenting the evidence at a preliminary hearing. In other cases, the prosecutor may decide to seek a criminal complaint through the grand jury or other information procedure.

Without question, prosecutors exercise a great deal of discretion in even the most serious cases. In a now classic study, Barbara Boland examined the flow of felony cases through three jurisdictions in the United States: Golden, Colorado; the borough of Manhattan in New York City; and Salt Lake City, Utah.¹⁵ Although procedures were different in the three districts, prosecutors used their discretion to dismiss a high percentage of the cases before trial. When cases were forwarded for trial, very few defendants were actually acquitted, indicating that the prosecutorial discretion was exercised to screen out the weakest cases. In addition, of those cases accepted for prosecution, a high percentage ended with the defendant pleading guilty. All the evidences here point to the conclusion that prosecutorial discretion is used to reduce potential trial cases to a minimum.

The prosecutor may also play a limited role in exercising discretion in minor offenses. This role may consist of simply consulting with the police after their investigation results in a complaint being filed against the accused. In such instances, the decision to charge a person with a crime may be left primarily to the discretion of the law enforcement agency. The prosecutor may decide to enter this type of case after an arrest has been made and a complaint filed with the court, and then subsequently determine whether to adjust the matter or proceed to trial.

L05 Describe prosecutorial discretion, and summarize its pros and cons

Factors Influencing Prosecutorial Discretion

Research indicates that a wide variety of factors influence prosecutorial discretion in invoking criminal sanction. These include legal issues, victim issues, extralegal issues, and resource issues.

LEGAL ISSUES Legal issues can include the characteristics of the justice system, the crime, the criminal, and the victim. The quality of police work and the amount and relevance of the evidence the police gather are critical legal variables that a prosecutor considers in deciding whether to bring a case forward to trial.¹⁶ A defendant who is a known drug user, has a long history of criminal offending, and caused the victim extensive physical injuries is more likely to be prosecuted than one who is a first offender, does not use drugs, and did not seriously injure the victim.¹⁷ Crime seriousness certainly influences discretion, too. As might be expected, prosecutors are much more likely to use their discretion in minor incidents than in more serious ones.

VICTIM ISSUES In some instances, the victim's behavior may influence charging decisions. Some victims may become reluctant to press charges, especially if the offender is a parent or spouse. Domestic violence cases are often difficult to prosecute. Some victims are unlikely to encourage or work with prosecutors even after the police get involved. Victim cooperation is a key factor in the decision to prosecute cases: the odds of a case being prosecuted are seven times greater when victims are considered cooperative.¹⁸

EXTRALEGAL ISSUES Extralegal factors include the offender's race, gender, and ethnic background. Of course, due process considerations demand that these personal characteristics have no bearing on the use of prosecutorial discretion. Nonetheless, some research efforts have found that the race of the offender or victim influences prosecutorial discretion; others show that decisions are relatively unbiased.¹⁹ Proving racial influence is difficult. To establish bias, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted but were not.

RESOURCE ISSUES Resource issues that influence prosecutorial discretion include the availability of treatment and detention facilities, the size of caseloads, and the number of prosecutors available. In some drug cases, prosecutors may decline to bring the case to trial because preparing it for prosecution would demand costly forensic analysis, expert witnesses, and forensic accountants.²⁰ Some research efforts have concluded that the availability of resources may be a more critical factor in shaping prosecutorial discretion than either legal or extralegal factors. In a world of tight government budgets, a prosecutor's office may be forced to accept plea bargains simply because it lacks the resources and personnel to bring many cases to trial.²¹

The Pros and Cons of Prosecutorial Discretion

Regardless of its source, the proper exercise of prosecutorial discretion can improve the criminal justice process by preventing the rigid implementation of criminal law. Discretion allows the prosecutor to consider alternative decisions and humanize the operation of the criminal justice system. If prosecutors had little or no discretion, they would be forced to prosecute all cases brought to their attention. As Judge Charles Breitler put it, "If every policeman, every prosecutor, every court, and every postsentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable."²²

On the other side, too much discretion can lead to abuses that result in the abandonment of law. Prosecutors are political creatures. Although they are charged with serving the people, they also must keep their reputations in mind; losing too many high-profile cases may jeopardize their chances of reelection. They therefore may be unwilling to prosecute cases where the odds of conviction are low; they are worried about convictability.²³

REALITYCHECK

Myth or Reality?

Prosecutors base their charging decisions solely on legal factors, such as the seriousness of the offense.

MYTH. Limited resources, along with several other extralegal factors, shape prosecutorial decision making.

Resource concerns are all the more important in this day and age. News accounts of courts strapped for money and prosecutors dropping charges against some suspects to save precious resources seem all too common. In what other ways are resource constraints likely to affect the administration of justice?

Prosecutorial Ethics

Although the prosecutor's primary duty is to enforce criminal law, the fundamental obligation is to seek justice. If the prosecutor discovers facts suggesting that the accused is innocent, he or she must bring this information to the attention of the court.

In carrying out their stated duties, prosecutors are sometimes caught in an ethical conundrum. They are compelled by their supervisors to do everything possible to obtain a guilty verdict, while acting as public officials concerned to ensure that justice is done. Sometimes this conflict can lead to prosecutorial misconduct. According to some legal authorities, unethical prosecutorial behavior is often motivated by the desire to obtain a conviction and by the fact that such misbehavior is rarely punished by the courts.²⁴ Some prosecutors may conceal evidence, misrepresent evidence, or influence juries by impugning the character of opposing witnesses. Even where a court may instruct a jury to ignore certain evidence, a prosecutor may attempt to sway the jury or the judge by simply mentioning the tainted evidence.

Prosecutorial Misconduct

Because prosecutorial misconduct is a serious matter, the courts have reviewed such prosecutorial behavior as making disruptive statements in court, failing to adhere to sentence recommendations pursuant to a plea bargain, making public statements harmful to the state's case that are not constitutionally protected under the First Amendment, and withholding evidence that might exonerate a defendant.

Courts have also been more concerned about prosecutors who use their discretion in a vindictive manner to punish defendants who exercise their legal rights. Three cases illustrate controls placed on "vindictive" prosecutors:

- *North Carolina v. Pearce*. In this case, the US Supreme Court held that a judge in a retrial cannot impose a sentence more severe than that originally imposed. In other words, a prosecutor cannot seek a stricter sentence for a defendant who succeeds in getting her first conviction set aside.²⁵
- *Blackledge v. Perry*. The Supreme Court found that imposing a penalty on a defendant for having successfully pursued a statutory right of appeal is a violation of due process of law and amounts to prosecutorial vindictiveness.²⁶
- *Bordenkircher v. Hayes*. In this case, the Court allowed the prosecutor to carry out threats of increased charges made during plea negotiations when the defendant refused to plead guilty to the original charge.²⁷

These decisions provide the framework for the "prosecutorial vindictiveness" doctrine: due process of law may be violated if the prosecutor retaliates against a defendant, and there is proof of actual vindictiveness. The prosecutor's legitimate exercise of discretion must be balanced against the defendant's legal rights.

The Defense Attorney

The defense attorney is the counterpart of the prosecuting attorney in the criminal process. The accused has a constitutional right to counsel, and when the defendant cannot afford an attorney, the state must provide one. The accused may obtain counsel from the private bar if he can afford to do so; if the defendant is indigent, private counsel or a **public defender** may be assigned by the court (see the discussion on the defense of the indigent later in this chapter).

The Role of the Criminal Defense Attorney

The defense counsel is an attorney as well as an officer of the court. As an attorney, the defense counsel is obligated to uphold the integrity of the legal profession and to observe the requirements of the American Bar Association's Code of Professional Responsibility in the defense of a client.

Defense attorneys are viewed as the prime movers in what is essentially an **adversarial procedure**: the procedure used to determine truth in the adjudication of

public defender An attorney usually employed (at no cost to the accused) by the government to represent poor persons accused of a crime.

adversarial procedure The process of publicly pitting the prosecution and the defense against one another in pursuit of the truth.

L06 Identify the role of the defense attorney in the justice process

guilt, in which the defense (advocate for the accused) is pitted against the prosecution (advocate for the state), with the judge acting as arbiter of the legal rules. Under the adversary system, the burden is on the state to prove the charges beyond a reasonable doubt. The defense uses all means at its disposal to refute the state's case. This system of having the two parties publicly debate, though imperfect, is thought to be the most effective method of arriving at the truth in a criminal case.

As a member of the legal profession, however, the defense counsel must be aware of his or her role as an officer of the court. The defense counsel is obligated to uphold the integrity of the legal profession and to rely on constitutional ideals of fair play and professional ethics to provide adequate representation for a client.

The Right to Counsel

The **Sixth Amendment** to the US Constitution allows for provision of counsel at trial. But what about the indigent criminal defendant who cannot afford to retain an attorney?

In the 1963 landmark case of *Gideon v. Wainwright*, the US Supreme Court took the first major step on the issue of right to counsel by holding that state courts must provide counsel to indigent defendants in felony prosecutions.²⁸ Almost 10 years later, in the 1972 case of *Argersinger v. Hamlin*, the Court extended the obligation to provide counsel to all criminal cases where the penalty includes imprisonment—regardless of whether the offense is a felony or a misdemeanor.²⁹ These two major decisions are related to the Sixth Amendment right to counsel as it applies to the presentation of a defense at the trial stages of the criminal justice system.

In numerous Supreme Court decisions since *Gideon v. Wainwright* (see Exhibit 7.2), the states have been required to provide counsel for indigent defendants at virtually all other stages of the criminal justice process, beginning with arrest and concluding with the defendant's release from the system. Today, the Sixth Amendment right to counsel and the Fifth and Fourteenth Amendments' guarantee of due process of law have been judicially interpreted together to provide the defendant with counsel by the state in all types of criminal proceedings.

Areas remain in the criminal justice system where the courts have not required that the assistance of counsel be provided for the accused. These include pre-indictment lineups; booking procedures, including the taking of fingerprints and other forms of identification; grand jury investigations; appeals beyond the first review; disciplinary proceedings in correctional institutions; and revocation hearings after release. Nevertheless, the general rule of thumb is that no person can be deprived of freedom or lose a "liberty interest" without representation by counsel.

Sixth Amendment The US constitutional amendment containing various criminal trial rights, such as the right to public trial, the right to trial by jury, and the right to confrontation of witnesses.

Gideon v. Wainwright The 1963 US Supreme Court case that granted counsel to indigent defendants in felony prosecutions.



Defense attorney Teresa Mann presents an argument to Fulton County Superior Court Judge Jerry Baxter during the Atlanta Public Schools test-cheating trial in Fulton County Superior Court. Several educators were convicted on April 1, 2015, of racketeering and other lesser offenses for inflating test scores of children in struggling schools. Nine of them were sentenced to prison.

EXHIBIT 7.2 Important *Gideon*-Related Decisions over the Years

Douglas v. California (1963) The Fourteenth Amendment guarantees the defendant the right to counsel during his or her first mandatory appeal.³⁰

In re Gault (1967) Juveniles enjoy the right to counsel in adjudicatory hearings.³¹

Coleman v. Alabama (1970) The preliminary hearing is a "critical stage," meaning that the defendant enjoys the right to counsel at it.³²

Argersinger v. Hamlin (1972) The Sixth Amendment right to counsel extends to those accused of committing misdemeanors.³³

Morrissey v. Brewer (1972) There is no right to counsel in parole revocation hearings.³⁴

Gagnon v. Scarpelli (1973) There is no right to counsel in probation revocation hearings.³⁵

Ross v. Moffitt (1974) There is no right to counsel provided for the second, discretionary appeal.³⁶

Scott v. Illinois (1979) If there is no possibility of confinement, the Sixth Amendment right to counsel does not apply.³⁷

Morris v. Slappy (1983) The Sixth Amendment does not require a "meaningful" relationship between the defendant and his or her attorney.³⁸

Wheat v. United States (1988) A trial court can deny the defendant's choice of counsel if the attorney's representation carries with it the strong possibility of a conflict of interest.³⁹

United States v. Monsanto (1989) It is not unconstitutional for a court to seize a defendant's assets such that it forces him or her to rely on a public defender.⁴⁰

United States v. Gonzalez-Lopez (2006) A convicted defendant has the automatic right to a new trial when a trial judge mistakenly refuses to allow the defendant's paid attorney to represent him.⁴¹

Rothgery v. Gillespie County (2008) The right to counsel attaches at the initial appearance, shortly after arrest.⁴²

L07 Discuss the different forms of indigent defense

assigned counsel A lawyer appointed by the court to represent a defendant in a criminal case because the person is too poor to hire counsel.

contract system (attorney)

Providing counsel to indigent offenders by having attorneys under contract to the county handle all (or some) such cases.

Legal Services for the Indigent

To satisfy the constitutional requirements that indigent defendants be provided with the assistance of counsel at various stages of the criminal process, the federal government and the states have had to evaluate and expand criminal defense services. Today, about 3,000 state and local agencies are providing indigent legal services in the United States.

Providing legal services for the indigent offender is a huge and costly undertaking. Although most states have a formal set of rules to signify who is an indigent, and many require indigents to repay the state for at least part of their legal services (known as "recoupment"), indigent legal services still cost over \$1.5 billion annually.

Programs providing counsel assistance to indigent defendants can be divided into three major categories: public defender systems, **assigned counsel** systems, and **contract systems (attorney)** (see Exhibit 7.3). Other approaches to the delivery of legal services include the use of mixed systems, such as representation by both the public defender and the private bar, law school clinical programs, and prepaid legal services.

EXHIBIT 7.3 The Forms of Indigent Defense

Public Defender A salaried staff of full-time or part-time attorneys render indigent criminal defense services through a public or private nonprofit organization, or as direct government-paid employees. The first public defender program in the United States opened in 1913 in Los Angeles. Public defenders can be part of a statewide agency, county government, the judiciary, or an independent nonprofit organization or other institution.

Assigned Counsel The appointment is from a list of private bar members who accept cases on a judge-by-judge, court-by-court, or case-by-case basis. This may include an administrative component and a set of rules and guidelines governing the appointment and processing of cases handled by the private bar members. There are two main types of assigned counsel systems. In the first, which makes up about 75 percent of all assigned counsel systems, the presiding judge appoints attorneys on a case-by-case basis; this is referred to as an ad hoc assigned counsel system. The second type is referred to as a coordinated assigned counsel system, in which an administrator oversees the

appointment of counsel and sets up guidelines for the administration of indigent legal services. The fees awarded to assigned counsels can vary widely, depending on the nature of the case. Restructuring the attorney fee system is undoubtedly needed to maintain fair standards for the payment of such legal services.

Contract Systems Nonsalaried private attorneys, bar associations, law firms, consortiums or groups of attorneys, or nonprofit corporations contract with a funding source to provide court-appointed representation in a jurisdiction. In some instances, an attorney is given a set amount of money and is required to handle all cases assigned. In other jurisdictions, contract lawyers agree to provide legal representation for a set number of cases at a fixed fee. A third system involves representation at an estimated cost per case until the dollar amount of the contract is reached. At that point, the contract may be renegotiated, but the lawyers are not obligated to take new cases.

Source: Carol J. DeFrances, *State-Funded Indigent Defense Services*, 1999 (Washington, DC: Bureau of Justice Statistics, 2001).

Although many jurisdictions have a combination of these programs, statewide public defender programs vary widely and are complicated.⁴³

In general, the attorney list/assigned counsel system is used in less populated areas, where case flow is minimal, and a full-time public defender is not needed. Public defenders are usually found in larger urban areas with high case flow rates. So although a proportionately larger area of the country is served by the assigned counsel system, a significant proportion of criminal defendants are represented by public defenders.

The Private Bar

Although most criminal defendants are represented by publicly supported lawyers, there are also private attorneys who specialize in criminal practice. Because most lawyers are not prepared in law school for criminal work, their skill often results from their experience in the trial courts. Some nationally known criminal defense attorneys represent defendants for large fees in celebrated and widely publicized cases, but this occurs rather infrequently. Some also represent high-profile offenders accused of committing heinous crimes (see the accompanying Contemporary Issues in Criminal Justice box for more on this).

Besides this limited group of well-known criminal lawyers, some lawyers and law firms serve as house counsel for such professional criminals as narcotics dealers, gamblers, prostitutes, and even big-time burglars. These lawyers, however, constitute a very small percentage of the private bar practicing criminal law.

L08 Summarize the pros and cons of private attorneys



CONTEMPORARY ISSUES IN CRIMINAL JUSTICE

Defending the Despised

Miriam Conrad, head of Boston's Federal Public Defender Office, was the lead defense attorney for Dzhokhar Tsarnaev, the man convicted and sentenced to die in connection with the Boston Marathon bombing on April 15, 2013. She has been called a terrorist sympathizer, an enemy combatant, and America's "most reviled lawyer." Why? In addition to defending Tsarnaev, she has represented a number of other infamous criminals, including shoe bomber Richard Reid, who is locked up in a "supermax" prison in Florence, Colorado, and Rezwan Ferdaus, who is serving 17 years in prison for plotting to bomb the Pentagon and US Capitol with remote control aircraft. Conrad, a former newspaper reporter turned attorney, takes a measure of delight in defending high-profile suspects. "There are very few clients I've had who I didn't like," she said. "If you scratch the surface, many have had difficult lives, and as their lawyer, I sort of see them whole, not just as a person charged with a crime."

Judy Clarke, another lawyer who served on the Tsarnaev defense team, has also defended her share of America's most despised criminals, including the Unabomber, Ted Kaczynski, Eric Rudolph, the man who detonated a bomb at the 1996 Olympics in Atlanta, and Jared Loughner, who shot former Representative Gabrielle Giffords and 18 others outside a supermarket in Arizona in 2011. All three men received life in prison rather than the death penalty. Clarke, who strongly believes people are not born evil, is known for spending hundreds of hours getting to know her clients—all to put on the best defense possible. She has even been called "St. Judy" because of her devotion to her clients. Clarke is also vehemently opposed to the death penalty, believing society should not legalize killing. This motivates her work and helps explain how she has succeeded on several occasions in sparing her clients the death penalty. Many defense attorneys clamor for the spotlight but not Clarke.

David Hoose, another prominent defense attorney, drew attention for his role in representing Kristen Gilbert, a veteran hospital nurse who killed four patients by overdosing them with drugs. She, like several of Clarke's clients, was also sentenced to a long prison term rather than executed. Attorneys Craig Weintraub and Jay Schlachet represented Ariel Castro, who was

sentenced to life in prison plus 1,000 years for kidnapping, rape, and murder. He, too, was able to avoid the death penalty, but he later committed suicide in prison. Like many of their colleagues, Weintraub and Schlachet are opposed to the death penalty: "We saved him from potentially lethal injection and 20 years on death row, which would have cost the taxpayers and the community millions and millions of dollars, and we spared the women the anguish and 'revictimization' of events."

Most of the criminals these attorneys represent cannot afford counsel, much less attorneys with such successful records. Sometimes, anti-death penalty groups help foot the bill. Other times the defense attorneys serve as court-appointed counsel and work for a rate similar to that of others tasked with representing lower-profile defendants. Rarely are they in it for fame and fortune.

CRITICAL THINKING

1. Should those accused of the most heinous crimes be represented by the likes of Judy Clarke and Miriam Conrad? Does it matter whether the death penalty is in play in a particular case?
2. What about those accused of less serious offenses who cannot afford representation? Do they get the same zealous defense?
3. What, if any, inequities are perpetuated by the current system we have in place?

Sources: Henry Gass, "An 'All-Star Team' to Defend Accused Boston Bomber Tsarnaev," *Christian Science Monitor*, January 2, 2015, <http://www.csmonitor.com/USA/Justice/2015/0102/An-all-star-team-to-defend-accused-Boston-bomber-Tsarnaev>; P. R. Keefe, "The Worst of the Worst," *The New Yorker*, September 14, 2015, <http://www.newyorker.com/magazine/2015/09/14/the-worst-of-the-worst>; C. Wolff, "CJN Interview with Ariel Castro's Lawyers Craig Weintraub and Jay Schlachet," *Cleveland Jewish News*, August 17, 2013, <https://tinyurl.com/hwt3ipq>. (URLs accessed April 2017).

A large number of criminal defendants are represented by lawyers who often accept many cases for small fees. These lawyers may belong to small law firms or work alone, but a sizable portion of their practice involves representing those accused of crime. Other private practitioners occasionally take on criminal matters as part of their general practice. A lawyer whose practice involves a substantial proportion of criminal cases is often considered a specialist in the field. And there is little question that having a preeminent private attorney can help clients achieve a favorable outcome (a "not guilty" verdict).

Does the Type of Lawyer Matter?

Do criminal defendants who hire their own private lawyers do better in court than those who depend on legal representatives provided by the state? Is one type of defense attorney for the indigent better than another?

Although there are some advantages to private counsel, national surveys indicate that state-appointed attorneys do quite well in court. According to data compiled by the federal government:

- Conviction rates for indigent defendants and for those with their own lawyers were about the same in federal and state courts. About 90 percent of the federal defendants and 75 percent of the defendants in the most populous counties were found guilty regardless of which type of attorneys represented them.
- Of those found guilty, however, those represented by publicly financed attorneys were incarcerated at a higher rate than those defendants who paid for their own legal representation.
- On average, sentence lengths for defendants sent to jail or prison were shorter for those with publicly financed attorneys than for those who hired counsel. In federal district court, those with publicly financed attorneys were given just under five years on average, and those with private attorneys just over five years. In large state courts, those with publicly financed attorneys were sentenced to an average of two and a half years, and those with private attorneys to three years.⁴⁴

The Competence of Defense Attorneys

Inadequacy of counsel may occur in a variety of instances. The attorney may refuse to meet regularly with the client, fail to cross-examine key government witnesses, or fail to investigate the case properly. A defendant's plea of guilty may be based on poor advice.



Attorney Stephen Diaco listens to testimony during the penalty phase in the case against three Adams and Diaco lawyers accused of orchestrating a DUI setup. They had a paralegal lure the plaintiff in a lawsuit against one of their clients into driving drunk and then getting caught. Diaco and the two other attorneys were barred from ever practicing law again in Florida.

WEB APP 7.3

Visit the American Bar Association Journal's Legal Ethics website at <http://www.abajournal.com/topic/legal-ethics/>. Find and report on a recent example of an attorney's ethical violation and the sanction imposed. Was the sanction fair? Why or why not? If no sanction was imposed, why was that? If the sanction was self-imposed (e.g., a resignation), do you agree with it? Explain.

where the attorney may misjudge the admissibility of evidence. When co-defendants have separate counsel, conflicts of interest between the defense attorneys may arise. On an appellate level, the lawyer may decline to file a brief, instead relying on a brief submitted for one of the co-appellants.

The US Supreme Court defined the concept of attorney competence in the 1984 case of *Strickland v. Washington*.⁴⁵ The case established the two-pronged test for determining effectiveness of counsel:

1. The defendant must show that the counsel's performance was deficient and that such serious errors were made as to essentially eliminate the presence of counsel guaranteed by the Sixth Amendment.
2. The defendant must also show that the deficient performance prejudiced the case to such an extent that the defendant was deprived of a fair trial.

Determining whether defense counsel is ineffective is a subjective decision. The Supreme Court has ruled that an attorney can be effective even when he admits a client's guilt before the trial is over, as long as doing so is part of a reasonable defense strategy, such as gaining sympathy from the jury.⁴⁶ For a defense attorney to be considered incompetent, he or she would have to miss filings, fail to follow normal trial procedure, and/or fail to use defense tactics that the average attorney would be sure to follow, such as using expert witnesses or mentioning past behaviors that might mitigate guilt.

Court Administration

In addition to qualified personnel, there is a need for efficient management of the judiciary system. The need for efficient management techniques in an ever-expanding criminal court system has led to the recognition that improving court administration is one way to relieve court congestion. Management goals include improving the organization and scheduling of cases, devising methods to allocate court resources efficiently, administering fines and monies due to the court, preparing budgets, and overseeing personnel.

The federal courts have led the way in creating and organizing court administration. In 1939, Congress passed the Administrative Office Act, which established the Administrative Office of the United States Courts. Its director was charged with gathering statistics on the work of the federal courts and preparing the judicial budget for approval by the Conference of Senior Circuit Judges. One clause of the act created a judicial council with general supervisory responsibilities for the district and circuit courts.

Unlike the federal government, the states have experienced slow and uneven growth in the development and application of court management principles. The first state to establish an administrative office was North Dakota in 1927. Today, all states employ some form of central administration.

Using Technology in Court Management

In most jurisdictions today, centralized court administrative services perform numerous functions with the help of computers that free the judiciary to fulfill their roles as arbiters of justice. Rapid retrieval and organization of data are used for such functions as these:

- Maintaining case histories and statistical reporting
- Monitoring and scheduling cases
- Preparing documents
- Indexing cases
- Issuing summonses
- Notifying witnesses, attorneys, and others of required appearances
- Selecting and notifying jurors
- Preparing and administering budgets and payrolls

REALITYCHECK

Myth or Reality?

Privately retained defense attorneys are more effective than court-appointed defense attorneys.

MYTH. Research reveals that public defenders and court-appointed attorneys perform similarly on average.

No clear evidence exists that having an expensive, privately retained attorney markedly increases one's chance of acquittal. What does this say about privately retained defense attorneys? What about court-appointed attorneys?

L09 Evaluate the expanding role of technology in the court process

Computer technology is also being applied in the courts in such areas as videotaped testimonies, new court reporting devices, information systems, and data processing systems to handle such functions as court docketing and jury management. In 1968, only 10 states had state-level automated information systems; today, all states employ such systems for a variety of tasks and duties. Other developing areas of court technology include the following.⁴⁷

COMMUNICATIONS Court jurisdictions are cooperating with police departments in the installation of communications gear that makes it possible to arraign defendants over closed-circuit television while they are in police custody. Closed-circuit television has been used for judicial conferences and scheduling meetings. Some courts are using voice-activated cameras to record all testimony during trials; these are the sole means of keeping trial records.

VIDEOCONFERENCING About 400 courts across the country have videoconferencing capabilities. It is now being employed for juvenile detention hearings, expert witness testimony at trial, oral arguments on appeal, and parole hearings. More than 150 courts use two-way live, televised remote linkups for first appearance and arraignment. Defendants typically appear from a special location in the jail where they can see and hear, and be seen and heard by, the presiding magistrate.

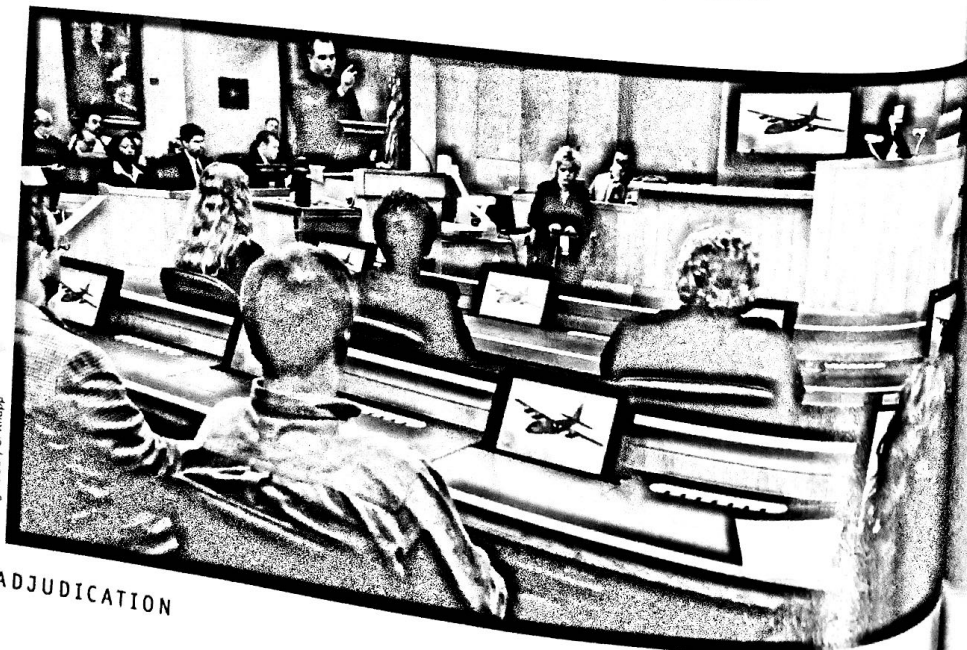
EVIDENCE PRESENTATION High-tech courtrooms are now equipped for real-time transcription and translation, audio-video preservation of the court record, remote witness participation, computer graphics displays, monitor screens for jurors, and computers for counsel and judge.

CASE MANAGEMENT In the 1970s, municipal courts installed tracking systems, which used databases to manage court data. These older systems were limited and could not process the complex interrelationships that pervade information about persons, cases, time, and financial matters in court cases. Contemporary relational databases now provide the flexibility to handle complex case management.

INTERNET UTILIZATION The Internet has found its way into the court system. In the federal system, J-Net is the judiciary's intranet website. J-Net makes it easier for judges and court personnel to find important information in a timely fashion.

Technology will become ever more present in the courtrooms of the future. The courtroom featured here contains monitor screens throughout, including one in front of each juror. Courts like this one rely on computer technology and the Internet to bring together witnesses, lawyers, judges, and the jury.

AP Images/Gary C. Knapp



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INFORMATION SHARING Technology has been harnessed to make it easier for courts to share information within and between states. This helps cut down on costs and accelerates the criminal justice process.

The computer cannot replace the judge, but it can be used to help speed up the trial process by identifying backlogs and bottlenecks that can be eradicated with intelligent managerial techniques. Just as a manager must know the type and quantity of goods on hand in a warehouse, so an administrative judge must have available information about those entering the judge's domain, what happens to them after they are in it, and how they fare after judgment has been rendered.

ETHICAL REFLECTION

As we discussed earlier in this chapter, prosecutors sometimes go "too far" in their efforts to secure convictions against criminals. For example, a prosecutor may engage in selective or unfair prosecution, such as by targeting one person for personal reasons rather than making a decision based on the evidence. Prosecutors have also been known to engage in what is known as pretextual prosecution. This occurs when a prosecutor who lacks evidence to charge a particular person with one crime instead charges the individual with a lesser, unrelated offense. The key here is "unrelated." If, for example, a prosecutor lacks evidence to charge someone with first-degree murder and instead pursues second-degree murder charges, such a decision is perfectly acceptable. In contrast, if a prosecutor lacks evidence to charge a person with racketeering and instead charges the individual with a violation of the Federal Meat Inspection Act, this is a pretextual prosecution.⁴⁸

In extreme cases, prosecutors have been known to fabricate evidence, use false statements at trial, withhold potentially favorable evidence from the defense (a violation of due process), influence witnesses, renege on plea agreements, and so on. What can be done? On the one hand, prosecutors cannot be sued for their decisions on whether to press charges or for how they act. Even in the most egregious of cases of flagrant misconduct, a prosecutor cannot be held liable for his or her actions during the judicial stage of a case.⁴⁹ This is known as absolute immunity. On the other hand, although prosecutors cannot be sued for misconduct, they can be punished by their superiors and state bar association disciplinary boards for misconduct that is too severe.

Writing Challenge Visit the Marshall Project's Prosecutorial Misconduct page here: <https://www.themarshallproject.org/records/1-prosecutorial-misconduct>. Read one of the "Marshall Project Originals" stories linked on that page and write a report about the case. Answer the following questions: What did the prosecutor do wrong, if anything? What else went wrong in the case? Who was most responsible for the miscarriage of justice detailed in the story? What criminal justice reforms could or should be undertaken to eliminate these sorts of issues?

SUMMARY

L01 Describe the varying structures of state court systems

State courts handle a wide variety of cases and regulate numerous personal behaviors ranging from homicide to property maintenance. Courts of limited jurisdiction are restricted in the types of cases they may hear. Courts of general jurisdiction handle the more serious felony cases (such as murder, rape, and robbery) and civil cases in which damages are over a specified amount, such as \$10,000. Appellate courts do not try cases; they review the procedures of the case to determine whether an error was made by judicial authorities.

L02 Describe the federal court system The federal government has established a three-tiered hierarchy of court jurisdiction that, in order of ascendancy, consists of the US district courts, the US courts of appeals (circuit courts), and the US Supreme Court.

L03 Summarize the selection procedure for and duties of the trial judge The judge is the senior officer in a court of

criminal law. His or her primary duty is to oversee the trial process. The qualifications for appointment to one of the existing 30,000 judgeships vary between the federal and state level—and from state to state. Most typically, the potential judge must be a resident of the state, must be licensed to practice law, must be a member of the state bar association, and must be at least 25 years of age and less than 70 years of age. Selection methods vary, too, and include election, appointment, and combinations of each.

L04 Explain the role of the prosecutor In the federal system, prosecutors are known as US attorneys and are appointed by the president. On the state and county levels, the attorney general and the district attorney, respectively, are the chief prosecutorial officers. Whatever the title, the prosecutor is the people's attorney, who is responsible for representing the public in criminal matters. Even if the prosecutor decides to pursue a case, the charges may later be dropped if conditions

8

Pretrial and Trial Procedures

About 17 officers are charged with murder or manslaughter each year.¹ That number may be increasing in light of recent high-profile police shootings of unarmed minority suspects, such as the 2014 death of Laquan McDonald in Chicago, whose case resulted in first-degree murder charges against officer Jason Van Dyke (see photo).² Nevertheless, it is still highly unusual to see police officers charged with serious crimes. Why? According to criminologist Philip Stinson, "To charge an officer in a fatal shooting, it takes something so egregious, so over that top that it cannot be explained in any rational way. It also has to be a case that prosecutors are willing to hang their reputations on."³ Prosecutors make the same point; most will only bring charges if the evidence can clearly disprove an officer's story that he was defending himself. So, for example, if a video clearly depicts an officer shooting a person in the back, murder or manslaughter charges are likely.

If police officers are rarely charged in cases involving questionable killings, how many are *convicted*? Fewer still. Indeed, any prosecutor tasked with putting a police officer on trial for murder faces an uphill climb. Why? Are juries reluctant to treat police officers in the same way as ordinary criminals? Johnny Baer, a prosecutor in Pennsylvania, seems to think so: "People want and are willing to give police officers the benefit of the doubt, when they're in uniform, and they're making split-second decisions, in very difficult environments."⁴ As another prosecutor put it, "To get [jurors] to buy into a story where the officers is the bad guy goes fundamentally against everything they believe."⁵ Thus, despite public outcries over questionable shootings, people may harbor deep-seated hesitations to convict officers of serious crimes.

Legal standards also make it difficult to convict police officers in people's deaths. Officers are authorized—and indeed expected—to use force in certain situations. This is not the case with ordinary citizens. Also, the question of whether too much force was used in a particular case is often complicated, and there are no objective standards that work perfectly across all scenarios. Juries need to weigh each individual case differently—and they often have to think

REALITYCHECK

Myth or Reality?

- There is **no** constitutional right to bail.
- A significant percentage of those released on bail never show up for their scheduled court dates.
- A person arraigned on criminal charges must plead either guilty or innocent.
- The Sixth Amendment right to a jury trial extends to defendants in all criminal trials.
- Trials are closed to the public.
- There is nothing inherently wrong with a black jury deciding the fate of a white defendant.
- Appellate court judges are partially responsible for the number of appeals filed by convicted individuals.

pretrial procedures Critical pretrial processes and decisions, including bail, arraignment, and plea negotiation.

bail The monetary amount for or condition of pretrial release, normally set by a judge at the initial appearance. The purpose of bail is to ensure the return of the accused at subsequent proceedings.

pretrial detention Holding an offender in secure confinement before trial.

REALITYCHECK

Myth or Reality?

There is no constitutional right to bail.

REALITY. The Eighth Amendment only prohibits excessive bail (and cruel and unusual punishment).

The prohibition against excessive bail does not extend to everyone because the Supreme Court has not required that the states honor this part of the Eighth Amendment. Nearly every state constitution has some sort of prohibition against excessive bail, but there can still be considerable variability in what is considered "excessive."

about what a reasonable officer would have done in the circumstances, even though they are not police officers. Clay Rogers, who served as a juror in a Connecticut case involving a narcotics officer who shot a fleeing black suspect, said, "It's difficult to prove an officer is not justified beyond a reasonable doubt, because you almost have to get inside their head to know what [they are] thinking and feeling."⁶

This chapter reviews the pretrial and trial process, beginning with the pretrial procedures. Pretrial procedures are important components of the justice process because the vast majority of criminal cases are resolved informally at this stage and never come before the courts. Although the media like to focus on the elaborate jury trial with its dramatic elements and impressive setting, formal criminal trials are relatively infrequent. Consequently, understanding the events that take place during the pretrial period is essential to grasping the reality of the criminal justice process.

Bail

A cash bond or some other security provided to the court to ensure the appearance of the defendant at every subsequent stage of the criminal justice process, especially trial, is known as bail. Its purpose is to obtain the release from custody of a person charged with a crime. After the amount of bail is set by the court, the defendant is required to deposit all or a percentage of the entire amount in cash or security (or to pay a professional bonding agent to submit a bond). If the defendant is released on bail but fails to appear in court at the stipulated time, the bail deposit is forfeited. A defendant who fails to make bail is confined in jail until the court appearance.

Right to Bail

The Eighth Amendment to the US Constitution does not guarantee a right to bail but rather prohibits "excessive bail." Because many state statutes place no precise limit on the amount of bail a judge may impose, many defendants who cannot make bail are placed in detention while awaiting trial. It has become apparent over the years that the bail system is discriminatory because defendants who are financially well off can make bail, whereas indigent defendants languish in pretrial detention in the county jail. In addition, keeping a person in jail imposes serious financial burdens on local and state governments—and, in turn, on taxpayers—who must pay for the cost of confinement. These factors have given rise to bail reform programs that depend on the defendant's personal promise ("recognizance") to appear in court for trial, rather than on her or his financial ability to make bail.

The Eighth Amendment restriction on excessive bail may also be interpreted to mean that the sole purpose of bail is to ensure that the defendant returns for trial; bail may not be used as a form of punishment, nor may it be used to coerce or threaten a defendant. In most cases, a defendant has the right to be released on reasonable bail. Many jurisdictions also require a bail review hearing by a higher court when the initial judge has set what might be considered excessive bail.

In *Stack v. Boyle*, the Supreme Court found bail to be a traditional right to freedom before trial that permits unhampered preparation of a defense and prevents the criminal defendant from being punished prior to conviction.⁷ The Court held that bail is excessive when it exceeds an amount reasonably calculated to ensure that the defendant will return for trial. To meet this criterion, bail should be in the amount that is generally set for similar offenses. Higher bail can be imposed when evidence supporting the increase is presented at a hearing at which the defendant's constitutional rights can be protected. Although *Stack* did not mandate an absolute right to bail, it did set guidelines for state courts to follow: if a crime is bailable, the amount set should not be frivolous, unusual, or beyond a person's ability to pay.

Bail Release Mechanisms

When and how are bail decisions made? Bail in a felony case is typically considered at a court hearing conducted shortly after a person has been taken into custody. At the hearing, such issues as type of crime, flight risk, and dangerousness are considered before a bail amount is set. In jurisdictions with pretrial release programs, program staff often interview arrestees detained at the jail before the first hearing, verify their background information, and present recommendations to the court at arraignment. Prior record is an important factor: less than half of defendants with an active criminal justice status (such as parole or probation) at the time of arrest are released, compared to more than two-thirds of those with no active status. Some jurisdictions have developed bail schedules to make amounts uniform based on crime and criminal history.

In practice, a significant majority of criminal defendants are released on bail prior to trial.⁸ The most recent surveys of pretrial release practices show that about 60 percent of felony defendants were released before the final disposition of their case. Defendants charged with the most serious violent offenses were less likely to be released than those charged with less serious public order or drug offenses. Nonetheless, more than half of all violent criminals are released before trial. As might be expected, defendants charged with murder are the least likely to be released prior to case disposition (about 8 percent are released on pretrial bail), followed by defendants whose most serious arrest charge was robbery (about 39 percent are released on bail).

Types of Bail

A variety of ways or mechanisms are available to secure bail, depending on the jurisdiction, the crime, and the defendant (see the accompanying Focus on Effectiveness box for a discussion of which method is most effective):

- **Full cash bail.** The defendant pays the full bail amount out of pocket. In some jurisdictions, property can be pledged instead of cash.
- **Deposit bail.** The defendant deposits a percentage of the bail amount, typically 10 percent, with the court. When the defendant appears in court, the deposit is returned, sometimes minus an administrative fee. If the defendant fails to appear, he or she is liable for the full amount of the bail.



Police remove Michael Steven Sandford from a 2016 Trump campaign event at Treasure Island Hotel and Casino in Las Vegas. Sandford, a British citizen, was accused of trying to take a police officer's gun and kill Donald Trump during the weekend rally. Federal Judge George Foley denied bail for Sandford, stating he was a potential danger to the community and a flight risk. Sandford later pleaded guilty to two felony counts in connection with the incident.

L01 Summarize the bail process



Which Bail Release Mechanism Is Most Effective?

Relatively few researchers have tried to determine which bail release mechanism is most effective. This oversight is important. If, for example, surety bail is the most effective, then this suggests the bail industry is more effective than the government in ensuring defendants appear in court. On the flipside, if the government is more effective in managing pretrial release, then perhaps we don't need commercial bail. Or what if some other approach is more effective? Are defendants who post the full amount of bail more likely to show up for their court dates?

Effects on Crime/Recidivism

In one of the early studies, researchers at the Bureau of Justice Statistics (BJS) attempted to answer these questions. They investigated several of the types of bail we discuss in this chapter: recognizance, surety bond, deposit bond, full cash bond, conditional release, and unsecured bonds. They also added two other types: property bond and emergency release. With a property bond, the defendant posts property valued in the amount of his/her bail with the court. Failure to appear results in forfeiture of the property. Emergency release refers, simply, releasing the defendant prior to trial because of exceptional circumstances. An example is jail overcrowding.

Surety bond is most common. Does that mean it is most effective, though? According to BJS researchers, the probability of being charged with pretrial misconduct was highest for unsecured bond and for emergency release. It was lowest for property bonds. Deposit bonds came next, followed by surety bonds. In looking specifically at failures to appear, the researchers found that emergency release was the least favorable approach. If emergency release was excluded, the percentage of those who failed to appear varied between 17 and 28 percent for each release mechanism, so the moral of the story was there was no clear and obvious winner.

A more recent study of pretrial release in Dallas reached some different conclusions. In that study, researchers at the University of Texas at Dallas compared the efficacy of four different pretrial release mechanisms. The terms they used were:

- **Attorney bond.** Texas law permits attorneys in some locations throughout the state to post bonds for individuals seeking pretrial release.
- **Cash bond.** Defendant posts full amount of bail with the court. If he or she fails to appear, the full amount is forfeited.
- **Commercial bond.** This is surety bail. A bonding agent posts bail in exchange for a fee, usually 10 percent.
- **Pretrial bond.** Reserved for low-risk defendants, this approach has the defendant pay a modest fee to the county in exchange for release. He or she is then held accountable to the county's Pretrial Services

Division but is not formally supervised. It is close to release on recognizance but not identical.

The researchers found that defendants released via commercial bond were the least likely to abscond. This finding held up even as the researchers controlled for other factors likely to influence whether a defendant would appear (such as criminal history, age, indigent status). The least effective approach, according to the study, was pretrial bond. The findings were not without controversy. With pretrial services coming in last, Dallas County was not painted in the most favorable light. Officials explained the finding as a result of understaffing. On the other hand, the bail industry applauded the results. Drew Campbell, spokesman for Dallas County's bail bond companies, said his constituents felt "vindicated by the study's results but also want to continue to work with the county to improve the system."

Thinking Critically About Research

Which release mechanism is most effective, then? The answer is not completely clear. It depends on where and when the study is conducted. It depends on who is compared to whom. It depends on which release mechanisms are in place in one location relative to the other. The bail system in the United States contains a patchwork of release mechanisms, so it will not be completely clear anytime soon which approach is most effective.

No study could ever offer the "last word" on what pretrial release mechanism is preferred; however, if one's concern is with a specific jurisdiction, then a study that carefully matches defendants with one another (on such factors as prior record, demographic makeup, etc.), assigns them to various forms of pretrial release, and then follows enough of them over time could reveal important insights.

QUESTIONS

1. Should private for-profit companies be involved in the bail process?
2. For what types of offenders and offenses should bail be denied?
3. What constitutes excessive bail?

Sources: T. H. Cohen and B. A. Reaves, *Pretrial Release of Felony Defendants in State Courts* (Washington, DC: Bureau of Justice Statistics, 2007), p. 10; R. G. Morris, *Research Report: Pretrial Release Mechanisms in Dallas County, Texas* (Richardson, TX: University of Texas at Dallas), <https://www.utdallas.edu/epps/ccjs/dl/Dallas%20Pretrial%20Release%20Report%20FINAL%20Jan%202013c.pdf>; K. Krause, "New Study Shows a Quarter of Dallas County Criminal Defendants Fail to Show up for Court," *Dallas Morning News*, January 13, 2013, <http://www.dallasnews.com/news/community-news/dallas/headlines/20130113-new-study-shows-a-quarter-of-dallas-county-criminal-defendants-fail-to-show-up-for-court.ece> (URLs accessed April 2017).

release on recognizance (ROR)

A nonmonetary condition for the pretrial release of an accused individual; an alternative to monetary bail that is granted after the court determines that the accused has ties in the community, has no prior record of default, and is likely to appear at subsequent proceedings.

- **Surety bail.** The defendant pays a percentage of the bond, usually 10 percent, to a bonding agent who posts the full bail. The fee paid to the bonding agent is not returned to the defendant if he or she appears in court. The bonding agent is liable for the full amount of the bond should the defendant fail to appear. Bonding agents often require posting collateral to cover the full bail amount. This is the most common form of bail.
- **Conditional bail.** The defendant is released after promising to obey some specified conditions in lieu of cash, such as attending a treatment program before trial.
- **Unsecured bond.** The defendant is released with no immediate requirement of payment. However, if the defendant fails to appear, he or she is liable for the full amount.
- **Release on recognizance.** According to the **release on recognizance (ROR)** concept, eligible defendants are released without bail upon their promise to return for trial.

Bail Issues

Whether a defendant can be expected to appear for his or her trial is a key issue in determining bail. Bail cannot be used to punish an accused, nor can it be denied or revoked at the whim of the court. Nonetheless, for the following reasons, critics argue that monetary bail is one of the most objectionable aspects of the criminal justice system:

- It is discriminatory because it works against the poor.
- It is costly because the government must pay to detain those offenders who cannot make bail but who would otherwise remain in the community.
- It is unfair because a higher proportion of detainees receive longer sentences than people released on bail.
- It is dehumanizing because innocent people who cannot make bail suffer in the nation's deteriorated jail system.

There is also the problem of racial and ethnic disparity in the bail process. Some research efforts show that the decision whether to grant bail may be racially or ethnically biased; black and Latino defendants receive less favorable treatment than whites charged with similar offenses.⁹ Although these results are troubling, it is often difficult to gauge racial/ethnic disparity in the bail process because differences in income, community ties, family support, and criminal record, rather than judicial bias, may account for any observed differences in the bail process. Despite these drawbacks, the bail system remains in place to ensure that defendants return for trial and that the truly dangerous can be kept in secure confinement pending their court proceedings.

BONDSMEN AND BOUNTY HUNTERS When bailees abscond before trial, bondsmen routinely hire skip tracers, enforcement agents, or bounty hunters to track them down. Each year a large network of full-time bail enforcement agents catch thousands of fugitives in the United States. Although organizations such as the National Institute of Bail Enforcement attempt to provide training, some untrained and/or unprofessional bounty hunters may use brutal tactics that can end in tragedy. Consequently, efforts have been made to reform and even eliminate money bail and reduce the importance of bonding agents.

PRETRIAL DETENTION CONDITIONS The criminal defendant who is not eligible for bail or ROR is subject to pretrial detention in the local county jail. The jail has long been a trouble spot for the criminal justice system. Conditions tend to be poor, and rehabilitation is a low priority. Hundreds of jails are overcrowded, and many are under court orders to reduce their populations and improve conditions.

L02 Discuss the main issues associated with bail

WEB APP 8.1

Visit the website of the Fugitive Recovery Network, an organization devoted to supporting the bail bond industry, at <http://fugitiverecovery.com/>. From there click on "Bail Bond Laws," click on the map of the United States, then read the laws in the state where you reside (not all states may be available). What are the limits on fugitive recovery, according to state law?



Aaron Kennedy, left, and Jim Elliott, bail enforcement agents from Salt Lake City, look over paperwork while trying to track down a man who jumped bail and had a warrant out for his arrest. Kennedy and Elliott were contracted by a bail bond company.

What happens to people who do not get bail or who cannot afford to put up bail money? Traditionally, these individuals are more likely to be convicted and then to get longer prison sentences than those who commit similar crimes but who were released on bail. A federally sponsored study of case processing in the nation's largest counties found that about 63 percent of all defendants granted bail were convicted; in contrast, 78 percent of detainees were convicted.¹⁰ Detainees are also more likely than releasees to be convicted of a felony offense and, therefore, are eligible for a long prison sentence instead of the much shorter term of incarceration given misdemeanants.

Manhattan Bail Project The innovative experiment in bail reform that introduced and successfully tested the concept of release on recognizance.

deposit bail The monetary amount set by a judge at a hearing as a condition of pretrial release; the percentage of the total bond required to be paid by the defendant.

Bail Reform Act of 1984 Federal legislation that provides for both greater emphasis on release on recognizance for nondangerous offenders and preventive detention for those who present a menace to the community.

preventive detention The practice of holding dangerous suspects before trial without bail.

REALITYCHECK

Myth or Reality?

A significant percentage of those released on bail never show up for their scheduled court dates.

MYTH. Research suggests otherwise. The Manhattan Bail Project found that less than 1 percent of those released default.

Official statistics tell a similar story; relatively few people released before their trial dates reoffend, get arrested, or fail to show up when they are required to do so. Could the same be expected with ROR programs?

BAIL REFORM Critics believe that the bail system is discriminatory because defendants who are financially well off can make bail, whereas indigent defendants languish in pretrial detention in the county jail—and then get convicted at higher rates. This has led to a number of bail-related reforms. The first such reform program was pioneered by the Vera Institute of Justice in an experiment called the **Manhattan Bail Project**, which began in 1961 with the cooperation of the New York City criminal courts and local law students.¹¹ The project found that if the court had sufficient background information about the defendant, it could make a reasonably good judgment about whether the accused would return to court. When release decisions were based on such information as the nature of the offense, family ties, and employment record, most defendants who were released on their own recognizance returned to court. The results of the Vera Institute's initial operation showed a default rate of less than 0.7 percent.

The success of ROR programs in the early 1960s resulted in bail reforms that culminated with the enactment of the federal Bail Reform Act of 1966, the first change in federal bail laws since 1789.¹² This legislation sought to ensure that release would be granted in all noncapital cases in which there was sufficient reason to believe that the defendant would return to court. The law clearly established the presumption of ROR that must be overcome before money bail is required, authorized 10 percent **deposit bail**, introduced the concept of conditional release, and stressed the philosophy that release should be under the least restrictive conditions necessary to ensure court appearance.

During the 1970s and early 1980s, the pretrial release movement was hampered by public pressure over pretrial increases in crime. As a result, the more recent federal legislation, the **Bail Reform Act of 1984**, mandated that no defendants will be kept in pretrial detention simply because they cannot afford money bail, established the presumption for ROR in all cases in which a person is bailable, and formalized restrictive preventive detention provisions (explained later in this chapter). The 1984 act required that community safety, as well as the risk of flight, be considered in the release decision. Consequently, such criminal justice factors as the seriousness of the charged offense, the weight of the evidence, the sentence that may be imposed upon conviction, court appearance history, and prior convictions are likely to influence the release decisions of the federal court.

PREVENTIVE DETENTION Bail reform acts have made it easier for some people to secure pretrial release, but they have also helped keep defendants who are considered dangerous behind bars before trial without the possibility of bail—a practice known as **preventive detention**. These laws require that certain dangerous defendants be confined before trial for their own protection and that of the community. Preventive detention is an important manifestation of the crime control perspective on justice because it favors the use of incapacitation to control the future behavior of suspected criminals. Critics, however, are concerned that preventive detention amounts to punishment before trial.

The most striking use of preventive detention can be found in the federal Bail Reform Act of 1984.¹³ Although the act does contain provisions for ROR, it also allows judges to order preventive detention if they determine "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."¹⁴

A number of state jurisdictions have incorporated elements of preventive detention into their bail systems. Although most of the restrictions do not constitute outright preventive detention, they serve to narrow the scope of bail eligibility. These provisions include three main features: (1) exclusion of certain crimes from bail eligibility, (2) definition of bail to include appearance in court and community safety, and (3) the limitations on right to bail for those previously convicted.

PRETRIAL SERVICES In our overburdened court system, determining which defendants can safely be released on bail pending trial is critical.¹⁵ In many jurisdictions, specialized pretrial services help courts deal with this problem. Hundreds of pretrial bail programs have been established in rural, suburban, and urban jurisdictions; they are typically operated in probation departments, court offices, and local jails, and through independent county contractors. These programs provide a number of critical services:

- Gathering and verifying information about arrestees—including criminal history, current status in the criminal justice system, address, employment, and drug and alcohol use history—which judicial officers can then take into account in making release/detention decisions.
- Assessing each arrestee's likelihood of failure to appear and chances of being rearrested.
- Monitoring released defendants' compliance with conditions of release designed to minimize pretrial crime, including curfews, orders restricting contact with alleged victims and possible witnesses, home confinement, and drug and alcohol testing.
- Providing direct "intensive" supervision for some categories of defendants by using program staff and collaborating with the police, other agencies, and community organizations.

Some pretrial services programs are now being aimed at special needs. One type focuses on defendants suffering from mental illness; almost three-quarters of pretrial services programs now inquire about mental health status and treatment as a regular part of their interview, and about one-quarter report having implemented special supervision procedures for defendants with mental illness. Another area of concern is domestic violence. About one-quarter of all pretrial programs have developed special risk-assessment procedures for defendants charged with domestic violence offenses, and about one-third have implemented special procedures to supervise defendants charged with domestic violence offenses.

Charging the Defendant

Charging a defendant with a crime is a process that varies somewhat, depending on whether it occurs via a grand jury or a preliminary hearing.

The Indictment Process and the Grand Jury

The grand jury was an early development of the English common law. Under the Magna Carta (1215), no freeman could be seized and imprisoned unless he had been judged by his peers. To determine fairly who was eligible to be tried, a group of freemen from the district where the crime was committed would be brought together to examine the facts of the case and determine whether the charges had merit. Thus, the grand jury was created as a check against arbitrary prosecution by a judge who might be a puppet of the government.

The concept of the grand jury was brought to the American colonies by early settlers and later incorporated into the Fifth Amendment of the US Constitution, which states that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." What is the role of the grand jury today? First, the grand jury has the power to act as an independent investigating body. In this capacity, it examines the possibility of criminal activity within its jurisdiction.

L03 Differentiate between the two main mechanisms for charging defendants (grand jury indictment and prosecutor's information)

presentment The report of a grand jury investigation, which usually includes a recommendation of indictment.

indictment The action by a grand jury when it finds that probable cause exists for prosecution of an accused suspect.

no bill The action by a grand jury when it votes not to indict an accused suspect.

WEB APP
8.2

Visit the National Center for State Courts' Grand Jury Resource Guide page at <http://www.ncsc.org/Topics/Jury/Grand-Juries/Resource-Guide.aspx>. Click on "State Links" and read about grand jury procedure in your state.

information Charging document filed by the prosecution that forms the basis of the preliminary hearing.

preliminary hearing A hearing that occurs in lieu of a grand jury hearing, when the prosecutor charges via information. Three issues are decided: whether a crime was committed, whether the court has jurisdiction over the case, and whether there is sufficient probable cause to believe the defendant committed the alleged crime.

Tulsa Police Officer Betty Shelby arrives at the Tulsa County Courthouse on May 11, 2017, for her manslaughter trial in the shooting death of Terence Crutcher. Dash cam and helicopter video footage never provided a clear image of the circumstances surround the shooting. Shelby was ultimately acquitted after eight hours of jury deliberations.

These investigative efforts may be directed toward general rather than individual criminal conduct, for example, organized crime or insider trading. After an investigation is completed, a report called a **presentment** is issued. The presentment contains not only information concerning the findings of the grand jury but also, usually, a recommendation of indictment.

The grand jury's second and better-known role is to act as the community's conscience in determining whether the accusation of the state (the prosecution) justifies a trial. The grand jury relies on the testimony of witnesses called by the prosecution through its subpoena power. After examining the evidence and the testimony of witnesses, the grand jury decides whether probable cause exists for prosecution. If it does, an **indictment**, or true bill, is affirmed. If the grand jury fails to find probable cause, a **no bill** (meaning that the indictment is ignored) is passed. In some states, a prosecutor can present evidence to a different grand jury if a no bill is returned; in other states, this action is prohibited by statute.

CRITIQUING THE GRAND JURY The grand jury usually meets at the request of the prosecution, and hearings are closed and secret. Neither the defense attorney nor the defendant is allowed to attend, and grand jury hearings are not open to the public. The prosecuting attorney presents the charges and calls witnesses who testify under oath to support the indictment. This process has been criticized as being a "rubber stamp" for the prosecution because the presentation of evidence is shaped by the district attorney, who is not required by law to reveal information that might exonerate the accused.¹⁶ An alternative is to open the grand jury room to the defense and hold the government to the same types of constitutional safeguards to protect defendants that are now used at trial.¹⁷

The Information Process and the Preliminary Hearing

In about half the states, a prosecutor's **information** is the charging mechanism of choice. When a person is charged in this fashion, a **preliminary hearing** is necessary. The purposes of the preliminary hearing and the grand jury hearing are the same—to establish whether probable cause is sufficient to merit a trial. The procedures differ between the two, however.

The preliminary hearing is conducted before a magistrate or lower-court judge and, unlike the grand jury hearing, is open to the public unless the defendant requests otherwise. Present at the preliminary hearing are the prosecuting attorney, the defendant, and the defendant's counsel, if one has already been retained. The prosecution presents its



evidence and witnesses to the judge. The defendant or the defense counsel then has the right to cross-examine witnesses and to challenge the prosecutor's evidence.

After hearing the evidence, the judge decides whether there is sufficient probable cause to believe that the defendant committed the alleged crime. If so, the defendant is bound over for trial, and the prosecuting attorney's information (described earlier; it is similar to an indictment) is filed with the superior court, usually within 15 days. If the judge does not find sufficient probable cause, the charges are dismissed, and the defendant is released from custody.

A unique aspect of the preliminary hearing is the defendant's right to waive the proceeding, a procedure that has advantages (and disadvantages) for both the prosecutor and the defendant. For the prosecutor, waiver helps avoid the need to reveal evidence to the defense before trial. Defense attorneys may waive the preliminary hearing for three possible reasons: (1) when the defendant has already decided to plead guilty, (2) to speed the criminal justice process, and/or (3) to avoid the negative publicity that might result from the hearing. On the other hand, a preliminary hearing may have some advantage for the defendant who believes that it will result in a dismissal of the charges. In addition, the preliminary hearing gives the defense an opportunity to learn what evidence the prosecution has. Figure 8.1 outlines the significant differences between the grand jury and the preliminary hearing processes.

Arraignment

After an indictment or information is filed following a grand jury or preliminary hearing, an arraignment takes place before the court that will try the case. At the arraignment, the judge informs the defendant of the charges against him or her and appoints counsel if one has not yet been retained. According to the Sixth Amendment of the US Constitution, the accused has the right to be informed of the nature and cause of the accusation. Thus, the judge at the arraignment must make sure that the defendant clearly understands the charges.

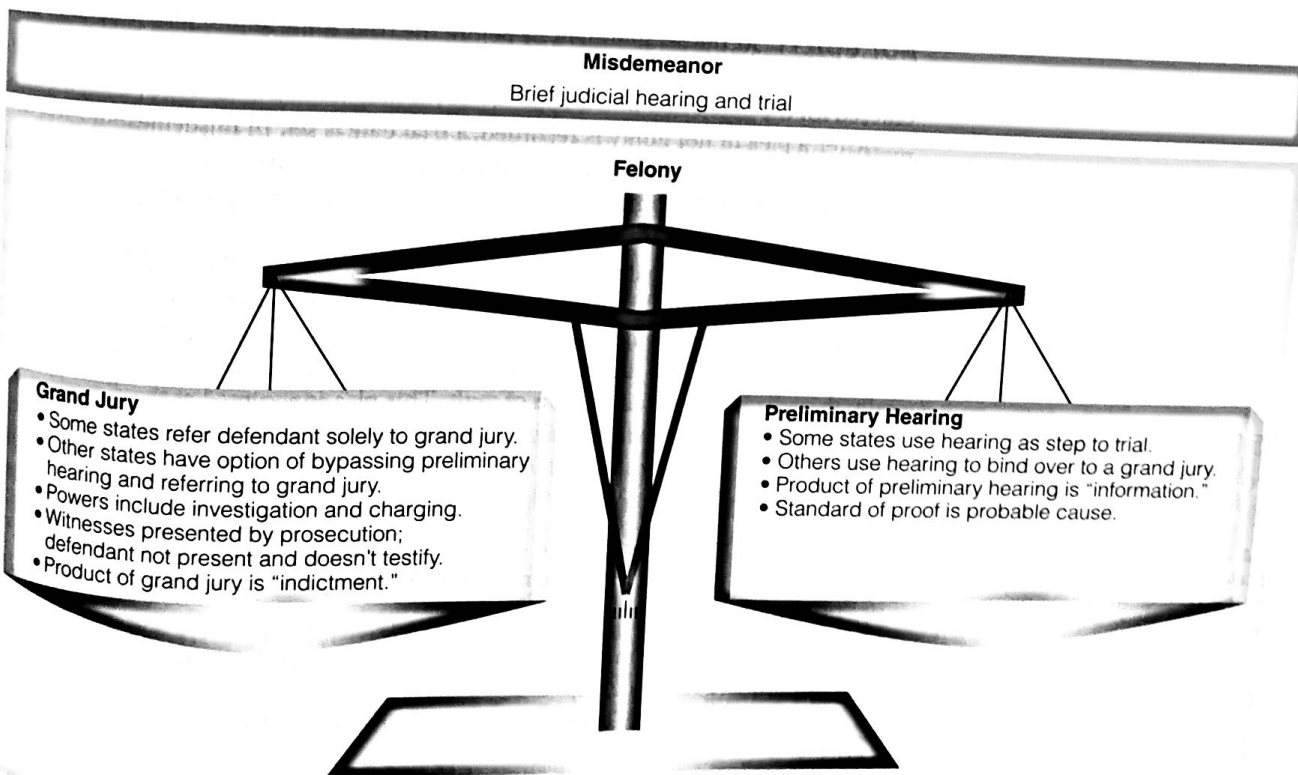


FIGURE 8.1 Charging the Defendant with a Crime
Note the difference between the grand jury and the preliminary hearing.

L04 Summarize the pleas available to a criminal defendant

REALITYCHECK

Myth or Reality?

A person arraigned on criminal charges must plead either guilty or innocent.

MYTH. The media routinely get it wrong, claiming that so-and-so pleaded innocent. There is no such plea!

What is the difference between "not guilty" and "innocent"?

L05 Explain the issues involved in plea bargaining

plea bargaining Nonjudicial settlement of a case in which the defendant exchanges a guilty plea for some consideration, such as a reduced sentence.

After the charges are read and explained, the defendant is asked to enter a plea. If a plea of not guilty or not guilty by reason of insanity is entered, a trial date is set. When the defendant pleads guilty or *nolo contendere*, a date for sentencing is arranged. The magistrate then either sets bail or releases the defendant on personal recognizance.

The Plea

Ordinarily, a defendant in a criminal trial will enter one of three pleas: guilty, not guilty, or *nolo contendere*.

GUILTY Most defendants appearing before the courts plead guilty prior to the trial stage. A guilty plea has several consequences. It functions not only as an admission of guilt but also as a surrender of the entire array of constitutional rights designed to protect a criminal defendant against unjustified conviction, including the right to remain silent, the right to confront witnesses against him or her, the right to a trial by jury, and the right to have an alleged offense proven beyond a reasonable doubt. After a plea is made, it cannot be rescinded or withdrawn after sentencing, even if there is a change in the law that might have made conviction more problematic.¹⁸

As a result, judges must follow certain procedures when accepting a plea of guilty. First, the judge must clearly state to the defendant the constitutional guarantees that he or she automatically waives by entering this plea. Second, the judge must believe that the facts of the case establish a basis for the plea and that the plea is made voluntarily. Third, the defendant must be informed of the right to counsel during the pleading process. In many felony cases, the judge will insist on the presence of defense counsel. Finally, the judge must inform the defendant of the possible sentencing outcomes, including the maximum sentence that can be imposed.

After a guilty plea has been entered, a sentencing date is arranged. In a majority of states, a guilty plea may be withdrawn and replaced with a not-guilty plea at any time prior to sentencing, if good cause is shown.

NOT GUILTY At the arraignment or before the trial, a not-guilty plea is entered in one of two ways: (1) it is verbally stated by the defendant or the defense counsel, or (2) it is entered for the defendant by the court while the defendant stands mute before the bench.

After a plea of not guilty is recorded, a trial date is set. In misdemeanor cases, trials take place in the lower-court system, whereas felony cases are normally transferred to the superior court. At this time, a continuance or issuance of bail is once again considered.

NOLo CONTENDERE With this plea (which means "no contest"), the defendant does not accept or deny responsibility for the crime(s) charged but agrees to accept punishment. Even though *nolo contendere* is essentially a plea of guilty, it may not be held against the defendant as proof in a subsequent legal matter, such as a civil lawsuit, because technically there has been no admission of guilt. This plea is accepted at the discretion of the trial court and must be voluntarily and intelligently made by the defendant.

Plea Bargaining

Plea bargaining is the exchange of prosecutorial and judicial concessions for pleas of guilty. Normally, a bargain can be made between the prosecutor and the defense attorney in one of four ways:

- The initial charges may be reduced to those of a lesser offense, thus automatically reducing the sentence imposed.
- In cases where many counts are charged, the prosecutor may reduce the number of counts.
- The prosecutor may promise to recommend a lenient sentence, such as probation.
- When the charge imposed has a negative label attached (such as child molester), the prosecutor may alter the charge to a more "socially acceptable" one (such as assault) in exchange for a plea of guilty.



Strange Plea Agreements

The typical plea agreement results in a reduced charge or a favorable sentencing recommendation by the prosecutor, but some agreements can only be described as strange or at least outside the box. What follows are some examples identified by law professor and former judge Joseph Colquitt. In exchange for leniency, the defendant agrees to:

- Make a charitable contribution
- Relinquish property ownership
- Surrender a professional license
- Undergo sterilization
- Undergo surgical castration
- Enter the military
- Not pursue appeals
- Undertake a shaming punishment, such as carrying a sign that says "I stole from this store"
- Seal the records of a case
- Surrender profits from crime, such as from books written about the crime
- Be banished to another location

These are examples of what Colquitt calls "ad hoc plea bargaining." In his view, ad hoc plea bargaining takes these forms:

- (1) the court may impose an extraordinary condition of probation following a guilty plea,
- (2) the defendant may offer or be required

to perform some act as a quid pro quo for a dismissal or more lenient sentence, (3) the court may impose an unauthorized form of punishment as a substitute for a statutorily established method of punishment, (4) the state may offer some unauthorized benefit in return for a plea of guilty, or (5) the defendant may be permitted to plead guilty to an unauthorized offense, such as a "hypothetical" or nonexistent charge, a nonapplicable lesser-included offense, or a nonrelated charge.

Ad hoc plea bargaining is controversial not just because it is unusual. In some cases it can border on unethical. In one case, the prosecutor offered leniency to a drug defendant if he would surrender several thousand dollars in cash that was found during a search of his property. In another case, a defendant was afforded leniency for agreeing to forfeit interest in his vehicle.

CRITICAL THINKING

1. Are ad hoc plea bargains reasonable? Are they fair?
2. What if the tables were turned and, say, a speeding motorist offered \$100 to the officer who stopped her in exchange for leniency? What would happen then?

Source: Joseph A. Colquitt, "Ad Hoc Plea Bargaining," *Tulane Law Review* 75 (2001): 695-776; Timothy Lynch, *The Case Against Plea Bargaining*, <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2003/10/v26n3-7.pdf> (accessed April 2017).

There is little question that these methods result in lesser sentences, especially when defendants are in states whose sentencing policies limit judicial discretion. Pleading guilty to reduced charges may help replace the absence of judicial leniency.¹⁹

Plea bargaining is one of the most common practices in the criminal justice system and a cornerstone of the informal justice system. Today more than 90 percent of criminal convictions are the result of negotiated pleas of guilty. Even in serious felony cases, plea bargaining can be an option. And it can happen from the earliest stages of criminal charges all the way up to the "shadow of the trial," or right before a verdict is reached.²⁰

See the accompanying Contemporary Issues in Criminal Justice box for more on some interesting plea agreements.

Plea bargaining is actually a relatively recent development, which took hold late in the nineteenth century. During the first 125 years after the nation's birth, the trial by jury was viewed as the fairest and most reliable method of determining the truth in a criminal matter. However, plea bargaining became more attractive at the turn of the twentieth century, when the mechanization of manufacture and transportation prompted a flood of complex civil cases; this event persuaded judges that criminal cases had to be settled quickly lest the court system break down.²¹

Pros and Cons of Plea Negotiation

Because of excessive criminal court caseloads and the personal and professional needs of the prosecution and the defense (to reach disposition of the case in the least possible time), plea bargaining has become an essential yet controversial part of the administration of justice. Proponents contend that plea bargaining actually benefits both the state and the defendant in the following ways:

- The overall costs of the criminal prosecution are reduced.
- The administrative efficiency of the courts is greatly improved.

- The prosecution can devote more time to more serious cases.
- The defendant avoids possible detention and an extended trial and may receive a reduced sentence.
- Resources can be devoted more efficiently to cases that need greater attention.²²

Those who favor plea bargaining believe it is appropriate to enter into plea discussions when the interests of the state in the effective administration of justice will be served. Opponents of the plea-bargaining process believe that the negotiated plea should be eliminated for the following reasons:

- It encourages defendants to waive their constitutional right to trial.
- Plea bargains allow dangerous offenders to receive lenient sentences. Jesse Timmendequas, a previously convicted sex offender, was given a 10-year plea-bargained sentence for child rape. Upon his release, he raped and killed 7-year-old Megan Kanka in one of the nation's most notorious crimes.²³
- Plea bargaining also raises the danger that an innocent person will be convicted of a crime if he or she is convinced that the lighter treatment ensured by a guilty plea is preferable to the risk of conviction and a harsher sentence following a formal trial.
- Prosecutors are given a free hand to induce or compel defendants to plea-bargain, thus circumventing the law.²⁴
- It is possible that innocent persons will admit guilt if they believe that the system is biased and that they have little chance of being acquitted.
- A guilty-plea culture has developed among defense lawyers. Elements of this attitude include the belief that most of their clients are dishonest people who committed the crime with which they have been charged and that getting a "sentence discount" for them is the best and only way to go.²⁵

Legal Issues in Plea Bargaining

The Supreme Court has reviewed the propriety of plea bargaining in several decisions and, while imposing limits on the practice, has upheld its continued use. The Court has ruled in several key cases that:

- Defendants are entitled to the effective assistance of counsel to protect them from pressure and influence.²⁶
- Pleas must be made voluntarily and without pressure. However, a prosecutor can tell defendants that they may be facing the death penalty if they go to trial.²⁷

Joseph Koettters (right), a former high school teacher accused of having sex with two students and getting one pregnant, pleads guilty and is sentenced in Los Angeles Superior Court while his attorney, Leonard Levine, listens to the terms of the plea agreement. Koettters was sentenced to a year in jail for four criminal counts and was required to register as a sex offender.



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- Any promise made by the prosecutor during the plea negotiations must be kept after the defendant admits guilt in open court. A prosecutor who promises leniency in private negotiations must stick to that position in court.²⁸
- Defendants must also keep their side of the bargain to receive the promised offer of leniency.²⁹ For example, if they agree to testify against a co-defendant, they must give evidence at trial or forfeit the bargain.
- A defendant's due process rights are not violated when a prosecutor threatens to re-indict the accused on more serious charges—for example, as a habitual offender— if the defendant does not plead guilty to a lesser offense.³⁰
- Accepting a guilty plea from a defendant who maintains his or her innocence is valid.³¹
- Statements made during a plea bargain may be used under some circumstances at trial if the negotiations break down. Statements made during a plea negotiation can be used if the defendant (1) admits to a crime during the bargaining process but then (2) later testifies in open court that he or she did not do the act and (3) is innocent of the charges.³²

Plea-Bargaining Decision Making

The plea-bargaining process is largely informal, lacking in guidelines, and discretionary. Research shows that prosecutorial discretion rather than defendant characteristics controls plea negotiations.³³ Yet studies also show that plea bargaining reflects a degree of cooperation between prosecutors and defense attorneys; in the vast majority of cases, they work together to achieve a favorable outcome.³⁴

Research on plea negotiation indicates that the process is rather complex. Offender, case, and community characteristics also weigh heavily on the negotiation process.³⁵ Such factors as the offense, the defendant's prior record and age, and the type, strength, and admissibility of evidence are important in the plea-bargaining decision as well.³⁶ The attitude of the complainant is also an important factor in the decision-making process. In victimless cases, such as heroin possession, the attitude of the police is most often considered, whereas in victim-related crimes, such as rape, the victim's attitude is a primary concern. Even the prosecutor's ego or political objectives can factor in. The list of factors that can affect plea agreements is practically endless.

THE ROLE OF THE DEFENSE COUNSEL Although the prosecutor formulates and offers the deal, the defense counsel—a public defender or a private attorney—is required to play an advisory role in plea negotiations. The defendant's counsel is expected to be aware of the facts of the case and familiar with the law and to advise the defendant of the alternatives available. The defense attorney is basically responsible for making certain that the accused understands the nature of the plea-bargaining process and the guilty plea. This means that the defense counsel should explain to the defendant that by pleading guilty, he is waiving certain rights that would be available if he were to go to trial. In addition, the defense attorney has the duty to keep the defendant informed of developments and discussions with the prosecutor regarding plea bargaining. While doing so, the attorney for the accused cannot misrepresent evidence or mislead the client into making a detrimental agreement. The defense counsel is not just ethically but also constitutionally required to communicate all plea-bargaining offers to a client, even if counsel believes the offers to be unacceptable.³⁷

THE ROLE OF THE JUDGE The leading national legal organization, the American Bar Association, is opposed to judicial participation in plea negotiations.³⁸ According to ABA standards, judges should not be a party to arrangements for the determination of a sentence, whether as a result of a guilty plea or a finding of guilty based on proof. According to this view, judicial participation in plea negotiations (1) creates the impression in the mind of defendants that they cannot receive a fair trial, (2) lessens the ability of the judge to make an objective determination of the voluntary nature of the plea, (3) is

L06 Describe the plea-bargaining process

inconsistent with the theory behind the use of presentence investigation reports, and (4) may induce innocent defendants to plead guilty because they are afraid to reject the disposition desired by the judge.³⁹ How, then, are judges involved in plea bargaining? Judges must approve plea agreements after they have been negotiated.

THE ROLE OF THE VICTIM What role should victims play in plea bargaining? Some suggest that the system today is too "victim driven" and that prosecutors too often seek approval for the plea from a victim or family member. Others maintain that the victim plays an almost secondary role in the process. In reality, the victim is not "empowered" at the pretrial stage of the criminal process. Statutes do not require that the prosecutor defer to the victim's wishes, and there are no legal consequences of ignoring the victim in a plea-bargaining decision.

Plea-Bargaining Reform

In recent years, efforts have been made to convert plea bargaining into a more visible, understandable, and fair dispositional process. Safeguards and guidelines have been developed to ensure that innocent defendants do not plead guilty under coercion. For example, the judge questions the defendant about the facts of the guilty plea before accepting the plea; the defense counsel is present and can advise the defendant of his or her rights; the prosecutor and the defense attorney openly discuss the plea; and full and frank information about the defendant and the offenses is made available at this stage of the process. In addition, judicial supervision ensures that plea bargaining is conducted in a fair manner.

NEGOTIATION OVERSIGHT Some jurisdictions have established guidelines to provide consistency in plea-bargaining cases. Guidelines define the kinds and types of cases and offenders that may be suitable for plea bargaining. Guidelines cover such aspects as avoiding overindictment and controlling unprovable indictments, reducing felonies to misdemeanors, and bargaining with defendants.⁴⁰

BANNING PLEA BARGAINING What would happen if plea bargaining were banned outright, as its critics advocate? Numerous jurisdictions throughout the United States have experimented with bans on plea bargaining. In 1975, Alaska eliminated the practice. Honolulu has also attempted to abolish plea bargaining. Other jurisdictions, including Iowa, Arizona, Delaware, and the District of Columbia, have sought to limit the use of plea bargaining.⁴¹ In theory, eliminating plea bargains means that prosecutors in these jurisdictions make no concessions to a defendant in exchange for a guilty plea.

In reality, however, in these and most jurisdictions, sentence-related concessions, charge-reduction concessions, and alternative methods for prosecution continue to be used in one way or another.⁴² Where plea bargaining is limited or abolished, the number of trials may increase, the sentence severity may change, and more questions about the right to a speedy trial may arise. Discretion may also be shifted further up the system. Instead of spending countless hours preparing for and conducting a trial, prosecutors may dismiss more cases outright or decide not to prosecute them after initial action has been taken.

L07 Explain the purpose of pretrial diversion

diversion A noncriminal alternative to trial, usually featuring counseling, job training, and educational opportunities.

Pretrial Diversion

Another important feature in the early court process is placing offenders into noncriminal diversion programs before their formal trial or conviction. The first pretrial diversion programs were established more than 40 years ago to reduce the stigma created by the formal trial process. To avoid stigma and labeling, diversion programs suspend criminal proceedings so that the accused can participate in a community treatment

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program under court supervision. Diversion programs give the client an opportunity to do the following:

- Avoid the stigma of a criminal record
- Continue to work and support his or her family
- Continue pursuing educational goals
- Access rehabilitation services, such as anger management, while remaining in the community
- When needed, make restitution to the victim of crime or pay back the community through volunteer services

Diversion also enables the justice system to reduce costs and alleviate prison crowding. Diversion programs can take many forms. Some are run by separate, independent agencies that were originally set up with federal funds but are now being continued with county or state assistance. Others are organized as part of a police, prosecutor, or probation department's internal structure. Still others represent a joint venture between the county government and a private, nonprofit organization that carries out the treatment process.

First viewed as a panacea that could reduce court congestion and help treat minor offenders, diversion programs soon came under fire when national evaluations concluded that they are no more successful at avoiding stigma and reducing recidivism than traditional justice processing.⁴³ There was also the suspicion that diversion might "widen the net" of the justice system. By this, critics meant that the people placed in diversion programs were the ones most likely to have otherwise been dismissed after a brief hearing with a warning or small fine.⁴⁴ Now they were receiving more treatment than they would have if the program had not been in place. Those who would ordinarily have received a more serious sentence were not eligible for diversion anyway. Thus, rather than limiting contact with the system, the diversion programs actually increase its grasp.

Of course, not all justice experts agree with this charge, and some programs have shown great promise. Rigorous evaluations indicate that given the proper treatment, some types of offenders, such as drug offenders, who are offered a place in pretrial programs can significantly lower their rates of recidivism.⁴⁵

The Trial

The criminal trial is an open and public hearing designed to examine the facts of the case brought by the state against the accused. Criminal trials are relatively rare events (most cases are settled by a plea bargain during the pretrial stage), but they are an important and enduring fixture in the criminal justice system. By its very nature, the criminal trial is a symbol of the moral authority of the state and of the administration of objective and impartial justice.

Most formal trials are heard by a jury, although some defendants waive their constitutional right to a jury trial and request a **bench trial**, in which the judge alone renders a verdict. In this situation, which occurs daily in the lower criminal courts, the judge may initiate a number of formal or informal dispositions, including dismissing the case, finding the defendant not guilty, finding the defendant guilty and imposing a sentence, or even continuing the case indefinitely. The decision the judge makes often depends on the seriousness of the offense, the background and previous record of the defendant, and the judgment of the court about whether the case can be properly dealt with in the criminal process. The judge may simply continue the case without a finding, in which case the verdict is withheld without a finding of guilt to induce the accused to improve her behavior in the community; if the defendant's behavior does improve, the case is ordinarily closed within a specific amount of time.

This section reviews some of the institutions and processes involved in adjudication and trial. We begin with a discussion of the legal rights that structure the trial process.

WEB APP 8.3

Visit the San Francisco Pretrial Diversion Project website at <http://sfpretrial.com/>. What programs and services are available to certain defendants in lieu of trial? What defendants are eligible? Which program do you feel is most effective and why?

bench trial The trial of a criminal matter by a judge only. The accused waives any constitutional right to trial by jury.

adjudication The determination of guilt or innocence, a judgment concerning criminal charges. The majority of offenders charged plead guilty; of the remainder, some cases are adjudicated by a judge and a few are adjudicated by a jury without a jury trial. Some are dismissed.

L08 Explain the legal rights of the accused at trial

Legal Rights During Trial

Underlying every trial are constitutional principles, complex legal procedures, rules of court, and interpretations of statutes—all designed to ensure that the accused will receive a fair trial.

THE RIGHT TO AN IMPARTIAL JUDGE Even though the Constitution does not say so, every criminal defendant enjoys the right to a trial by an impartial judge. The Supreme Court ruled as much way back in the 1927 case of *Tumey v. Ohio*. In that case, a municipal court judge was also the mayor, an executive official. What's more, he received fines and fees that he ordered against defendants who were convicted in his courtroom. The Supreme Court held that it is a violation of due process when a judge "has a direct, personal, substantial pecuniary interest in reaching a conclusion against [a defendant] in his case."⁴⁶

What if a judge is not impartial? How can such a judge be removed? Generally, the judge will excuse himself or herself if there is a conflict of interest. Judicial codes of ethics provide the guidelines judges need to make such decisions. Some jurisdictions, however, permit peremptory removal of judges.⁴⁷ These are like the peremptory challenges used in jury selection (covered later in this chapter). When this occurs, one of the attorneys can move to have the judge removed, and another judge will come on board. Usually the peremptory removal can occur only once.

THE RIGHT TO BE COMPETENT AT TRIAL To stand trial, a criminal defendant must be considered mentally competent to understand the nature and extent of the legal proceedings. If a defendant is considered mentally incompetent, his trial must be postponed until treatment renders him capable of participating in his own defense.

Can state authorities force a mentally unfit defendant to be treated so that he can be tried? In *Riggins v. Nevada* (1992), the US Supreme Court ruled that forced treatment does not violate a defendant's due process rights if it was medically appropriate and, considering less intrusive alternatives, was essential for the defendant's own safety or the safety of others.⁴⁸

THE RIGHT TO CONFRONT WITNESSES The Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The accused enjoys this right not just by being able to confront witnesses in person but by being allowed to participate in his or her trial. That is, trials

Robert Lewis Dear addresses Judge Gilbert Martinez during a court appearance in Colorado Springs. Prosecutors filed charges against Lewis in connection with a Planned Parenthood attack in which police Officer Garrett Swasey, Iraq war veteran Ke'Arre Stewart, and Jennifer Markovsky, a mother of two, were killed. On May 11, 2016, a judge declared Dear incompetent to stand trial and ordered that he be indefinitely committed to a state mental hospital.



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cannot be conducted without the accused being afforded the right to appear in person. This right can be waived or forfeited through misconduct. The accused may choose not to show up,⁴⁹ which is constitutionally permissible, and he or she may forfeit the right to appear by acting out and causing a significant distraction in the courtroom.⁵⁰ There are also some exceptions, such as in child abuse cases, where it is felt that child victims would suffer irreparable harm by being forced to appear before their abusers.⁵¹

The **confrontation clause** is essential to a fair criminal trial because it restricts and controls the admissibility of **hearsay evidence**. Hearsay evidence is akin to secondhand evidence; rather than being told firsthand, it consists of information related by a second party (it is what one person hears and then says—hence the term “hearsay”). The framers of the Constitution sought face-to-face accusations in which the defendant has a right to see and cross-examine all witnesses. The idea that it is always more difficult to tell lies about people to their face than behind their back underlies the confrontation clause.

THE RIGHT TO COMPULSORY PROCESS The Sixth Amendment says, in part, that the accused shall “have compulsory process for obtaining witnesses in his favor.” **Compulsory process** means to compel the production of witnesses via a subpoena. A subpoena is an order requiring a witness to appear in court at a specified time and place. The Supreme Court decided that compulsory process is a fundamental right in the case of *Washington v. Texas* (1967).⁵²

THE RIGHT TO AN IMPARTIAL JURY It is no accident that of all the rights guaranteed to the people by the Constitution, only the right to a jury trial in criminal cases appears in both the original Constitution (Article III, Section 2) and the Bill of Rights (the Sixth Amendment). Although they may have disagreed on many points, the framers did not question the wisdom of the jury trial.

Today, the criminal defendant has the right to choose whether the trial will be before a judge or a jury. Although the Sixth Amendment guarantees the defendant the right to a jury trial, the defendant can and often does waive this right. A substantial proportion of defendants, particularly those charged with misdemeanors, are tried before the court without a jury.

The major legal issue surrounding jury trial has been whether all defendants—those accused of misdemeanors as well as those accused of felonies—have an absolute right to a jury trial. Although the Constitution says that the right to a jury trial exists in “all criminal prosecutions,” the Supreme Court has restricted this right. In *Baldwin v. New York* (1970), the Court decided that a defendant has a constitutional right to a jury trial when facing a possible prison sentence of six months or more, regardless of whether the crime committed was a felony or a misdemeanor.⁵³ When the possible sentence is six months or less, the accused is not entitled to a jury trial unless it is authorized by state statute. In most jurisdictions, the more serious the charge, the greater the likelihood of trial—and by jury.

THE RIGHT TO COUNSEL AT TRIAL Recall from previous chapters that the defendant has a right to counsel at numerous points in the criminal justice process. Today, state courts must provide counsel at trial to indigent defendants who face even the possibility of incarceration.⁵⁴ The threat of incarceration need not be immediate. Even if the defendant might be sentenced to probation in which a prison or jail term is suspended, or might receive any other type of sentence containing a threat of future incarceration, he or she is afforded the right to counsel at trial.⁵⁵

What if a defendant wants to serve as his or her own attorney? As a result of a 1975 Supreme Court decision, defendants are now permitted to proceed *pro se*, or for themselves.⁵⁶ Today, when defendants ask to be permitted to represent themselves and are found competent to do so, the court normally approves their requests. However, these defendants are nearly always cautioned by the court against self-representation. When *pro se* defendants' actions are disorderly and disruptive, the court can terminate their right to represent themselves.

confrontation clause A part of the Sixth Amendment that establishes the right of a criminal defendant to see and cross-examine all the witnesses against him or her.

hearsay evidence Testimony that is not firsthand but, rather, relates information told by a second party.

compulsory process Compelling the production of witnesses via a subpoena.

REALITYCHECK

Myth or Reality?

The Sixth Amendment right to a jury trial extends to defendants in all criminal trials.

MYTH. Although the Sixth Amendment says otherwise, the Supreme Court has restricted this right to cases where the possible sentence exceeds imprisonment for six months.

There are some exceptions to the general rule that jury trials are offered when the possible punishment exceeds six months, but the fact remains that those accused of minor crimes are rarely tried before juries. Is this fair? Is it just? Before answering, consider that serious crimes (those that would merit jury trials) are the exception rather than the rule.

pro se “For oneself”; presenting one’s own defense in a criminal trial; self-representation

REALITYCHECK

Myth or Reality?

Trials are closed to the public.

MYTH. Nearly every trial, civil or criminal, is open to the public.

Seeing artists' sketches of high-profile trials on the evening news gives the impression that trials are closed to the public, but the fact that restrictions are placed on the press in most trials (e.g., cameras are generally not allowed) does not mean trials are closed to the public. What are some advantages of having trials open to the public? What are some disadvantages?

proof beyond a reasonable doubt

The standard of proof needed to convict in a criminal case. The evidence offered in court does not have to amount to absolute certainty, but it should leave no reasonable doubt that the defendant committed the alleged crime.

preponderance of the evidence

The level of proof in civil cases; more than half the evidence supports the allegations of one side.

THE RIGHT TO A SPEEDY TRIAL The tactics employed by wary defense attorneys (pretrial motions, complex plea negotiations, delay tactics during trial), along with inefficiencies in the court process (such as the frequent granting of continuances, poor scheduling procedures, and the abuse of time by court personnel), have made delays in criminal cases a serious and constitutional issue. As the American Bar Association states in the *Standards Relating to Speedy Trial*, "Congestion in the trial courts of this country, particularly in urban centers, is currently one of the major problems of judicial administration."⁵⁷ Delays in the trial process conflict with the Sixth Amendment's guarantee of a right to a speedy trial.⁵⁸

THE RIGHT TO A PUBLIC TRIAL The Sixth Amendment refers to a "public trial." This simply means that all trials must be open to the public. The right to a public trial is generally unrestricted. Anyone who wants to see a criminal trial can do so.

Sometimes having a trial open to the public can cause problems. In the 1966 case of *Sheppard v. Maxwell*, the courtroom was packed with people, including members of the media, for all nine weeks of the trial. Reporters handled evidence and took pictures throughout the trial. The Supreme Court eventually reversed the defendant's conviction, citing the "carnival atmosphere." The case did not lead to the exclusion of cameras from the courtroom, but some judges require that they be kept out. This is why one sometimes sees sketches of a case instead of actual photos.

Adverse pretrial publicity can prevent a defendant from getting a fair trial. The release of premature evidence by the prosecutor, extensive and critical reporting by the news media, and vivid and uncalled-for details in indictments can all prejudice a defendant's case. Press coverage can begin early in a criminal case and can even affect the outcome.

As a general rule, pretrial publicity and reporting cannot be controlled. However, judges may bar the press from some pretrial legal proceedings and hearings, such as preliminary hearings, when police officers make an arrest, or when a warrant is being served, if their presence will infringe on the defendant's right to a fair trial.⁵⁹ Other steps can be taken as well. These include changes of venue (moving the trial to another jurisdiction, where there is less press coverage and hence less contamination of the pool of potential jurors) and gag orders (restrictions on what the parties or the media can report), among others.

THE RIGHT TO BE CONVICTED BY PROOF BEYOND A REASONABLE DOUBT The standard required to convict a defendant charged with a crime at the adjudicatory stage of the criminal process is **proof beyond a reasonable doubt**. This requirement dates back to early American history, and over the years has become the accepted measure of persuasion needed by the prosecutor to convince the judge or jury of the defendant's guilt. Many twentieth-century US Supreme Court decisions have reinforced this standard by making "beyond a reasonable doubt a due process and constitutional requirement."⁶⁰ In *Brinegar v. United States* (1949), for instance, the Supreme Court stated:

Guilt in a criminal case must be proven beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions with resulting forfeitures of life, liberty, and property.⁶¹

The reasonable doubt standard is an essential ingredient of the criminal justice process. It is the prime instrument for reducing the risk of convictions based on factual errors.⁶² The underlying premise of this standard is that it is better to release a guilty person than to convict someone who is innocent. Because the defendant is presumed innocent until proven guilty, this standard forces the prosecution to overcome this presumption with the highest standard of proof. Unlike the civil law, where a mere **preponderance of the evidence** is the standard, the criminal process requires proof beyond a reasonable doubt for each element of the offense.⁶³ The various evidentiary standards of proof are analyzed and compared in Exhibit 8.1.

FIGURE 8
Source: Marvin Z...

EXHIBIT 8.1 Evidentiary Standards of Proof: Degrees of Certainty

Standard	Definition	Ruling
Absolute certainty	No possibility of error; 100 percent certainty	
Beyond reasonable doubt; moral certainty	Conclusive and complete proof, without leaving any reasonable doubt about the innocence or guilt of the defendant; allows the defendant the benefit of any possibility of innocence	Not used in civil or criminal law Criminal trial
Clear and convincing	Prevailing and persuasive to the trier of fact	
Preponderance of the evidence	Greater weight of evidence in terms of credibility; more convincing than an opposite point of view	Civil commitments, insanity defense evidence Civil trial
Probable cause	US constitutional standard for arrest and search warrants, requiring existence of facts sufficient to warrant that a crime has been committed	Arrest, preliminary hearing, motions
Sufficient evidence	Adequate evidence to reverse a trial court	Appellate review
Reasonable suspicion	Rational, reasonable belief that facts warrant investigation of a crime on less than probable cause	Police investigations
Less than probable cause	Mere suspicion; less than reasonable belief to conclude criminal activity exists	Prudent police investigation where safety of an officer or others is endangered

The Trial Process

The trial of a criminal case is a formal process conducted in a specific and orderly fashion in accordance with rules of criminal law, procedure, and evidence. Unlike what transpires in popular TV programs involving lawyers—where witnesses are often asked leading and prejudicial questions and where judges go far beyond their supervisory role—the modern criminal trial is a complicated and often time-consuming, technical affair. It is a structured adversarial proceeding in which both prosecution and defense follow specific procedures and argue the merits of their cases before the judge and jury. Each side seeks to present its case in the most favorable light.

Although each jurisdiction in the United States has its own trial procedures, all jurisdictions conduct criminal trials in a generally similar fashion. The basic steps of the criminal trial, which proceed in an established order, are described in this section and outlined in Figure 8.2.

JURY SELECTION In both civil and criminal cases, jurors are selected randomly from licensing or voter registration lists within each court's jurisdiction. Few states impose qualifications on those called for jury service, although most mandate a residency requirement.⁶⁴ There is also little uniformity in the amount of time served by jurors; the

L09 Summarize the trial process

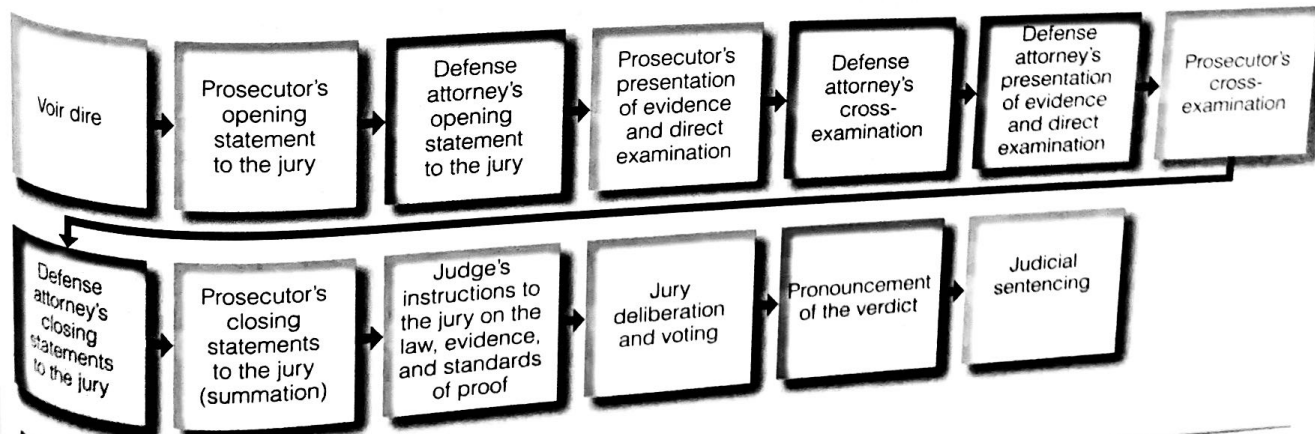


FIGURE 8.2 The Steps in a Jury Trial

Source: Marvin Zelman and Larry Siegel, *Criminal Procedure: Constitution and Society* (St. Paul, MN: West, 1991), p. 655.



AP Images/Stephen B. Morton

Justin Ross Harris is pictured during jury selection for his trial at the Glynn County Courthouse in Brunswick, Georgia. Harris, who was accused of intentionally leaving his toddler son in a hot SUV to die, was found guilty of murder and sentenced to life in prison without the possibility of parole.

venire The group called for jury duty from which jury panels are selected.

voir dire The process in which a potential jury panel is questioned by the prosecution and the defense to select jurors who are unbiased and objective.

challenge for cause A request that a prospective juror be removed because he or she is biased or has prior knowledge about a case, or for other reasons that demonstrate the individual's inability to render a fair and impartial judgment in a particular case.

peremptory challenge The dismissal of a potential juror by either the prosecution or the defense for unexplained, discretionary reasons.

term ranges from one day to months, depending on the nature of the trial. In addition, most jurisdictions prohibit convicted felons from serving on juries, as well as others exempted by statute, such as public officials, physicians, and attorneys.

The initial list of persons chosen, which is called a venire, or jury array, provides the state with a group of potentially capable citizens able to serve on a jury. Many states, by rule of law, review the venire to eliminate unqualified persons and to exempt those who, by reason of their professions, are not allowed to be jurors. The actual jury selection process begins with those remaining on the list.

The court clerk, who handles the administrative affairs of the court—including the processing of the complaint and other documents—randomly selects what he or she believes will be enough names to fill the required number of places on the jury. After reporting to a courtroom, the prospective jurors are first required to swear that they will truthfully answer all questions asked about their qualifications to serve. A group of 12 will be asked to sit in the jury box while the remaining group stands by.

After prospective jurors are chosen, the lengthy process of voir dire (from the Old French for “to tell the truth”) starts. To determine their appropriateness to sit on the jury, prospective jurors are examined under oath by the government, the defense, and sometimes the judge about their backgrounds, occupations, residences, and possible knowledge of or interest in the case. A juror who acknowledges any bias for or prejudice against the defendant—if the defendant is a friend or relative, or if the juror has already formed an opinion about the case—may be removed by either the prosecution or the defense with a **challenge for cause** asking the judge to dismiss the biased juror. If the judge accepts the challenge, the juror is removed for cause and replaced with another juror from the remaining panel. Because normally no limit is placed on the

number of challenges for cause that can be exercised, it often takes considerable time to select a jury, especially for controversial and highly publicized criminal cases.

Besides challenges for cause, both the prosecution and the defense are allowed **peremptory challenges**, which enable the attorneys to excuse jurors for no particular reason or for undisclosed reasons. A prosecutor might not want a bartender as a juror in a drunk-driving case, believing that a person with that occupation would be sympathetic to the accused. Or the defense attorney might excuse a male prospective juror because the attorney prefers to have a predominantly female jury. The number of peremptory challenges given to the prosecution and defense is limited by state statute and often varies by case and jurisdiction.

The peremptory challenge has been criticized by legal experts who question the fairness and propriety with which it has been used.⁶⁵ Historically, the most significant criticism was that it was used by the prosecution to exclude African Americans from serving on juries in which the defendant was also African American—a policy that seemed to allow legally condoned discrimination against minority group members. In the landmark 1986 case *Batson v. Kentucky*, the Supreme Court held that the use of peremptory challenges against potential jurors by prosecutors in criminal cases violated the US Constitution if the challenges were based solely on race.⁶⁶ Since that decision, the issue of race discrimination in the use of peremptory challenges has been raised by defendants in numerous cases.

It is becoming increasingly difficult to find impartial jurors, especially in this technological age. Heinous crimes have always been broadcast all over the news, and the result has sometimes been to contaminate the pool of prospective jurors. Now jurors

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OPENING STA has been read t may each make statement is to a line the facts, a yond a reasona defense intends

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PROSECUTION its case by prese evidence are pres lice officers, vict **direct examin** pertinent to the heard, or touched in certain situati er a defendant ap opinions because ple, a psychiatrist Upon complet **cross-examinatio**

EXHIBIT 8.2 Ty

In general, the primary cceeding is its relevance; or bottle has relevant ev Ordinarily, evidence that the court. In a prosecutio fendant to be a known dr photos of the defendant r be found relevant to the c

- **Testimonial evidence.** is the most basic form what he or she heard,
- **Real evidence.** Exhibits by the jury constitute r

are able to turn to their smartphones and seek information about *any* case. By searching the Internet and sharing information (such as on Facebook), which they are expressly forbidden to do, they often learn more about cases than is presented in court. As one article noted, this practice is "wreaking havoc on trials around the country, upending deliberations and infuriating judges."⁶⁷ Although there is no official tally of the number of cases compromised by jurors' Internet research, the number is certainly growing. For example, a Florida case involving a man accused of illegally selling prescription drugs was upended because one juror researched the case on her own and was able to discover information not presented at trial. After her actions came to light, the judge had no choice but to declare a mistrial.

OPENING STATEMENTS After the jury has been selected, and the criminal complaint has been read to the jurors by the court clerk, the prosecutor and the defense attorney may each make an opening statement about the case. The purpose of the prosecutor's statement is to acquaint the judge and jury with the particular criminal charges, to outline the facts, and to describe how the government will prove the defendant guilty beyond a reasonable doubt. The defense attorney reviews the case and indicates how the defense intends to show that the accused is not guilty.

Both sides use the opening statement to give the jury a concise overview of the evidence that is to follow. Neither attorney is allowed to make prejudicial remarks or inflammatory statements or to mention irrelevant facts. Both are free, however, to identify what they will eventually prove by way of evidence, which includes witnesses, physical evidence, and the use of expert testimony. The opening statements are important because they give both sides an opportunity to sway the jury before the trial begins.

PROSECUTION'S CASE Following the opening statements, the government begins its case by presenting evidence to the court through its witnesses. Numerous types of evidence are presented at trial (see Exhibit 8.2). Those called as witnesses—such as police officers, victims, or experts—provide testimony via direct examination. During **direct examination**, the prosecutor questions the witness to reveal the facts believed pertinent to the government's case. Testimony involves what the witness actually saw, heard, or touched; it does not include opinions. However, a witness's opinion can be given in certain situations, such as when describing the motion of a vehicle or indicating whether a defendant appeared to act intoxicated or insane. Witnesses may also qualify to give opinions because they are experts on a particular subject relevant to the case. For example, a psychiatrist may testify about a defendant's mental capacity at the time of the crime.

Upon completion of the prosecutor's questioning, the defense usually conducts a **cross-examination** of the witness. During this exchange, the defense attorney may

REALITYCHECK

Myth or Reality?

There is nothing inherently wrong with a black jury deciding the fate of a white defendant.

REALITY. The Sixth Amendment requires an "impartial jury of the state." If a black jury can be impartial with respect to a white defendant, there is no problem. The reverse is also true.

The problem is one of appearances. Also, and very important, if it can be shown that prospective jurors were excluded because of race, then the resulting jury will not conform to Sixth Amendment requirements.

direct examination The questioning of one's own (prosecution or defense) witness during a trial.

cross-examination The process in which the defense and the prosecution interrogate witnesses for the other side during a trial.

EXHIBIT 8.2 Types of Evidence Presented at Trial

In general, the primary test for the admissibility of evidence in a criminal proceeding is its relevance; that is, the court must consider whether the gun, tool, or bottle has relevant evidentiary value in determining the issues in the case. Ordinarily, evidence that establishes an element of the crime is acceptable to the court. In a prosecution for possession of drugs, evidence that shows the defendant to be a known drug user might be relevant. In a prosecution for bribery, photos of the defendant receiving a package from a coconspirator would clearly be found relevant to the case. The following are the four main types of evidence:

- **Testimonial evidence.** Given by police officers, citizens, and experts, this is the most basic form of evidence. The witness must state, under oath, what he or she heard, saw, or experienced.
- **Real evidence.** Exhibits that can be taken into the jury room for review by the jury constitute real evidence. A revolver that may have been in the

defendant's control at the time of a murder, tools in the possession of a suspect charged with a burglary, and a bottle allegedly holding narcotics are examples of real, or physical, evidence. Photographs, maps, diagrams, and crime scene displays are other types of real evidence.

- **Documentary evidence.** This type of evidence includes writings, government reports, public records, business or hospital records, fingerprint identification, and DNA profiling.
- **Circumstantial evidence.** In trial proceedings, circumstantial (indirect) evidence is often inferred or indirectly used to prove a fact in question. For example, in a murder case, evidence that carpet fibers found on the body match the carpet in the defendant's home may be used at trial to link the two, even though they do not provide direct evidence that the suspect actually killed the victim.

challenge elements of the testimony, such as the witness's accuracy in reporting what was seen or heard. The right to cross-examine witnesses is an essential part of a trial, and unless extremely unusual circumstances exist (such as a person's being hospitalized), witness statements will not be considered unless they are made in court and are open for question. If desired, the prosecutor may seek a second direct examination after the defense attorney has completed cross-examination; this allows the prosecutor to ask additional questions about information brought out during cross-examination. Finally, the defense attorney may then question, or re-cross-examine, the witness once again. All witnesses for the trial are sworn in and questioned in the same basic manner.

directed verdict The right of a judge to direct a jury to acquit a defendant because the state has not proved the elements of the crime or otherwise has not established guilt according to law.

THE CRIMINAL DEFENSE After the prosecutor has provided all the government's evidence against a defendant, he will inform the court that he rests the people's case. The defense attorney at this point may enter a motion for a **directed verdict**. This is a procedural device in which the defense attorney asks the judge to order the jury to return a verdict of not guilty. Depending on the weight of the prosecution's case, the judge may either sustain or overrule this motion. In essence, the defense attorney argues in the directed verdict that the prosecutor's case against the defendant is insufficient to support the legal elements needed to prove the defendant guilty beyond a reasonable doubt. If the court sustains the motion, the trial is terminated. If it rejects the motion, the defense begins to legally rebut the prosecution's case.

The defense attorney has the option of presenting many, some, or no witnesses on behalf of the defendant. The burden of proving guilt is on the prosecution, and if the defense team believes that the burden has not been met, they may feel there is no need to present witnesses of their own. In addition, the defense attorney must decide whether the defendant should take the stand and testify in his own behalf. In a criminal trial, the defendant is protected by the Fifth Amendment right to be free from self-incrimination, which means that a person cannot be forced by the state to testify against himself. However, defendants who choose voluntarily to tell their side of the story can be subject to cross-examination by the prosecutor.

The defense attorney is charged with putting on a vigorous defense in the adversary system of justice. She presents her own witnesses and introduces evidence to refute the prosecution's allegations. After the defense concludes its case, the government may then present rebuttal evidence. If the judge grants permission, this involves bringing forward evidence to refute, counteract, or disprove evidence introduced by the defense. A prosecutor may not go into new matters or present evidence that further supports or reinforces his own case. At the end of rebuttal, the defense may be allowed surrebuttal—presenting witnesses to respond to issues that were raised for the first time in the prosecutor's rebuttal case. The defense cannot restate its case or introduce new issues during surrebuttal evidence.

CLOSING ARGUMENTS In closing arguments, the attorneys review the facts and evidence of the case in a manner favorable to their respective positions. At this stage of the trial, both prosecution and defense are permitted to draw reasonable inferences and to show how the facts prove or refute the defendant's guilt. Often both attorneys have a free hand in arguing about the facts, issues, and evidence, including the applicable law. They cannot comment on matters not in evidence, however, or on the defendant's failure to testify in a criminal case. Normally, the prosecutor makes a closing statement first, followed by the defense, and many jurisdictions allow the prosecution an opportunity for rebuttal. Either party can elect to forgo the right to make a final summation to the jury.

INSTRUCTIONS TO THE JURY In a criminal trial, the judge will instruct, or charge, the jury members on the principles of law that ought to guide and control their decision on the defendant's innocence or guilt. The charge includes information about the elements of the alleged offense, the type of evidence needed to prove each element, and the burden of proof that must be met to obtain a guilty verdict. Although the judge commonly provides this instruction, he or she may ask the prosecutor and the defense



AP Images/Kath Bedford/Globe Staff

Judge Jeffrey Locke addresses the court during jury deliberations in the trial of former New England Patriots tight end Aaron Hernandez at Suffolk Superior Court in Boston. Hernandez, who was no stranger to legal troubles, was ultimately found not guilty for his alleged role in a 2012 double murder outside a Boston nightclub. Five days later, he was found hanged in his prison cell, an apparent suicide.

attorney to submit instructions for consideration; the judge will then exercise discretion in determining whether to use any of their instructions. The instructions that cover the law applicable to the case are extremely important because they may serve as the basis for a subsequent appeal.

DELIBERATION AND VERDICT After the charge is given to the jury members, they retire to deliberate on a verdict. In highly publicized and celebrated cases, the judge may sequester the jury, preventing them from having contact with the outside world. This process is discretionary, and most judges believe that sequestering or “locking up a jury” is needed only in sensational cases.

A review of the case by the jury may take hours or even days. The jurors always meet privately during their deliberations, and in certain lengthy and highly publicized cases, they are kept overnight in a hotel until the verdict is reached. In less sensational cases, the jurors may be allowed to go home, but they are cautioned not to discuss the case with anyone.

If a verdict cannot be reached, the trial may result in a hung jury, after which the prosecutor must bring the defendant to trial again if the prosecution desires a conviction. If found not guilty, the defendant is released from the criminal process. If the defendant is convicted, the judge will normally order a presentence investigation by the probation department before imposing a sentence. Before sentencing, the defense attorney will probably submit a motion for a new trial, alleging that legal errors occurred in the trial proceedings. The judge may deny the motion and impose a sentence immediately, a practice quite common in most misdemeanor offenses. In felony cases, however, the judge will set a date for sentencing, and the defendant will either be placed on bail or held in custody until that time.

Although jurors are required by law to base their decision on the facts of the case and on the judge's legal instructions, they are sometimes asked by the defense to ignore both and render decisions based on emotion and personal preference.⁶⁸ This strategy, called **jury nullification**, has been in practice since 1735 when John Peter Zenger, editor of the *New York Weekly Journal*, was charged with printing libelous statements about the governor of the Colony of New York, William Cosby. Despite the fact that Zenger clearly printed the alleged libels, and the trial judge gave the jury clear instructions for a finding of guilt, the jury found Zenger not guilty on all charges. The Zenger case remains one of the most famous examples of jury nullification in the nation's history.

jury nullification A defense tactic that consists of suggesting that the jury acquit a defendant, despite evidence that he actually violated the law, by maintaining that the law was unjust or not applicable to the case.

Supporters of jury nullification argue that it is an important safeguard against government oppression and that the function of the jury is to serve as a safety valve against the unjust application of the law. Critics, however, see jury nullification as an abuse of power. Would it be fair if jurors, motivated by racial bias, found a person accused of a hate crime not guilty despite overwhelming evidence of guilt?⁶⁹

THE SENTENCE Imposing the criminal sentence is normally the responsibility of the trial judge. In some jurisdictions, the jury may determine the sentence or make recommendations involving leniency for certain offenses. Often, the sentencing decision is based on information and recommendations given to the court by the probation department after a presentence investigation of the defendant. The sentence itself is determined by the statutory requirements for the particular crime as established by the



CAREERS IN CRIMINAL JUSTICE BORDER PATROL AGENT

Duties and Characteristics of the Job

- Court reporters create the official transcripts of legal proceedings such as trials and depositions.
- These transcripts include all the dialogue as well as other important details, such as emotional reactions.
- Court reporters use voice writers that make an audio record of the proceedings.
- Some use audio equipment to tape an event and then supplement this recording later with notes taken during the proceedings.
- The commonly used recording method in legal and courtroom settings is the stenographic machine, which court reporters use to transcribe spoken words. A court reporter can press multiple keys simultaneously to represent words, sounds, or even phrases.
- Although the primary responsibility of court reporters is to record courtroom legal proceedings, they also provide this information from the official record when requested.
- Court reporters can advise lawyers on legal procedure when necessary.

Job Outlook

- The number of jobs available for court reporters is greater than the number of trained professionals entering the field.
- The job outlook is favorable for entry-level court reporters, especially those who are certified.
- Court reporters are always needed in courtrooms and lawyers' offices across the country, although jobs may be more plentiful in urban areas.
- They often freelance for extra income at attorneys' offices or as closed-captioners and/or real-time translators.
- Other court reporters work for court reporting agencies or freelance full time.
- Agency workers and freelancers enjoy the flexibility of setting their own schedules.
- Despite the seemingly simple training requirements, many people drop out, partly as a consequence of the high speed required (around 225 words per minute, far in excess of the speed at which skilled typists can type).
- The constant pressure to be fast and accurate can cause considerable stress.

Salary

- Pay will depend on several factors, including method of transcription, region of the United States, type of employer, amount of previous work experience, and level of certification.
- The median annual salary for court reporters is around \$50,000. The majority of court reporters earn between \$35,390 and \$67,430. At the extremes, a small percentage of court reporters earn around \$27,000 and the highest paid earn \$90,000 or more.

Qualifications

- The qualifications to be a practicing court reporter vary by state.
- In some states, court reporters are required to be notary publics; in others, an individual must become a certified court reporter (CCR) by passing a state certification test.
- Court reporters must continually study and practice their skills.

Education and Training

- At minimum, a court reporter needs an associate's degree, although requiring a bachelor's degree is more common.
- In addition to general education, training programs are available at vocational or technical schools.
- Currently, 70 programs are approved by the National Court Reporters Association in the United States and Canada.

Reality Check

- Because a court reporter must create a record of events as they occur, the ability to listen carefully and work quickly is key. Familiarity with legal terms and practices is necessary, as is a thorough knowledge of grammar, spelling, and vocabulary.
- Court reporters must become intimately familiar with stenotype machines. As one reporter said, "Your wrists will become your worst enemy if you don't show them some love."
- The future is somewhat uncertain; digital audio recorders could well replace court reporters someday.

Sources: S. E. Lambert and D. Regan, "Court Reporter," *Great Jobs for Criminal Justice Majors* (New York: McGraw-Hill, 2001), pp. 159–161; Bureau of Labor Statistics, "Court Reporters," *Occupational Outlook Handbook*, <https://www.bls.gov/ooh/legal/court-reporters.htm#tab-5> (accessed April 2017).

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legislature; in addition, the judge ordinarily has a great deal of discretion in reaching a sentencing decision. The different criminal sanctions available include fines, probation, imprisonment, and even commitment to a state hospital. The sentence may be a combination of all these.

APPEALS After a verdict has been rendered and a defendant found guilty, the defense may petition an appellate court to review the procedures used during trial. Defendants have two main avenues to challenge such procedures: appeals and *habeas corpus*. These both give the convicted person an opportunity to appeal to a higher state or federal court on the basis of an error that affected the conviction in the trial court. Extraordinary trial court errors, such as denial of the right to counsel or inability to provide a fair trial, are subject to the plain error rule of the federal courts.⁷⁰ Harmless errors, such as the use of innocuous identification procedures or the denial of counsel at a noncritical stage of the proceeding, would not necessarily result in the overturning of a criminal conviction.

A postconviction **appeal** is a request for an appellate court to examine a lower court's decision to determine whether proper procedures were followed. It is important to note that appeals do not give the convicted an opportunity to try the case a second time, only to challenge procedural matters (such as a judge's decision to exclude a witness's testimony). Most defendants benefit from at least one direct appeal. Direct appeals are guaranteed by law; the result is that most defendants get to appeal at least once, even if they cannot afford it.⁷¹ Discretionary appeals are also possible. The appellate court decides whether it will hear a discretionary appeal. There is no restriction on the number of discretionary appeals that can be filed.

Through objections made at the pretrial and trial stages of the criminal process, the defense counsel will reserve specific legal issues on the record as the basis for appeal. A copy of the transcript of these proceedings will serve as the basis on which the appellate court will review any errors that may have occurred during the lower-court proceedings. The *Careers in Criminal Justice* feature describes the work of the court reporter, the person who prepares these transcripts.

A writ of *habeas corpus* is the primary means by which state prisoners have their convictions or sentences reviewed in the federal court. A writ of *habeas corpus* (which means "you may have the body") seeks to determine the validity of a detention by asking the court to release the person or give legal reasons for the incarceration.

REALITYCHECK

Myth or Reality?

Appellate court judges are partially responsible for the number of appeals filed by convicted individuals.

REALITY. Appellate judges decide whether they want to hear certain appeals. If they refused to hear all such discretionary appeals, there would be no incentive to appeal. Word would get around that appeals are a waste of time.

Thinking about the lengthy death penalty appeals process, then, who is most responsible for the delay between the crime and the execution? Do appellate court judges share some of the blame?

appeal A request for an appellate court to examine a lower court's decision to determine whether proper procedures were followed.

writ of habeas corpus A judicial order requesting that a person who detains another person produce the body of the prisoner and give reasons for his or her capture and detention. *Habeas corpus* is a legal device used to request that a judicial body review the reasons for a person's confinement and the conditions of confinement. *Habeas corpus* is known as "the great writ."

ETHICAL REFLECTION

Consider the following hypothetical scenario, then reread this chapter's plea bargaining section.

Shantel is an unemployed former crack addict with an extensive criminal record. When she was actively using, she gave birth to six children, each of whom was taken away by Child Protective Services. She has since put her life back on track, secured a job, stopped using drugs, and given birth to her seventh child, Keisha, who lives with her. When Keisha was 2 years old, Shantel moved back in with her estranged boyfriend, Deshaun, whom she thought had also stopped using. Unbeknownst to Shantel, although Deshaun had stopped using crack, he had become hooked on OxyContin and was using the drug on a regular basis. Not long after they moved in together, the police served a search warrant on their property and found a stash of the drug. Both Shantel and Deshaun were charged with drug possession. Shantel's extensive criminal record would probably result in a long-term prison sentence, not to mention the possible loss of Keisha, if she were found guilty at a trial. Surprisingly, during Shantel's pretrial negotiations, the district attorney offered a plea bargain to give Shantel three years or probation and no jail time if she agreed to sterilization. Shantel did not want to take the chance of going to trial and getting a long-term prison sentence. She knew she would not have any chance of getting Keisha back if she got a long-term prison sentence. She felt her only option was to agree to the plea negotiation of probation and sterilization.

Writing Challenge: Write an essay on the ethical issues raised in this plea-bargaining scenario. In doing so, answer these questions: Should Shantel plead guilty to a crime she did not commit? Should she subject herself to sterilization for a crime she did not commit? How many other defendants plead guilty to crimes they have not committed? Is it even possible to know? One of the main criticisms of plea bargaining is just this: a guilty plea does not always mean the offender is guilty. What other criticisms of plea bargaining have been raised? Consult this chapter's "Plea Bargaining" section as you answer the questions.