Twelfth Edition

Procedures in the Justice System

Cliff Roberson | Robert Winters

TWELFTH EDITION

PROCEDURES IN THE JUSTICE SYSTEM

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Cliff Roberson: The fourth through eighth editions have been dedicated to our colleague Gilbert Stuckey. This edition, like the ninth, tenth and eleventh, is dedicated to my friend and colleague Paul Harvey Wallace. Harvey and I were fellow Marines, friends, and coauthors for sixteen years. We coauthored ten books together. I still miss him.

Robert Winters: To Sue, my wife and Mike, my son, for your unfailing support, encouragement and inspiration.

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Brief Contents

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Contents

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Preface

The judicial procedures involved in a criminal case are complex and interesting. The text, *Procedures in the Justice System*, is designed to cover the judicial procedures involved in a criminal case from arrest to conviction and sentencing. It is also designed with an appropriate amount of material that covers the key issues yet is concise enough to allow the material to be covered in a one-semester course. As noted by the numerous television shows and movies involving the issues, the path is exciting and, in many cases, real life is stranger than fiction. Accordingly, the many examples used in the text to illustrate different points were all taken from actual court cases and are not works of fiction.

The twelfth edition of *Procedures in the Justice System* continues the tradition of providing the reader with a thorough understanding of our justice system from the time of arrest through the sentencing of the criminal offender. Legal rules of procedure are presented in language that is easy to understand. The high crime rate continues to be one of society's major problems not only in the United States but also throughout the world. It is the primary responsibility of those directly connected with the justice system, such as members of law enforcement agencies, the courts, and correctional officers, to fight crime. Yet, to effectively curb crime, society needs the assistance of every law-abiding person.

By studying history, we often see the mistakes of the past and thus can make efforts not to repeat those mistakes in the future. One past mistake was the failure to recognize that the members of the justice system are a team who must work together. Yet, to work as a team, it is necessary for each member to understand his or her own responsibility as well as that of each of the other members.

This book was written for those interested in our justice system, particularly police and correctional science students. It explains the duties and responsibilities of the law enforcement agencies, courts, and correctional departments in relation to law violators from the time of accusation until completion of the sentence. Criminal justice students should, however, study more than just judicial procedures. They should have some knowledge of why we have laws and why those laws are broken, should be cognizant of the constitutional rights of an accused, and should have a better understanding of the philosophy of correctional endeavors. Thus, material on these subjects is incorporated in the text. The information in this book will help the students, as well as others, attain a more thorough knowledge of our justice system and of the role that each member must play to achieve, through teamwork, law and order for all.

Special thanks to the following reviewers for their hard work and assistance on this edition: Mark Brown, University of South Carolina; James Elshoff, Texas State University, San Marcos; 1. Michael Lee, Midlands Technical College. We would also like to thank the previous edition's reviewers: Lisa W. Clayton, College of Southern Nevada; Brian Donnelly, Raritan Valley Community College; James D. Elshoff, Texas State University; and Theodore P. Skotnicki, Niagra County Community College. The invaluable assistance of Portfolio Manager Gary Bauer, Editorial Assistant Lynda Cramer, Content Producer Rinki Kaur, and production project manager Yohalakshmi Segar, was necessary to accomplish this extensive revision to the text.

A warm and special thanks to the supplements author Harrison Watts.

Suggestions for improvement, corrections, and other comments are invited and may be forwarded to Cliff Roberson at cliff.roberson@washburn.edu.

New to the Twelfth Edition

In addition to updating legal issues and cases, there have been numerous changes made to the twelfth edition. The additions include the following:

- Expanded discussion on the roles of prosecutors and state attorneys.
- Expanded discussions on the primary duty of a prosecutor.
- Discussions on the search of an arrestee.
- Expanded discussion on frisking for weapons.
- Expanded discussions on self-incrimination and interrogations.
- Expanded discussions on pretrial procedures in the criminal justice system.
- Expanded discussions on trial procedures.
- Discussions on Victim Impact Statements

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Takashi Honoma/123RF

KEY TERMS

Abstract goals
Court rules
Jurisdiction
Orientation goals
Pragmatic goals
Standards
Venue

1 An Introduction to the Justice System

A Constitution is not intended to embody a particular economic theory . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

—Oliver Wendell Holmes, Jr. (1841–1935)
Associate Justice of the Supreme Court of the United States in His Dissenting Opinion in Lochner v. New York, 198 U.S. 45, 76 (1905)

CHAPTER OUTLINE

LEARNING OBJECTIVES

After completing this chapter, you should be able to:

1. *Summarize the constitutional basis for criminal procedure.*
2. *Describe the concept of judicial guidance.*
3. *Explain the concept of "rule of law."*
4. *Describe the impact of the Bill of Rights on criminal procedure.*
5. *Explain the importance of precedent.*
6. *Outline the structure of the court system, including the responsibilities and jurisdictions of each level.*

▶ Overview

Our justice system is not fixed in stone but is ever changing and flexible.

Former Supreme Court Justice Oliver Wendell Homes once stated that the law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics (Oliver Wendell Holmes, *The Common Law, 1881*). Photo 1-1 is a photo of Justice Holmes. As we begin our review of the American justice system the approach should be that this study should be viewed not as a set of rules for memorization. The study should be viewed as a cluster of ideas, principles, and values about which reasonable people can and do disagree.

PHOTO 1-1 Justice Oliver Wendel Holmes celebrated his eighty-fifth birthday on March 8, 1926. Justice Holmes is probably the most often quoted Supreme Court Justice and his quotes regarding the law are referred to several times in this chapter. Justice Holmes served on the Supreme Court from 1902 to 1931.

Photo courtesy of U.S. Library of Congress Prints and Photographs Division Washington, D.C.

Understanding our concept of justice requires a thoughtful comprehension of the historical background, social values, moral standards, and political realities that give direction to our system.

The major issue facing our state and federal court systems is their ever-increasing caseloads. Criminal courts are the heart of criminal justice system. A criminal court has three primary missions:

- to administer justice in a fair and impartial manner;
- to protect the individual rights of persons accused of crimes; and
- to provide an authority for controlling crime.

In the United States, there are two separate court systems in each state, the federal system and the state system. Generally, federal courts are involved only in matters concerning federal issues and state courts are involved in the other matters. The court systems of the federal and state governments in the United States operate on an adversarial system in that the prosecution or plaintiff is opposed by the defense with the judge and jury operating as the decision-makers.

Both the state and federal governments have enacted statutes to regulate the administration of the criminal justice system. The primary state regulatory statute is the state code of criminal procedure that regulates procedure in state courts. The primary federal statute that governs the trial of criminal cases in federal court is Title 18 of the U.S. Code. Except for constitutional issues, federal procedural rules apply only to federal criminal cases. State procedural rules apply only to state cases.

Courts are established either by the U.S. Constitution, state constitutions, or legislation. If the court is established under a constitution, it is considered as a constitutional court. Those established by a state or federal legislation are considered as legislative courts. According to Section 1, Article III, of the U.S. Constitution:

> 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 Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at Times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Judicial Guidance

Judicial Opinions

Judicial opinions construe the constitutionality, meaning, and effect of constitutional and statutory provisions. The court decisions included in each chapter of this text provide examples of the importance of judicial opinions in the justice system.

Court Rules

Court rules consist of the various standard procedures used by the courts that were developed as the result of a court's inherent supervisory power over the administration of the criminal justice system. Court rules regulate the guilt-determining process of the courts in the areas not regulated by other rules. Most students of the justice system fail to consider the importance of court rules in the trial of criminal cases.

Example of court rules that have an impact on the courts follow.

> **U.S. District Court (Eastern District California) Rule 5a:**
> (1) The trial of a defendant held in custody solely for purposes of trial on a federal charge shall commence within 90 days following the beginning of continuous custody.

Sample Court Rules and Documents

In almost all jurisdictions the courts are updating their administrative procedures to include the requirement that documents be filed electronically. For example, the U.S. Supreme Court provides that while paper remains the official form of filing, all parties who are represented by counsel must also submit electronic versions of filings through the system. Most documents that are submitted electronically will be made available on the Court's public docket free of charge. Filings from pro se parties are submitted only on paper but will be scanned and made available electronically on the Court's docket. In some jurisdictions, only electronic filing is available.

Court Documents

To provide guidance to readers who are not familiar with court procedures, Appendices A and B are attached. Appendix A is an outline of the order in which criminal courts usually proceed. Appendix B is a sample motion that may be filed in a criminal case. In some jurisdictions there may be minor variations. Appendix C contains the federal guidelines and a copy of the form that should be used for the submission of a request for a Habeas Corpus writ.

▶ Goals of the Justice System

Most experts on the justice system agree that the most basic goal of the system is to protect society from crime. Beyond that, there is little agreement. There are several competing philosophies concerning the purposes of the justice system, each with its own specific goals. To help us understand some of the more commonly accepted goals of the justice system, the goals are classified as **orientation goals**, **pragmatic goals**, **abstract goals**, and **standards**.

Orientation Goals

Criminal justice professionals generally are oriented in one of two opposite directions—law and order or individual rights. The law and order orientation stresses the need to solve the crime problem. The individual rights orientation stresses the need to protect an individual's rights and considers this need greater than the need to punish offenders. Too great an emphasis on individual rights will restrict law enforcement and allow offenders to escape punishment. Arbitrary police practices that may occur under the law and order orientation may infringe on human and constitutional rights. As Chief Justice Earl Warren stated in *Miranda* v. *Arizona*:

> The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of the criminal law.... All of these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord the dignity and integrity of its citizens. To maintain a fair state–individual balance, the government must shoulder the entire load.

Pragmatic Goals

The pragmatic goals of the justice system include the following:

Preventing Crime

This goal includes providing potential criminals with conventional opportunities for success before they start a career of crime, building stronger social control units

such as the family, providing guidance and counseling in our schools, and developing better environmental conditions in the neighborhoods that foster law-abiding behavior.

Diverting Offenders

This refers to the efforts to remove offenders from the system and place them in nonpunitive treatment programs. The purpose of this effort is to correct offenders without placing the stigma of a criminal conviction on them.

Deterring Crime

The justice system attempts to deter crime by making potential criminals believe that the punishments received for criminal behavior outweigh any potential benefit (i.e., crime does not pay).

Controlling Criminals

The system attempts to control the behavior of known criminals by incarcerating the more serious offenders and placing the less serious ones in community correction programs.

Rehabilitating Offenders

An objective of the system is to provide rehabilitation treatment to offenders in order to reduce the likelihood of future involvement in criminal behavior. The goal of rehabilitation was very popular in the 1960s. During the 1980s, it was discounted because of the popular belief that existing rehabilitation programs were not effective. Today, rehabilitation is not a popular objective in most states.

Abstract Goals

Abstract goals are the underlying principles upon which our justice system is based. The most common abstract goals include the following:

Fairness

The justice system should ensure that all persons involved in the criminal justice system are treated fairly and humanely. More specifically, socioeconomic status, ethnicity, and other factors should not determine the type of treatment or form of punishment one receives from various criminal justice agencies.

Efficiency

The system should be organized and managed in a manner to ensure maximum utilization of personnel and resources.

Effectiveness

The justice system should operate in an effective manner.

Justice

Justice is considered as the ideal goal of all governments and the disposition of a criminal matter in such a manner that the best interest of society is served. It is not measured solely by its application to the accused. Justice is the broad concept of reward and punishment currently accepted as proper by a society. A state court judge in an early Texas case defined justice as follows:

> Justice is the dictate of right, according to the common consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals.

▶ Justice System Structure and Process

We refer to the justice system as a system as if it were a formal system. It would be more accurate to refer to it as a nonsystem. The term system refers only to the interrelationship among all those agencies concerned with the prevention of crime in society. The systems approach to criminal justice sees a change in one part of the system affecting change in all the others. It implies that a closely knit, coordinated structure of organizations exists among the various components of the system.

The justice system, however, is not a close-knit, coordinated structure of organizations. It is actually three separate elements: police, courts, and correction institutions. Each operates almost independently of the others. In many cases, the goal orientations of the various elements within a local jurisdiction are in conflict with each other concerning the main functions of the criminal justice system. Thus, the system can best be described as fragmented or divided. Accordingly, the criminal justice system is a group of agencies organized around various functions that each agency is assigned.

Evolution of Criminal Procedure

Our system of criminal justice is based on English common law. The colonists brought English traditions and concepts with them when they settled in our country. Except for a few modifications, English common law became the common law of the colonies. During and shortly after the American Revolution, there was hostility toward the English in the colonies. The hostility extended to the common law system of law as well. Most of the newly founded states enacted new codes and statutes defining criminal acts and establishing criminal procedures. The codes and statutes, however, were based on common law concepts. Included was the English concept of justice on which our system is based. To this foundation, a bit of Spanish and French influence was added as the system was developed and changed to meet the requirements of our growing nation.

Foundational Concepts in Criminal Procedure

As an introduction to the study of criminal procedure, the foundational concepts in criminal procedure listed below should be considered. These concepts will be explained in the text and are listed here to create an awareness of their existence.

- The guarantees of the Bill of Rights in the U.S. Constitution apply directly only to the federal government.
- The Due Process Clause of the Fourteenth Amendment by selective incorporation applies most of the rights contained in the Bill of Rights to the states.
- State constitutions may provide rights to citizens in addition to those provided for in the U.S. Constitution, but may not restrict the rights granted by the U.S. Constitution.
- The two basic questions regarding the burden of proof in criminal proceedings are as follows:

  (1) Who has the burden of proving an issue? (2) What is the magnitude of the burden? The magnitude may be (1) proof beyond a reasonable doubt, (2) clear and convincing evidence, or (3) preponderance of evidence. On issues relating to the guilt of a defendant, the burden is proof beyond a reasonable doubt and that burden rests on the prosecutor or state.

- Charges in a criminal trial must first be formalized either by an indictment returned by a grand jury or by information prepared by a prosecutor.
- Prior to trial, both the prosecution and the defense may submit pretrial motions, and both have discovery rights imposed on them.
- Our system of criminal procedure is based on the adversarial process.

Two famous quotes from U.S. Supreme Court Justice Oliver Wendell Holmes should be noted:

- "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard."[1]
- "The life of the law has not been logic, it has been experience."[2]

Common Law

Much of the basic criminal law of this country originated from the common law of England. Originally, the common law of England was nothing more than a set of unwritten regulations and customs that acted as guidelines in settling disputes, determining the inheritance of property, and dealing with persons who committed misdeeds of a serious antisocial nature. As time passed, court decisions were made a part of the common law. Court decisions are still a major part of the law. Photo 1-2 is a picture of attorneys waiting for court decisions to be issued. Thereafter, the common law was further enlarged by legislative enactments and was brought to this country by the colonists to act as guidelines for conduct.

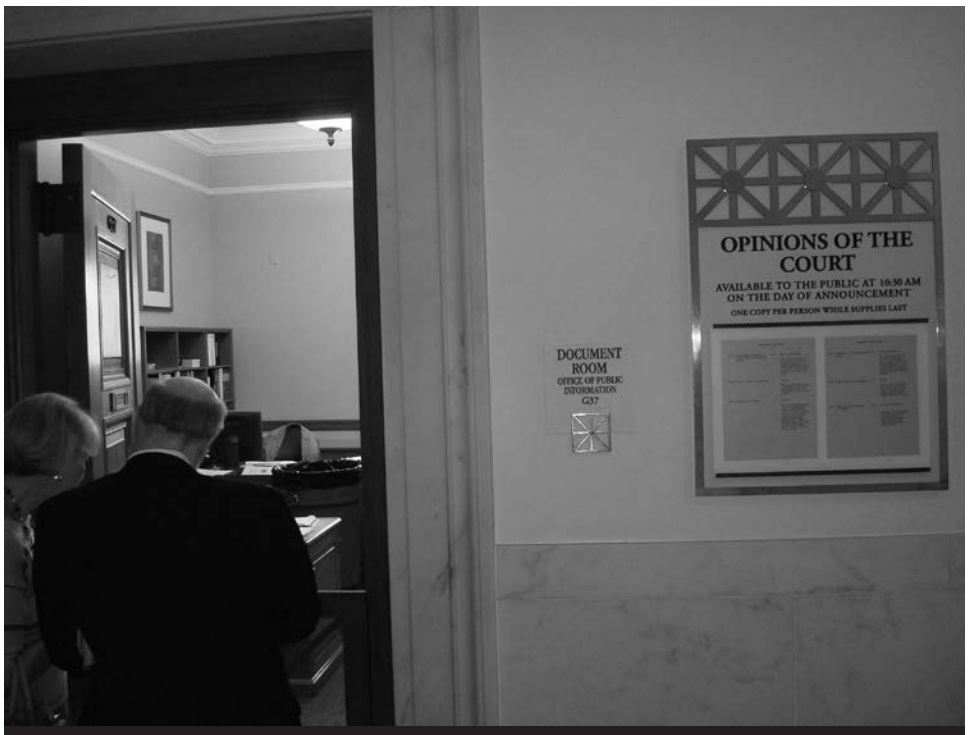


PHOTO 1-2 As noted in this chapter, common law depends heavily on prior court decisions. This photo depicts attorneys at the U.S. Supreme Court building in Washington, D.C., obtaining copies of court decisions that are handed down each Monday when the Court is in session.

Photo by Cliff Roberson.

▶ Modern Criminal Law

Today, the criminal law of the various states is a written set of regulations that is largely the result of legislative action. These regulations are recorded in some official record within the states and are often referred to as the penal code. Criminal laws vary somewhat among the states. In some states, there is no reliance upon the common law to determine what is right and wrong. The statutes spell out specifically the act that is made a crime and the punishment that may be inflicted for the commission of such an act. For example, the law may state that manslaughter is the unlawful killing of a human being without malice. This definition will be followed by a statement that one convicted of manslaughter may be imprisoned for a period not to exceed four years. The statutes of other states provide that manslaughter is punishable by imprisonment not to exceed a prescribed number of years. But these latter statutes do not define what act constitutes manslaughter. The courts must then look to the common law to determine the interpretation of manslaughter.

▶ What Constitutes Justice?

The concept of "justice" is commonly used but seldom defined. It is a concept that relates to our ideas about morality or what is right and what is wrong. Most individuals associate the concept with our concepts of fairness, equality, and goodness. We expect justice in both our private lives and in our public ones. One text defines justice as upholding what is just, especially fair treatment and due reward in accordance with honor, standards, or law.

[*Source:* Jeffery A. Jenkins, *The American Courts: A Procedural Approach* (Boston, MA: Jones and Bartlett), 2011, p. 4]

It is via our laws that we most often reflect our concept of justice. As noted in the below excerpt from the Preamble to the U.S. Constitution, we place a high premium on the concept of justice.

> **Preamble to the U.S. Constitution:**
> We the people of the United States, in Order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

There are no bright line rules as to what constitutes "justice." It is a subjective concept and has different meanings in different situations. We rely on our court systems to make decisions that implement our concept of justice. Whether justice is served in a case depends upon the facts of the case, the law involved in the case, and the behavior of the person being judged as well as the behavior of the persons doing the judging. In summary, justice is a multifaceted concept.

▶ Rule of Law

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the use of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.
>
> [*Source:* A.V. Dicey, *The Law of the Constitution*, 8th ed. (London: Macmillan), 1915, p. 60)]

The "Rule of Law" refers to the concept that all individuals and institutions will abide by the laws and no one is above the law. In other words, we all have a duty to obey the law. This duty applies to everyone, including the president, or in Great Britain, even to the Queen. By choosing to become a part of a society, we agree to abide by the society's rules and laws. In addition, it refers to the concept that no one may be punished for conduct unless there is a law that forbids that conduct.

▶ Classification of Crimes and Punishment

In our present form of jurisprudence, not only do we tell people what a criminal act is, but we also tell them the punishment they may be subjected to if they commit the act. The following definition is generally found in the statutes of the states: A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it and to which is annexed, upon conviction, one or more of several punishments. The basic forms of punishment are death, imprisonment, fines, removal from office, or disqualification to hold and enjoy any office of honor, trust, or profit. We have classified criminal laws in accordance with their seriousness to society and have stated the punishment that could be inflicted upon conviction. Earlier in our history, we classified criminal laws as treason, felonies, and misdemeanors. Most states eliminated treason as a category of crime and listed it merely as another felony violation. Thus, two classifications remained: felonies and misdemeanors. However, in recent years, many states have added a third and a fourth classification, an infraction and a state jail felony. An infraction is a minor crime less serious than a misdemeanor. A state jail felony is a crime that has some aspects of a felony and some of a misdemeanor. In severity, it is classified as between a felony and misdemeanor.

With the felony being the most serious crime, the violator is subjected to the most severe punishment either by death, imprisonment in a state prison, or a sentence of more than one year. The misdemeanor, being a less serious threat to the existence of a society, carries a lesser punishment, the most severe of which is usually not more than a year in jail. The infraction is the least serious crime, carrying a fine or probation but, in most states, no imprisonment.

The procedure by which one accused of a crime is brought to trial and punished is known as a criminal action, and the one prosecuted is known as the defendant or accused. Criminal actions are commenced with the filing of a formal written document with the appropriate court. In some states, there is no requirement to file a formal written document in cases involving infractions.

The charging document is referred to as an accusatory pleading. In most felony prosecutions, the document will be an indictment or an information. In misdemeanor prosecutions, the accusatory pleading is generally a complaint. When a criminal law is broken, it is done against society as a whole, so that the prosecutive action is brought in the name of the people; thus, the action is generally entitled "People versus [the defendant]," "State versus [the defendant]," or "Commonwealth versus [the defendant]," stating the defendant's name.

The most frequently used classification of offenses is based on one of the three broad categories:

- based on the gravity of the offense and corresponding punishment—felonies, misdemeanors, and infractions/violations;
- based on the degree of evilness—mala in se or mala prohibita offenses; and
- based on the subject matter—offenses against the state, habitation, person, and so on.

▶ Justice System

When examining the criminal justice system, we will discover many technical rules and procedures that must be followed. These rules and procedures are the result of a long evolutionary process. Trial by jury, for example, is regarded by many as one of the greatest achievements of our justice system.

When considering trial by jury, we immediately visualize a comfortable courtroom with a judge sitting behind a desk on a raised platform and presiding over the trial proceedings in a dignified and formal manner. We see the jury sitting in the jury box listening to the testimony of witnesses who have some knowledge about the facts of the case and the prosecuting attorney presenting evidence in an effort to prove the defendant guilty beyond a reasonable doubt. We may also picture the defendant conferring with the attorney throughout the trial. At the conclusion of the trial, we visualize the jury deliberating on the evidence that has been presented and returning a verdict of guilt or innocence. The reality may, however, be quite different.

Guilt or innocence has not always been decided by a jury trial. In fact, the jury system as we know it today is of comparatively recent origin, coming into existence at the start of the eighteenth century. The early history of efforts to determine guilt or innocence of an accused was primarily based on calls upon the supernatural or for signs from God.

As we trace the development of trial by jury, we focus primarily on England, where most of our judicial system originated. Many blank spots are encountered in tracing the history of a jury trial, but it is known that the Christian church played an important role in the development of much of the law and procedure of early England.

Development of Trial by Jury

As early as the ninth century, Frankish kings on the European continent would summon the most trustworthy people of a community, who were then placed under oath to answer truthfully all questions directed at them during sessions with the king. These sessions, called inquests, did not necessarily arise out of criminal activity or litigation, but were often merely fact-finding meetings for the king to learn about the community. During the inquest, the king might ask such questions as, What were the rights of the king in their particular community? Who were the landowners, and how much land did they own? What were the customs of their area? Who had a better title to a piece of property, John or James? The number of people summoned to serve on this body varied from three to seventy-two, but twelve was the number most frequently called.

As time passed, greater use of the jury was made. It was called upon not only to decide whether an accusation was well founded but also to render a verdict of guilt or innocence. It was eventually believed that a jury should not be both an accusatory jury and a trial or verdict jury. Consequently, one jury would be summoned to hear the accusation (later referred to as the grand jury), and another jury was summoned to render a verdict of guilt or innocence (known as the petit jury). The petit, or trial, jury, which usually consisted of twelve persons, initially functioned entirely differently from the juries of today. These early trial juries assembled and stated what they knew about a particular crime, or they might be assembled and commanded to go forth into the countryside and ascertain facts about the alleged crime. The jurors would talk to neighbors, pick up hearsay information and rumors, and undoubtedly be contacted by the accused and the accuser. After gathering their evidence, they would reassemble and draw a conclusion as to guilt or innocence.

Soon it was not just the jurors who stated what they had learned about the crime, witnesses might appear before the jury and relate what they knew about the accusation. Since the knowledge of the witnesses was often no more than rumor or hearsay, the jury might give little weight to their testimony and decide contrary to the general consensus of the witnesses. This outcome was particularly likely if the witnesses believed the accused to be innocent. The jury was usually fearful of rendering a false verdict, thus denying the king his revenue. The jurors knew that the king's justices often had advance information about a crime because of reports from the sheriffs and the coroners. If the jurors made a false verdict in the eyes of the justices, they would be required to make atonement and were even punished in some instances.

Because of the danger of conviction in a trial by jury, an accused would frequently elect trial by ordeal. However, after the ordeal was abolished around AD 1215 and trial by compurgation had met with disfavor, the only procedure remaining was trial by battle. But if the accuser was a woman or a noncombatant, trial by battle was impossible, so it was unknown what should be done with the accused who refused a trial by jury. Occasionally the accused was simply hanged immediately or, in other instances, was imprisoned for a year and given only a sip of water daily and a small morsel of bread. Sometimes the accused was imprisoned and had weights placed on his or her chest in increasing amounts until the person submitted to a trial by jury. Still, the accused often preferred being crushed to death in an effort to save his or her possessions for his or her family, rather than having them confiscated by the king, should the jury pass a conviction.

As time passed and the king could no longer confiscate property as payment for crimes and jurors were no longer punished or required to make atonement for possibly erroneous verdicts, greater reliance was placed on the testimony of witnesses. Eventually, the development of trial by jury progressed to what we know today. However, it still had a way to go even when the colonists settled in this country. The Maryland Archives reveal that on September 22, 1656, a judge in Patuxent, Maryland, impaneled a jury of seven married women and four single women to determine the guilt of one Judith Catchpole, who was accused of murdering her child. She denied guilt and even denied having a child. The judge then commanded the jury to go forth and determine first whether Judith had a child and, if so, whether she had murdered it. At this time, the jury was to "go forth into the countryside and seek information" rather than depend upon the sworn testimony of witnesses. The all-female jury inspected Catchpole's body and concluded that she had not recently given birth. It is also interesting that a jury of eleven instead of twelve was impaneled, because long before that time, the number of twelve jurors for a trial was well established in England. By the thirteenth century, the usual number for a petit jury in England was twelve. By the fourteenth century, a jury of twelve persons was firmly established, and thereafter the number of twelve persons composing a trial jury seems to have developed some superstitious reverence.

The reason why a jury of twelve evolved is lost in the annals of history, but it is believed to have been based on Christ having chosen twelve apostles. It has been suggested that twelve was numerologically significant at the time of Christ, as evinced by the twelve tribes of Israel, the twelve tablets, Solomon's twelve judges, and the twelve signs of the zodiac. Thus, it is highly likely that the jury comprising twelve persons is based upon that fact, especially since the church played a dominant role in the development of the judicial systems in both Europe and England. Furthermore, later the following oath is alleged to have been required of a trial jury of twelve: "Hear this, ye justices, that I will speak of that which ye shall ask of me on the part of the king, and I will do faithfully to the best of my endeavor. So help me God, and these holy Apostles."

When the colonists came to North America, they were well indoctrinated in the view that a trial jury should comprise twelve persons, although it is known that one or two of the colonies permitted a jury to comprise fewer than twelve. It is not entirely clear from historical data whether permitting fewer than twelve was a conscious effort to break from tradition, in defiance of the king and England, or whether it was because of the small number of people in the colonies involved, making it difficult to find twelve qualified jurors.

Historical Development of the Bill of Rights

As we approach the study of the judicial procedure followed today, it is important to review some of the rights and guarantees granted to one accused of a crime. These rights and guarantees are to be found either in the Constitution of the United States or in the constitutions and statutes of the various states. Some of these rights are based upon the common law of England, but others were developed over time as a result of dealing with accused persons.

Regarding the Magna Carta, although it created no panacea, but it did ensure the people certain liberties, which they had been denied previously, and made way for the establishment of due process of law. However, the people of England continued to be subjected to many oppressive practices, and many were persecuted because of their religious beliefs. To escape these practices, a number of people left for North America to establish colonies. The king considered these colonies to be his possessions; the colonists were still under the rule of the king, and all too often that rule laid heavily upon them. They were taxed excessively and were generally oppressed. When they objected, they were often taken to England for trial. As time passed, the colonists increased their opposition. This became a source of irritation to the king, who sent his armies to enforce his rule. Suspected objectors were frequently subjected to searches and seizures without cause and imprisoned without justification.

As a result of the king's extreme actions, the colonists banded together and adopted a resolution declaring their political independence from England. The Declaration of Independence announced to the world that the colonists were serious in their aim to become an independent nation and asked for understanding and compassion from other nations. The Declaration of Independence set forth the reasons for their actions and grievances against the king. Among the charges were that the king

> has refused to assent to laws, the most wholesome and necessary for the public good; … has obstructed the administration of justice; … has kept among us, in times of peace, standing armies without the consent of our legislatures; … has deprived many of the benefits of trial by jury; … has transported us beyond seas to be tried for pretended offenses.

By reviewing the Declaration of Independence, we can appreciate the conditions of the time and the conflicts experienced by the people of America. The Declaration became the basis of the guarantees later to be embodied in our Constitution.

The king did not take this Declaration of Independence lightly. He sent additional armies to subdue the colonies, resulting in the Revolutionary War. When peace was restored in 1783, the colonies became a self-governing nation. A governmental structure had to be formed, and laws had to be made for governing the people. Although various efforts at governmental structures were attempted, each

manifested its own particular weaknesses. In 1787, representatives of the colonies, now referred to as states, met in Philadelphia to attempt again to formulate an acceptable and a workable governmental structure. The result of this conference, known as the Constitutional Convention, was the U.S. Constitution, which was finally adopted in 1789. It established three branches of government: executive, legislative, and judicial.

As the various state representatives reviewed this document, they felt that a vital weakness still remained in its structure: The people were not guaranteed protection against oppression should this central government become too strong and powerful. Therefore, it was agreed that certain additions should be made to the Constitution. Again, representatives of the states met in Congress during 1789 and proposed twelve amendments to the Constitution. Ten of them were adopted in 1791 and are known as the Bill of Rights, which guarantees certain rights to the people. The two amendments that were not adopted did not pertain to guarantees but were related to the legislative structure of the government As noted previously, most scholars consider that the Magna Carta had a significant influence on the drafters of the Declaration of Independence. Photo 1-3 is a picture of the Magna Carta being deposited in the Library of Congress for the duration of World War II.

PHOTO 1-3 Magna Carta deposited in Congressional Library for duration of war (World War II), Washington, D.C., on November 28, 1939. The most cherished existing copy of the Magna Carta was deposited in the Congressional Library here for the duration of the war by British Ambassador Lord Lothian. Librarian Archibald MacLeish, left, is shown thanking Lord Lothian after accepting the document, which can be seen in the background. The Magna Carta was on display for the public in a spot opposite the Declaration of Independence and the U.S. Constitution.

Photo courtesy of the U.S. Library of Congress Prints and Photographs Division Washington, D.C.

The Bill of Rights

Amendment I: Restriction on Powers of Congress. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II: Right to Bear Arms. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Amendment III: Billeting of Soldiers. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

Amendment IV: Seizures, Searches, and Warrants. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment V: Criminal Proceedings, Condemnation of Property. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

Amendment VI: Mode of Trial in Criminal Proceedings. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII: Trial by Jury. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury, shall be otherwise reexamined in any court of the United States than according to the rules of common law.

Amendment VIII: Involuntary Servitude. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment IX: Certain Rights Not Denied to the People. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment X: State Rights. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states, respectively, or to the people.

LAW IN PRACTICE

INCORPORATION CONTROVERSY

At the time that the Bill of Rights was adopted, it applied only to federal criminal cases, which were only a fraction when compared to the cases in state criminal courts. The clear majority of crimes were state crimes controlled by state statutes and codes and tried in state courts. When the Fourteenth Amendment was adopted in 1868, states were restricted in three ways:

- States were restricted from making or enforcing any laws that abridged the privileges and immunities of the citizens of the United States.
- States could not deprive any person of life, liberty, or property without due process of law.
- Equal protection of the law was guaranteed for all persons within a state's jurisdiction.

A controversy began as to the relationship between the Fourteenth Amendment and the Bill of Rights. The question was to what extent did the Fourteenth Amendment incorporate the protections of the Bill of Rights in state prosecutions. The Supreme Court had held in a 5-4 decision in the Slaughter-Hose cases (21 L. Ed. 394 (1873)) that the privileges and immunities clause applied to citizens in New Orleans by virtue of national citizenship and that did not include the Bill of Rights protections.

In *Hurtado* v. *California*, 110 U.S. 516 (1884), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment applied to state criminal processes. In subsequent decisions, the Court has decided that certain protections and rights in the Bill of Rights were incorporated into the Fourteenth Amendment's Due Process Clause. The Court has adopted a selected incorporation theory as to which rights and protections were incorporated against the states by the Fourteenth Amendment's Due Process Clause.

Justice Hugo Black had advocated for total incorporation of the Bill of Rights into state criminal procedures. Justice Black stated in *Adamson* v. *California*, 332 U.S. 46 (1947) (dissenting opinion), "One of the chief objects (of the Fourteenth Amendment) was to make the Bill of Rights applicable to the states." Black also noted that by allowing the judges to pick which protections were incorporated by the due process clause, the judges were taking legislative actions. While Black's total incorporation was never accepted during his thirty-six years on the Court, by the time of his death in 1971, most of the protections had been incorporated into state criminal procedures by the Fourteenth Amendment's Due Process Clause.

LAW IN PRACTICE

CASES INCORPORATING PROVISIONS OF THE BILL OF RIGHTS INTO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The information below indicates how the U.S. Supreme Court has applied the Due Process Clause of the Fourteenth Amendment to incorporate certain rights contained in the U.S. Constitution's Bill of Rights into state proceedings.

First Amendment	
Establishment of religion	*Everson* v. *Board of Education* (1947)
Free exercise of religion	*Cantwell* v. *Connecticut* (1940)
Freedom of speech	*Gitlow* v. *New York* (1925)
Freedom of the press	*Near* v. *Minnesota* (1931)
Freedom to peaceably assemble	*DeJong* v. *Oregon* (1937)
Fourth Amendment	
Unreasonable search and seizure	*Wolf* v. *Colorado* (1949)
Exclusionary rule	*Mapp* v. *Ohio* (1961)

(continued)

Fifth Amendment	
Grand jury	*Hurtado* v. *California* (1884) (Held not applicable to the states.)
Double jeopardy	*Benton* v. *Maryland* (1969)
Self-incrimination	*Mallay* v. *Hogan* (1964)
Compensation for taking private property	*Chicago, Burlington and Quincy Railroad* v. *Chicago* (1897)
Sixth Amendment	
Speedy trial	*Klopfer* v. *North Carolina* (1967)
Public trial	*In re Oliver* (1948)
Impartial jury	*Parker* v. *Gladden* (1966)
Jury trial	*Duncan* v. *Louisiana* (1968)
Confrontation of witnesses	*Pointer* v. *Texas* (1965)
Compulsory process	*Washington* v. *Texas* (1967)
Assistance of counsel	*Gideon* v. *Wainwright* (felony cases) (1963) *Argersinger* v. *Hamelin* (misdemeanors involving confinement) (1972)
Eighth Amendment	
Excessive bail	*United States* v. *Salerno* (1987)
Cruel and unusual punishment	*Robinson* v. *California* (1962)

Due Process of Law

When the Bill of Rights was adopted, the oppressive conditions that brought them into being were still vivid in the memory of the people. Thus, these guarantees were to protect the people against any action that might be attempted by the federal government and as such were applicable only to federal officers. The states, as provided in the Ninth and Tenth Amendments, were free to establish their own guarantees relating to the actions permitted by state and local officials. We will find that the Fourth, Fifth, Sixth, and Eighth Amendments are most significant in the administration of justice.

As time passed, slavery and involuntary servitude, such as forcing men to build public roads or to serve in a state militia without pay, were permitted in some states. After the Civil War, the Thirteenth Amendment, abolishing slavery, was added to the U.S. Constitution. To prohibit other oppressive and arbitrary actions by the states, the Fourteenth Amendment was adopted in 1868. This amendment held that

> all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It should be emphasized that this amendment was directed at the states to prevent them from depriving any person of life, liberty, or property without due process of law. However, the amendment raised a question regarding the interpretation of the term due process of law as it related to the administration of justice. The courts later concluded that if an accused had his day in court with the right to appeal a conviction, the Due Process of Law Clause of the Fourteenth Amendment had been satisfied. The U.S. Supreme Court has since placed a different interpretation on the meaning of the Due Process of Law Clause of the Fourteenth Amendment. The Supreme Court has ruled that the following particular Bill of Rights guarantees are applicable to the states: the

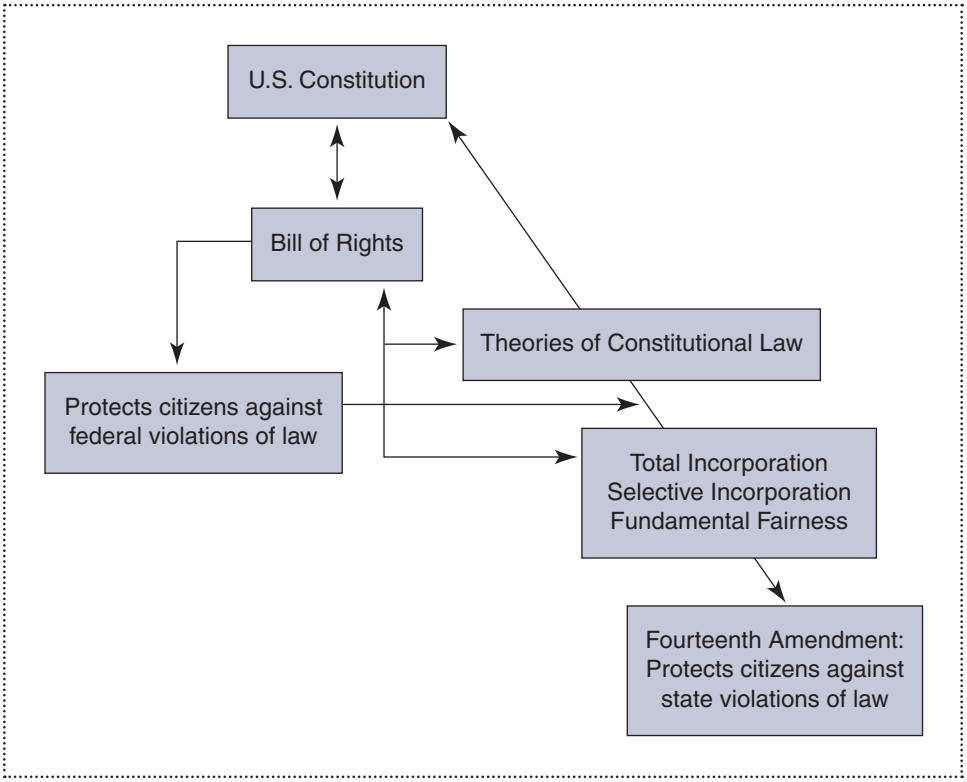


FIGURE 1-1 Relationship of the Bill of Rights and the Fourteenth Amendment to the Constitutional Rights of the Accused.

Fourth Amendment right to be free from unreasonable searches and seizures and to have any illegally seized evidence excluded from criminal trials;[3] the Fifth Amendment privilege against self-incrimination[4] and the guarantee against double jeopardy,[5] and the Sixth Amendment rights to counsel,[6] to a speedy trial,[7] to a public trial,[8] to confront opposing witnesses,[9] and to an impartial jury.[10] Decisions making these guarantees applicable to the states will be discussed as the judicial procedure is further explained. For practical purposes, these amendments are as applicable to state and local officers as they are to federal officers. Figure 1-1 ■ indicates the relationship of the Bill of Rights and the Fourteenth Amendment to the Constitutional Rights of the Accused.

In addition to the guarantees provided by the Bill of Rights, each state has furnished to the people within that state additional guarantees and rights, which are contained in the statutes of the state constitution. To ensure that the guarantees of the Bill of Rights and the state statutes are properly afforded the people, court structures have been established.

▶ Court Structures

The court system in the United States is based upon the principle of federalism.[11] The first Congress established a federal court system, and the individual states were permitted to continue their own judicial structure. There was general agreement among our nation's founding fathers that individual states needed to retain significant autonomy from federal control. Under this concept of federalism, the United States developed as a loose confederation of semi-independent states, with the federal court system acting in a very limited manner. In the early history of our nation, most cases were tried in state courts, and it was only later that the federal government and the federal judiciary began to exercise jurisdiction over crimes

and civil matters. **Jurisdiction** in this context simply means the ability of the court to enforce laws and punish individuals who violate those laws.

As a result of this historical evolution, a dual system of state and federal courts exists today. Therefore, federal and state courts may have concurrent jurisdiction over specific crimes. For example, a person who robs a bank may be tried and convicted in state court for robbery and then tried and convicted in federal court for the federal offense of robbery of a federally chartered savings institution.

The second characteristic of the American court system is that it performs its duties with little or no supervision. A Supreme Court justice does not exercise supervision over lower court judges in the same way that a government supervisor or manager exercises control over his or her employees. The U.S. Supreme Court and the various state supreme courts exercise supervision only in the sense that they hear appellate cases from lower courts and establish certain procedures for these courts.

The third feature of our court system is the specialization that occurs primarily at the state and local levels. In many states, courts of limited jurisdiction hear misdemeanor cases. Other state courts of general jurisdiction try felonies. Still other courts may be designated as juvenile courts and hear only matters involving juveniles. This process also occurs in certain civil courts that hear only family law matters, probate matters, or civil cases involving damages. At the federal level, there are courts, such as bankruptcy court, that hear only cases dealing with specific matters. Figure 1-2 ■ depicts the structure of the federal court system.

A fourth characteristic of our court system is that generally the courts perform either trial or appellate functions. A trial court tries the case and issues a verdict and if appropriate a sentence. Evidence is presented at the trial court and the jury (or judge when there is no jury) makes the findings of fact, for example, whether the defendant killed the victim. The evidence is presented by witnesses, documents, and so on to help the decision-maker arrive at the verdict.

Generally, an appellate court does not hear evidence or make findings of fact. The appellate court rules on the legal issues presented in the appeals of the parties

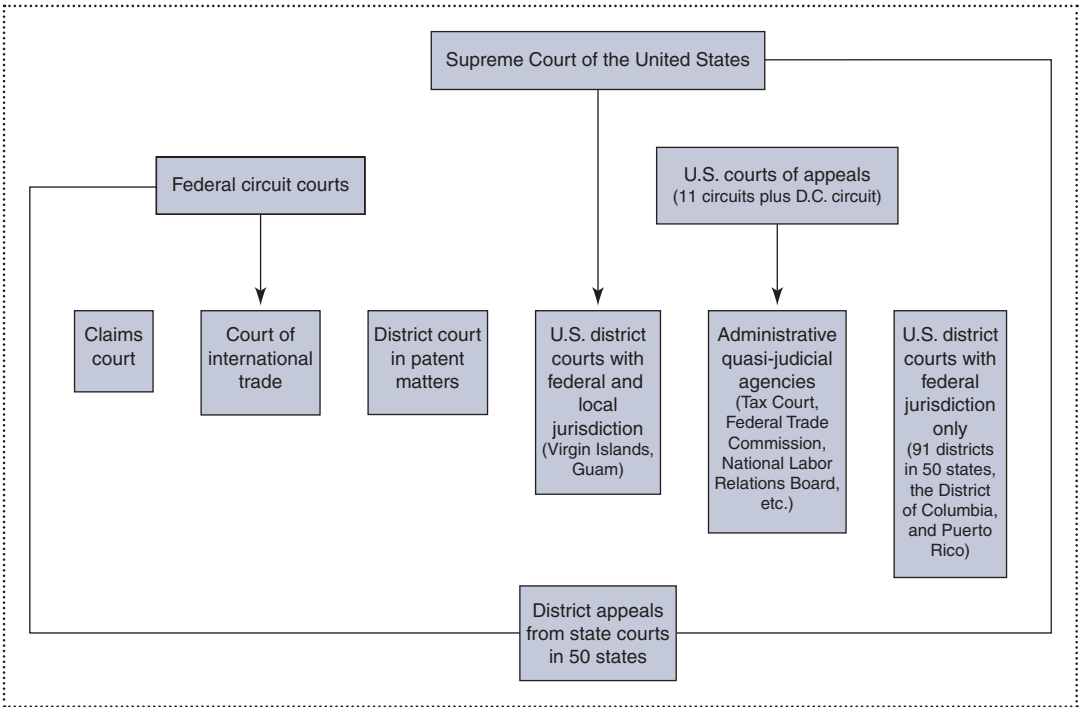


FIGURE 1-2 Structure of the Federal Court System.

from the judgment of the trial court. Witnesses do not appear in appellate court, and the defendant does not have a right to be present at any hearing before an appellate court. The appellate court makes its decision on the record presented by the briefs of the parties, record of trial, and arguments of the parties.

The fifth characteristic of the American court system is the organization of state and federal courts into geographic areas. In many jurisdictions, these are called judicial districts and contain various levels of courts. For example, on the federal level, the Ninth Circuit Court of Appeals has district (trial) courts that hear matters within certain specific boundaries and an appellate court that hears all appeals from cases within that area. Several studies have been conducted regarding the difference in sentences for the same type of crime in geographic district courts. For instance, in Iowa, the average sentence for motor vehicle theft was forty-seven months, whereas the average sentence for the same offense in New York was fourteen months.[12] This observation shouldn't be taken as a criticism; rather, it may reflect different social values and attitudes within specific geographic areas.

After a person is arrested, unless the charge against him or her is dismissed, some prosecutive action must be taken, which will occur in the appropriate court. In order for students to have a clearer understanding of the judicial proceedings from the time of arrest through sentencing, a discussion of the court system follows. Although the court system may vary somewhat among the states, it is basically the same. The states are divided into territorial divisions known as counties, except in Louisiana, where they are called parishes, and in Alaska, which is divided into four judicial districts. Each county, parish, or district has its own trial court system. The chief trial court is known as the superior court, district court, or circuit court, depending upon the title that the court is given in a particular state. This court, in addition to trying civil matters, will hear trials involving felony cases and possibly some more serious, or high, misdemeanor charges. Generally, this court holds forth in the county seat. Although these courts are technically county courts, they are referred to in many books on judicial procedures as state courts, as distinguished from federal courts.

LAW IN PRACTICE

CONTROVERSY OVER SOBRIETY CHECKPOINTS

In 2011, four U.S. senators attempted to restrict the use of downloadable applications to cell phones that alert drivers to the locations of sobriety checkpoints. The Federal Centers for Disease Control and Prevention has concluded that sobriety checkpoints had reduced alcohol-related accidents.

The U.S. Supreme Court has ruled that these sobriety checkpoints are legal. This is one area where some state courts have disagreed with the U.S. Supreme Court and have concluded that the checkpoints were a violation of individual rights. This issue provides an example of how a state may offer more individual rights than provided by the U.S. Constitution. The reverse does not work in that a state may not restrict individual rights more than that permitted by the federal constitution.

As of 2018, thirty-seven states, the District of Columbia, the Northern Mariana Islands, and the Virgin Islands conduct sobriety checkpoints. In thirteen states, sobriety checkpoints are not conducted. Some states prohibit them by state law or Constitution (or interpretation of state law or Constitution). Texas prohibits them based on its interpretation of the U.S. Constitution, and Missouri law prohibits funds from being spent on checkpoint programs. The remaining states that do not use the checkpoints included Alaska, Iowa, Michigan, Minnesota, Montana, Oregon, Rhode Island, Washington, Wisconsin, and Wyoming.

State Court System

Historically, each of the thirteen states had its own unique court structure. This independence continued after the American Revolution and resulted in widespread differences among the various states; some of these differences still exist today. Because each state adopted its own system of courts, the consequence was a poorly planned and confusing judicial structure. As a result, there have been several reform movements whose purpose has been to streamline and modernize this system.

Many state courts can be divided into three levels: trial courts, appellate courts, and state supreme courts. It is in trial courts that criminal cases start, evidence is presented, the defendant is found guilty or not guilty, and a sentence is imposed if the defendant is found guilty. The trial court conducts the entire series of acts that culminates in either the defendant's release or sentencing. State trial courts can be further divided into courts of limited or special jurisdiction and courts of general jurisdiction.

The nature and type of case determines which court will have jurisdiction. Courts that hear and decide only certain limited legal issues are courts of limited jurisdiction. Typically, these courts hear certain types of minor civil or criminal cases. Approximately 13,000 local courts exist in the United States. They are county, magistrate, justice, or municipal courts. Judges in these courts may be either appointed or elected. In many jurisdictions, these are part-time positions, and the incumbent may have another job or position in addition to serving as a judge. Figure 1-3 ■ depicts the hierarchy of the U.S. Court System.

Coming to the county seat from outlying areas of the county has often created hardship and expense for many of those involved in a trial. To accommodate these persons and to relieve part of the caseload of the superior court, some counties have been divided into judicial districts, each containing a lower court. This lower court is often referred to as an inferior court, as opposed to the superior court, and is known in many places as the justice court. The judge is frequently called the justice of the peace. This court has limited jurisdiction, hearing certain misdemeanor charges and civil matters involving small amounts of money. Usually the judge is elected by the people within the district, and generally in the past there was no requirement that he or she have legal training. The reason for no such requirement was that in many outlying judicial districts, there were no attorneys; however, the people of those districts were entitled to some judicial assistance. Today, since more attorneys are available, many states have phased out the judges of the inferior courts who are not attorneys. However, the elimination of the layperson judge has met with resistance. Some contend that the local inferior, or lower, court can provide a form of justice that is convenient for both the accused and the accuser and that the layperson justice of the peace is part of the American heritage. Others contend that to subject an accused to possible imprisonment after a conviction in a trial presided over by a layperson judge is to deny the accused the right to due process of law. This matter was brought before the U.S. Supreme Court in the case of *North* v. *Russell* after North was convicted of drunk driving and sentenced to thirty days in jail by a layperson sitting as a police court judge.[13] North contended that his conviction for drunk driving and sentencing to thirty days in jail was a violation of his right to due process of law as provided in the Fourteenth Amendment. The Court upheld the conviction upon the grounds that North could have taken his case to a higher court and had it completely tried again by a court presided over by an attorney judge. Therefore, North was not denied due process of law. The Court pointed out that there was an advantage to the accused in having the trial in a community near his residence rather than traveling to a distant court where a law-trained judge was provided. The decision did not rule out all laypersons judges as

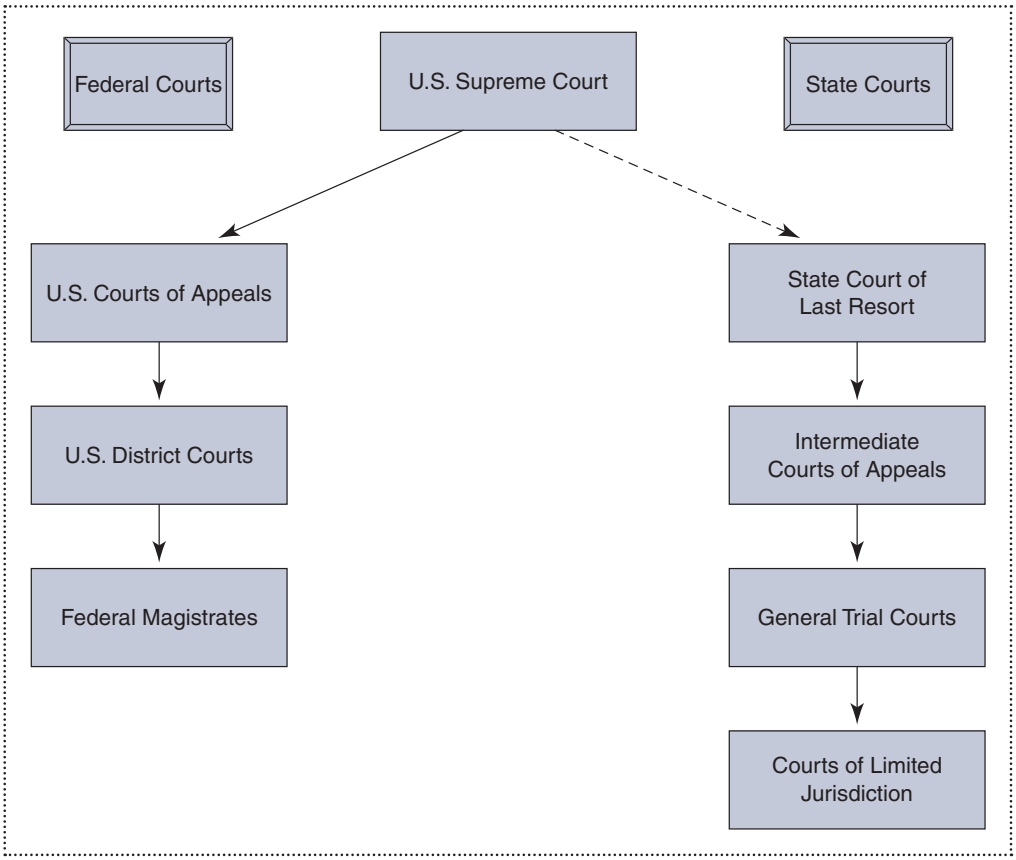


FIGURE 1-3 Hierarchy in the U.S. Court System.

being a denial of due process of law, but it should be noted that the judicial structures of some states do not provide for a conviction in a lower court to be taken to a higher court and the case started anew. Where such a procedure is not available, courts could hold that an accused would be denied the right of due process of law in a proceeding before a layperson judge.

However, simply because they handle minor civil and criminal matters does not mean that these courts do not perform important duties. In many cases, the only contact the average citizen will have with the judicial system occurs at this level. Courts of limited jurisdiction hear and decide issues such as traffic tickets or set bail for criminal defendants.

LAW IN PRACTICE

STATE MAJOR CRIMINAL TRIAL COURTS

Circuit Court	Alabama, Arkansas, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Oregon, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin
Court of Common Pleas	Ohio and Pennsylvania
District Court	Colorado, Idaho, Kansas, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming
Superior Court	Alaska, Arizona, California, Connecticut, Delaware, District of Columbia, Georgia, Maine, Massachusetts, New Hampshire, New Jersey, North Carolina, Rhode Island, Vermont, Washington, and New York
Supreme Court	New York (New York also uses county courts and superior courts)

Source: David Rottman, Carol Flango, and R. Shedine Lockley, *State Court Organizations, 1993* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, Government Printing Office), 1995.

Courts of limited jurisdiction may also hear certain types of specialized matters such as probate of wills and estates, divorces, child custody matters, and juvenile hearings. These types of courts may be local courts or, depending on the state, courts of general jurisdiction that are designated by statute to hear and decide specific types of cases. For example, in California, a superior court is considered a court of general jurisdiction; however, certain superior courts are designated to hear only juvenile matters, thereby becoming courts of limited jurisdiction when sitting as juvenile courts.

Courts of general jurisdiction are granted authority to hear and decide all issues that are brought before them. These are the courts that normally hear all major civil or criminal cases. These courts are known by a variety of names, such as superior courts, circuit courts, district courts, or courts of common pleas. Since they are courts of general jurisdiction, they have authority to decide issues that occur anywhere within the state. Some larger jurisdictions such as Los Angeles or New York may have hundreds of courts of general jurisdiction within the city limits. Typically, these courts hear civil cases involving the same types of issues that courts of limited jurisdiction hear, although the amount of damages will be higher and may reach millions of dollars. These courts also hear the most serious forms of criminal matters, including death penalty cases. Figure 1-4 ■ depicts the Commonwealth of Virginia's court system.

Courts of general jurisdiction traditionally have the power to order individuals to do or refrain from doing certain acts. These courts may issue injunctions prohibiting certain acts or requiring individuals to perform certain functions or duties. This authority is derived from the equity power that resides in courts of general jurisdiction. Equity is the concept that justice is administered according to fairness, as contrasted to the strict rules of law. In early English common law, such separate courts of equity were known as courts of chancery. These early courts were not concerned with technical legal issues; rather, they focused on rendering decisions or orders that were fair or equitable. In modern times, these courts have been merged with courts of general jurisdiction, allowing them to rule on matters

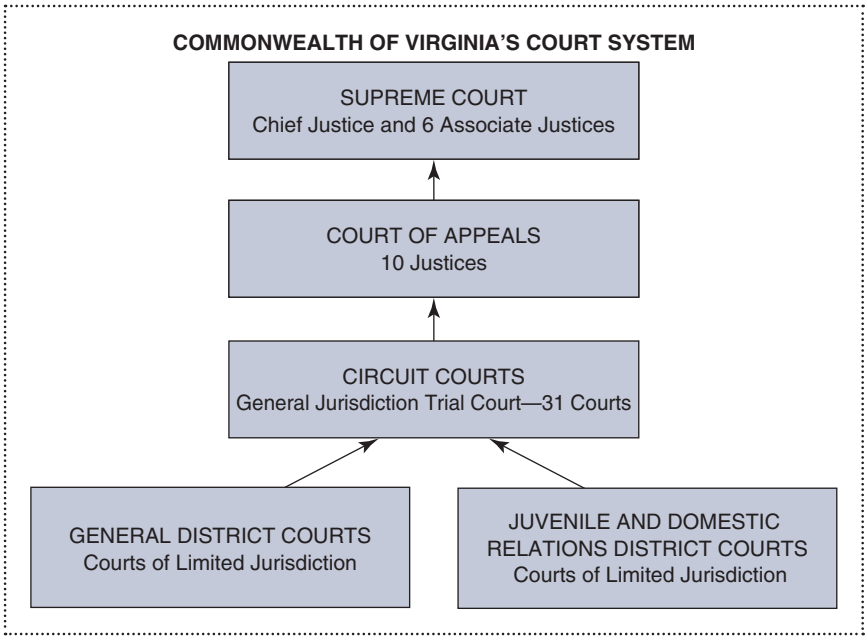


FIGURE 1-4 Commonwealth of Virginia's Court System.

that require fairness as well as the strict application of the law. The power to issue temporary restraining orders in spousal abuse cases comes from this authority.

Appellate Courts

Appellate jurisdiction is reserved for courts that hear appeals from both limited and general jurisdiction courts. Except for appeals from minor courts that are heard "de novo" (as a new trial), these courts do not hold trials or hear evidence. Instead, they decide matters of law on the basis of the record of trial and appellate briefs, and they issue formal written decisions, or opinions. In a few states, the intermediate-level appellate courts have limited authority to make findings of fact. There are two classes of appellate courts: intermediate and final.

The intermediate appellate courts are known as courts of appeals. Approximately half of the states have designated intermediate appellate courts. These courts may be divided into judicial districts that hear all appeals within their district. They hear and decide all issues of law that are raised on appeal in both civil and criminal cases. Since these courts deal strictly with legal or equitable issues, there is no jury to decide factual disputes. These courts accept the facts as determined by the trial courts. Most criminal cases end at either the trial or intermediate appellate court level; less than 1 percent of the cases are appealed to the state highest appellate court. However, whereas all states have appellate courts for criminal appeals, there appears to be no constitutional duty for states to have appellate courts. Intermediate appellate courts have the authority to reverse the decision of the lower courts and to send the matter back with instructions to retry the case in accordance with their opinion. They also may uphold the decision of the lower court. In either situation, the party who loses the appeal at this level may file and appeal to the next higher appellate court.

A Comparison of Criminal and Tort Laws

Similarities

- Goal of controlling
- Imposition of sanctions
- Some common areas of legal action—for example, personal assault, control of white-collar offenses such as environmental pollution

Differences

Criminal Law	*Tort Law*
Crime is a public offense.	A tort is a civil or private wrong.
The sanction associated with criminal law is incarceration or death.	The sanction associated with tort law is monetary damages.
The right of enforcement belongs to the state.	The individual brings the action.
The government ordinarily does not appeal.	Both parties can appeal.
Fines go to the state.	The individual receives damages as compensation for harm done.
The burden of proof is beyond a reasonable doubt.	The burden of proof is preponderance of evidence.
Remedies after verdict: punishment.	Remedies after verdict: money damages, injunctions, writs commanding certain action.

A Comparison of Criminal and Tort Laws.

Supreme Courts

Final appellate courts are the highest state appellate courts. They may be known as supreme courts or courts of last resort. There may be five, seven, or nine justices sitting on this court, depending on the state. This court has jurisdiction to hear and decide issues dealing with all matters decided by lower courts, including ruling on state constitutional or statutory issues. Its decision is binding on all other courts within the state. In two states, Oklahoma and Texas, the state supreme courts do not have jurisdiction over criminal matters. In these two states, the highest court of appeal for criminal matters is the Court of Criminal Appeals.

Once the highest state appellate court decides an issue, the conviction is considered final. The defendant may attack the judgment of a state court by filing a writ with a federal court. But before the federal court will accept a writ attacking a state court judgment, a federal issue must be involved. Normally, the federal issue is that the state court violated the federal constitutional rights of the defendant. This is regarded as a collateral attack.

LAW IN PRACTICE

THE NEW YORK UNIFIED COURT SYSTEM

The New York State court system is different from that of the other states. In New York, the Supreme Court is a trial court and the New York Court of Appeals is the court of last resort for the State of New York.

State Trial Courts in New York

The trial courts of superior jurisdiction are the supreme courts, the Court of Claims, the family courts, the surrogate's courts, and, outside New York City, the county courts. In New York City, the supreme court exercises both civil and criminal jurisdiction. Outside New York City, the supreme court exercises civil jurisdiction, while the county court generally handles criminal matters.

The trial courts of limited jurisdiction in New York City are the New York City Civil Court and the New York City Criminal Court. Outside New York City, the trial courts of limited jurisdiction are the city courts, which have criminal jurisdiction over misdemeanors and lesser offenses and civil jurisdiction over claims of up to $15,000. There are district courts in Nassau County and parts of Suffolk County. District courts have criminal jurisdiction over misdemeanors and lesser offenses and civil jurisdiction over claims of up to $15,000.

Upstate New York Trial Courts

The county court is established in each county outside of New York City. It is authorized to handle the prosecution of all crimes committed within the county. The county court also has limited jurisdiction in civil cases involving amounts of up to $25,000.

City courts outside of New York City exist in sixty-one cities and have criminal jurisdiction over misdemeanors and lesser offenses and civil jurisdiction over claims of up to $15,000. Some city courts have separate parts to handle small claims or housing matters. City court judges act as arraigning magistrates and conduct preliminary hearings in felony cases.

Town and village courts have criminal jurisdiction over violations and misdemeanors and civil jurisdiction over claims of up to $3,000. As magistrates, town and village court justices hold arraignments and preliminary hearings for those charged with more serious crimes. Traffic infractions also are heard in these courts.

New York City Courts

The New York City Supreme Court is the trial court of unlimited original jurisdiction, but it generally only hears cases that are outside the jurisdiction of other trial courts of more limited jurisdiction. It exercises civil jurisdiction and jurisdiction over felony charges.

The Family Court hears matters involving children and families. Its jurisdiction includes custody and visitation, support, family offense

(continued)

(domestic violence), persons in need of supervision, delinquency, child protective proceedings (abuse and neglect), foster care approval and review, termination of parental rights, adoption, and guardianship.

The Surrogate's Court hears cases involving the affairs of decedents, including the probate of wills, the administration of estates, and adoptions.

The Civil Court of the City of New York has jurisdiction over civil cases involving amounts of up to $25,000 and other civil matters referred to it by the Supreme Court. It includes a small claims part for informal dispositions of matters not exceeding $5,000 and a housing part for landlord–tenant matters and housing code violations.

The Criminal Court of the City of New York has jurisdiction over misdemeanors and violations. Judges of the Criminal Court also act as arraigning magistrates and conduct preliminary hearings in felony cases.

State Appellate Courts

The appellate courts hear and determine appeals from the decisions of the trial courts. The appellate courts are the Court of Appeals (the highest court in the state), the appellate divisions of the Supreme Court, the appellate terms of the Supreme Court, and the county courts acting as appellate courts in the Third and Fourth Judicial Departments.

▶ Federal Court System

Although state courts had their origin in historical accident and custom, federal courts were created by the U.S. Constitution. Section 1 of Article III established the federal court system with the words providing for "one supreme Court, and ... such inferior Courts as the Congress may from time to time ordain and establish." From this beginning, Congress has passed a series of acts that have resulted in today's federal court system. The Judiciary Act of 1789 created the U.S. Supreme Court and established district and circuit courts of appeals.

Federal district courts are the lowest level of the federal court system. These courts have original jurisdiction over cases involving a violation of federal statutes. Because these district courts handle thousands of criminal cases per year, questions have been raised regarding the quality of justice that can be delivered by overworked judges.

Federal circuit courts of appeals are the intermediate-appellate courts within the federal system. These courts are called circuit courts because the federal

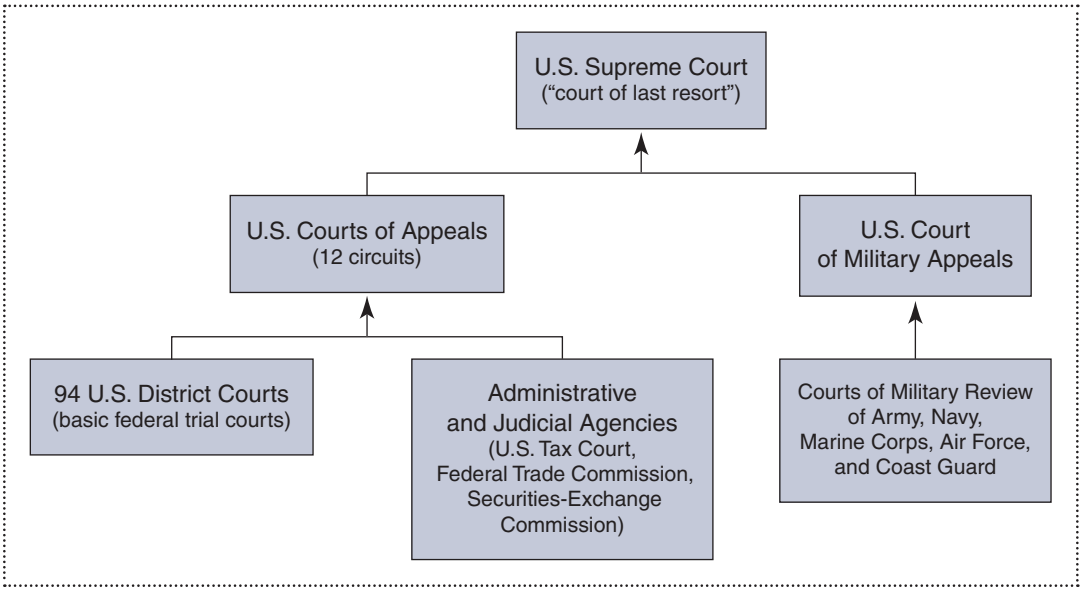


FIGURE 1-5 Organization of Federal Courts Handling Criminal Matters.

system is divided into eleven circuits. A twelfth circuit court of appeals serves the Washington, D.C., area. These courts hear all criminal appeals from the district courts. These appeals are usually heard by panels of three of the appellate court judges rather than by all the judges of each circuit.

The U.S. Supreme Court is the highest court in the land. It has the capacity for judicial review of all lower court decisions involving federal issues or federal questions. The Supreme Court determines what laws and what lower court decisions conform to the mandates set forth in the U.S. Constitution, national treaties, and federal law. The concept of judicial review was first referred to by Alexander Hamilton in *The Federalist Papers*, where he referred to the Supreme Court as ensuring that the will of the people will be supreme over the will of the legislature.[14] This concept was firmly and finally established in our system when the Supreme Court asserted its power of judicial review in the case of *Marbury* v. *Madison*.[15] Figure 1-5 ■ depicts the organization of federal courts handling criminal matters. The U.S. Supreme Court has original jurisdiction in the following cases:

- cases between the United States and a state;
- cases between states;
- cases involving foreign ambassadors, ministers, and consuls; and
- cases between a state and a citizen of another state or country.

The Supreme Court hears appeals from lower courts, including the various state supreme courts (on issues involving federal questions). If four justices of the U.S. Supreme Court vote to hear a case, the Court will issue a writ of certiorari, which is an order to a lower court to send the records of the case to the Supreme Court for review. The Court meets on the first Monday of October and usually remains in session until June. The Court may review any case it deems worthy of review, but it hears very few of the cases filed with it. Of approximately 5,000 appeals each year, the Court hears about 100.

U.S. Courts' Web site

For those researchers or readers who want more detailed information on the federal courts please visit the U.S. Courts' Web site. The site provides detailed information on the various aspects of the federal courts. It may be accessed by doing an online search of "U.S. Courts."

▶ Venue

Defined simply, **venue** is the geographic area in which a case may be heard. It is the place where a case is brought to trial and the area from which the jurors are selected. Usually, venue will lie within the county or judicial district in which a crime is committed. Venue may be waived by the defendant. There are times when a defendant may request that a trial be held in a county other than where the crime was committed.

Occasionally, situations arise when it is difficult to determine in which county a crime was committed in order to have venue established. Many states have set forth guidelines to overcome this dilemma. They include such provisions as the following:

- When an offense is committed in part in one county and in part in another, the trial may be held in either county.
- When an offense is committed on the boundary of two or more counties, or within 500 yards (this distance varies among states) of the boundary, the trial may be held in either jurisdiction.

- When a crime is committed within the state in a boat, a motor vehicle, an aircraft, or a common carrier, the trial may be held in any county through which the trip passed or the one in which it was terminated.

LAW IN PRACTICE

TEXAS STATUTE ON A MOTION FOR CHANGE OF VENUE

Summary of Texas Criminal Code § 31.03: (Most change of venue statutes are similar to this one)

A change of venue may be granted in any felony or misdemeanor case punishable by confinement on the written motion of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine:

1. That there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial.
2. That there is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial. An order changing venue to a county beyond an adjoining district shall be grounds for reversal.

▶ Jurisdiction

Jurisdiction is the inherent power of a court to hear and decide a case, whereas venue designates a particular area in which a case may be heard and decided. Unfortunately, the statutes of some states use jurisdiction when in fact the statute refers to venue, thus creating confusion for the layperson. This dual use of the term jurisdiction stems from the fact that it is an all-encompassing word, embracing every kind of judicial action. Figure 1-6 ■ depicts a jurisdictional map of the U.S. Courts of Appeal.

Federal versus Local Jurisdiction

Since we have learned that there are two court systems, that is, the state system and the federal system, it may be useful at this point to compare the jurisdiction of each. As previously stated, criminal laws enacted by the U.S. Congress are known as federal criminal laws and are enforced by federal officers. Criminal laws passed by the state legislatures are generally enforced by city police departments or sheriffs and their deputies and are assisted by state officers where they have the authority to do so. Although most of the criminal laws within a state are state enacted, violators are prosecuted in the county court or local system, since that is where the trial courts are located. Thus, our discussion of the jurisdiction of the two systems is directly related to the trial jurisdiction of the federal and county courts.

When a crime is committed, the violator may have broken either a federal law, a state law or both, depending upon the act. For example, if a person robs a liquor store, it would be a violation of a state statute, since all states have laws making robbery a crime. If a person violates the Sherman Antitrust Law, that act would be a federal violation. The county court would have exclusive jurisdiction to try the case of robbery, whereas the federal government would have exclusive jurisdiction to try the antitrust violation. It is possible for a person to commit both a federal and a state violation with a series of acts arising out of a sequence of events. For example, a person may steal an automobile in one state and transport it to another state. Such an individual could be prosecuted in the local courts for the theft of the vehicle and prosecuted in federal court because it is a federal crime to transport a

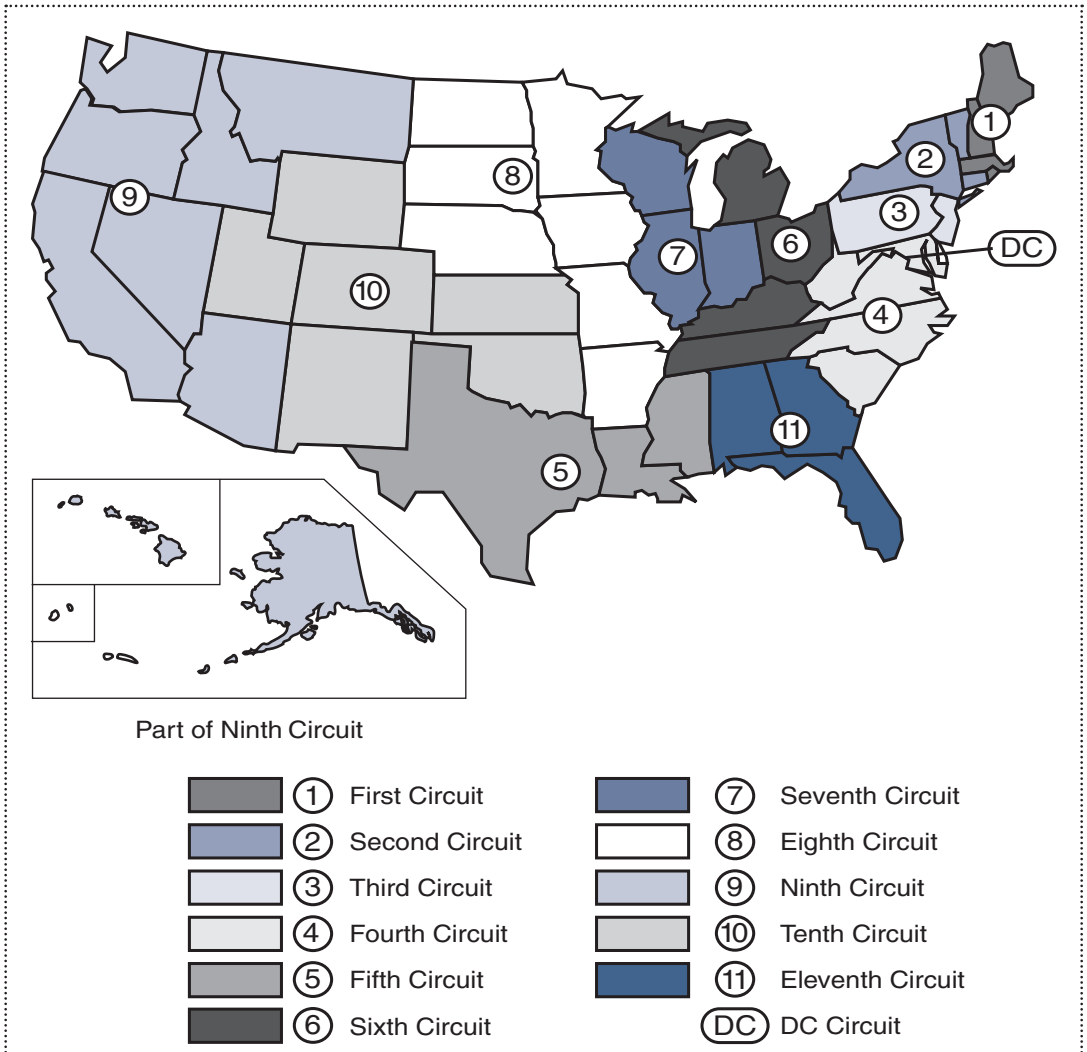


FIGURE 1-6 Jurisdictional Map of U.S. Courts of Appeal.

vehicle from one state to another knowing that it has been stolen. In this example, the offender has actually committed two violations as a result of two different acts—one being the theft and the other the transportation of the vehicle while knowing that it has been stolen. In these two examples, each court has its own trial jurisdiction exclusive of the other.

It is also possible for an individual to violate both a federal and a state law by the same act. For example, an individual may kill a federal officer, thereby violating a federal statute, and the killing may also violate a state homicide statute. Under these circumstances, concurrent jurisdiction would exist. The question then would be whether the accused could be prosecuted in both the federal and the state courts. Where an act violates both federal and state statutes, the federal government can always take jurisdiction and prosecute the violation. In some states, like California, if the federal government prosecutes, the state prosecutor is barred by state statute from prosecuting for the same criminal act.

Although most crimes committed on government reservations are also local or state violations, the federal courts have exclusive jurisdiction to try those matters because they were committed on government reservations. In order for a territorial area to be a government reservation, the land must have always been U.S. property, with the title still retained by the United States, or property acquired from a

LAW IN PRACTICE

FOUNDATIONAL CONCEPTS IN CRIMINAL PROCEDURE

As an introduction to the study of criminal procedure, the foundational concepts in criminal procedure listed below should be considered. These concepts will be explained in the text and are listed here to create an awareness of their existence.

- The guarantees of the Bill of Rights in the U.S. Constitution apply directly only to the federal government.
- The Due Process Clause of the Fourteenth Amendment, by selective incorporation, applies most of the rights contained in the Bill of Rights to the states.
- State constitutions may provide rights to citizens in addition to those provided for in the U.S. Constitution, but may not restrict the rights granted by the U.S. Constitution.
- The two questions regarding the burdens of proof in criminal proceeding are (1) Who has the burden of proving an issue? (2) What is the magnitude of the burden?

  The magnitude may be
  - proof beyond a reasonable doubt;
  - clear and convincing evidence; or
  - preponderance of the evidence.
- Formal charges in a criminal trial must first be formalized either by an indictment returned by a grand jury or by information prepared by a prosecutor.
- Prior to trial, both the prosecutor and the defense may submit pretrial motions, and both have discovery rights imposed on them.
- Our system of criminal procedure is based on the adversarial process.

Two famous quotes from Oliver Wendell Holmes should be noted:

- "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard."[16]
- "The life of the law has not been logic, it has been experience."[17]

Jurisdiction—as it relates to the administration of justice—refers to the right and the power of a particular court to try a case. It includes jurisdiction over the person and the subject matter of the issue to be tried. For example, inferior courts have jurisdiction, or the right, to hear misdemeanor matters. The superior or district court has jurisdiction, or the right, to hear felony cases. Jurisdiction is basic to the trial of a case, and it cannot be waived. It is a right of the court established by law.

The Interrelationship of the Criminal Justice System and the Criminal Justice Process

The System: Agencies of Crime Control	*The Process*
1. **Police**	1. Contact 2. Investigation 3. Arrest 4. Custody
2. **Prosecution and defense**	5. Complaint/charging 6. Grand jury/preliminary hearing 7. Arraignment 8. Bail/detention 9. Plea negotiations
3. **Court**	10. Adjudication 11. Disposition 12. Appeal/postconviction remedies
4. **Corrections**	13. Correction 14. Release 15. Post release

The Interrelationship of the Criminal Justice System and the Criminal Justice Process.

state for which all right and title was relinquished. Most military installations and national parks are government reservations; most post offices are not. Scattered throughout the United States are many national forests, but most of these are not government reservations, so that any crimes committed in these forests are within the jurisdiction of the local courts. However, any theft of the trees from these forests is a theft of government property, which would be a federal violation.

LAW IN PRACTICE

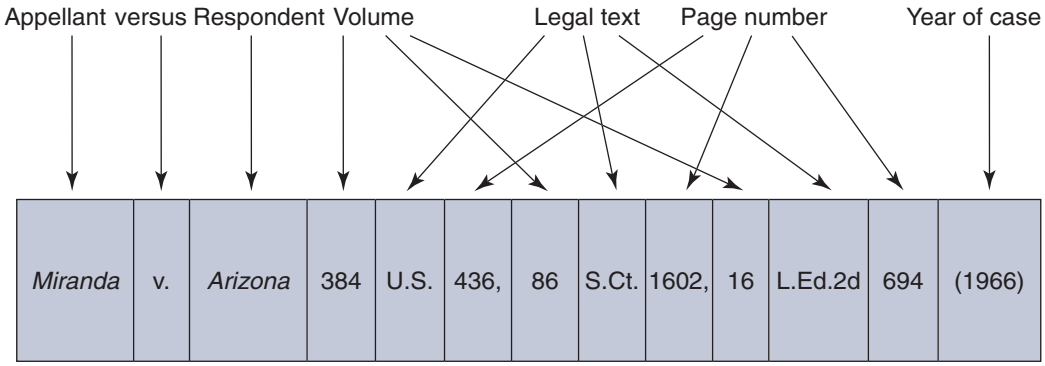
THE *MIRANDA* CITATION

The use of standard citation formats helps locate cases and statutes. For example, the full citation for the *Miranda* v. *Arizona* case is *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The lead name in the case usually refers to the party who lost in the lower court and is seeking to overturn that decision. That party is called the appellant. The second name refers to the other party (or parties) who won at the lower level (in this instance, the state of Arizona). The second party is called the appellee or the respondent. Miranda was seeking to overturn his conviction. The state of Arizona was named as the respondent because criminal prosecutions are brought in the name of the state.

After the names of the parties are three sets of references. All decisions of the U.S. Supreme Court are reported in the *Supreme Court Reports*, which is published by the U.S. Government Printing Office. It is the official reporting system and is abbreviated U.S. In addition, decisions of the Supreme Court are reported in two commercial reporting systems: the *Supreme Court Reporter*, which is abbreviated S.Ct., and *Lawyers Supreme Court Reports, Lawyers Edition*, which is abbreviated L.Ed.2d.

The numbers preceding the abbreviation for the volume refer to the volume number. Thus, *Miranda* can be found in volume number 384 of the *Supreme Court Reports*. The numbers after the abbreviation refer to the page number of the first page. Thus, the *Miranda* decision in volume 384 begins on page 436, in volume 86 of the *Supreme Court Reporter*, it is on page 1602, and so on.

LEGAL CITATIONS



LAW IN PRACTICE

MODEL PENAL CODE

The Model Penal Code (MPC) is not a statute, but a model code of laws recommended by Members of the American Law Institute (ALI). It has influenced many changes in state statutes since it was completed in 1962. The MPC was developed in an attempt to standardize and organize the often-fragmentary criminal codes enacted by the states.

(continued)

The MPC was organized into four parts: (1) general provisions containing definitional functions and presumptive rules; (2) definitions of specific offenses; (3) provisions governing treatment and correction; and (4) provisions governing the organization of corrections departments and divisions such as the divisions responsible for Parole or Probation. Many states have codified their criminal laws based on the MPC format.

Elements of the MPC have changed the way criminal law is administered in the United States. One example of this is on the issue of mens rea, meaning state of mind or guilty mind. Previous state criminal statutes took a scattershot approach to mens rea, requiring it for some crimes and not for others, and using multiple terms to measure culpability. The MPC stated simply that a person is not guilty of an offense unless he or she acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense. The MPC then defined the terms in a criminal law context, and what types of conduct would satisfy these terms. The clarity and simplicity of this approach resulted in many states replacing their codes with MPC-influenced codes. Even some states that have not adopted the language have used the MPC's model of organization as a starting point. The MPC's influence is also felt in the courts, where judges often rely on the code when handling substantive criminal law decisions.

▶ Criminal Law Administration

The primary state agency involved in criminal law administration in most states is the State Department of Justice or Office of Attorney General (Criminal Division). This department is usually composed of the State Attorney General and the Division of Law Enforcement. The typical goals of the department are to seek to control and eliminate organized crime in the State, to publish and distribute a compilation of the state laws relating to crimes and criminal law enforcement that are of general interest to peace officers, and other related functions.

State Attorney General

The chief law officer of most states is the attorney general. It is the attorney general's duty to see that all laws of the state are uniformly and adequately enforced. The attorney general, however, does not have direct supervision of district attorneys, sheriffs, and other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices. In most states, however, the attorney general may require any of the officers to make reports concerning the investigation, detection, prosecution, and punishment of crime within their jurisdiction.

The attorney general in most states may prosecute any violations of law of which a superior or district court has jurisdiction when he or she is of the opinion that the law is not being adequately enforced in any county. Also, when directed by the governor, the attorney general shall assist any district attorney in the discharge of the duties of the district attorney. If a district attorney is disqualified to conduct a criminal prosecution, the attorney general may appoint a special prosecutor.

District or State Attorneys

District attorneys are elected county or judicial district officers in most states. In a few states, they are appointed. They also are officers of the state. The district attorney is, in most cases, the public prosecutor. Duties of a district attorney in criminal matters normally include:

- Institutionalizing of proceeding before magistrates for the arrest of persons charged with or reasonably suspected of public offenses;

- presenting cases to the grand jury in those states that use grand juries for indictments; and
- conducting all prosecution for public offenses.

In a few states (Florida and Rhode Island, for example), there are state attorneys who are appointed rather than elected who perform those duties normally performed by the district attorney. In a few states, they are called county attorneys. In other states, there are both county attorneys and district attorneys, with the county attorneys involved mostly in misdemeanor cases.

PHOTO 1-4 Justice George Sutherland of the Supreme Court celebrated his seventy-fifth birthday on March 25, 1937. He was the fourth member of the Supreme Court to reach 75 years of age. Justice Sutherland is noted for his opinion in the case of *Berger* v. *United States* in which he discussed the role of a prosecutor in criminal courts. The *Berger* decision is discussed in the following section.

Photo courtesy of the U.S. Library of Congress Prints and Photographs Division Washington, D.C.

What Is the Primary Duty of a Prosecutor?

In *Berger* v. *United States*, 295 U.S. 78 (1935) Associate Supreme Court Justice Sutherland noted that the United States' prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court in respect of which no proof was offered; of pretending

to understand that a witness had said something which he had not said, and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner. Photo 4-1 is a picture of Justice Sutherland who delivered the court decision in the case of *Berger* v. *United States.*

The U.S. attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he (the prosecutor) is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffers. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Answer: The prosecutor's primary duty is not to prosecute but to promote justice.

National District Attorneys Association

For readers who are interested in learning more about the functions and duties of a prosecutor or those who are considering a career in prosecution, you should research the Web site of the National District Attorneys Association. This site can be reached by doing a Web search on NDAA. At their Web site you will discover many free downloadable publications on various functions of a prosecutor including the National District Attorneys Association's National Prosecution Standards Third Edition with Revised Commentary. The Standards is a 90-page document that describes in detail the numerous duties of a prosecutor and contains guidelines for many issues involving prosecutors.

How Would You Rule?

Jerry Hall kidnaps Ruth in Washington, D.C., and takes her to Virginia. While in Virginia, he rapes her several times. Then he takes her to Maryland and drops her at a roadside park. In which jurisdictions may he be prosecuted? Will he be prosecuted in state or federal courts? [The answers are located after review questions.]

Judicial Definitions

This section contains some key definitions used in the judicial system.

Aggravation or circumstances in aggravation. Facts that tend to justify the imposition of the more severe punishment.

Civil contempt. Willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule, or command that by its nature is still capable of being complied with.

Complaint. A written statement made upon oath before a judge, magistrate, or official authorized by law to issue warrants of arrest, setting forth essential facts constituting an offense and alleging that the defendant committed the offense.

Constructive contempt. Any criminal or civil contempt other than direct contempt. (*See* Direct contempt.)

Criminal contempt. Either:

- Misconduct of any person that obstructs the administration of justice and that is committed either in the court's presence or so near thereto as to interrupt, disturb, or hinder its proceedings; or
- Willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, or command, where the dominant purpose of the contempt proceeding is to punish the contemptor.

Curtilage of a dwelling-house. A space, necessary and convenient and habitually used for family purposes and the carrying on of domestic employments. It includes the garden, if there is one, and it need not be separated from other lands by a fence.

Determination of guilt. A verdict of guilty by a jury, a finding of guilty by a court following a nonjury trial, or the acceptance by the court of a plea of guilty.

Direct contempt. Disorderly or insolent behavior or other misconduct committed in open court, in the presence of the judge, that disturbs the court's business, where all of the essential elements of the

misconduct occur in the presence of the court and are actually observed by the court, and where immediate action is essential to prevent diminution of the court's dignity and authority before the public.

Duplicate. A counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Evidence relating to past sexual behavior. Such a term includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, and general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards and opinion of character for those traits.

Evidentiary hearing. A hearing held by the trial court to resolve contested factual issues.

Harmless error. Any error, defect, irregularity, or variance that does not affect substantial rights shall be disregarded.

Hearsay. A statement, other than one made by the declarant (person who makes the statement) while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Indictment. A written statement charging the defendant or defendants named therein with the commission of an indictable offense, presented to the court by a grand jury, endorsed "A True Bill," and signed by the foreman. The term indictment includes presentment.

Indigent. A person who is financially unable to pay for his or her defense.

Information. A written statement charging the defendant or defendants named therein with the commission of an indictable offense, made on oath, signed, and presented to the court by the district attorney without action by a grand jury.

Judgment. The adjudication of the court based upon a plea of guilty by the defendant, upon the verdict of the jury, or upon its own finding following a nonjury trial, that the defendant is guilty or not guilty.

Law enforcement officer and officer. Any person vested by law with a duty to maintain public order or to make arrests for offenses.

Magistrate. Includes magistrates, district judges, superior court judges, and any other judicial officer authorized by law to conduct a preliminary examination of a person accused of a crime or issue a warrant.

Mentally incompetent. Unable to stand trial or to be sentenced for an offense if the defendant lacks sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant.

Mitigation or circumstances in mitigation. Facts that tend to justify the imposition of a lesser punishment.

Order to show cause. An order in response to a habeas corpus petition directing the respondent (warden) to file a return. The order to show cause is issued if the petitioner (prisoner) has made a prima facie showing that he or she is entitled to relief; it does not grant the relief requested. An order to show cause may also be referred to as "granting the writ."

Original. In regard to a writing or recording, the writing or recording itself or any counterpart intended to produce the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print form. If data are stored in a computer or a similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

Plain error. Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the court.

Reasonable cause to believe. A basis for belief in the existence of facts that, in view of the circumstances under and purposes for which the standard is applied, is substantial, objective, and sufficient to satisfy applicable constitutional requirements.

Reasonable suspicion. A suspicion based on facts or circumstances that of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but that give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Release on own recognizance. Release of a defendant without bail upon his or her promise to appear at all appropriate times, sometimes referred to as personal recognizance.

Relevant evidence. Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Return. The law enforcement officer executing an arrest warrant shall endorse thereon the manner and date of execution, shall subscribe his name, and shall return the arrest warrant to the clerk of the court specified in the arrest warrant.

Search. Any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or the state.

Search warrant. A written order, in the name of the state or municipality, signed by a judge or magistrate authorized by law to issue search warrants, directed to any law enforcement officer as defined by Rule 1.4(p), commanding him or her to search for personal property and, if found, to bring it before the issuing judge or magistrate.

Seizure. The taking of any person or thing or the obtaining of information by an officer pursuant to a search or under other color of authority.

Spousal privilege. A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse. The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed. There is no privilege under this rule in a proceeding in which one spouse is charged with a crime against the other person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of them.

Subpoenas. Orders issued by the clerk of the court in which a criminal proceeding is pending at any time for such witnesses as any party may require for attendance at trial and at hearings, for taking depositions, or for any other lawful purpose.

Summons. An order issued by a judicial officer or, pursuant to the authorization of a judicial officer, by the clerk of a court, requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time.

Verdict. In criminal proceedings, the decision of the jury in a jury trial or of a judge in a nonjury trial.

Victim. A person against whom a criminal offense has allegedly been committed, or the spouse, parent, lawful representative, or child of someone killed or incapacitated by the alleged criminal offense, except where the spouse, parent, lawful representative, or child is also the accused.

Voir dire. The preliminary examination of a potential juror to determine qualifications to serve as a juror; preliminary examination of a witness to determine his or her competency to speak the truth.

Waiver of error. No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof or to the submission or the failure to submit a form of verdict unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of his or her objection.

Work product. Discovery cannot be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecutor, members of the prosecutor's legal or investigative staff or law enforcement officers, or of defense counsel or defense counsel's legal or investigative staff.

Writ. A formal written order issued by a court commanding an individual or party identified in the order to do, or abstain from doing, some specified act.

Summary

- The law is merely a guideline for human behavior.
- The study of our justice system should be viewed as a cluster of ideas, principles, and values about which reasonable persons can and do disagree.
- Judicial opinions construe the constitutionality, meaning, and effect of constitutional and statutory provisions.
- Most individuals agree that the most basic goal of the criminal justice system is to protect society from crime.
- Criminal justice professionals are generally oriented toward one of two opposite goals—law and order or individual rights.
- The pragmatic goals include the goal of preventing crime.
- Organizations have developed standards, which are detailed goals for improving the system.
- Although the criminal justice system is referred to as a system, it is more accurate to refer to it as a nonsystem.
- Two important questions regarding the burden of proof in criminal proceedings are: Who has the burden of proving an issue? What is the magnitude of the burden?
- Most of our criminal law concepts and principles originated in the common law of England.
- Today, the criminal laws of the states are largely the result of legislative action.
- The court system in the United States is based upon the principle of federalism.
- A dual system of state and federal courts exists today.
- Appellate jurisdiction is reserved for courts that hear appeals from both limited and general jurisdiction courts. In many states, the appeals from minor courts are heard de novo.
- The Judiciary Act of 1789 created the U.S. Supreme Court and established district and circuit courts of appeal.
- Venue is the geographic area in which a case may be heard.
- Jurisdiction is the power of a court to hear and determine an issue.

Review Questions

1. Why are laws necessary?
2. Define common law.
3. The U.S. Bill of Rights is what part of what document?
4. What portions of the Bill of Rights are of particular significance to the administration of justice?
5. What amendment makes the Bill of Rights applicable to the states?
6. Define venue.
7. Define jurisdiction.
8. How do jurisdiction and venue differ from each other?

Answers to "How Would You Rule?"

1. By taking her across state lines, Jerry can be tried in a federal court because it is a violation of federal law to take a person across state lines for an illegal purpose.
2. Since the District has a kidnap statute, he can also be tried in the local courts of Washington, D.C., for the kidnapping. Since he continued the kidnapping by taking her to Virginia and Maryland, he may also be tried in a state court in Virginia for violating the Commonwealth of Virginia's kidnapping statute. In addition, he may be tried in a state court in Maryland for violation of the Maryland kidnapping statute.
3. Because he raped her in Virginia, he may be tried in a state court in Virginia for the rape. Under certain circumstances, he may be tried in the state court in Maryland and the local court in Washington according to the local

statutes and a determination that the crime of rape was one continuing plan when she was kidnapped.

I am positive that a creative prosecutor could come up with other charging situations.

Note: He may be prosecuted in all the jurisdictions without a violation of the double jeopardy clause because in each case he would be tried by a different jurisdiction for violations of different crimes. For example, in Virginia, he would be tried in state court for the Commonwealth's statute on kidnapping; whereas in the Washington, he would be tried for Washington's statute for kidnapping.

Local Procedure

Since judicial procedure differs slightly from state to state, the reader may wish to consult the local prosecuting attorney for the procedure within his or her state.

1. By what names are trial courts known in your state?
2. What are the trial jurisdictions of the trial courts in your state?
3. What are the required qualifications of the trial judges in your state that preside over major criminal courts?

Endnotes

1. *Frank* v. *Mangum*, 237 N.S. 309, 347 (1914).
2. *The Common Law* (1881) 1.
3. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).
4. *Malloy* v. *Hogan*, 378 U.S. 1 (1964).
5. *Benton* v. *Maryland*, 95 U.S. 784 (1969).
6. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).
7. *Kloper* v. *N.C.*, 386 U.S. 335 (196).
8. In re *Oliver*, 330 U.S. 257 (1942).
9. *Pointer* v. *Texas*, 380 U.S. 400 (1965).
10. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).
11. Portions of this section have been adapted from Harvey Wallace, "The Roles of Federal and State Law: The Judicial System and Victims of Crime" in *The National Victim Assistance Academy Text* (Washington, D.C.: OVC), 2001.
12. Robert D. Pursley, *Introduction to Criminal Justice*, 6th ed. (New York: Macmillan), 1994.
13. 437 U.S. 328 (1976).
14. *The Supreme Court of the United States* (Washington, D.C.: Government Printing Office), 2001.
15. 1 Cranh 137 (1803).
16. *Frank* v. *Mangum*, 237 N.S. 309, 347 (1914).
17. *The Common Law* (1881) 1.

KEY TERMS

Abandonment
Exclusionary rule
Expectation of privacy zone
Fruits of the Poisonous Tree Doctrine
Independent state grounds
Magistrate
Open fields
Plain View Doctrine
Probable cause
Search

Takashi Honoma/123RF

2 Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

—Fourth Amendment of the U.S. Constitution (1791)

CHAPTER OUTLINE

LEARNING OBJECTIVES

After completing this chapter, you should be able to:

1. *Explain the requirements for obtaining a search warrant.*
2. *Outline the history, purpose, and essential elements of the Fourth Amendment.*
3. *Summarize the Fourth Amendment's expectation of privacy.*
4. *Explain the concept of probable cause and its implications.*
5. *Summarize the exclusionary rule and the issues associated with it.*

History and Purpose of the Fourth Amendment

From a criminal procedure perspective, the Fourth and Fifth Amendments contain the most important language in existence within the U.S. legal structure. It must be stressed that not all searches are prohibited, but only those that are unreasonable. The issues surrounding searches and seizures can become quite complex, and many times students or even professionals in the field lose sight of the rationale and reasons for the Fourth Amendment. Asking the following questions any time that a **search** or seizure situation arises will assist in analyzing this complex area of constitutional law:

1. **Does the Fourth Amendment apply?** If it does not apply, the question of reasonableness and warrants and probable cause are irrelevant. For example, as will be discussed later in this chapter, there are certain situations, such as evidence found in open fields, that can be seized because the Fourth Amendment does not apply to property found in open fields.
2. **If the Fourth Amendment does apply, has it been complied with?** If all the requirements have been satisfied, then any evidence will be admitted. If it has not been complied with, go to question 3.
3. **If the Fourth Amendment does apply and has not been complied with, what sanctions will the court impose on any evidence seized in violation of the amendment?** The court has a range of options available to it if it determines that the officers or agents have violated the Fourth Amendment.
4. **Are there exceptions to the Warrant requirement under the Fourth Amendment that will apply in this case?**

These are simple questions and a seemingly simple approach to the concepts of search and seizure but using this approach will enable students to focus on the correct issues within this area of criminal procedure.

When the U.S. Constitution was being drafted and considered by our forefathers, very little, if any, thought was given to including a declaration of rights for individual citizens. At that time, the original state constitutions contained language that purported to protect individuals from undue oppression by the government. However, the ratification process produced a movement to include amendments in the form of a Bill of Rights, which would address individual rights and restrict government action in the criminal justice process. The drafters of the U.S. Constitution and the Bill of Rights were influenced by a number of factors, including our English heritage, the misuse of the criminal justice process within the colonies during English rule, and a belief in the limited role of government.[1] Thus, the Fourth Amendment was based upon a distrust of government and a desire to prevent arbitrary actions by that government or its agents in personal areas, such as the unreasonable seizure of persons, property, or other items without proper justification.

However, before the rights that are guaranteed in the Bill of Rights could have an impact on individuals within the criminal justice system, two critical events would have to occur: First, since most criminal prosecutions take place at the local or state level, the U.S. Supreme Court would have to make the Bill of Rights apply to local criminal justice procedures; and second, the Court would have to interpret those rights and the way that they impact local government and individual citizens. As will be seen later in this chapter, both of those events would occur, with the result that individuals are protected from invasive governmental action.

The Fourth Amendment deals with the "seizures" of both persons and property. To properly understand its scope and ramifications within the criminal justice

1. The right of the people to be secure in their
   a. persons,
   b. houses,
   c. papers,
   d. and effects
   against unreasonable searches and seizures, shall not be violated, and
2. No warrants shall issue, but
   a. upon probable cause
   b. supported by oath or affirmation and
3. Particularly describing the
   a. place to be searched
   b. and the persons or things to be seized.

FIGURE 2-1 Fourth Amendment Diagrammed.

Source: U.S. Constitution, Fourth Amendment (designations added)

system, we should examine a concept known as the exclusionary rule. Figure 2-1 ■ is a diagrammed breakdown of the Fourth Amendment to the U.S. Constitution.

▶ Protected Areas and Interests

Exactly what interest is protected by the Fourth Amendment? The language in the Amendment states that persons, houses, papers, and effects shall be protected or secure against unreasonable searches. Does that mean that a person can carry a bomb on an airplane without being searched? Can a person commit a crime inside his or her home and be secure against a search? The courts have established a "zone of constitutional protection" that surrounds a person and moves with that person wherever he or she travels.

LAW IN PRACTICE

***SANCHEZ-LLAMAS* V. *OREGON*, 548 U.S. 331 (2006)**

The defendant, a Mexican national, argued that his incriminating statements to police in an attempted murder case should have been suppressed, as he was not informed of his right under Vienna Convention art. 36 to have the Mexican Consulate notified of his detention.

How Would You Rule?

The Vienna Convention on Consular Relations does not prescribe specific remedies for violations of Vienna Convention art. 36. Rather, it expressly leaves the implementation of Vienna Convention art. 36 to domestic law: Rights under Vienna Convention art. 36 are to be exercised in conformity with the laws and regulations of the receiving state. The exclusionary rule as it is known is an entirely American legal creation. The exclusionary rule is unique to American jurisprudence. More than forty years after the drafting of the Vienna Convention on Consular Relations, the automatic exclusionary rule applied in American courts is still universally rejected by other countries. It is implausible that other signatories to the Vienna Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law. Under the United States' domestic law, the exclusionary rule is not a remedy that is applied lightly. The rule's "costly toll" upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule. Because the rule's social costs are considerable, suppression is warranted only where the rule's remedial objectives are thought most efficaciously served. [The Supreme Court ruled that exclusion of the evidence was not appropriate.]