Andrews University
Seventh-day Adventist Theological Seminary
Doctor of Ministry Program

RLED 757 Family Law and Public Policy
Summer 2010 3 Credits
2007 Family Ministries Concentration Cohort

Instructors:

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Teaching Intensive Dates:

July 11-16, 2010
Sunday: 7-9:00 pm and Mon-Fri: 8:00 am – 5:30 pm

Location:

Chan Shun Hall Room 208
[adjacent to Seventh-day Adventist Theological Seminary]

Course Module Description

This module is an introduction to legal and social problems affecting families. We will examine how family law and public policies relate to and interface with social services for children and families. Participants will develop sensitivity to the legal and social aspects of particular family challenges which church members may encounter and develop a model plan for local church response.

Course Module Content

The description of content for this module is not meant to represent the learning design and does not constitute a contract for the content. Time constraints will not allow for in-depth coverage or discussion of all topics.

Family Ministry Concentration Competencies

The DMin Family Ministry concentration seeks to create competency in four areas related to the discipline:

1. *Family Life Education:* to help participants acquire knowledge of current issues and empirical findings related to the field of family life education.
2. *Spiritual, Theological, and Personal Formation:* to reflect theologically on the lived experience of families, to help participants integrate their spiritual and theological perspectives into the practice of ministry. To help participants become aware of their strengths and limitations (background, emotional state) and to realize the impact self-awareness and self-understanding may have on ministry.
3. *Research and Praxis:* to help participants learn and acquire basic research skills pertinent to their practice in the field of family life education and family ministry within the context of church and community. Based on the current research develop and deploy a relevant, field-based project intentionally addressing family ministry in the local context.
4. *Professional:* to help participants gain knowledge of the professional field including family life education, family ministry constructs, family law and public policy. To help participants acquire ministry skills pertinent to their practice in the field of family life education within the context of ministry.

Competencies Germane to RLED757

1. Basic understanding of the legal concepts, terminology, practices and procedures of the community in which participants function relative to divorce and separation, juvenile justice, elder law, abuse and neglect, mental competency, criminal law, adoption and non-traditional family issues. Ability to identify family problems likely to be affected by the legal system and appropriately assess need for consultation with appropriate legal professionals and community resources.

2. Demonstrated ability to access, interface, and partner with community governmental/social resources and programs, including those not associated with the SDA church, to meet the needs of constituents confronted by various legal challenges.

3. Demonstrated ability to formulate a comprehensive and practical strategy for local church response to assist members encountering legal/social problems. Such strategies will integrate the goals and objectives of the church, with the goals and availability of community agencies, in light of contemporary cultural and religious influences.

4. Ability to recognize and analyze the influence of one's own personality, life experiences, identity, education, biases, religious training, culture, and race when assisting church members grappling with legal or social challenges.

The Cohort

This course module is open to members of this cohort who take the sequence of modules and courses together as listed in the program description. Cohort members will meet in groups between intensives and pursue projects that advance their competencies.

See the Doctor of Ministry program planner at www.doctorofministry.com for possible adjustments to the date and locations of future teaching intensives.

Course Requirements

Pre-Intensive

1. *Texts and Discussion Questions.* Read the following books and submit a statement that you have read the required books. Develop two discussion questions from each chapter that capture the salient points. Provide substantive and thoughtful answers for each question.

    a. Zimmerman, Shirley L. (2001) *Family Policy: Constructed Solutions to Family Problems.* Thousand Oaks, CA: Sage Publications.

    b. Tesler, Pauline and Thompson, Peggy (2006) *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life.* New York: HarperCollins Publishers.

2. *Text and Reflective Paper.* Read Cairns, Moira (2003) *Transitions in Dying and Bereavement: A psychosocial guide for Hospice and Palliative Care.* Portland, OR: Thompson, Wainwright and Victoria Hospice Society and write a reflective paper (5-7 pages) addressing:

   a. How will you, as a pastor, assess and address the legal and social context that families and individuals bring to their final journey toward death or bring to their adjustment to living with a life-threatening illness. The social context includes a person's hopes, fears, lifetime experiences, ways of coping with stress, family situation, age, career, financial situation, relationship to the church, social support, etc.

   b. The legal and social context that you, as a pastor, bring to your work with families who are dealing with a dying loved one and the many decisions they face in assisting a loved one with life's final journey. Discuss your strengths, potential areas for growth, fears, hopes, education.

   c. How you define your role within an interdisciplinary team that is formed to assist an individual and family who is dying. This team may include, but is not limited to, physicians, nurses, caregivers, social workers, spiritual advisors, lawyers, family members, and friends.

   Books can be purchased in any manner convenient to the participant; they are often less expensive through online outlets, especially if purchased used through the Amazon online book store.

3. *Divorced Couples Interviews.* Identify two couples with children who divorced within the last 5 years. The four individuals comprising the couples must have been active members of an SDA church at the time of separation. Two of the four individuals must have remained in the church and two must have left the church following the divorce. Conduct personal, one-on-one interviews with each member of each couple individually (four separate interviews). Assess the following for each person and prepare a substantive summary:

   a. How long has s/he been divorced, how old were the children at the time of divorce, is s/he remarried?

   b. How does s/he view the response received from the church? (E.g., did s/he feel support, grace and non-judgmental love? Did s/he feel shunned, judged, diminished?) Note: if individual removed him or herself from the church in the early stages of the divorce process, ferret out why s/he did so; what response was s/he anticipating that may have led to that decision?

   c. At the time of the divorce, did s/he believe that the church pastor or membership felt it important to determine which spouse was at fault in the divorce?

d. How would s/he describe the current level of emotional health of the children? How would s/he describe the current level of spiritual health of the children?

e. Why did s/he remain a member of, or not remain a member of, the SDA church following the divorce? If no longer a member of the SDA church, is s/he a part of another worship community?

f. How would s/he describe his or her own emotional health? Spiritual health?

g. What assistance did s/he receive from the church at the time of the divorce? (E.g., marriage counseling, divorce adjustment counseling, support groups for spouses, support groups for children, referrals to appropriate professionals such as psychologists, lawyers, etc., practical assistance such as child care, attendance at hearings, etc.)

h. What did s/he find most meaningful in terms of the church's response to the divorce? What did s/he find most disappointing or hurtful?

i. What were your own personal thoughts and reactions as you got to know this person and listened to his or her story?

4. *Criminal Law and the Pastor* . Read both pre-intensive journal articles [see appendix a]. Identify in your community a minimum of five events which may bring a family into direct contact with the criminal justice system (e.g., domestic violence, juvenile delinquency, sexual abuse, drugs). Identify and assess the range of options for clergy to optimally assist families encountering the criminal justice system (e.g., pure passive support, active advocacy in the system, attempts to mediate by contacting victim's family and seeking extra-judicial resolution, identifying non-traditional organizations such as community services, restorative justice programs, etc. which may function in lieu of incarceration).

   For this project, you may wish to interview several of the following professionals: probation officer, prosecuting attorney, domestic violence advocate, criminal defense lawyer, domestic violence victim, restorative justice program director, anger management program director, peer mediation program director, etc. Write a paper assessing the various roles a pastor might perform when a member or his or her church is charged with a crime and how a pastor should determine when each role would be appropriate or inappropriate. Consider the question of when incarceration might be appropriate and when fines or community service is appropriate.

5. *Optional Credit* . Not required but for extra credit, locate and attend the play *Late Nite Catechism.* It is playing in Chicago, California, Pennsylvania, Texas, Seattle and Scottsdale. For Chicago performances, go to http://latenitecatechism.info.

   Alternatively, rent and view the movie, *Yentl*, starring Barbra Streisand.

   Journal your thoughts and reactions as you watched and thought about the play or movie as it relates to your work as a pastor with families in legal or social turmoil.

The Intensive

1. Class Attendance: "Whenever the number of absences exceeds 10% for graduate classes of the total course appointments, the teacher may give a failing grade…The class work missed may be made up only if the teacher allows. Three tardies are equal to one absence." *Andrews University Bulletin.*

2. Participation in class discussion, group activities, and field experiences is expected.

3. Participants should include in Ministry Development Plans knowledge and competency in Family Law and Public Policy as a result of this class.

4. Field experiences are planned for Monday morning and Tuesday afternoon. Times are subject to change.

Post Intensive

1. *Church Response Plan.* Develop a model comprehensive Church Response Plan ("CRP") for your home church's use in responding to various legal and social problems which congregants might encounter. The CRP must include *at a minimum* the following:

   a. List of attorneys to whom you could comfortably refer congregants. The list will include two attorneys from each area of the law potentially implicated in various legal challenges a congregant might encounter. At least one attorney in each area of the law must be a non-SDA. The members of your group must have each met personally with at least two of the lawyers on the list (if there are 5 members of your group, there will have been 10+ individual and personal meetings with lawyers. You may or may not be comfortable with the first

attorney with whom you meet and that person would not make it onto your list; thus, more than two individual meetings may be necessary.)

b. Comprehensive community resource list identifying organizations in your community that provide social services relevant to various legal issues.

c. List of services and assistance available in your home church.

d. List of relevant support groups for adults and children available in the community with description of each and contact information.

e. List of education classes available in the community, such as anger management, divorce adjustment, parenting skills, etc.

f. List of qualified, experienced mental health professionals, providing professional degree, area of concentration and contact information.

g. List of resources available via the internet, with descriptions and links to each.

The above list is by no means exhaustive. It is anticipated that several communities may be represented in your work group. You will need to discuss how you each will contribute to the model plan; you may consider each member providing a portion of each component of the model plan based on what's available in your respective communities.

2. *Case Study*. Utilizing your CRP, analyze the case study provided during the intensive and identify how you would respond to each issue presented by the case study. Write a description of options available for responding to each issue and how you would determine the most appropriate approach

3. *Volunteer Experience.* Contribute ten hours of volunteer time at an agency or agencies providing legal or social services in your community. Because part of the goal of this course is to become familiar with community resources, the agency may not be associated with the SDA church. There should be a representative sampling of types of agencies among your work group so you will need to coordinate with one another.

   Options include area agency on aging, victim witness programs, juvenile delinquency programs, community mediation centers, restorative justice programs, CASA (child abuse special advocate), child abuse assessment centers, hospice volunteer, child protective services, to name only a few.

Submit a written summary of the organization(s) for whom you volunteered, the services provided by the agency, your experience in volunteering, and why you will or will not include the agency or agencies as a resource in a CRP which you might develop for your own local church.

4. *Journal Reflections*. Reflect upon your own **personal and professional** growth with respect to the various topic areas addressed in this class. Use journaling to make sense of and incorporate the materials presented in this class with your personal sense of identity, education, biases, religious training, culture, racial background and life experiences. Address how the materials and field experiences broadened your professional and personal outlook. What areas will you continue to pursue growth and development?

Assessment

1. *Written Work Policy .The Andrews University Standards for Written Work, 11th Edition* (or more recent edition) will provide the standards for all written work [http://www.andrews.edu/sem/dmin/project/written_work/index.html]. Assignments will be in APA Style, typed, double-spaced, using 12-pt font and 1 inch margins.

2. *Elements of Grade and Points*

Discussion questions from required reading—	
38 from Zimmerman @ 3 points each	114 points
20 from Tesler @ 3 points each	60 points
Reflective paper on Cairns	66 points
Interview summaries 4 @ 30 points each	120 points
Criminal Law & The Pastor paper	100 points
Field Experiences 1 page summary 2 @ 25 points ea	50 points
Post-Intensive Project—CRP	300 points
Case Study	100 points
Volunteer Experience	50 points
Journal	40 points
TOTA	**1000 points**

Optional extra credit-play or movie 10 points

3. *Grade Percentages*

96 - 100% - A
93 - 95% - A-
90 - 92% - B+
85 - 89% - B
82 - 84% - B-
79 - 81% - C+
75 - 78% - C
72 - 74% - C-

4. *Deadlines* . Assignment submission deadlines will be applied as follows:

Assignment due date:	(possible A grade)
Late up to 30 days:	(no more than A- grade)
Late 31 to 60 days:	(no more than B+ grade)
Late 61 to 90 days:	(no more than B grade)*
Late 91 days or more:	(DN deferred and not completable)

The grade of DG (deferred grade) will be given until the due date.

Reading reports and reading journals for pre-intensive books are due the first session of the teaching intensive, July 11, 2010. If submitted late, the work will be discounted 10%.

The remaining assignments are due October 15, 2010 by 5:00 p.m. EST. They should be submitted in both hard copy (1) and emailed to the lead teacher in one bundled mailing. Hard copy should be mailed to the lead instructor at 4265 Niles Road, St. Joseph, MI 49085. Always retain a copy for your records.

* Graduation requires a 3.0 or better program GPA. Students who receive a DN must seek permission from the DMin office to restart with another cohort and seek a new program time limit. Such requests are considered by the DMin program committee and not guaranteed. No tuition refunds are considered.

The Doctor of Ministry program requires 60 hours of study for each semester credit. This course is three credits, so the entire course module is to require 180 hours.

Assessment

Assessment is accomplished by evaluating participation and assignments around the outcomes of the concentration. The chart below describes the process of judging the integration of those outcomes. Distinctions become vague when the contribution of all experience to the cyclical process of true learning in the areas of being, knowing, and doing are considered.

Competency	Learning Resources	Assessment
Family Life Education: to help participants acquire knowledge of current issues and empirical findings related to the field of family life education.	Pre and post-intensive reading; intensive presentations	Pre/ post intensive reading & journaling reports; journaling & topical presentation in intensive
Spiritual, Theological, and Personal Formation: to reflect theologically on the lived experience of families, to help participants integrate their spiritual and theological perspectives into the practice of ministry. To help participants become aware of their strengths and limitations (background, emotional state) and to realize the impact self-awareness and self-understanding may have on ministry.	Class discussions; group activities; the Ministry Development Plan; journaling the literature	Daily journaling prior, during, and following the intensive
Professional: to help participants gain knowledge of the professional field including family life education, family ministry constructs, family law and public policy. To help participants acquire ministry skills pertinent to their practice in the field of family life education within the context of ministry.	Peer group participation; mentoring relationships	Develop a research-based intervention plan focusing on family issues that could be implemented in an agency or your local church.

Academic Integrity

Academic integrity is treated seriously at Andrews University. From the *Andrews University Bulletin:*

> In harmony with the mission statement, Andrews University expects that students will demonstrate the ability to think clearly for themselves and exhibit personal and moral integrity in every sphere of life. Thus, students are expected to display honesty in all academic matters (A list of behaviors that constitute academic dishonesty follows the above statement.).

You should pay particular attention to the matter of plagiarism. The following definition may help you to understand the various forms that plagiarism can take:

> Plagiarism means submitting work as your own that is someone else's. For example, copying material from a book or other source without acknowledging that the words or ideas are someone else's and not your own is plagiarism. If you copy an author's words exactly, treat the passage as a direct quotation and supply the appropriate citation. If you use someone else's ideas, even if you paraphrase the wording, appropriate credit should be given. You have committed plagiarism if you purchase a term paper or submit a paper as your own that you did not write.
> (Barbara G. Davis, *Tools for Teaching*, Jossey-Bass, 1993, p. 300)

Students who have studied in countries where plagiarism is not defined as stated in the above paragraph should acquaint themselves with academic standards in the United States. If you so desire, the instructor will assist you on an individual basis in understanding what constitutes plagiarism.

All course work turned in to the instructor, written and otherwise should be prepared by you alone, unless the instructor has given a specific group project requiring team/group work.

Interpersonal Integrity

In accordance with the *Andrews University Bulletin*, all conduct between students and between students and instructor/staff are to follow respectful classroom decorum, the highest ethical standards, and Christian etiquette. At the discretion of the instructor, disruptive or distracting behavior may result in point deductions from "Active Attendance," or excusing the student from class. Children and guests are not to attend class except by advance permission granted by the instructor. Consuming food and beverages in class is discouraged.

Note: Accommodations are made for disabilities. Students with diagnosed disabilities should request accommodation. If you qualify for accommodation under the American Disabilities Act, please contact the department chair as soon as possible for referral and assistance in arranging such accommodations.

Appendix A:

Pre-Intensive Journal Articles

CRIMINAL JUSTICE SYSTEM

1. OVERVIEW

Introduction

The criminal justice system may be considered from at least three perspectives. First, it can be considered a normative system, that is, a body of legal rules expressing social values through prohibitions backed by penal sanctions against conduct viewed as seriously wrong or harmful. Second, the criminal justice system can be regarded as an administrative system. This view comprehends the official apparatus for enforcing the criminal law, including the police and other front-line enforcement agencies, prosecutorial authorities, the judiciary, and penal and correctional facilities and services. A third view of criminal justice is that of a social system. In this perspective, defining and responding to criminal conduct involves all elements of society. This definition of criminal conduct includes not only the penal law enacted by the legislature but also the way in which these provisions are interpreted by the citizenry at all levels. For example, if particular communities do not regard simple assaults taking place within the family as fully criminal, those communities are unlikely to summon the police when one family member beats up another. So also, prosecutors generally do not pursue white-collar crime with the same intensity as they pursue violent crime, even if the actual harms are comparable, because the constituencies to which prosecutors generally respond are more concerned with violent crime. By taking into account such societal views of criminal behavior, it is possible to explain many apparent anomalies in the administration of criminal justice, for example, why many criminal provisions are in some degree "dead letters." Another example is the phenomenon of "acquittal of the guilty," that is, the fact that juries and judges often return findings of not guilty of accused persons with respect to whom the proof of technical guilt is clear and uncontroverted.

These three aspects of the criminal justice system may be integrated in examining particular phases of criminal justice and in interpreting the system as a whole. Hence, the arrest and prosecution of an offender for theft can be considered simultaneously as a manifestation of a legislative prohibition against knowingly taking another's property, as a response by the police, prosecutor, judiciary, and penal-correctional system to conduct that appears to be criminal, and as a community interpretation of the behavior in question. Criminal justice as a whole results from the interaction between legal rules, administrative practice, and societal attitudes and behavior.

Some caution is required in using the term *system* to refer to the myriad complexities contained in this framework. The term may imply a series of transactions that are arranged in a rational and efficient way to produce specified results within more or less consciously perceived constraints. The criminal justice system does indeed have a substantial degree of coherence in this sense. Thus, in the law of crimes itself the penalties for deliberate homicide are much more severe than the penalties for assault. This differential is rationally coherent if one assumes that the underlying value is protection of human life and that an attack resulting in death is a more serious impairment of that value than an attack which leaves the victim alive. Similarly, it is rational that adjudication of guilt by the court system should follow *after* investigation of an offense by the police, if the underlying value is that guilt should be determined on the basis of a disinterested weighing of evidence and not upon predisposition.

Nevertheless, it must be recognized that the criminal justice system is pervaded by anomalies and discontinuities. For example, although law and public opinion attach high value to human life, as expressed in the penalties for willful homicide, measures to control the distribution of weapons, particularly handguns, are modest to the point of being virtually nominal. So also, great efforts are made to control industrial pollutants at the same time that subsidies are provided for the production of tobacco, even though cigarette smoke probably has worse immediate effects on health than any other pollutant. Still another example of discontinuity is the phenomenon of street drunks being arrested, jailed overnight, and then released in a never-ending cycle, rather than being handled in some nonpenal way. When full account is taken of such anomalies, the criminal justice process is a "system" in only a limited sense. Although a comprehensive view of criminal justice can be projected only in terms of some conceptual system, it is important to remember that concepts are merely constructs for interpreting profoundly ambiguous and endlessly complex social events.

In the following analysis, attention will focus on

the penal law as a normative system and on the police, the prosecutor, the judiciary, and the penal agencies as constituting an administrative system. The system of criminal procedural law and the larger social system that envelops the whole are considered only incidentally.

The penal law

Common law. Taken together, the legislative provisions defining crimes and prescribing punishments are usually referred to as the penal law, although they are also called the criminal law. The penal law in virtually all states in the United States is legislative in origin. That is, conduct is not criminally punishable unless it has been proscribed by statute.

The situation was not always thus. In the original common law, which began its development with the Norman domination of England after 1066, crimes and civil wrongs were not clearly distinguished. Moreover, there was no systematic body of criminal prohibitions. Rather, the original common-law offenses consisted of the use of force by the offender in violation of the King's peace and could result in both punitive and compensatory sanctions. It was the use of violence as such, rather than the particular consequences of a violent act, that constituted the wrong. From this foundation, the common law of crimes evolved over the course of centuries. Development took place through judicial decisions interpreting and elaborating the concept of violence into such specific categories as homicide, robbery, arson, and assault. In the later years of the common law's development, particularly from the sixteenth century onward, enactments of Parliament added specific crimes to the array of common-law offenses.

There was, however, no penal code or official systemization of the law of crimes. Commentaries by jurists, such as Matthew Hale's *History of the Pleas of the Crown* and the fourth volume of William Blackstone's *Commentaries on the Laws of England,* undertook to group the array of offenses, common-law and statutory, into coherent order according to the nature of the harm inflicted and the intensity and severity of the violation. The law of crimes thus unofficially systematized was nevertheless essentially common law, that is, the pronouncements of courts defining conduct that constituted a crime. In the colonization of British North America, the common law of crimes was received and applied. With the rupture of sovereignty in the colonies at the time of the American Revolution, however, a strong movement arose to establish all law, including the criminal law, on the foundation of legislative enactment. Initially, this took the form of legislative enactments that simply declared the common law, including the common law of crimes, to be in effect except as displaced by particular statutory provisions. However, the principle was established in many states that the definition of crimes was the province of the legislature and not of the courts.

Legislation. The period of social and political upheaval after the American and French revolutions engendered, among many other legal changes, a strong movement toward legislative codification of law, particularly the criminal law. Reform efforts aimed both to order and clarify the law and to ameliorate its severity, for in English law by 1800 more than one hundred different kinds of offenses were punishable by death. A leading reformer was Jeremy Bentham, whose utilitarianism afforded a coherent basis for ordering the law of crimes according to the principle of degrees of social harm. Many reform efforts were launched in the United States, paralleling and to some extent inspired by those of Bentham, as a result of which the law of crimes in many states was recast into more or less coherent penal codes. At least since the late nineteenth century, the criminal law has been expressed in a penal code in all but a few American jurisdictions.

Today the paradigm of penal legislation, both in substance and format, is the Model Penal Code, promulgated by the American Law Institute in 1962. The Code is a comprehensive reformulation of the principles of criminal liability that is drawn from previous codes, decisional law, and scholarly commentary. It has been substantially adopted in many states and is the preeminent source of guidance in revision and reform of substantive criminal law in the United States.

The Model Penal Code establishes a hierarchy of substantive criminal proscriptions and a corresponding hierarchy of social values. It can be considered as having two dimensions. The first consists of the principles of criminal liability; the second, of the definition of various specific crimes.

Principles of liability. The principles of liability express the fundamental notion that an individual is responsible for conforming his behavior to the standards prescribed in the criminal law. Quite different fundamental conceptions of criminal responsibility might be imagined. An individual could be considered responsible under the criminal law, and hence subject to condemnation and punishment, for causing any kind of substantial injury to another person, even for an accidental act on his own part. Some offenses actually are defined in this way, so that a violator is subject

to criminal penalties even though he did not intend the result or indeed made an effort to avoid it. A familiar example is that of parking violations, which are penalized without regard to the actor's intention and for the purpose of allocating the use of street parking. However, in American law, as in Western cultures generally, such strict liability under criminal law usually is limited to monetary penalties in various regulatory schemes governing business and financial transactions. Aside from these "regulatory" offenses—which in modern society are widespread—Anglo-American criminal law generally reflects the principle that criminal liability should depend on an intention to commit wrong, or at least an awareness that serious wrong will result from a course of action.

Closely related to the principle of intentionality is that of justification or excuse. The essential notion is that a serious harm to another is not criminally punishable if it resulted from conduct that was necessary to preserve some other equal or superior interest. The most obvious example is self-defense as a basis for avoiding liability for homicide or assault on another. Other defenses include protection of third persons, protection of property, and necessity in the carrying out of official responsibilities, for example, where a policeman uses physical force to subdue a person resisting arrest. The criminal law thus holds the individual responsible for the consequences of his intended acts, but it authorizes him in a limited way to exercise judgment to vindicate fundamental interests of social safety and order. However, popular sentiment—that is, the principles of criminal responsibility embedded in popular culture—is often more lenient. As a result, there is tension between the norms of responsibility expressed in the penal law and those shared by the ordinary citizenry. Where there is a serious discrepancy between the legal concept of responsibility and the common notions of responsibility, the result is often erratic enforcement. This tendency, in turn, compromises to some extent the legitimacy of the criminal law and therefore the legitimacy of the administration of criminal justice.

The principle of responsibility has a corollary concerning the effect of mental incapacity or immaturity on the individual's accountability. This aspect of the problem includes the endlessly debatable question of the "insanity defense." Fundamentally, the question is whether an individual under given circumstances "could but did not" control his behavior or "could not" control it. In extreme cases, everyone would recognize that a given individual is "really crazy"—that is, obviously demented. On the other hand, to excuse one who acted on the basis of impulse or passion would be to say that crimes consist only of wrongs that were definitely premeditated and committed without emotion. A society could function with a criminal law of this limited scope, relying on communal control, persuasion, and inhibition to protect its members. But our society is inhospitable to communal control, for individual autonomy holds a high place in our values. Our system therefore relies on a combination of self-control and criminal penalties for breach of self-control. The conflicting tendencies of this policy are perhaps most fully revealed in the dilemma as to how intense and how pervasive must a mental or emotional disorder be before it excuses an actor from criminal responsibility for inflicting serious harm on another.

For similar reasons, intense conflict attends the question of immaturity as a basis for limiting or precluding criminal responsibility. The notion that a youth is not fully responsible for his acts is the basis of the law governing juvenile offenders. The law provides that juveniles below a very young age are not criminally responsible at all, for example, a five-year-old who kills a playmate. Above that age but below the level of adulthood, a youthful offender is treated as responsible but with less severity than an adult under the same circumstances. The central issues are the definition of immaturity, particularly the age below which prosecution as an adult is not permitted, and the degree to which sanction against a youthful offender should emphasize rehabilitation rather than punishment. In popular terminology, this conflict presents itself as the question of whether a youthful offender is "a kid" or "a young thug." Such conflicting epithets reveal both the importance of the concept of responsibility in the criminal law and the difficulties of giving specific legal definition to the concept. A legally specified age of responsibility is, at the margin, necessarily arbitrary, and it also necessarily contradicts some segments of popular opinion.

Specific offenses. On the foundation of these basic concepts of criminal liability, the penal law defines specific offenses. The crimes established in the law are enormous in number and variety. There is a classical distinction between fundamentally or intrinsically criminal types of misbehavior, and misbehavior that is only formally criminal. This distinction is expressed in the terms *malum in se* and *malum prohibitum:* wrongs in themselves, and wrongs that are such only because they have been so declared. In this classification, homicide, assault, and theft are *mala in se*—acts that would be regarded as serious wrongs in any legal system in any culture. In contrast, the crime of driving on the wrong side of the street can be regarded as

malum prohibitum; with much less confidence the same can be said of the crimes of failing to conform to pollution control requirements and violating building and zoning codes. However, it is evident that many offenses in the latter category are designed to induce patterns of behavior that will in turn minimize risks of serious social harms. Traffic regulations are intended, among other things, to prevent death and injury from highway accidents, and pollution controls are intended to prevent the accretion of toxic substances to lethal or injurious levels. Although it is therefore possible loosely to classify criminal offenses as *mala in se* and *mala prohibita,* it is impossible to use such a distinction for refined classification.

Among serious crimes there is an ordering that reflects fundamental social values. At one time in Western cultures, treason headed the list of crimes. It may be inferred that this positioning expressed a strong sense of insecurity about the stability of government. In modern society the state is relatively stable except under extraordinary circumstances of turmoil or revolution, and the penal law of the modern state characteristically places homicide at the head of the list of crimes. Such is the arrangement of the Model Penal Code, which begins with homicide and then proceeds to other offenses against the person: assault, including threat of assault; kidnapping; and sexual offenses, including rape, sexual molestation of minors, and related offenses. The next general category encompasses offenses against property, including arson, burglary, robbery, various forms of theft, and forgery and other frauds committed by manipulation of documents. A third general category is that of offenses against public administration, including bribery and corruption, perjury, obstruction of justice, and abuse of office. There is also a category of offenses against the family, including incest and abortion. These offenses perhaps could better have been classified as offenses against the person, but they can be viewed as addressed to the protection of the family as a social institution. Finally comes the category of offenses against public order, such as riot, disorderly conduct, and violation of privacy. Within each category there are comparable gradations. Thus, the provisions dealing with homicide begin with willful murder and end with negligent homicide, and the offenses against property begin with arson, burglary, and robbery, all of which involve an element of threat to human safety, and proceed to simple theft of various forms, where that element is absent.

This classification expresses a system of values in which individual human life stands highest and public decorum stands relatively low. A rather different hierarchy of values can be conceived. Preservation of decorum, for example, could be given far greater relative weight. Some differences in value are conspicuous. American penal law places high value on human life as compared with protection from fraud; accordingly, the fact that an attacker has previously been defrauded by the person assaulted is not a justification for an assault. However, a penal code would be intelligible which provided that assault is excusable in these circumstances, since it would thus express a high societal value on integrity in exchange transactions as compared with the value of immunity from physical violence. In any event, the relative weight attached to these specific values as expressed in the penal code is not the relative value in which they are held by some members of society. Specifically, it seems probable that the poor more than the rich regard fraud as comparable in wrongfulness to assault, and perhaps even more wrongful.

The relative order of social values in the criminal law manifests itself in still another way. In some societies, and certainly in contemporary America, the resources available to enforce the criminal law fall considerably short of those required to suppress crime completely. The administration of criminal justice therefore entails allocating resources in such a way that suppression of some crimes is pursued intensely whereas other crimes are more or less ignored. Allocation of resources may take place at the micro level, as when a policeman on patrol decides, in response to an unfolding situation, whether to chase a purse-snatcher or to respond to a burglary alert. The process also occurs at the macro level, in the way in which police, prosecution, and other agencies are organized and deployed. Thus, all police departments apparently devote a great deal of effort to following up homicides—effort that is probably disproportionate to the actual effect on the incidence of homicide. Meanwhile, they give only sporadic attention to those norms whose systematic enforcing might substantially affect behavior, for example, the incidence of muggings. The deployment of criminal justice resources is a complex mixture of efficiency and symbolism. But both calculation of efficiency and projection of symbols are intelligible only by reference to the system of values that society seeks to realize.

The administrative system in general

Subsystems. The system of criminal justice can be considered as an administrative bureaucracy consisting of four principal subsystems: police, prosecution, judiciary, and corrections. Broadly speaking, the po-

lice are responsible for prevention of crime through patrol, and for detection of crime after it has taken place. The prosecution is responsible for assembling evidence gathered by the police, determining whether prosecution is warranted, and, where it is, presenting the evidence and the law to establish the accused person's guilt. The judiciary is responsible for deciding the questions of law and fact relevant to determination of guilt and imposition of sentence; and the correctional system provides imprisonment and monitoring of offenders who are released on probation or parole.

The functional divisions between these subsystems are not tidy. The police not only investigate crimes but may exercise considerable influence in the determination of which crimes are prosecuted. Prosecutorial policies influence police practices regarding patrol and detection. Judge-made law pervasively influences the whole criminal process and apparatus, and the judicial attitude toward sentencing affects dispositions at every point in the system. The capacity and competence of the correctional system to provide either incarceration or rehabilitation constrain the effectiveness of the criminal law as an instrument of deterrence and rehabilitation. As in all complex administrative systems, there is continuous intercommunication and influence among the components of the system and the people within them.

Influential constituencies. There are other groups, not officially part of the administrative system, who strongly interact with it. Among these is the legal profession, particularly the lawyers who regularly represent criminal defendants. They continually monitor and check the enforcement apparatus, influence the development of the law in the courts and legislatures, and mediate impressions of the system to various sectors of the general population. Another highly influential group is the news media. It is an ancient maxim that justice must not only be done, but must be seen to be done. The modern public sees the criminal justice system chiefly as the media present it, in what is published, ignored, or withheld. Another important influence in many communities, a semiofficial constituency, are the labor organizations of which police and corrections officers are members.

Also influencing the system are the accused persons themselves. Most criminal suspects are young, male, and relatively poor. They are disproportionately members of ethnic minorities. In some sense they are official participants in the criminal justice process, for their status as such is legally recognized and defined. They are permitted by law to express their attitudes and inclinations in certain key decisions by the system. Furthermore, although the resources of the prosecution are formidable when compared with those of an individual defendant, the criminal defendant group as a whole has resources that the administrative system cannot ignore. It is well recognized that the inmate population of a penal institution strongly influences the operation of the institution; similar influence operates, although in a less obvious manner, in the functions of the police, prosecution, and judiciary.

Other agencies. The exposition here focuses primarily on the ordinary criminal justice system as it exists at the state and local level. In addition to that system, there is a federal law enforcement apparatus, which includes such police agencies as the Federal Bureau of Investigation and the Customs Bureau; the prosecutorial authority of the attorney general of the United States and the local United States district attorneys; the United States courts, particularly the district courts that have trial jurisdiction and are located throughout the country; and the Federal Probation Service and the Federal Bureau of Prisons, constituting the federal correctional system.

In addition, at both the federal and state levels there are many specialized law enforcement agencies having important criminal responsibilities. These include the state police and motor-vehicle bureaus, revenue enforcement agencies such as the Internal Revenue Service at the federal level and tax commission agencies at the state and local level, and a myriad of specialized regulatory agencies having authority to investigate and prosecute violations of penal prohibitions governing health, safety, environment, and the like. The functions of these specialized agencies are not considered here. It may be noted, however, that the offenses with which these agencies deal generally are classified as white-collar offenses, for which the typically employed sanction is a monetary penalty rather than either imprisonment or probation.

System characteristics.

Mass production and discretion. Several general observations should be made about the administrative system. First, it is required to deal with a large and never-ending flow of cases. Even though the system attempts to individualize its response to each offender, and in theory is supposed to treat each case as though it stood alone under the law, the process is in fact one of mass production. This is not to say that the system was planned as a mass-production system. Quite the contrary, many difficulties with it arise from the discrepancy between the fact of mass production and the ideal that each case be considered on its own merit.

A second general observation is that the system is

pervaded by exercise of loosely controlled discretion, which is both systemic and particular. Systemically, discretion is exercised to mediate between the high incidence of crime and the modest resources available to respond to it. Decisions must be made as to the allocation of the system's resources. These decisions are made officially and to some degree publicly, but often they are not based upon open deliberation. Thus, for example, no legislative act or mayoral directive says that the police shall devote intensive effort to investigating crimes against police officers, or that they shall deal with rape only where the victim is willing to carry the prosecution all the way through, but such policies in fact exist in most communities. They are necessary simply so that the system may deal with the overload of demand that would exist if it attempted to enforce the criminal law across the board.

Exercise of discretion is particular in that subsystems and individual officials within the system have a high degree of autonomy in performing their functions. A policeman is assigned a beat, but the patrol of the beat is usually under minimal supervision from superior police officers; the patrolman's allocation of time and effort is not subject to anything like the direction given an ordinary office or production-line worker, for example. In prosecutor's offices, individual deputy prosecutors generally have considerable discretion in deciding on the types and quality of cases that should be fully prosecuted. This discretion results partly from loose administration and partly from the fact that the prosecuting staff consists of lawyers who regard themselves as having the right and duty to exercise professional judgment in the performance of their functions. At the judicial stage, judges are the principal officials and have broad professional discretion in the exercise of their functions, particularly in sentencing. Moreover, the courts are very loosely administered in most localities, so that individual judges have administrative autonomy to an important degree. So also in the correctional system, discretion is both formal and de facto. Broad official discretion is exercised with regard to whether imprisonment will be terminated and parole granted, whether "good time" allowance (resulting in the shortening of imprisonment) will be denied for violation of prison regulations, and so on. Lower-level, informal discretion is exercised by prison guards in responding to prisoner behavior of all kinds.

Taken as a whole, the system is subject to pervasive formal legal controls, but it is also characterized by the pervasive exercise of unsupervised discretion. There are dynamic relationships between these two phenomena: because legal rules so thoroughly govern official action, it is assumed that the official actions are under control and that higher administrative controls are unnecessary; and the rigidity of legal controls creates incentives to seek waivers, a fact that in turn entails exercise of discretion.

Balkanization. The administrative structure of the criminal justice system is extremely decentralized. There are about forty thousand different public police forces in the United States, one for almost every city and for many villages, and usually a separate one in every county. In some large cities there are several different police agencies, such as transit police or housing police, in addition to the municipal police as such. In virtually all states, the prosecutorial function is centered at the county level in the office of the district attorney. Many large cities have a further division of prosecutorial authority in that municipal legal departments prosecute misdemeanors. The judiciary is usually organized along county lines, although in rural areas in most states the counties are grouped into judicial districts. In a few states the judiciary is organized on a statewide basis, but even there the daily operation of calendars and judicial assignments usually is handled separately in each courthouse. In any case, the work load of judges and supporting court staff is unbalanced and poorly managed in many jurisdictions.

The correctional system is sharply divided in almost all states between local authorities and state authorities. At the local level, except in very thinly populated rural areas, virtually all counties maintain a jail. All cities of substantial size have their own jails. Jails are used for temporary incarceration of persons awaiting prosecution and for punishment of offenders sentenced to short jail sentences. Also at the local level, but usually attached to the court system rather than the jail system, is the probation service, which performs essentially two functions. The first is investigating an offender's background immediately after conviction and before sentence for the purpose of providing information on which to base the sentence. The second is supervising offenders who are given a sentence of probation. The correctional system at the state level consists of the prison system, including institutions for the incarceration of juveniles, and the parole service. The parole service is usually attached to the state prison administration and provides supervision of offenders who have served a prison term and are released on parole.

The administrative autonomy of these various administrative organizations has two dimensions. First, each of the components—police, prosecution, judiciary, and corrections—generally is administratively

autonomous from the others. (In a few states the courts and the prosecutor's office are under one administrative authority.) Second, the various local subdivisions of each of these functions are administratively separated from one another. Thus, police units of different cities, even those in a single metropolitan area, are subject to no common administrative control, although they often have various formal and informal working arrangements. The same is true of prosecutor's offices from one county to the other and, to a lesser extent, of courts and probation services.

The foregoing description if anything understates the lack of administrative coordination in criminal justice. A complete account would require describing the separation between various federal criminal justice agencies and their state counterparts, and between state-level criminal justice agencies, such as the state police and the state attorney general's office, and their local counterparts. It would also describe how these separations impede vital routines, such as controlling the flow of cases from one subsystem to another, coordinating allocation of resources, and using common terminology and comparable statistics. On the other hand, the fact that these organizations are not well orchestrated has certain important benefits. Most obvious is the maintenance of the independence of the judiciary, with the resulting governance of the functions of police, prosecution, and corrections by independent judicial review. This legal control of the criminal justice system is unparalleled anywhere else in the world. Moreover, the tensions arising between autonomous agencies result in public visibility of fundamental issues in criminal justice that otherwise would be submerged within a bureaucracy. For example, the fundamental issue of allocating police and prosecutorial resources is manifested in conflicts between police and prosecutorial agencies over priorities regarding specific crimes. Making the issues visible subjects them in some degree to resolution in accordance with public opinion, rather than simply with the preference of the agencies involved.

Another generalization is that the degree of professionalism and competence in the broadest sense varies considerably throughout the country. The variance is probably much less than it was around 1960, and certainly less than it was in 1930. The day of the bumpkin sheriff or of the judge who is law unto himself has virtually passed. Modern communication and interaction disseminate techniques and standards of performance despite administrative boundaries. Nevertheless, variance remains and has important consequences. "Professionalism" implies certain values, particularly impersonality, neutrality, and formal rationality in goals and techniques. The fact that professionalism is unevenly distributed among various elements in the system indicates, among other things, that there are corresponding differences of public opinion on the underlying issues of value. It seems fair to say, for example, that some communities prefer an "old boy" police force.

Police

Organization. Of the two basic police functions, prevention and detection, prevention—patrolling streets and other places where crime may happen—is the most visible.

Prevention and detection. Patrolling is a "proactive" technique, that is, it consists of planned anticipatory maneuvers which frustrate potential criminal activity. Detection consists of investigating crimes that already have taken place, and may be described as a reactive technique, in that it is mobilized after, and in response to, criminal activity initiated by an offender. In strategic terms, prevention and detection obviously reinforce each other. Effective prevention makes unnecessary the laborious process of identifying and prosecuting criminal offenders, whereas effective detection provides a deterrent to crime that would take place beyond the scrutiny of a preventive patrol.

From an organizational and tactical point of view, however, prevention and detection are generally fairly distinct. Characteristically, preventive police patrol is carried out by more or less widely dispersed police officers, operating individually or in pairs and patrolling on foot or in patrol cars. The number and distribution of patrols is worked out, mainly on the basis of continuous trial and error, with the aim of reducing crime in public spaces (such as street assaults), and in places accessible from public spaces (such as burglaries in residential districts). Police departments rarely patrol purely private locations, such as apartment houses or office buildings, partly because of legal limitations on such patrols and partly because responsibility for such locations is deemed a matter of private concern. Hence, there has been an enormous expansion of private policing of private locations through all kinds of guards and "security officers" in stores, office buildings, shopping areas, apartment houses, and residential areas, where private police forces are employed to supplement public patrol. The number of private police engaged in various forms of patrol is now substantially larger than the number of public police engaged in that function. Whether patrol is performed by public or private police, however, it is characteristically performed by low-ranking

officers assigned to cruise a particular territory and to keep an eye out for criminal eventuality. In most urban localities it is very dangerous work.

Specialized squads. The detective function is usually performed by specialized squads. Many police departments have several detective squads dealing specifically with such crimes as homicide, burglary, rape, and narcotic trafficking. The detective function is so organized because detection essentially involves compiling and sifting through background information. For certain types of crime, particularly homicide, the useful information relates chiefly to the facts of the immediate crime and the identity of persons having a motive, since that crime typically involves people who have had a relationship with each other. With respect to other crimes, particularly burglary and robbery, the investigative task consists of comparing prior police records with what is known about the immediate offense to derive a suspect or set of suspects upon whom more intensive investigation may then focus. The key to any suspect is a pattern of repeated offenses, that is, his modus operandi (M/O). In either case, the detection focus is largely a historical investigation, dealing with records, photographs, fingerprints, and the like, whereas patrol is a face-to-face "action" interchange.

In general, detection is performed by police who are older, higher in rank, longer in service, and more knowledgeable about patterns of crime and the criminal process than are patrol officers. However, virtually all detectives are former patrolmen, a consequence of the fact that virtually all police forces hire at the patrolman rank and promote from within. The detection function is thus carried out by officers who have first established their ability to perform the more rough-and-ready functions of patrol. Few police departments directly recruit and train experts in detection, although in urban centers there are specialists in such fields as ballistics and fingerprint analysis. Few police departments have officers trained in detection of white-collar crime, a circumstance that contributes to relegating responsibility for controlling such crime to specialized administrative agencies.

Most urban police departments have specialized units that deal with victimless crimes, including narcotic violations, gambling, and prostitution. Characteristically, these offenses involve consensual participants, and hence no unwilling victims. For this reason, these offenses cannot be suppressed by either patrol or the usual detective function, since these methods presuppose either that the offense is directly observable by the police or that persons injured by the offense will cooperate in supplying information about the offender. In dealing with victimless crimes the police therefore must be both aggressive and surreptitious, using such methods as hidden surveillance and informers. Because concealment and deception necessarily must be used, this kind of police work is morally ambiguous and often crosses the border of legal restrictions on police search, interrogation, and entrapment. In addition, victimless crimes constitute a commerce often involving large sums of money, a circumstance which makes police operations directed against such crimes very vulnerable to corruption.

Police operations addressing crime, whether through patrol or detection, in fact occupy only a fraction of the effort and attention of police departments. Most police departments spend the bulk of their time in various helping services to the public, such as traffic control, crowd control, emergency ambulance and other health and safety care, physical rescue, and emergency taxi service. In addition, all police departments devote a substantial amount of effort to traffic offenses and to the routine arrest and temporary jailing of drunks, both motorists and pedestrians.

Arrest. The term *arrest* is ambiguous. Legally, an arrest includes a temporary involuntary interception of a person's otherwise intended movement, for example, stopping a pedestrian or motorist to ask a question. Arrest also means the more formal and complete act of taking a suspect into custody for purposes of detention and possible prosecution. Many of the legal rules defining police authority to make an arrest apply to both forms of arrest, although it is recognized that the threshold of suspicion sufficient for stopping and questioning is much lower than the threshold for taking a person into custody. Nevertheless, the basic law of arrest is founded on the premise that the involuntary suspension of a person's movements usually requires the same justification as a full-blown arrest and detention.

Probable cause. Authority to arrest depends upon the existence of "probable cause"—the existence of a substantial factual basis for supposing that an offense was committed and that the arrested person committed it. If such facts are evident to the police officer, an arrest may be made without a warrant. If the crime involved is a felony, the police officer need not have directly witnessed the required facts. The same rule generally applies to misdemeanors, but in some states a misdemeanor arrest is authorized only if the offense took place in the officer's presence. Alternatively, if the police have evidence constituting probable cause, they can seek a judicial warrant for arrest. If the court determines that probable cause

exists, it issues the warrant, and the police arrest on the basis of the warrant. The judicial determination that probable cause exists constitutes a prior adjudication that there is sufficient evidentiary basis for arrest.

Most arrests made on police patrol are made without warrants, for the obvious reason that an encounter with crime on a patrol requires immediate response. Warrants for arrest therefore are more often used where the suspect is identified through detection, when emergency conditions have subsided. Arrest warrants are awkward to use with regard to victimless crime because successful prosecution usually requires that the offense actually has been committed, as distinct from being in preparation. Apart from the problem of maintaining secrecy, it is generally difficult to show that such a crime will probably be committed.

Search warrant. An arrest warrant must be distinguished from a search warrant. A warrant for arrest authorizes taking the person in question into custody. A search warrant authorizes the police to enter premises and to search for specified evidence of criminality such as weapons, stolen goods, or narcotics, and it requires a showing of reasonable cause to believe that the evidence will be found at the specified premises. Without a search warrant, the police may search a person, a vehicle, or premises only under very limited circumstances. Arrest without a warrant and search without a warrant are governed by rules developed by the United States Supreme Court under the Bill of Rights and the Fourteenth Amendment. The rules involve many fine distinctions and render the process of arrest and search a highly technical exercise except where an offense is committed in the presence of a policeman. This fact is a powerful inducement for police to assert that an offense was committed before their very eyes when this is not true—that is, to lie. The legal controls on arrest and search serve to protect individual rights, but they also carry the risk of morally corrupting the police.

An arrest in the course of patrol is usually made on the basis of the individual officer's judgment, but sometimes upon radio consultation with a supervisory officer. An arrest by detectives or upon warrant by definition is usually based on a decision by a higher authority. In either case, the arrested person is taken to a police facility, either a central jail or a precinct station. For some types of less serious offenses, a policeman who observes the offense is permitted, rather than making an arrest, to issue a citation requiring the offender to appear in court at a specified time. The procedure is adapted from, and is essentially similar to, the issuing of a "ticket" for a motor-vehicle violation.

Police follow-up.

Scope and criteria. Where an arrest has been mad by a patrol officer, the question arises whether prose cution should be followed through. A chief issue i whether the evidence is sufficient to carry the cas through to the prosecutor's office. From their continu ous dealings with the prosecutor, the police know th standards of proof that the prosecutor will requir to commence judicial proceedings, and if they believ that the standard of proof has been met, they forwar the case to the prosecutor. After having made an ar rest the police rarely presume to decide not to prose cute a case; discretion at this stage is reserved to th prosecutor and the judiciary. On the other hand, i the evidence does not meet the standard require by the prosecutor, the police have to decide whethe further investigatory effort is justified. That decisio will be based on the seriousness of the crime, whethe a victim is willing to pursue the case, whether there appear to be sources of additional evidence, whethe the offender has a prior record, and other circum stances. The additional investigation may be relatively intensive or virtually perfunctory. For example, the killing of a police officer will be pursued relentlessly even in the face of few promising leads. On the othe hand, muggings not involving serious injury generally are given sufficient attention to placate the victim thereby pacifying public opinion about the police, but are given no more attention unless the crime fits a pattern pointing to a specific suspect. The police have a realistic sense of the futility of trying to identify a snatch thief from the portfolio of hundreds of plausible suspects whose photographs are on file from previous arrests.

An essentially similar calculation is made in the detective units responsible for investigating crimes reported to the police. Serious offenses against the person receive relatively intensive pursuit, particularly if the victim actively participates and if serious injury was involved. On the other hand, routine cases of breaking and entering dwellings are pursued by reviewing files on past offenses for clues to a pattern associated with a particular offender.

Booking. A person who is taken into custody to be charged is "booked" by the police. In the era before tight legal restrictions were imposed on arrest, patrol officers confronted with doubtful cases could take a suspect into custody and leave it to the station officer to decide whether the accused should be booked or simply released. Now that a patrol arrest can have serious legal consequences, including possible civil litigation against the arresting officer, the police resolve doubtful cases on patrol in favor of releasing

the suspect, subject to the possibility of follow-up investigation. Indeed, the patrol officer may simply let the suspect go or ignore the situation. These front-line decisions, made rapidly and according to the officer's personal judgment, often determine whether a suspect will be virtually untouched or will be caught up in the prosecutorial apparatus coming into play after an arrest.

Release pending prosecution.

Bail. An arrested suspect is generally entitled to release after booking. Where the charge is a misdemeanor, the suspect ordinarily becomes automatically eligible for release upon his promise to appear in court to answer the charge against him; sometimes he must also post bail. When the charge is a felony, the accused generally may obtain release from custody only by posting bail. Bail is a deposit of cash or a cash-equivalent asset, or the posting of bond. A bond is a written promise to pay the bail sum and is posted in lieu of bail by a person whose financial credit is recognized by the court, such as a professional bondsman. Until about 1960, bail typically was high, so that indigent suspects simply stayed in jail until their cases came before the court. A bail reform movement led to a radical reduction of bail, and by the early 1980s bail had been dramatically reduced except in serious offenses where there was a demonstrated risk that the offender would fail to appear for trial.

Preventive detention. The desuetude of bail has led to a search for alternatives. The underlying concern is not that the suspect will flee but that he will commit more offenses pending prosecution and conviction. To deal with this problem, the procedure of "preventive detention" has been widely proposed and in some places adopted. In preventive detention a judicial hearing is held to determine whether the suspect is likely to commit more offenses if released. Preventive detention procedure juxtaposes two fundamental but contradictory ideas. On the one hand, many suspects arrested in the modern criminal justice system have had repeated encounters with the police. They are almost certainly guilty of something and are quite possibly guilty of the offense for which they have been arrested; they may well commit other offenses if they are let go. At the same time, it is a principle of law that no person should be held in jail unless he has been convicted according to law. Preventive detention authorizes the court to estimate whether an arrested but legally innocent person is likely to commit another offense, and on the basis of such an estimate to order his detention. As a technique of public protection, preventive detention serves much the same function as high bail and has the additional merit of focusing on the question of the accused's present dangerousness. Nevertheless, it has proved impossible to make very accurate estimates of dangerousness, and there is an inevitable tendency in actual administration to err on the side of caution. As a practical matter, suspects with a prior record are likely to be held if they are charged with a serious offense. In any event, the decision whether to insist on bail or preventive detention rests with the court rather than the police.

Aiding prosecution. After the police develop a case sufficiently for formal prosecution, they relinquish control of the matter to the prosecution and the courts. However, the police participate in the prosecution. Police officers are often important witnesses, particularly in cases encountered on patrol, and they usually have responsibility for conserving evidence and conducting such supplemental investigation as the prosecutor determines to be necessary. This division of authority between police and prosecution is not necessary in the nature of things. In other countries the police have substantial responsibility for prosecution: in some, the prosecuting attorney is essentially a legal representative of the police, and in others, the police are subject to administrative supervision by the prosecutor. The division of function between police and prosecution in the American criminal justice system means that there can be continuing unresolved conflict over enforcement policy and practice. Furthermore, there is often conflict between the police and the courts, the police perceiving that their cases disappear into the prosecutor's office and become ensnarled in judicial technicalities.

Prosecution and defense

Adversary system. A criminal proceeding moves along through the mechanism of the adversary system. In the adversary system the accused is presumed innocent until proved guilty, and under modern American criminal procedure he has a right to assistance of counsel from the point where he is arrested. The procedure for determining guilt is that of competitive presentations by the prosecuting attorney as legal representative of the state, countered by the defense counsel as representative of the defendant. Although only a small fraction of all charges originating from the police actually go to trial, the adversary process dominates criminal prosecutions from the point of arrest and even before that point. A criminal charge can become a conviction only through an adversary trial or by guilty plea on the part of the defendant. Although it may be said that the police function is administratively self-contained and operates by a sys-

tem of quasi-military command, the prosecutorial function proceeds by a dialectic between the prosecuting attorney and the defense counsel. Hence, the most fundamental practical problem confronting a prosecution is whether the proceedings leading to trial, and trial itself, can be successfully sustained in face of challenge and resistance by the defendant through his legal counsel.

The adversary system may be contrasted with the inquisitorial, or investigatory, system of prosecution that prevails in most of Europe and in such countries as Japan, whose legal system is patterned on that of Western Europe. In the investigatory system, the prosecutor has more authority, but also more responsibility, for determining the charge and the evidence that will be presented to the court. In some versions of the European system the prosecutor is regarded as a member of the court. By contrast, in the adversary system, prosecutor and defense counsel stand as equals. However, even in the Anglo-American system the prosecutor is required to be not only advocate for the state but a guardian against unfair or unwarranted prosecution. This dual responsibility obliges a prosecutor continually to balance between overcoming the defendant's resistance to conviction, and terminating the prosecution if he himself is not satisfied that the defendant is legally guilty.

Prosecutor.

Office of the prosecutor. The prosecuting attorney is a full-time public official, except in very sparsely populated rural counties. In most jurisdictions he is chosen by election in the county in which he serves; in a few jurisdictions the prosecutor is appointed by a state-level authority. In urban areas the prosecutor has a supporting staff, which in large cities may run to hundreds of lawyers, along with paralegals, investigators, and clerical staff. The legal and paralegal staff is largely professionalized, in contrast to the patronage system once prevalent. In some states, members of the legal staff hold merit-rated positions, and a substantial percentage of the incumbents serve as such during their entire professional career. On the other hand, top-level deputies are often discretionary appointments and are often selected on political or patronage grounds. There is also a relatively high turnover at junior-level staff positions, with lawyers entering to gain rapid, intensive trial experience and then moving on to private practice. This pattern results in many cases being handled by deputy prosecutors who are young in years and limited in experience.

The prosecutor's office is responsible for a case from the point where it is received from the police through its termination by trial, guilty plea, or dismissal. The prosecutor is responsible for determining whether a formal charge should be lodged, and, if so, what specific crime should be charged; for conducting settlement negotiations where a plea of guilty may be in prospect; for deciding to abandon prosecutions that cannot be proved or settled; and for trying cases that go to trial. Particularly in the charging and negotiating processes, the prosecutor has very broad range of discretion.

Decision to charge. A complex set of factors is involved in the decision to charge. The single most important factor is the seriousness of the crime; if it is serious, only a dearth of evidence or extraordinary circumstances would warrant a prosecutor's refusing to proceed. The decision to charge is strongly influenced by the strength of the evidence available to the prosecutor. Where the offense is heinous but the evidence is weak, the prosecutor may be obliged to charge a lesser offense that can be proved. Another relevant factor is the defendant's criminal record. If he has a prior record, the prosecutor will be much more inclined to charge—and to charge the maximum offense that the evidence will permit—than if the accused has no prior record. The theory is simply that the accused with a criminal record deserves further punishment and is also more dangerous to the community.

Still another factor is the attitude of the victim. Victim attitude influences the availability of evidence, obviously so where a conviction can be obtained only if the victim will testify. But beyond this, the fact that the victim wants prosecution is morally and politically influential, for the prosecutor's office must sustain public confidence that it is seriously interested in vindicating the criminal law. On the other hand, if the accused has no criminal record and is a provably good citizen, if the crime was in some sense a response to provocation, or if the victim is a provably evil person, the prosecutor normally will be inclined to a lesser charge or, in some circumstances, will simply let the matter go without prosecution.

Alternatives to prosecution. Also relevant in formulating the charge is the possibility of redress outside the criminal justice system. For example, if an offense appears to have been the product of violent emotion, and if the accused has agreed to submit to psychological therapy or supervision, the prosecutor may suspend prosecution or moderate the charge. Prosecutions for possession or use of narcotics are often terminated in a disposition that involves voluntarily submitting to rehabilitative therapy. Where the of-

fense involves actual harm to the victim, the fact that the defendant can make restitution is a relevant circumstance, particularly if restitution is made voluntarily. Basically, the charging decision consists of selecting the appropriate criminal component of a suitable overall resolution of the transaction. This reflects the fact that the conduct in question results from a complex transaction in which the involvement of a crime is only a part of the picture, although of course often the most important part.

This perspective reveals the practical importance of whether the accused has economic and social resources to commit in closing the transaction. Noncriminal redress is, up to a point, a substitute for criminal redress. In an extreme case, a wealthy offender may be able to buy off a victim. Less dramatically, the community, speaking through the prosecutor, may be propitiated by gestures of contrition and acts of redress outside criminal prosecution. These gestures and acts generally are more feasible for the relatively affluent and literate than for the poor and inarticulate. Hence, there is an inherently unequal capacity among the affluent and the poor to participate in the "closing" of a transaction involving a crime. The resulting tendency is that the poor submit to heavier criminal sanctions, or have their offenses treated on a lower moral plane, than do the affluent.

Constituencies. Serving to moderate and channel the prosecutor's discretion are influences from various constituencies to which the prosecutor must be responsive. These include (1) the courts, whose past decisions have to be taken into account and whose future decisions have to be anticipated; (2) the police, who in some sense are the prosecutor's clients and who certainly can influence the esteem in which the prosecutor's office is held by the general public; (3) the press; (4) victims, bystanders, neighbors, and other more or less proximately involved elements of the public; (5) other agencies of government, particularly mayors and city councilmen; and (6) the legal profession, of which the lawyers in the prosecutor's office are members. These cumulative surveillances place the charging decision in something of a goldfish bowl, so that its exercise is only in a formal sense ungoverned by outside controls. The prosecutor's decisions also are influenced by the limited resources available to deal with the steady flow of incoming cases.

Only a fraction of the cases booked by the police are charged at about the same offense level by the prosecutor. Many potential prosecutions are abandoned, and most others go forward on a reduced charge, which may be reduced still further through settlement or at trial.

Negotiation of pleas. A substantial majority of all prosecutions filed by the prosecutor's office are resolved by a negotiated plea of guilty. The prosecution agrees that the original charge will be reduced to a somewhat lesser offense, thus reducing the range of penalties that the judge may impose. In addition, or alternatively, the prosecutor may agree to make a specific recommendation to the court regarding the sentence. The defendant agrees in return to abandon resistance to the accusation and to plead guilty. Generally, and appropriately, this process is called plea bargaining.

Resource constraints. Plea bargaining is a practical necessity in the criminal justice system. The prosecution does not have the resources to develop evidence and conduct trials to convert every accusation into a conviction through a trial. Similar considerations constrain the defense. Where a defendant has retained his own counsel, the cost of conducting a defense is a relevant factor in all but those crimes for which the penalty is so severe that monetary considerations become irrelevant. The cost factor is particularly relevant if the state's evidence is strong, for then the probability of success in defense is correspondingly small. It would make little sense for a defendant to spend five or ten thousand dollars pursuing a one-in-fifty chance of acquittal when conviction means a probable prison sentence and a negotiated plea of guilty will result in probation. Where the defendant is represented by publicly employed counsel, for example, a public defender, these economic constraints still exist but fall directly on the lawyer rather than on the client. That is, a public defender's legal staff cannot afford to spend five or ten thousand dollars' worth of its resources on behalf of a defendant who is simply being stubborn, where the consequence is to reduce the assistance that could be provided to other defendants whose cases are more meritorious.

The guilty plea purports to be a voluntary concession of guilt by the defendant. Expressions of contrition are relevant in a moral calculation of the wrongfulness of an offender's conduct. This moral factor is a part of plea bargaining, for the prosecutor, the court, and public opinion are constrained to leniency toward a defendant who has, at least ostensibly, acknowledged his responsibility for wrong. This explains and justifies the fact, often officially denied, that courts on the average are less severe with defendants who plead guilty than with those who defend their innocence to the end. However, this tendency

also vitiates to some degree the presumption of innocence, for it results in the imposition of heavier sentences on offenders who have insisted on their right to trial than on offenders who acquiesce in the accusation against them. Furthermore, the possibility of a plea bargain is an incentive for a person who sincerely believes himself innocent to acquiesce in a negotiated plea of guilty in order to eliminate the risk of a severe sentence that may result from conviction following a trial. The incentive is particularly strong where the flood of cases is so great that the system makes many mistakes. A system of plea bargaining therefore inevitably creates inducements for innocent persons to plead guilty. Furthermore, the exaction of disingenuous guilty pleas undermines the morality of contrition.

Guilty pleas and innocence. Plea bargaining also results in anomalous guilty pleas. For example, a case involving homicide may yield a negotiated plea to the offense of manslaughter when the facts of the killing show that it was almost certainly murder. Such a plea is perfectly intelligible where the evidence for the prosecution is sufficient to go to trial, but insufficient, in the prosecutor's estimation, to be clearly convincing to a jury. In such a situation, and especially if the defendant's prior record and personal situation warrant only a modest sentence, both parties have strong incentives to reach the plea bargain. The prosecution faces a serious risk of failure to obtain any conviction at all; the defense faces the risk that a trial will result in conviction of the much more serious crime of murder. Both parties agree to conviction of a lesser crime, even though that crime certainly did not occur. Negotiated pleas in such situations, and endless varieties of a less dramatic type, are a part of the routine of criminal justice administration. They violate the premises both of the substantive penal law, which attempts to apportion blame according to the nature of the offense, and of the rules of criminal procedure and evidence, which seek to ensure that criminal punishment will be imposed only on those who are proved guilty beyond a reasonable doubt.

Plea bargaining is perhaps the most controversial and disparaged aspect of modern criminal justice administration. Yet some process is necessary by which to discount a criminal charge to reflect the value of the evidence that supports it, for not all charges stand on the same quality of proof. The variability of proof in turn reflects several more fundamental propositions about criminal law: it can never be certain that an accused is guilty or innocent; the criminal law cannot be fully enforced because the state has limited resources to enforce it; defendants cannot insist on ultimate efforts to determine whether they are really innocent, again because of resource constraints; an accused person who acknowledges guilt is morally more worthy than one who attempts to escape responsibility before the law and should be treated with corresponding leniency; and it is morally outrageous that a person who is actually innocent should have to plead guilty in order to avoid the greater injustice of being wrongly convicted of a serious crime. All these propositions are both true and intractable.

It seems evident that charge discounting in some form has existed for as long as there has been a system of criminal justice, that is, a system where guilt is determined only in accordance with law and a standard of objective proof. The biblical story of King Solomon's threat to cut the baby in half can be interpreted as the use of a coercive method to obtain a guilty plea from the false mother, thus obviating a dismissal for lack of sufficient evidence. The fundamental question, then, is where and by whom the business of charge discounting is to be done. In many criminal justice systems, it is done at the police interrogation stage, with charges formulated after it is established how the defendant will respond to a particular accusation. In the present American system, it is conducted at the prosecution stage by lawyers on behalf of the state and the defense. Charge discounting goes on, overtly or tacitly, from the point the case arrives in the prosecutor's hands until trial, indeed until the matter is submitted for decision by the judge or jury.

Procedure.

Post-arrest stage. The prosecution stage begins at the transition between arrest and formal accusation. There are two basic pathways, depending on whether the defendant has been arrested upon a warrant or without a warrant. An arrest upon a warrant presupposes a hearing before a magistrate, who is a judge or a parajudicial officer, in order to obtain the warrant. Obtaining a warrant for arrest requires a charge and a showing of probable cause that a crime was committed and that the defendant committed it. A prosecutor ordinarily will not have sought an arrest warrant unless the evidence is also sufficient to carry through the prosecution, that is, unless the evidence easily meets the standard of probable cause. However, notwithstanding the fact that an arrest warrant was obtained, it may be open to the defendant to object that probable cause has not been established.

In most criminal cases the accused is arrested without a warrant. After an arrest, if the prosecutor is satisfied that the evidence is sufficient, a charge is filed against the offender. The technical purpose of the charge is to justify holding the accused in custody

(subject to the right to bail) pending further proceedings. Custody is justified if there is probable cause to believe that a crime was committed and that the defendant committed it. Whether probable cause exists is determined by a judicial officer at a preliminary hearing. The preliminary hearing thus is functionally similar to a hearing on an application for an arrest warrant, but it takes place after the arrest rather than before.

The procedure in prosecutions beyond this point depends on whether the accusation is a felony or a misdemeanor, and whether a grand jury is involved. Where the crime charged is a misdemeanor, the charging document is denominated a complaint. If the defendant has been arrested, probable cause must be established at a preliminary hearing; if the defendant was not arrested, he will have been, or will be, summoned to answer. In either case, the defendant responds through a plea of guilty or not guilty. This simple form of procedure is used for lesser crimes and for petty offenses.

Preliminary hearing. In some jurisdictions, the preliminary hearing is a relatively superficial review of the evidence. In other jurisdictions, it is a "minitrial" where the prosecution's evidence is fully developed and the defendant's counsel may challenge the evidence through cross-examination. In either event, but particularly where the preliminary hearing is relatively extensive, prosecution and defense are able to assess their cases with greater realism, having seen how the evidence will come across in open court. The more realistic assessments may change the parties' positions, resulting in either a reduction or dismissal of the charge or an acceleration of a guilty plea.

Assuming that the prosecution sustains its burden of showing probable cause, the defendant is "bound over" on the charge. This means that he remains obligated to appear to respond to the charge and may be required to post bail.

Felony and misdemeanor. The procedure from this point forward depends on whether the charge is a felony or a lesser offense. Where the charge is a misdemeanor or petty offense, the defendant responds through a plea of guilty or not guilty, and the issue thus joined goes on the trial calendar. The procedure for charging a felony is more complicated. Under common-law procedure, a felony could be charged only by an indictment of a grand jury. The grand jury is a criminal investigation body composed of laymen selected under the auspices of the court in much the same way that an ordinary (petit) jury is assembled. In the earlier common law, before professional police had been established, community knowledge of a crime was transformed by the grand jury into accusations that were then tried before judges riding on circuit. A vestige of this original function remains in the many states in which a felony accusation still requires a grand jury indictment. In these jurisdictions, after the police have investigated a crime and the prosecutor has been satisfied that sufficient evidence exists to justify prosecution, a presentation is made to the grand jury to obtain an indictment. The process usually is wholly routine, for in appearance, and to a considerable extent in fact, the grand jury is simply a rubber stamp for the prosecution. However, the grand jury serves as something of a check on the prosecutor's freedom to go forward with prosecution.

Grand jury. Grand juries nevertheless can exercise a very important investigative function. A grand jury has authority to subpoena witnesses and documents, a power that the prosecutor ordinarily does not have. Hence, where crime is involved that requires extensive investigation, particularly crimes involving conspiracy or the conduct of illegal businesses, the grand jury is a powerful investigative mechanism and its function as such is anything but routine.

Because the procedure for grand jury indictment is redundant in routine cases, many states provide an alternative method of accusation, known as the information. An information is an accusation made on the authority of the prosecutor; instead of a grand jury affirming its belief that the accused is guilty, the prosecutor himself does so. Abuse of the power to proceed by information is constrained by the right to a preliminary hearing and by the fact that in most jurisdictions the defendant can demand that there be a grand jury indictment instead.

After an indictment or information is filed, the defendant makes a further appearance, which is called the arraignment. The arraignment is simply a summoning of the defendant to respond formally to the charge. The defendant pleads guilty or not guilty. If he pleads guilty, the matter proceeds to the sentencing stage. If the defendant pleads not guilty, it proceeds to trial.

Trial.

Prosecution's case. A trial begins with the selection of the jury, unless a jury trial is waived. The charge is formally read by the judge, and a record is made of the fact that the defendant has pleaded not guilty. Thereupon the prosecution begins its presentation. The presentation commences with an opening statement, which is a narrative of the nature of the offense, the identity of the victim and the defendant, the facts and circumstances of the crime, and the evidence that

will be offered. The defendant at this point is permitted, but not required, to make an opening statement corresponding in subject matter to that of the prosecution. However, the defendant may reserve making an opening statement until the conclusion of the prosecution's case.

The prosecution then presents the evidence constituting its "case in chief," that is, all of its case except what may later be added as a rebuttal of the defendant's evidence. This consists of testimonial evidence and may include real evidence such as a weapon, documents, and expert testimony. Upon completing its evidence, the prosecution rests.

Defense. When the prosecution has rested, the defendant may move for dismissal of the charge on the ground that the evidence does not establish proof of the crime beyond a reasonable doubt. The court may dismiss all or some of the charges, depending on its assessment of the evidence. If the matter is tried before a jury, the court's function is to determine whether the jury properly could find guilt beyond a reasonable doubt with respect to the various offenses charged. Charges not established by this quantum of evidence are dismissed by the court. The charges for which the required evidentiary standard has been met are open for consideration by the jury, subject to the right of the defendant to present his own contradicting evidence. In a case tried by the judge without a jury, the motion to dismiss may be treated as a request to find the defendant not guilty.

The defendant has the privilege of introducing contradictory evidence, but he may simply rest on the prosecution's evidence. Under the Fifth Amendment privilege against self-incrimination, the defendant is not required to testify but has a right to do so. He also has the right to offer evidence other than his own testimony. For example, in the case in which ballistics is the central issue, the defendant may have his own ballistics expert. After the defendant has presented his evidence, he rests. The prosecution then may introduce rebuttal evidence, limited to proof contradicting new matter offered by the defendant; the prosecution is not allowed simply to offer evidence additional to that initially presented.

After all the evidence has been received, counsel for each side may address the jury or, in a nonjury case, the judge. This address is called the final argument, or summation, and is an opportunity for the prosecution and defense in turn to review the evidence and argue its cogency and weight. At the conclusion of the summations, the judge instructs the jury as to the governing legal principles and may review and comment upon the evidence. A standard instruction in a jury case is that questions of fact, including questions of credibility and of the weight of the evidence, are for the jury to decide. The jury then retires for deliberation and a verdict. If the case is tried without a jury, the court simply takes the matter under deliberation.

Verdict and judgment. The verdict may be one of acquittal or conviction, or the jury may become deadlocked and reach no verdict. If the verdict is an acquittal, that is the end of the matter, for the state has no right of appeal from an acquittal. If a jury returns a verdict of guilty, the defendant may request a new trial on the ground either of procedural error during the trial or of the evidence being insufficient to sustain the conviction. If the jury is deadlocked, a mistrial is declared and a new trial may be held.

When the defendant has been found guilty, a judgment of conviction is entered. The defendant is thereupon sentenced. After sentence, the defendant may simply accept the disposition and proceed to serve whatever penalty is imposed, but he has the right of appeal. In modern procedure, where a defendant is provided with the assistance of publicly compensated counsel, appeals are routine where a prison sentence is imposed. Not infrequently, a court imposes a sentence of "time served" where the offense is not heinous and where the defendant has been compelled to stay in jail for want of bail during prosecution.

Courts

Court systems.

Federal and state systems. The American judiciary includes a system of federal courts and a separate system of courts in each state. The federal courts are organized on a nationwide basis. In each state there is a federal trial court, the United States District Court. Above the district courts in the federal hierarchy are the twelve United States courts of appeals, organized by geographical regions called circuits. At the apex of the federal court system is the United States Supreme Court, which has appellate jurisdiction over the lower federal courts and also authority to review issues of federal law that arise in state courts.

State courts. Each state has its own court system. The structure in most states is essentially similar to the federal court system—a trial court level, an intermediate appellate court, and a state supreme court. The trial courts in most states are organized along county lines, with a separate trial court in each county, although in some rural areas several counties are grouped together to form a trial court district. In most states the trial courts are in two divisions, an upper

one of general jurisdiction and a lower one of limited authority. The trial court of general jurisdiction is variously called the district court, circuit court, or superior court; the court of limited jurisdiction had its origin in the justice-of-the-peace courts and municipal courts of an earlier era and is now called by various names. Generally speaking, felony prosecutions are conducted in the trial court of general jurisdiction, whereas the courts of limited jurisdiction conduct preliminary hearings in felony cases, and trials in cases involving misdemeanors and minor offenses.

Procedural standards.

Federal due process. All offenses against federal law are prosecuted in federal courts. All prosecutions for offenses against state law are prosecuted in state courts, with exceptions concerning offenses that involve federal activity. However, the federal courts have important supervisory authority with regard to the administration of criminal justice in the state courts. Since about 1930, the Supreme Court has been interpreting the due process clause of the Fourteenth Amendment to imply procedural requirements that state courts must observe in criminal prosecutions. These federally imposed procedural requirements now include (1) the right to jury trial in all serious offenses; (2) the right to assistance of counsel in any case in which a jail sentence may be imposed; (3) the privilege against self-incrimination, including the right not to testify against oneself and a prohibition against comment by the prosecution on the defendant's failure to testify; (4) a requirement that proof of guilt be established beyond a reasonable doubt; (5) the right to refuse to respond to police interrogation and the right to demand the presence of a lawyer during such interrogation; and (6) freedom from racial and sex discriminatory provisions in substantive and procedural criminal law.

These federally created procedural rights must be observed by the state courts. An accused who contends that he has been denied or improperly interpreted has a right to appeal through the state court system to the Supreme Court. Although this right of appeal to the Supreme Court is important in principle, its practical effect is limited because the Court is able to consider only a small fraction of state court cases involving federal questions. However, the Court has also developed doctrines protecting these federal rights through habeas corpus proceedings in the United States district courts. After a state court conviction has become final, the state prisoner petitions the federal court to determine whether the state court observed his federal procedural rights.

Although basic criminal procedure in state courts is prescribed by state law, procedural protections established by federal law amount to a supplemental code of criminal procedure. Enforcing these protections results in federal trial court review of the procedural regularity of criminal prosecutions that have already been reviewed by state appellate courts. The total effect of federal procedural protections has been virtually revolutionary. As late as 1950, state criminal process, except in unusually serious or complex cases, consisted of relatively free police investigation, charging based on the prosecutor's estimate of the sufficiency of the evidence, defense without the assistance of counsel in the case of indigents, and convictions that were rarely appealed. By the 1980s, police investigatory methods were stringently regulated, particularly concerning interrogation and search of premises; prosecution was restricted by the requirement that evidence be legally obtained and by the stricter enforcement of standards of proof; defense counsel was provided to the indigent; and conviction was almost routinely followed by appeal if a substantial sentence had been imposed. The proceeding as a whole became subject to the possibility of still additional review through federal habeas corpus proceedings.

Technical complexity. Criminal procedure has probably become more complicated and technical than any other body of procedural law. Additional complexity results from the fact that much of this law has evolved through case law decisions over time, rather than through comprehensive legislative enactment. As a result, at any given time it is often difficult to say what the law is, particularly since the Supreme Court has shifted its approach from time to time and because lower courts have inevitably overinterpreted or underinterpreted Supreme Court trends. In addition, a number of state supreme courts have themselves been very active in elaborating procedural rights for defendants. In some states, the procedural protections established by state courts are considerably more exacting than those established by the Supreme Court in interpretation of the federal Constitution. These developments have changed the whole tenor of criminal proceedings and have reduced the risk of unjust conviction, particularly the disproportionateness of the risks to which minorities are subject.

In modern criminal procedure the trial court judiciary is responsible for applying a highly complex body of procedural law to a very high volume of cases. Giving full-scale treatment to all cases is simply impossible. In heinous offenses, particularly ones that have attracted public attention, the full panoply of procedures unfolds, so that it can cost literally hundreds of thousands of dollars to try a major felony where

the evidence is in serious dispute and the defendant is determined to seek acquittal. The criminal justice system adapts with shortcuts in routine cases, including waiver of various formalities, dispositions by stipulation, and postponement. These cases constitute virtually a system of consensual justice, in which prosecution goes forward on the basis of the defendants' acquiescence. The low-visibility cases that flow endlessly through the criminal justice system are resolved by "slow plea" and "delayed dismissal." The slow plea is a guilty plea to a relatively minor offense, elicited from the defendant through the persuasion of his own counsel in response to alternating threats and cajolery from the prosecution. A delayed dismissal is a dismissal obtained from the prosecutor by defense threats and cajolery but withheld for a time—perhaps three to six months—as a stern warning to the defendant and to allow the victim to be placated or at least reconciled to the fact that a severe sanction will not be forthcoming. Prosecutor and defense counsel work out the slow pleas and delayed dismissals while the lower courts record and monitor.

Juvenile courts. Brief mention should be made of the juvenile court system. In all states, offenders under a specified age, typically sixteen or eighteen, are proceeded against in juvenile courts, except in the most heinous offenses such as murder. The proceedings nominally are civil rather than criminal, the theory being that the respondent is to be rehabilitated rather than punished. However, the basis of the proceedings is an act which if committed by an adult would be a criminal offense. In some states, the juvenile court is a separate trial court; in others, it is a specialized branch of the regular trial court. In any event, juvenile court procedure roughly corresponds to criminal procedure; however, it is less formal and less technical and, in almost all jurisdictions, trials are held with a judge alone rather than with a jury. Until about 1960, juvenile court procedure was quite informal, intended to be mediatory and protective rather than accusatory and concerned with the question of guilt. Procedural changes, many of them required by Supreme Court interpretations of the due process requirement, have subsequently made juvenile court procedure quite formal. It is now required that there be a written accusation, proof beyond a reasonable doubt, and the assistance of counsel. The aim and character of juvenile courts nevertheless remain more amelioratory than is so in the criminal courts. However, as serious offenses have come to be committed by younger and younger persons, the case pattern in juvenile courts has come increasingly to resemble that of criminal courts. The cases include a high proportion of assaults and thefts by young males who are predominantly from poor families and ethnic minorities.

Sentencing and corrections

An offender who has been convicted, whether by trial or by plea of guilty, is subject to sentencing. Imposing sentence is the responsibility of the judge, except in a few jurisdictions where the jury is authorized to impose the penalty for felonies. Sentence may consist of confinement in jail or prison, release under supervision, a fine, or a combination of these sanctions. Every state has a cluster of penal facilities for the incarceration of offenders, and a cluster of agencies responsible for the supervision of convicted offenders.

Jails and prisons. The most familiar penal institution is the local jail. Jails are maintained in all urban communities, operated by cities or counties or both. A jail provides temporary custody for arrested persons pending prosecution, and a place of punishment for persons sentenced to short periods of confinement. In most urban communities the jail is part of a facility that also serves as police headquarters or subheadquarters. A jail is thus a police administration center, an intake facility, a holding place, and a facility for local punishment. Its inmate population at any given time commingles the legally innocent, the legally guilty, and people whose legal and life situation is in disarray. It is a population that is above all transient. Jails in large urban centers generally have a mildly chaotic atmosphere, stabilized by the facts that all inmates have an interest in getting out and that most have excellent prospects of doing so soon if they do not seriously misbehave. In general, urban jails are chronically overcrowded and have few services beyond preserving order and providing food, a bunk, and a common room with a television set. In all but very rural communities, separate facilities are provided for women and for juveniles. Generally, the level of services in juvenile detention centers is somewhat higher, but those facilities have the same characteristic atmosphere of transience and boredom.

All states operate penal institutions at the state level. These institutions include a state prison and a state juvenile training facility. Separate wings or facilities are provided for female adult prisoners and for female juveniles. For adult males, and sometimes for other categories of offenders, facilities are graduated according to tightness of security and rigor of regimen, ranging from maximum security to fairly liberal conditions. Most states, including all those with large populations, have a number of separate facilities grad-

uated in this way. The total number of prison facilities in the country, excluding the federal system, exceeds five hundred. The total prison and jail population in 1981 was estimated at more than five hundred thousand.

Sentencing purposes.

Multiple purposes. Sentence to imprisonment is designed to fulfill a mixed set of objectives. The most immediate and popular purpose is punishment. Since about 1800, prisons have been a substitute in this respect for capital punishment, corporal punishment such as whipping or disfigurement, and enslavement or banishment, which were the forms of punishment used in earlier times. The will to punish is a strong one, animated by the outrage and desire for revenge that are aroused by the offenses for which offenders are typically given prison sentence—murder, rape, assault, and robbery. A second and rather different theory of imprisonment is that isolation in confinement provides occasion for an offender to reconsider his life and mend his ways. This theory is the origin of the term *penitentiary,* that is, a place in which to be penitent. It may be doubted whether there was ever much realistic possibility that convicts would undergo transformation through penitence, but there is little doubt that the prison experience brings home the lesson that committing crime can interfere with one's life. A third objective, also associated with prison reforms of the nineteenth century, is that a prison should be a place of rehabilitation, where the prisoner undergoes a change in outlook and acquires the capacity to live a law-abiding life through education and training provided in the institution. A fourth theory is that incarceration simply keeps the offender out of circulation, so that as long as he remains in prison he cannot do further injury to society. Finally, it is said that the foregoing consequences of imprisonment serve as examples to others and thus deter them from committing crime.

Conflict among purposes. It seems obvious, although it is not always recognized, that this set of purposes is internally inconsistent in several important ways. The purpose of punishment and deterrence is served by making prison as brutal and bleak an experience as possible; however, making prisons brutal and bleak has the effect of making them poor places in which to conduct moral education and technical training for the purposes of rehabilitation. The theory of penitence holds that an offender through his own will can come to understand and control himself; however, placing him involuntarily in custody presumes his inability to govern himself. Furthermore, if the prisoner really is meditating, it is inconsistent to punish him for doing so. The rehabilitation of offenders would require that they be taught job skills through which they can earn a satisfactory living; however, given the typically low level of achievement and educability of most prison populations, attaining such an objective would entail creating an educational program far more extensive than is afforded to persons of similar background who are not in prison, resulting in an anomalous distribution of social benefits. At the same time, truly effective rehabilitation and training would require long periods of incarceration, although those who perform well in rehabilitation programs deserve to be released early. Finally, if the aim of prison is to keep the offender out of circulation, it is not clear why investment should be made in rehabilitation until shortly before he is ready for release.

These inconsistencies reflect a deeper contradiction in the attitude toward crime that seems always to have prevailed. This is the dilemma of whether to condemn an offender as an outlaw and treat him as absolutely or provisionally subhuman, or instead to regard him as an autonomous being who can be brought around to behave himself. This fundamental ambivalence seems unavoidable. If it is, inconsistency in the administration of penal policy is also unavoidable. At any rate, the contemporary prison system in the United States reflects these contradictions.

Prisons.

Conditions. Prisons are elaborate and expensive, but the number of places in prison is low compared to the demand. Hence at least since the 1960s prisons have been chronically overcrowded. For most prisoners in the United States, the prison term is nominally long but actually short through allowance for "good time" and parole. As a result, productive training programs are extremely difficult to manage. Physical brutality is prohibited but, particularly in the case of violence by inmates against other inmates, is inadequately controlled and sometimes unofficially condoned. Psychological brutality is pervasive. Rehabilitation programs are elaborate in ambition and are the subject of continuously reborn experimental and demonstration programs, but they are generally underfunded and often technically obsolete and pedagogically dispirited. The moral ambivalence and technical mediocrity that characterize modern American prisons help explain the state of demoralization and danger generally prevailing within them. The environment is literally vicious, involving pervasive use of drugs, physical exploitation between prisoners including rampant homosexuality, and a culture dominated by prisoners with long criminal records and serving long sentences. The overwhelming majority of prison-

ers in most American prisons are black or Hispanic, whereas the guards are white lower-level civil servants. The growing legal protection of prisoner rights has considerably restricted the extent to which prison authorities can use arbitrary administrative methods to control inmates. The improved legal status of prisoners has reduced the degree of official lawlessness in handling prisoners, but it may also have contributed to increased lawlessness among prisoners. As a result, life in modern prisons is subject to less discrimination and arbitrary official action, but it also seethes with repressed unrest that periodically bursts out in riots and rampage.

The condition of prisons is largely the result of a desire by governmental authorities, particularly at the state level, to have a criminal justice system that provides rigorous sanctions at low operating cost. The combination of growing rates of crime and growing incidence of prison sentences increases demand for prison places. Relentless inflation, higher building costs, and rising staff compensation rates increase the cost of each place. The transformation of the prison population from predominantly white to predominantly black reduces the empathy of the general population with the prison population. As a result, almost all prisons are overcrowded and understaffed but are subject to unremitting pressures to accept more inmates.

Federal legal intervention. Partly in response to this deterioration, the courts, and particularly the federal courts, have become actively involved in scrutinizing the administration of prisons. Expansion of prisoners' legal rights, a major legal development since the late 1960s, has taken place along two related lines. The first is procedural—the decision procedures used by prison authorities in such matters as imposing prison punishments or withholding good time, granting or refusing parole, and dealing with disputes between prisoners and prison personnel. In general, there has been expansion of rights to a hearing or at least to statements of the reason for official action. The other line of development has concerned prison programs and facilities. Under the rubric in the Bill of Rights forbidding "cruel and unusual punishments," the courts have prohibited the use of brutal corporal punishment, the unregulated use of solitary confinement, and the arbitrary restriction of outside communication. Affirmatively, the courts have regulated the availability and quality of medical care and access to legal services and law books. Taken as a whole, these legal standards, enforceable by proceedings in federal court, have considerably raised the legally required level of administration in prisons.

This improvement, welcome insofar as it has been given actual effect, results in two additional discrepancies in contemporary prison policy. The first is between the level of legally prescribed conditions in penal institutions, and the level of conditions that actually exist. In general, prisons are probably not much worse than they were in 1960, and many of them are considerably better. In the meantime, however, the legally prescribed standards have risen still farther, so that the gap between aspiration and fulfillment may have widened. This generates a legitimate sense of injustice among prisoners that is not conducive to their acceptance of their sentences. The second discrepancy concerns the theory of prison management. Both the old-style lockup prison and the reformed rehabilitative penal institution were administered on principles of hierarchical authority, in which prisoners were told what to do. This concept of management remains, but is now intersected by what amounts to management with the participation of prisoners, who use legal proceedings as leverage.

Probation and parole.

Probation policy. The alternative to jail or prison is release under supervision. Most persons convicted of crimes are sentenced neither to jail nor to prison but are released back into the community under obligation to report periodically to a probation officer charged with supervising their behavior. Probation is the most frequent disposition of a first offender convicted of anything but murder or murderous assault. The period of probation usually is proportional to the length of the prison sentence that would have been imposed for the crime in question. Since penalties of imprisonment average perhaps a nominal five years, and involve an actual term of something less than two years, probation usually is imposed for a period of one to three years. While on probation, the convicted person is required to stay out of trouble, to avoid association with previous companions in crime, to attempt to find a job, to avoid use of alcohol or narcotics, and to report periodically to the probation officer. Theoretically, the probation service provides psychological, social, and employment counseling. In idealized form the relationship between probation officer and offender is avuncular.

Probation practice. However, probation resources in manpower and auxiliary services generally are insufficient to live up to the stated aims. As a result, probation in fact generally consists merely of nominal supervision in which the probation officer keeps in occasional touch with the convicted person and becomes actively involved only when a new offense has been committed, which happens in a substantial frac-

tion of cases. At that point, the offender's performance while on probation, so far as it can be established from information available to the probation service, will become a highly relevant factor in determining whether probation will be revoked and whether the offender will be prosecuted for his subsequent offense. Often a subsequent offense will result in a proceeding before the court at which revocation is threatened but where probation is actually continued. The records of many offenders, particularly those who avoid really heinous offenses, consist of a series of convictions, probation, brief revocations, and reprobation. All these determinations are made on the basis of proof falling considerably short of the standard required for conviction, but they result in treating the offender as a repeater. At some point along the line, if the pattern of behavior continues, prison will result. The hope, however, is that prison can be avoided, to spare the offender a harsh disposition and the system additional expense.

Some form of probation must always have existed in the criminal justice system. That is, offenders, particularly those who admitted their guilt, were simply let go on a promise to behave themselves. In the modern system, the probation decision is made by the judge on the basis of a presentence investigation conducted by the probation service. Theoretically, this investigation includes a full account of the circumstances surrounding the offense (including details not admissible in a trial), a biography of the offender, and a scientific psychological appraisal of his predisposition to further criminal behavior. In fact, the information provided the court generally falls short of this ideal, partly because diagnostic technique is very imperfect and partly because resources generally do not exist to permit a full professional workup of each case. Nevertheless, an attempt is made to provide the court with information so that it can formulate a sentence with regard not only to the offense but also to the offender.

An offender who has served a jail sentence is usually simply discharged at the conclusion of the specified period; one sentenced to prison is subject to a more complicated set of adjustments in his sentence. While in prison he is entitled to reduction of the nominal sentence on the basis of good time: for every interval in prison in which he avoids breaking rules, the offender receives a proportionate reduction in his sentence. An offender who maintains steady good time can shorten his sentence by about two-thirds. On top of this, the rules fixing eligibility for parole generally permit a person to be considered for parole at regular intervals after the commencement of his sentence. If the prisoner is regarded as a safe bet for parole, he may be paroled ahead of the normal time, and this is frequently done in the case of persons without prior records.

Parole. Supervision on parole is essentially similar to probation supervision, except that the parole service is an agency of the state correctional system, whereas probation services are connected administratively to the court system. If a parolee violates parole, the consequences are the same as for violation of probation. Parole may be revoked, with the parolee returned to prison, or it may simply be continued with a warning. In general, violation of parole is more likely to lead to reimprisonment than is violation of probation, because the population that has found its way into parole by way of imprisonment is made up of persons with more serious criminal records.

Although the criminal justice system seeks at all points to consider each offender as an individual, it functions on the supposition that the best indicator of an offender's future behavior is his pattern of behavior in the past. This is no doubt a realistic supposition, although in practice if not in theory it contradicts the legal presumption of innocence.

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BIBLIOGRAPHY

American Bar Association. *Standards for Criminal Justice.* 2d ed. 4 vols. Prepared with the assistance of the American Bar Foundation. Boston: Little, Brown, 1980.

American Law Institute. *Model Penal Code: Proposed Official Draft.* Philadelphia: ALI, 1962.

BLACKSTONE, WILLIAM. *Commentaries on the Laws of England* (1765–1769). 4 vols. Reprint. University of Chicago Press, 1979.

Cleveland Foundation. *Survey of the Administration of Criminal Justice in Cleveland, Ohio.* Cleveland: The Foundation, 1922.

GOLDSTEIN, HERMAN. *Policing a Free Society.* Cambridge, Mass.: Ballinger, 1977.

HALE, MATTHEW. *The History of the Pleas of the Crown* (1685; first publication, 1736). 2 vols. Edited by W. A. Stokes and E. Ingersoll. Philadelphia: Small, 1847.

LAFAVE, WAYNE R. *Arrest: The Decision to Take a Suspect into Custody.* Edited by Frank J. Remington. Boston: Little, Brown, 1965.

MCINTYRE, DONALD M. *Law Enforcement in the Metropolis: A Working Paper on the Criminal Law System in Detroit.* Chicago: American Bar Foundation, 1967.

MILLER, FRANK W. *Prosecution: The Decision to Charge a Suspect with a Crime.* Edited by Frank J. Remington. Boston: Little, Brown, 1970.

MORRIS, NORVAL. *The Future of Imprisonment.* University of Chicago Press, 1974.

PACKER, HERBERT L. *The Limits of the Criminal Sanction.* Stanford, Calif.: Stanford University Press, 1968.
President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society.* Washington, D.C.: The Commission, 1967.
SILBERMAN, CHARLES E. *Criminal Violence, Criminal Justice.* New York: Random House, 1978.
THOMAS, WAYNE H. *Bail Reform in America.* Berkeley: University of California Press, 1976.
U.S. National Commission on Law Observance and Enforcement. *Report.* Washington, D.C.: The Commission, 1931.
WILSON, JAMES Q. *Varieties of Police Behavior: The Management of Law and Order in Eight Communities.* Cambridge, Mass.: Harvard University Press, 1968.

2.
SOCIAL DETERMINANTS

This article examines the principal social determinants of enforcement activity across three stages of the criminal justice system: arrest, prosecution, and sentencing. Research has clearly shown that the criminal justice system does not simply respond to the stimulus of criminal behavior but is selective both in its perception of lawbreaking and in its application of sentences. Indicators of social stratification, as well as characteristics of and relationships between the participants to a dispute, can explain observed variations in law enforcement activity.

Criminal justice activity is approached here from a microtheoretical perspective, which studies variations within and across different segments of a single criminal justice system rather than large-scale differences across entire legal systems. Although this is the perspective of most modern research in criminology and the sociology of law, it should be viewed in the light of a larger, macrotheoretical perspective on the study of legal life.

Historical background

Macroanalyses of legal systems. The study of legal systems as social phenomena can be traced back at least as far as Charles-Louis de Montesquieu's *L'Esprit des lois,* published in 1748. Notwithstanding such efforts, however, analyses of social determinants of legal evolution failed to blossom until the late nineteenth and early twentieth centuries, with the works of such sociological theorists as Emile Durkheim and Max Weber. Durkheim was concerned with the development of the division of labor, its relationship to social integration, and the impact of these structural features of society on legal sanctions. Weber's interest centered on the procedures of legal decision-making and the rationalization of these procedures that culminated in industrialized capitalism. For each theorist, the nature and development of a legal system was neither an invariant nor an inherent property of social life. Instead, comparative and historical analyses led them to conclude that variations in dimensions of law were dependent upon such facets of social life as integration and rationalization.

In a similar vein, the work of Karl Marx (1818–1883) was also methodologically relevant. Marx studied the economic foundations of different societies throughout history and postulated that changes in social life resulted from changes in economic structures. Since he also viewed law as a product of a society's economic system, Marx paid scant attention to the subject. However, Marx's thesis had a significant impact on subsequent legal scholarship. For example, George Rusche and Otto Kirchheimer hypothesized in 1939 that variations in the types of punishment found in Western society were a function of the economic structure of a given society. Placing considerable emphasis on labor supplies in the preindustrial period and after the consolidation of industrial capitalism, they concluded that this structural change explained the shift from utilitarian to repressive incarceration.

Whereas scholarship on legal evolution and cross-cultural variations in criminal justice systems has continued in the tradition of Durkheim and Marx (Greenberg, 1977a), sociological research since 1960 has largely focused on issues of legal effectiveness and discrimination within particular segments of the criminal justice system.

Microanalyses of legal life: labeling and conflict perspectives. By the early 1960s, sociologists, in attempting to explain the causes of criminal behavior, began to shift attention from the motives or character of the criminals themselves to those individuals and agencies who identify others as criminal. Labeling theory viewed law violation as a routine occurrence and assumed that offenders were created through the invocation of social control rather than by an individual's specific law-violating actions. Examples of the concern with the selective identification of only a minority of all law violators is particularly evident in research on juveniles. Irving Piliavin and Scott Briar suggested, for example, that whether the police arrested a youth, as well as the manner in which they chose to dispose of him, was largely based on the youth's group affiliations, age, race, grooming, dress,

tional questions and issues rulings that must be followed throughout the country.

The United States incarcerates more offenders than any other country in the world. However, at the beginning of the twenty-first century, the nation was again exploring alternative sanctions, including day fines, house arrest, and shock incarceration. Restorative conferencing is also becoming increasingly popular, designed for victims and offenders to discuss the crimes, allowing the offenders to admit their guilt and express remorse to their victims to help return the victims to the state that they were in prior to the offenses.

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Further Reading

Chapin, Bradley. *Criminal Justice in Colonial America, 1606-1660.* Athens: University of Georgia Press, 1983. Detailed description and analysis of the origins of the early American criminal justice system, including criminal law, courts, and punishment.

Friedman, Lawrence M. *Crime and Punishment in America History.* New York: Basic Books, 1993. Study of changes in the criminal justice system—including criminal law, police, courts, sentencing, and punishment—from the colonial era through the early 1990's.

Hall, James P. *The History and Philosophy of Law Enforcement.* Dubuque, Iowa: Kendall/Hunt, 1975. Study of the changing philosophies in law enforcement from ancient times through early English history and the American colonial period to law enforcement in the United States in the 1970's.

Law Enforcement Assistance Administration. *Two Hundred Years of American Criminal Justice: An LEAA Bicentennial Study.* Washington, D.C.: U.S. Department of Justice, 1976. Official U.S. Justice Department history of criminal law in the United States from 1776 through 1976.

Miller, Wilbur R. *Cops and Bobbies: Police Authority in New York and London, 1830-1870.* 2d ed. Columbus: Ohio State University Press, 1999. Study of police forces in the United States and England from 1830 to 1870 that pays special attention to the question of how countries with similar legal histories developed markedly different models of policing.

Ruth, Henry S., and Kevin R. Reitz. *The Challenge of Crime: Rethinking Our Response.* Cambridge, Mass.: Harvard University Press, 2003. Examination of crime policy, including policing, sentencing, incarceration and the juvenile justice system from 1970 into the early twenty-first century.

Schmalleger, Frank. *Criminal Justice Today: An Introductory Text for the Twenty-first Century.* 7th ed. Upper Saddle River, N.J.: Prentice-Hall, 2003. Introduction to the criminal justice system that includes a discussion of the history of criminal justice in the United States.

Walker, Samuel. *Popular Justice: A History of American Criminal Justice.* 2d ed. New York: Oxford University Press, 1998. Review of the evolution of the criminal justice system in the United States, from the colonial era through the 1990's.

See also Canadian justice system; Common law; Court types; Crime; Criminal justice system; Criminal prosecution; Criminals; Judicial system, U.S.; Justice Department, U.S.; Juvenile justice system; Law enforcement; Outlaws of the Old West; Prison and jail systems; Slave patrols; Vigilantism; Violent Crime Control and Law Enforcement Act; Wickersham Commission.

Criminal justice system

Definition: Interrelationships among law enforcement, the courts, corrections, and juvenile justice

Criminal justice issues: Courts; juvenile justice; law-enforcement organization; punishment

Significance: The American criminal justice system is a multilayered complex that interconnects courts, law-enforcement agencies, and corrections of federal, state, and local governments in the common goal of reducing crime, punishing wrongdoers, and rehabilitating offenders.

Crime is found in all societies, and every culture develops its own mechanisms to control and prevent it. The ways in which the different peoples of

the world confront crime vary considerably. Great dissimilarities can be found in the very definitions of what constitute illegal acts and in the variety of methods used to judge and punish criminals. The ways that a society employs to confront crime often reflect the society's political and cultural values.

The United States is a democracy, and the ways in which Americans control crime reflect the national political philosophy. The usual meaning of a democratic government is a representative one in which those in authority are periodically elected by the people. The basic philosophy of an elected government should thus reflect the will of the people. However, on many issues, the people may disagree with their government. Even when they agree, they may differ among themselves on how the majority opinions should be put into effect.

A key element in a democracy is consent of the people. Democratic governments operate on agreement and not on the basis of coercion. It is understood that a democracy's citizens concur as to its existence. If not, then its citizens are free to withdraw from the society or to work within the system for change. Another element of democracy is that of participation. Democratic governments allow and encourage their citizens to participate in making policies and, at times, executing them as well. In a democracy the dignity of the people will be assumed along with all citizens being treated with fairness and justice.

People, Personalities, and Politics in Criminal Justice

Although the depictions of the criminal justice system conveyed by Hollywood films are often distorted and inaccurate, many films nevertheless provide realistic insights into the ways in which criminal justice actually works. An example is director Alan J. Pakula's *Presumed Innocent* (1990), a thriller based on the best-selling 1987 novel of the same title by veteran attorney Scott Turow. This film demonstrates that the law is not simply a matter of books and treatises but one of people and the tangles of their lives. The film also reveals the criminal justice system as not merely a structure of rules but also a maze of personalities and personal agendas—from a sexy prosecutor willing to trade on her sensuality to a judge with a secret and a district attorney worried about getting reelected.

In fact, the law, as depicted in *Presumed Innocent*, is mostly incompetent or corrupt. District Attorney Rusty Sabich (Harrison Ford) is initially assigned to investigate the murder of his former mistress and fellow prosecutor (Greta Scacchi), only to be charged later with the murder himself. Sabich's wife, who has been cheated on, is the real murderer, and although she makes a valiant attempt to frame her husband for the murder, the incompetence and corruption of various actors within the criminal justice system frustrate her attempt to exact revenge for her husband's infidelities. A police officer friendly with Sabich holds onto evidence (a glass with the defendant's fingerprint planted in the victim's apartment) that would have incriminated him. The police decline to get a warrant to search the defendant's house, where they would have discovered the murder weapon, still caked with blood, in the defendant's toolbox, where his wife had left it. The defense attorney uses a dirty secret from the judge's past to pressure him into dismissing the case.

Harrison Ford as the government prosecutor who finds himself on trial for murder in *Presumed Innocent*. (Warner Bros., Inc.)

Timothy L. Hall

The foundation of American democracy traditionally holds the value in the confidence and consent of the people as the primary basis for justice.

The governmental system that deals with the nature of crime in society, as well as analyzing the social agencies and formal processes, has come to be known as the criminal justice system. The word "system" implies an integrated process that works to control crime. Some scholars consider criminal justice to be more of a process than a coordinated system working together to control and prevent crime and prefer the term "criminal justice process." However, the term "criminal justice system" has become accepted when discussing the process of handling crime through the legal channels to arrest, convict, and punish criminal offenders.

Framework of the Criminal Justice System

The basic framework of the American criminal justice system is found in the legislative, judicial, and executive branches of government. The legislative branch defines the laws determining criminal conduct and establishing criminal penalties. Appellate courts interpret laws and review their constitutionality. The executive branch has administrative responsibility for criminal justice agencies and program planning. Also, public agencies such as police departments and parole boards function as parts of the government and are established to implement specific legislation.

All three branches of government generally work together to direct the criminal justice system. The legislative branch is not completely independent of the executive branch, nor is the judiciary branch independent of the other two branches of government. For example, if a legislature passes a criminal statute making conviction for possession of a handgun a mandatory prison sentence, both the judiciary and executive branches are involved in the law's implementation and influence the criminal justice system. A gun law may be the product of the executive branch, requiring legislative approval and eventually judicial review.

The criminal justice system has three separately organized components: law enforcement, the courts, and corrections. Some scholars consider the juvenile justice system to be a fourth component of the criminal justice system. The primary reason for this is that juvenile offenders are handled in noncriminal procedures. Terms from civil law, and not from criminal law, are used when juveniles are accused of criminal offenses. The philosophy of the juvenile justice system is completely different from that of the adult system. Since the creation of the first juvenile system by the Illinois legislature in 1899, the philosophy of juvenile justice has been to "save the child." In contrast, the goals of the adult criminal justice system have been either to punish or to rehabilitate offenders.

Each of the three components of the criminal justice system—law enforcement, the courts, and corrections—has distinct tasks. However, these components are not independent of one another. What each one does and how it operates have direct bearings on the work of the other components. For example, courts can deal with only those whom the police arrest, and correctional institutions handle only those who are sentenced to incarceration by the courts. Moreover, the successful reform of prisoners by correctional institutions determines whether the offenders may again come into contact with law-enforcement officers and influence the sentences judges pass. In addition, law-enforcement activities are scrutinized by the courts, and court decisions establish law-enforcement procedures.

The concept that the agencies of justice form a system has become increasingly popular among academicians, practitioners, and other professionals involved in the criminal justice field. The term, theoretically, refers to interrelationships among all the agencies concerned with the prevention of crime in society. Generally, it has become acceptable to some students of the criminal justice system to assume that if a change occurs in one of the major criminal justice components, that change will affect the other components. This approach implies that coordinating of policies and procedures occurs among the various components composing the system.

The various elements of the criminal justice system—law enforcement, courts, and corrections—are all related, but only to the extent that they are influenced by each others' policies and procedures. They are not well coordinated. Adjectives such as "fragmented," "divided," and

"splintered" are often used to describe the criminal justice system.

Criminal justice is a field of study, an interrelated system of agencies, and a system that involves moving offenders from the arrest stage to the release stage from a correctional institution. The goals of the system may be broken down to two basic categories: theoretical and practical. Theoretical goals include retribution, deterrence, incapacitation, and rehabilitation. Practical goals include crime prevention, diversion of offenders from the criminal justice system, fairness in handling offenders, and efficiency in criminal justice operations.

Law Enforcement

The functions and goals of the different components of criminal justice all differ from one another. The law-enforcement component consists of all police agencies at the federal, state, and local levels. Included at the local level are county and municipal agencies. Law-enforcement agencies are part of the executive branches of government and work toward deterring and preventing crime. Their mission is to reduce crime or to eliminate the opportunities for criminal acts.

The police have the function to apprehend and arrest criminal law violators. They are responsible for investigating crimes, collecting and preserving evidence, and preparing criminal cases for prosecution. The police play an important role from the investigative phases of criminal acts through the arrests and prosecution of cases against offenders. Without sufficient evidence collected by the police, prosecutors will not prosecute cases against suspects charged with crimes.

Another function of police is protection of life and property. The strategies of this have included crime prevention, crime repression, apprehension of criminals to protect society, and the performance of specialized services to maintain public safety.

Law enforcement functions at all three levels of government—local, state, and federal. In 2005, there were approximately 18,000 local police agencies in the United States. They vary in size from a single police officer to the approximately 40,000 officers of the New York City Police Department. Most police officers serve as patrol car officers; in some instances, they walk beats. The largest departments contain many specialized sections. These may include investigation units, planning units, drug units, juvenile units, traffic units, and SWAT teams.

Several counties in the United States have established county police departments to police unincorporated areas of the county. County police departments are given law-enforcement duties when local sheriff's departments have limited jurisdiction. Among the best-known county police departments are those of Maryland's Baltimore County and New York's Nassau and Suffern Counties. All three are counties with urban populations of sufficient size and resources to provide full law-enforcement services.

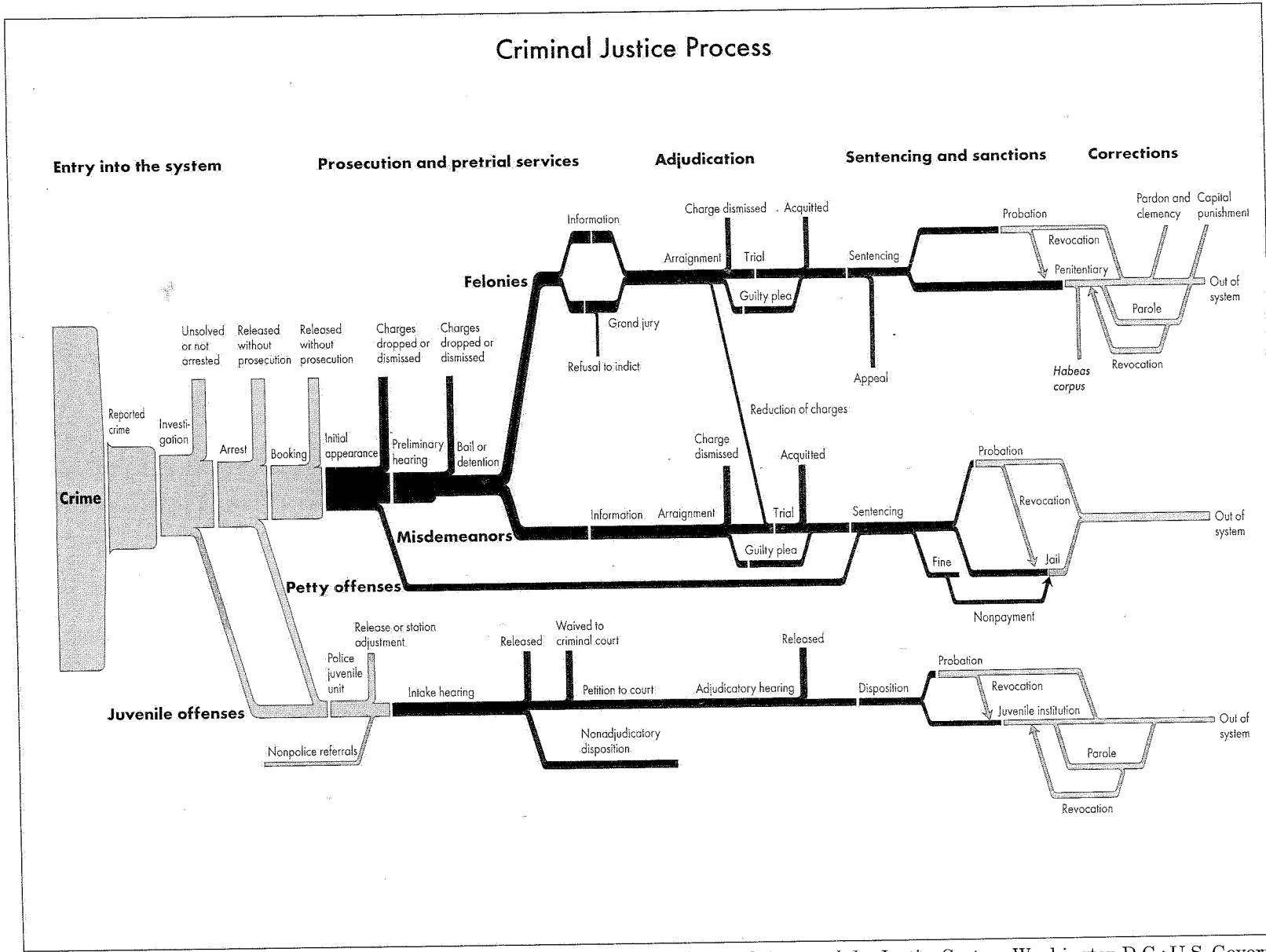
State constitutions generally provide that sheriffs are the chief law-enforcement officers of counties. Services provided by sheriffs' offices vary from county to county and often from state to state. Some sheriffs may have virtually no fixed responsibilities at all, or they can be responsible for a full range of law-enforcement services.

The federal government's role in law enforcement evolved during the twentieth century. Until the 1960's, the federal government emphasized that federal law-enforcement agencies should concentrate on enforcing federal laws. In 1968, the U.S. Congress passed the Omnibus Crime Control and Safe Streets Act, which was designed to provide resources to local law enforcement for equipment, training, and personnel. Local law-enforcement officers are now often incorporated into federal task forces directed by the Drug Enforcement Agency and Federal Bureau of Investigation.

There are approximately fifty federal law-enforcement agencies. Most of these agencies have specific powers and their investigative powers are specified by federal legislation. In 2002, several federal investigative agencies were placed under the new Department of Homeland Security.

State Courts

The second criminal justice component, the court system, includes those judicial agencies at all levels of government. The courts ensure that the accused receive fair and impartial trials un-



Graphic by Deborah Cowder; adapted from U.S. Bureau of Justice Statistics, *Drugs, Crime, and the Justice System*. Washington D.C.: U.S. Government Printing Office, 1992.

der the relevant laws of the jurisdictions in which they are charged with criminal offenses. There two basic types of courts: trial courts and appellate courts. All criminal crimes take place in trial courts.

The names of the state trial courts differ from state to state. In Kansas, for example, they are called district courts. In Pennsylvania, they are called courts of common pleas. The federal court system calls its trial courts district courts. In jurisdictions, trial courts have the responsibility of determining by the evidence presented whether defendants should be convicted of crimes. The trial courts review all evidence presented by prosecutors and consider its relevance and admissibility, while examining and reviewing the circumstances surrounding the crimes.

The trial courts have the responsibility of protecting the rights of accused offenders. They review the actions of the law-enforcement agencies to ensure that the police have not violated the constitutional rights of the accused. Upon conviction, the trial courts examine the backgrounds of the defendants and consider sentencing alternatives. Since the trial courts have a duty to protect their communities and repress criminal behavior, they have the task of imposing specific penalties. When imposing penalties, the trial courts usually take into consideration the circumstances of the crimes, the characters of the offenders, and the potential threats that the offenders may pose to public safety.

Federal Courts

Article III of the U.S. Constitution provides that "the judicial power of the United States shall be vested in one Supreme court and in such inferior courts as the Congress may from time to time ordain and establish." The United States has a "dual court system" meaning that there is one federal court and fifty state courts. The fifty-one court systems are independent of one another and are not hierarchically related, except for the fact that the constitutional decisions of the U.S. Supreme Court are binding on both state and federal courts at all levels.

The U.S. Supreme Court is the highest court in the country. Although it can conduct ordinary trials, it functions primarily as appeals court. The Court hears cases appealed from either the federal court of appeals or from the highest courts of appeal of the individual states. Below the Supreme Court are thirteen U.S. courts of appeals, each of which handles appeal from its own designated region of the country or its territories. These courts hear appeals from federal district courts, the trial courts of the federal government. The district courts conduct trials in ninety-four districts scattered throughout the United States and its territories.

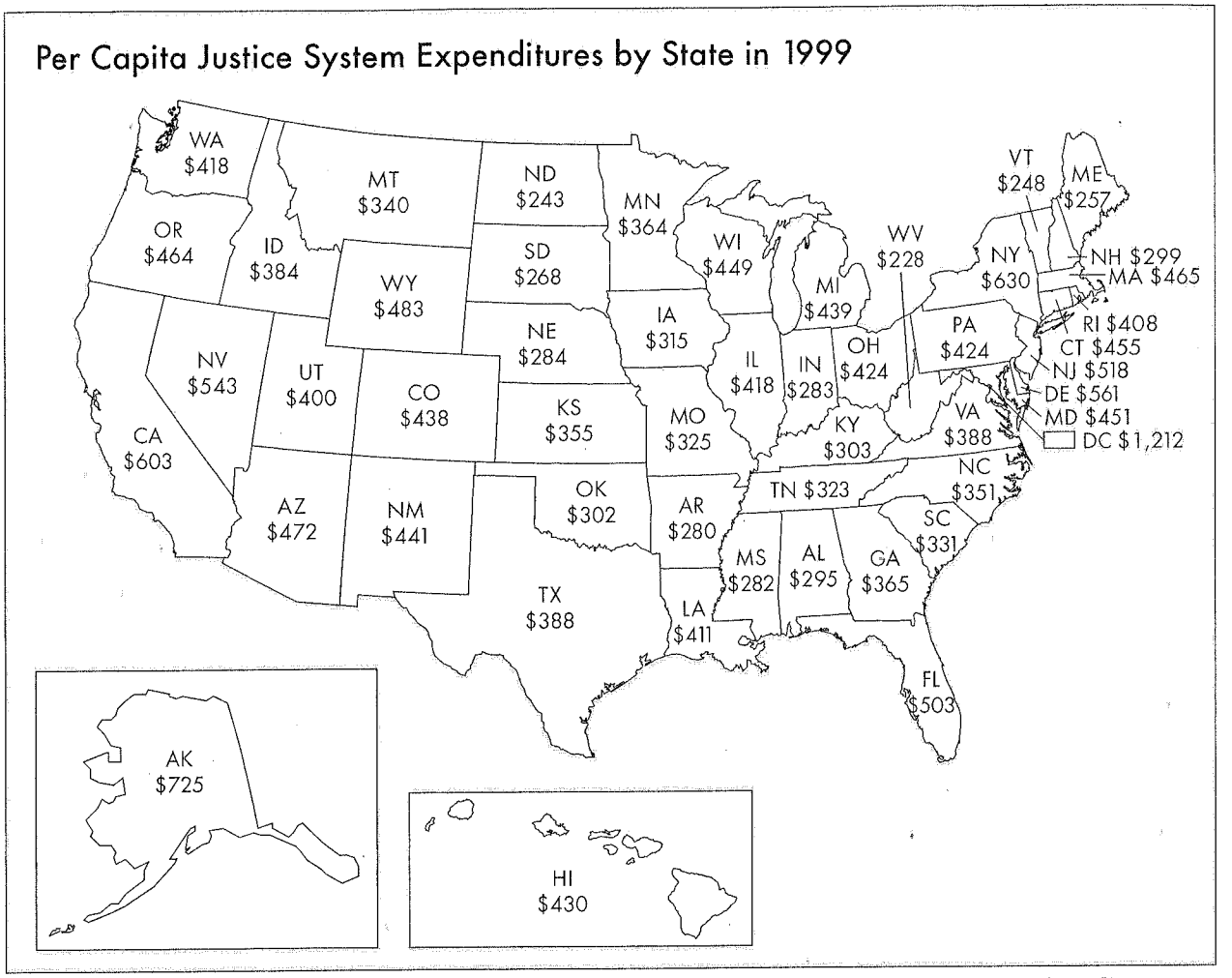
Most states have appeals courts comparable to the U.S. Supreme Court. Their various names include Court of Appeals, Supreme Court of Appeals, and Supreme Judicial Court. Below the states' highest courts of appeals lie intermediate courts of appeals and trial courts.

Cases generally enter the federal and state judicial systems at the trial court level. In these courts, defendants are either convicted or held to be innocent. Losers in the cases may appeal the verdicts to the appeals court. Appeals courts do not re-evaluate the evidence presented in trial courts. Instead, they determine whether errors of law have been made and provide remedies for prejudicial errors. The federal and state court system merges at the Supreme Court of the United States. The Supreme Court reviews only claims and defenses found in the U.S. Constitution or laws enacted under its authority.

Corrections

Corrections, the third component of the criminal justice system, comprises the executive agencies of the federal, state, and local government that are responsible both directly and indirectly for housing and controlling persons convicted of crimes. The first duty of corrections is to maintain prisons, jails, and halfway houses. The purpose of corrections is to provide protection for law-abiding citizens by isolating criminal offenders in secure facilities. The confinement of offenders prevents them from committing further crimes.

At various periods in the history of American corrections, consideration has been given to reforming offenders. Reforming offenders consists of providing services that will assist them to be released and returned to society to lead law-abiding lives. The trial courts also encourage crime deterrence by incarcerating convicted of-



Source: U.S. Bureau of Justice Statistics, 2002. Figures represent average per capita expenditures for police protection, judicial and legal systems, and corrections. Figures are rounded off to the nearest dollar. Per capita expenditure for federal judicial system in 1999 was $442.10.

fenders. This act may deter potential criminal offenders from violating the law by the threat of the loss of their freedom of movement.

The federal government's Bureau of Prisons was established in 1930, under the Department of Justice. Facilities within the federal system consist of correctional institutions, detention centers, medical centers, prison camps, metropolitan corrections centers, and penitentiaries.

All fifty states maintain their own corrections systems. State departments of corrections generally divide their facilities according to their levels of security: minimum, medium, and maximum. Large states, such as New York, Texas, and California, operate a wide variety of units, encompassing all levels of security and beyond. Smaller states generally have fewer and less-specialized facilities.

Jails are another type of corrections facility that are used for temporary detentions at the local level. Depending upon the jurisdiction, jails may be called lockups, workhouses, detention centers, or stockades. Most jails are overcrowded. They usually employ minimal staff, who are usually poorly paid and poorly trained. These limitations can result in giving inadequate attention to inmate needs and the mistreatment of the inmates by the jailers.

An important part of the corrections component is community-based corrections, which involve activities and programs within local communities. Emphasis in community-based corrections programs is on rehabilitation rather than punishment. Rehabilitation may include education, employment, and social services. Community-based corrections sometimes include diversion programs that remove offenders from the direct application of the criminal law process. Criminal proceedings are stopped in favor of noncriminal dispositions.

Probation and parole are other forms of community-based corrections. Probation is a conditional release from a prison upon conviction of a crime provided the probationers follow the guidelines established by the court. Parole provides for prison inmates to be released early, then follow the guidelines established by their parole boards.

Juvenile Justice

The fourth component of criminal justice deals primarily with juveniles who have not reached the age of majority. Because of their age, juveniles are deemed to have a special status. The philosophy of the juvenile justice system holds that children should be treated in ways that protect them and correct their misbehavior.

The state of Illinois established the first juvenile court system in 1899. Under Illinois law, all children were placed under one jurisdiction. The juvenile court was given jurisdiction over dependent, neglected, and delinquent children. The first juvenile court was established in Cook County, which included the city of Chicago. All juveniles under the age of sixteen alleged to be delinquents came under the jurisdiction of the juvenile courts, which were created by the legislatures as courts of limited jurisdiction.

Illinois's juvenile courts were designed to protect and correct the inappropriate behavior of juvenile offenders. These courts were to provide protective services, which included placing youthful offenders with families that would function as surrogate parents. The intent of the Illinois legislature was for juvenile court settings to be informal and for proceedings to function in a civil manner rather than in a criminal-court manner. The hope was that humane judges would function as substitute parents who would prescribe and apply individual treatment based on the needs of the children and the communities.

Juvenile courts differ from adult criminal courts in several ways. First, their judges are assigned to handle juvenile cases. Also, records of juvenile courts are separated from those of adult criminal court; juvenile court records are confidential. Juvenile courts employ more informal court procedures than adult courts, and their courtrooms are physically separated from courtrooms used in adult cases. In theory, juvenile courts do not consider juveniles defendants or criminals and regard them as children in need of care, protection, and rehabilitation.

In contrast to procedures in adult criminal court, juvenile courts do not readily recognize due process for the juvenile defendants. Juvenile courts have the power to punish juveniles for specific offenses and the responsibility to determine if the juveniles are immoral, wayward, in need of supervision, incorrigible, or living in unfit homes.

The chief objective of juvenile courts is to promote the rehabilitation of juvenile offenders and to assist them to become useful citizens. To achieve this goal, judges are appointed specifically to deal with juvenile cases, and probation officers are hired to supervise the juveniles. Juvenile court facilities are separated from adult courthouses and usually offer physical environments that are less severe and threatening. Juvenile judges sit behind desks rather than benches, and terms such as "intake hearing," "petition," and "adjudication inquiry" are used in place of "hearing," "arrest," and "arraignment."

Michael J. Palmiotto

Further Reading

Champion, Dean John. *Criminal Justice in the United States*. 2d ed. Chicago: Nelson Hall, 1997. General survey of the modern legal system of the United States, with an extensive treatment of juvenile crime and alternatives to incarceration.

_____. *The Juvenile Justice System: Delinquency, Processing, and the Law*. 4th ed. Upper Saddle River, N.J.: Prentice-Hall, 2003. Broad overview of the treatment of juveniles in the justice system. Examines juvenile legal rights and court decisions regarding adjudication, disposition, and sanctions.

Cole, George F., and Christopher Smith. *American System of Criminal Justice*. 10th ed. Belmont, Calif: Thomson/Wadsworth, 2004. Standard textbook that covers all aspects of criminal justice in the United States.

Inciardi, James A. *Criminal Justice: 2004-2005 Update*. Boston: McGraw-Hill, 2005. Comprehensive overview of the criminal justice system: law enforcement, courts, and corrections, along with up-to-date statistics and major court decisions and important changes in the criminal justice system.

Travis, Lawrence F., III. *Introduction to Criminal Justice*. 4th ed. Cincinnati: Anderson Publishing, 2001. Another excellent textbook covering all aspects of the criminal justice system.

See also Appellate process; Arrest; Bail system; Counsel, right to; Court types; Criminal justice in U.S. history; Criminal procedure; Criminal prosecution; Criminology; Judges; Judicial system, U.S.; Justice; Justice Department, U.S.; Juvenile justice system; Law enforcement; Police; Prison and jail systems; Special weapons and tactics teams (SWAT); State police; Women in law enforcement and corrections.

Criminal law

Definition: Body of law that defines criminal offenses and sets out appropriate punishments for convicted offenders

Criminal justice issues: Law codes; law-enforcement organization; prosecution; punishment

Significance: Criminal law sets out formal codifications and definitions of crimes against which to measure actions.

Crimes are generally regarded as offenses against society, even though they are often committed against single persons or small groups. Nevertheless, the fundamental concept assumes that criminal acts injure society as a whole. Therefore, the state, acting as the injured party, begins the process of bringing offenders to justice in criminal proceedings. Violations of the criminal law can result in the imposition of punishments that express society's outrage or displeasure with the offensive behaviors.

Criminal law is said to have numerous goals: punishment of wrongdoers, deterrence of future criminal acts by making wrongdoers examples to others, retribution justifying punishment on the ground that it is correct to inflict pain on criminals in order to prevent future crimes, rehabilitation aiming to change criminals' behavior so that they will conform to the law, and incapacitation of criminals through confinement. Despite these goals, studies have indicated that many convicted criminals are recidivists, or repeat offenders.

Elements of a Crime

Every statutory crime has three elements: a wrongful act, or *actus reus*; an evil intent, or *mens rea*; and causation. At trial, prosecution must prove the presence of each element of a crime separately and beyond a reasonable doubt in order to convict a wrongdoer of a crime.

For an act to be wrongful, it must be willful and not an involuntary action, such as a physical spasm or an action undertaken while sleepwalking or under hypnosis. A failure to act in a situation in which one has a legal duty to act may also constitute a wrongful act. Examples might include parents who neglect the proper care of their children or a lifeguard who does not attempt to rescue a drowning swimmer. The duty to act may also be imposed by statute, such as a citizen's duty to file an income tax return or register with the selective service. Failure to perform moral duties does not constitute criminal omission.

Possession offenses constitute an exception to the requirement of a physical act. For example, a person found with a controlled substance, such as cocaine, in a pocket may not be engaging in any physical act; however, the law would treat the fact of possession of the illegal substance as the equivalent of a wrongful act.

The principle of *mens rea* recognizes the mental component to crime. It focuses on the intent of wrongdoers at the moments the crimes are committed, rather than the mental state of the wrongdoers at some earlier or later times. People rarely express intent overtly. Therefore, the law determines intent by indirect or circumstantial evidence. Intent is inferred from actions in the