





CHAPTER

# 5

## THE CRIMINAL COURT PROCESS

A jury forewoman reads the verdict in court. The Sixth Amendment of the Constitution guarantees Americans the right to an impartial jury.

The criminal process begins when a law is first broken and extends through the arrest, indictment, trial, and appeal. There is no single criminal, or civil, court process in the United States. Instead, the federal system has a court process at the national level, and each state and territory has its own set of rules and regulations that affect the judicial process. Norms and similarities do exist among all of these governmental entities, and the discussion will focus primarily on these, but no two states have identical judicial systems and no state's system is identical to that of the national government.

### THE NATURE AND SUBSTANCE OF CRIME

An act is not automatically a crime because it is hurtful or sinful. An action constitutes a true crime only if it specifically violates a criminal statute duly enacted by Congress, a state legislature, or some other public authority. A crime, then, is an offense against the state punishable by fine, imprisonment, or death. A crime is a violation of obligations due the community as a whole and can be punished only by the state. The sanctions of imprisonment and death cannot be imposed by a civil court or in a civil action (although a fine may be a civil or a criminal penalty).

In the United States most crimes constitute sins of commission, such as aggravated assault or embezzlement; a

few consist of sins of omission, such as failing to stop and render aid after a traffic accident or failing to file an income tax return. The state considers some crimes serious, such as murder and treason, and this seriousness is reflected in the corresponding punishments, such as life imprisonment or the death penalty. The state considers others crimes only mildly reprehensible, such as double parking or disturbing the peace, and consequently punishments of a light fine or a night in the local jail are akin to an official slap on the wrist.

Some crimes, such as kidnapping or rape, constitute actions that virtually all citizens consider outside the sphere of acceptable human conduct, whereas other crimes constitute actions about which opinion would be divided. For example, an 1897 Michigan statute makes it illegal to curse in front of a child, and a Nebraska law forbids bingo games at church suppers. Other criminal statutes are plainly silly: In Wisconsin it is illegal to sing in a bar, and in Louisiana it is forbidden to appear drunk at a meeting of a literary society.

The most serious crimes in the United States are felonies. In a majority of the states a felony is any offense for which the penalty may be death (in states that allow it) or imprisonment in the penitentiary (a federal or state prison); all other offenses are misdemeanors or infractions. In other states, and under federal law, a felony is an

offense for which the penalty may be death or imprisonment for a year or more. Thus, felonies are distinguished in some states according to the place where the punishment occurs; in some states and according to the federal government, the length of the sentence is the key factor. Examples of felonies include murder, forcible rape, and armed robbery.

Misdemeanors are regarded as petty crimes by the state, and their punishment usually consists of confinement in a city or county jail for less than a year. Public drunkenness, small-time gambling, and vagrancy are common examples of misdemeanor offenses. Some states have a third category of offense known as infractions. Often they include minor traffic offenses, such as parking violations, and the penalty is usually a small fine. Fines may also be part of the penalty for misdemeanors and felonies.

## CATEGORIES OF CRIME

**F**ive broad categories that comprise the primary criminal offenses in the United States today are conventional, economic, syndicated, political, and consensual.

### Conventional Crimes

Property crimes make up the lion's share of the 31.3 million conventional crimes committed annually in the United States. Property crimes are distinguished by the government from crimes of violence, although the two

often go hand in glove. For example, the thief who breaks into a house and inadvertently confronts a resistant owner may harm the owner and thus be involved in more than just the property crime of burglary.

The less numerous, but more feared, conventional crimes are those against the person. These crimes of violence include murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.

### Economic Crimes

There are four broad categories of economic crimes:

- Personal crimes consist of nonviolent criminal activity that one person inflicts on another with the hope of monetary gain. Examples include intentionally writing a bad check, cheating on one's income tax, and committing welfare fraud.
- Abuse of trust occurs when business or government employees violate their fidelity to their employer or clients and engage in practices such as commercial bribery, theft and embezzlement from the workplace, and filling out false expense accounts.
- Business crimes are crimes that are not part of the central purpose of the business enterprise but are incidental to (or in furtherance of) it. Misleading advertising, violations of the antitrust laws, and false depreciation figures computed for corporate income tax purposes are all business crimes.

- Con games are white-collar criminal activities committed under the guise of a business.

### Syndicated, or Organized, Crimes

Syndicated crime is engaged in by groups of people and is often directed on some type of hierarchical basis. It represents an ongoing activity that is inexorably entwined with fear and corruption. Organized crime tends to focus on areas that are particularly lucrative, such as trafficking in illegal drugs, gambling, prostitution, and loan-sharking (money-lending at exorbitant interest rates and high repayment rates).

### Political Crimes

Political crime usually constitutes an offense against the government: treason, armed rebellion, assassination of public officials, and sedition. However, the term has come to include crimes committed by the government against individual citizens, dissident groups, and foreign governments or nationals — for example, illegal wiretaps conducted by the government of politically dissident groups or the refusal of the military to investigate incidents of sexual harassment.

### Consensual Crimes

So-called victimless crime, such as prostitution, gambling, illegal drug use, and unlawful sexual practices between consenting adults, is called consensual because both perpetrator and client desire the forbidden activity.

### ELEMENTS OF A CRIME

Every crime has several distinct elements, and unless the state is able to demonstrate in court the existence of these essential elements there can be no conviction. Although the judicial process in the courtroom may not focus separately and distinctly on each of these elements, they are at least implicit throughout the entire



Syndicated crime is one of five broad categories that comprise the primary criminal offenses in the United States today. At this June 20, 2002, press conference, U.S. Attorney General for the Southern District of New York James Comey, left, and Kevin Donovan, right, assistant director of the New York FBI field office, announce the indictment of 14 alleged members of the Gambino organized crime family in New York.

process of duly convicting someone of a criminal offense.

### **A Law Defining the Crime and the Punishment**

If an act is to be prohibited or required by the law, a duly constituted authority (usually Congress or a state legislature) must properly spell out the matter so that the citizenry can know in advance what conduct is prohibited or required. Lawmakers must also set forth the penalties to be imposed upon the individual who engages in the harmful conduct.

There are several corollaries to this general principle. One is that the U.S. Constitution forbids criminal laws that are *ex post facto*, that is, laws that declare certain conduct to be illegal after the conduct takes place. Likewise, the state may not pass bills of attainder, which are laws that single out a particular person or group of persons and declare that something is criminal for them but legal for everyone else. A final corollary is that a law defining a crime must be precise so that the average person can determine in advance what conduct is prohibited or required.

### **The Actus Reus**

“Actus reus” is the Latin phrase meaning the criminal action committed by the accused that gives rise to the legal prosecution. The actus reus is the material element of the crime. This element may be the commission of an action that is forbidden (for instance,

assault and battery), or it may be the failure to perform an action that is required (for instance, a person’s refusal to stop and render aid to a motor vehicle accident victim).

### **The Mens Rea**

The “mens rea” (a Latin term) is the essential mental element of the crime. The U.S. legal system has always made a distinction between harm that was caused intentionally and harm that was caused by simple negligence or accident. Thus, if one person takes the life of another, the state does not always call it murder. If the killing was done with malice aforethought by a sane individual, it will likely be termed “murder in the first degree.” But if the killing occurred in the passion of a barroom brawl, it would more likely be called “second-degree murder,” which carries a lesser penalty. Reckless driving on the highway that results in the death of another would correspondingly be considered “negligent homicide” — a wrong, to be sure, but not as serious in the eyes of the state as the intentional killing of another.

### **An Injury or Result**

A crime consists of a specific injury or a wrong perpetrated by one person against another. The crime may harm society at large, such as selling military secrets to a foreign government, or the injury may be inflicted upon an individual and, because of its nature, is

considered to offend society as a whole. The nature of the injury, as with the *mens rea*, often determines the nature of the crime itself. For example, consider two drivers who have been cutting each other off in traffic. Finally they both stop their cars and come out fighting. Suppose one of them hits the other so hard he dies. The crime may be murder (of some degree). If the man does not die but suffers serious bodily harm, the crime is aggravated assault. If the injury is minor, the charge may be simple assault. Because the nature of the injury often determines the offense, it is frequently asserted that the nature of the injury is the key legal element of the crime.

Some actions may be criminal even though no injury is actually inflicted. Most crimes of criminal conspiracy fall into this category. For instance, if several persons were to plan to assassinate a judge or to bribe jurors in an attempt to keep a criminal from being convicted, the crime would be conspiracy to obstruct justice. This would be a crime even if the judge went unharmed and no money was ever passed to the jurors. All that is required is that the crime be planned and intended and that some specific, overt act be taken by one of the conspirators in furtherance of their plan (such as the purchase of a weapon or possession of a map of the route that the judge takes between his home and the courtroom).

### **A Causal Relationship Between the Action and the Resultant Injury**

Before there can be a conviction for a criminal offense, the state must prove that the accused, acting in a natural and continuous sequence, produced the harmful situation. Usually proving a causal relationship is not difficult. If “Bill” stabs “John” with a knife and inflicts a minor wound, there is no doubt that Bill is guilty of assault with a deadly weapon. But what if John does not obtain proper medical care for the wound, develops an infection, and subsequently dies? Is Bill now guilty of manslaughter or murder? Or what if after being stabbed, John stumbles across a third party and causes injury to her? Is Bill to blame for this, too?

Resolution of questions such as these are often difficult for judges and juries. The law requires that all circumstances be taken into account. The accused can be convicted only if the state can prove that his or her conduct is the direct, immediate, or determining cause of the resultant harm to the victim.

### **PROCEDURES BEFORE A CRIMINAL TRIAL**

**B**efore a criminal trial can be held, federal and state laws require a series of procedures and events. Some of these stages are mandated by the U.S. Constitution and state constitutions, some by court decisions, and others by legislative en-

actments. Custom and tradition often account for the rest. Although the exact nature of these procedural events varies from federal to state practice — and from one state to another — there are similarities throughout the country. These procedures, however, are not as automatic or routine as they might appear; rather, the judicial system’s decision makers exercise discretion at all stages according to their values, attitudes, and views of the world.

### The Arrest

The arrest is the first substantial contact between the state and the accused. The U.S. legal system provides for two basic types of arrest — those with a warrant and those without. A warrant is issued after a complaint, filed by one person against another, has been presented and reviewed by a magistrate who has found probable cause for the arrest. Arrests without a warrant occur when a crime is committed in the presence of a police officer or when an officer has probable cause to believe that someone has committed (or is about to commit) a crime. Such a belief must later be established in a sworn statement or testimony. In the United States up to 95 percent of all arrests are made without a warrant.

An officer’s decision whether to make an arrest is far from simple or automatic. To be sure, the officer who witnesses a murder will make an arrest on the spot if possible. But most law-breaking incidents are not that simple

or clear-cut, and police officials possess — and exercise — wide discretion about whether to take someone into custody. Sufficient resources are simply not available to the police for them to proceed against all activities that Congress and the legislatures have forbidden. Consequently, discretion must be exercised in determining how to allocate the time and resources that do exist. Police discretion is at a maximum in several areas.

**Trivial Offenses.** Many police manuals advise their officers that when minor violations of the law are concerned, a warning is a more appropriate response than an arrest. Traffic violations, misconduct by juveniles, drunkenness, gambling, and vagrancy all constitute less serious crimes and entail judgment calls by police.

**Victim Will Not Seek Prosecution.** Nonenforcement of the law is also the rule in situations where the victim of a crime will not cooperate with the police in prosecuting a case. In the instance of minor property crimes, for example, the victim is often satisfied if restitution occurs and the victim cannot afford the time to testify in court. Unless the police have expended considerable resources in investigating a particular property crime, they are generally obliged to abide by the victim’s wishes.

When the victim of a crime is in a continuing relationship with the crim-



inal, the police often decline to make an arrest. Such relationships include landlord and tenant, one neighbor and another, and, until recently, husband and wife. In this last case, however, heightened awareness of domestic violence has had a significant impact on police procedures.

Rape and child molestation constitute another major category of crimes for which there are often no arrests because the victims will not or cannot cooperate with the police. Oftentimes the victim is personally acquainted with, or related to, the criminal, and the fear of reprisals or of ugly publicity inhibits the victim from pressing a complaint.

### ***Victim Also Involved in Misconduct.***

When police officers perceive that the victim of a crime is also involved in some type of improper or questionable conduct, the officers frequently opt not to make an arrest.

### **Appearance Before a Magistrate**

After a suspect is arrested for a crime, he or she is booked at the police station; that is, the facts surrounding the arrest are recorded and the accused may be fingerprinted and photographed. Next the accused appears before a lower-level judicial official whose title may be judge, magistrate, or commissioner. Such an appearance is supposed to occur “without unnecessary delay”; in 1991 the U.S. Supreme Court ruled that

police may detain an individual arrested without a warrant for up to 48 hours without a court hearing on whether the arrest was justified.

This appearance in court is the occasion of several important events in the criminal justice process. First, the accused must have been informed of the precise charges and must be informed of all constitutional rights and guarantees. Among others, these rights include those of the now famous *Miranda v. Arizona* decision handed down in 1966 by the Supreme Court. The accused “must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning.” (Such warnings must also be given by the arresting officer if the officer questions the suspect about the crime.) In some states the accused must be informed about other rights that are provided for in the state’s Bill of Rights, such as the right to a speedy trial and the right to confront hostile witnesses.

Second, the magistrate will determine whether the accused is to be released on bail and, if so, what the amount of bail is to be. Constitutionally, the only requirement for the amount is that it shall not be “excessive.” Bail is considered to be a privilege — not a right — and it may be

denied altogether in capital punishment cases for which the evidence of guilt is strong or if the magistrate believes that the accused will flee from prosecution no matter what the amount of bail. An alternative to bail is to release the defendant on recognizance, basically on a pledge by the defendant to return to court on the appointed date for trial.

In minor cases the accused may be asked to plead guilty or not guilty. If the plea is guilty, a sentence may be pronounced on the spot. If the defendant pleads not guilty, a trial date is scheduled. However, in the typical serious (felony) case, the next primary duty of the magistrate is to determine whether the defendant requires a preliminary hearing. If such a hearing is appropriate, the matter is adjourned by

the prosecution and a subsequent stage of the criminal justice process begins.

### **The Grand Jury Process or the Preliminary Hearing**

At the federal level all persons accused of a crime are guaranteed by the Fifth Amendment to have their cases considered by a grand jury. However, the Supreme Court has refused to make this right binding on the states. Today only about half of the states use grand juries; in some of these, they are used for only special types of cases. Those states that do not use grand juries employ a preliminary hearing or an examining trial. (A few states use both procedures.) Regardless of which method is used, the primary purpose of this stage in the criminal justice process is to determine whether there

#### **WARNING AS TO YOUR RIGHTS**

**You are under arrest. Before we ask you any questions, you must understand what your rights are.**

**You have the right to remain silent. You are not required to say anything to us at any time or to answer any questions. Anything you say can be used against you in court.**

**You have the right to talk to a lawyer for advice before we question you and to have him with you during questioning.**

**If you cannot afford a lawyer and want one, a lawyer will be provided for you.**

**If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.**

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Since 1966, police have had to advise suspects about their rights prior to any interrogation. They use the so-called "Miranda Warning," named after Ernesto Miranda, who was granted a retrial because he was not advised about his rights.

is probable cause for the accused to be subjected to a formal trial.

**The Grand Jury.** Grand juries consist of 16 to 23 citizens, usually selected at random from the voter registration lists, who render decisions by a majority vote. Their terms may last anywhere from one month to one year, and some may hear more than a thousand cases during their term. The prosecutor alone presents evidence to the grand jury. Not only are the accused and his or her attorney absent from the proceedings, but usually they also have no idea which grand jury is hearing the case or when. If a majority believes probable cause exists, then an indictment, or true bill, is brought. Otherwise the result is a no bill.

Historically two arguments have been made in favor of grand juries. One is that grand juries serve as a check on a prosecutor who might be using the office to harass an innocent person for political or personal reasons. Ideally an unbiased group of citizens would interpose themselves between an unethical prosecutor and the defendant. A second justification for grand juries is to make sure that the district attorney has secured enough evidence to warrant the trouble and expense — for both the state and the accused — of a full-fledged trial.

**The Preliminary Hearing.** In the majority of states that have abolished the grand jury system, a preliminary

hearing is used to determine whether there is probable cause for the accused to be bound over for trial. At this hearing the prosecution presents its case, and the accused has the right to cross-examine witnesses and to produce favorable evidence. Usually the defense elects not to fight at this stage of the criminal process; in fact, a preliminary hearing is waived by the defense in the vast majority of cases.

If the examining judge determines that there is probable cause for a trial or if the preliminary hearing is waived, the prosecutor must file a bill of information with the court where the trial will be held. This serves to outline precisely the charges that will be adjudicated in the new legal setting.

### **The Arraignment**

Arraignment is the process in which the defendant is brought before the judge in the court where he or she is to be tried to respond to the grand jury indictment or the prosecutor's bill of information. The prosecutor or a clerk usually reads in open court the charges that have been brought against the accused. The defendant is informed that he or she has a constitutional right to be represented by an attorney and that a lawyer will be appointed without charge if necessary.

The defendant has several options about how to plead to the charges. The most common pleas are guilty and not guilty. But the accused may also plead not guilty by reason of insanity, for-

mer jeopardy (having been tried on the same charge at another time), or “nolo contendere” (from the Latin, no contest). Nolo contendere means that the accused does not deny the facts of the case but claims that he or she has not committed any crime, or it may mean that the defendant does not understand the charges. The nolo contendere plea can be entered only with the consent of the judge (and sometimes the prosecutor as well). Such a plea has two advantages. It may help the accused save face vis-à-vis the public because he or she can later claim that technically no guilty verdict was reached even though a sentence or a fine may have been imposed. Also, the plea may spare the defendant from certain civil penalties that might follow a guilty plea (for example, a civil suit that might follow from conviction for fraud or embezzlement).

If the accused pleads not guilty, the judge will schedule a date for a trial. If the plea is guilty, the defendant may be sentenced on the spot or at a later date set by the judge. Before the court will accept a guilty plea, the judge must certify that the plea was made voluntarily and that the defendant was aware of the implications of the plea. A guilty plea is to all intents and purposes the equivalent to a formal verdict of guilty.

### **The Possibility of a Plea Bargain**

At both the state and federal levels at least 90 percent of all criminal cases

never go to trial. That is because before the trial date a bargain has been struck between the prosecutor and the defendant’s attorney concerning the official charges to be brought and the nature of the sentence that the state will recommend to the court. In effect, some form of leniency is promised in exchange for a guilty plea.

Because plea bargaining virtually seals the fate of the defendant before trial, the role of the judge is simply to ensure that the proper legal and constitutional procedures have been followed. There are three (not mutually exclusive) types of plea bargains.

***Reduction of Charges.*** The most common form of agreement between a prosecutor and a defendant is a reduction of the charge to one less serious than that supported by the evidence. This exposes the criminal to a substantially reduced range of sentence possibilities. A second reason for a defendant to plead guilty to a reduced charge is to avoid a record of conviction for an offense that carries a social stigma. Another possibility is that the defendant may wish to avoid a felony record altogether and would be willing to plead guilty to almost any misdemeanor offered by the prosecutor rather than face a felony charge.

***Deletion of Tangent Charges.*** A second form of plea bargain is the agreement of the district attorney to drop other charges pending against an indi-

vidual. There are two variations on this theme. One is an agreement not to prosecute “vertically” — that is, not to prosecute more serious charges filed against the individual. The second type of agreement is to dismiss “horizontal” charges; that is to dismiss additional indictments for the same crime pending against the accused.

Another variation of this type of plea bargaining is the agreement in which a repeater clause is dropped from an indictment. At the federal level and in many states, a person is considered a habitual criminal upon the third conviction for a violent felony anywhere in the United States. The mandatory sentence for the habitual criminal is life imprisonment. In state courts the habitual criminal charge often is dropped in exchange for a plea of guilty.

Another plea bargain of this type is the agreement in which indictments in different courts are consolidated into one court in order that the sentences may run concurrently. As indictments or preliminary hearing rulings are handed down in many jurisdictions, they are placed on a trial docket on a rotation system. This means that a defendant charged with four counts of forgery and one charge of possession of a forged instrument might be placed on the docket of five different courts. Generally it is common practice in such multicourt districts to transfer all of a person’s indictments to the first court listed. This gives the

presiding judge the discretion of allowing all of the defendant’s sentences to run concurrently.

**Sentence Bargaining.** A third form of plea bargaining concerns a plea of guilty from the defendant in exchange for a prosecutor’s agreement to ask the judge for a lighter sentence. The strength of the sentence negotiation is based upon the realities of the limited resources of the judicial system. At the state level, at least, prosecutors are able to promise the defendant a fairly specific sentence with confidence that the judge will accept the recommendation. If the judge were not to do so, the prosecutor’s credibility would quickly begin to wane, and many of the defendants who had been pleading guilty would begin to plead not guilty and take their chances in court. The result would be a gigantic increase in court dockets that would overwhelm the judicial system and bring it to a standstill. Prosecutors and judges understand this reality, and so do the defense attorneys.

**Constitutional and Statutory Restrictions on Plea Bargaining.** At both the state and federal levels, the requirements of due process of law mean that plea bargains must be made voluntarily and with comprehension. This means that the defendant must be admonished by the court of the consequences of a guilty plea (for example, the defendant waives all oppor-

tunities to change his or her mind at a later date), that the accused must be sane, and that, as one state puts it, “It must plainly appear that the defendant is uninfluenced by any consideration of fear or by any persuasion, or delusive hope of pardon prompting him to confess his guilt.”

For the first two types of plea bargains — reduction of charges and deletion of tangent charges — some stricter standards govern the federal courts. One is that the judge may not actually participate in the process of plea bargaining; at the state level judges may play an active role in this process. Likewise, if a plea bargain has been made between the U.S. attorney and the defendant, the government may not renege on the agreement. If the federal government does so, the federal district judge must withdraw the guilty plea. Finally, the Federal Rules of Criminal Procedure require that before a guilty plea may be accepted, the prosecution must present a summary of the evidence against the accused, and the judge must agree that there is strong evidence of the defendant’s guilt.

***Arguments For and Against Plea Bargaining.*** For the defendant the obvious advantage of the bargain is that he or she is treated less harshly than would be the case if the accused were convicted and sentenced under maximum conditions. Also, the absence of a trial often lessens publicity

on the case, and because of personal interests or social pressures, the accused may wish to avoid the length and publicity of a formal trial. Finally, some penologists (professionals in the field of punishment and rehabilitation) argue that the first step toward rehabilitation is for a criminal to admit guilt and to recognize his or her problem.

Plea bargaining also offers some distinct advantages for the state and for society as a whole. The most obvious is the certainty of conviction, because no matter how strong the evidence may appear, an acquittal is always a possibility as long as a trial is pending. Also, the district attorney’s office and judges are saved an enormous amount of time and effort by their not having to prepare and preside over cases in which there is no real contention of innocence or that are not suited to the trial process. Finally, when police officers are not required to be in court testifying in criminal trials, they have more time to devote to preventing and solving crimes.

Plea bargains do have a negative side as well. The most frequent objection to plea bargaining is that the defendant’s sentence may be based upon nonpenological grounds. With the large volume of cases making plea bargaining the rule, the sentence often bears no relation to the specific facts of the case, to the correctional needs of the criminal, or to society’s legitimate

interest in vigorous prosecution of the case. A second defect is that if plea bargaining becomes the norm of a particular system, then undue pressure may be placed upon even innocent persons to plead guilty. Studies have shown that, in some jurisdictions, the less the chance for conviction, the harder the bargaining may be because the prosecutor wants to get at least some form of minimal confession out of the accused.

A third disadvantage of plea bargaining is the possibility of the abuse called overcharging — the process whereby the prosecutor brings charges against the accused more severe than the evidence warrants, with the hope that this will strengthen his or her hand in subsequent negotiations with the defense attorney.

Another flaw with the plea bargaining system is its very low level of visibility. Bargains between prosecutor and defense attorney are not made in open court presided over by a neutral jurist and for all to observe. Instead, they are more likely made over a cup of coffee in a basement courthouse cafeteria where the conscience of the two lawyers is the primary guide.

Finally, the system has the potential to circumvent key procedural and constitutional rules of evidence. Because the prosecutor need not present any evidence or witnesses in court, a bluff may result in a conviction even though the case might not be able to pass the muster of the due process

clause. The defense may be at a disadvantage because the rules of discovery (the laws that allow the defense to know in detail the evidence the prosecution will present) in some states limit the defense counsel's case preparation to the period after the plea bargain has occurred. Thus the plea bargain may deprive the accused of basic constitutional rights.

### **The Adversarial Process**

The adversarial model is based on the assumption that every case or controversy has two sides to it: In criminal cases the government claims a defendant is guilty while the defendant contends innocence; in civil cases the plaintiff asserts that the person he or she is suing has caused some injury while the respondent denies responsibility. In the courtroom each party provides his or her side of the story as he or she sees it. The theory (or hope) underlying this model is that the truth will emerge if each party is given unbridled opportunity to present the full panoply of evidence, facts, and arguments before a neutral and attentive judge (and jury).

The lawyers representing each side are the major players in this courtroom drama. The judge acts more as a passive, disinterested referee whose primary role is to keep both sides within the accepted rules of legal procedure and courtroom decorum. The judge eventually determines which side has won in accordance with the

rules of evidence, but only after both sides have had a full opportunity to present their case.

## **PROCEDURES DURING A CRIMINAL TRIAL**

Assuming that no plea bargain has been struck and the accused maintains his or her innocence, a formal trial will take place. This is a right guaranteed by the Sixth Amendment to all Americans charged with federal crimes and a right guaranteed by the various state constitutions — and by the Fourteenth Amendment — to all persons charged with state offenses. The accused is provided many constitutional and statutory rights during the trial. The following are the primary rights that are binding on both the federal and state courts.

### **Basic Rights Guaranteed During the Trial Process**

The Sixth Amendment says, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The Founders emphasized the word *speedy* so that an accused would not languish in prison for a long time prior to the trial or have the determination of his or her fate put off for an unduly long period of time. But how soon is *speedy*? Although this word has been defined in various ways by the Supreme Court, Congress gave new meaning to the term when it passed the Speedy Trial Act of 1974. The act mandated time

limits, ultimately reaching 100 days, within which criminal charges must either be brought to trial or dismissed. Most states have similar measures on the statute books, although the precise time period varies from one jurisdiction to another. By “public trial” the Founders meant to discourage the notion of secret proceedings whereby an accused could be tried without public knowledge and whisked off to some unknown detention camp.

The Sixth Amendment also guarantees Americans the right to an impartial jury. At the least this has meant that the prospective jurors must not be prejudiced one way or the other before the trial begins. For example, a potential juror may not be a friend or relative of the prosecutor or the crime victim; nor may someone serve who believes that anyone of the defendant’s race or ethnic ancestry is “probably the criminal type.” What the concept of an impartial jury of one’s peers has come to mean in practice is that jurors are to be selected randomly from the voter registration lists — supplemented in an increasing number of jurisdictions by lists based on automobile registrations, driver’s licenses, telephone books, welfare rolls, and so on. Although this system does not provide a perfect cross-section of the community, because not all persons are registered to vote, the Supreme Court has said that this method is good enough. The High Court has also ruled that no class of persons (such as African



Americans or women) may be systematically excluded from jury service.

Besides being guaranteed the right to be tried in the same locale where the crime was committed and to be informed of the charges, defendants have the right to be confronted with the witnesses against them. They have the right to know who their accusers are and what they are charging so that a proper defense may be formulated. The accused is also guaranteed the opportunity “to have the Assistance of Counsel for his defense.” Prior to the 1960s this meant that one had this right (at the state level) only for serious crimes and only if one could pay for an attorney. However, because of a series of Supreme Court decisions, the law of the land guarantees one an attorney if tried for any crime that may result in a prison term, and the government must pay for the legal defense for an indigent defendant. This is the rule at both the national and state levels.

The Fifth Amendment to the U.S. Constitution declares that no person shall “be subject for the same offence to be twice put in jeopardy of life and limb.” This is the double jeopardy clause and means that no one may be tried twice for the same crime by any state government or by the federal government. It does not mean, however, that a person may not be tried twice for the same action if that action has violated both national and state laws. For example, someone who robs a fed-

erally chartered bank in New Jersey runs afoul of both federal and state law. That person could be legally tried and acquitted for that offense in a New Jersey court and subsequently be tried for that same action in federal court.

Another important right guaranteed to the accused at both the state and federal levels is not to “be compelled in any criminal case to be a witness against himself.” This has been interpreted to mean that the fact that someone elects not to testify on his or her own behalf in court may not be used against the person by judge and jury. This guarantee serves to reinforce the principle that under the U.S. judicial system the burden of proof is on the state; the accused is presumed innocent until the government proves otherwise beyond a reasonable doubt.

Finally, the Supreme Court has interpreted the guarantee of due process of law to mean that evidence procured in an illegal search and seizure may not be used against the accused at trial. The source of this so-called exclusionary rule is the Fourth Amendment to the U.S. Constitution; the Supreme Court has made its strictures binding on the states as well. The Court’s purpose was to eliminate any incentive the police might have to illegally obtain evidence against the accused.

### **Selection of Jurors**

If the accused elects not to have a bench trial — that is, not to be tried and sentenced by a judge alone — his

or her fate will be determined by a jury. At the federal level 12 persons must render a unanimous verdict. At the state level such criteria apply only to the most serious offenses. In many states a jury may consist of fewer than 12 persons and render verdicts by other than unanimous decisions.

A group of potential jurors is summoned to appear in court. They are questioned in open court about their general qualifications for jury service in a process known as “voir dire” (from Old French, meaning “to say the truth”). The prosecutor and the defense attorney ask general and specific questions of the potential jurors. Are they citizens of the state? Can they comprehend the English language? Have they or anyone in their family ever been tried for a criminal offense? Have they read about or formed any opinions about the case at hand?

In conducting the voir dire, the state and the defense have two goals. The first is to eliminate all members of the panel who have an obvious reason why they might not render an impartial decision in the case. Common examples might be someone who is excluded by law from serving on a jury, a juror who is a friend or relative of a participant in the trial, and someone who openly admits a strong bias in the case at hand. Objections to jurors in this category are known as challenges for cause, and the number of such challenges is unlimited. It is the judge who determines whether these challenges are valid.

The second goal that the opposing attorneys have in questioning prospective jurors is to eliminate those who they believe would be unfavorable to their side even though no overt reason is apparent for the potential bias. Each side is allowed a number of peremptory challenges — requests to the court to exclude a prospective juror with no reason given. Most states customarily give the defense more peremptory challenges than the prosecution. At the federal level one to three challenges per jury are usually permitted each side, depending on the nature of the offense; as many as 20 are allowed in capital cases. The use of peremptory challenges is more of an art than a science and is usually based on the hunch of the attorneys.

In the past attorneys were able to exclude potential jurors via the peremptory challenge for virtually any reason whatsoever. However, in recent years the Supreme Court has interpreted the Fourteenth Amendment’s equal protection clause to restrict this discretion by prohibiting prosecutors from using their challenges to exclude African Americans or women from serving on a criminal jury.

The process of questioning and challenging prospective jurors continues until all those duly challenged for cause are eliminated, the peremptory challenges are either used up or waived, and a jury of 12 (six in some states) has been created. In some states alternate jurors are also chosen. They

attend the trial but participate in deliberations only if one of the original jurors is unable to continue in the proceedings. Once the panel has been selected, they are sworn in by the judge or the clerk of the court.

### **Opening Statements**

After the formal trial begins, both the prosecution and the defense make an opening statement (although in no state is the defense compelled to do so). Long and detailed statements are more likely to be made in jury trials than in bench trials. The purpose of opening statements is to provide members of the jury — who lack familiarity with the law and with procedures of criminal investigation — with an outline of the major objectives of each side's case, the evidence that is to be presented, the witnesses that are to be called, and what each side seeks to prove. If the opening statements are well presented, the jurors will find it easier to grasp the meaning and significance of the evidence and testimony. The usual procedure is for the state to make its opening statement first and for the defense to follow with a statement about how it will refute that case.

### **The Prosecution's Case**

After the opening statements the prosecutor presents the evidence amassed by the state against the accused. Evidence is generally of two types — physical evidence and the testimony of

witnesses. The physical evidence may include things such as bullets, ballistics tests, fingerprints, handwriting samples, blood and urine tests, and other documents or items that serve as physical aids. The defense may object to the admission of any of these tangible items and will, if successful, have the item excluded from consideration. If defense challenges are unsuccessful, the physical evidence is labeled by one of the courtroom personnel and becomes part of the official record.

Most evidence at criminal trials takes the form of testimony of witnesses. The format is a question-and-answer procedure whose purpose is to elicit very specific information in an orderly fashion. The goal is to present only evidence that is relevant to the immediate case at hand and not to give confusing or irrelevant information or illegal evidence that might result in a mistrial (for example, evidence that the accused had a prior conviction for an identical offense).

After each witness the defense attorney has the right to cross-examine. The goal of the defense will be to impeach the testimony of the prosecution witness — that is, to discredit it. The attorney may attempt to confuse, fluster, or anger the witness, causing him or her to lose self-control and begin providing confusing or conflicting testimony. A prosecution witness' testimony may also be impeached if defense witnesses who contradict the version of events suggested by the state

are subsequently presented. Upon completion of the cross-examination, the prosecutor may conduct a redirect examination, which serves to clarify or correct some telling point made during the cross-examination. After the state has presented all its evidence and witnesses, it rests its case.

### **The Case for the Defense**

The presentation of the case for the defense is similar in style and format to that of the prosecution. Tangible evidence is less common in the defense's case, and most of the evidence will be that of witnesses who are prepared to rebut or contradict the prosecution's arguments. The witnesses are questioned by the defense attorney in the same style as those in the prosecution case. Each defense witness may in turn be cross-examined by the district attorney, and then a redirect examination is in order.

The difference between the case for the prosecution and the case for the defense lies in their obligation before the law. The defense is not required by law to present any new or additional evidence or any witnesses at all. The defense may consist merely of challenging the credibility or the legality of the state's evidence and witnesses. The defense is not obligated to prove the innocence of the accused; it need show only that the state's case is not beyond a reasonable doubt. The defendant need not even take the stand. (However, if he or she elects to do so, the ac-

cused faces the same risks of cross-examination as any other witness.)

After the defense has rested its case, the prosecution has the right to present rebuttal evidence. In turn, the defense may offer a rejoinder known as a surrebuttal. After that, each side delivers closing arguments. Oftentimes this is one of the more dramatic episodes in the trial because each side seeks to sum up its case, condense its strongest arguments, and make one last appeal to the jury. New evidence may not be presented at this stage, and the arguments of both sides tend to ring with emotion and appeals to values that transcend the immediate case. The prosecutor may talk about the crime problem in general, about the need for law and order, and about the need not to let compassion for the accused get in the way of empathy for the crime victim. The defense attorney, on the other hand, may remind the jurors "how we have all made mistakes in this life" or argue that in a free, democratic society any doubt they have should be resolved in favor of the accused. The prosecution probably avoids emotionalism more than the defense attorney, however, because many jury verdicts have been reversed on appeal after the district attorney injected prejudicial statements into the closing statements.

### **Role of the Judge During the Trial**

The judge's role in the trial, although very important, is a relatively passive



Prosecutors and police display a seizure of more than \$45 million worth of heroin and cocaine. Illegal drug traffic belongs under either one of two categories of crime: organized crime and consensual crime, also known as victimless crime, because both the perpetrator and the client desire the forbidden activity.



Witnesses and physical evidence form the principal elements of the prosecution's case in most trials. Left: Tampa Police Department investigators take fingerprint samples in an attempt to trace an accused terrorist. Above: An expert witness points to a chart of the parking lot where an alleged crime took place.

one. He or she does not present any evidence or take an active part in the examination of the witnesses. The judge is called upon to rule on the many motions of the prosecutor and of the defense attorney regarding the types of evidence that may be presented and the kinds of questions that may be asked of the witnesses. In some jurisdictions the judge is permitted to ask substantive questions of the witnesses and also to comment to the jury about the credibility of the evidence that is presented; in other states the judge is constrained from such activity. Still, the American legal tradition has room for a variety of judicial styles that depend on the personality, training, and wisdom of individual judges.

First and foremost, the judge is expected to play the part of a disinterested party whose primary job is to see to it that both sides are allowed to present their cases as fully as possible within the confines of the law. If judges depart from the appearance or practice of being fair and neutral parties, they run counter to fundamental tenets of American jurisprudence and risk having their decisions overturned by an appellate court.

Although judges do for the most part play such a role, the backgrounds and values of the jurists also affect their decisions in the close calls — when they are called upon to rule on a motion for which the arguments

are about equally strong or on a point of law that is open to a variety of interpretations.

### **Role of the Jury During the Trial**

The jurors' role during the trial is passive. Their job is to listen attentively to the cases presented by the opposing attorneys and then come to a decision based solely on the evidence that is set forth. They are ordinarily not permitted to ask questions either of the witnesses or of the judge, nor are they allowed to take notes of the proceedings. This is not because of constitutional or statutory prohibitions but primarily because it has been the traditional practice of courts in America.

In recent years, however, many judges have allowed jurors to become more involved in the judicial arena. Chicago's Chief U.S. District Court Judge John F. Grady has for over a decade permitted jurors in his courtroom to take notes. At least four U.S. appellate courts have given tacit approval to the practice of juror participation in questioning witnesses, as long as jurors are not permitted to blurt out queries in the midst of trial and attorneys are given a chance to object to specific questions before they are posed to witnesses. In some states a few trial judges have allowed jurors to take fairly active roles in the trial. Still, at both state and federal levels the role of the jury remains basically passive.

## Instructions to the Jury

Although the jury's job is to weigh and assess the facts of the case, the judge must instruct the jurors about the meaning of the law and how the law is to be applied. Because many cases are overturned on appeal as a result of faulty jury instructions, judges tend to take great care that the wording be technically and legally correct.

All jury instructions must have some basic elements. One is to define for the jurors the crime with which the accused is charged. This may involve giving the jurors a variety of options about what kind of verdict to bring. For example, if one person has taken the life of another, the state may be trying the accused for first-degree murder. Nevertheless, the judge may be obliged to acquaint the jury with the legal definition of second-degree murder or manslaughter if it should determine that the defendant was the killer but did not act with malice aforethought.

The judge must also remind the jury that the burden of proof is on the state and that the accused is presumed to be innocent. If, after considering all the evidence, the jury still has a reasonable doubt as to the guilt of the accused, it must bring in a not guilty verdict.

Finally, the judge usually acquaints the jurors with a variety of procedural matters: how to contact the judge if they have questions, the order in which they must consider the charges

if there are more than one, who must sign the official documents that express the verdict of the jury. After the instructions are read to the jury (and the attorneys for each side have been given an opportunity to offer objections), the jurors retreat into a deliberation room to decide the fate of the accused.

## The Jury's Decision

The jury deliberates in complete privacy; no outsiders observe or participate in its debate. During their deliberation jurors may request the clarification of legal questions from the judge, and they may look at items of evidence or selected segments of the case transcript, but they may consult nothing else — no law dictionaries, no legal writings, no opinions from experts. When it has reached a decision by a vote of its members, the jury returns to the courtroom to announce its verdict. If it has not reached a decision by nightfall, the jurors are sent home with firm instructions neither to discuss the case with others nor read about the case in the newspapers. In very important or notorious cases, the jury may be sequestered by the judge, which means that its members will spend the night in a local hotel away from the public eye.

If the jury becomes deadlocked and cannot reach a verdict, it may report that fact to the judge. In such an event the judge may insist that the jury continue its effort to reach a ver-



Defendants in the photos to the left and above are shown awaiting the jury's verdict and listening to the judge's announcement of the verdict. Once the verdict is reached, the judge has several weeks to determine the penalty, based on the principle that the punishment should fit the crime. Bottom left, a prisoner is led back to his cell.





dict. Or, if the judge is convinced that the jury is in fact hopelessly deadlocked, he or she may dismiss the jury and call for a new trial.

Research studies indicate that most juries dealing with criminal cases make their decisions fairly quickly. Almost all juries take a vote soon after they retire to their chambers in order to see how divided, or united, they are. In 30 percent of the cases it takes only one vote to reach a unanimous decision. In 90 percent of the remainder, the majority on the first ballot eventually wins out. Hung juries — those in which no verdict can be reached — tend to occur only when a large minority existed on the first ballot.

Scholars have also learned that juries often reach the same verdict that the judge would have, had he or she been solely responsible for the decision. One large jury study asked judges to state how they would have decided jury cases over which they presided. The judge and jury agreed in 81 percent of the criminal cases (about the same as in civil cases). In 19 percent of the criminal cases the judge and jury disagreed, with the judge showing a marked tendency to convict where the juries had acquitted.

When the members of the jury do finally reach a decision, they return to the courtroom and their verdict is announced in open court, often by the jury foreman. At this time either the prosecutor or the defense attorney often asks that the jury be polled —

that is, that each juror be asked individually if the general verdict actually reflects his or her own opinion. The purpose is to determine whether each juror supports the overall verdict or whether he or she is just caving in to group pressure. If the polling procedure reveals that the jury is indeed not of one mind, it may be sent back to the jury room to continue deliberations; in some jurisdictions a mistrial may be declared. If a mistrial is declared, the case may be tried again before another jury. There is no double jeopardy because the original jury did not agree on a verdict. If the jury's verdict is not guilty, the defendant is discharged on the spot and is free to leave the courtroom.

## **PROCEDURES AFTER A CRIMINAL TRIAL**

**A**t the close of the criminal trial, generally two stages remain for the defendant if he or she has been found guilty: sentencing and an appeal.

### **Sentencing**

Sentencing is the court's formal pronouncement of judgment upon the defendant at which time the punishment or penalty is set forth.

At the federal level and in most states, sentences are imposed by the judge only. However, in several states the defendant may elect to be sentenced by either a judge or a jury, and in capital cases states generally require

that no death sentence shall be imposed unless it is the determination of 12 unanimous jurors. In some states after a jury finds someone guilty, the jury deliberates a second time to determine the sentence. In several states a new jury is empaneled expressly for sentencing. At this time the rules of evidence are more relaxed, and the jury may be permitted to hear evidence that was excluded during the actual trial (for example, the previous criminal record of the accused).

After the judge pronounces the sentence, several weeks customarily elapse between the time the defendant is found guilty and the time when the penalty is imposed. This interval permits the judge to hear and consider any posttrial motions that the defense attorney might make (such as a motion for a new trial) and to allow a probation officer to conduct a presentence investigation. The probation officer is a professional with a background in criminology, psychology, or social work, who makes a recommendation to the judge about the length of the sentence to be imposed. The probation officer customarily examines factors such as the background of the criminal, the seriousness of the crime committed, and the likelihood that the criminal will continue to engage in illegal activity. Judges are not required to follow the probation officer's recommendation, but it is still a major factor in the judge's calculus as to what the sen-

tence shall be. Judges are presented with a variety of alternatives and a range of sentences when it comes to punishment for the criminal. Many of these alternatives involve the concept of rehabilitation and call for the assistance of professionals in the fields of criminology and social science.

The lightest punishment that a judge can hand down is that of probation. This is often the penalty if the crime is regarded as minor or if the judge believes that the guilty person is not likely to engage in additional criminal activity. If a probated sentence is handed down, the criminal may not spend any time in prison as long as the conditions of the probation are maintained. Such conditions might include staying away from convicted criminals, not committing other crimes, or with increasing frequency, performing some type of community service. If a criminal serves out his or her probation without incident, the criminal record is usually wiped clean and in the eyes of the law it is as if no crime had ever been committed.

If the judge is not disposed toward probation and feels that jail time is in order, he or she must impose a prison sentence that is within a range prescribed by law. The reason for a range of years instead of an automatically assigned number is that the law recognizes that not all crimes and criminals are alike and that in principle the punishment should fit the crime.

In an effort to eliminate gross disparities in sentencing, the federal government and many states have attempted to develop sets of precise guidelines to create greater consistency among judges. At the national level this effort was manifested by the enactment of the Sentencing Reform Act of 1987, which established guidelines to structure the sentencing process.

Congress provided that judges may depart from the guidelines only if they find an aggravating or mitigating circumstance that the commission did not adequately consider. Although the congressional guidelines do not specify the kinds of factors that could constitute grounds for departure from the sentencing guidelines, Congress did state that such grounds could not include race, gender, national origin, creed, religion, socioeconomic status, drug dependence, or alcohol abuse.

The states, too, have a variety of programs for avoiding vast disparities in judges' sentences. By 1995, 22 states had created commissions to establish sentencing guidelines for their judges, and as of late 1997 such guidelines were in effect in 17 states. Likewise, almost all of the states have now enacted mandatory sentencing laws that require an automatic, specific sentence upon conviction of certain crimes — particularly violent crimes, crimes in which a gun was used, or crimes perpetrated by habitual offenders.

Despite the enormous impact that judges have on the sentence, they do

not necessarily have the final say on the matter. Whenever a prison term is set by the judge, it is still subject to the parole laws of the federal government and of the states. Thus parole boards (and sometimes the president and governors who may grant pardons or commute sentences) have the final say about how long an inmate actually stays in prison.

### **An Appeal**

At both the state and federal levels everyone has the right to at least one appeal upon conviction of a felony, but in reality few criminals avail themselves of this privilege. An appeal is based on the contention that an error of law was made during the trial process. Such an error must be reversible as opposed to harmless. An error is considered harmless if its occurrence had no effect on the outcome of the trial. A reversible error, however, is a serious one that might have affected the verdict of the judge or jury. For example, a successful appeal might be based on the argument that evidence was improperly admitted at trial, that the judge's instructions to the jury were flawed, or that a guilty plea was not voluntarily made. However, appeals must be based on questions of procedure and legal interpretations, not on factual determinations of the defendant's guilt or innocence as such. Furthermore, under most circumstances one cannot appeal the length of one's sen-

tence in the United States (as long as it was in the range prescribed by law).

Criminal defendants do have some degree of success on appeal about 20 percent of the time, but this does not mean that the defendant goes free. The usual practice is for the appellate court to remand the case (send it back down) to the lower court for a new trial. At that point the prosecution must determine whether the procedural errors in the original trial can be overcome in a second trial and whether it is worth the time and effort to do so. A second trial is not considered to be double jeopardy, since the defendant has chosen to appeal the original conviction.

The media and others concerned with the law often call attention to appellate courts that turn loose seemingly guilty criminals and to convictions

that are reversed on technicalities. Surely this does happen, and one might argue that this is inevitable in a democratic country whose legal system is based on fair play and the presumption of the innocence of the accused. However, about 90 percent of all defendants plead guilty, and this plea virtually excludes the possibility of an appeal. Of the remaining group, two-thirds are found guilty at trial, and only a small percentage of these appeal. Of those who do appeal, only about 20 percent have any measurable degree of success. Of those whose convictions are reversed, many are found guilty at a subsequent trial. Thus the number of persons convicted of crimes who are subsequently freed because of reversible court errors is a small fraction of 1 percent. ๕๖