The murder was shocking, even in a city recently proclaimed murder capital of the United States. For their first date, Michael Gerardi gave Connie Babin a single red rose and took her out to dinner at the Port of Call restaurant on the edge of New Orleans’ historic French Quarter. As they were returning to his truck parked a block away they were confronted by three black youths. Before Gerardi had a chance to hand over his wallet he was shot in the face. The part-time bartender, who was also a medical student, provided emergency first aid but to no avail. Michael Gerardi was killed during what became known as New Orleans’ bloodiest week.
The murder in front of the Port of Call restaurant provides but one poignant example that crime has been a pressing national concern for four decades. Newspapers headline major drug busts. Local television news broadcasts graphic footage of the latest murder scene. Not to be outdone, the national media offer tantalizing details on the latest sensational crime or prominent criminal. Meanwhile, official government statistics document high murder rates, and unofficial pollsters report that Americans believe crime rates are too high. These concerns prompt governmental response. Candidates for public office promise that, if elected, they will get tough on criminals. Governmental officials, in turn, announce bold new programs to eradicate street crime, reduce violence, and end the scourge of drugs. Yet, despite all the attention and promises, street crime remains a volatile, persistent, and intractable issue in America (Scheingold 1991).

A good deal of the political rhetoric about crime focuses on the criminal courts. Judges and defense attorneys—much more so than police chiefs and prison wardens—are blamed for high crime rates. Prosecutors are viewed as being too ready to engage in plea bargaining. Judges are accused of imposing unduly lenient sentences. Appellate courts are blamed for allowing obviously guilty defendants to go free on technicalities. Meanwhile, the police complain that Supreme Court decisions handcuff the fight against crime. Victims of crime become frustrated by lengthy trial delays. Witnesses protest wasted trips to the courthouse.

The purpose of this chapter is to build on public perceptions of the criminal courts by focusing on a few basic topics. We begin by discussing where the courts fit in the criminal justice system and how the public perceives the courts. Next, attention shifts to the three activities that set the stage for the rest of the book:

- Finding the courthouse
- Identifying the actors
- Following the steps of the process

As we will see shortly, the judicial process is complicated, so throughout this book we will examine the courts from three perspectives:

- Law on the books
- Law in action
- Courts in controversy

THE COURTS AND THE CRIMINAL JUSTICE SYSTEM

Fighting crime is a major societal activity. Every year local, state, and federal governments spend $112 billion to apprehend, convict, and punish criminals (Gifford 1999). These tax dollars support an enormous assortment of criminal justice agencies, who in turn employ a large (and growing) number of employees; roughly 2 million people earn their living working in the criminal justice system. These governmental officials are quite busy; every year the police make more than 14.5 million arrests, and every day correctional personnel supervise 6.3 million people. Yet as large as these figures are, they still underestimate societal activity directed against crime. A substantial number of persons are employed in the private sector either directly (defense attorneys) or indirectly (defense experts, private investigators, forensic scientists, etc.).
attorneys and bail agents) or indirectly (locksmiths and security consultants) (Hakim, Rengert, and Shachmurove 1996). There are, for example, more private security guards than public law enforcement officers in the United States (Cunningham, Strauchs, and VanMeter 1991).

The numerous public agencies involved in implementing public policy concerning crime are referred to as the criminal justice system. Figure 1-1 depicts the criminal justice system as consisting of three overlapping circles: Police are responsible for apprehending criminals; the courts are responsible for deciding whether those arrested are legally guilty, and if so, determining the sentence; corrections is responsible for carrying out the penalty imposed on the guilty.

The major components of the criminal justice system do not make up a smoothly functioning and internally consistent organization. Rather, the criminal justice system is both interdependent and fragmented.

**An Interdependent Criminal Justice System**

Viewing the various components of criminal justice as a *system* highlights the fact that these different agencies are interdependent and interrelated (Walker 1992). Police, courts, and corrections are separate governmental institutions with different goals, histories, and operating procedures. Though separate, they are also tied together because they must interact with one another. The courts play a pivotal role within the criminal justice system because many formal actions pertaining to suspects, defendants, and convicts involve the courts. Only the judiciary can hold a suspect in jail prior to trial, find a defendant guilty, and sentence the guilty to prison. Alternatively, of course, the courts may release the suspect awaiting trial, find the suspect not guilty, or decide to grant probation.

The decisions that courts make have important consequences for other components of the criminal justice system. Judges’ bail policies, for example, immediately affect what happens to a person arrested by the police; likewise, corrections personnel are affected because the bail policies of the judges control the size of the local jail population. If the decisions made by the courts have important consequences for police and prisons, the reverse is equally true: The operations of law enforcement and corrections have a major impact on the judiciary. The more felons the police arrest, the greater the workload of the prosecutors; and the more overcrowded the prisons, the more difficult it is for judges to sentence the guilty.

**A Fragmented Criminal Justice Nonsystem**

The system approach to criminal justice dominates contemporary thinking about criminal justice. But not everyone is convinced of the utility of this conceptualization. Some people point to a *nonsystem* of criminal justice. Although the work of the police, courts, and corrections must, by necessity, overlap,
this does not mean that their activities are coordinated, or coherent. From the perspective of the nonsystem, what is most salient is the fragmentation of criminal justice. Fragmentation characterizes each component of the criminal justice system. The police component consists of more than 17,000 law enforcement agencies, with varying traditions of cooperation or antagonism. Likewise, the corrections component includes approximately 1,300 state and federal correctional facilities, to say nothing of thousands of local jails. But corrections also encompasses probation, parole, drug treatment, halfway houses, and the like.

The same fragmentation holds true for the courts. In many ways, talking about courts is misleading, because the activities associated with the “court” encompass a wide variety of actors. Many people who work in the courthouse are employed by separate governmental agencies—judges, prosecutors, public defenders, clerks, court reporters, and bailiffs, primarily. Others who work in the courthouse are private citizens, but their actions directly affect what happens in this governmental institution—defense attorneys and bail agents are prime examples. Still others are ordinary citizens who find themselves in the courthouse either because they are compelled to be there—defendants and jurors—or because their activities are essential to case disposition—victims and witnesses.

The fragmentation within the three components of the nonsystem of criminal justice is compounded by the decentralization of government. American government is based on the principle of federalism, which distributes governmental power between national (usually referred to as federal) and state governments. In turn, state governments create local units of government, such as counties and cities. Each of these levels of government is associated with its own array of police, courts, and corrections. This decentralization adds tremendously to the complexity of American criminal justice. For example, depending on the nature of the law allegedly violated, several different prosecutors may bring charges against a defendant, including the following: city attorney (local), district attorney (county), attorney general (state), U.S. attorney (U.S. district court), and U.S. attorney general (national).

Needless to say, the fragmentation of the criminal justice nonsystem results in a lack of coordination between the components. Most actors are highly specialized in their particular function and therefore have little concern about the operation of the system as a whole (Heinz and Manikas 1992). This means that attempts to find solutions to a problem typically involve the interactions of numerous governmental agencies, each with its own set of priorities. Consider a local jail filled to overflowing. When a federal court ordered a county jail to reduce overcrowding, an interagency task force was created to coordinate the response of the county sheriff, city police departments, the state probation department, locally elected judges, and the county governing board. As one would expect, there was considerable tension and conflict among these different organizations (Welsh and Pontell 1991).

### Tensions and Conflicts

Criminal justice is best viewed as both a system and a nonsystem. Both interdependence and fragmentation characterize the interrelationships between the agencies involved in apprehending, convicting, and punishing wrongdoers. In turn, these structural arrangements produce tensions and conflicts within each component. For example, a suburban police department only reluctantly cooperates with its big-city neighbor; the prosecutor loudly condemns the actions of a judge; and the prison warden expresses concern over the activities of halfway houses.

Tensions and conflicts occur also between the components of criminal justice. The interrelationships between police, courts, and corrections are often marked by tension and conflict because the work of each component is evaluated by others: The police make arrests, yet the decision to charge is made by the prosecutor; the judge and jury rate the prosecutor’s efforts. decentralized again plays a role in the inherent tensions and conflicts in the criminal justice nonsystem. For example, it is not unusual to find that the relationship between the city police department and a federal law enforcement agency is marked by friction, nor is it unusual to find that state courts are frustrated by decisions of the federal judiciary.

Tensions and conflicts also result from multiple and conflicting goals concerning criminal justice.
Governmental officials bring to their work different perspectives on the common task of processing persons accused of breaking the law. Tensions and conflicts among police, courts, and corrections, therefore, are not necessarily undesirable; because they arise from competing goals, they provide important checks on other organizations, guaranteeing that multiple perspectives will be heard (Wright 1981).

The Blame Game

Tensions and conflict, though typical and to be expected, can nonetheless be frustrating, particularly to the public, which expects somebody to be responsible for running the war on crime and instead finds constant public bickering. In turn, some public officials seem more intent on blaming another criminal justice official than on working toward a solution. Thus, the blame game is common in criminal justice. Perhaps The New York Times (December 9, 1981, 30) said it best when it compared the justice system to Rubik’s Cube:

It’s long been understood that criminal justice is a Rubik’s Cube: what the police do will affect what happens in court, which will affect what happens in the jails and prisons. You can’t hope to deal with crime better by focusing on any single part—any more than you can solve the cube by concentrating on one square at a time.

Yet for years criminal justice officials have responded to public frustration by focusing blame on each other—regarding small matters as well as large. We could hold speedier trials, say court administrators, if only the corrections people would get the prisoners to court on time. We could keep more men on the street, say the police, if only the courts wouldn’t tie them up so long when they bring people in. We could send convicts to prison faster, say judges, if only the probation department would prepare pre-sentencing reports on time.

The editorial concluded that there certainly is plenty of blame to go around but that it is time that various officials begin turning such complaints into questions, and holding each other accountable for the answers.

Because the courts occupy a pivotal role within criminal justice, they are most often the target of this blame game. It is important to emphasize, however, that although some of the blame game is indeed trivial, petty, and personal, a good deal of it reflects basic organizational structure. Citizens are frustrated because no one seems in charge, but in a basic sense this is by design.

Throughout this book we will discuss efforts to bring greater coherence to the criminal justice system. Coordination is now a term heard throughout the system. Particularly in problem areas such as domestic violence and drug abuse, actors in the criminal justice system are instituting innovative programs that join activities, not only of law enforcement, courts, and corrections, but also health care and social services.
First, Americans are concerned about crime:

- Eighty-three percent say their best guess is that “the crime rate in this country is going up.”
- Thirty-eight percent are afraid to walk alone at night near where they live.

Second, Americans often blame the courts for the crime problem:

- Eighty-two percent believe that courts “do not deal harshly enough with criminals.”
- Sixty-eight percent conclude that “the police can’t really do much about crime because the courts have put too many restrictions on the police.”
- Fifty-five percent believe that “most judges have more sympathy for the criminals than for their victims.”

Finally, despite widespread dissatisfaction with the performance of the criminal courts, when asked more questions, Americans are highly supportive of courts and judges. Judges, far more than legislators or public administrators, retain the respect of the public:

- Seventy-five percent believe that judges are generally fair and honest in deciding each case.
- Ninety percent assume that if they were ever accused of a crime they would receive a fair trial.

Public opinions about these matters are not uniform. Perceptions of the courts vary by race. Hispanics are more likely to be dissatisfied with the ability of courts to protect society and also voice concerns about the quality of the courts. African Americans are more likely to be dissatisfied with equality and fairness of the judicial process (Myers 1996).

Broad contours of public opinion aside, individuals often voice their opinions about the criminal court process, and often their views are negative if not hostile. Letters to the editor typically portray the courts as flawed; callers to radio talk shows complain that the system has failed. And in the era of cyberspace, homepages spring up dedicated to “criminal justice reform.” In turn, books geared to the general market carry catchy titles such as *The Collapse of Criminal Justice* (Rothwax 1996).

Beyond expressions of individual opinions, a variety of groups attempt to influence criminal justice policy. At the national level, policy debates concerning gun control and victims’ rights, to select two areas, are shaped by the actions of several different interest groups (Neubauer 2001). Meanwhile, in local communities, citizen groups pressure mayors and police chiefs to stop crime now. Thus, groups and organizations such as Crimestoppers, neighborhood watch, Crime Commissions, Night Out Against Crime, and Community in Action have become important components of the criminal justice system. In short, although the criminal justice system is almost overwhelmingly governmental, one should not discount the importance of nongovernmental actors, individual as well as collective.

There is a growing recognition at all levels of the criminal justice system of the importance of actively working with (and not against) citizens in the community. Indeed community has in recent years become an important word. Community-oriented policing, community courts, community prosecution, and community anticrime programs are examples of innovative efforts involving closer working relationships between justice officials and the broader community. Community antidrug efforts, for example, are premised on the notion that reducing illegal drug use cannot be limited to the efforts of police, courts, and corrections (Weingart, Hartmann, and Osborne 1994). Similarly, solutions to domestic abuse are understood in terms of a collaborative approach among health, justice, and social service professionals (Witwer and Crawford 1995). In important ways the recent emphasis on community efforts represents a major change in thinking; whereas criminal justice officials were once insular, they are now expected to reach out and involve the community.
holds true for the courts. Judges, prosecutors, and defense attorneys, for example, share the common task of processing cases but at the same time exhibit different perspectives on the proper outcome of the case. In understanding this complexity, America’s Courts and the Criminal Justice System examines the nation’s judiciary from three complementary perspectives. To oversimplify slightly, Part I is about finding the courthouse, or the basic organization of our court system; Part II concerns identifying the actors in the courthouse; and Part III focuses on following the steps of the process from arrest to appeal.

By rough count there are 17,000 courthouses in the United States. Some are imposing turn-of-the-century buildings noted for their elaborate architecture. Others are faceless modern structures marked by lack of architectural inspiration. A few courts, you might be surprised to learn, are in the front of a funeral parlor or the back of a garage, where justices of the peace preside in rural areas. Buildings aside, courts are governmental organizations. They are created to hear specific types of cases.

Figure 1-2 offers a preliminary overview of different types of courts in the United States. One distinction is between federal and state courts. The term dual court system refers to separate state and federal courts (rarely do cases move from one system to another). The dual court system has tremendous implications for the criminal justice system. In numerous and growing ways laws passed by the U.S. Congress, decisions of the president of the United States, or decisions of the U.S. Supreme Court affect activities of local police departments, local courts, and local corrections. The result is a complicated mosaic.

Another important difference between courts relates to function. Most courts are trial courts. As the name implies, this is where trials are held, jurors
sworn, and witnesses questioned. Trial courts are noisy places resembling school corridors between classes. Amidst the noisy crowd you will find lawyers, judges, police officers, defendants, victims, and witnesses walking through the building during working hours. Trial courts, in turn, are divided between major and lower. Lower courts initially process felony cases (set bail, for example) but cannot find the defendant innocent or guilty and therefore cannot sentence. Their primary activity involves processing the millions of minor offenses such as public drunkenness, petty theft, and disorderly conduct. Major trial courts, on the other hand, are responsible for the final phases of felony prosecutions. It is in these courts that defendants charged with crimes such as murder, robbery, burglary, and drug dealing enter a plea of guilty (or occasionally go to trial), and the guilty are sentenced.

Other courts (fewer in number) are appeals courts that review decisions made by trial courts (usually only the major trial courts). Appeals courts review decisions made elsewhere, but no trials are held, no jurors employed, nor witnesses heard. Rather, appellate courts are places where lawyers argue whether the previous decision correctly or incorrectly followed the law. In many ways appellate courts are like a monastery where scholars pore over old books and occasionally engage in polite debates.

In criminal cases defendants who are found guilty by judge or jury have the right to one appeal (findings of not guilty cannot be appealed). Given the growing volume of cases, the federal government and most states have created two levels of appellate courts—intermediate courts, which must hear all cases, and supreme courts, which pick and choose the cases they hear. Although the U.S. Supreme Court stands atop the organizational ladder, it hears only a handful of the cases filed each year (less than 100 per year). Thus its importance is measured not in terms of the number of cases decided but the wide-ranging impact that these few decisions have on all stages of the process.

Prosecutors

The organization of prosecutors in the United States is as fragmented as the courts in which they appear. To limit ourselves only to state courts and state prosecutions, in most states you find one prosecutorial office for the lower courts (typically the city attorney), another for the major trial court (typically called the district attorney or the state’s attorney), and yet another at the state level (almost uniformly called the attorney general).

Regardless of the level, prosecutors are the most influential of the courthouse actors. Their offices decide which cases to prosecute, which cases to plea-bargain, and which cases to try. They may also be influential in matters such as setting bail and choosing the sentence.
Defense Attorneys

The U.S. Constitution guarantees defendants the right to counsel. But for most defendants this abstract “right” collides with economic reality. Up to 80 percent of defendants in large cities cannot afford to hire a lawyer, so the government must provide them with one at government expense. Small counties use the assigned counsel system, whereby the judge appoints a member of the local bar to represent the defendant. Big cities employ the public defender system; indigent defendants are represented by full-time government attorneys who represent all defendants too poor to afford a lawyer. A handful of defendants hire a private lawyer.

Our notions of defense attorneys have been shaped by fictional characters such as Perry Mason, who always was able to show that his client was innocent. Realities are strikingly different. Often defense attorneys urge their clients to plead guilty based on the assessment that a jury will find the defendant guilty beyond a reasonable doubt. Even when cases are tried, defense attorneys only occasionally are able to secure a not guilty verdict for their client.

Defendants and Their Victims

Defendants are, by and large, young, poor, uneducated minority males. A large percentage stand accused of property crimes (theft and burglary) or low-level drug offenses. They are hardly the clever and sophisticated criminals portrayed in fiction. This profile has important implications for the judicial process. For one, many defendants are too inarticulate to help their attorney mount a defense. For another, the fact that the defendants are disproportionately minorities means they are now center stage
in the great fault line of U.S. politics—race. Whether
the criminal justice system discriminates, either
intentionally or unintentionally, against African
Americans, Hispanics, or Native Americans is a hot
topic and one for which there is no unequivocal
answer.

The victims of crime are playing an increasingly
important role in the criminal courts. Once ban-
ished to a bit part of testifying, they are increasingly
demanding major roles in setting bail, agreeing to
pleas of guilty, and imposing sentences and release
from prison. Groups such as Mothers Against
Drunk Driving (MADD) have become a potent
political force. Rhetoric aside, it is important to
remember that victims often share the same charac-
teristics as their tormentors—they are, by and large,
young, poor, undereducated minorities.

**FOLLOWING THE STEPS**

**OF THE PROCESS**

From arrest to appeal, a case passes through numer-
ous stages. Figure 1-4 presents the steps of criminal
procedure in the typical order in which they occur.
These steps are meant to provide only a basic over-
view. The specifics of criminal procedure vary from
state to state, and federal requirements differ from
state mandates. Moreover, prosecutions of serious
crimes (felonies) are more complicated than prose-
cutions of less serious offenses (misdemeanors).
Rest assured that the remainder of the text will com-
plicate this oversimplification. But for now we will
focus on a defendant charged with a noncapital state
felony.

**Crime**

There is no way to precisely quantify the amount of
crime in the United States, but compared to other
industrialized nations it is high. Every year about 12
million serious crimes are reported to the police
(many others are never reported and therefore never
make the official statistics). Although the media
focus on crimes of violence, the overwhelming
majority of crimes involve property (burglary and
theft primarily). For example, the 15,533 homicides
that occur each year account for less than 1 percent
(.2%) of serious crime.

Legally, crimes fall into three categories: felonies
(in most states punishable by one year or more in
prison); misdemeanors (typically punishable by a
sentence in the local jail); and ordinance violations
(subject to fine or a short jail term). Felonies are
filed in major trial courts, whereas misdemeanor
and ordinance violations are typically heard in the
lower courts.

**Arrest**

Every year the police make more than 14.5 million
arrests for nontraffic offenses. Most are for minor
crimes, but 3 million involve serious crimes such as
murder, rape, assault, robbery, burglary, and theft.
The police are able to make an arrest in only one out
of five crimes known to the police. As a result, only
a fraction of the nation’s major crimes ever reach
the courts.

**Initial Appearance**

An arrested person must be brought before a judge
without unnecessary delay. For felony defendants
the initial appearance is largely a formality because
no plea may be entered. Instead, defendants are told
what crime they are alleged to have committed, per-
functorily advised of their rights, and a date for the
preliminary hearing is set. For misdemeanor defen-
dants, the initial appearance is typically the defen-
dant’s only courtroom encounter; three out of four
plead guilty and are sentenced immediately.

**Bail**

The most important event that occurs during the
initial appearance is the setting of bail. Because a
defendant is considered innocent until proven
guilty, the vast majority of defendants have the right
to post bail. But this legal right is tied to the defen-
dant’s economic status. Many defendants are too
poor to scrounge up the ready cash to pay the bail
agent’s fee; thus they must remain in jail awaiting
trial. The overriding reality, however, is that Amer-
ica’s jails are overflowing. As a result, pretrial deten-
tion is limited largely to defendants who have com-
mitted serious crimes; judges set a very high bail
because they don’t want these defendants wandering
the streets before trial. For defendants charged with
less serious crimes, judges and prosecutors may
want to keep them in jail while awaiting trial, but
the citizens are not willing to invest the tens of millions of dollars needed to build more jails.

**Preliminary Hearing**

During the preliminary hearing the prosecutor must prove there is probable cause to believe the defendant committed the crime. Probable cause involves two elements: proof that a crime was committed and a linkage between the defendant and that crime. This isn’t much of a standard of proof, so most of the time the judge finds that probable cause is present and orders the defendant held for further proceedings. In most courthouses, few cases are

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**FIGURE 1-4 Steps of Criminal Procedure**

<table>
<thead>
<tr>
<th><strong>Law on the Books</strong></th>
<th><strong>Law in Action</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Crime</strong></td>
<td>Any violation of the criminal law.</td>
</tr>
<tr>
<td></td>
<td>Fourteen million serious crimes reported to the police yearly.</td>
</tr>
<tr>
<td></td>
<td>Property crimes outnumber violent offenses eight to one.</td>
</tr>
<tr>
<td><strong>Arrest</strong></td>
<td>The physical taking into custody of a suspected law violator.</td>
</tr>
<tr>
<td></td>
<td>About 3 million felony arrests each year.</td>
</tr>
<tr>
<td><strong>Initial appearance</strong></td>
<td>The accused is told of the charges, bail is set, and a date for the preliminary hearing is set.</td>
</tr>
<tr>
<td></td>
<td>Occurs soon after arrest, which means the judge and lawyers know little about the case.</td>
</tr>
<tr>
<td><strong>Bail</strong></td>
<td>Guarantee that a released defendant will appear at trial.</td>
</tr>
<tr>
<td></td>
<td>Every day the nation’s jails hold over 600,000 pretrial detainees.</td>
</tr>
<tr>
<td><strong>Preliminary hearing</strong></td>
<td>Pretrial hearing to determine if probable cause exists to hold the accused.</td>
</tr>
<tr>
<td></td>
<td>Cases are rarely dismissed but provides defense attorney a look at the evidence.</td>
</tr>
<tr>
<td><strong>Charging</strong></td>
<td>Formal criminal charges against defendant stating what criminal law was violated.</td>
</tr>
<tr>
<td></td>
<td>From arrest to the major trial court, half of cases are dropped.</td>
</tr>
<tr>
<td><strong>Grand jury</strong></td>
<td>A group of citizens who decide if persons accused of crimes should be charged (indicted).</td>
</tr>
<tr>
<td></td>
<td>Grand juries indict the defendants the prosecutor wants indicted.</td>
</tr>
<tr>
<td><strong>Arraignment</strong></td>
<td>The defendant is informed of the pending charges and is required to enter a plea.</td>
</tr>
<tr>
<td></td>
<td>Felony defendant’s first appearance before a major trial court judge.</td>
</tr>
<tr>
<td><strong>Evidence</strong></td>
<td>Formal and informal exchange of information before trial. Defense may seek to have evidence suppressed because it was collected in a way that violates the Constitution.</td>
</tr>
<tr>
<td></td>
<td>Prosecutors turn over evidence of guilt in hopes of obtaining a plea of guilty.</td>
</tr>
<tr>
<td></td>
<td>Suppression motions are granted less than 1 percent of the time but are at the heart of major debate.</td>
</tr>
<tr>
<td><strong>Plea negotiations</strong></td>
<td>The defendant pleads guilty with the expectation of receiving some benefit.</td>
</tr>
<tr>
<td></td>
<td>Ninety to 95 percent of felony defendants admit their guilt.</td>
</tr>
<tr>
<td><strong>Trial</strong></td>
<td>A fact-finding process using the adversarial method before a judge or usually a jury of twelve.</td>
</tr>
<tr>
<td></td>
<td>Most likely only in serious cases; defendant is likely to be convicted.</td>
</tr>
<tr>
<td><strong>Sentencing</strong></td>
<td>Punishment imposed on a defendant found guilty of violating the criminal law.</td>
</tr>
<tr>
<td></td>
<td>There are 6.3 million persons in prison, on probation, or on parole.</td>
</tr>
<tr>
<td><strong>Appeal</strong></td>
<td>Review of the lower court decision by a higher court.</td>
</tr>
<tr>
<td></td>
<td>Only 6 percent of convicted defendants win a significant victory.</td>
</tr>
</tbody>
</table>
dismissed at the preliminary hearing for lack of probable cause.

Charging Decision

Sometime after arrest a prosecutor reviews the case, paying particular attention to the strength of the evidence but also keeping in mind office policies on case priorities. Half the time this review results in dismissal. One out of two defendants is lucky indeed; they are released without the filing of criminal charges. But the other half are in deep trouble; their chances of being found not guilty are now slim indeed.

Grand Jury

Like the preliminary hearing, the grand jury is designed as a check on unwarranted prosecutions. Grand juries are required in all federal felony prosecutions, but only about half of the states use them. If the grand jury thinks there is enough evidence to hold the defendant for trial, they return an indictment (also called a true bill) charging the defendant with a crime. On rare occasions grand juries refuse to indict (such refusal is called a no bill or a no true bill). Legal theory aside, grand juries are dominated by the prosecutor, and they obligingly indict whom-ever the prosecutor wants indicted.

Arraignment

Although the two terms are often used interchangeably, arraignment differs from the initial appearance. During arraignment the defendant is given a copy of the formal charges, advised of his or her rights (usually more extensively than at the initial appearance), and for the first time is called upon to enter a plea. Not surprisingly, most defendants plead not guilty, but a handful admit their guilt then and there and enter a plea of guilty. Overall, little of importance happens during arraignment; this legal step is somewhat equivalent to the taking of class attendance.

Evidence

The term discovery refers to the exchange of information prior to trial. In some states (but not all) the prosecutor is required to turn over a copy of the police reports to the defense prior to trial. Generally, however, the defense is required to provide the prosecutor with little if any information, an imbalance that attracted considerable public attention during the O. J. Simpson trial. The law aside, many prosecutors voluntarily give defense attorneys they trust extensive information prior to trial, anticipating that the defense attorney will persuade the defendant to enter a plea of guilty.

Motions are simply requests that a judge make a decision. Many motions are made during trial, but a few may be made beforehand. The most significant pretrial motions relate to how the police gathered evidence. Defense attorneys file motions to suppress evidence, that is, to prevent its being used during trial. Motions to suppress physical evidence contend that the police conducted an illegal search and seizure (Mapp). Motions to suppress a confession contend that the police violated the suspect’s constitutional rights during questioning (Miranda).

Plea Negotiations

Most findings of guilt result not from a verdict at trial but from a voluntary plea by the defendant. Ninety percent of all felony convictions are the product of negotiations between the prosecutor and the defense attorney (and sometimes the judge as well). Although the public thinks of plea bargaining as negotiating a sentence less than the maximum, this term represents a variety of different practices and court traditions. At times, bargaining involves negotiations over the seriousness of the offense or over the number of separate charges (called counts).

Trial

Trial by jury is one of the most fundamental rights granted those accused of violating the criminal law. A defendant can be tried either by a judge sitting alone (called a bench trial) or by a jury. A jury trial
begins with the selection of twelve jurors (fewer in some cases). Each side makes opening statements, indicating what they think the evidence in the case will show. Because the prosecutor has the burden of proving the defendant guilty beyond a reasonable doubt, he or she is the first to call witnesses. After the prosecution has completed its case, the defense has the opportunity to call its own witnesses. When all the evidence has been introduced, each side makes a closing argument to the jury, and the judge then instructs the jury about the law. The jurors retire to deliberate in secret. Though the details of trial procedure vary from state to state, one factor is constant—the defendant’s chances for an acquittal are not good.

**Sentencing**

Most of the steps of the criminal process are concerned with determining innocence or guilt. As important as this question is, the members of the courtroom work group spend most of their time deciding what sentence to impose on the guilty. Indeed, defendants themselves are often more concerned about how many years they will have to spend in prison than about the question of guilt.

The principal decision the judge must make involves selecting between the option of imposing a prison sentence or placing the defendant on probation. Fines are rarely used in felony cases. The death penalty is hotly debated but in actuality is limited to only some first-degree murder cases. Prison overcrowding is the dominant reality of contemporary sentencing—over 1.4 million inmates are incarcerated in state and federal prisons, and the numbers increase by 8 to 12 percent each year. Only recently has attention begun to focus on the fact that the political rhetoric of “lock them up and throw away the key” has resulted in severe prison overcrowding.

**Appeal**

Virtually all defendants found guilty during trial contest their fate, filing an appeal with a higher court in hopes that they will receive a new trial. Contrary to public perceptions, defendants are rarely successful on appeal—only one of sixteen appellants achieves a significant victory in the appellate courts. Moreover, appeals are filed in only a small proportion of all guilty verdicts; defendants who plead guilty rarely appeal. Appellate court opinions, however, affect future cases because the courts decide policy matters.

**LAW ON THE BOOKS**

An important first step in understanding how American courts dispense justice is to learn the basic law underlying the process. The structure of the courts, the legal duties of the main actors, and the steps in the criminal process are all basic to an understanding of how the courts dispense criminal justice. One must also understand the assumptions underlying these rules, the history of how they evolved, and the goals they seek to achieve. These elements constitute law on the books—the legal and structural components of the judiciary. In essence, the starting point in understanding the legal system is knowing the formal rules.

Law on the books is found in constitutions, laws enacted by legislative bodies, regulations issued by administrative agencies, and cases decided by courts. There is little doubt that decisions by the U.S. Supreme Court have far-reaching ramifications. To highlight the importance of court decisions, each chapter’s Case Close-Up provides an in-depth look at some of the court decisions that have shaped our nation’s criminal justice system (see Case Close-Up: Overview).

**LAW IN ACTION**

The ongoing public debate over the courts indicates that the criminal courts do not stand in splendid isolation, removed from the rest of society. Rather, their activities are intimately intertwined with other social institutions, community values, public opinion, and the actions (or inactions) of other members of the criminal justice system. This perspective has important consequences for how we study the criminal courts (Neubauer 1997). We need to know not only what the law says (law on the books) but also how the rules are applied (law in action).

In many ways law on the books represents an idealized view of law, one that stresses an abstract set of rules that is so theoretical that it fails to
incorporate real people. Law on the books provides only an imperfect road map of the day-to-day realities of the courthouse. The concept of law in action, on the other hand, focuses on the factors governing the actual application of the law. It stresses that in the criminal courthouses of the United States, few cases ever go to trial. Most defendants either plead guilty or have their cases dismissed before trial. Instead of the conflict projected by the adversary system, judges, prosecutors, and defense attorneys cooperate on a number of matters. Whereas the main goal of the adversary model is to discover truth and decide guilt, a great deal of the court’s attention is directed toward determining the appropriate penalty.

Ours is a law-drenched age. Voters and elected officials alike see the solution to pressing social problems in terms of passing a law. Somehow we are not serious about an issue unless we have a law regulating it, and we are not really serious unless we have criminal laws. But laws are not self-enforcing. Some people delude themselves by thinking that passing a law solves the problem. This is not necessarily so. Indeed, if the problem persists, frustration sets in. Thus legislatures mandate that drivers purchase automobile insurance, but accident victims become frustrated when they discover the other party has no insurance. Similarly, judges require defendants to pay restitution, but crime victims discover that impoverished defendants (particularly those in prison) have no ability to pay. In the same vein, conservatives call for preventive detention, but jailers find that there are no available jail cells.

In short, there is a wide gap between legal theory (law on the books) and how that law is applied (law in action). Although some persons find this gap shocking, actually it is not; after all, no human institution ever lives up to the high ideals set out for it. If you spend five minutes observing a stop sign on a well-traveled street, you will find that not all

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<td>3</td>
<td>U.S. v. Miller and the Right to Bear Arms</td>
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<td>Wachtler v. Cuomo and Court Financing</td>
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<td>5</td>
<td>Barker v. Wingo and the Right to a Speedy Trial</td>
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<td>Burns v. Reed and Prosecutorial Misconduct</td>
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<td>Gideon v. Wainwright and the Right to Counsel</td>
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<td>8</td>
<td>Chisom v. Roemer and Diversity and the Bench</td>
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<td>9</td>
<td>Payne v. Tennessee and Victim Impact Statements</td>
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<td>10</td>
<td>County of Riverside v. McLaughlin and a Prompt Hearing before a Magistrate</td>
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<td>11</td>
<td>U.S. v. Salerno and Preventive Detention Interrogations</td>
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<td>12</td>
<td>Miranda v. Arizona and Limiting Police Interrogations</td>
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<td>13</td>
<td>Santobello v. New York and Honoring a Plea Agreement</td>
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<td>14</td>
<td>Sheppard v. Maxwell and Prejudicial Pretrial Publicity</td>
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<td>15</td>
<td>Furman v. Georgia and Cruel and Unusual Punishment</td>
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<td>16</td>
<td>Mistretta v. U.S. and Sentencing Guidelines</td>
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<td>Coleman v. Thompson and Federal Court Scrutiny of State Court Convictions</td>
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<td>North v. Russell and Nonlawyer Judges</td>
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<td>19</td>
<td>In re Gault and Due Process Rights of Juveniles</td>
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Throughout this book A Day in Court sections focus on law in action, examining the reality of courthouse justice. Sometimes A Day in Court will examine a specific person; other times, an idea or a program. Here is what to expect:

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<tr>
<th>Chapter</th>
<th>A Day in Court</th>
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<td>“The French Legal System”</td>
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<td>“DuPage County Says the Jury Is Still Out on Its Fledgling Drug Court”</td>
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<td>“Those People behind the Scenes”</td>
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<td>6</td>
<td>“The Good Fight Takes Its Toll”</td>
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<td>7</td>
<td>“Legal Workload Frustrating to Both Sides”</td>
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<td>8</td>
<td>“‘Frustrated’ Judge Gets the Gridlocked System Moving”</td>
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<td>9</td>
<td>Trial by Ordeal for Waiting Witnesses</td>
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<td>10</td>
<td>“Hell’s Waiting Room”</td>
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<td>11</td>
<td>Get Outta Jail Free</td>
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<td>12</td>
<td>“Lawyers Claim DAs Exclude Evidence”</td>
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<td>13</td>
<td>“Where ‘Swift’ Justice Means Just That”</td>
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<td>The Name of the Game Is Plea Bargaining</td>
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<td>14</td>
<td>“The Verdict: Juries Work”</td>
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<td>15</td>
<td>Probation Officers Classify Defendants</td>
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<td>16</td>
<td>“Drug Sentencing Draws Wrath of Judge”</td>
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<td>17</td>
<td>“A Self-Appointed Lawyer for the Nation’s Condemned”</td>
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<td>18</td>
<td>“(Traffic) Crime and Punishment”</td>
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<td>19</td>
<td>“Juvenile Court Judge Finds Peace of Mind”</td>
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<td>Teen Court</td>
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Realizing that law on the books is not the same as the law in action is only the second step in understanding how the courts dispense justice. The crucial task is to understand and explain why the law as practiced differs from the apparent intent of the formal rules. Toward this end a variety of studies have highlighted three important features of the way criminal courts operate: Assembly-line justice, discretion, and the courtroom work group are concepts that describe law in action.

Assembly-line Justice

A basic principle of the American legal system is that each case and each defendant will be considered individually. To some, however, assembly-line justice is a more realistic description of how the criminal courts operate. Particularly in the misdemeanor
and traffic courts of large cities, dispositions are usually made with lightning speed. A person’s day in court to answer a charge of speeding may consist of less than a minute before the judge.

Assembly-line justice is partially a reflection of the large numbers of cases that reach the courts. Every year approximately 14 million persons are arrested by the police, 3 million for felonies and the rest for misdemeanors. Because of the large volume, overworked officials are often more interested in moving the steady stream of cases than in individually weighing each case on the scales of justice. Particularly in large cities, there are tremendous pressures to move cases lest the backlog become worse and delays increase. In short, law on the books suggests a justice process with unlimited resources, whereas law in action stresses an administrative process geared to disposing of a large volume of cases.

Discretion

Law on the books projects an image of a legal system that seemingly runs by itself; it is a mechanical process of merely applying rules of law to given cases. Law in action, however, emphasizes a legal system in which the legal actors exercise discretion because choices must be made. Prosecutors, for example, exercise discretion in deciding whether to charge a defendant with a violation of the law, and judges clearly exercise discretion when deciding whether to send defendants to prison or place them on probation.

One reason actors in the criminal court community exercise discretion is that the law provides minimal guidance for making decisions. Sentencing provides the clearest example. For each criminal offense, the law specifies a potential range of penalties: probation, prison, or a fine. The legislative law, however, provides only the broadest standards for deciding where in the range of penalties a particular defendant’s case should fall. Such discretionary decisions are required at virtually every step of the criminal court process. Judges, prosecutors, and defense attorneys also exercise discretion in an attempt to make the system fair. They seek individualized justice. In short, law on the books emphasizes a law that is fixed and absolute, whereas law in action emphasizes a law that is flexible, requiring discretion in its application.

The Courtroom Work Group

Although we usually think of the criminal courts in terms of a conflict at trial, a more realistic appraisal is one of limited cooperation among the major participants. Whereas defendants come and go, the judges, prosecutors, and defense attorneys work together daily. They are tied together by more than a shared workplace, the courtroom; each is dependent on the others. Because defense attorneys seldom have resources to investigate a case fully, they are dependent on the prosecutor for access to police reports and the like. Because prosecutors have more cases to try than time to try them, they must rely on guilty pleas from the defense to secure convictions. Because judges want to prevent a backlog of cases from developing, they are dependent on prosecutors and defense attorneys to negotiate pleas. Such cooperation is a two-way street, of course. Actors who work within the system can expect to receive some benefits. Defense attorneys who do not needlessly make additional work for the others are sometimes able to secure a lighter than normal sentence for their clients. On the other hand, actors who challenge the system can expect sanctions. Defendants represented by uncooperative defense counsel sometimes receive longer prison terms than they would otherwise.

This courtroom work group is best described as a social organization. No individual actor works in social isolation; each can accomplish tasks only by interacting with the others. The network of cooperation underlying the courtroom community produces a commonly understood set of practices. Courts develop rules of thumb about how certain types of cases will be handled and what penalties will be applied. In short, law on the books stresses conflict at trial, whereas law in action finds a courtroom work group marked by limited cooperation between the key actors.

**Discretion:** The lawful ability of an agent of government to exercise choice in making a decision.

**Courtroom work group:** The regular participants in the day-to-day activities of a particular courtroom: judge, prosecutor, and defense attorney interact on the basis of shared norms.
At the heart of the public’s concern about crime has been a debate over the actions and inactions of the criminal courts. What the courts do (and don’t do) and how they do it (but rarely why) occupies center stage in the nation’s continuing focus on crime. Numerous reforms have been suggested, but there is no agreement over what types of change are in order. Even a brief review of the critical comments about the criminal courts discussed so far should indicate the varying and often conflicting views about what is wrong. Throughout this book Controversy sections highlight many issues facing the courts that are debated today (see Controversy: Overview).

In the public dialogue on the issues facing the criminal courts, conservatives square off against liberals, hard-liners against those said to be soft on crime. This sort of terminology is not very helpful. Such phrases as “soft on crime” attract our attention to questions about the goals of the criminal courts, but they are not useful for systematic inquiry because they are ambiguous and emotional. More constructive in understanding the controversy over the criminal courts are the crime control and due process models developed by Herbert Packer (1968) and discussed by Samuel Walker (2001). In an unemotional way, these two models...
highlight competing values concerning the proper role of the criminal courts. The conservative crime control model proposes to reduce crime by increasing the penalties on criminals. On the other hand, the liberal due process model advocates social programs aimed primarily at reducing crime by reducing poverty. Figure 1-5 summarizes the two views.

**Crime Control Model**

The most important value in the crime control model is the repression of criminal conduct. Unless crime is controlled, the rights of law-abiding citizens will not be protected, and the security of society will be diminished. Conservatives see crime as the product of a breakdown of individual responsibility and self-control. To reinforce social values of discipline and self-control, and to achieve the goal of repressing crime, the courts must process defendants efficiently. They should rapidly remove defendants against whom there is inadequate evidence and quickly determine guilt according to evidence. The crime control model holds that informal fact-finding—initially by the police and later by the prosecutor—not only is the best way to determine whether the defendant is in fact guilty but is also sufficiently foolproof to prevent the innocent from being falsely convicted. The crime control model, therefore, stresses the necessity of speed and finality in the courts in order to achieve the priority of crime suppression.

According to the crime control model, the courts have hindered effective law enforcement and therefore have produced inadequate protection of society. Advocates of this model are concerned that criminals “beat the system” and “get off easy.” In their view the cure is to eliminate legal loopholes by curtailing the exclusionary rule, abolishing the insanity defense, allowing for preventive detention of dangerous offenders, and increasing the certainty of punishment.

**Due Process Model**

In contrast, the due process model emphasizes protecting the rights of the individual. Its advocates are concerned about lawbreaking; they see the need to protect the public from predatory criminals. At the

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**Figure 1-5 Competing Values in the Criminal Justice System**

<table>
<thead>
<tr>
<th>Crime Control Model</th>
<th>Due Process Model</th>
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<tr>
<td><strong>Key value</strong></td>
<td>Protect rights of citizens.</td>
</tr>
<tr>
<td><strong>Causes of crime</strong></td>
<td>Breakdown of individual responsibility.</td>
</tr>
<tr>
<td><strong>Police fact-finding</strong></td>
<td>Most likely to determine guilt or innocence.</td>
</tr>
<tr>
<td><strong>Goal of courts</strong></td>
<td>Process guilty defendants quickly.</td>
</tr>
<tr>
<td><strong>Rights of defendants</strong></td>
<td>Technicalities let crooks go free.</td>
</tr>
<tr>
<td><strong>Sentencing</strong></td>
<td>Punishment will deter crime.</td>
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Crime control model: A perspective on the criminal justice process based on the proposition that the most important function of criminal justice is the repression of crime, focusing on efficiency as a principal measure.

Due process model: A philosophy of criminal justice based on the assumption that an individual is innocent until proven guilty and has a right to protection from arbitrary power of the state.
Overview

Acting on an anonymous tip, New Orleans police department detectives arrested Shareef Cousin at his home just a few blocks from where Michael Gerardi had been slain. Nine months later the case went to trial. The state’s star witness was Connie Babin, the victim’s date, who identified Cousin as the attacker. The defense countered with an alibi contending that Cousin was playing basketball about the time of the shooting. After three hours of deliberations the jury in Judge Raymond Bigelow’s courtroom unanimously found Cousin guilty of first-degree murder. Following the penalty phase of the trial, Shareef Cousin was sentenced to die by lethal injection.

Amid allegations that the prosecutor had improperly withheld evidence during the trial, the state’s case unraveled on appeal, however. The Louisiana Supreme Court reversed on the basis of improper use of hearsay testimony. But there would be no retrial. In January 1999 District Attorney Harry Connick reluctantly dismissed the case. Yet Cousin would not walk away from death row a free man. Earlier he had pled guilty to four armed robberies and is now serving twenty years in Angola, the state’s major penitentiary.

Throughout this book we will follow the murder trial of Shareef Cousin. Each chapter will examine one aspect of the prosecution, trial, and appeal of this case. The goal is to illustrate important aspects of the American justice system. Here is what to expect:

<table>
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<tr>
<th>Chapter</th>
<th>The Murder Trial of Shareef Cousin</th>
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<td>The Question of Civil Liability</td>
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<td>3</td>
<td>A Federal Civil Rights Lawsuit Is Filed</td>
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<td>4</td>
<td>“Doing Time at Tulane and Broad” (Part I)</td>
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<td>5</td>
<td>“Doing Time at Tulane and Broad” (Part II)</td>
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<td>6</td>
<td>DA Harry Connick Defends His Aggressive Tactics</td>
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<td>7</td>
<td>Limitations Facing the Defense</td>
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<td>8</td>
<td>Judge Raymond Bigelow, Ex-Prosecutor</td>
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<td>9</td>
<td>The Anguish of the Victims</td>
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<td>10</td>
<td>New Orleans’ Bloodiest Week in Memory</td>
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<td>11</td>
<td>Awaiting Trial in Foti’s Fortress</td>
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<td>12</td>
<td>The DA Fails to Disclose a Witness Statement</td>
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<tr>
<td>13</td>
<td>Pleading Guilty to Four Armed Robberies</td>
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<td>14</td>
<td>Two Trial-Day Surprises</td>
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<td>15</td>
<td>Doing Time on the Farm</td>
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<td>16</td>
<td>The Jury Chooses Death</td>
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<td>17</td>
<td>A Reversal on Narrow Grounds</td>
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<tr>
<td>19</td>
<td>“Few Options or Safeguards in a City’s Juvenile Courts”</td>
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To learn more about the murder trial of Shareef Cousin go to [http://www.wadsworth.com/product/0534563406s](http://www.wadsworth.com/product/0534563406s). This companion Web site provides additional resources, including timelines of key events, list of participants, photos, key documents in the case, newspaper stories of the case, court opinions, motions filed, and much more.

same time, however, they believe that granting too much leeway to law enforcement officials will only result in the loss of freedom and civil liberties for all Americans. This alternative diagnosis stresses different causes of crime. Liberals see crime not as a product of individual moral failure but as the result of social influences (Currie 1985). In particular, unemployment, racial discrimination, and governmental policies that work to the disadvantage of the poor are the root causes of crime; only by changing the social environment will crime be reduced (Currie 1989).

Although adherents of the due process model do not downgrade the need for controlling crime, they believe that single-minded pursuit of such a goal threatens individual rights and poses the threat of a tyrannical government. Thus, the key function of the courts is not the speed and finality projected in the crime control model, but an insistence on careful consideration of each case. The dominant image is one of the courts operating as an obstacle course. The due process model stresses the possibility of error in the informal fact-finding process and therefore insists on formal fact-finding, to protect
against mistakes made by the police and prosecutors. Proponents of the due process model believe that the courts’ priority should be to protect the rights of the individual. Any resulting decrease in the efficiency of the courts is the price we must pay in a democracy based on individual liberties.

The due process model emphasizes the need to reform people through rehabilitation. Community-based sentencing alternatives are considered preferable to the extensive use of prison sentences. Advocates of this approach are concerned that the court system is fundamentally unfair to poor and minority defendants; they therefore support the decisions of the Warren Court expanding protections of criminal defendants.

To some, the refusal of District Attorney Harry Connick to try Shareef Cousin a second time represented a miscarriage of justice—a brutal murderer was released on a legal technicality. In the words of Connie Babin, the victim’s date for that evening: “You try and do the right thing, and you get kicked in the end” (Coyle 1999). To others, the reversal of the murder conviction meant that justice eventually prevailed—an innocent man had been freed from death row. Throughout the proceedings, the defendant’s family alleged racism, prosecutorial misconduct, and underhanded police work. These contrasting reactions illustrate conflicting perspectives on the meaning of justice. They also mirror conflicting views of the purposes of the criminal justice process as summarized in the crime control versus due process models of justice.

The public dialogue and media attention devoted to courts reflect the fact that law is an important part of our culture. Indeed, most Americans possess an elementary knowledge about the criminal courts. They learn in high school civics that a person is presumed innocent until proven guilty. Media coverage of dramatic criminal cases has made them aware of the number of varying steps and procedures involved in a criminal prosecution. Television shows portray some of the difficulties that detectives, prosecutors, and defense attorneys face in fulfilling their responsibilities. Although most people know something about the law, they also know much that is contrary to fact.

Some of these public misunderstandings and misrepresentations about law are the product of education. High school American government and history textbooks, for example, offer a simplified, formal picture of law and the courts, lawyers, and trials. Americans also learn about the legal system by going to the movies, watching television, and reading fiction. At times, persons who rely on these sources are badly misled. Entertainment programs misrepresent the nature and amount of crime in the United States. Because murder makes a much better show than embezzlement or burglary, entertainment rarely shows street crime other than drug offenses.

Television also offers a number of false or doubtful propositions: It tells us, for example, that criminals are white males between the ages of twenty and fifty, that bad guys usually are businesspeople or professional criminals, and that crime is almost always unsuccessful in the end. Television and film also often misrepresent the roles of actors in the legal system. With few exceptions police are in constant action, chasing crooks in cars, running after them on foot, and capturing them only after exchanging gunfire. Perry Mason set the pattern for atypical portrayals of lawyers by always securing his client’s acquittal. In addition, entertainment distorts important issues of civil liberties. As soon as we know who did it, and that the guilty crook has been apprehended, the case is solved with no need for the prosecutor to prove the defendant guilty.

CONCLUSION

The American Civil Liberties Union (ACLU) is often identified with the due process model of criminal justice. For their views on a variety of criminal justice issues go to http://www.aclu.org.

For an up-to-date list of Web links, go to http://www.wadsworth.com/product/0534563406s.
These understandings and misunderstandings form the backdrop for this book. The Epilogue will examine in greater depth how and why courts figure so prominently in the public rhetoric over crime.

CRITICAL THINKING QUESTIONS

1. On a large sheet of paper, diagram the criminal justice system in your community. How well do the diagrams in this chapter fit your local community? If you live in a rural area, contemplate how different the system might be in a large city. Conversely, if you live in a big city, what differences would you expect in more rural areas?

2. What private, nongovernmental organizations are important to the criminal justice system of your community?

3. Use newspapers, radio, and criminal justice discussion lists/chat groups to monitor discussions concerning the criminal justice system. Do citizens make distinctions about police, courts, or corrections, or do they lump everything under the general rubric of the criminal justice system?

WORLD WIDE WEB RESOURCES AND EXERCISES

Web Guides
http://dir.yahoo.com/Society_and_Culture/Crime/
http://dir.yahoo.com/Government/Law/
    Criminal_Justice/
http://dir.yahoo.com/Government/U_S__Government/
    Judicial_Branch/
http://dir.yahoo.com/Society_and_Culture/Crime/
    Outlaws/

Web Search Terms
“Criminal justice”; “administration of justice”

Useful URLs
Sourcebook of Criminal Justice Statistics. This yearly publication runs over 600 pages. As new material becomes available, it is included in the online version: http://www.albany.edu/sourcebook/.

CNN.COM offers the latest news about law and crime: http://www.cnn.com/LAW/.


The Justice Information Center maintained by the National Criminal Justice Reference Service provides full text of hundreds of government publications: http://www.ncjrs.org/.

Uncommon URLs

Famous American Trials offers a fascinating glimpse into trials, old and new, that have shaped U.S. society: http://www.law.umkc.edu/faculty/projects/trials/trials.htm.

Crime Library is a gallery of famous and infamous criminals: http://www.crimelibrary.com/.

Cecil Greek’s Homepage contains lots of links to criminal justice sites: http://www.fsu.edu/~crimdo/greek.html.


Famous Cases offers a walk through the history of the FBI: http://www.fbi.gov/yourfbi/history/famcases/famcases.htm.

Web Exercises

1. The Internet has been called the world’s largest library, and as in any library, the easiest way to retrieve information is to go directly to the place where it is located. Each site on the Web has a unique location called a URL (Uniform Resource Locator).

   One site that contains a wealth of statistical data on the criminal justice system is maintained by the Bureau of Justice Statistics: http://www.ojp.usdoj.gov/bjs. Click on Expenditure & Employment and update the employment statistics discussed in this chapter. You can also use this site to add to Figure 1-3 with basic data about numbers of criminal justice agencies and employees.

2. The Internet is not only the world’s largest library but also the world’s largest library
without a card catalog. Unless you know specifically where to find information (the URL) you can waste a lot of time and become very frustrated in the process. Thankfully, several Web guides organize information around topics. In turn, this information is organized as a menu, which allows you to go from the most general topics (Society and Culture, for example) to specific ones. One of the most popular Web guides is Yahoo. You can access Yahoo either by clicking on Net Search on your browser and then clicking Yahoo or by going directly to Yahoo. The URL for Yahoo is http://www.yahoo.com. Once in Yahoo, here are the links to find information about the criminal justice system: Society and Culture/Crime/Organizations.

Look for organizations that span different segments of the criminal justice system and see what they say about coordination.

3. Select the search engine of your choice and use the search term administration of justice to locate three or more groups active in the crime debate. Which Web sites articulate values associated with the crime control model? Which Web sites articulate values associated with the due process model?

**REFERENCES**


**INFOTRAC COLLEGE EDITION RESOURCES AND EXERCISES**

**Basic Search Terms**

Criminal justice, administration of; crime

**Recommended Articles**

Kent Roach, “Four Models of the Criminal Process”
Stephen Pomper, “Reasonable Doubts”
Rebecca Porter, “Public Attitudes about Justice System Explored in Survey, Conference”

**InfoTrac College Edition Exercises**

1. Using the search term crime, causes of, locate one article that reflects the crime control model of criminal justice and another that is based on the due process model of criminal justice. How did you decide that the articles belong to one category and not the other? Do these two articles make arguments similar or different from those discussed in this book?

2. Using the search term criminal justice, administration, of locate two or more articles that discuss the criminal justice system. To what extent do the articles emphasize the interdependent nature of the criminal justice system? To what extent do they stress the fragmentation of the criminal justice system?


**FOR FURTHER READING**


PART I examines the legal foundations of the American judicial system, with a particular emphasis on criminal law and the criminal courts.

Chapter 2 provides an overview of law, America’s common law heritage, adversarial justice, and the rights of the accused. Particular attention is devoted to how the criminal law defines certain acts as illegal. Topics to be highlighted include the growing use of civil law for what traditionally had been criminal matters and how criminal law is both constant and changing.

Chapter 3 examines the federal court system with its four tiers of courts: magistrate courts, U.S. District Court, U.S. Courts of Appeal, and U.S. Supreme Court. The federal courts also have an important array of administrative mechanisms. Some of the topics of interest include the rising volume of federal caseloads and efforts to federalize state crimes.

Chapter 4 focuses on the organization of state courts, which in most states consists of four levels: minor trial courts, major trial courts, intermediate courts of appeals, and state supreme court. Of special interest are efforts to reform court structures and the consequences of the diversity of judicial bodies. Drug courts are an example of current efforts to modernize the judiciary.
In a flat, disembodied monotone, the court clerk read the jury verdict: “Not guilty.” The nation reacted either in stunned silence or jubilant celebration. The verdict, like the thirty-seven-week-long trial of O. J. Simpson, divided the nation, largely along racial lines. But the criminal verdict did not end the matter. Victims of crime are increasingly filing civil lawsuits to right a wrong they believe was done by a criminal court jury. Thus the parents of Nicole Brown Simpson and Ronald Goldman filed a civil action for wrongful death. This time the jury
found Simpson liable for the slayings and awarded $33.5 million in damages. Even though the parents were unlikely to collect enough money to cover their legal expenses, they felt that at last justice had been done.

The multiple legal proceedings surrounding the deaths of Nicole Brown Simpson and Ronald Goldman illustrate the complexities of U.S. law. And it is this law that constitutes the basic source of authority for the court. Thus, before we can assess the type of justice produced by the courts, we need to know something about the law that is applied in reaching those results. Bear in mind that the United States has no uniform set of criminal or civil laws. Instead, each jurisdiction enacts its own set of criminal prohibitions, leading to some important variations from state to state.

This chapter begins by providing a working definition of law and then examines our common law heritage, including the adversary system and the rights of the accused. Next the discussion shifts from procedure to substance. After looking at differences between civil law and criminal law, we will concentrate on the elements of a crime and legal defenses. The chapter concludes by discussing how American criminal law is both constant and changing and the consequences of this for the criminal courts.

**THE BASIS OF LAW**

The basis of law can be summarized in two words: human conflict. A controversy over how much money is owed, a quarrel between husband and wife, a collision at an intersection, and the theft of a television set are a few examples of the great number of disputes that arise and threaten to disrupt the normal activities of society. Business, transportation, and everyday activities depend on mechanisms for mediating inevitable human conflicts. Without such mechanisms, individual parties might seek private, violent means of settlement. The legendary feud between the Hatfields and the McCoys illustrates the disruptiveness of blood feuds motivated by revenge—not only in the lives of the individual parties directly involved but also in the larger society.

*Law* is an everyday word, but as Law Professor Lawrence Friedman (1984, 2) suggests, “It is a word of many meanings, as slippery as glass, as elusive as a soap bubble.” Although there are various approaches to defining the term, most scholars define *law* as a body of rules enacted by public officials in a legitimate manner and backed by the force of the state (Neubauer 1997). This definition can be broken into four phrases, and each has important implications for how we think about law.

The first element—law is a body of rules—is self-evident. What is not immediately obvious, however, is the fact that these rules and regulations are found in a variety of sources: statutes, constitutions, court decisions, and administrative regulations.

The second element—law is enacted by public officials—is of critical importance. All organizations of any size or complexity have rules and regulations that govern their members. But these private rules are not law under our definition, unless they are recognized by public officials—judges, legislators, and executives in particular.

The third element—law is enacted in a legitimate manner—means that it must be agreed upon ahead of time how the rules will be changed. Thus, legislatures have methods for passing new laws, bureaucrats have procedures for applying those rules, and judges follow a well-known process in interpreting those rules.

The final element—law is backed by the force of the state—says that these rules and regulations would be largely meaningless without sanctions. Thus, what differentiates law from other societal rules is that law has teeth to it. As Daniel Oran’s *Law Dictionary for Nonlawyers* (1985) puts it, law is “that which must be obeyed.” In most instances, however,
it is not necessary to apply legal sanctions, because the threat is enough to keep most people in line most of the time.

It is also important to stress what this working definition of law omits, namely, any mention of justice. In a representative democracy, public perceptions of law embody fundamental notions of justice, fairness, and decency (Walker 2001). It is the potential linking of law and justice (in the form of unjust laws) that also makes law so difficult to define. But law and morality do not necessarily equate. Our working definition of law deliberately excludes any reference to justice because there is no precise legal or scientific meaning to the term. Furthermore, people use justice to support particular political and social goals. In the public arena, justice is a catchall used in several different ways. As discussed in Chapter 1, backers of the crime control model see justice differently than do supporters of the due process model.

THE COMMON LAW HERITAGE

The American legal system traces its origins to England and is therefore referred to as Anglo-Saxon or Anglo-American law. Common law is utilized in English-speaking nations, including England, Australia, New Zealand, Canada, and the United States. (The only exception is the state of Louisiana, which derives its civil law from the Napoleonic Code and the Continental legal heritage; the state’s criminal law, however, derives from the common law.)

The common law first appeared in medieval England after the Norman conquest of England in 1066. The new rulers gradually introduced central governmental administration, including the establishment of courts of law. Initially, the bulk of the law was local and was administered in local courts or the private courts of the feudal lords. A distinct body of national law began to develop during the reign of Henry II (1154–1189), who was successful in expanding the jurisdiction of the royal courts. The king’s courts applied the common customs of the entire realm rather than the parochial traditions of a particular village. Thus, the term common law meant general law as opposed to special law; it was the law common to the entire land. During the development of the common law legal system, a distinctive way of interpreting the law gradually emerged. Three key characteristics of this common law heritage stand out: The law was judge-made, based on precedent, and found in multiple sources.

Judge-Made Law

One key characteristic of the common law is that it is predominantly judge-made law (rather than legislatively enacted). Until the late nineteenth century there was no important body of statutory law in either England or the United States. Rather, judges performed the task of organizing social relationships through law. In the field of civil law, for example, the common law courts developed the rights and obligations of citizens in such important areas as property, contracts, and torts. Even today American law in these areas is predominantly judge-made.

Similarly, in the field of criminal law, by the 1600s the English common law courts had defined such felonies as murder, suicide, manslaughter, arson, robbery, larceny, rape, and mayhem. Moreover, the legal defenses of insanity, infancy, self-defense, and coercion had also entered the common law. These English criminal law concepts, often with some adaptations, were transplanted to America by the colonists. After the Revolution, these common law crimes considered applicable to local conditions were retained. The process of the courts creating and defining new crimes continued in America during the nineteenth century. During this period

Common law: Law developed in England by judges who made legal decisions in absence of written law. Such decisions served as precedents and became “common” to all of England. Common law is judge-made, it uses precedent, and it is found in multiple sources.

Judge-made law: The common law as developed in form and content by judges or judicial decisions.
offenses such as conspiracy were developed. Although legislative bodies, not the courts, now define crimes, contemporary statutory definitions often reflect their common law heritage.

Precedent

A second key characteristic of the common law is the use of precedent, often referred to as stare decisis ("let the decision stand"). The doctrine of precedent requires a judge to decide a case by applying the rule of law found in previous cases, provided the facts in the current case are similar to the facts in the previous cases. By following previous court decisions, the legal system promotes the twin goals of fairness and consistency. Exhibit 2-1 gives an example of the precedent-based citation system used in American law.

The common law's reliance on precedent reflects a cautious approach to problem solving. Rather than writing a decision attempting to solve the entire range of a given legal problem, common law courts decide only as much of the case as is necessary to resolve the individual dispute. Broad rules and policy directives emerge only through the accumulation of court decisions over time. Unfortunately, many Americans make the mistake of translating the common law heritage, particularly the doctrine of precedent, into a static view of the courts and the law. The entire history of Anglo-American law emphasizes the importance of common law courts shaping old law to new demands. In the words of Justice Oliver Wendell Holmes (1920, 187): “It is revolting to have no better reason for a rule of law than that it was so laid down in the times of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”

One way courts achieve flexibility is in adapting old rights to new problems. Another is the ability of courts to distinguish between precedents. Recall that the doctrine of precedent involves previous cases with a similar set of facts. Courts sometimes state that the present set of facts differ from previous decisions and reach a different ruling. Finally, judges will occasionally (but very reluctantly) overturn a previous decision by stating that the previous court opinion was wrong. However, the common law is committed to gradual change in order to maintain stability; it is often said that the law and the courts are conservative institutions.

Multiple Sources of Law

The third key characteristic of the common law is that it is found in multiple sources (a concept sometimes expressed as uncodified). In deciding the legal meaning of a given crime (murder, for example), it is not sufficient to look only at the legislative act. To aid lawyers and others in determining the legal meaning of crimes, a variety of annotated works contain the law plus commentary (history, explanations, and major court cases discussing the law). Although these annotated works are helpful, they are intended only as guides. They are not official and therefore are not accepted by courts as definitive statements of the law. Depending on the issue, the applicable rules of law may be found in constitutions, statutes, administrative regulations, and court decisions.

Constitutions

Within the hierarchy of law, constitutions occupy the top rung. A constitution is the first document that establishes the underlying principles and general laws of a nation or state. The U.S. Constitution is the fundamental law of the land. All other laws—federal, state, or local—are secondary. Similarly, each state has a constitution that is the “supreme law of the state.” State courts may use the state constitution

Precedent: A case previously decided that serves as a legal guide for the resolution of subsequent cases.

Stare decisis: Latin phrase meaning “let the decision stand.” The doctrine that principles of law established in earlier judicial decisions should be accepted as authoritative in similar subsequent cases.

Constitution: The fundamental rules that determine how those who govern are selected, the procedures by which they operate, and the limits to their powers.
to invalidate the actions of legislators, governors, or administrators.

Constitutions define the powers that each branch of government may exercise. For instance, Article III of the U.S. Constitution creates the federal judiciary (see Chapter 3).

Constitutions also limit governmental power. Some limitations take the form of prohibitions. Thus, Article I, Section 9, states, “The privilege of the Writ of Habeas Corpus shall not be suspended.” Other limitations take the form of specific rights granted to citizens. The clearest example is the first ten amendments to the Constitution, known collectively as the Bill of Rights. For example, the First Amendment begins “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” State constitutions also contain bills of rights, many of which are modeled after their national counterpart.

Constitutions also specify how governmental officials will be selected. The U.S. Constitution provides that federal judges shall be nominated by the president, confirmed by the Senate, and serve for “good behavior.” Similarly, state constitutions spec-

EXHIBIT 2-1 How to Read Legal Citations

When first confronted with legal citations, students are often bewildered by the array of numbers. But with a few basics in mind, these citations need not be confusing; they are efficient aids in finding court decisions.

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

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

The numbers preceding the abbreviation for the volume refer to the volume number. Thus, Miranda can be found in volume number 384 of the Supreme Court Reports. The numbers after the abbreviation refer to the page number. Thus the Miranda decision in volume 384 begins on page 436, and in volume 86 of the Supreme Court Reporter, it is on page 1602, and so on. A library usually carries only one of the reporting systems, so the multiple references make it easy to locate the given case, no matter which of the three reporting systems is available.

Decisions of other appellate courts at both the federal and state levels are reported in a similar manner in other volumes.
ify that state judges will be selected by election, appointment, or merit (see Chapter 8).

**Statutes**
The second rung of law consists of statutes. Laws enacted by federal and state legislatures are usually referred to as statutory law. The statutory law enacted by local units of government is commonly called a municipal ordinance.

Until the latter part of the nineteenth century, American legislatures played a secondary role in the formulation of law. It was not until the twentieth century that state legislatures became the principal source of law (Friedman 1984). A fundamental reason for the growing importance of legislatively enacted statutes was that new types of problems faced a rapidly industrializing society. Questions of how to protect the interests of workers and consumers were much broader in scope than those typically handled by the courts. The common law took decades to develop and refine legal rights and obligations, but the growing needs of an increasingly complex society could not afford the luxury of such a lengthy time frame. Legislators could enact rules of law that were not only much broader in scope than those adopted by judges but were also more precise and detailed. Thus, a great deal of law today is statutory.

**Administrative Regulations**
The third rung of American law consists of administrative regulations. Legislative bodies delegate rule-making authority to a host of governmental bureaucracies variously called agencies, boards, bureaus, commissions, or departments. All levels of government—federal, state, and local—authorize administrative agencies to issue specific rules and regulations consistent with the general principles specified in the statute or municipal ordinance. The Internal Revenue Service, by rule, decides what constitutes a legitimate deduction. State boards, by rule, set standards for nursing homes. Local zoning boards, by rule, decide where restaurants may be built.

Administrative regulations are the newest, fastest-growing, and least-understood source of law. The rules and regulations promulgated by governmental agencies are extensive. The federal bureaucracy alone issues approximately 7,000 rules and policy statements each year. Controlling the actions and inactions of unelected bureaucrats has always been a major concern in the United States. Besides the substantive laws promulgated by administrative agencies, there are also rules and regulations relating to procedure. Administrative law concerns the duties and proper running of an administrative agency.

**Judicial Decisions**
Appellate court decisions also remain an important source of law (Exhibit 2-1). According to the common law tradition, courts do not make law, they merely find it. But this myth, convenient as it was for earlier generations, cannot mask the fact that courts do make law. This tradition, though, suggests a basic difference between legislative and judicial bodies. Legislative bodies are free to pass laws boldly and openly. Moreover, their prescription of the rules is general and all-encompassing. Courts make law more timidly, on a piece-by-piece basis, and operate much more narrowly. In the words of Law Professor Lawrence Friedman (1984), “Legislatures make law wholesale while courts make it retail.”

Although American law today is primarily statutory and administrative, vestiges of judge-made law persist. The law governing personal injury (tort) remains principally judge-made law, as do procedural matters such as rules of evidence. The major influence of case law (another term for court decisions), however, is seen in interpreting the law of other sources. The Constitution is a remarkably short document of some 4,300 words, and it is full of generalizations such as “due process of law,” “equal protection of the laws,” and “unreasonable searches and seizures.” The founding fathers left later generations to flesh out the operating details of government. Supreme Court decisions have been primarily responsible for adapting constitutional provisions to changing circumstances. Through an extensive body of case law, the Court has supplied specific meaning to these vague phrases. For this

| Statute: | A written law enacted by a legislature. |
| Municipal ordinance: | Laws passed by local units of government. |
| Administrative regulations: | Rules and regulations adopted by administrative agencies that have the force of law. |
| Administrative law: | Law that governs the duties and proper running of an administrative agency. |
reason, the Court has often been termed an ongoing constitutional convention (Chapter 17).

Case law is vital in determining the meaning of other sources of law as well. Statutes, for example, address the future in general and flexible language. The interpretations that courts provide can either expand or contract the statute’s meaning. No lawyer is comfortable with his or her interpretation of an alleged violation of the criminal law without first checking to see how the courts have interpreted it.

THE ADVERSARY SYSTEM

Law is both substantive and procedural. Substantive law creates legal obligations. Tort, contract, property, domestic relations, and inheritance are examples of substantive civil law. Murder, robbery, rape, burglary, and assault are examples of substantive criminal law. Procedural law, on the other hand, establishes the methods of enforcing these legal obligations. Trials are the best-known aspect of American procedural law, but trials do not exist alone. Before trial there must be orderly ways to start lawsuits, conduct them, and end them. An important aspect of procedural law centers on the roles lawyers and judges play in the legal process.

The premise of the Anglo-American legal system is that the best way for courts to apply the law is through the adversary system, a battle between two differing parties. Under the adversary system the burden is on the prosecutor to prove the defendant guilty beyond a reasonable doubt, and the defense attorney is responsible for arguing for the client’s innocence and asserting legal protections. The judge serves as a neutral arbitrator who stands above the fight as a disinterested party, ensuring that each side battles within the established rules. Finally, the decision is entrusted to the jury (although in some instances a judge alone may decide). The adversary system reflects two important premises: the need for safeguards and the presumption of innocence.

Safeguards

The first safeguard of the adversary system involves testing evidence. When the two parties approach “the facts from entirely different perspectives and objectives . . . [they] will uncover more of the truth than would investigators, however industrious and objective, seeking to compose a unified picture of what has occurred” (American Bar Association 1970, 3). Through cross-examination, each side has the opportunity to examine witnesses’ truthfulness, to probe for possible biases, and to test what witnesses actually know, not what they think they know. The right to cross-examination is protected by the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him.”

The adversary system imposes a second type of safeguard by putting power in several different hands. Each actor is granted limited powers, and each has limited powers to counteract the others. If the judge is biased or unfair, the jury has the ability to disregard the judge and reach a fair verdict; if the judge believes the jury has acted improperly, he or she may set aside the jury’s verdict and order a new trial. This diffusion of powers in the adversary system incorporates a series of checks and balances aimed at curbing political misuse of the criminal courts.

In diffusing power, the adversary system provides a third safeguard: It charges a specific actor—the defense attorney—with asserting the rights of the accused. Defense attorneys search out potential violations of the rights of the accused. They function as perpetual challengers in the criminal court process and, in theory at least, are ready at every juncture to challenge the government by insisting that the proper procedures be followed.

Presumption of Innocence

One of the most fundamental protections recognized in the American criminal justice process is the pre-
sumption of innocence. The state has the burden of proving defendants guilty of alleged crimes; defendants are not required to prove themselves innocent. This difference is fundamental. A moment’s reflection makes clear how difficult it would be to prove that something did not happen or that a person did not do an alleged criminal act. Therefore, a defendant is cloaked with the legal shield of innocence during the criminal justice process.

In meeting the obligation to prove the defendant guilty, the prosecution is required to prove the defendant guilty beyond a reasonable doubt. This legal yardstick measures the sufficiency of the evidence; it means that the jury must be fully satisfied that the person is guilty. It does not mean the jury must be 100 percent convinced, but it comes close (Oran 1985). The state’s burden of proof beyond a reasonable doubt does not require that the state establish absolute certainty by eliminating all doubt whatsoever—only that it eliminate reasonable doubt. This criterion is more stringent than the burden of proof in a civil case, in which the yardstick is the preponderance of the evidence, meaning a slight majority of the evidence for one side or the other.

THE RIGHTS OF THE ACCUSED

Procedural law in the United States places a heavy emphasis on protecting the individual rights of each citizen. A key feature of a democracy is the insistence that the prevention and control of crime be accomplished within the framework of law. The criminal process embodies some of society’s severest sanctions: detention before trial, confinement in prison after conviction, and, in certain limited situations, execution of the offender. Because the powers of the criminal courts are so great, there is concern that those powers not be abused or misapplied. The Judeo-Christian tradition places a high value on the worth and liberty of each individual citizen.

Restrictions on the use and application of governmental power take the form of rights granted to the accused. One of the most fundamental protections is the right to remain silent. Another is the right to a trial by jury. These protections exist not to free the guilty but to protect the innocent (see Figure 2-1). Basing the criminal justice process on the necessity of protecting individual liberties (of the innocent and guilty alike) obviously reduces the effectiveness of that process in fighting crime. To ensure that innocent persons are not found guilty, Anglo-American criminal law pays the price of freeing some of the guilty.

The American tradition of instituting limits on the use of governmental power flows from several basic concerns. The primary justification for providing constitutional safeguards for those caught in the net of the criminal process is to ensure that innocent persons are not harassed or wrongly convicted. The American legal system is premised on a distrust of human fact-finding. Because it fears human errors, the criminal court process provides multiple review points, believing that errors made at one step will be spotted during a later stage. The possibility of wrongly convicting an innocent person arises when honest mistakes are made by honorable people. But it also arises when dishonorable officials use the criminal justice process for less-than-honorable ends. In countries without built-in checks, the criminal justice process provides a quick and easy way for governmental officials to dispose of their enemies. For example, a common ploy in a totalitarian government is to charge persons with the ill-defined crime of being an “enemy of the state.” The possibility of political misuse of the criminal justice process by a tyrannical government or tyrannical officials is a major concern in the Anglo-American heritage.

Another reason that democracies respect the rights of those accused or suspected of violating the criminal law is the need to maintain the respect and support of the community. Democratic governments derive their powers from the consent of the governed. Such support is undermined if power is applied arbitrarily. Law enforcement practices that
are brutal, random, or overzealous are likely to produce fear and cynicism among the people—law-binders and law abiders alike. Such practices undermine the legitimacy that law enforcement officials must have to enforce the law in a democracy. Even in a dictatorship, efforts are often made to portray an image of a fair trial.

A hallmark of American law, then, is that governmental officials must follow a regularized set of procedures in making decisions. The essential goal is to reduce arbitrariness by government officials (Skolnick 1994). In short, we expect our leaders to make decisions according to an agreed-upon set of legal procedures.

**Due Process**

The principal legal doctrine for limiting the arbitrariness by officials is due process. Due process of law is mentioned twice in the Constitution:

- “No person shall . . . be deprived of life, liberty or property without due process of law.” (Fifth Amendment)
- “No state shall deprive any person of life, liberty or property without due process of law.” (Fourteenth Amendment)

The concept of **due process of law** has a broad and somewhat elastic meaning, with definitions varying in detail from situation to situation. The core of the
idea of due process is that a person should always be given notice of the charges brought against him or her and be provided a real chance to present his or her side in a legal dispute and that no law or government procedure should be arbitrary. The specific requirements of due process vary somewhat, depending on the Supreme Court’s latest interpretations of the Bill of Rights.

The major obstacle to the ratification of the Constitution was the absence of specific protections for individual rights. Several of the most prominent leaders of the American Revolution opposed the adoption of the Constitution, fearing that the proposed national government posed as great a threat to the rights of the average American as had the king of England. Therefore, shortly after the adoption of the Constitution, ten amendments, collectively known as the Bill of Rights, were adopted. Many of these protections—particularly the Fourth, Fifth, Sixth, and Eighth Amendments—deal specifically with criminal procedure.

Originally, the protections of the Bill of Rights restricted only the national government. Through a legal doctrine known as incorporation, however, the Supreme Court ruled that the due process clause of the Fourteenth Amendment made some provisions of the Bill of Rights applicable to the states as well. Although not all the protections of the Bill of Rights have been incorporated into the Fourteenth Amendment, all of the major protections now apply to the states as well as the national government (Figure 2-2). The major provisions of the Bill of Rights incorporated through the due process clause of the Fourteenth Amendment are protections against unreasonable searches and seizures (Fourth Amendment); protection against self-incrimination (Fifth); the right to counsel and trial by jury (Sixth); and the prohibition against cruel and unusual punishment (Eighth). Some have aptly called the Bill of Rights a constitutional code of criminal procedure.

State constitutions also contain bills of rights that are increasingly important in determining individual rights and liberties. As the U.S. Supreme Court has become more conservative, state supreme courts have treated state constitutions as an independent basis for establishing rights of privacy and due process.

**Bill of Rights**

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**Civil Law**

Most disputes that come to court involve private parties. Conflicts over ownership of property, failure to live up to the terms of a contract, or injuries suffered in an automobile accident are settled on the basis of the body of rules collectively known as civil law. These suits are brought because the courts possess powers that private parties do not; courts can order a business to pay another business money owed under a contract, grant a husband and wife a divorce, award monetary damages suffered for an injury received in an automobile accident, and so forth.

A civil suit is brought by a private party to enforce a right or to seek payment for a wrong committed by another private party. But “private parties” are not limited to individual citizens. They may include groups of citizens (advocacy groups and home owners’ associations, for example) as well as businesses and the government. Given these “legal fictions,” it is best to view civil law as every lawsuit other than a criminal proceeding.

**Bill of Rights:** The first ten amendments to the U.S. Constitution, guaranteeing certain rights and liberties to the people.

**Incorporation:** The theory that the Bill of Rights has been incorporated or absorbed into the due process clause of the Fourteenth Amendment, thereby making it applicable to the states.

**Civil law:** Law governing private parties; other than criminal law.
### Figure 2-2  Cases Incorporating Provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment

<table>
<thead>
<tr>
<th>First Amendment</th>
<th>Case</th>
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<tbody>
<tr>
<td>Establishment of religion</td>
<td>Everson v. Board of Education</td>
<td>1947</td>
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<tr>
<td>Free exercise of religion</td>
<td>Cantwell v. Connecticut</td>
<td>1940</td>
</tr>
<tr>
<td>Freedom of speech</td>
<td>Gitlow v. New York</td>
<td>1925</td>
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<tr>
<td>Freedom of the press</td>
<td>Near v. Minnesota</td>
<td>1931</td>
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<tr>
<td>Freedom to peaceably assemble</td>
<td>DeJong v. Oregon</td>
<td>1937</td>
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<tr>
<td>Freedom to petition government</td>
<td>Hague v. CIO</td>
<td>1939</td>
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<tr>
<th>Second Amendment</th>
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<tbody>
<tr>
<td>Right of the militia to bear arms</td>
<td>[Presser v. Illinois, 1886]</td>
<td>NI</td>
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<thead>
<tr>
<th>Fourth Amendment</th>
<th>Case</th>
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<tbody>
<tr>
<td>Unreasonable search and seizure</td>
<td>Wolf v. Colorado</td>
<td>1949</td>
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<tr>
<td>Exclusionary rule</td>
<td>Mapp v. Ohio</td>
<td>1961</td>
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<th>Fifth Amendment</th>
<th>Case</th>
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<td>Grand jury</td>
<td>[Hurtado v. California, 1884]</td>
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<tr>
<td>No double jeopardy</td>
<td>Benton v. Maryland</td>
<td>1969</td>
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<tr>
<td>No self-incrimination</td>
<td>Malloy v. Hogan</td>
<td>1964</td>
</tr>
<tr>
<td>Compensation for taking private property</td>
<td>Chicago, Burlington and Quincy</td>
<td>1897</td>
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<td>Railroad v. Chicago</td>
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<th>Sixth Amendment</th>
<th>Case</th>
<th>Year</th>
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<tbody>
<tr>
<td>Public trial</td>
<td>In re Oliver</td>
<td>1948</td>
</tr>
<tr>
<td>Impartial jury</td>
<td>Parker v. Gladden</td>
<td>1966</td>
</tr>
<tr>
<td>Jury trial</td>
<td>Duncan v. Louisiana</td>
<td>1968</td>
</tr>
<tr>
<td>Venue</td>
<td>[Implied in Due Process]</td>
<td>NI</td>
</tr>
<tr>
<td>Notice</td>
<td>Cole v. Arkansas</td>
<td>1948</td>
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<tr>
<td>Confrontation of witnesses</td>
<td>Pointer v. Texas</td>
<td>1965</td>
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<tr>
<td>Compulsory process</td>
<td>Washington v. Texas</td>
<td>1967</td>
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<tr>
<td>Assistance of counsel</td>
<td>Gideon v. Wainwright (felony)</td>
<td>1963</td>
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<td></td>
<td>Argersinger v. Hamlin (some misdemeanors)</td>
<td>1972</td>
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<tr>
<th>Seventh Amendment</th>
<th>Case</th>
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<tr>
<td>Jury trial in civil cases</td>
<td>[Walker v. Sauvinet, 1875]</td>
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<tr>
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<th>Case</th>
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<tr>
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<td>[United States v. Salerno, 1987]</td>
<td>NI</td>
</tr>
<tr>
<td>No excessive fines</td>
<td></td>
<td>NI</td>
</tr>
<tr>
<td>No cruel and unusual punishment</td>
<td>Robinson v. California</td>
<td>1962</td>
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<tr>
<th>Ninth Amendment</th>
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<tbody>
<tr>
<td>Privacy*</td>
<td>Griswold v. Connecticut</td>
<td>1965</td>
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</tbody>
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*The word privacy does not appear in the Ninth Amendment (nor anywhere else in the Constitution) but in Griswold several justices viewed the Ninth Amendment as guaranteeing that right.

NI—Not incorporated

“The French Legal System”

In French courts, the black robes are worn by lawyers, not judges. They wear red. Lawyers speak only when spoken to, while judges question witnesses. And the jury? Nowhere to be found. Juries don’t decide cases in France.

As the French government builds a legal case against seven photographers who pursued Princess Diana in the final hours of her life, prepare to set aside much of what you know about the American legal system. The French legal system is rooted in the Middle Ages, owing more to Napoleon than James Madison.

America boasts an adversarial process that weighs competing rights and turns lawyers into combatants. In France, from start to finish, the process is an inquiry in which the judge is the all-powerful truth-seeker and lawyers are the supporting cast. “Après Dieu, c’est lui,” says Pierre-Philippe Barkats, a lawyer licensed in France and Washington, referring to French judges. “After God, it’s the judge.” He adds, “This is no O. J. Simpson [trial].”

The first sign of major differences in the two legal systems came as the photographers were taken into custody after Saturday’s tragedy. They were held two days without charges being filed. And they had no legal right to see their lawyers during the initial questioning — sure grounds for throwing out a case in the USA.

“The justice system in France would be unconstitutional here,” says Tulane University law professor Thomas Carbonneau, who has practiced in France. “They have a very different sense of justice, that it’s a job for professionals, not the people. They’re less interested in public access to the process.”

The probe has no parallel in the U.S. system. The photographers have not been indicted, but a determination has been made that an investigation is warranted. “It’s less than indictment, but it’s still something significant,” says Jonathan Wohl, an American lawyer in Paris. An investigating judge, who has no counterpart in the USA, will conduct the probe in close cooperation with the prosecutor. The judge’s investigation could take months. If he decides no charges should be brought, the French prosecutor, unlike American district attorneys, could appeal. But if the judge decides some or all of the photographers should stand trial, the trial will get under way in a formal setting in which the lawyers must be civil and flamboyance is unwelcomed. “Lawyers are rarely celebrities in France,” says Axelle Hovine, aide to a judge in Paris. “The judicial process is much more closed.”

A panel of judges would preside in the trial phase and question witnesses. Answers could include almost anything, even hearsay evidence that would be barred here. The lawyers can also ask questions, but have no right to cross-examine. The judges are civil servants, not elected or appointed as in the USA. But the fact that they are bureaucrats does not necessarily give them any greater independence, says Carbonneau. “In a celebrity case like this, the judge is going to follow what he believes is the position of the executive branch,” says Carbonneau. The French government, he suggests, probably wants the paparazzi punished.

If the photographers are found guilty of anything, it will not be based on the U.S. standard of guilt “beyond a reasonable doubt” but rather the “conviction intime du juge”—the judge’s [personal] belief of what really happened.

Also highlighting the difference between the two systems is the fact that one of the charges the photographers might face in France does not even exist in the USA: failure to aid someone in danger. It does not require anyone to try to rescue someone, but they must try to get medical or police help. Lawyers for some of the photographers are already insisting that their clients arrived late to the scene and could not have done anything to interfere with rescue efforts.

The charge familiar to Americans is manslaughter. “That’s very much the charge you would expect to be brought in the United States,” says Laurie Levenson, a Loyola University law professor in Los Angeles. “That is defined as causing a death by reckless and grossly negligent conduct. The big issue in this case is who caused the death.”

In a “piggyback” process unfamiliar in the USA, the outcome of the criminal trial—guilt or innocence—will also determine the outcome of the civil suit filed this week by Dodi Fayed’s father. There will be no separate civil trial. By contrast, O. J. Simpson was found not guilty of the crime of murdering his former wife and her friend, but a separate jury found him liable for their death.

The French civil system is different in other ways, too. Punitive damage awards, which can run into millions in America, are not allowed in France. And French lawyers work for flat fees, not for a percentage

(continued on following page)
Basis for Filing a Civil Suit

Civil law is considerably more voluminous than criminal law. Figure 2-3 summarizes the major branches of civil law, which form the basis for filing suit in court. **Tort** law involves the legal wrong done to another person. Injuries suffered during automobile accidents are a prime example of tort law. When lawyers speak of an *injury*, however, they do not necessarily mean a physical injury. The term has a broader meaning, including any wrong, hurt, or damage done to a person’s rights, body, reputation, or property.

Another type of private law involves **contracts**, or agreements between two or more persons involving a promise (termed a consideration). Insurance policies and bank loans for buying a new car are considered contracts.

**Property**, which centers on the ownership of things, is another division of private law. Property is usually divided into *real property* (land and things attached to it) and *personal property* (everything else). Personal property can range from stocks and patents to automobiles and the right to use a famous person’s name. But property does not have to be tangible. It may also include ideas. An area of property law that is increasingly important in the computer age is the law of intellectual property (formerly called patent and copyright).

Property received from a person who has died is governed by laws on **inheritance**. The best-known example is a will, a written document telling how a person’s property should be distributed after his or her death.

**Domestic relations** constitutes a major and growing area of law. These family law matters usually divided into *real property* (land and things attached to it) and *personal property* (everything else). Personal property can range from stocks and patents to automobiles and the right to use a famous person’s name. But property does not have to be tangible. It may also include ideas. An area of property law that is increasingly important in the computer age is the law of intellectual property (formerly called patent and copyright).

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mainly involve divorce and related issues such as determining child custody, setting levels of child support, allocating economic resources (homes, cars, and savings accounts), and in some states, providing for spousal support (alimony and the like). Some areas of domestic relations overlap with juvenile law (Chapter 19).

**Remedies**

Individuals, groups, or governments sue because they want something from the other party. What they want is termed a remedy. A court’s official decision about the rights and claims of each side in a lawsuit is known as a judgment. Thus, if the plaintiff wins, the judgment also contains a remedy, which is the relief granted by the court. The remedies granted depend on whether the case involves

**Remedy:** Vindication of a claim of right. A legal procedure by which a right is enforced or the violation of a right is prevented or compensated.

**Judgment:** The official decision of a court concerning a legal matter.
Most civil cases involve a request for monetary damages. The **plaintiff** (the person who starts a lawsuit) demands that the **defendant** (the person against whom a lawsuit is brought) pay money for the plaintiff’s legal rights (an injury). For example, in a case involving an automobile accident, the injured party may request a sum of money to pay for hospital expenses, doctors’ fees, lost wages, and general “pain and suffering.” **Monetary damages** are payments for the actual harm suffered and may include medical bills, lost income, and pain and suffering. **Punitive damages** are monies awarded to a person who has been harmed in a particularly malicious or willful way. They are not related to the actual cost of the injury or the harm suffered, but are designed to serve as a warning to keep that sort of act from happening again. (Thus both the civil and criminal law involve deterrence.)

Another type of remedy occasionally requested is a **declaratory judgment**, which is a judicial determination of the legal rights of the parties. For example, in prisoner litigation, lawyers seek declaration that prison conditions violate constitutional standards (Chapter 15).

A third type of remedy is called an **injunction** (and comes from another type of law found in

### Declaratory judgment
A court decision declaring the legal rights of the parties.

### Monetary damages

| **Compensatory damages** | Payment for actual losses suffered by a plaintiff. | Principal outcome of tort cases. |
| **Punitive damages** | Money awarded by a court to a person who has been harmed in a malicious or willful way by another person. The purpose is to warn others. | Rarely awarded. Major source of debate over product liability. |

### Equity

| **Temporary restraining order (T.R.O.)** | A judge’s order to a person to keep from taking certain action before a full hearing can be held on the question. | Can be granted without the other party present. Expires after a few days. |
| **Preliminary injunction** | A judge’s order to a person to keep from taking certain action after a hearing but before the issue is fully tried. | During the hearing, both sides present their case. Plaintiff must be able to show irreparable damages will occur if injunction is not issued. |
| **Permanent injunction** | A judge’s order to a person to keep from taking certain action after the issue has been fully tried. | As with all injunctions, violations are punishable by contempt of court, which can include fines but also jail time. |

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**Plaintiff**: The person or party who initiates a lawsuit.

**Defendant**: The person or party against whom a lawsuit or prosecution is brought.

**Monetary damage**: Compensatory damages—payment for actual losses suffered by a plaintiff. Punitive damages—money awarded by a court to a person who has been harmed in a malicious or willful way.

**Declaratory judgment**: Judicial pronouncement declaring the legal rights of parties involved in an actual case or controversy.

**Injunction**: A court order directing someone to do something or to refrain from doing something.
England termed equity or sometimes chancellory law). An injunction is a court order that requires a person to take an action or to refrain from taking an action. For example, a court may issue an injunction prohibiting a company from dumping industrial wastes into a river. To qualify for an injunction, the plaintiff must demonstrate to the court that it will suffer irreparable damages. Consistent with the preventive and remedial heritage of equity, a judge may issue a preliminary or temporary injunction to stabilize an emergency situation. A permanent injunction is granted only after the issues have been fully tried in court. An injunction is a powerful measure that can be enforced by the contempt power of the court. Thus, a person who violates an injunction can be fined or sent to jail.

### Using Civil Remedies to Fight Crime

Civil law is having an increasing impact on the criminal justice system (Barrineau 1994). Crime victims are filing civil lawsuits against the criminal defendant, defendants are settling in civil court in lieu of criminal prosecution, and those who perceive that their legal rights have been violated are more willing to sue criminal justice officials.

Victims of crime are increasingly resorting to civil litigation, in addition to victim compensation and restitution, as a means of recovering from the ill effects of crime (Office for Victims of Crime 1992). Moreover, victims’ rights advocates are advocating civil remedies as one way for victims to reassert control (Chapter 9). In criminal prosecutions the prosecutor essentially makes all decisions, but in civil litigation it is the plaintiff and plaintiff’s lawyer who make the decisions. Although parallel civil and criminal proceedings have been brought for years, they are being used today more frequently than ever before (McCampbell 1995). Three areas—drugs, rape, and drunk driving—illustrate the blending of criminal and civil law.

The overlap between civil and criminal law is highlighted by a number of recent efforts to fight drugs. Legislators at both the state and national levels are passing laws allowing for the seizure of the assets of drug dealers, eviction of residents from public housing if they are convicted of drug possession, and drug testing of employees. Similarly, the California legislature passed a law, prompted by the suicide of actor Carroll O’Connor’s son, allowing suspected drug dealers to be sued for any deaths, injuries, or damages they cause. Likewise, nuisance abatement suits have targeted so-called crack houses. These essentially civil laws increase the arsenal of legal weapons law enforcement officials may use against the sale and use of illegal drugs. But some people now wonder whether the use of civil remedies, particularly asset forfeiture, may have gone too far (see Controversy: Should Asset Forfeiture Be Limited?).

Rape victims are pursuing justice in the civil courts at a growing rate, seeking damages from almost anyone they can find who may have shared liability for the rape (Balleza 1991). These lawsuits often proceed on the basis of the legal theory of premises liability. In premises liability cases the victim alleges that the owner and/or manager of the property failed to provide adequate security and thereby contributed to the occurrence of the crime. The claims raise issues concerning inadequate security caused by poorly trained security guards, too few security guards, or environmental design flaws. In short, premises liability lawsuits argue that the crime that occurred was foreseeable and the defendant had a legal duty to provide adequate security (Gordon and Brill 1996).

In recent years civil justice has become almost as controversial as criminal justice. Perhaps nowhere is this more apparent than in efforts to curb drunk driving. Seemingly every session, legislatures vote even tougher penalties for driving while intoxicated (Chapter 18). But at the same time, civil lawsuits filed by a person injured in an automobile accident caused by a drunk driver are viewed with skepticism. Tort reformers often implicitly suggest that such lawsuits unnecessarily drive up the already high cost of automobile insurance. It is for this reason that President Clinton labeled Republican-backed tort reform legislation the “drunk driving protection act.”

The principal downside of civil remedies is the obvious—few criminal defendants have the economic resources to make litigation financially worthwhile. Indeed, in the most prominent civil lawsuits, the plaintiffs’ motives have been primarily vindication, with little likelihood of collecting a dime from Bernhard Goetz, or anything close to the $8.5 million O. J. Simpson was ordered to pay (see Figure 2-5).
Civil Liability of Criminal Justice Officials

In the modern era it is not just criminal defendants who find themselves hauled into civil court but police officers and prison guards as well. Increasingly, criminal justice officials find that they must defend themselves against a variety of types of civil lawsuits. Perhaps the best known are cases filed by prison inmates alleging that conditions of confinement constitute cruel and unusual punishment in violation of the Eighth Amendment. These lawsuits have reshaped American prisons in recent years (Chapter 15). More recently the Americans with Disabilities Act has forced changes in the design of police stations and prisons.

One form of asset forfeiture is criminal; a defendant convicted under the RICO law is subject not only to criminal penalties (fines and prison) but also forfeiture of property obtained from the profits of the illegal enterprise. Thus, drug dealers who pour their profits into a restaurant can have the restaurant seized by governmental agents.

But asset forfeiture is not limited to criminal actions. The more potent form of asset forfeiture is civil in nature. The government is proceeding not against a person but against the property in what is termed an in rem procedure. (In rem refers to a lawsuit brought against a thing rather than against a person.) In rem lawsuits rest on the legal fiction that the property itself has been charged with a crime and not the owner of the property. As a result it is easier for the government to proceed, because once the property is seized, the burden of proof is on the property owner to show that the property was not used illegally (Cassella 1996).

Through the years Congress has greatly expanded the scope of asset forfeiture (Jensen and Gerber 1996). For example, the Comprehensive Drug Abuse and Control Act of 1970 contains asset forfeiture provisions; the working premise is that illegal drug trafficking is motivated by economic rewards reaped from these illegal activities. Following the federal example, all states except one have enacted asset forfeiture laws.

Asset forfeiture has become big business; $875 million was seized in 1992, declining since then to $650 million a year. Where do these funds go? Under

Should Asset Forfeiture Be Limited?

NBC’s Dateline television series focused on two small Louisiana parishes (the equivalent of counties elsewhere in the United States). Police were accused of targeting innocent motorists on heavily traveled I-10 and seizing their cars for a hefty departmental profit. The law lets police seize property from drivers whom they think may be violating drug laws, even if they don’t find any drugs. To recover their property, motorists must first post a $2,500 bond and then wage a long court battle. The local sheriffs and district attorneys told the state legislature that the NBC report was “trash journalism designed to boost ratings.” They did, however, acknowledge that their rural jurisdictions totaled $19 million a year—37 percent of all asset forfeitures in the state (Wardlaw 1997). This TV report focused national attention on complaints that some law enforcement officials have abused powers under asset forfeiture.

Asset forfeiture involves governmental seizure of the personal assets obtained from, or used in, a crime. Assets refer to property, businesses, cars, cash, and the like. For example, a car used in the distribution of illegal drugs may be forfeited to the government.

Asset forfeiture was part of British common law as early as 1660. More recently it is identified with the Racketeer Influenced and Corrupt Organizations Act (RICO for short) enacted by Congress in 1970. Congress was concerned about the infiltration of organized crime into the regular business marketplace and sought to discourage such activities by taking away the profits.
the “equitable sharing” program of the Department of Justice, any law enforcement agency that participates in the seizure of assets may request part of the monies related to the action, and request they do; 41 percent of local law enforcement agencies participated, with the percentage climbing to 90 percent in jurisdictions with populations of 250,000 or greater.

One concern about asset forfeiture relates to goals. Although initially designed to fight crime by hurting drug dealers and others in the pocketbook, some the tail now wags the dog: the purpose is to seize cash in order to fund the law enforcement agency. In short, seizing drugs is of little use, because they cannot later be legally sold for a profit; it is better to wait until after the drugs are sold, so that the cash can be seized. To remove such temptations, some argue that forfeiture monies should be placed in the general revenue fund, to be spent on drug education, substance treatment programs, and the like. Under equitable sharing, local police departments can gain windfall profits in the form not only of money but also equipment, cars, and so on (Levy 1996).

Another concern is that current laws make it too easy for law enforcement officials to seize the assets of innocent persons. Defense lawyers and civil libertarians accuse the government of confiscating money or property not only from criminals but also from people with no knowledge they had received proceeds of criminal activities.

The Supreme Court has begun to rein in the government’s forfeiture power. In the case of a South Dakota man who had his mobile home and auto body shop seized after being convicted of selling two grams of cocaine, the Court unanimously ruled that the amount seized (almost $43,000) was disproportionate to the crime, basing their reasoning on the Eighth Amendment’s little-used ban on excessive fines (Austin v. U.S. 1993; Giffuni 1995). The next term, the Court held that the constitutional protections afforded criminal defendants in the Fourth Amendment (unreasonable search and seizure) and the Fifth Amendment (due process and right to notice) also apply in asset forfeiture (U.S. v. James Daniel Good Real Property 1993).

But innocent owners can have their assets seized (Bennis v. Michigan 1996). Moreover, civil forfeitures do not violate the prohibition against double jeopardy (U.S. v. Ursery 1996).

After years of debate Congress passed the Civil Asset Forfeiture Act of 2000, which shifts the burden of proof to the government. The new law also awards lawyers’ fees to those who successfully challenge confiscation of property. These changes, though, were strongly opposed by the U.S. Department of Justice. Moreover, proponents labeled the law only a first step.

What do you think? Should more limits be placed on law enforcement officials’ ability to seize assets of suspected wrongdoers? Do large financial incentives like these provide too great a temptation?

To continue the debate you can visit the following sites:

Forfeiture Endangers Americans’ Rights (FEAR): http://www.fear.org/
Liberty Project: http://www.libertyproject.org/splash.cfm
For an up-to-date list of Web links, go to http://www.wadsworth.com/product/0534563406.

Criminal Law

Some disputes are viewed as so disruptive to society that they require special treatment because civil law remedies are not enough. There are several important differences between civil law and criminal law (see Figure 2–6 on page 46). One difference centers on who has been harmed. Whereas a breach of the civil law is considered a private matter involving

Criminal Law: Laws passed by government that define and prohibit antisocial behavior.
only the individual parties, violations of the criminal law are considered public wrongs. As such, criminal law relates to actions that are considered so dangerous, or potentially so, that they threaten the welfare of society as a whole.

A second difference involves prosecution. Unlike the civil law, in which private parties file suit in court alleging an infringement of private rights, violations of public wrongs are prosecuted by the state.

The type of penalties imposed on law violators is a third difference. In civil law the injured party receives compensation. Violators of the criminal law, however, are punished through the imposition of a prison sentence, a fine, a sentence of probation, or some similar action. In setting penalties, American law often makes a distinction between a misdemeanor and a felony. In general, a misdemeanor is a criminal offense less serious than a felony, punishable by a fine or up to a year in jail. But there is no uniform usage or definition of these terms in the United States. Three jurisdictions (Maine, New Jersey, and the District of Columbia) do not use the term felony to classify their criminal offenses, and nine others offer no explicit definition. In the thirty-four [66x692]PART I • THE LEGAL SYSTEM

<table>
<thead>
<tr>
<th>Person</th>
<th>Criminal</th>
<th>Civil</th>
</tr>
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<tbody>
<tr>
<td>Bernhard Goetz</td>
<td>Criminal jury convicted the subway vigilante of illegally having a gun but acquitted of more serious charges after 1984 shooting of a youth Goetz claimed was trying to rob him. The shooting had clear racial overtones (Goetz is white, his victim black).</td>
<td>A 1996 civil jury ordered Goetz to pay $43 million to the man he left paralyzed. It is unlikely that Darrell Cabey, who was paralyzed and suffered brain damage, will be able to collect from the unemployed electrician.</td>
</tr>
<tr>
<td>O. J. Simpson</td>
<td>In the televised “trial of the century” the jury acquitted O. J. Simpson of murdering his former wife Nicole Brown Simpson and her friend Ronald Goldman. The verdict divided the nation along racial lines.</td>
<td>A civil jury found Simpson liable for the killings of his ex-wife and her friend. The jury awarded $8.5 million in compensatory damages to Goldman’s parents and $25 million in punitive damages. Plaintiff’s ability to collect on the judgment is limited because Simpson placed most of his money in retirement accounts that cannot be seized.</td>
</tr>
<tr>
<td>Rodney King</td>
<td>Two Los Angeles police officers were acquitted in state court of beating Rodney King, but they were later convicted in federal court (Chapter 3).</td>
<td>The City of Los Angeles settled the civil lawsuit for $3.8 million.</td>
</tr>
<tr>
<td>Randall Weaver</td>
<td>After a months-long stand-off, federal agents arrested Randall Weaver at his mountain home in Ruby Ridge, Idaho. During the arrest a fire fight broke out and Weaver’s wife was killed. A criminal jury acquitted Weaver of a variety of gun charges.</td>
<td>The U.S. Justice Department paid $3.1 million to settle wrongful death claims against federal agents for the 1992 death of Randall Weaver’s wife and son.</td>
</tr>
<tr>
<td>Amadou Diallo</td>
<td>Four NYPD officers were acquitted of murder. The Justice Department will not file federal charges.</td>
<td>Lawsuit against the city of New York by the parents pending.</td>
</tr>
</tbody>
</table>

[Misdemeanor: Lesser of the two basic types of crime; usually punishable by no more than one year in prison.]

[Felony: The more serious of the two basic types of criminal behavior, usually bearing a possible penalty of one year or more in prison.]
nine states that use and define the term *felony*, one common method is to define felonies by the place of imprisonment—the convicted are sentenced to death or to imprisonment in the state prison. The alternative approach is to define felonies on the basis of the duration of imprisonment—the convicted are sentenced to death, life imprisonment, or imprisonment for more than one year. A few states define felony in terms of both place and duration (Bureau of Justice Statistics 1987).

The stress on punishment derives from the goal of criminal law to prevent and control crime. It is important to recognize that the criminal law is intended to supplement, not supplant, the civil law. Thus, as discussed earlier, a person may be prosecuted criminally and the victim may also seek to recover civil damages for the same act (see Case Close-Up: Two Verdicts in the O. J. Trials). In automobile accidents involving drinking, for example, the drunk driver may be charged criminally with drunk driving, and the injured party may also file a civil suit seeking monetary damages.

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**ELEMENTS OF A CRIME**

*Corpus delicti*, a Latin phrase meaning “body of the crime,” refers to the essential *elements of a crime*. In defining the elements of a particular offense, criminal laws are based on five general principles. No behavior can be called criminal unless

- a *guilty act* is committed, with a
- *guilty intent*, and
- the *guilty act and the guilty intent are related."

In addition, a number of crimes are defined on the basis of

- *attendant circumstances* and/or
- *specific results*.

An understanding of the basic concepts embodied in the statutory definitions of crime is essential for correctly interpreting definitions of crime. In turn, these basic concepts produce numerous categories of criminal activities (murder, voluntary manslaughter, and involuntary manslaughter, for example).

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**Guilty Act**

Before there can be a crime, there must be a *guilty act* (*actus reus*). Thus, criminal liability occurs only after a voluntary act that results in criminal harm. The requirement of a guilty act reflects a

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**Corpus delicti:** The body or substance of a crime, composed of two elements—the act and the criminal agency producing it.

**Elements of a crime:** Five principles of a crime that are critical to the statutory definition of crimes: guilty act, guilty intent, relationship between guilty act and guilty intent, attendant circumstances, and results.

**Guilty act (actus reus):** Requirement that, for an act to be considered criminal, the individual must have committed an overt act that resulted in criminal harm (see elements of a crime).
fundamental principle of American law: No one should be punished solely for bad thoughts. Depending on the crime, there are different types of guilty acts. In the offense of possession of an illegal drug, for instance, the guilty act is the possession. Differences in the nature of the guilty act account for many gradations of criminal offenses. To choose one obvious example, stealing property is considered separately from damaging property.

An important subdivision of the guilty act is a class of offenses labeled as attempts (for example, attempted burglary or attempted murder). The law does not want a person to avoid legal liability merely because someone or something prevented the commission of a crime. Typically, though, the penalties for attempt are less severe than if the act had succeeded. One result is that in some states, defendants often plead guilty to attempt to reduce the possible severity of the prison sentence.

### Guilty Intent

Every common law crime consists of two elements, the guilty act itself and the accompanying mental state. The rationale is that criminal sanctions are not necessary for those who innocently cause harm. As Justice Holmes once pithily put it, “Even a dog distinguishes between being stumbled over and being kicked.” The mental state required for a crime to have been committed is referred to as **guilty intent** or **mens rea** (“guilty mind”).

Despite its importance in criminal law, guilty intent is difficult to define because it refers to a subjective condition, a state of mind. Some statutes require only general intent (intent to do something that the law prohibits), but others specify the existence of specific intent (intent to do the exact thing charged). Moreover, legislatively defined crimes have added new concepts of mental state to the traditional ones. Thus crimes differ with respect to the mental state the prosecution must prove existed in order to secure a criminal conviction. Larceny (termed theft in some states), for example, typically requires proof of a very great degree of intent; the prosecutor must prove that the defendant intentionally took property to which he knew he was not entitled, intending to deprive the rightful owner of possession permanently. Negligent homicide, on the other hand, is an example of a crime involving a

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**To find out what legal resources are available online for your state, just click on [http://dir.yahoo.com/Government/Law/U_S_States/](http://dir.yahoo.com/Government/Law/U_S_States/) and then select your state.**

For an up-to-date list of Web links, go to [http://www.wadsworth.com/product/0534563406s](http://www.wadsworth.com/product/0534563406s).

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**Guilty intent (mens rea):** Mental state required for a crime.

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**Attempt:** An act done with the intent to commit a crime, an overt act toward its commission, the failure to complete the crime, and the apparent possibility of committing it.
lesser degree of intent; the prosecution need only show that the defendant negligently caused the death of another. Most crimes require that the defendant knew he or she was doing something wrong. Also, the law assumes that people know the consequences of their acts. Thus, a person cannot avoid legal liability by later saying, “I didn’t mean to do it.”

Exhibit 2-2 uses the Illinois homicide statute to illustrate how different types of guilty intent lead to varying types of crimes.

**Fusion of Guilty Act and Guilty Intent**

The criminal law requires that the guilty act and the guilty intent occur together. Here is an example that illustrates this concept of fusion of the guilty act and guilty intent: Suppose a husband planned to kill his wife; he purchased some poison but never got around to putting the poison in her drink. The husband returns home late one night, an argument ensues, and he stabs her. In this situation the intent to kill necessary for a murder conviction did not occur along with the death. Therefore, the correct charge would be voluntary manslaughter.

**Attendant Circumstances**

Some crimes require the presence, or absence, of attendant (accompanying) circumstances. Most states differentiate between classes of theft on the basis of the amount stolen. In Illinois, for example, the law provides that theft of less than $300 is treated as a misdemeanor and more than $300 as a felony. The amount stolen is the attendant circumstance.

**Results**

In a limited number of criminal offenses the results of the illegal act play a critical part in defining the crime. The difference between homicide and battery, for example, depends on whether the victim lived. Similarly, most states distinguish between degrees of battery, depending on how seriously the victim was injured. Note that the concept of results differs from that of intent. In all of the preceding examples, the defendant may have had the same intent. The only difference was how hearty the victim was or perhaps how skillful the defendant was in carrying out his or her intentions.

Based on the five general principles—guilty act, guilty intent, fusion, attendant circumstances, and results—the corpus delicti of each crime (murder, robbery, rape, and burglary, for example) differs (Figure 2-7 on page 51). The elements of a particular crime provide the technical (that is, legal) definitions of a crime. For this reason, criminal statutes must be read closely, because each clause constitutes a critical part of the offense. Before a defendant can be convicted, all the elements of a crime must be proven.

**LEGAL DEFENSES**

Under the law, individuals may have performed illegal acts but still not be found guilty of a criminal violation because of a legally recognized justification for the actions or because legally they were not responsible for their actions. These legal defenses derive from the way crime is defined.

The requirement of a guilty act gives rise to several legal defenses. Above all, criminal acts must be voluntary. Thus, a person who strikes another while suffering an epileptic seizure would not be guilty of battery, because the act (hitting) was not voluntary. Similarly, the law recognizes the defense of duress—unlawful pressure on a person to do what he or she would not otherwise have done. Duress includes force, threat of violence, and physical restraint. In a defense of duress, the defendant is contending, in
The requirement of guilty intent gives rise to several other legal defenses. Some types of persons are considered legally incapable of forming criminal intent and therefore cannot be held criminally responsible for their actions. Children are prime examples. Until children reach a certain age (seven in most states), they are presumed not to be responsible for their actions and therefore cannot be criminally prosecuted. After reaching this minimum age, but before becoming an adult, a child's criminal violations are treated as acts of juvenile delinquency (Chapter 19). The premise of juvenile delinquency acts is that people under a certain age have less responsibility for their actions than adults do. The exact age at which a person is no longer considered a juvenile, and can thus be prosecuted as an adult, differs from state to state. As more and more youths are committing violent crimes, states are lowering the age for prosecuting a minor as an adult (see Chapter 19). Similarly, the law assumes that persons with certain types of mental illness are incapable of forming criminal intent. Indeed, the best known, and also most controversial, legal defense is insanity. In Chapter 14 we will examine how insanity and other legal defenses are occasionally used at trial.

**CASE CLOSE-UP**

Two Verdicts in the O. J. Trials

The trial of O. J. Simpson has been called the “trial of the century.” While some argue that this phrase has become overused, there is little doubt that the trial of O. J. Simpson was the most watched event of its type in history.

The reason for this intense viewer interest is that from the beginning the case seemingly had it all. The shocking news of the murder of Nicole Brown Simpson seemed like an event from a paperback novel: a beautiful blonde and her male companion brutally murdered near her home. The defendant was well known and well liked—a former star football player who after his playing days enjoyed a wide following as a TV sports personality. And to add even more interest, the suspect disappeared in the middle of the night, only to be seen days later by millions of television viewers as the police slowly pursued his white SUV in a surreal chase scene.

Nor was the trial itself an anticlimax. Prominent lawyers basked in the media attention while obscure prosecutors quickly became media celebrities, and a good-natured judge appeared, at times, unable to control the “media circus.” For thirty-seven weeks witnesses testified and experts offered their opinions with lawyer pundits quick to label some “flaky” and others just plain wrong. Throughout, the defense kept the focus on the conduct of the Los Angeles police department during the case, alleging, at best, shoddy police work and, at worst, racial bias. But perhaps most importantly of all, the case was widely followed because there was an underlying dramatic tension to the proceedings: Was Simpson innocent or guilty?

Finally, the case went to the jury. After only four hours of deliberation the jury returned a verdict of not guilty. A year after O. J. Simpson was acquitted of criminal charges, the civil trial began. The underlying allegation—O. J. Simpson murdered his ex-wife and Ronald Goldman—remained the same, but the rules in the proceedings were fundamentally different.

The party bringing the lawsuit differs in criminal and civil proceedings. In a criminal prosecution it is the government that files suit. In a civil case it is the injured party. This means that the parties (the families of the deceased in this case) must hire their own lawyers and present their own case. But in this case it also meant that the defendant could not attack the motives and competence of the police (as was done during the criminal trial).

The nature of the accusations also vary. In the criminal trial Simpson was charged with homicide, but in the civil case the allegations involved wrongful death (a type of tort). Instead of having to prove guilty intent, the plaintiff had only to establish that

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**Juvenile delinquency:** An act committed by a juvenile for which an adult could be prosecuted in a criminal court.

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Crimelynx is the criminal defense lawyer’s guide to legal research and investigation on the Internet:

http://www.crimelynx.com/

For an up-to-date list of Web links, go to http://www.wadsworth.com/product/0534563406s.
CRIMINAL LAW: CONSTANT AND CHANGING

Definitions of crime have changed over time, and this process of change continues today. The criminal law is both constant and changing. Some areas are well settled; typical street crimes such as murder, robbery, theft, and burglary rarely present judges, prosecutors, or defense attorneys with any new issues. But other areas of the law are in flux. Every legislative session produces additions and alterations in the existing criminal code. Some of these changes are narrow and technical. Such legislative changes in the criminal law generate little public interest; this type of lawmaker activity is monopolized by criminal justice professionals—lawyers, police officers, judges, and corrections officers.

But other changes in criminal law are more far-reaching. Stuart Scheingold (1984, 22) underscores the close relationship between politics and the legislative process:

Does not the politicization of crime best explain the odd contours of criminal law controlling gambling, drug use, and sexual behavior? How else are we to understand the passage of these laws and the patterns of inclusion and exclusion? Horse racing is generally legal, but numbers gambling is criminal. Alcohol and Valium may be used legally, while the use of marijuana and cocaine is prohibited. It can hardly be argued that these distinctions reflect some natural moral order. Clearly, some segments are imposing their values on others—perhaps to demonstrate symbolically their superior status or perhaps to protect vested economic interests. Symbolic uses of the criminal law seem to have been paramount in the creation of Prohibition.

O. J. Simpson was negligent, an allegation that is easier to prove because it is a broader concept. Standards of proof also contrasted during the two proceedings. In a criminal trial the prosecution must prove the defendant guilty beyond a reasonable doubt. But in a civil trial there is a lower standard; the plaintiff must prove the allegations with a “preponderance of the evidence,” meaning jurors can decide for the plaintiff if they determine there is at least a 50.1 percent probability that Simpson was negligent.

Constitutional protections likewise differ in criminal and civil proceedings. In a criminal case the defendant has a right to remain silent. During the criminal proceedings Simpson largely availed himself of this right. Although he gave a statement at police headquarters a few days after the murder, he did not testify at trial. (His lawyers could have called him to the stand but did not.) But in a civil case the defendant can be forced to testify, and testify Simpson did. Prior to the trial the plaintiff’s attorneys took Simpson’s deposition. And during trial they called him to the stand as a plaintiff witness. Later the defense also called Simpson to the stand.

Finally, the Simpson cases illustrated important differences in remedies. If Simpson had been found guilty in the criminal case he most certainly would have gone to prison. In the civil case the jury awarded compensatory damages of $8.5 million and $25 million in punitive damages. But this $33.5 million jury award is not self-enforcing. Simpson said he was broke and could not pay. Thus the lawyers for Ronald Goldman’s parents filed separate lawsuits trying to seize assets. Simpson was forced to turn over his Heisman trophy, but it is unlikely that the plaintiffs will ever recover the majority of the damage awards.

Most citizens were more than willing to volunteer themselves as a juror for a day. The verdicts divided Americans citizens largely along racial lines. Whites strongly believed that Simpson literally got away with murder whereas African Americans were more supportive. These sentiments were reversed after the civil trial, with many arguing that justice had finally been done.

The O. J. Simpson trial produced a variety of reactions. Here are three perspectives on the trials:

Walter L. Gordon III, “Reflections of a Criminal Defense Lawyer on the Simpson Trial”

Steven Fein, Seth J. Morgan, Michael I. Norton, Samuel R. Sommers, “Hype and Suspicion: The Effects of Pretrial Publicity, Race, and Suspicion on Jurors’ Verdicts”

Charles Fairfield, “Race, Rage, and Denial: The Media and the O. J. Trials”

Changes in laws dealing with abortion, as well as those regarding obscenity, gambling, flag burning, and drugs, are examples of highly publicized and emotional issues that generate considerable public debate.

Pressures for Changing the Criminal Law

Legislative changes in the criminal codes arise from diverse political factors. One is public concern over rising crime rates. During the 1970s and 1980s, perceptions of crime waves—major increases of armed robberies or rapes, for example—led to public demands that elected officials pass new and tougher laws. More recently, public attention has focused on drugs, producing a frenzy of antidrug legislation (Chapter 10). Perhaps the clearest contemporary example of public pressure is the passage of laws requiring convicted sex offenders to notify neighbors when they move in. Such laws, called “Megan’s laws,” are named after Megan Kanka. Jesse Timmendequas, a twice-convicted sex offender, lured the seven-year-old into his house, raping and killing her. In the wake of this tragedy most states have enacted community notification statutes targeting sex offenders. Police, prosecutors, and victims’ rights organizations regularly use public concern over rising crime rates to lobby for harsher sentences.

Similarly, the emergence of new forms of unpopular behavior often produces calls for new laws to cover existing loopholes. Computer crimes, child
### FIGURE 2-7 Characteristics of the Most Common Serious Crimes

<table>
<thead>
<tr>
<th>Law on the Books</th>
<th>Law in Action</th>
</tr>
</thead>
</table>
| **Homicide**     | • Homicide is the least frequent violent crime.  
                  | • Most often murderers are relatives or acquaintances of the victim.  
                  | Causing the death of another person without legal justification or excuse.  |
| **Rape**         | • Most rapes involve a lone offender and a lone victim, at night.  
                  | Unlawful sexual intercourse with a female, by force or without legal or factual consent.  |
| **Robbery**      | • Half of all robberies involve one offender.  
                  | • Half of all robberies involve the use of a weapon.  
                  | Unlawful taking or attempted taking of property that is in the immediate possession of another, by force or threat of force.  |
| **Assault**      | • Simple assault occurs more frequently than aggravated assault.  
                  | • Assault is the most common type of violent crime.  
                  | • Most assaults involve one victim and one offender.  
                  | Aggravated assault is the unlawful intentional inflicting of serious bodily injury or unlawful threat or attempt to inflict bodily injury or death by means of a deadly or dangerous weapon with or without actual infliction of injury.  
                  | Simple assault is the unlawful intentional inflicting of less than serious bodily injury without a deadly or dangerous weapon or an attempt or threat to inflict bodily injury without a deadly or dangerous weapon.  |
| **Burglary**     | • Residential property is targeted in two out of three of burglaries.  
                  | Unlawful entry of any fixed structure, vehicle, or vessel used for regular residence, industry, or business, with or without force, with the intent to commit a felony or larceny.  |
| **Larceny (theft)** | • Pocket picking and purse snatching occur most frequently inside businesses or on street locations.  
                  | Unlike most other crimes, pocket picking and purse snatching affect the elderly as much as other age groups.  
                  | Unlawful taking or attempted taking of property other than a motor vehicle from the possession of another, by stealth, without force and without deceit, with intent to permanently deprive the owner of the property.  |
| **Motor vehicle theft** | • Motor vehicle theft is relatively well reported to the police.  
                  | • Vehicles are more likely than other stolen property to be recovered.  
                  | Unlawful taking or attempted taking of a self-propelled road vehicle owned by another, with the intent of depriving the owner of it permanently or temporarily.  |
| **Arson**        | • Single-family residences are the most frequent targets of arson.  
                  | • Sixteen percent of all structures where arson occurs are not in use.  
                  | Intentional damaging or destruction or attempted damaging or destruction by means of fire or explosion of the property without the consent of the owner, or of one's own property or that of another by fire or explosives with or without the intent to defraud.  |

The Question of Civil Liability

After the criminal charges were dropped against Shareef Cousin, legal attention shifted to the civil law. At first glance the issue seems straightforward. After all, Shareef Cousin’s rights were apparently violated—he spent almost two years on Louisiana’s death row and almost as long in jail awaiting a new trial that never occurred. But the legal issues are much more complicated and evolving. Legislatures and courts across the nation are debating the question: If an inmate turns out to be wrongfully convicted, does the state owe compensation for the years lost in prison? Or is the restoration of freedom compensation enough? These have become pressing questions in the wake of a wave of persons who have been freed from death row or long prison terms. Only fourteen states and the District of Columbia have enacted laws that create a rational system for paying compensation (Coyle 2000). In the other jurisdictions, these issues are being decided by courts.

In Louisiana the question of compensating the wrongfully incarcerated arose in a lawsuit that was winding its way through the courts at about the same time that Shareef Cousin was being convicted and sentenced to death. Roland Gibson was convicted for the 1967 murder of a New Orleans cab driver and sentenced to life imprisonment. After he spent seventeen years in prison, Gibson’s boyhood friend and co-defendant, Lloyd West, recanted his claim that Gibson had been the triggerman. A new trial was ordered, but the DA decided not to conduct a retrial. Nonetheless, Gibson still spent eight years in prison after the problem of perjured testimony surfaced.

Following a bench trial, civil court judge Carolyn Gill-Jefferson ruled that the New Orleans police lacked probable cause to arrest Gibson and ordered the city to pay the plaintiff and his family $10.7 million in damages (Finch 1998). But the Louisiana Supreme Court unanimously held that civil trials should not “second-guess” a criminal court finding of probable cause to arrest, even when that evidence later turns out to be false. The court also chastised the trial judge for putting too much weight on the testimony of West, a convicted felon (Gibson v. New Orleans, 2000).

Given these legal standards it would be hard for Shareef Cousin to successfully sue the New Orleans police department. And even if he were to win, it would be difficult to collect because the city of New Orleans is cash-starved. In a lawsuit against a private party, the plaintiff is entitled to seize the defendant’s assets to pay the judgment. But the federal courts have exempted cities from such possibilities. Thus in the past when plaintiffs have successfully sued the city of New Orleans over matters like police brutality, the city has delayed paying for years. Indeed, some may never collect.

Because state law allows little likelihood that Shareef Cousin could successfully win a civil lawsuit for wrongful conviction, his lawyers turned to federal court, filing a federal civil rights lawsuit (see Chapter 3).

Thus, after the Supreme Court upheld the Georgia death penalty law but struck down capital punishment laws in other states (Gregg v. Georgia 1976), a number of states drafted new laws attempting to reimpose capital punishment within the dictates of the Court’s ruling (Chapter 15). In other cases, legislatures may not try to resurrect a law declared invalid by the courts (Wasby 1970). Thus, some laws struck down by the courts remain on the books—unrepealed although unenforced.

Piecemeal Change

Political forces cause changes in the criminal law to occur piecemeal (Berk, Brackman, and Lesser 1977). To be sure, over the last three decades, thirty-four states have codified or substantially revised their criminal codes. But more often, legislatures respond...
to practical problems in an ad hoc, pragmatic way. As specific deficiencies in the law become evident or new events arise, individual changes designed to cure isolated problems are voted into law. "As a result criminal laws seem to tumble out of our legislatures with great frequency and little reflection. Although there is some movement toward decriminalization of certain behavior, the general tendency is towards proliferation of criminal laws. In America more is often confused with better" (Sigler 1981, 266).

A legislature's choice of what acts to label as criminal has major consequences for how the criminal courts dispense justice.

**EFFECTS OF THE CRIMINAL LAW ON THE COURTS**

Because the criminal code constitutes the basic source of authority for law enforcement agencies, the way crimes are defined has an important bearing on the entire administration of criminal justice. This principle was articulated early in the nineteenth century by Sir Robert Peel, who was called "the father of the English police" (Skolnick 1994). Peel first reformed the criminal law, under which even minor offenses had carried the death penalty, before introducing a new police system. More recently, the National Advisory Commission on Criminal Justice Standards and Goals (1973, 175) reached a similar conclusion, arguing that substantive criminal law revision "is a necessary concomitant to modernization of the criminal justice system." But such changes are not easily accomplished. Because there is no consensus in American society about what behavior should be criminalized and what penalties are appropriate (Sigler 1981).

In practice, judges and prosecutors attempt to rectify these inconsistencies by informally developing a consistent set of penalties. It should be obvious that the courts must apply the law as they find it. The corollary is that the courts often must rectify inconsistencies in that law. Disparities in possible sentences as provided in state statutes require judges, prosecutors, and defense attorneys to arrive at a workable penalty structure. Society would be outraged if serious crimes elicited the same punishment as minor ones, even if the law technically allowed both categories of offenses to be treated the same way.

**Criminal Law and Inconsistencies**

Inconsistencies exist within each criminal code (sometimes referred to as the penal code). Consider the following. In California, breaking into the glove compartment of a car is punishable by up to fifteen years imprisonment, but stealing the entire car carries a maximum penalty of ten years. In Colorado, stealing a dog is punishable by a maximum sentence of ten years, but killing a dog carries a maximum punishment of six months in jail. These are just two examples cited by Marvin Frankel (a former U.S. district court judge) of what he calls the crazy quilt of state criminal statutes. Not all criminal statutes are this inconsistent, but the examples draw our attention to a major problem: Many states lack a consistent set of criminal definitions and penalties.

Because legislatures change criminal codes piecemeal, the end product is a set of criminal laws with obsolete prohibitions and inconsistent penalties. At times these problems are inadvertent. No one sets out to create such inconsistencies; they just happen. It is not always immediately obvious that changes in one section of the law may be inconsistent with another section of the law. But at other times such contradictions indicate a lack of agreement in American society about what behavior should be criminalized and what penalties are appropriate (Sigler 1981).

In practice, judges and prosecutors attempt to rectify these inconsistencies by informally developing a consistent set of penalties. It should be obvious that the courts must apply the law as they find it. The corollary is that the courts often must rectify inconsistencies in that law. Disparities in possible sentences as provided in state statutes require judges, prosecutors, and defense attorneys to arrive at a workable penalty structure. Society would be outraged if serious crimes elicited the same punishment as minor ones, even if the law technically allowed both categories of offenses to be treated the same way.

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For an up-to-date list of Web links, go to [http://www.wadsworth.com/product/0534563406s](http://www.wadsworth.com/product/0534563406s).

**Criminal Law and Plea Bargaining**

Variations in the definitions of crimes make the criminal courts fertile ground for plea bargaining. In particular, differences in degrees of seriousness provide the means for charge bargaining (the
defendant pleads guilty to a less serious offense than the one charged). For example, in some states, assault and battery involves five degrees (categories). Although the law must attempt to differentiate between, say, a punch thrown in anger and a deliberate gunshot wound that leaves its victim permanently paralyzed, the existence of many different degrees of seriousness facilitates pleas to less serious offenses. Thus, prosecutors may deliberately overcharge in hopes of inducing the defendant to later plead guilty to a lesser charge (Chapter 13).

**Criminal Law and Sentencing**

The most obvious way criminal law affects the operations of the criminal courts is in sentencing. As we will discuss in greater detail in Chapters 15 and 16, the legislature establishes sentencing options from which judges must choose. Because of the public’s concern about crime, pressures are strong to increase penalties. As a result, legislatures increase the harshness of sentencing, and the courthouse mitigates that harshness. According to Rosett and Cressey (1976, 95), such legislative action and courthouse reactions follow a predictable pattern:

**Step I.** Laws calling for severe punishments are passed by legislatures on the assumption that fear of great pain will terrorize the citizenry into conformity.

**Step II.** Criminal justice personnel soften these severe penalties for most offenders (a) in the interests of justice, (b) in the interests of bureaucracy, and (c) in the interests of gaining acquiescence.

**Step III.** The few defendants who then insist on a trial and are found guilty, or who in other ways refuse to cooperate, are punished more severely than those who acquiesce.

**Step IV.** Legislatures, noting that most criminals by acquiescing avoid “the punishment prescribed by law,” (a) increase the prescribed punishments and (b) try to limit the range of discretionary decision making used to soften the harsh penalties.

**Step V.** The more severe punishments introduced in the preceding step are again softened for most offenders, as in Step II, with the result that the defendants not acquiescing are punished even more severely than they were at Step III.

This book will return often to the question of whether the legislatures or the courts have adopted the most appropriate stance.

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**CONCLUSION**

The verdicts in the O. J. Simpson trials left citizens divided over where justice lay. Was the criminal jury right (or wrong) in finding Simpson not guilty of murder? Was the civil jury equally right (or wrong) in awarding civil damages? As for Simpson, he kept protesting that the process was unfair because he suffered double jeopardy. Alas for him and a smattering of other criminal defendants, this concept (discussed in Chapter 3) might apply to parallel criminal prosecutions by both the state and national government, but it has nothing to do with parallel criminal and civil actions.

The Simpson trials also illustrate the importance of understanding both law on the books and law in action. The law on the books—first degree murder, in this case—is abstract. The law in action—what victims, defendant, lawyers, judges, and jury do—is concrete. Ultimately the meaning of the law is not what the judge instructs to the jury (law on the books) but the decision reached by the jury (law in action). By voting not guilty, the first jury decided that this conduct was not criminal. By deciding that Simpson was liable, another jury decided that his conduct violated community standards.

What activity should be labeled criminal is the source of constant political discussion. Actions viewed as bad in the past may no longer be considered bad. As society changes, so do public perceptions of public wrongs, and pressures develop to add more activities to the list of officially proscribed ones. Through all of this change, we must not lose sight of the essential fact that law is an integral part of society. Law is not imposed on society; rather it reflects the sociology, economy, history, and politics of society. Law was created to help society, not the other way around.
CRITICAL THINKING QUESTIONS

1. Constitutional rights of the accused is, of course, a controversial topic. The crime control model, in particular, decries letting the obviously guilty go on “technicalities,” whereas the due process model emphasizes basic rights. Examining Figure 2-1, what common ground do these two approaches share? Where do they disagree most?

2. All non-English-speaking industrial democracies use the inquisitorial system rather than the adversary system. In this system the judge, not the prosecutor and not the defense attorney, calls witnesses and questions them. Would you prefer being tried under the adversary system or the inquisitorial system? Would you have confidence in the willingness of the judge to equally search out evidence for conviction and evidence for acquittal?

3. If O. J. Simpson had been tried in France, what procedural differences in the case would have occurred? Would the substantive findings also have been different?

4. Each legislative session seems to bring about changes in the laws. For the most recent session of your state legislature, examine the major changes of the law. Which changes seem designed to correct gaps in the law and which ones seem more likely to be exercises in political symbolism (as discussed in Chapter 1 and the Epilogue)?

5. One of the biggest societal changes in recent years has been the rapid expansion of computer technology. How have legislatures responded to crimes involving use of computers? How has the Internet changed the debate over pornography?

Web Search Terms
“Law,” “common law,” “criminal law,” “asset forfeiture”; “O. J. Simpson”; “subway vigilante”

Useful URLs
Internet Legal Resource Guide is a categorized index of more than 4,000 Web sites in 238 nations: http://www.ilrg.com.
The Legal Information Institute offers a menu of federal and state sources: http://www.law.cornell.edu/topics/criminal.html.
The federal Web locator from the Center for Information Law and Policy is at http://www.infoctr.edu/fwi/.
The state Web locator from the Center for Information Law and Policy is at http://www.law.vill.edu/.
For state resources, go to http://www.findlaw.com and select your state.
Legal research on the Web is at http://www.accd.edu/sac/leassist/la1103/webres.htm.

Uncommon URLs
Anatomy of a Murder offers a trip through our nation’s legal system: http://library.thinkquest.org/2760/homep.htm.
Legal History and Philosophy is a site with links to many of the common law classics: http://www.commonlaw.com/.
About.Com/Law shows today’s legal headlines: http://law.about.com/newissues/law/.
Nolo Press is the leading publisher of legal self-help materials: http://www.nolo.com/.
United Kingdom Web sites explain another common law jurisdiction, but there are some important differences: http://www.leeds.ac.uk/ccjs/ukweb.htm.
The Subway Vigilante Board Game is a beer-and-pretzel game: http://waggle.gg.caltech.edu/~jeff/games/subwayv.html.
The Five-Hour Law School is a primer that was designed for nonlawyer employees of Thomson Publishing: http://members.aol.com/ronin48th/hope.htm.

Web Exercises
1. One of the major links for doing legal research is FindLaw. Its URL is http://www.findlaw.com/. You can find the U.S. Constitution
by following this path: Laws: Cases and Codes/Constitution. Click on Article III—Judicial Department to read the full article.

Also click on one of the amendments in the Bill of Rights to find annotated information about the meaning of that provision. In particular, examine the Second Amendment and the bearing of arms.

2. Each year more laws are added to the Web. Check to see what is available in your state. Again we will use FindLaw: http://www.findlaw.com/. On the menu click State Law Resources.

The states are arrayed in alphabetical order. Click on your state to get a general sense of what is available. Is the criminal law for your state online? If so, compare the homicide section of your state code to the Illinois statute provided in Exhibit 2-2. (If you are in Illinois, don’t get lazy and ignore this assignment! Compare your provisions to those of New York or California.)

3. Update the debate over asset forfeiture by doing a Yahoo search. Access Yahoo at http://www.yahoo.com; then click Society and Culture/ Crime/Asset Confiscation.

You may also want to go directly to Forfeiture Endangers American Rights (F.E.A.R.) at http://www.fear.org. This group says it is dedicated to helping forfeiture victims, working to reform draconian forfeiture laws, assisting legal counsel in difficult forfeiture cases, and acting as a watch-dog over governmental forfeiture practices. Where do they fit in the crime control versus due process debate?

INFOTRAC COLLEGE EDITION
RESOURCES AND EXERCISES

Basic Search Terms
Criminal law; asset forfeiture; rape, common law, double jeopardy; United States Constitution, 1st to 10th Amendments

Recommended Articles
Harper’s, “This Is Your Bill of Rights”
Kent Greenawalt, “Justifications, Excuses, and a Model Penal Code for Democratic Societies”
Hossein Esmaili, Jeremy Gans, “Cultures Colliding in Court”

InfoTrac College Edition Exercises

1. One of the most hotly debated proposed criminal laws involves hate crimes. Using the search term hate crime, analysis locate one article on either side of the debate. To what extent does the debate over passage of hate crime laws parallel the divisions discussed by Herbert Packer using the concepts of the due process and crime control models of criminal justice? Here is one article that debates the topic: Elizabeth Birch, Paul Weyrich, “Symposium: Debate for Specific Hate Crime Legislation Protecting Homosexuals.”

2. Another hotly debated criminal law is the Internet Decency Act, which Congress has passed twice only to be struck down as unconstitutional by the U.S. Supreme Court. After entering the search term Telecommunications Act of 1996, limit the search with the term pornography. Locate at least one article on each side of this issue. To what extent do the arguments parallel the debate between adherents of the crime control model versus the proponents of the due process model of criminal justice? To what extent does the debate cross traditional ideological lines? Here are two articles of relevance: William F. Buckley Jr., “Internet: The Lost Fight” and Christopher Harper, “How Free Is the Net?”

REFERENCES


FOR FURTHER READING


Chapter 3

Federal Courts

Basic Principles of Court Organization
  Jurisdiction
  Trial and Appellate Courts
  Dual Court System
  Controversy: Should the Double Jeopardy Clause Prohibit Parallel State and Federal Prosecutions?

History of the Federal Courts
  The Constitutional Convention
  The Judiciary Act of 1789
  1789–1891
  Court of Appeals Act of 1891
  Federal Courts Today

U.S. Magistrate Judges
  Caseload of U.S. Magistrate Judges

U.S. District Courts
  Caseload of U.S. District Courts

U.S. Courts of Appeals
  Caseload of U.S. Courts of Appeals

A Day in Court: Bunton’s Rocket Docket

U.S. Supreme Court
  Caseload of U.S. Supreme Court

CourtTV: New York v. Nelson

Specialized Courts
  Military Justice
  Tribal Courts

The Murder Trial of Shareef Cousin: A Federal Civil Rights Lawsuit Is Filed

Federal Judicial Administration
  Chief Justice
  Judicial Conference of the United States
  Administrative Office of the U.S. Courts
  Federal Judicial Center
  Judicial Councils
  U.S. Sentencing Commission

Rising Caseloads in the Federal Courts
  Dramatic Increase in Workload
  How Many Federal Judges Are Too Many?
  Reduce Federal Jurisdiction?

Controversy: Should State Crimes Also Become Federal Violations?

Consequences of Federal Involvement in the Criminal Justice System
  Limited Scope
  Forum for Symbolic Politics
  Federal Dollars

Case Close-Up: U.S. v. Miller and the Right to Bear Arms

Conclusion
  Critical Thinking Questions
  World Wide Web Resources and Exercises
  InfoTrac College Edition Resources and Exercises
  References
  For Further Reading
Much of the American court system is complicated and technical. Even lawyers who regularly use the courts sometimes find the details of court organization confusing. Court nomenclature includes many shorthand phrases that mean something to those who work in the courts daily but can be quite confusing to the outsider who tries to interpret the words in their literal sense. Learning the language of courts is like learning any foreign language—some of it can come only from experience. Before studying the specifics of federal and state courts (Chapter 4), it is helpful to understand the basic principles of court organization. Three concepts—jurisdiction, trial versus appellate courts, and the dual court system—underlie the structure of the American judiciary.

**Jurisdiction**

Court structure is largely determined by limitations on the types of cases a court may hear and decide. **Jurisdiction** is the power of a court to decide a dispute. A court’s jurisdiction can be further classified according to three subcomponents: geographical jurisdiction:

**The power of a court to hear a case in question.**
jurisdiction, subject matter jurisdiction, and hierarchical jurisdiction.

Geographical Jurisdiction

Courts are authorized to hear and decide disputes arising within a specified geographical jurisdiction. Thus, a California court ordinarily has no jurisdiction to try a person accused of committing a crime in Oregon. Courts’ geographical boundaries typically follow the lines of other governmental bodies such as cities, counties, or states.

Two principal complications arise from geographical jurisdiction. First, events that occur on or near the border of different courts may lead to a dispute over which court has jurisdiction. If the laws of the two jurisdictions differ significantly, determination of which law applies can have important consequences for the outcome of the case. Second, a person accused of committing a crime in one state may for whatever reason (flight or happenstance) be in another state when he or she is arrested. Extradition involves the surrender by one state (or country) of an individual accused of a crime outside of its own territory and within the territorial jurisdiction of the other state. If an American fugitive has fled to a foreign nation, the U.S. Secretary of State will request the return of the accused under the terms of the extradition treaty the United States has with that country (but a few nations of the world do not have such treaties).

Subject Matter Jurisdiction

Court structure is also determined by subject matter jurisdiction. Trial courts of “limited jurisdiction” are restricted to hearing a limited category of cases, typically misdemeanors and civil suits involving small sums of money (termed small claims). U.S. bankruptcy courts, for example, are restricted to hearing bankruptcy cases. State courts typically have traffic courts or juvenile courts, both of which are examples of subject matter jurisdiction. Trial courts of “general jurisdiction” are empowered to hear all other types of cases within the jurisdictional area. In the state court systems (to be discussed in the next chapter) the county trial court fits here. (See Neubauer 1997 for a discussion of court-developed rules on subject matter jurisdiction of federal courts.)

Hierarchical Jurisdiction

The third subcomponent of jurisdiction is hierarchical jurisdiction, which refers to differences in the courts’ functions and responsibilities. Original jurisdiction means that a court has the authority to try a case and decide it. Appellate jurisdiction means that a court has the power to review cases that have already been decided by another court. Trial courts are primarily courts of original jurisdiction, but they occasionally have limited appellate jurisdiction, for example, when a trial court hears appeals from lower trial courts such as mayor’s courts or a justice of the peace court. Appellate courts often have a very limited original jurisdiction. The U.S. Supreme Court has original jurisdiction involving disputes between states, and state supreme courts have original jurisdiction in matters involving disbarment of lawyers.

Geographical jurisdiction: Geographical area over which courts can hear and decide disputes.
Extradition: Legal process whereby officials of one state surrender an alleged criminal offender to officials of the state in which the crime is alleged to have been committed.
Subject matter jurisdiction: Types of cases courts have been authorized to hear and decide.

Trial and Appellate Courts

The second concept embodied in the American court system is the relationship between trial and appellate courts. Virtually all cases, whether civil or criminal, begin in the trial court. In a criminal case

Hierarchical jurisdiction: Refers to differences in the functions of courts and involves original as opposed to appellate jurisdiction.
Original jurisdiction: Jurisdiction in the first instance; commonly used to refer to trial jurisdiction as compared to appellate jurisdiction. Appellate courts, however, have limited original jurisdiction.
Appellate jurisdiction: The authority of a court to hear, determine, and render judgment in an action on appeal from an inferior court.
Trial court: Judicial body with primarily original jurisdiction in civil or criminal cases. Juries are used and evidence is presented.
the trial court arraigns the defendant, sets bail, conducts a trial (or takes a guilty plea), and, if the defendant is found guilty, imposes sentence. In a civil case the trial court operates in much the same way, ensuring that each party is properly informed of the complaint, supervising pretrial procedures, and conducting a trial or accepting an out-of-court settlement. Because only trial courts hear disputes over facts, witnesses appear only in trial courts. Trial courts are considered finders of fact, and the decision of a judge (or jury) about a factual dispute normally cannot be appealed.

The losing party in the trial court generally has the right to request an appellate court to review the case. The primary function of the appellate court is to ensure that the trial court correctly interpreted and applied the law. In performing this function, appellate courts perform another important function: They reexamine old rules, devise new ones, and interpret unclear language of past court decisions or statutes. Appellate and trial courts operate very differently because their roles are not the same. In appellate courts no witnesses are heard, no trials are conducted, and juries are never used. Moreover, instead of a single judge deciding, as in trial courts, a group of judges makes appellate court decisions; there may be as few as three or as many as twenty-eight judges, as in the U.S. Court of Appeals for the Ninth Circuit. In addition, appellate judges often provide written reasons justifying their decisions; trial court judges rarely write opinions.

The principal difference between a trial and an appeal is that a trial centers on determining the facts, whereas an appeal focuses on correctly interpreting the law. This distinction is not absolute, however. Fact-finding in the trial courts is guided by law, and appellate courts are sensitive to the facts of a case.

### Dual Court System

America has a dual court system: one national court system and also separate court systems in each of the fifty states, plus the District of Columbia as well as the U.S. territories. The result is over fifty-one separate court systems. You will find federal courts in every state and territory of the Union, and a federal court in Alabama operates essentially the same as the counterpart federal court in Wyoming. However, the structural uniformity does not mean that actual practices are identical. On the contrary, there are important variations in how the law is interpreted and applied, an indication that the federal courts are rooted in a heritage that stresses independence, decentralization, and individualism.

Figure 3-1 shows the ordering of cases in the dual court system. The division of responsibilities is not as clear-cut as it looks, however. State and federal courts share some judicial powers. Some acts, for example, selling drugs or robbing banks, are crimes under federal law and under the laws of most states, which means the accused could be tried both in a federal and a state court. Moreover, litigants in state court may appeal to the U.S. Supreme Court, a federal court.

One of the most immediate consequences of the dual court system is the complexity it adds to the criminal justice system. In essence the framers of the U.S. Constitution created two parallel criminal justice systems consisting of their own law enforcement, court structure, and correctional systems. (In virtually all the other federated nations—Germany and Austria for example—the only separate federal courts are found at the highest level.) Of all the levels of complexity created by the dual court system, perhaps the most confusing is the application of the constitutional prohibition against double jeopardy (see Controversy: Should the Double Jeopardy Clause Prohibit Parallel State and Federal Prosecutions? on page 63 and Court TV: New York v. Nelson on page 74). It is to the complexities created by federalism that we now turn.

### HISTORY OF THE FEDERAL COURTS

At first glance the history of the federal courts appears to be a debate over details of procedure. But a closer look reveals that the political controversies that have shaped the federal judiciary go to the heart of the federal system of government, often involving the allocation of power between the national and the state governments. Thus, any discussion of the
federal courts in the late twentieth century must begin with two eighteenth-century landmarks—Article III of the U.S. Constitution and the Judiciary Act of 1789. Although there have been important changes since, the decisions made at the beginning of the Republic about the nature of the federal judiciary have had a marked impact on contemporary court structure.

### The Constitutional Convention

One major weakness of the Articles of Confederation was the absence of a national supreme court to enforce federal law and resolve conflicts and disputes between courts of the different states. Thus, when the delegates gathered at the Constitutional Convention in Philadelphia in 1787, a resolution was unanimously adopted that “a national judiciary be established.” There was considerable disagreement, however, on the specific form that the national judiciary should take. Article III was one of the most hotly debated sections of the Constitution.

The dominant question of whether there should be a federal court system separate from the state sys-

---

**FIGURE 3-1 Overview of Court Structure in the United States**

<table>
<thead>
<tr>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Hears cases everywhere in the United States</td>
<td>• Important variations from state to state</td>
</tr>
<tr>
<td>• Decides 46,000 criminal cases a year</td>
<td>• State felony filings outnumber federal by eighty-seven to one.</td>
</tr>
<tr>
<td><strong>U.S. Supreme Court</strong></td>
<td><strong>Supreme Court</strong></td>
</tr>
<tr>
<td>• Most powerful court in the world</td>
<td>• Typically has almost total control over cases to be heard</td>
</tr>
<tr>
<td>• Virtually complete control over cases it hears</td>
<td>• Major policymaker for the state</td>
</tr>
<tr>
<td>• Decisions have completely changed the criminal justice system</td>
<td>• Final decider of questions of state law</td>
</tr>
<tr>
<td>• Hears only a handful of state criminal cases</td>
<td>• Decides a handful of criminal appeals</td>
</tr>
<tr>
<td><strong>U.S. Courts of Appeals</strong></td>
<td><strong>Court of Appeals or Appeals Court</strong></td>
</tr>
<tr>
<td>• Twelve circuits are organized regionally</td>
<td>• Thirty-nine states have intermediate courts of appeals</td>
</tr>
<tr>
<td>• Must hear all requests for review</td>
<td>• Must hear all requests for review</td>
</tr>
<tr>
<td>• Last stop for the vast majority of defendants convicted in federal court</td>
<td>• One in sixteen appellants win a significant victory</td>
</tr>
<tr>
<td><strong>U.S. District Court</strong></td>
<td><strong>District, Superior, or Circuit Court</strong></td>
</tr>
<tr>
<td>• Eighty-nine courts in the continental U.S.</td>
<td>• Organized by county (or groups of counties)</td>
</tr>
<tr>
<td>• Criminal cases: drugs, fraud, and embezzlement</td>
<td>• Criminal cases: burglary, theft, drugs, murder, robbery, rape</td>
</tr>
<tr>
<td>• Civil cases: civil rights, federal statutes, diversity of citizenship</td>
<td>• Civil cases: automobile accidents, divorce, contract, probate</td>
</tr>
<tr>
<td><strong>U.S. Magistrate Court</strong></td>
<td><strong>Municipal, City, or Justice of the Peace Court</strong></td>
</tr>
<tr>
<td>• Responsible for preliminary stages of felony cases</td>
<td>• In rural areas, judges may be nonlawyers</td>
</tr>
<tr>
<td>• Hears a fair volume of minor crimes on federal property</td>
<td>• Handles preliminary stages of felony cases</td>
</tr>
<tr>
<td>• Has responsibility (but not authority) over habeas corpus petitions</td>
<td>• Criminal cases: petty theft, public drunkenness, disturbing the peace, disorderly conduct</td>
</tr>
<tr>
<td></td>
<td>• Civil cases: small claims</td>
</tr>
</tbody>
</table>

tems produced two schools of thought. Advocates of states’ rights (later called Anti-Federalists) feared that a strong national government would weaken individual liberties. More specifically, they saw the creation of separate federal courts as a threat to the power of state courts. As a result, the Anti-Federalists believed that federal law should be adjudicated first by the state courts; the U.S. Supreme Court should be limited to hearing appeals only from state courts. On the other hand, the Nationalists (who later called

Should the Double Jeopardy Clause Prohibit Parallel State and Federal Prosecutions?

Lemrick Nelson, Jr., who is black, was acquitted of state charges of murdering Jewish scholar Yankel Rosenbaum during a 1991 race riot in Brooklyn. Yet he was convicted in 1997 in federal court of violating the victim’s civil rights. To some, the federal conviction meant that justice was finally done. But to others, the federal prosecution was itself a miscarriage of justice.

Of all the complexities created by the dual court system, perhaps the most confusing to laypersons and lawyers alike is the application of the constitutional prohibition against double jeopardy. The Fifth Amendment provides, “Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” How then can a defendant be tried in both state court and federal court for the same crime? The answer is that the double jeopardy clause prevents only trial by the same government for the same offense (Bartkus v. Illinois 1958). This justification has been termed the “dual sovereign” doctrine, because two different sovereign governments (state and federal) are prosecuting the defendant for actions that happen to violate their separate criminal laws. Consider a defendant arrested for robbing a bank. The federal government can try the defendant for robbing a federal bank, and the state government may try the same defendant for robbery. Although the event is the same, it violates both federal and state laws.

The Supreme Court justified its decision on the concerns of federalism; the Court felt that a jurisdiction’s interest would be impaired if the jurisdiction (state or federal) was unable to try an individual who had been tried elsewhere facing lesser penalties. Not all agree with this interpretation, however. Critics argue that the dual sovereign exception has no legal or historical basis (Piccarreta and Keenan 1995). The ACLU would bar parallel prosecutions by different governments for the same event, a view shared by sundry defendants who have been acquitted in one court only to be convicted in another. The application of the double jeopardy clause has in recent years engendered considerable controversy in several highly publicized cases:

• Two Los Angeles police officers were acquitted of state charges in the 1991 beating of Rodney King but were later convicted in federal court of violating his civil rights.
• Four white New York police officers were acquitted in state court of murdering Amadou Diallo in 2000. The U.S. Justice Department later decided against federal prosecution.

These few cases aside, separate state and federal prosecutions are rare. As a practical matter, policies of the U.S. Department of Justice establish a strong presumption against federal reprosecution of a defendant already prosecuted by a state for the same conduct (Litman and Greenberg 1996).

What is perhaps most striking about the controversy over parallel prosecutions by dual sovereigns is that it cuts across the ideological dimensions that structure so much of our nation’s debate concerning crime policy. In the Rodney King case, for example, members of the police union readily accepted the ACLU position. Similarly, some groups that are otherwise noted for conservative positions oppose parallel prosecutions. In short, the crime control and due process models are not particularly helpful in understanding this controversy.

What do you think? Are federal prosecutions after failed state prosecutions a good way to remedy miscarriages of justice, or are the rights of defendants unnecessarily placed in jeopardy?

To continue the debate use the search term double jeopardy to locate additional articles on the topic. Here are two: Kelly McMurry, “Fourth Circuit Opens Door to Double Jeopardy” and Donald Dripps, “The Continuing Decline of Finality in Criminal Law.”
themselves Federalists because they favored ratification of the Constitution) distrusted the provincial prejudices of the states and favored a strong national government that could provide economic and political unity for the struggling new nation. As part of this approach, the Nationalists viewed state courts as incapable of developing a uniform body of federal law that would allow businesses to flourish. For these reasons, they backed the creation of lower federal courts.

The conflict between states’ rights advocates and Nationalists was resolved by one of the many compromises that characterized the Constitutional Convention. Article III is brief and sketchy, providing only an outline of a federal judiciary: “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 brevity of this provision left Congress with the task of filling in much of the substance of the new judicial system.

The Judiciary Act of 1789

Once the Constitution was ratified, action on the federal judiciary came quickly. Indeed, the first bill introduced in the Senate dealt with the unresolved issue of inferior federal courts. The congressional debate included many of the same participants, who repeated all the arguments that were involved in the judiciary debates at the Constitutional Convention. After extensive debate, Congress passed the Judiciary Act of 1789, which laid the foundation for our current national judicial system. The Judiciary Act of 1789 represented a major victory for the Federalists; they were successful in creating separate federal district courts. At the same time, the act was a compromise that allayed some of the Anti-Federalists’ fears. The organization of the federal judiciary supported state interests in three ways (Richardson and Vines 1970).

First, the boundaries of the district courts were drawn along state lines; no district encompassed more than one state. Thus, from the outset, the federal judiciary was “state-contained.” Even though district courts enforced national law, they were organized along local lines, with each district court responsible for its own work under minimal supervision.

Second, by custom the selection process ensured that federal district judges would be residents of their districts. Although nominated by the president, district judges were to be (and are today) local residents, approved by senators from the state, presiding in their home area, and therefore subject to the continuing influence of the local social and political environment (Chapter 8).

Third, the act gave the lower federal courts only limited jurisdiction. The Federalists wanted the full range of federal jurisdiction granted by the Constitution to be given to district and circuit courts. However, to achieve a lower federal court system, they were forced to reduce this demand greatly. But this issue would reappear repeatedly over the next 100 years.


For an up-to-date list of Web links, go to http://www.wadsworth.com/product/0534563406s.

1789–1891

The Judiciary Act of 1789 provided only a temporary compromise on the underlying disagreements between Federalists and Anti-Federalists. The Federalists immediately pushed for expanded powers for the federal judiciary. These efforts culminated in the passage of the Judiciary Act of 1801, which created many new judgeships and greatly extended the jurisdiction of the lower courts. The Federalist victory was short-lived, however. With the election of Thomas Jefferson as president, the Anti-Federalists in Congress quickly repealed the act and returned the federal judiciary to the basic outlines of the previous circuit court system. The 1801 law is best remembered for the resulting lawsuit of Marbury v. Madison (1803) in which Chief Justice Marshall created the power of judicial review (the Court can strike down as unconstitutional an act of Congress) (Neubauer 1997).

Between 1789 and 1891 there was general agreement on the inadequacy of the federal judicial sys-
tem, but the underlying dispute persisted. Congress passed numerous minor bills modifying the system in a piecemeal fashion. Dissatisfaction centered on two principal areas: circuit riding and the appellate court workload.

One of the most pronounced weaknesses of the 1789 judicial structure was circuit riding. The Supreme Court justices, many of them old and ill, faced days of difficult and often impossible travel. In 1838, for example, the nine justices traveled an average of 2,975 miles. Justice McKinley of the circuit that included Alabama, Louisiana, Mississippi, and Arkansas traveled 10,000 miles a year, yet found it impossible to make it to Little Rock. There were numerous complaints from the justices about the intolerable conditions that circuit-riding duties imposed on them.

Beyond the personal discomforts some justices encountered, the federal judiciary confronted a more systemic problem—mounting caseloads. Initially the federal judges of the newly created trial courts had relatively little to do because their jurisdiction was very limited. The Supreme Court likewise had few cases to decide. But the initially sparse workload began to expand as the growth of federal activity, the increase in corporate business, and the expansion of federal jurisdiction by court interpretation created litigation for a court system that was ill equipped to handle it. From the end of the Civil War until 1891, it was not uncommon for a case to wait two or three years after being docketed before it was argued before the Supreme Court. Indeed, by 1890 the high court’s docket contained over 1,800 cases. The essential cause was that the high court had to decide every case appealed to it.

The landmark Court of Appeals Act of 1891 represented the climactic victory of the nationalist interests. The law created nine new courts known as circuit courts of appeals. Under this new arrangement, most appeals of trial decisions went to the circuit court of appeals. In short, the creation of the circuit courts of appeals released the high court from hearing many types of petty cases. The high court now had much greater control over its workload and could concentrate on deciding major cases and controversies.

Federal Courts Today

In 1925 Congress passed the Judges Bill, which among other things gave the Supreme Court much greater control over its docket. In 1988 Congress eliminated even more mandatory appeals to the high court. Figure 3-2 summarizes other key developments in the federal judiciary.

The current structure of federal courts is best understood in terms of four layers of courts: magistrate, district, appellate, and Supreme Court. In addition the federal judiciary consists of specialized courts and administrative structures.

U.S. Magistrate Judges

U.S. magistrate judges are the federal equivalent of state trial court judges of limited jurisdiction. Although they are officially a subcomponent of the
district courts, their duties and workload merit separate discussion. Congress created U.S. magistrate judges in 1968 to replace the former position of U.S. commissioners. The purpose was to provide a new first echelon of judicial officers in the federal judicial system to alleviate the increased workload of the U.S. district courts (Puro 1976). The magistrates, as they were originally called, were unhappy over the title, and in 1990 Congress responded to their concerns by including the word judge; thus they are now known officially as magistrate judges (Smith 1992).

Magistrate judges are selected by the district court judges. Full-time magistrate judges are appointed for eight-year terms and part-time magistrate judges for four years. They may, however, be removed for “good cause.” Except in special circumstances, all must be lawyers. According to the Administrative Office of the U.S. Courts, there are 422 full-time magistrate judges and 77 part-time magistrate judges (the part-time magistrate judges serve primarily national parks, where the work is seasonal).

Creation of the office raised several constitutional issues, some of which remain under active discussion today (Administrative Office 1993). Magistrate judges perform quasi-judicial tasks and work within the judicial branch of government. They are not, however, Article III judges (that is, they are not nominated by the president nor confirmed by the Senate and therefore do not serve for life). For this reason, several Supreme Court decisions limited the powers of the magistrate judges. In response, Congress passed the 1976 and 1979 Federal Magistrates Acts, which clarified and expanded the scope of the magistrates’ power and authority.

Magistrate judges are authorized to perform a wide variety of duties. In felony cases they are responsible for preliminary proceedings, including holding initial appearances, conducting preliminary hearings, appointing counsel for indigents, setting bail, and issuing search warrants. In misdemeanor and petty offense cases, the jurisdiction of magistrate judges is more extensive; they may preside over trials, accept pleas of guilty, and also impose sentences. On the civil side they supervise discovery, review Social Security disability benefit appeals, and even conduct full civil trials with the consent of the litigants. In short, under specified conditions and controls, magistrate judges may perform virtually all

### U.S. magistrate judges

Judicial officers appointed by the U.S. district courts to perform the duties formerly performed by U.S. commissioners and to assist the court by serving as special masters in civil actions, conducting pretrial or discovery proceedings, and conducting preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses.
tasks carried out by district court judges, except trying and sentencing felony defendants (Smith 1987; Seron 1988). But disputes over their authority continue. In 1991 a bare majority of the Supreme Court decided that magistrate judges may supervise jury selection in a felony trial, thus overruling a contrary decision less than two years old (Peretz v. U.S.).

Caseload of U.S. Magistrate Judges

Magistrate judges play an increasingly important role in helping district court judges dispose of their growing caseloads. In a typical year, for example, they handle approximately 650,000 matters for the federal courts, including being involved in some way in 350,000 felony matters. In addition they dispose of over 100,000 misdemeanor and petty offenses.

Given the rising workload of felony cases on the district court docket, magistrate judges are increasingly involved in civil matters—about 163,000 in the most recent year for which statistics are available. Indeed in recent years magistrate judges have presided over 17 percent of civil trials.

Finally, they review but do not decide prisoner petitions, a topic we will address shortly. During 1999, for example, magistrate judges reviewed 25,791 prisoner litigation matters.

U.S. DISTRICT COURTS

Congress has created ninety-four U.S. district courts of which eighty-nine are located within the fifty states. There is also a district court in the District of Columbia and four territorial district courts located in Guam, Puerto Rico, the Virgin Islands, and the Northern Mariana Islands. In the U.S. territories the district courts may also be responsible for local and federal matters.

There is at least one district court in each state; moreover, based on the compromise that produced the Judiciary Act of 1789, no district court crosses state lines. Some states have more than one district court: California, New York, and Texas, for instance, each have four. Because district courts often encompass large geographical areas, some hold court in various locations, or divisions. Some districts have only one division while others have several.

Congress has created 646 district court judgeships for the 94 districts. The president nominates district judges, who must then be confirmed by the Senate (Chapter 8). Once they take the oath of office, they serve during "good behavior," which for practical purposes means for life. The number of judgeships in each district depends on the amount of judicial work as well as the political clout of the state’s congressional delegation and ranges from two in sparsely populated Wyoming to twenty-eight in densely inhabited Manhattan (officially called the U.S. District Court for the Southern District of New York).

Judges are assisted by an elaborate supporting cast of clerks, secretaries, law clerks, court reporters, probation officers, pretrial services officers, and U.S. marshals. The larger districts also have a federal public defender. Another important actor at the district court level is the U.S. attorney. There is one U.S. attorney (Chapter 6) in each district, nominated by the president and confirmed by the Senate, but, unlike the judges, he or she serves at the pleasure of the president. The U.S. attorney and his or her staff prosecute violations of federal law and represent the U.S. government in civil cases, which constitute about one third of all civil lawsuits.

The work of the district judges is significantly assisted by 326 bankruptcy judges. Although bankruptcy judges are adjuncts of the district courts, they are appointed for fourteen-year terms by the court of appeals in which the district is located. The bankruptcy workload of the district courts is enormous,
with over 1.3 million petitions filed annually. The vast majority of these bankruptcy filings are non-business related, typically involving consumers who cannot pay their bills. The others are filed by businesses big and small. Indeed, companies valued in the billions have declared bankruptcy; obviously such filings create much more work for the judiciary than a bankruptcy petition filed by an individual consumer.

Caseload of U.S. District Courts

In the federal system, the U.S. district courts are the federal trial courts of original jurisdiction. Table 3-1 provides an overview of case volume in the federal courts. The volume of cases is large and growing. Each year, around 300,000 civil and criminal cases are filed in the U.S. district courts (not including bankruptcy, misdemeanors, and the like). These numbers represent a dramatic increase in workload over the last several decades.

The district courts are the trial courts for all major violations of federal criminal law (magistrate judges hear minor violations). Each year, U.S. attorneys file approximately 60,000 criminal cases, primarily for drug violations, embezzlement, and fraud. For many years federal prosecutions remained fairly constant (roughly 30,000 per year) only to shoot up beginning in 1980. A major part of this upsurge has been due to a dramatic increase in drug prosecutions. Today, drug prosecutions account for 25 percent of all federal criminal cases. Moreover, trials of criminal cases are now more frequent (and also longer) than in years past. Thus although civil, not criminal, cases account for most of the work of the district courts, in some districts criminal filings are limiting the ability of these courts to decide civil cases. (See A Day in Court: Bunton’s Rocket Docket.)

Civil lawsuits consume considerably more of the federal courts’ time than criminal cases do. Although only a small number of all civil cases are filed in federal courts, these cases typically involve considerably larger sums of money than the cases filed in state court. Federal court jurisdiction is limited to a few types of cases, primarily involving questions of federal law, diversity of citizenship, and prisoner petitions.

Federal Questions

Article III provides that federal courts may be given jurisdiction over “Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority.” Cases that fall under this type of jurisdiction are generally referred to as involving a federal question. Most federal question cases are filed alleging a violation of a congressional statute. Some of the principal federal laws that are the basis of litigation include Social Security, labor, civil rights, truth in lending, and antitrust. These federal laws are having an increasing impact on state and local criminal justice (see Exhibit 3-1).

Diversity Jurisdiction

Diversity of citizenship cases involve suits between citizens of different states or between a U.S. citizen and a foreign country or citizen. For example, a citizen from California claims to be injured in an automobile accident in Chicago with an Illinois driver and sues in federal court in Illinois since the parties to the suit were of “diverse citizenship.” (However, our injured California driver also has the option of suing in state court in Illinois.) In deciding diversity of citizenship cases, federal courts apply state (not federal) law (Sloviter 1992). Overall, diversity cases constitute almost one fourth of the civil docket of the district courts, thus making a significant contribution to the workload of the district courts.

In an effort to restrict the types of minor disputes that may be filed in federal court, Congress in 1988 raised the amount-in-controversy threshold from $10,000 to $50,000, and raised it again in 1996 to $75,000. Despite some speculation to the contrary, this change in jurisdictional amount has indeed significantly decreased the number of diversity cases filed in federal courts each year (Flango
TABLE 3-1  Case Filings in the U.S. Courts

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Criminal</th>
<th>Civil</th>
<th>Prisoner Petitions</th>
<th>Minor Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
<td>7,692</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Courts of Appeals</td>
<td>54,693*</td>
<td>10,251</td>
<td>19,489</td>
<td>17,191</td>
<td></td>
</tr>
<tr>
<td>District Courts</td>
<td>317,000</td>
<td>59,923</td>
<td>203,668</td>
<td>56,603</td>
<td></td>
</tr>
<tr>
<td>Magistrate judges</td>
<td>647,970</td>
<td>350,000</td>
<td>163,218</td>
<td>25,791</td>
<td>109,101</td>
</tr>
</tbody>
</table>

* Includes 7,762 original proceedings and other appeals.

Note: Some of these numbers have been rounded.


Prisoner Petitions

A controversial area of district court jurisdiction involves prisoner petitions. Prisoners incarcerated in either federal or state penitentiaries may file a civil suit alleging that their rights under federal law are being violated. (Similar suits may also be filed in state court, where they are called habeas corpus petitions.) Some prisoner petitions contend that the prisoners are being illegally held because they were improperly convicted; for example, they were denied the effective assistance of counsel at trial (discussed further in Chapter 7). Other prisoner petitions relate to the conditions of confinement; for example, the penitentiary is overcrowded or provides inadequate medical assistance (mentioned in Chapter 15). Petitions from state and federal inmates have increased significantly from about 3,500 filings in 1960 to over 56,000 in 1999. Thus, prisoner petitions constitute 25 percent of the total civil caseload as measured by filings. These numbers are being driven by the sharp increase in the prison population. U.S. magistrate judges hear most of these prisoner petitions but are limited to making a recommendation to the U.S. district judge (who typically follows the recommendation). Thus these cases add volume but take little of the district judges’ time.

Prisoner petition:  Civil lawsuit filed by a prisoner alleging violations of his or her rights during trial or while in prison.

U.S. COURTS OF APPEALS

As mentioned previously, Congress created the courts of appeals in 1891 to relieve the Supreme Court from hearing the growing number of appeals. The courts of appeals are the intermediate appellate courts of the federal system. Originally called circuit courts of appeal, they were renamed and are now officially known as the United States Court of Appeals for the ____ Circuit. Eleven of the circuits are identified by number and another is called the D.C. Circuit (see Figure 3-3).

The courts of appeals are staffed by 179 judges nominated by the president and confirmed by the Senate. As with the district courts, the number of judges in each circuit varies from six (the First Circuit) to twenty-eight (the Ninth Circuit) depending on the volume and complexity of the caseload. Each circuit has a chief judge (chosen by seniority) who has supervisory responsibilities. Several staff positions aid the judges in conducting the work of the courts of appeals. A circuit executive assists the chief judge in administering the circuit. The clerk’s office maintains the records. Each judge is also allowed to hire three law clerks. In addition, each circuit has a central legal staff that screens appeals and drafts memorandum opinions.

In deciding cases, the courts of appeals normally utilize rotating three-judge panels. Along with active judges in the circuit, these panels often include visiting judges (primarily district judges from the same circuit) and senior judges. By majority vote, all the judges in the circuit may sit together to
decide a case or rehear a case already decided by a panel. Such *en banc* hearings are relatively rare, however; in a typical year less than 100 are held throughout the entire nation.

**Caseload of U.S. Courts of Appeals**

Over the last four decades, the caseload of the courts of appeals has skyrocketed. This dramatic increase in caseload has not been matched by an equivalent increase in judgeships, however. In 1960 there were 68 judgeships compared to 179 today. As a result, the number of cases heard per panel has increased from 172 (1960) to 983 (1999).

Approximately 55,000 cases are filed annually. A small number of these cases involve reviews from various administrative agencies such as the Securities and Exchange Commission and National Labor Relations Board. Primarily, the jurisdiction of the courts of appeals consists of criminal appeals, civil
appeals, and prisoner petitions. Appeals from criminal convictions in the U.S. district courts constitute about 19 percent of the workload of the courts of appeals. Appeals from decisions in civil cases make up the backbone of their caseload with approximately 20,000 heard every year. Finally, the courts of appeals review a large number of prisoner petitions each year. As Chapter 17 will discuss in greater depth, prisoners petitioning the court are rarely successful except in death penalty cases.

A decision by the court of appeals exhausts the litigant’s right to one appeal. The losing party may request that the Supreme Court hear the case, but such petitions are rarely granted. As a result the courts of appeals are the “courts of last resort” for virtually all federal litigation. Their decisions end the case; only a tiny percentage will be heard by the nation’s highest court.

EXHIBIT 3-1 Federal Laws Affecting State and Local Criminal Justice

The impact of federal law on the criminal justice system of the states is most apparent in the decisions of federal courts expanding the rights of those accused of crimes. Under Chief Justice Earl Warren the U.S. Supreme Court sparked a due process revolution (Chapter 17) giving defendants the right to counsel (Chapter 7), broadening notions of a fair trial (Chapter 14), and expanding the right to appeal (Chapter 17). The Court also dealt with sentencing, imposing minimal standards of confinement, and striking down the death penalty (Chapter 15). Perhaps most in the public eye have been decisions restricting police gathering of evidence (Chapter 12).

But indirectly, civil lawsuits (or the threat of civil lawsuits) also play an important role. Federal civil law affects the internal operations of criminal justice agencies as well as how these organizations deal with the general public. Here are four types of federal civil cases that have important consequences for state and local criminal justice officials.

- **Civil Rights Violations** Under Section 1983 (originally passed by Congress in 1871) city or state employees may be sued civilly for depriving an individual of his or her constitutional rights (Monroe v. Pape, 1967). Moreover, the government, and not just the individual, are liable for damages (Monell v. Department of Social Services, 1978). Section 1983 has become second only to prisoner petitions in the number of cases filed in the federal courts (Barrineau 1994). Police officers are sued for brutality and prison guards are now regularly sued for alleged physical mistreatment.

- **Equal Employment Opportunities** Federal laws relating to equal employment opportunity prohibit discrimination on the basis of race, color, religion, sex, age, national origin, or disability. However, they allow exclusion of members of a “protected class” if there is a bona fide occupational qualification, for example, a valid job-related requirement that is necessary to normal business operation. Thus, criminal justice agencies should avoid height and weight requirements that are not related to job performance.

- **Sex Discrimination** Several federal laws prohibit sex discrimination. Except in rare instances, employers are required to ignore gender when hiring or promoting, provide equal pay to all employees, and treat pregnancy like any other temporary disability (Rubin 1995).

- **Discrimination against the Disabled** The 43 million Americans with disabilities are now protected against discrimination in employment and in their use of public facilities and services (Dooley and Wood 1992). Police departments, in particular, are covered (Smith and Alpert 1993). The Americans with Disabilities Act might have a noticeable impact on the docket of the federal courts, because there is the possibility of a significant number of lawsuits being filed.

U.S. SUPREME COURT

The highest court in the nation is composed of nine justices: eight associate justices and one chief justice, who is nominated specifically to that post by the president. Like other judges appointed under Article III of the Constitution, Supreme Court justices are nominated by the president, require confirmation by the Senate, and serve for life.

Cases proceed to the Supreme Court primarily through the writ of certiorari, an order to the lower court to send the case records so that the Supreme Court can review the case. The writ is issued from an appellate court for the purpose of obtaining from a lower court the record of its proceedings in a particular case.
Court can determine whether the law has been correctly applied. The Court reviews decisions from the U.S. courts of appeals and state appellate courts of last resort. Although the Supreme Court is the only court in the nation to have authority over all fifty-one separate legal systems, its authority is actually limited.

Caseload of U.S. Supreme Court

With few exceptions, the Court selects which cases it will decide out of the many it is asked to review each year. In deciding to decide, the Court employs the rule of four: Four judges must vote to hear a case before it is placed on the docket. As a result, only a small percentage of the requests for appeals are ever granted. By law and custom a set of requirements must be met before a writ of certiorari (or cert, as it is often called) is granted. In particular, the legal issue must involve a “substantial federal question.” This means state court interpretations of state law can be appealed to the Supreme Court only if there is an alleged violation of either federal law or the U.S. Constitution. For example, a suit contending that a state supreme court has misinterpreted the state’s divorce law would not be heard because it involves an interpretation of state law and does not raise a federal question. As a result, the vast majority of state cases are never reviewed by the Supreme Court.

Through its discretionary powers to hear appeals, the high court limits itself to deciding about 80 cases a year. The Court does not operate as the court of last resort, attempting to correct errors in every case in the nation, but rather marshals its time and energy to decide the most important policy questions of the day. The cases granted certiorari reflect conflicting legal doctrines; typically, lower courts have decided similar cases in very different ways. Although the Supreme Court decides a frac-
tion of all cases filed in the courts, these decisions set policy for the entire nation.

SPECIALIZED COURTS

The magistrate, district, appeals courts, and Supreme Court handle the bulk of federal litigation and therefore are a principal focus of this book. To round out our discussion of the federal judicial system, however, we also need to briefly discuss several additional courts that Congress has periodically created. These courts are called specialized federal courts because they are authorized to hear only a limited range of cases—taxes or patents, for example. They are created for the express purpose of helping administer a specific congressional statute.

Figure 3-4 gives an overview of the specialized federal courts and highlights two important distinctions. First, most specialized courts have permanent, full-time judges appointed specifically to that court. A few specialized courts, however, temporarily borrow judges from federal district or courts of appeals as specific cases arise (Baum 1991).

The second distinction relates to the specialized courts’ constitutional status. Judicial bodies established by Congress under Article III are known as constitutional courts. The Supreme Court, courts of appeals, and district courts are, of course, constitutional courts. Judicial bodies established by Congress under Article I are known as legislative courts. Courts presided over by bankruptcy judges and U.S. magistrate judges are examples of legislative courts. The constitutional status of federal courts has important implications for judicial independence. Article III (constitutional court) judges serve for a period that amounts to a lifetime appointment, but Article I (legislative court) judges serve for a period that amounts to a lifetime appointment, but Article I (legislative court) judges serve for a period that amounts to a lifetime appointment, but Article I (legislative court) judges serve for a period that amounts to a lifetime appointment, but Article I (legislative court) judges serve for a period that amounts to a lifetime appointment, but Article I (legislative court) judges serve for a period that amounts to a lifetime appointment, but Article I (legislative court) judges serve for a period that amounts to a lifetime appointment, but Article I (legislative court) judges serve for a period that amounts to a lifetime appointment.

**FIGURE 3-4 | Specialized Federal Courts**

<table>
<thead>
<tr>
<th>Courts with permanent judges</th>
<th>Level</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax Court</td>
<td>Article I</td>
<td>Trial</td>
</tr>
<tr>
<td>Court of Federal Claims</td>
<td>Article I</td>
<td>Trial</td>
</tr>
<tr>
<td>Court of Veterans Appeal</td>
<td>Article I</td>
<td>Trial</td>
</tr>
<tr>
<td>Court of International Trade</td>
<td>Article III</td>
<td>Trial</td>
</tr>
<tr>
<td>U.S. Court of Appeals of the Armed Forces</td>
<td>Article I</td>
<td>Appellate</td>
</tr>
<tr>
<td>Court of Appeals for the Federal Circuit</td>
<td>Article III</td>
<td>Appellate</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Courts with judges borrowed from other federal courts</th>
<th>Level</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alien Terrorist Removal Court</td>
<td>Trial</td>
<td>Decides whether an alien should be removed from the U.S. on the grounds of being an alien terrorist</td>
</tr>
<tr>
<td>Foreign Intelligence Surveillance Court</td>
<td>Trial</td>
<td>Electronic surveillance of foreign intelligence agents</td>
</tr>
<tr>
<td>Foreign Intelligence Surveillance Court of Review</td>
<td>Appellate</td>
<td>Electronic surveillance of foreign intelligence agents</td>
</tr>
</tbody>
</table>

are appointed for a specific term of office. Moreover, Article III judges are protected against salary reductions while in office. Article I judges enjoy no such constitutional protection. In short, constitutional courts have a greater degree of independence from the other two branches of government than the legislative courts.

The specialized federal courts are overwhelmingly civil in their orientation, handling such matters as patents and tariffs on imported goods. But two specialized courts bear directly on criminal matters: military courts and tribal courts.

**Military Justice**

Military law provides the legal mechanism for controlling the conduct of military personnel. Congress adopted the Uniform Code of Military Justice in 1950, extending significant new due process rights in courts-martial. The law created the Court of Military Appeals (the name was later changed to the U.S. Court of Appeals for the Armed Forces) composed of three civilian judges appointed for fifteen-year terms by the president. The intent was clearly to extend civilian influence to military law. The Military Justice Act of 1968 contributed to the further civilianization of court-martial. The code covers criminal acts but also can punish acts that are not criminal for civilians (for example, disrespect of an officer). Moreover, on a military base, military justice applies not only to members of the armed services but also to civilian employees, and it covers acts committed on and off a military base (Sherman 1987).

Like other systems of criminal law, the objective of military justice is to provide a forum for determining guilt or innocence. But in addition, court-martials serve the purpose of enforcing order and discipline in the military. In the words of the U.S. Army: “The purpose of military law is to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” Thus, although military justice is not exempt from the Constitution, it is certainly distinctive. Military justice differs from state and federal justice in the following ways:

- Six-person jury
- A two-thirds majority is sufficient to convict
- Convictions are automatically appealed to a higher military court

Ultimately the case may be appealed to the U.S. Supreme Court, but such cases are rare.

In recent years a few high-profile cases have thrust military justice into the news. Some of the more prominent cases include these:

- Drill Sergeant Delmar Simpson was sentenced to twenty-five years in military prison for raping and abusing more than a dozen trainees at the Aberdeen, Maryland, Army base.
- The Army charged its top enlisted man, Sergeant Major Gene McKinney, with eighteen counts of adultery, maltreatment, and sexual misconduct toward subordinates.
- A U.S. soldier raped a young girl in Okinawa.
- Prosecution of the Marine Corps pilot of an airplane that struck a gondola cable in the Italian Alps, killing the twenty people on board the gondola.
Tribal Courts

In 1789 Congress designated the Native American tribes as foreign nations to enable the government to sign land and boundary treaties with them. During the nineteenth century U.S. policy was to force Native Americans onto reservations west of the Mississippi River. Today there are about 285 federal and state protected land bases, colloquially called reservations but technically termed Indian Country (18 U.S.C. sec. 151). The Bureau of Indian Affairs manages federal reservations. On the reservations today, Native Americans enjoy a degree of self-determination and sovereignty, but the degree of self-government varies from tribe to tribe. Moreover, state governments often seek to exert some authority over Indian reservations (Resnik 1995).

A Federal Civil Rights Lawsuit Is Filed

Late on the afternoon of January 7, 2000, attorney Clive Stafford-Smith walked the five blocks from his office to the federal courthouse at 500 Camp Street. The date was important. Federal law mandates a one-year statute of limitations in cases like this one. Thus the lawsuit was filed exactly one year after District Attorney Harry Connick decided not to try Shareef Cousin for the Port of Call murder.

Smith had represented Shareef Cousin in the state criminal trial and appeal. But now he was filing a federal civil rights lawsuit. Proceeding to the intake desk of the clerk’s office he paid the $150 filing fee and the office time-stamped the lawsuit, entitled “Shareef Cousin, versus Anthony Small.” The complaint was given the number 00-0069, indicating that it was the sixty-ninth civil lawsuit filed during the year 2000. The case was then randomly allotted to U.S. district court judge Sarah Vance, who had been appointed to the federal bench in 1994 by President Clinton. As a practicing lawyer she had worked in the civil litigation section of one of the city’s largest law firms. As a presiding judge she is noted for running a tight ship, particularly in cases involving felony prosecutions of some of the states top elected officials (Gyan 1997).

The lawsuit names the city of New Orleans and eight individuals as defendants. Some of the defendants were the prosecutors in the state criminal prosecution. The others were New Orleans police officers. The eighty-three-page lawsuit begins: “This civil action arises from the malicious prosecution, wrongful arrest, incarceration and prosecution of plaintiff Shareef Cousin.” The lawsuit alleges that the plaintiff’s rights were violated under the Civil Rights Act (Chapter 42 of the U.S. Code), particularly Section 1983. The document offers a broad-based indictment of both police and prosecution. Detective Anthony Small, the lead homicide detective in the murder of Michael Gerardi, is accused of being corrupt and fabricating evidence. Assistant District Attorney Roger Jordan is accused of repeatedly not turning over favorable evidence to the defense. The complaint concludes with a broad-based indictment of racial bias in the police department and Connick’s office. The most interesting allegation involves the anonymous “tip” that led to the arrest of Shareef Cousin. Soon after the murder, Crimestoppers offered a $10,000 reward for information about the case. The plaintiff alleges that the tip was bogus—Detective Small had a friend make the call and they later split the reward.

The complaint requests an unspecified amount of damages. In a later letter from one of Cousin’s attorneys, however, the lawyer suggested that based on past cases $2.5 million would constitute a justifiable settlement.

The City Attorney for New Orleans defended the police officers. His reply simply denied the allegations, thus providing little guidance as to the defense the city might use in the case. More interesting was the reply from Harry Connick’s lawyer, who asserted that the district attorney enjoys absolute immunity from lawsuits (see Chapter 6). The reply also termed the complaint as redundant and immaterial. The judge would later call the document convoluted but refuse to dismiss it.

A month before filing the civil rights lawsuit, attorney Clive-Stafford-Smith and other defense lawyers held a news conference to bestow their first Chef Menieur award (which in French means “big liar”). The recipient was an NOPD homicide detective who allegedly falsified evidence in a trial that resulted in the defendant being acquitted. A longtime homicide detective, who requested that he not be identified by name, scoffed. He said the lawsuits have little to do with the case they claim to address but instead are part of an effort to undermine the credibility of detectives who testify in future cases (Coyle 2000).

The trial is set for spring 2001, but given the heavy docket in the federal court, there is no guarantee that the case will actually be tried then. Make sure to check the Web site for an update.
The tribe is the basic unit of federal Indian law. Federal legislation protects Native American groups and grants them rights against the federal government. Treaties, for example, give tribes rights to land and hunting, fishing, and water rights. The key elements of American law regarding Native Americans are (1) federal acknowledgment of sovereign governmental powers possessed by Native American groups and (2) a federal trust obligation toward and special federal powers over such groups and their members (Goldberg-Ambrose 1994).

Native American law is a jurisdictional maze of civil and criminal courts affecting Native Americans, as well as non-Native Americans living or operating a business within the jurisdiction of a Native American government (Nielsen and Silverman 1996). Tribal courts total 248, staffed by 271 trial and 39 appellate judges in 27 states. Most were created under the Indian Reorganization Act of 1934, which encouraged self-government through tribal constitutions, organized government, and tribally created courts. Recently Congress mandated a survey of tribal justice systems to examine, among other factors, the capacity of the tribal justice system, volume of the caseload, and facilities, including detention facilities. The Bureau of Justice Statistics (1999) reports in *American Indians and Crime* that Native Americans experience a high rate of violent crimes and are more likely to be victimized by someone of another race; also, 46 percent of all violent victimizations involve a drinking offender.

**FEDERAL JUDICIAL ADMINISTRATION**

The judicial system created by Congress in the Act of 1789 and subsequent laws can best be characterized in terms of independence, decentralization, and individualism. Courts at all levels enjoyed virtual autonomy. Judges in administrative matters were not only independent of Congress and of the president but of each other as well (Fish 1973). In essence Congress had created a hierarchy of courts that was without direction and without responsibility. “Each judge was left to himself, guided in the administration of his business by his conscience and his temperament” (Frankfurter and Landis 1928, 220).

This situation changed with the passage of the Administrative Office Act of 1939, which largely created the current administrative structure of the federal judiciary. This law illustrates the interplay between judicial administration and politics. During the mid-1930s the conservative majority on the Supreme Court declared many pieces of New Deal legislation unconstitutional. After his reelection in 1936, President Franklin Delano Roosevelt put forth his Court packing plan—the Court would be expanded from nine to fifteen justices, thus allowing FDR to pack the Court with justices more sympathetic to his policies. There was no legal barrier to such actions because the Constitution fails to specify how many justices shall serve on the Court. But the political obstacles proved insurmountable; many of Roosevelt’s backers felt that tampering with the Court was a bad idea. The Court packing plan never passed, but it did call attention to the president’s complaints that administration of federal court was inefficient. To solve this problem, FDR proposed a national court administrator, to be appointed by the chief justice and with absolute authority to manage the judicial system.

The judiciary opposed the initial legislation as an attack on its heritage of independence, decentralization, and individualism. But at the same time some judges were dissatisfied with the old system of court management because it was located in the Department of Justice, an executive agency. Thus a movement arose among federal judges and national court reformers to clean their own house. The result was a compromise plan; the Administrative Office Act of 1939 was the judiciary’s substitute for FDR’s court bill. The act expanded the responsibilities of the Judicial Conference, created the Administrative Office of the U.S. Courts, and established the judicial councils. These agencies, along with the office of the chief justice, the Federal Judicial Center, and the more recently created U.S. Sentencing Commission, are the main units involved in administering the federal courts.

The official site of the Supreme Court of the United States is very good for recent opinions, arguments, and schedules: [http://www.supremecourtus.gov/](http://www.supremecourtus.gov/).

For an up-to-date list of Web links, go to [http://www.wadsworth.com/product/0534563406s](http://www.wadsworth.com/product/0534563406s).

**Chief Justice**

The chief justice is the presiding officer of the Supreme Court and has supervisory authority over the entire federal judicial system. In fulfilling these
duties, the chief justice is allotted an extra law clerk and an administrative assistant to help with the administrative tasks for both the Court and the judicial system as a whole. As head of the federal judiciary, the chief justice is an ex officio member of several important administrative organizations and also appoints persons to key administrative posts. Chief Justice Warren Burger (1969–1986) devoted considerable effort to judicial administration and the conditions of American prisons. Current Chief Justice William Rehnquist has often spoken about the need for Congress to increase the number of federal judges, increase the salaries of judges to be competitive with the private practice of law, and reduce the workload of the courts.

**Judicial Conference of the United States**

The Judicial Conference of the United States is the administrative policy-making organization of the federal judicial system. Its membership consists of the chief justice, the chief judges of each of the courts of appeals, one district judge from each circuit, and the chief judge of the Court of International Trade. The conference meets semiannually for two-day sessions. Because these short meetings are not sufficient to accomplish a great deal, most of the work is done by about twenty-five committees. The committees consist of judges and a few lawyers appointed by the chief judge. In spite of the long hours and unpaid labor, appointments to the committees are coveted. A committee appointment is a status symbol through which judges gain esteem among their peers (Fish 1973). The recommendations of the committees set the agenda for the conference.

The Judicial Conference directs the Administrative Office in administering the judiciary budget and makes recommendations to Congress concerning the creation of new judgeships, increases in judicial salaries, and budgets for court operations. The Judicial Conference also plays a major role in the impeachment of federal judges (a topic discussed in greater depth in Chapter 8). Probably the most important function of the conference is revising the various rules of federal procedure. Proposed changes in the federal rules originate with the Judicial Conference. The Supreme Court can approve, modify, or disapprove these recommendations. Once adopted, the recommendations are transmitted to Congress and automatically become law in ninety days unless Congress acts adversely. In short, the Judicial Conference is a vehicle through which federal judges play a major role in developing policy for the federal judiciary.

**Administrative Office of the U.S. Courts**

From 1870 to 1939 the U.S. Department of Justice handled the day-to-day administrative tasks of the federal courts. This arrangement generated pervasive conflict because administrative control over the judiciary was in the hands of an executive agency (Fish 1973). Against this backdrop the Administrative Office Act of 1939 created the Administrative Office of the U.S. Courts, a judicial agency. Appointed by the chief justice, the director reports to the Judicial Conference.

Acting as the Judicial Conference’s official representative in Congress, the Administrative Office’s lobbying and liaison responsibilities include presenting the annual budget requests for the federal judiciary, arguing for the need for additional judgeships, and transmitting proposed changes in court rules. The Administrative Office (AO) is also the housekeeping agency of the judiciary responsible for allotting authorized funds and supervising expenditures. Throughout the year, local federal court staff send the AO a vast array of statistical data on the operations of the federal courts, ranging from the number of filings to the speed of the disposition of cases. The data are published in three separate volumes. The heftiest is the *Annual Report*, which runs hundreds of pages long and is now available on computer tape.

**Federal Judicial Center**

The Federal Judicial Center is the research and training arm of the federal judiciary. Its activities are managed by a director appointed by the board, which consists of the chief justice, the director of the Administrative Office, judges from the U.S. district court, courts of appeals, and bankruptcy court.
One of the principal activities of the Federal Judicial Center is education and training of federal judicial personnel, including probation officers, clerks of court, and pretrial service officers. For example, seminars for newly appointed federal judges are held whenever there is a sufficient number of judges to justify them. The center also conducts research on a wide range of topics, including the work of the magistrate judges, ways of measuring the workload of the courts, and causes of delay.

Judicial Councils

The judicial council (sometimes referred to as a circuit council) is the basic administrative unit of a circuit. Originally the judicial councils were composed of all the active-duty judges of the courts of appeals; in effect the circuit councils consisted of the courts of appeals sitting en banc but wearing administrative rather than judicial hats. The judicial councils were restructured and strengthened by congressional legislation in 1981. No longer are all active-duty circuit judges automatically members of the council; rather they decide by majority vote who will sit. In addition, half the membership of the council consists of district judges.

A judicial council is given sweeping authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." Working within this broad mandate, the councils monitor district court caseloads and judicial assignments. Although the law specifies that "all judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council," the actual enforcement powers are limited. The major weapons at the councils’ disposal are persuasion, peer group pressure, and publicity directed at the judge or judges who are reluctant to comply with circuit policy. At times, for example, circuit councils have ordered that a district judge receive no new cases until his or her docket has been brought up to date. Judicial councils are also authorized to investigate complaints of judicial disability or misconduct (a topic probed in greater detail in Chapter 8).

U.S. Sentencing Commission

The U.S. Sentencing Commission is an independent agency in the judicial branch of government. The commission was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. Its principal purpose is to establish sentencing policies and practices for the federal courts, including detailed guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes. Although the development, monitoring, and amendment of the sentencing guidelines is the centerpiece of the agency’s work, the commission also provides training, conducts research on sentencing-related issues, and serves as an information resource for Congress, criminal justice practitioners, and the public.

The commission is charged with the ongoing responsibilities of evaluating the effects of the sentencing guidelines on the criminal justice system, recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, and establishing a research and development program on sentencing issues (Chapter 16).

RISING CASELOADS IN THE FEDERAL COURTS

Too many cases has been a significant issue since the early years of the federal judiciary. At first almost all of the nation’s judicial business was handled by the state courts—federal jurisdiction was tightly limited by the Judiciary Act of 1789. But with the onset of the Industrial Revolution, the caseload of the federal courts began to grow. This increase in federal judicial business was accelerated by Prohibition, then the New Deal, and even further by federal lawmaking often associated with President Johnson’s “Great Society” programs. Growing caseloads in turn prompted changes and additions to the federal judiciary—appellate courts have been added, specialized courts created, and administrative agencies provided for.
Federal caseload growth, therefore, is nothing new. What is new is the pace of that expansion. For most of our nation’s history the growth in federal cases was gradual. No longer! Over the last forty years district court filings have more than trebled, and court of appeals cases have increased more than tenfold (Figure 3-5). According to the Administrative Office of the U.S. Courts, federal judges today are faced with unprecedented levels of work. Although there have been small declines in discrete areas of workload, by and large federal judges across the country face a greater number of cases this year than last, and in some instances, are encountering record levels of work.

Dramatic Increase in Workload

“The demands placed on United States judges today are staggering,” said L. Ralph Mecham, director of the Administrative Office of the U.S. Courts. “Jurists at virtually every level of our federal system are facing a greater number of cases, which involve increasingly complex issues, explore novel areas of the law, and consume a larger portion of their time” (Administrative Office 1996). The following are some examples.

- The number of civil rights cases filed in U.S. district courts jumped 86 percent between 1990 and 1995. This increase, when weighted for complexity, equates to fifty-five judgeships solely to handle civil rights cases.
Filings in U.S. bankruptcy courts doubled over the last decade. Annual bankruptcy filings topped 1.3 million in 1999.

Approximately one third of all cases filed in the U.S. courts of appeals are prisoner petitions—jumping by nearly 4,700 between 1990 and 1995.

The number of criminal cases filed in the U.S. courts of appeals has nearly doubled from 1987 until 1995.

The caseload problem is particularly acute in some metropolitan jurisdictions, where federal judges must postpone civil trials for months and even years to accommodate criminal trial schedules (particularly of major drug dealers) in accordance with the Speedy Trial Act (Williams 1993). Moreover, during one recent year the federal courts were forced to stop scheduling new civil jury trials altogether because of a severe budget shortfall (Labaton 1993). Developments like these give rise to the term “federal judicial gridlock.” The two solutions most often suggested are adding more federal judgeships and reducing federal jurisdiction.

How Many Federal Judges Are Too Many?

The dramatic increases in federal court cases have not been accompanied by a corresponding increase in the number of federal judgeships, particularly at the appellate level. It is clear that in the short term the number of federal judgeships will be increased, but this process is closely tied to partisan battles in Congress (Chapter 8). More fundamentally, some observers wonder how big the federal judiciary should become.

Judge Jon Newman of the U.S. Court of Appeals for the Second Circuit argues that 1,000 is the effective limit of the federal judiciary. To exceed this number would lead to an inevitable drop in quality of judges, he argues. Judge Joseph Weis of the U.S. Court of Appeals for the Third Circuit agrees, stating, “The Federal courts are like a committee, and any committee works less efficiently and has a tougher time arriving at a consensus the bigger it gets” (quoted in Wiehl 1990).

To others, imposing a maximum number of federal judges is the wrong approach. Opponents think the efforts to limit the number of federal judges are artificial and imaginary. To Judge Stephen Reinhardt of the Ninth Circuit, limiting the number of federal judges is simply a procedural device to achieve the substantive objectives of the conservatives—shut the little guys out of court (Reinhardt 1993; Newman 1993). In his words, “The right of ordinary citizens to use the Federal courts is in jeopardy. . . . There is a growing movement among Federal judges to freeze the number of judgeships at 1,000, when what is needed is just the opposite, a substantial increase.” Judge Reinhardt fears that freezing the number of judges would turn the federal courts into an elitist institution and advance the philosophical agenda of Chief Justice William Rehnquist and Justice Antonin Scalia. Limiting the number of cases the federal courts hear would shut off access to federal courts for poor people, minorities, women, and other disadvantaged persons.

Reduce Federal Jurisdiction?

In the late 1980s, Congress decided for the first time in the nation’s history to systematically study the caseload of the federal courts. At the urging of the federal judiciary, Congress created a special study committee with members appointed by the chief justice. In 1990, the Report of the Federal Courts Study Committee concluded that “the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us.”

The report makes it abundantly clear that in the committee’s view Congress created most of these problems by unwisely expanding federal court jurisdiction, and therefore Congress should act immediately to pass remedial legislation. Alas, having been labeled as the culprit, it is hardly surprising that Congress gave the report a chilly reception (Biskupic 1993). Indeed many of the committee’s recommendations had already been considered by Congress and rejected. In short, the nation’s top elected lawmakers have been at odds with the nation’s top appointed law interpreters for most of this century, and this disagreement is not likely to change.

Arguments based on numbers of cases stress issues of efficiency but typically need to be under-
CONTROVERSY

Should State Crimes Also Become Federal Violations?

Walk into federal court for the first time and you probably won’t expect to see defendants like Alfonso Lopez. We associate federal courts with big cases and important issues. Bank embezzlers and big-time drug dealers are what we expect to see. Street criminals like Lopez are more likely to be found in state courts. But increasing-ly the dockets of federal courts are being crammed with such criminals. Deciding what should be a fed-eral offense and what should be a state crime is not an easy task—one that says more about the sociology and politics of the nation than its law.

The division of power between the national gov-ernment and state governments is at times fuzzy. Whereas some ideologues argue for absolute divisions between federal and state power, the reality is that federalism involves shared powers, not necessarily distinct and separate layers of authority.

Under federalism, one of the powers reserved to the states is the power to regulate persons and property in order to promote the public welfare (commonly referred to as police powers). Based on these police powers, state governments and their local subdivisions pass laws to promote the public health, welfare, and safety. Thus, most crimes are defined by the states (see Chapter 2).

Congressional Expansion

Over the years Congress has extended federal criminal jurisdiction beyond the basics centering on federal property and interstate commerce. The underlying motivation has been public concerns (some would say public hysteria) about selected activities. Thus, it is no coincidence that a great deal of the expansion of federal criminal jurisdiction involves public morality in matters like drugs, alcohol, prostitution, and gambling (Meier 1994). The Mann Act (also known as the White Slave Traffic Act) was passed in 1910 after lurid revelations of the growth of prostitution in the United States and fears about importing European women for U.S. brothels. The Harrison Act of 1914 outlawed opium, morphine, heroin, and cocaine because these drugs were associated with deviants (Chinese opium dens and the like). The Volstead Act ushered in Prohibition in 1919, representing the political dominance of rural Protestants over big-city Catholics. The movie Reefer Madness is often associated with the federal government’s crackdown on marijuana in the 1930s. National attention on the Mafia after World War II led to the passage of the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970. More recently, federal attention has focused on guns (see Case Close-Up: U.S. v. Miller and the Right to Bear Arms) and yet again on drugs (Brickey 1996).

The same political process continues today, only the specifics have changed. Contemporary demands to expand federal criminal jurisdiction occasionally attract bipartisan support. Recent federal legislation dealing with child pornography falls into this category. But mostly these discussions reflect contrasting partisan and ideological positions. Conservatives generally favor reducing federal court caseloads, but when it comes to some issues, they favor expansion. Some conservative congresspersons, for example, have called for increasing federal criminal jurisdiction to include car-jacking and transferring numerous gun cases from state to federal courts. These efforts, if successful, would potentially result in numerous violent offenders who were armed with a weapon being pros-ecuted in federal, not state, court.

Democrats oppose such efforts but tend to support expansion of federal criminal law to cover citi-zens with limited political power. Thus, they favor expanding federal criminal legislation to cover hate crimes, stalking, and violence against women. More-over, they would allow victims of crimes “motivated by gender” to sue civilly in federal court. And most of all they back gun control as the best strategy for con-trolling crime. Republicans oppose such efforts.

Judicial Responses

Federal judges, whether appointed by Republican or Democratic presidents, almost uniformly oppose the federalization of state crimes (Schwarzer and Wheeler 1994). Thus, the Report of the Federal Courts Study Committee recommended sending drug cases back to state court and eliminating mandatory minimum sentences. Chief Justice Rehnquist (1993) has decried what he calls the near transformation of some federal courts into national narcotics courts. Twenty-five per-cent of all federal criminal cases are now drug related.

The position of the federal judiciary is that federal jurisdiction should be limited to cases that cannot or should not be brought in state courts. Chief Judge Henry Politz of the Fifth U.S. Court of Appeals expressed the following sentiment: “We ought to be flattered that Congress reacts by saying let’s make a

(continued on following page)
stood within a more basic framework of political winners and losers. Thus some disagreements reflect divisions along the lines of the due process versus crime control models of justice. But other disagreements reflect institutional differences—the views of federal judges (whether appointed by Republican presidents or Democratic ones) contrast with the views of federal lawmakers. Part of the political battle over federal court jurisdiction involves the scope of federal criminal law. Controversy: Should State Crimes Also Become Federal Violations? explores why this topic cuts across typical ideological perspectives.

**Lopez and Morrison Decisions**

The Lopez case is ultimately significant not because it involves guns but because the Court set limits on what crimes Congress may federalize. Writing for the majority, Chief Justice William Rehnquist stressed that in passing the Gun-Free School Zones Act in 1990 Congress “did not issue any findings showing a relationship between gun possession on school property and commerce.”

More recently a bare conservative majority of the Court declared part of the Violence Against Women Act of 1994 unconstitutional (U.S. vs. Morrison, 2000). In particular, victims of rape and other violent felonies “motivated by gender” no longer may sue their attackers in federal court (although state remedies are still available).

These decisions have sparked intense debate. To some, concern about overexpansion of federal jurisdiction is a genuine concern in matters like this. But to others the concern over caseload appears to be a façade masquerading conservative antipathy toward gun control and protecting the rights of vulnerable members of society.

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**CONSEQUENCES OF FEDERAL INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM**

Crime, Chapter 1 argued, has been a pressing national concern for decades. As a result, national elected officials, whether members of Congress or the president, have often made crime a key campaign issue. In turn, the crime policies of nonelected officials, whether bureaucrats or judges, have been closely scrutinized. Despite all this clamor at the national level, crime remains primarily the responsibility of state and local governments. This imbalance between federal officials’ need to be seen as doing something about the crime problem, and their limited jurisdiction to do anything, explains a good deal of the political dynamics of the role of the federal government (and the federal judiciary) in the criminal justice system.

**Limited Scope**

Although crime receives extraordinary attention from the national government, the role of the federal government in the criminal justice system is limited. The majority of events labeled as crime are violations not of federal law but of state law; as a result the capacity of the federal justice system is limited. Table 3-2 makes the point. The federal system has 6 percent of law enforcement personnel and 9 percent of prison inmates. In terms of numbers of prisoners, this is comparable to Texas (the Lone Star state’s 97,000 inmates rank it second...
behind California). Over the last two decades federal crime has become heavily identified with the war on drugs. Indeed, 44 percent of all federal prosecutions, and 60 percent of all federal inmates, are drug related.

Forum for Symbolic Politics

In spite of the limited scope of its involvement in crime, the federal government remains the focal point of the national debate. Crime is a powerful issue and therefore has attracted a variety of interest groups. Some focus on crime issues directly—for example, the Coalition to Stop Gun Violence, National Association of Chiefs of Police, and National Organization for the Reform of Marijuana Law (NORML). Other interest groups find that crime and crime issues are related to other concerns—the National Rifle Association and the National Association of Attorneys General, for example.

Interest groups have a major impact on public policy. Most directly they lobby on behalf of their members for favorable governmental policies. They can also mount campaigns encouraging their members to write federal officials in favor of (or in opposition to) specific proposals. Some organizations likewise make campaign contributions to selected officials. The National Rifle Association, for instance, contributes to officials who are dubious about gun control, whereas Handgun Control, Inc., supports candidates who favor gun control (Marion 1995).

Many interest group activities are instrumental—that is, they are tied to the passage or defeat of specific legislation. But other activities are more symbolic, seeking to have the values of their organization recognized to the exclusion of other groups, even if the actions have little if any impact. The debate over the death penalty fits here. Congress and the president have debated expanding federal death penalty laws for several decades, but the reality is that any such laws will have limited impact at best.

Federal Dollars

A basic rule of American politics is that citizen demands for services exceed the willingness of voters to raise taxes to pay for those services. Those who one day vocally demand a tax reduction are quick to demand expanded governmental services the next day. Funding the criminal justice system illustrates this equation. Citizens demand that courts “get tough with criminals” but are unwilling to raise taxes for a new jail. Likewise, pleas for more cops on the beat are seldom followed by requests for increased taxes to pay for such increased people power. Faced with these limitations, local and state officials often turn to Washington as a source of

<table>
<thead>
<tr>
<th>Activity</th>
<th>State and Local</th>
<th>Federal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law enforcement personnel</td>
<td>828,435</td>
<td>52,105</td>
</tr>
<tr>
<td>Supreme Court justices</td>
<td>357</td>
<td>9</td>
</tr>
<tr>
<td>Courts of appeals judges</td>
<td>874</td>
<td>179</td>
</tr>
<tr>
<td>Major trial court judges</td>
<td>9,763</td>
<td>649</td>
</tr>
<tr>
<td>Lower trial court judges</td>
<td>18,317</td>
<td>422</td>
</tr>
<tr>
<td>Prison inmates</td>
<td>958,704</td>
<td>95,034</td>
</tr>
<tr>
<td>Prisoners under sentence of death</td>
<td>2,723</td>
<td>6</td>
</tr>
<tr>
<td>Justice system employment</td>
<td>1,635,502</td>
<td>162,202</td>
</tr>
<tr>
<td>Correctional officers</td>
<td>352,847</td>
<td>25,515</td>
</tr>
</tbody>
</table>

CASE CLOSE-UP

**U.S. v. Miller and the Right to Bear Arms**

It is no small irony that in the polemics over gun control the U.S. Constitution is very salient while the U.S. Supreme Court has been very silent. The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The high court has addressed the meaning of these archaic words only five times in its history, most recently in 1939.

Jack Miller and Frank Layton drove from Claremore, Oklahoma, to Siloam Springs, Arkansas. Why they were making the trip is unknown; in the quaint words of The New York Times (“Supreme Court Bars Sawed-Off Shotgun” 1939), “The record in the case of Miller and Dayton (sic) does not show for what purpose they were taking the sawed-off shotgun across State lines.” Both were arrested for transporting a sawed-off shotgun in interstate commerce. The U.S. district court dismissed the indictment on grounds that the National Firearms Act “violates the Second Amendment to the Constitution of the United States” (U.S. v. Miller et al. 1939). Alas, for Miller and Layton, the nation’s high court reached a very different conclusion.

Writing for a unanimous court, Justice James McReynolds (a jurist noted for his conservative views) explored the history of the Second Amendment, emphasizing that the drafters inserted the phrase “well regulated Militia” very purposefully. “The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.” In short “the right of the people to keep and bear Arms” applied only to militia and not to individual citizens. (States maintained militias until the War of 1812, but their woeful performance against the British army led to their demise, to be replaced by a standing army.)

Since Miller, the Supreme Court has declined to directly address the issue. Lower federal courts have upheld firearms regulations either on grounds that the Second Amendment is a collective, not an individual right, or because it has not been incorporated, that is, it limits only the national government, but not state or local entities. Recently, however, the high court (in the tradition of Lopez) struck down the part of the Brady Act dealing with background checks, reasoning that the Tenth Amendment prohibits Congress from compelling state law enforcement officers to “administer or enforce a federal regulatory program” (Printz v. United States, 1997).

The decision in U.S. v. Miller is often mentioned by gun control advocates and just as often ignored by gun rights supporters. The ongoing debate over the meaning of the Second Amendment illustrates the interplay between law on the books and law in action. In terms of law on the books, the Supreme Court has the final say. But in terms of law in action, other branches of government and citizens themselves play a vital role. The Constitution is an important symbol of American society. Labeling a governmental program as constitutional (or unconstitutional) has tremendous consequences. No matter what the Court (and lawyers and judges for that matter) might say, a significant minority of the American public interprets the Second Amendment as creating a personal right to bear arms (and therefore not limited to the militia). Moreover, these views are reinforced by powerful interest groups—most notably the National Rifle Association.

“free” money (with free defined as no local taxes). In turn, federal officials find that appropriating federal money is one way of assuring voters that they take the crime problem seriously.

Congress has authorized spending for a variety of anticrime programs. Some are general in nature, for example, block grants for local projects that reduce crime and improve public safety. Similarly, 60 percent of the research budget of the National Institute of Justice—the principal federal agency involved in the war on crime—is spent on developing new technology for law enforcement and the criminal justice system. Other spending programs are targeted toward specific concerns, for example, domestic violence and victim assistance programs (Chapter 9). Drug and alcohol abuse are also prime targets, as are deadbeat dads. Priorities vary between administrations. Reagan backed preventive detention programs, whereas Clinton supported community-oriented policing and adding 100,000 more cops. Recently, federal funding has become available for building local jails and state prisons. Overall, though, the amount of federal dollars is small compared to what local and state governments
spend. Moreover, federal money is often limited to a short period of time (typically three years). After federal funding ends, state or local units of government are expected to take over funding, but often these agencies are strapped for cash, meaning that successful programs are canceled.

The federal government provides state and local criminal justice system support in ways other than just federal dollars. Personnel is one. Federal law enforcement agencies such as the FBI have provided technological support in the form of crime lab analysis, fingerprint identification, and the like. Today, such help is being extended in the form of joint task forces. Some types of crimes—drug distribution in particular—cross numerous geographical lines and also potentially violate numerous federal and state laws. Because of this, local police departments are cooperating with a wide variety of federal law enforcement agencies in targeting either specific suspects or specific crimes. Wiretapping authority is another form of federal support. The FBI is in a better position both legally and organizationally to tap the telephones of suspected criminals than are local police departments.

**CONCLUSION**

Street punks like Alfonso Lopez were no doubt on Justice Scalia’s mind when he spoke in New Orleans a few years ago, condemning what he called the deterioration of the federal courts. In the 1960s the federal courts had a few judges and small caseloads, but the cases they did hear were “by and large . . . cases of major importance.” Today, he argued, the federal courts have more judges and larger caseloads, but many of these cases are “minor” and “routine,” concerning “mundane” matters of less import or even “overwhelming triviality” (quoted in Galanter 1988). Thus, to one of the Court’s leading conservatives, the federal courts should be returned to their rightful role of deciding major controversies; lesser ones would be banished to state courts.

Other federal judges, whether noted for their liberal, moderate, or conservative views, have also expressed concern about the federalization of state crimes, calling for drug cases to be sent back to state courts where they rightfully belong. But in an era when crime remains a major political issue, rolling back federal jurisdiction to the “good old days” (whenever that might have been) is unlikely to happen. What we learn ultimately is that the jurisdiction of federal courts is determined in no small measure by decisions of elected officials in Congress. In an earlier era federal officials decided that federal law should cover matters such as prostitution, consumption of alcoholic beverages, gambling, and organized crime. Today they focus more on drug dealers, crooks who use guns, and wife beaters.

Federal prosecutions often grab the headlines because the crimes are large or audacious or because the accused are people of prominence. In turn the public by and large identifies the judiciary with federal courts. But we should not be misled. The federal courts are a relatively small part of the nation’s judicial system. A major city such as Chicago or Los Angeles prosecutes more felons in a year than the entire federal judiciary. The nature of the crimes brought to federal court differs strikingly from those appearing in state jurisdictions, though. State courts handle primarily street crimes that require immediate action—burglary, armed robbery, and murder, for example. By contrast, federal crimes are often paper crimes requiring no immediate action—bank embezzlement and money laundering, for instance. It is to the more common state courts that we turn our attention in the next chapter.

**CRITICAL THINKING QUESTIONS**

1. To what extent are contemporary debates over the role of the federal government similar to, but also different from, the debates in the late eighteenth century?

2. How would the criminal justice system be different today if the founding fathers had decided not to create a separate system of federal courts and instead allowed federal laws to be enforced in state courts?

3. How would you reduce the federal court caseload? In considering where you would reduce...
federal court jurisdiction, also consider where you might increase it. What do your choices reflect about your political values?

4. To what extent does the debate over federalization of state crimes cut across traditional ideological values as represented in the due process model and the crime control model?

5. Federal law enforcement is limited in scope but subject to considerable public attention. Why?

6. Why do opponents of gun control so often ignore _U.S. v. Miller_?

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**Web Exercises**

1. The homepage for the federal courts contains links to all the federal courts and federal judicial agencies. The URL is [http://www.uscourts.gov/](http://www.uscourts.gov/). Click on the Web sites for the Administrative Office of the U.S. Courts and also the _Third Branch_ (the newsletter published by the Federal Judicial Center). Examine recent discussions of federal court caseloads.

2. Yahoo also contains numerous links to federal courts. To access them, first go to Yahoo at [http://www.yahoo.com](http://www.yahoo.com); then click on Government/Judicial Branch/Federal Courts. Don’t be dismayed to find many of the same sites as on the U.S. courts homepage. The Web is interrelated, which means there is more than one way to access a specific site. Which route you take is entirely your preference.

   Click on the site for the circuit that governs your state and see what information is available. In particular, do the sites provide information about the number of criminal cases decided each year? Do the data give any indication of the nature of the crimes involved (drugs, bank robbery, for example)? Who do you think the audience is for the Web site—practicing lawyers, potential jurors, the general public?

3. U.S. Supreme Court opinions are available on the Web, which saves the drudgery of walking to the law section of the library and getting your hands dirty on all the dust of older volumes. One of the major links, FindLaw, is at [http://www.findlaw.com/](http://www.findlaw.com/). Choose Laws: Cases and Codes/Supreme Court Opinions and search for the court’s opinion in _U.S. v. Lopez_ using either the citation search (U.S.) or the party (Lopez). (The option of full-text search is not recommended for the novice.)
Recommended Articles

Donald C. Dilworth, "Blue Ribbon Judicial Panel Will Recommend Fate of Federal Ninth Circuit" 
Carrie E. Johnson, "Rocket Dockets: Reducing Delay in Federal Civil Litigation" 
Clarissa Campbell Orr, "Court History"

InfoTrac College Edition Exercises

1. Using the search term crime, federal, find articles that discuss what types of behavior should be made a federal violation. Based on these articles, discuss what arguments are made suggesting why a crime should be a federal offense. What arguments are made against such proposals? Overall do disagreements reflect philosophical differences of the crime control versus due process model of justice? Here are two suggested articles: Brian Levin, Bruce Fein, “Q. Does America Need a Federal Hate-Crime Law?” and David Savage, “The Chief Lays Down the Law.”

REFERENCES


FOR FURTHER READING

After attending several judicial conferences around the nation, two judges had little trouble identifying the major problems facing the Los Angeles County municipal courts: Soaring drug prosecutions were further crowding jails that were already full. Implementing a solution, however, proved a more troublesome and time-consuming process. In order to establish a drug court the judges needed the active cooperation of other judges, the district attorney, the public defender, treatment providers, and the sheriff. To ensure that these agencies had a voice in the process, a coordinating council was formally established. Finally, after months of meeting and planning, two drug courts were created (Torres and Deschenes 1997).
Discussions of state courts usually contain references to major cases like armed robberies and automobile accidents. But this is only part of their workload. State judges must also adjudicate cases involving wives who want divorces from unfaithful husbands and husbands who physically abuse their wives; juveniles who rob liquor stores and juveniles who simply drink liquor. The contemporary realities reflect an increase in the number of cases placed on the dockets of state courts and rising societal expectations about the administration of justice—while staffing levels remain constant. Thus, although an earlier generation viewed court reform in terms of a neater organizational chart, contemporary discussions are more likely to focus on such topics as finding a better way to handle drug cases.

This chapter examines the structure and functions of state courts. We begin with a discussion of the development of American courts and then divide the somewhat confusing array of state courts into four levels: trial courts of limited jurisdiction, trial courts of general jurisdiction, intermediate appellate courts, and courts of last resort. (Chapter 18 examines the lower courts in depth, and we will discuss juvenile courts in Chapter 19.) We will examine the efforts of court reformers to reorganize state court structure as well as the consequences of court organization for the administration of justice.

HISTORY OF STATE COURTS

Just as American law borrowed heavily from English common law, the organization of American courts reflects their English heritage. But the colonists and later the citizens of the fledgling new nation that called itself the United States of America adapted this English heritage to the realities of the emerging new nation. Issues such as the clash of opposing economic interests, the debate over state versus national power, and outright partisanship have shaped the development of America’s fifty diverse state court systems.

Colonial Courts

Early colonial courts were rather simple institutions whose structure replicated English courts in form but not in substance. The numerous, complex, and highly specialized English courts were ill suited to the needs of a small group of colonists trying to survive on the edge of the wilderness, so the colonists greatly simplified the English procedures. As towns and villages became larger, however, new courts were created so that people would not have to travel long distances to have their cases heard. Moreover, a notion of separation of governmental powers began to emerge. In the early days the same governmental body often held executive, legislative, and judicial powers. The county courts, for example, stood at the heart of American colonial government. Besides adjudicating cases, they also performed important administrative functions (Friedman 1985). Gradually, different institutions began to perform these tasks.

Diversity was the hallmark of the colonies, with each colony modifying its court system according to variations in local customs, different religious practices, and patterns of commercial trade. Some of these early variations in legal rulings and court structures have persisted and contribute to the great variety of U.S. court systems today (Glick and Vines 1973).

Early American Courts

After the American Revolution, the functions of state courts changed markedly. Their governing powers were drastically reduced and taken over by the legislative bodies. Moreover, their decisions were often closely watched. The former colonists distrusted lawyers and harbored misgivings about English common law. They were not anxious to see the development of a large, independent judiciary. Thus, state legislatures often scrutinized judicial decisions, and in response to unpopular court decisions, some judges were removed from office or specific courts were abolished.
The distrust of the judiciary increased as courts declared legislative acts favoring free money to be unconstitutional. Such actions were a major source of political conflict between legislatures and courts representing opposing interests. Legislators were more responsive to policies that favored debtors, usually small farmers. Courts, on the other hand, reflected the views of creditors, often merchants. Out of this conflict over legislative and judicial power, the courts gradually emerged as an independent political institution.

Courts in a Modernizing Society

Rapid industrialization following the Civil War produced fundamental changes in the structure of the American judiciary. Increases in population, the growth of cities, and the rise of industrialization greatly expanded the volume of litigation. Moreover, the types of disputes coming to the courts changed as well. Not only did the growth of industry result in disputes over this new wealth, but the concentration of people in the cities (many of whom were immigrants), coupled with the pressures of industrial employment, meant the courts were faced with a new set of problems. The American courts, still reflecting the rural agrarian society of the early nineteenth century, were inadequate in the face of rising demands for services (Jacob 1984).

States and localities responded to the increased volume of litigation in a number of ways. City courts were created to deal with new types of cases in the urban areas. Specialized courts were formed to handle specific classes of cases (e.g., small claims courts, juvenile courts, and family relations courts). Additional courts were created, often by specifying the court’s jurisdiction in terms of a geographic boundary within the city. The development of courts in Chicago illustrates the confusion, complexity, and administrative problems that resulted from this sporadic and unplanned growth. In 1931 Chicago had 556 independent courts; the majority were justice of the peace courts that handled only minor offenses (Glick and Vines 1973).

The jurisdiction of these courts was not exclusive; that is, a case could be brought before a variety of courts depending on the legal and political advantages that each one offered. Moreover, each court was a separate entity; each had a judge and a staff. Such an organizational structure meant there was no way to shift cases from an overloaded court to one with little to do. Each court also produced patronage jobs for the city’s political machines.

The sporadic and unplanned expansion of the American court system has resulted in an often confusing structure. Each state system is different. Although some states have adopted a unified court structure, others still have numerous local courts with overlapping jurisdictions. Moreover, there may be major variations in court jurisdiction within a state; the jurisdiction of courts in one county may differ from that in the adjoining county. To reduce confusion, we will examine state courts at four levels: trial courts of limited jurisdiction, trial courts of general jurisdiction, intermediate appellate courts, and courts of last resort. Table 4-1 summarizes the tremendous volume of cases decided each year by state courts.

### Trial Courts of Limited Jurisdiction: Lower Courts

At the first level of state courts are trial courts of limited jurisdiction, sometimes referred to as inferior courts, or more simply, lower courts. There are almost 14,000 trial courts of limited jurisdiction in the United States, staffed by about 18,000 judicial officers. The lower courts constitute 85 percent of all judicial bodies in the United States. The number of
trial courts of limited jurisdiction varies from none in Idaho, Illinois, Iowa, Massachusetts, Minnesota, South Dakota, and the District of Columbia (where their functions have been absorbed by the major trial courts), to over 2,900 in New York and 2,500 in Texas.

Variously called district, justice, justice of the peace, city, magistrates, or municipal courts, the lower courts decide a restricted range of cases. Most of these courts are created by city or county governments and therefore are not part of the state judiciary. Thus lower courts are typically controlled only by the local governmental bodies that create them and fund them.

The caseload of the lower courts is staggering—over 67 million matters a year, the overwhelming number of which are traffic cases (almost 46 million in any given year) (Table 4-1). The caseload indicates that these are the courts that the average citizen is most likely to come into contact with. For this reason Chapter 18 will examine the lower courts in more depth, highlighting their role in conducting the preliminary stages of felony cases and deciding misdemeanor, traffic, and small claims cases.

### TRIAL COURTS OF GENERAL JURISDICTION: MAJOR TRIAL COURTS

At the second level of state courts are the trial courts of general jurisdiction, usually referred to as major trial courts. There are an estimated 2,600 major trial courts staffed by over 9,000 judges (Ostrom and Kauder 1999). The phrase general jurisdiction means that these courts have the legal authority to decide all matters not specifically delegated to lower courts. The specific division of jurisdiction between the lower courts and the major trial courts is specified by law—statutory or constitutional or both. The most common names for these courts are district, circuit, or superior. The specific names used in all states are listed in Exhibit 4-1.

The geographical jurisdictions of the major trial courts are defined along existing political boundaries, counties primarily. Each court has its own support staff consisting of a clerk of court, a sheriff, and others. In most states the trial courts of general jurisdiction are also grouped into judicial districts or circuits. In rural areas these districts or circuits encompass several adjoining counties. Here the trial courts responsible for major criminal and civil cases.

### TABLE 4-1  Case Filings in State Courts

<table>
<thead>
<tr>
<th></th>
<th>Civil</th>
<th>Criminal</th>
<th>Domestic</th>
<th>Juvenile</th>
<th>Traffic</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of last resort</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>97,000</td>
</tr>
<tr>
<td>Intermediate courts of appeals</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>200,000</td>
</tr>
<tr>
<td>Trial courts of general jurisdiction</td>
<td>6,300,000</td>
<td>4,400,000</td>
<td>3,500,000</td>
<td>1,300,000</td>
<td>8,600,000</td>
<td>24,100,000</td>
</tr>
<tr>
<td>Trial courts of limited jurisdiction</td>
<td>9,100,000</td>
<td>10,200,000</td>
<td>1,500,000</td>
<td>800,000</td>
<td>45,800,000</td>
<td>67,400,000</td>
</tr>
<tr>
<td>Total</td>
<td>15,400,000</td>
<td>14,600,000</td>
<td>5,000,000</td>
<td>2,100,000</td>
<td>54,400,000</td>
<td>91,800,000</td>
</tr>
</tbody>
</table>

Note: These are estimates based on percentages and therefore the numbers may not total.


The quickest way to determine if your local courts have Web sites is to go to [http://www.ncsc.dni.us/court/sites/Courts.htm](http://www.ncsc.dni.us/court/sites/Courts.htm).

For an up-to-date list of Web links, go to [http://www.wadsworth.com/product/0534563406s](http://www.wadsworth.com/product/0534563406s).
Court judges are true generalists who hear a wide variety of cases as they literally ride circuit, holding court in different counties on a fixed schedule. More populated counties have only one circuit or district for the area. Here judges are often specialists assigned to hear only certain types of cases, such as criminal, family, juvenile, civil, and so on. Refer back to Table 4-1 for some basic workload data on the major trial courts.

As discussed in Chapter 3, the lion's share of the nation's judicial business exists at the state, not the federal, level. Twenty-four million cases are filed each year in the nation's state trial courts, more than 100 times the number of similar filings in the federal district courts. Moreover, the types of cases filed in the state courts differ greatly from those going to the federal courts. Litigants in federal courts are most often big businesses and governmental bodies. In sharp contrast, litigants in state courts are most typically individuals and small businesses.

One of the leaders in providing useful Web sites is the Superior Court of San Diego County, California: http://www.sandiego.courts.ca.gov/superior/index.html.

For an up-to-date list of Web links, go to http://www.wadsworth.com/product/0534563406.

Criminal Cases

Whereas federal courts hear a high percentage of white-collar crimes and major drug distribution cases, state courts decide primarily street crimes. The more serious criminal violations are heard in the trial courts of general jurisdiction. The public associates felonies with crimes of violence such as murder, robbery, and rape, but as we will see in Chapter 10, 90 percent of criminal violations involve nonviolent crimes such as burglary and theft. State courts must also process a rising volume of drug-related offenses, ranging from simple possession of small amounts of illicit drugs to sale of large quantities of cocaine and heroin. Over the last decade and a half criminal cases filed in general jurisdiction courts (primarily felonies) increased 50 percent. Most criminal cases do not go to trial. Thus, the dominant issue in the trial courts of general jurisdiction is not guilt or innocence but what penalty to apply to the guilty.

Civil Cases

The focus on criminal cases in the media might lead one to believe that criminal cases account for the majority of court business. In reality, civil cases dominate the dockets of major trial courts. Press attention also suggests that personal injury lawsuits dominate civil filings. In reality, tort cases make up a relatively small percentage of the docket.

Domestic relations constitutes the single largest category of cases filed in the major trial courts. These family law matters mainly involve divorce and related issues such as determining child custody,

EXHIBIT 4-1 Major Trial Courts in Different States

<table>
<thead>
<tr>
<th>Circuit Court</th>
<th>Court of Common Pleas</th>
<th>District Court</th>
<th>Superior Court</th>
<th>Supreme Court</th>
</tr>
</thead>
</table>

* Arkansas, Delaware, Mississippi, and Tennessee have separate chancery courts with equity jurisdiction.
* Indiana uses superior and circuit courts.
* Vermont also uses district courts.
* New York also uses county courts.

setting levels of child support, allocating economic resources (homes, cars, and savings accounts), and in some states providing for spousal support (alimony and the like). Domestic relations cases account for a full one third of case filings. Moreover, domestic relations cases exhibit the fastest growing part of the civil caseload.

Estate cases (often referred to as probate) are the second most common type of case filed in the states’ major trial courts. For those who made a will prior to their death, the courts supervise the distribution of assets according to the terms of the will. For those who failed to make a will before dying, the courts determine which heirs will inherit the estate. Most estate matters present the judge with little if any controversy.

**Estate:** The interest a person has in property; a person’s right or title to property.

**Personal injury** cases constitute the third most common type of case filings in state trial courts of general jurisdiction. Tort law covers a wide range of legal injuries. Most involve a physical injury, which can vary from a sprained ankle to wrongful death. Although tort cases may involve a wide range of activities, most stem from accidents involving motor vehicles. Tort cases constitute only about 8 percent of all filings in trial courts of general jurisdiction, but they are the most likely to go to trial. Only the handful that involve large sums of money are likely to be covered in the press. Contrary to popular belief, there has been no “litigation explosion” (Neubauer 1997); tort case filings actually decreased by 1 percent over the last decade (Ostrom and Kauder 1999).

**Personal injury:** Negligence lawsuits, often involving automobile accidents.
A variety of other types of civil cases are also filed in state trial courts of general jurisdiction. Contract cases arise when one party claims that the other party failed to live up to the terms of a contract and asks for monetary damages as compensation. Other cases allege violations of property rights, which typically involve mortgage foreclosures. Thus, most of the other cases are commercial matters, involving businesses in one form or another. Most commercial cases involve debt collection in one form or another.

INTERMEDIATE COURTS OF APPEALS

A century ago state court systems included only a single appellate body—the state court of last resort. Like their federal counterparts, however, state courts have experienced a significant growth in appellate cases that threatens to overwhelm the state supreme court. State officials in thirty-nine states have responded by creating intermediate courts of appeals, or ICAs (Exhibit 4-2). The only states that have not followed suit are sparsely populated ones with a low volume of appeals. The ICAs must hear all properly filed appeals. Subsequent appeals are at the discretion of the higher court. Thus a decision by the state’s intermediate appellate court is the final one for most cases.

The structure of the intermediate courts of appeals varies in several ways. Twenty-four states organize their ICAs on a statewide basis, and the rest, on a regional basis. In most states these bodies

**Intermediate courts of appeals:** Judicial bodies falling between the highest, or supreme, tribunal and the trial court; created to relieve the jurisdiction’s highest court of hearing a large number of cases.
hear both civil and criminal appeals. Alabama and Tennessee, however, have separate courts of appeals for civil and criminal cases. The number of judges in the intermediate courts of appeals ranges from three to the eighty-eight in the California Court of Appeals. Like their federal counterparts, these courts typically employ rotating three-judge panels for deciding cases.

The ICAs handle the bulk of the caseload in the appellate system, and their workload has increased dramatically in the last decade. States have created these courts and given them additional judgeships in hopes of relieving the state supreme courts from crushing caseloads, only to find that the ICAs experience the same problems (Chapter 17). Numerous efforts are under way to increase the efficiency of the appellate process, but not everyone agrees where to draw the line between needed efficiencies and the requirement that justice be done.

Looking ahead, criminal defendants are increasingly likely to appeal their convictions but will find appellate courts markedly unsympathetic to their legal arguments; only one of sixteen receives a major victory (even if temporary). Appellants in civil cases are more likely to persuade a panel of three judges that the trial court erred, but even here trial court decisions are typically affirmed. As we will shortly see, the intermediate appellate courts represent the final stage of the process for most litigants—very few cases make it to the appellate court in the first place, and of those cases only a handful will be heard by the state’s highest appellate court.

For up-to-date statistics on court filings go to the Court Statistics Project in the National Center for State Courts: http://www.ncsc.dni.us/research/PROJECTS/Admin2.html#csp.

For an up-to-date list of Web links, go to http://www.wadsworth.com/product/0534563406s.

### EXHIBIT 4-2 Intermediate Courts of Appeals (Number of Judges)

<table>
<thead>
<tr>
<th>Appeals Court</th>
<th>Massachusetts (14)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appellate Court</td>
<td>Connecticut (9), Illinois (42)</td>
</tr>
<tr>
<td>Appellate Division of Superior Court</td>
<td>New Jersey (28)</td>
</tr>
<tr>
<td>Appellate Divisions of Supreme Court</td>
<td>New York (48)</td>
</tr>
<tr>
<td>Appellate Terms of Supreme Court</td>
<td>New York (15)</td>
</tr>
<tr>
<td>Commonwealth Court</td>
<td>Pennsylvania (9)</td>
</tr>
<tr>
<td>Court of Appeals</td>
<td>Alaska (3), Arizona (21), Arkansas (6), Colorado (16), Georgia (9), Idaho (3), Indiana (5), Iowa (6), Kansas (10), Kentucky (14), Michigan (24), Minnesota (16), Missouri (32), Nebraska (6), New Mexico (10), North Carolina (12), North Dakota (3), Ohio (65), Oklahoma (12), Oregon (10), South Carolina (6), Tennessee (12), Utah (7), Virginia (10), Washington (23), Wisconsin (15)</td>
</tr>
<tr>
<td>Courts of Appeal</td>
<td>California (88), Louisiana (55), Texas (80)</td>
</tr>
<tr>
<td>Court of Civil Appeals</td>
<td>Alabama (3)</td>
</tr>
<tr>
<td>Court of Criminal Appeals</td>
<td>Alabama (5), Tennessee (9)</td>
</tr>
<tr>
<td>Court of Special Appeals</td>
<td>Maryland (13)</td>
</tr>
<tr>
<td>District Court of Appeals</td>
<td>Florida (57)</td>
</tr>
<tr>
<td>Intermediate Court of Appeals</td>
<td>Hawaii (3)</td>
</tr>
<tr>
<td>Superior Court</td>
<td>Pennsylvania (15)</td>
</tr>
</tbody>
</table>

* Temporary

b Civil only

**COURTS OF LAST RESORT: STATE SUPREME COURTS**

The court of last resort is generally referred to as the *state supreme court*. The specific names vary from state to state.
state to state, and to further complicate the picture, Texas and Oklahoma have two courts of last resort—one for civil appeals and another for criminal appeals. The number of supreme court judges varies from a low of three to as many as nine (see Exhibit 4-3). Unlike the intermediate appellate courts, these courts do not use panels in making decisions. Rather, the entire court participates in deciding each case. All state supreme courts have a limited amount of *original jurisdiction* in dealing with matters such as disciplining lawyers and judges. In most states the high court has a purely *discretionary docket*; that is, much like the U.S. Supreme Court, they select only a few cases to hear, but these cases tend to have broad legal and political significance. In states without an intermediate court of appeal, however, the supreme court has no power to choose which cases will be placed on its docket.

The state supreme courts are the ultimate review board for matters involving interpretation of state law. The only other avenue of appeal for a disgruntled litigant is the U.S. Supreme Court, but successful applications are few and must involve important questions of federal law. Although state supreme courts vary greatly in the details of the internal procedures used in deciding cases, most follow procedures that are roughly similar to the U.S. Supreme Court’s. State supreme courts, however, tend to have greater caseloads.

Chapter 17 will probe why many state supreme courts have in recent years emerged as significant governmental bodies. In state after state, the supreme courts are deciding issues that have a major impact on the law and government of their jurisdiction (see Case Close-Up: *Wachtler v. Cuomo* and Court Financing).

**COURT UNIFICATION**

Since the turn of the last century, the organization of American courts has been a central concern to court reformers who believe that the multiplicity of courts is inefficient (because judges cannot be shifted to meet the caseload needs of other courts) and also inequitable (because the administration of justice is not uniform). Historically, court reform has been associated with implementing a unified court system. Figure 4-1 provides a diagram of a state (Florida) with a unified court system, and Figure 4-2 offers a contrasting diagram of a state (Texas) with limited unification.

The principal objective of a unified court system is to shift judicial administration from local

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**EXHIBIT 4-3 Courts of Last Resort in Different States (Number of Judges)**

| Supreme Court | Alabama (9), Alaska (5), Arizona (5), Arkansas (7), California (7), Colorado (7), Connecticut (7), Delaware (5), Florida (7), Georgia (7), Hawaii (5), Idaho (5), Illinois (7), Indiana (5), Iowa (9), Kansas (7), Kentucky (7), Louisiana (8), Michigan (7), Minnesota (9), Mississippi (9), Missouri (7), Montana (7), Nebraska (7), Nevada (5), New Hampshire (5), New Jersey (7), New Mexico (5), North Carolina (7), North Dakota (5), Ohio (7), Oklahoma (9), Oregon (7), Pennsylvania (7), Rhode Island (5), South Carolina (5), South Dakota (5), Tennessee (5), Texas (9), Utah (5), Vermont (5), Virginia (7), Washington (9), Wisconsin (7), Wyoming (5) |
| Court of Appeals | District of Columbia (9), Maryland (7), New York (7) |
| Supreme Judicial Court | Maine (7), Massachusetts (7) |
| Court of Criminal Appeals | Oklahoma (3), Texas (9) |
| Supreme Court of Appeals | West Virginia (5) |

*Two courts of last resort in these states.*


Unified court system: Entails a simplified state trial court structure, rule making centered in the supreme court, system governance authority vested in the chief justice of the supreme court, and state funding of the judicial system with a statewide judicial budget.
**FIGURE 4-1  Example of a State with a Unified Court Structure**

**FLORIDA COURT STRUCTURE**

**SUPREME COURT**
7 justices sit en banc
Case types:
- Mandatory jurisdiction in civil, capital criminal, criminal, administrative agency, juvenile, disciplinary, advisory opinion cases.
- Discretionary jurisdiction in civil, noncapital criminal, administrative agency, juvenile, advisory opinion, original proceeding, interlocutory decision cases.

**DISTRICT COURTS OF APPEAL (5 courts)**
61 judges sit in 3-judge panels
Case types:
- Mandatory jurisdiction in civil, capital criminal, administrative agency, juvenile, original proceeding, interlocutory decision cases.
- Discretionary jurisdiction in civil, noncapital criminal, juvenile, original proceeding, interlocutory decision cases.

**CIRCUIT COURTS (20 circuits)**
442 judges
Case types:
- Tort, contract, real property rights ($15,001 / no maximum), miscellaneous civil. Exclusive domestic relations, mental health, estate, civil appeals jurisdiction.
- Juvenile.
- Preliminary hearings.

Jury trials except in appeals.

**COUNTY COURTS (67 counties)**
254 judges
Case types:
- Tort, contract, real property rights ($2,501 to $15,000), miscellaneous civil. Exclusive small claims jurisdiction ($2,500).
- Misdemeanor, DWI/DUI, miscellaneous criminal.
- Exclusive traffic/other violation jurisdiction, except parking (which is handled administratively).
- Preliminary hearings.

Jury trials except in miscellaneous traffic.
**FIGURE 4-2 Example of a State with Limited Court Unification**

**TEXAS COURT STRUCTURE**

**SUPREME COURT**
- 9 justices sit en banc
- Case types:
  - Mandatory jurisdiction in civil cases.
  - Discretionary jurisdiction in civil, administrative agency, juvenile, certified questions from federal courts, original proceeding cases.

**COURT OF CRIMINAL APPEALS**
- 9 justices sit en banc
- Case types:
  - Mandatory jurisdiction in capital criminal, criminal, original proceeding cases.
  - Discretionary jurisdiction in noncapital, original proceeding cases and certified questions from federal courts.

**COURTS OF APPEALS (14 courts)**
- 80 justices sit in panels
- Case types:
  - Mandatory jurisdiction in civil, noncapital criminal, administrative agency, juvenile, original proceeding, interlocutory decision cases.
  - No discretionary jurisdiction.

**DISTRICT COURTS (387 courts, 387 judges)**

**DISTRICT COURTS (377 courts, 377 judges)**
- Case types:
  - Tort, contract, real property rights ($200/no maximum), domestic relations, estate, miscellaneous civil. Exclusive administrative agency appeals jurisdiction.
  - Felony, misdemeanor, DWI/DUI, miscellaneous criminal.
  - Juvenile.

**DISTRICT COURTS (10 courts, 10 judges)**
- Case types:
  - Felony, misdemeanor, DWI/DUI, miscellaneous criminal cases.

**COUNTY-LEVEL COURTS (443 courts, 443 judges)**

**Constitutional County Courts**
- (254 courts, 254 judges)
- Case types:
  - Tort, contract, real property rights ($200/$5,000), domestic relations, estate, mental health, civil trial court appeals, miscellaneous civil.
  - Misdemeanor, DWI/DUI, criminal appeals.
  - Moving traffic, miscellaneous traffic.
  - Juvenile.

**Probate Court**
- (18 courts, 18 judges)
- Case types:
  - Estate.
  - Mental health.

**County Court at Law**
- (171 courts, 171 judges)
- Case types:
  - Tort, contract, real property rights ($200/varies), estate, mental health, civil trial court appeals, miscellaneous civil.
  - Misdemeanor, DWI/DUI, criminal appeals.
  - Moving traffic, miscellaneous traffic.
  - Juvenile.

**Municipal Court**
- (847 courts, 1,215 judges)
- Case types:
  - Misdemeanor.
  - Moving traffic, parking, miscellaneous traffic. Exclusive ordinance violation jurisdiction.
  - Preliminary hearings.

**Justice of the Peace Court**
- (842 courts, 842 judges)
- Case types:
  - Tort, contract, real property rights ($0/$5,000), small claims ($5,000), mental health.
  - Misdemeanor.
  - Moving traffic, parking, miscellaneous traffic.
  - Preliminary hearings.

* Some municipal and justice of the peace courts may appeal to the district court.
control to centralized management. The loose network of independent judges and courts would be replaced by a coherent hierarchy with authority concentrated in the state capital. Although court reformers differ about the exact details of a unified court system, their efforts reflect five general principles: a simplified court structure; centralized administration, rule making, and budgeting; and statewide financing (Berkson and Carbon 1978).

Simplified Court Structure
Court reformers stress the need for a simple, uniform court structure for the entire state. In particular, the multiplicity of minor and specialized courts, which often have overlapping jurisdiction, would be consolidated in one county-level court. This would mean that variations between counties would be eliminated and replaced by a similar court structure throughout the state. Overall, the court reformers envision a three-tier system: a state supreme court at the top, intermediate courts of appeal where the volume of cases makes it necessary, and a single trial court.

Centralized Administration
Reformers envision the state supreme court, working through court administrators, as providing leadership for the state court system. The state court system would embody a genuine hierarchy of authority, with local court administrators required to follow the policy directives of the central office and in turn be held accountable by the state supreme court. Thus a centralized state office would supervise the work of judicial and nonjudicial personnel.

Centralized Rule Making
Reformers argue that the state supreme court should have the power to adopt uniform rules that would be followed by all courts in the state. Examples of such rules include procedures for disciplining errant attorneys and time standards for disposing of cases. In addition, judges could be temporarily assigned to other courts to alleviate backlogs and reduce delay. Centralized rule making would shift control from the legislatures to judges and lawyers.

Centralized Judicial Budgeting
Centralized budgeting would give the state judicial administrator (who reports to the state supreme court) the authority to prepare a single budget for the entire state judiciary and send it directly to the legislature. The governor’s power to recommend a judicial budget would be eliminated. Likewise, lower courts would be dependent on the supreme court for their monetary needs and unable to lobby local representatives directly. Thus, decisions about allocating funds would be made at the state and not the local level.
Wachtler v. Cuomo and Court Financing

The governor and the chief judge were longtime friends (and sometimes rivals). Governor Mario Cuomo, a Democrat, had appointed Sol Wachtler, a Republican, chief judge in 1985. And now on the last day of 1990, Cuomo asked Wachtler to administer the oath of office in the paneled chambers of the court of appeals. Neither man could anticipate that within a year they would meet again in another courtroom to do battle over funding the state judiciary. A few weeks into his third term as governor, Mario Cuomo was forced to confront the state’s worst financial crisis since the Great Depression. Facing a projected shortfall of $6 billion, Governor Cuomo proposed unprecedented budget cuts throughout the entire New York state government, the courts included. The state judiciary would receive $77 million less than they had requested. Chief Judge Wachtler responded with a lawsuit asserting that the proposed budget cuts violated the doctrine of inherent powers (Glaser 1994).

The doctrine of inherent powers holds that as a coequal branch of government, the judiciary has the authority to exercise power reasonably necessary to the performance of judicial functions. American courts have used this doctrine since the early nineteenth century to assert judicial independence. But these efforts were largely limited to matters of judicial housekeeping, such as rules of courtroom decorum, paying jurors, and compensating court-appointed counsel. More recently, the doctrine of inherent powers has been evoked to compel the local legislature to create judicial support positions and fund them at adequate levels. Although the doctrine appears to be rather sweeping, its application has typically been limited to specific discrete items, and moreover, appellate courts have imposed important limitations.

Wachtler v. Cuomo was significant because it marked the first substantial use of the doctrine of inherent powers by a state high court against an equal branch of government. It also differed from previous efforts to assert inherent judicial powers because of the large sums of money involved. Unlike previous lawsuits, which involved discrete items amounting to a few thousand dollars or occasionally a million or two, Wachtler v. Cuomo centered on the entire budget in the range of $1 billion plus. Funding for the New York judiciary increased significantly in the decade before the lawsuit, rising from $480 million in 1982 to almost $1 billion nine years later. Yet this 86 percent increase could not keep up with demand; caseloads rose swiftly while judicial staffing resources increased only minimally.

Faced with a projected $6 billion deficit, the governor and legislature thought it only fair that the judiciary also absorb some of the budget pain. The initial proposed judicial budget represented an actual decrease of $6.5 million or 0.7 percent from the previous year. The judiciary responded that any cut would unnecessarily weaken the judiciary. Indeed, the chief judge projected 500 layoffs in the court system. After considerable public posturing, the chief judge made good on his threat to file suit in the supreme court (trial court for New York) in Albany County.

The case never came to trial. Amid bantering in the press, the chief judge decided “to cut both his fiscal and public relations losses by ending the year-long conflict” (Glaser 1994, 19). The chief judge called the governor, and an hour later the deal was finalized—judicial budget cuts were largely ended, but the courts would not receive any increases in funding.

Was the lawsuit worth it politically? The legal basis for the judiciary’s case was weak. Moreover, public confidence in the judiciary was shaken, and the judiciary’s relationship to the other branches of government was strained. According to Howard Glaser, who served as the governor’s special assistant (1994, 24):

“The ultimate implication of Wachtler v. Cuomo is that all parties emerge as losers in an inherent powers conflict of this nature, no matter what the legal outcome of the exercise.” Perhaps the headline in The New York Times said it best: “Wachtler v. Cuomo = Two Losers.”

Although judicial budgets consume a small portion of the entire state budget, they are nonetheless tempting targets when states face difficult fiscal circumstances. This situation is ironic because many fiscal problems of the states stem from public efforts to get tough on crime—judges are expected to send more defendants to prison for longer periods of time. The result is a swelling prison population, which further strains state budgets. At the same time courts are under pressure to produce speedier justice. Again, there is an irony: As court dockets have increased, legislatures have largely been unwilling to add personnel to meet the increasing tide of expectations. In short, the courts are expected to do more with less.
Statewide Financing

Along with centralized judicial budgeting, reformers argue for the adoption of statewide financing of the judiciary. Although courts are mandated by state law, they are often financed in whole or in part by local governments. Given that courts are often not a high priority for local government, they end up with less than adequate local financing. State government, in contrast, has more money and could better support necessary court services. (But as Controversy: The Politics of Court Reorganization highlights, problems of financing courts are not so easily solved. See page 104.)

COURT REFORM: THE EMERGING AGENDA

The assumptions and philosophy of traditional notions of court reform have been called into serious question. A new generation of scholars believes that the old principles of court reorganization hamper creative thinking about the direction court reform should take (Lamber and Luskin 1992; Hudzik 1985; Flango 1994; Scheb and Matheny 1988). One concern is that the concept of a unified court system does not allow for a desirable diversity. The standard blueprint of court organization fails to consider, for example, important differences in the working environment of courts in densely inhabited cities as opposed to those in sparsely populated rural areas.

Modern critics have also charged that traditional concepts of court reform stress abstract ideals of court organization (law on the books) to the neglect of the realities of the courthouse (law in action) (Baar 1980). As a result, court reformers suffer from elite bias. Their perceptions of the problems of the courthouse extend only to cases with policy significance involving major community actors and rarely extend to ordinary cases affecting average citizens. In the biting words of Laura Nader (1992), court reformers talk about “how to rid the . . . courts of ‘garbage cases’ (e.g., consumer, environmental, feminist issues).” The net result is that problems of battered women and abused children are not considered “real” court cases, and the difficult questions of child custody are ignored while judges concentrate on the issues raised by big business and big government.

Today court reform concentrates more on how to improve the quality of justice meted out by American courts and less on how to provide a neater organizational chart. The solutions proposed by lawyer elites seem unresponsive to the realities of ordinary cases heard in the nation’s trial courts. A judiciary with a clearly delineated organizational structure staffed by judges selected on the basis of merit (Chapter 8) will face the same difficult problems of large caseloads and types of cases—juvenile delinquency, for example—that are difficult to decide. The emerging agenda of court reform includes topics such as improving the efficiency of the appellate courts (Chapter 17) and alternative dispute resolution (Chapter 18). It also includes a focus on case management as a way to reduce delay in the trial courts (Chapter 5).

The emerging agenda on court reform reflects efforts to strengthen the relationship between courts and the communities they serve (Efkeman and Rottman 1997). Perhaps the best known effort is the movement to create community courts (Chapter 18). For now, we will examine the general concept of therapeutic jurisprudence and its most widely known application—drug courts.

Therapeutic Jurisprudence

Contemporary court reform involves the creation of specialized courts to deal with specific types of cases. Initially these were called designer courts or boutique courts, indicating their specialized nature. Common examples include drug court, domestic violence court, family court, juvenile drug court, gun court, drunk driving court, elder court, and reentry court (which deals with prisoners reentering the community).

More recently these specialized courts have been said to rely on therapeutic jurisprudence (Wexler and Winick 1996). Such courts have five essential elements:

1. Immediate intervention
2. Nonadversarial adjudication
3. Hands-on judicial involvement
4. Treatment programs with clear rules and structured goals
5. A team approach that brings together the judge, prosecutors, defense counsel, treatment provider, and correctional staff (Rottman and Casey 1999)

Drug treatment courts are the best-known examples of therapeutic jurisprudence.

Drug Courts

The emergence of drug courts illustrates how the judiciary is responding both to increases in caseload and changes in the types of cases being brought to court. In the mid-1980s drug caseloads increased dramatically in courts throughout the country. As a centerpiece of the so-called War on Drugs, elected officials at all levels—federal, state, and local—backed efforts to arrest, prosecute, and imprison persons possessing or selling illegal drugs. As a result, arrests for drug abuse violations represent the largest single category of police activity—over 1,550,000 per year. Moreover, in the major urban areas of the United States the impact of the War on Drugs has been even more dramatic; several large eastern cities experienced 100 percent increases in arrests (Goerdt and Martin 1989).

Some judges and court administrators feared that the first major casualty of the War on Drugs would be the nation’s urban trial courts. In the words of one big-city prosecutor: “The situation is desperate. The overload causes backlog; backlog feeds delay; and delay . . . results in the lack of jail and prison space” (Lipscher 1989, 14). Fears of a system breakdown, however, were somewhat overdrawn (Mahoney 1994). One reason is that many prosecutions are straightforward—pleas of guilty are entered shortly after arraignment. Another reason is that some courts began to experiment with new ways of processing cases by creating drug courts.

Drug courts vary widely in structure, target populations, and treatment programs. The least distinctive way of creating a drug court is to establish one section of court that processes all minor drug cases; the primary goal is to speed up case dispositions of drug cases and at the same time free other judges to expedite their own dockets. Another type of drug court concentrates on drug defendants accused of serious crimes who also have major prior criminal records. These cases are carefully monitored by court administrators to ensure that all other charges are consolidated before a single judge and no unexpected developments interfere with the scheduled trial date (Davis, Smith, and Lurigio 1994).

Still other drug courts emphasize treatment. The assumption is that treatment will reduce the likelihood that convicted drug offenders will be rearrested. Dade County (Miami) Circuit Court is an example of a treatment approach to drug offenders. It has received extensive national publicity because it was the first in the nation. To be eligible, defendants must have no prior felony convictions, must be charged with possession only (not sale), and must admit their drug problem and request treatment. These offenders are diverted into treatment. The sentencing judge, rather than a probation officer, monitors offenders’ progress. Participants must periodically report to the drug court judge, who assesses their progress and moves them through the phases of the program.

Within a decade drug courts have moved from experimental innovation to well-established programs. The government lists over 325 drug courts across forty-three states and the District of Columbia. Less formally, drug courts operate in many other jurisdictions as well.

Initial evaluations gave favorable rates of success. For example, in Miami, compared to defendants not in the program, offenders in the Miami drug court treatment program had lower incarceration rates, less frequent rearrests, and longer times to rearrest (Goldkamp and Weiland 1993). Likewise, an evaluation of Broward County, Florida, found that first-time cocaine offenders who were treated were less likely to be rearrested (Terry 1996). But more sophisticated evaluations have reported a different picture. In Washington, D.C., participation in a drug court treatment program has been poor—
only forty-one percent of those eligible chose to participate. Moreover, completion of the program took much longer than anticipated; cases were open an average of eleven months as opposed to the six months estimated (Harrell, Cavanagh, and Roman 2000). (See A Day in Court: “DuPage County Says the Jury Is Still Out on Its Fledgling Drug Court.”)

The Politics of Court Reorganization

Judicial reformers have achieved considerable success. Many states have substantially unified their court systems. Significantly, though, only a few states have adopted most or all of the principles suggested by court reformers (Baar 1993). Several states, for example, have adopted a four-tier system (rather than the recommended three tiers) by retaining the lower courts as a separate level rather than combining them with the major trial courts (Flango and Rottman 1992). Along these same lines, the principle of statewide financing has not fared well. In many states the county (or an equivalent unit) still finances the major trial courts to a significant degree (Lim 1987). Moreover, not all reform efforts have been successful. Some states (such as Tennessee) have considered and then rejected constitutional amendments to restructure their courts.

Why have some reform proposals been rejected? Why have the reformers’ recommendations been significantly modified? To answer these questions, we need to examine the politics of court reorganization. Battles over court organization are usually presented as dry technical issues involving case volume and efficiency. But such arguments mask the underlying political dynamics.

Support for court reform is concentrated among the elite of the legal profession. The American Bar Association is a long-time advocate of judicial reform. The American Judicature Society was formed in 1913 by elite members of the bar to campaign for improving the courts. Likewise, middle-class reform organizations such as the League of Women Voters endorse the ideals of court reform. More recently, judicial reform has achieved wide official recognition and has become the “government-approved” approach to judicial administration. The National Institute of Justice within the U.S. Justice Department and the quasi-private National Center for State Courts reflect a trend toward greater government involvement and leadership in the reform model of judicial administration (Glick 1988).

But efforts of legal elites to drum up support for court reform are often greeted with disinterest or skepticism. Lawyers reflect divided sentiments over judicial reform. General practice and trial lawyers (who are less likely to be members of the American Bar Association) perceive that court reform would require unnecessary changes in their routines. Judges and other court personnel likewise resist the idea of being forced to learn new procedures if the courts are reorganized. Finally, many of the problems associated with the existing structure of courts are concentrated in the large cities. Rural politicians and rural lawyers, because they see no problems in their own area, are not sympathetic to major overhauls that would not

CONSEQUENCES OF COURT ORGANIZATION

How the courts are organized and administered has a profound effect on the way cases are processed and on the type of justice that results.
Decentralization and Choice of Courts

Although people often talk about the American legal system, no such entity exists. Instead, America has fifty-one legal systems—the U.S. courts and separate courts in each of the fifty states. As Chapter 2 stressed, there are significant differences in the law between each legal system. As a result, lawyers sometimes try to maneuver cases so that they are heard in courts that are perceived to be favorable to their clients (or, alternatively, maneuver to avoid courts that are perceived to be less favorable). For example, some criminal offenses violate both state and federal laws. As a general rule, federal officials prosecute major violations, leaving more minor prosecutions to state officials. Civil litigants may also have choices about where to file suit. For cases with federal jurisdiction, litigants may also choose in which federal court to file. The oil and natural gas industry, for example, prefers to litigate in the Fifth Circuit because this court has historically been supportive of the industry. By contrast, consumer groups prefer to file in the District of Columbia Court of Appeals, because this court has historically supported consumers.

Local Control and Local Corruption

The fifty state court systems are in actuality often structured on a local basis. The officials that staff
“DuPage County Says the Jury Is Still Out on Its Fledgling Drug Court”

Mark McGee struggled with his cocaine addiction for nearly half his life. The Wheaton man went through numerous treatment programs but, like many addicts, often relapsed. At 42, he was unemployed and staring down another prison sentence for retail theft. McGee decided he’d had enough. “I was tired of the lifestyle,” he said. “I tried treatment but the hardest thing for me was that once I got to a certain level, I always managed to sabotage myself. I was afraid of success.”

Earlier this month, McGee and two other men became the first graduates of a fledgling drug court in DuPage County that aims to thwart crime by treating drug-addicted criminals. . . . “I’ve been in prison,” McGee said. “Prison is easy. This is hard.”

The program has not been without some high-profile failures since its inauguration more than 10 months ago. One man overdosed. Another participant was arrested on reckless homicide charges. He is accused of driving drunk during a crash that killed a family of four in Hanover Park. And officials have stopped taking new applications until at least this spring in order to review the past year and make needed changes.

Still, for the three graduates and roughly 20 others still enrolled, drug court is offering a second chance to avoid prison and lead a sober life. “Anyone who says you’re going to save 100 percent is wrong,” said William Padish, the first-assistant public defender in DuPage County, who is part of the drug court team. “You can’t. But I do think the program promises to do better than what we have been doing. If you can intervene and get these people out of the system, everyone benefits.” . . .

DuPage Circuit Judge Ann Jorgensen spearheaded the program and presides over the drug court. But its success hinges on the teamwork of judges, prosecutors, defense attorneys, probation officials, and specialists in substance abuse treatment. The team reviews the arrest and treatment histories of possible participants. To be eligible, a defendant must have been charged with a nonviolent felony, such as drug possession, auto theft or, in McGee’s case, repeated retail thefts. The program does not accept those accused of more serious felonies, such as sex crimes, arson, or drug dealing, since they are deemed a greater risk to society.

If accepted, defendants must agree to a strict treatment plan, often including recovery homes, counseling, frequent drug testing and court visits, sobriety meetings, and group sessions. If they reach graduation, the participant’s felony arrest is reduced to a misdemeanor conviction with probation. Intense monitoring to respond to program violations is a key component of drug court. Participants appear before Jorgensen each Friday. “They do all the work,” Jorgensen said. “Our goal is to give them every tool possible to get through this.” . . .

“These courts arose in response to the revolving door of the criminal justice system,” said Susan Weinstein, chief counsel for the Alexandria, Virginia–based National Association of Drug Court Professionals. “Prosecutors, defense attorneys, and judges were seeing the same persons over and over and over again. Instead of treating them like criminals, they started treating them as drug-addict criminals.” . . .

DuPage’s drug court is on hiatus as far as taking new enrollees. . . . “I truly believe in what we are doing,” said prosecutor Jennifer Hulvat, a member of the drug court team. “But it’s got to have its limitations and safeguards. That’s what this pause is for. We have to make sure there’s accountability. As a prosecutor, I have to make sure there’s protection to the community. That’s my utmost responsibility and I can’t forget that.”

For McGee, recovery has not come easy. He relapsed early after starting the program last January. He admits it’s still a day-to-day fight, but one he hopes to win for himself and his two children. He’s even started a Friday night club in which other recovering addicts meet at a local treatment center to discuss their progress and give each other support. “It’s a struggle,” he said. “It’s always going to be a struggle. I don’t know what tomorrow is going to bring, but I know I’m sober now and I want to stay this way.”

these courts—judges and lawyers, prosecutors and defense attorneys—are recruited from the local community they serve and thus reflect the sentiments of that community. As a result, the U.S. system of justice has close ties to local communities and the application of “state” law often has a local flavor. Jurors in rural areas, for example, often have markedly different attitudes toward who is at fault in an accident and the amount of damages that should be awarded.

Local control of justice has the obvious advantage of closely linking courts to the people they serve. But local control has been the incubator for corruption and injustice. Every state invariably has a town or two where gambling and prostitution flourish because the city fathers agree to look the other way. Not surprisingly, they often receive monetary benefits for being so near-sighted. Increasingly, though, such activities attract the attention of state police, state attorney generals, and federal prosecutors.

The locally administered criminal justice system has also been marked by pockets of injustice. At times the police and the courts have been the handmaids of the local economic elite. In the South the police and the courts hindered efforts to exercise civil rights by arresting or harassing those who sought to register to vote, eat at whites-only lunch counters, or simply speak up to protest segregation.

The dual court system has provided a safety valve for checking the most flagrant abuses of local justice. Often, it is federal—not state or local—officials who prosecute corrupt local officials.

The implementation of drug courts in Los Angeles County (and numerous other areas across the nation) illustrates a major shift in thinking about court reform in the United States. Whereas traditional court reform emphasized consolidating various judicial bodies, the emerging agenda encourages the creation of specialized courts. Modern court reform also actively encourages working with members of the community, whereas the older tradition stressed notions of professionalism that disdained popular input. Likewise, court reform in the contemporary context stresses the importance of working with other agencies rather than viewing the judge as a lone authority figure. The next chapter focuses on these other agencies, elaborating on the concept of the courtroom workgroup.

What is perhaps most striking is that the ideas that have dominated discussion of court reform for most of this century are now being quietly buried. Instead of stressing organizational charts and other abstract notions, most efforts to reform the judiciary now focus on more specific matters—reduce court delay and target drug cases for special treatment, for example. Thus, today’s court reform is marked by tremendous experimentation at the local level. Judges and other court actors identify a problem and seek solutions, adapting local resources and local understandings in the process. This adaptation to change has always been the hallmark of the American judiciary. Perhaps the only differences today are the rapid pace of change and the public attention paid to these ongoing efforts at judicial reform.

**CONCLUSION**

The implementation of drug courts in Los Angeles County (and numerous other areas across the nation) illustrates a major shift in thinking about court reform in the United States. Whereas traditional court reform emphasized consolidating various judicial bodies, the emerging agenda encourages the creation of specialized courts. Modern court reform also actively encourages working with members of the community, whereas the older tradition stressed notions of professionalism that disdained popular input. Likewise, court reform in the contemporary context stresses the importance of working with other agencies rather than viewing the judge as a lone authority figure. The next chapter focuses on these other agencies, elaborating on the concept of the courtroom workgroup.

What is perhaps most striking is that the ideas that have dominated discussion of court reform for most of this century are now being quietly buried. Instead of stressing organizational charts and other abstract notions, most efforts to reform the judiciary now focus on more specific matters—reduce court delay and target drug cases for special treatment, for example. Thus, today’s court reform is marked by tremendous experimentation at the local level. Judges and other court actors identify a problem and seek solutions, adapting local resources and local understandings in the process. This adaptation to change has always been the hallmark of the American judiciary. Perhaps the only differences today are the rapid pace of change and the public attention paid to these ongoing efforts at judicial reform.

**CRITICAL THINKING QUESTIONS**

1. Although we typically talk of state courts (as opposed to federal courts), would it be better to talk about local courts? To what extent are there major variations within your state?
2. Compare your state to Figures 4-1 and 4-2. How unified is your state court structure?
3. Have there been discussions in your state of court reorganization? What major interest
groups are urging court reform, and what advantages do they suggest? What interest groups are opposing court reform, and what disadvantages do they cite?

4. Why do crime control advocates often oppose drug courts, and why do due process proponents support drug courts?

5. Make a list of state and local politicians who have been tried in federal court. Were there parallel state investigations or prosecutions? To what extent would corrupt local officials be better off if federal court jurisdiction were limited?

WORLD WIDE WEB RESOURCES AND EXERCISES

Web Guides
http://dir.yahoo.com/Government/Law/U_S__States/

Web Search Terms
“Courts,” “state courts,” “drug courts,” “court reform,” “courthouses”

Useful URLs
The National Center for State Courts provides a variety of reports on caseloads and latest trends. Search under Latest News or Information about the courts: http://www.ncsc.dni.us/.
Read about “Restructuring the Judiciary” on Hawai’i’s State Judiciary’s Web site: http://www.state.hi.us/jud/ACE.htm.
Trial Lawyers for Public Justice is a national public interest law firm that uses trial lawyers to create a more just society: http://www.tlpj.org.
The State Justice Institute was established by federal law to award grants for the improvement of state courts: http://www.statejustice.org/.
The American University’s Drug Court Clearinghouse and Technical Assistance Project can be accessed at http://www.american.edu/justice/.
The National Center for State Courts’ Web site is http://www.ncsc.dni.us/.
To learn more about federal funding, see the Web site of the Drug Courts Program Office: http://www.ojp.usdog.gov/dcpo/.

Uncommon URLs
The Legal Justice Reform Network is a self-help site for those who believe they have been “judicial victims”: http://www.atps.com/uclr/.
See Georgia courthouses: http://www.cviog.uga.edu/Projects/gainfo/courthouses/.
See Indiana county courthouses: http://members.iquest.net/~browns/county/.
See courthouses recorded by the Historic American Buildings Survey (HABS) and the Historic American Engineering Record (HAER): http://lcweb.loc.gov/rr/print/171_cour.html.

Web Exercises
1. FindLaw has information not only on state law but also on state courts. To locate specific information about your state, go to http://www.findlaw.com/. On the menu, click State Law Resources and then your state. Examine state-level courts. Based on this information,
where would you rank your state on a continuum from consolidated to fragmented?

2. Information on state courts is also available in Yahoo at [http://www.yahoo.com](http://www.yahoo.com). Choose Government/Judicial Branch/State Courts, or Government/U.S. States/Your State. Using either path (or preferably, both), find information on trial courts in your state. How easy or difficult is it to locate information? In some states information is easier to locate on the executive and legislative branches than on the judiciary. Is this true in your state? If so, why?

3. Using a search engine such as Alta Vista or Excite, look for information on drug courts. You can access a search engine by clicking Net Search on the browser. In the box marked Search, type the words drug court. Look for a drug court near you and examine the site.

4. Using the search engine of your choice use the phrase court reform to locate two or more Web sites that deal with this topic. What range of specific topics is included under the general rubric of court reform? To what extent are they consistent or inconsistent with your notions of court reform?

### INFOTRAC COLLEGE EDITION RESOURCES AND EXERCISES

#### Basic Search Terms

*Courts, state courts, drug courts, National Center for State Courts*

#### Recommended Articles

Neeley Tucker, “Seven Vying to Lead D.C. Superior Court”

Jet, “Blacks Have Little Confidence in State, Local Courts”

Spencer Abraham, “The Case for Needed Legal Reform: Frivolous Lawsuits”

*UN Chronicle*, “Permanent International Criminal Court Established”

#### InfoTrac College Edition Exercises

1. Using the search term court administration, select two articles that discuss state efforts. Does the approach discussed reflect traditional court reform ideas or the emerging agenda of court reform? Here are two possibilities: Major B. Harding, "Preparing Florida Courts for the New Millennium" and Donald C. Dilworth, "BJA Reports Measurement System for Trial Court Performance."

2. Using the search term drug court, select two or more articles that discuss this growing phenomenon. What advantages do the writers see for drug courts? What pitfalls do they discuss? Here are two possibilities: Robert Curley, “Drug Court Boom May Bust Treatment Availability” and Alcoholism & Drug Abuse Weekly, “Justice-Treatment Relationship Crucial to Drug Court Success.”

### REFERENCES


FOR FURTHER READING


