



1222

AJ 122



TAFT COLLEGE

Criminal Court Processes & Procedures

CRIMINAL COURT PROCESSES & PROCEDURES

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Editor: Trudi Radtke

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[Taft College](#)

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Cover by: **Trudi Radtke**

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PREFACE

Welcome to Taft College AJ 122 Criminal Court Processes and Procedures.

This textbook was designed especially for Taft College students. The following chapters will cover topics such as the US Court System, the collection and use of evidence, and the trial and sentencing processes. There are several types of interactive features in this book to help you, the student, engage with the various concepts and procedures involved in criminal court systems. Below are two examples of what these look like; interact with these special features to deepen your understanding of the course content.



Think About It... Boxes

These boxes encourage you to do just that, think about the information provided in the box and form an opinion. Often, what's placed in these boxes are ideas or issues that are controversial, such as the death penalty or immigration concerns. Sometimes these topics can be difficult to think about objectively because they are emotionally charged. However, taking a moment to consider your values and beliefs and thinking about how they affect your opinions and decision making produces mental stamina, which is an important life skill. Remember, the brain is a muscle too.



Pin It! Boxes

These boxes refer to information that you should mentally “pin” for later. The information included in pin it boxes will help you better understand textbook material.

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CHAPTER 1: FOUNDATIONS IN CRIMINAL COURT PROCESSES

OVERVIEW

This module is to provide you with a foundation of the key concepts of the criminal court process and procedures. The American justice system is founded on the belief that the accused are *innocent until proven guilty*. To ensure this, the system is founded on the principles of *equal justice, due process*, and fundamental fairness. After we discuss these concepts, we will also investigate other important concepts such as criminology theories on the causes of crime. We also focus on the value of empirical evidence and how this helps develop evidence-based policies and programs in the criminal court processes.

OBJECTIVES

- Be able to define and discuss the terms of due process, fundamental fairness, and due process.
- Identify how of the Crime Control Model (CCM) and Due Process Model (DPM) and how they similar and different in how the view the criminal justice process.
- Identify the pros and cons of the CCM and DPM and demonstrate how these two models can work together.
- Explain the value of empirical evidence and the scientific method in the criminal justice system/criminal court processes.
- Be able to identify and define the key components of a "Good" theory.
- Explain the importance and value of evidence-based practices in the criminal justice system.

KEY TERMS

due process, procedural due process, substantive due process, fundamental fairness, incorporation doctrine, equal justice, social contract theory, crime control model, due process model, empirical evidence, scientific method, hypothesis, theory, positivism, evidence-based practices

CRITICAL THINKING

- 1.1 Identify how **procedural due process** and **substantive due process** work to ensure fundamental fairness in the criminal justice process. For this exercise, think of a person who is arrested for a crime (i.e., shoplifting); what procedural due process is followed immediately after arrest to ensure fairness. Identify the one procedural due process. Now thinking of this same crime and identify a substantive due process that ensures a law is not arbitrary.
- 1.2 After examining the **Crime Control Model** and **Due Process Model**, what type best describes our current justice system model. Make sure to identify specific attributes/examples that leads you to believe this is the current criminal justice model. (It is not about picking one model as correct, the key to correctly answering this question is supporting your position with accurate attributes/examples that demonstrate and understanding of both models and their application).
- 1.3 After reviewing the value of empirical evidence in the criminal justice system, identify a question you would like to examine in criminal justice. For example, “Do men commit more crimes than women?” Then identify your hypothesis (potential answer/theory) to this question. Set up a potential experiment on how you could test your answer/theory.

CRIMINAL COURT THEORIES AND CONCEPTS

This module is designed to provide the foundations necessary to understand the criminal court process and procedures. We start the course with a discussion of the principles, concepts, and theories necessary to the criminal court. The key belief of the criminal court process is to ensure that every person charged with a crime is treated fairly and provided due process. As you will learn throughout this course, this is a very complex system that has evolved substantially since the Founding Fathers drafted the Constitution and rights afforded under the Constitution. How the criminal court system can adapt to changing social dynamics and advancements in technology the framers could never have envisioned. This course will demonstrate the evolution and methods used to maintain the functionality of the criminal courts in an ever-changing society. In addition to these concepts, we will also examine the role the scientific method plays in criminal court processes and developing evidence-based policies that work effectively.

1.1 DUE PROCESS, FUNDAMENTAL FAIRNESS & EQUAL JUSTICE

The American Justice System is founded on the belief that the accused are **innocent until proven guilty**. To ensure this, the system is founded on the principles of **due process, fundamental fairness, and equal justice**.

Due Process

Due process and fundamental fairness process are the primary concepts of our American Justice system and are designed to protect the rights of the citizens from the government. We all want to solve crimes, protect the innocent, and punish those who are guilty, but it must be done fairly and justly.

Due process has two main focuses, the first ensures that formal proceedings (such as criminal court proceedings) are carried out regularly and in accordance with established rules and principles. This is called **procedural due process**. The second portion is a judicial requirement that the laws created cannot contain provisions that result in the unfair, arbitrary, or unreasonable treatment of an individual. This is called also **substantive due process**.

Due process is found in both the Fifth and Fourteenth Amendments of the Constitution. The Fifth Amendment prescribes that no citizen of the United States will be "deprived of life, liberty or property without due process of law" by the federal government. In 1868, the Fourteenth Amendment uses the same words, called the Due Process Clause, to describe a legal obligation of all states. There are two types of due process, substantive due process and procedural due process. **Procedural due process**, as the name indicates, focuses on the processes used to try and convict defendants accused of crimes. **Substantive due process** is the way the courts protect individuals and prevent governmental interference with fundamental rights found in the Constitution.



Pin It! *Due Process*

Learn more about due process of law in this video: [Due Process](#).



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Fundamental Fairnessⁱⁱ

The fundamental fairness doctrine is the rule that applies the principles of due process to the criminal court process. Fundamental fairness and due process are synonymous (similar). The U.S. Constitution provides citizens protection that the government will not deprive a person of life, liberty, or property without the due process of law.



Pin It! *The Incorporation Debate*

When drafted and passed, the U.S. Constitution and the Bill of Rights applied only to the federal government. Individual states each had their own guarantees and protections of individuals' rights found in the state constitutions. Since 1868, the Fourteenth Amendment has become an important tool for making states also follow the provisions of the Bill of Rights. It was drafted to enforce the Civil Rights Act passed in 1866 in the post-Civil War states. Section 1 of the Fourteenth Amendment enjoins the states from depriving any person of life, liberty, or property, without due process of law. It prohibits states from adopting any laws that abridge the privileges and immunities of the citizens of the United States and requires that states not deny any person equal protection under the law. U.S. Const. amend. XIV, § 2. The practice of making the states follow provisions of the Bill of Rights is known as incorporation. Over decades, the Supreme Court debated whether the Bill of Rights should be incorporated all together, in one-fell-swoop, called total incorporation, or piece-by-piece, called selective incorporation. The case-by-case, bit-by-bit approach won. In a series of decisions, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment makes enforceable against the states those provisions of the Bill of Rights that are "implicit in the concept of ordered liberty." For example, in 1925 the Court recognized that the First Amendment protections of free speech and free press apply to states as well as to the federal government. In the 1960s, the Court selectively incorporated many of the procedural guarantees of the Bill of Rights. The Court also used the Fourteenth Amendment to extend substantive guarantees of the Bill of Rights to the states. Most recently, on February 20th, 2019 the Court incorporated the right to be free from excessive fines guarantee found in the Eighth Amendment to the states in *Timbs v. Indiana* (2019).

The Fourth, Fifth, Sixth, and Eighth Amendments have provisions that govern criminal procedure during the investigative, pretrial, and trial phases. The Eighth Amendment sets limits on the government's ability to impose certain types of punishments, impose excessive fines, and set excessive bail. The Due Process Clauses of the Fifth and Fourteenth Amendments require that criminal justice procedures be fundamentally fair. The Fourteenth Amendment's Equal Protection Clause requires that, at a minimum, there be some rational reason for treating people differently. For example, states can pass laws prohibiting minors from purchasing and consuming alcohol because states have a reasonable interest in protecting the health and welfare of their citizens. These amendments added several constraints on Congress. The impact of the Bill of Rights was to place substantial checks on the federal government's ability to define crimes.

***Equal Justice*ⁱⁱⁱ**

John Rawls (1921-2002) was a contemporary philosopher who studied theories surrounding justice. His theories are not focused on helping individuals cope with ethical dilemmas; rather they address general concepts that consider how the criminal justice system ought to behave

and function in a liberal democracy. It is for this reason that it is important that all law enforcement personnel be aware of Rawls' theories of justice or at least have a general understanding of the major concepts that he puts forth.

Rawls' theory is oriented toward liberalism and forms the basis for what law enforcement, and the criminal justice system, should strive for in a pluralistic and liberal society. Borrowing from some concepts of **social contract theory**, Rawls envisions a society in which the principles of justice are founded in a social contract. However, Rawls identifies problems with the social contract that do not allow fairness and equality to exist among members of society. He therefore proposes a social contract that is negotiated behind a "veil of ignorance." Here, the negotiating participants have no idea what their race, gender, education, health, sexual orientation, and other characteristics are, so that the social contract is fair. Ultimately, Rawls argues that the primary concern of justice is fairness, and within this paradigm, Rawls identifies two principles:

1. "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (Rawls, 2006, p.63). Rawls goes further by allowing each person to engage in activities, as long as he or she does not infringe on the rights of others.
2. "Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage (b) attached to positions and offices open to all..." (Rawls, 2006, p.63). Likewise, everyone should share in the wealth of society, and everyone should receive benefits from the distribution of wealth. Rawls does not argue that everyone should be paid the same, but rather that everyone should have benefited from a fair income and have access to those jobs that pay more.

These principles should be adhered to, according to Rawls, to ensure that disadvantages are neutralized, and everyone receives the same benefits of justice.

Rawls further addresses ethics in the individual. Though this is not the central tenet of his theory, it serves as a general statement of how moral people should behave (Banks, 2013).

Equal Justice.' in white. In the center is a white square containing a QR code with a circular logo in the middle that has a lowercase 'b' inside." data-bbox="112 676 875 903"/>

Pin It! *Equal Justice*
Learn more about Equal Justice in this video: [Equal Justice.](#)

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Remember the Innocent^{iv}

It is important to remember that one of the worst things that could happen in the Criminal Court system is that an innocent person is prosecuted for a crime they did not commit. Therefore, the system creates numerous protections to ensure the government does not falsely convict a person. However, with the advent of DNA and other technologies, we are learning that people have been incarcerated (sometimes for decades) for crimes they did not commit. This is why there are processes and procedures which must be followed by law enforcement, district attorney, and defense counsel, as well as judges to minimize the possibility of false convictions.

This course will review these processes and examine the purpose behind each process.

1.2 THE CRIME CONTROL AND DUE PROCESS MODELS^v

The criminal justice system can be quite complicated, especially in the attempt to punish offenders for wrongs committed. Society expects the system to be efficient and quick, but the protection of individual rights and justice is fairly delivered. Ultimately, the balance of these goals is ideal, but it can be challenging to control crime and quickly punish offenders, while also ensuring our constitutional rights are not infringed upon while delivering justice.

In the 1960s, legal scholar Herbert L. Packer created models to describe exceeding expectations of the criminal justice system. These two models can be competing ideologies in criminal justice, but we will discuss how these models can be merged or balanced to work together. The first tension between these models is often the values they place as most important in the criminal justice system. These two models are referred to as the **crime control model** and the **due process model**.

The **crime control model** focuses on having an efficient system, with the most important function being to suppress and control crime to ensure that society is safe and there is public order. Under this model, controlling crime is more important than individual freedom. This model is a more conservative perspective. In order to protect society and make sure individuals feel free from the threat of crime, the crime control model advocates for swift and severe punishment for offenders. Under this model, the justice process may resemble an assembly-line. Law enforcement suspects; they apprehend suspects; the courts determine guilt; and guilty people receive appropriate, and severe, punishments through the correctional system. The crime control model may be more likely to take a plea bargain because trials may take too much time and slow down the process.



Pin It! *Murder in the Gym: Crime Control Model Example by Dr. Sanchez*

Imagine you are working out at the local gym, and a man starts shooting people. This man has no mask on, so he is easy to identify. People call 911, police promptly respond, and arrest the shooter within minutes. Under the crime control model, the police should not have to worry too much about how evidence gets collected and expanded. Investigative, arrest, and search powers would be considered necessary. A crime control model would see no need to waste time or money by ensuring due process rights. Legal technicalities, such as warrantless searches of the suspect's home, would obstruct the police from effectively controlling crime. Effective use of time would be to immediately punish, especially since the gym had cameras and the man did not attempt to hide his identity. Any risk of violating individual liberties would be considered secondary to the need to protect and ensure the safety of the community in this model. Additionally, the criminal justice system is responsible for ensuring victim's rights, especially helping provide justice for those murdered at the gym.



Pin It! *Murder in the Gym: Due Process Model by Dr. Sanchez*

Using the same example of the gym murder, the due process model would want to see all the formalized legal practices afforded to this case in order to hold him accountable for the shooting. If this man did not receive fair and equitable treatment, then the fear is this can happen to other cases and offenders. Therefore, due process wants the system to move through all the stages to avoid mistakes and ensure the rights of all suspects and defendants. If the man in the gym pled not guilty due to the reason of insanity, then he can ask for a jury trial to determine whether he is legally insane. The courts would then try the case and may present evidence to a jury, ultimately deciding his fate. The goal is not to be quick, but to be thorough. Because the Bill of Rights protects the defendant's rights, the criminal justice system should concentrate on those rights over the victim's rights, which are not listed. Additionally, limiting police power would be seen as positive to prevent oppressing individuals and stepping on rights. The rules, procedures, and guidelines embedded in the Constitution should be the framework of the criminal justice system and controlling crime would be secondary. Guilt would get established on the facts and if the government legally followed the correct procedures. If the police searched the gym shooter's home without a warrant and took evidence then that evidence should be inadmissible, even if that means they cannot win the case.

There are several pros and cons to both models; however, there are certain groups and individuals that side with one more often than the other. The notion that these models may fall along political lines is often based on previous court decisions, as well as campaign approaches in the U.S. The crime control model is used when promoting policies that allow the system to get tough, expand police powers, change sentencing practices such as creating "Three Strikes,"

and more. The due process model may promote policies that require the system to focus on individual rights. These rights may include requiring police to inform people under arrest that they do not have to answer questions without an attorney (*Miranda v. Arizona*), providing all defendants with an attorney (*Gideon v. Wainwright*), or shutting down private prisons that often abuse the rights of inmates.

To state that crime control is purely conservative and due process is purely liberal would be too simplistic, but it is relevant to recognize that the policies are a reflection of our current political climate. If Americans are fearful of crime, as Gallup polls suggest they are, politicians may propose policies that focus on controlling crime. However, if polls suggest police may have too many powers and that can lead to abuse, then politicians may propose policies that limit their powers such as requiring warrants to obtain drugs. Again, this may reflect society as a whole, a sector of society, or the interests of a political party or specific politician.

1.3 IMPORTANCE OF EMPIRICAL EVIDENCE IN CRIMINAL JUSTICE - THE USE OF SCIENCE TO UNDERSTAND CRIME & DEVELOP SOLUTIONS^{vi}

It is important to understand the need for **empirical evidence** and **scientific method** in all aspects of the criminal justice process. The criminal court processes and procedures are no exception. While the court process relies heavily on historical practices and rights established in the Constitution, we must rely on empirical evidence and the scientific method to support the court processes and procedures. This allows our practices to grow and evolve through different cultural adaptations and also technological advances. This section examines what the scientific method is and how it is applied to criminology.



Pin It! *The Scientific Method*

Learn more about the scientific method in this video: [the Scientific Method](#).



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Overview^{vii}

A theory is an explanation to make sense of our observations about the world. We test **hypotheses** and create **theories** that help us understand and explain phenomena. According to Paternoster and Bachman (2001), theories should attempt to portray the world accurately and must “fit the facts.” Criminological theories focus on explaining the causes of crime. They explain why some people commit a crime, identify risk factors for committing a crime, and can focus on how and why certain laws are created and enforced. Sutherland (1934) has referred to criminology as the scientific study of breaking the law, making the law, and society’s reaction to those who break the law. Besides making sense of our observations, theories also strive to make predictions. If we understand why crime is happening, we can formulate policies or programs to minimize it.

If criminal behavior were merely a choice, the crime rates would more likely be evenly spread. However, when European researchers started to calculate crime rates in the 19th century, some places consistently had more crime from year to year. These results would indicate criminal behavior must be influenced by something other than choice and crime and must be correlated with other factors.

Positivism is the use of empirical evidence through scientific inquiry to improve society. Ultimately, positivist criminology sought to identify other causes of criminal behavior beyond choice. The basic premises of positivism are measurement, objectivity, and causality. Early positivist theories speculated that there were criminals and non-criminals. Thus, we have to identify what causes criminals.

Charles Darwin wrote *On the Origin of Species* (1859), which outlined his observations of natural selection. A few years later, he applied his observations to humans in *Descent of Man* (1871); he claimed that some people might be evolutionary reversions to an early stage of man. Although he never wrote about criminal behavior, others borrowed Darwin’s ideas and applied them to crime.

What Makes a Good Theory?



Critical Thinking... A “Good” Theory

Numerous criminological theories attempt to explain why people commit a crime. What makes one better than another? How do we judge theories against each other? The natural and physical sciences mostly agree on the knowledge of their disciplines. However, criminology is interdisciplinary, and many criminologists may not agree on what causes criminal behavior. For instance, Cooper, Walsh, and Ellis (2010) have looked at the political ideology of criminologists and their preferred or favored theories. Even one’s political leanings can influence a person’s set of beliefs about the causes of crime.

We must apply the scientific criteria to test our theories. Akers and Sellers (2013) have established a set of criteria to judge criminological theories: logical consistency, scope, parsimony, testability, empirical validity, and usefulness. Logical consistency is the basic building block of any theory. It refers to a theory's ability to "make sense". Is it logical? Is it internally consistent? A theory's scope refers to its range, or ranges, of explanations. Does it explain crimes committed by males AND females? Does it explain ALL crimes or just property crime? Does it explain the crime committed by ALL ages or just juveniles? Better theories will have a wider scope or a larger range of explanations.

A parsimonious theory is concise, elegant, and simple. There are not too many constructs or hypotheses. Simply put, parsimony refers to a theory's "simplicity". A good scientific theory needs to be testable too. It must be open to possible falsification. "Every genuine *test* of a theory is an attempt to falsify it or to refute it. Testability is falsifiability; but there are degrees of testability: some theories are more testable, more exposed to refutation than others; they take, as it were, greater risks...One can sum up all this by saying that *the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability*" (Popper, 1965, pp. 36-37).

After many tests and different approaches to research, those theories supported by evidence have empirical validity. Thus, according to Gibbs (1990), the verification or repudiation of a given theory through empirical research is the most important principle to judge a theory.

Finally, all theories will suggest how to control, prevent, or reduce crime through policy or programs. The premise of a particular theory will guide policymakers. For example, if a theory suggested that juveniles learn how to commit crime through a network of delinquent peers, policymakers will try to identify juveniles at-risk for joining delinquent subcultures.

Evidence-Based Policies and Procedures in Criminal Justice

In the 1970s, Martin Robinson issued his infamous claim that "nothing works" in rehabilitating offenders. In the 1980s, numerous research studies were published that contradicted this claim and proposed alternative approaches to combating crime and effective interventions. Since then, countless researchers, agencies, and even Congress have adopted the need to create comprehensive evaluations of effective programs.

Evidence-based practices mean utilizing research in pursuit of identifying programs, policy initiatives, or practices that work. The Office of Justice Programs (OJP) "considers programs and practices to be evidence-based when their effectiveness has been demonstrated by causal evidence, generally obtained through high-quality outcome evaluations," and notes that "causal evidence depends on the use of scientific methods to rule out, to the extent possible, alternative explanations for the documented change."

National research clearinghouses are great resources for systematic literature reviews of effective public programs across a plethora of areas, such as:

- The U.S. Department of Education's What Works Clearinghouse,
- The U.S. Department of Justice's CrimeSolutions.gov,
- Blueprints for Healthy Youth Development,
- The Substance Abuse and Mental Health Services Administration's National Registry of evidence-based Programs and Practices,
- The California Evidence-Based Clearinghouse for Child Welfare,
- What Works in Reentry, and the Coalition for Evidence-Based Policy.

With evidence-based practices comes evidence-based policymaking. Evidence-based policymaking identifies what works, enables policymakers to use evidence in deciding budgets and policy, identifies where there are gaps or information is lacking, monitors and measures key outcomes, and continuously uses the information to improve performance and objectives. The goal is to create a policy that can be enforced consistently and can withstand political change.



Criminal Process Overview

CHAPTER 2: CRIMINAL PROCESS OVERVIEW

OVERVIEW

In this chapter, we examine the structure and the foundations of the criminal court processes. The theories of due process, fundamental fairness, and equal justice are demonstrated and applied to the process. By the end of this chapter, you should be able to identify the different levels of criminal courts, and how the local, state, and federal court work to address the jurisdiction of crimes. This chapter also begin looking at the rights of the accused and why these protections are in place to protect the innocent. These rights will be examined in depth in later in the course but provide the foundation for understanding the key concepts of due process and fundamental fairness.

OBJECTIVES

- Be able to describe the American dual court system.
- Identify the role and jurisdiction of the federal, state, and local courts.
- Explain state and federal substantive law.
- Explain the differences between the grand jury and preliminary hearing process.
- Identify the rights of the accused.
- Outline the steps of the criminal court process.

KEY TERMS

dual court system, substantive due process (state & federal), Model Penal Code, right to counsel, pretrial detention, criminal complaint, grand jury, indictment, preliminary hearing, information, pre-trial motion, plea bargain, right to trial, sentencing, double jeopardy, parole, commutation.

CRITICAL THINKING

- 2.1 Explain why most criminal court cases are handled at the state and local level and not the federal level.
- 2.2 The reach of the federal government to pass federal criminal laws has grown substantially in the 20th/21st century. The framers of the Constitution wanted to protect citizens from a powerful government. How can increasing federal laws affect the power of the federal government?

2.3 Explain how the rights of the accused are affected in the grand jury/preliminary hearing process. Identify how both processes are similar/different and how they protect the accused.

CRIMINAL JUSTICE IN THE UNITED STATES: A PRIMER^{viii}

In this module, we examine the structure and basic jurisprudence of criminal law and criminal procedure in the United States.

Every state and the federal government has its own “substantive criminal law” (specifying crimes and defenses) and “criminal procedure” (specifying the stages of the criminal process from arrest through prosecution, sentencing, appeal, and release from prison). Each state legislature promulgates that state’s criminal law, which is enforced by state and county prosecutors, adjudicated in local and state-level courts, and punished in state prisons or local jails. Congress passes federal criminal laws, which are enforced, prosecuted, adjudicated, and punished by federal law enforcement agencies, prosecutors, courts, prisons, and probation, and parole systems.



Pin It! *The American Court System*

Learn more about the American court system in this video: [the American court system](https://www.youtube.com/watch?v=3QeopjC).



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2.1 THE UNITED STATES COURT SYSTEM - A DUAL COURT SYSTEM^{ix}

The Federal System

There are over twenty specialized federal law enforcement agencies, most of which are in the Departments of Justice and Treasury, and now in the Department of Homeland Security. The most prominent federal law enforcement agencies are the Federal Bureau of Investigation, Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms, the Secret Service, and the Customs Service. These agencies are located in Washington, D.C., with field offices around the United States, and in some cases, abroad. Federal prosecutors, called “U.S. attorneys,” are appointed by the president for each of ninety-four judicial districts in the United States. They prosecute only federal crimes in federal courts. As presidential appointees, attorneys have a great deal of independence, but they are accountable to the U.S. attorney general, who heads the Department of Justice and who is a member of the president’s cabinet.

The Department of Justice’s criminal division in Washington, D.C. provides assistance, expertise, and some guidance and supervision to U.S. attorneys. The Department of Justice’s central office also includes special prosecutorial units with nationwide authority in such matters as organized crime, war crimes, antitrust and international drug trafficking; these units usually work in cooperation with U.S. attorneys.

Federal offenders are incarcerated in prisons administered by the Federal Bureau of Prisons, an agency within the Department of Justice. These prisons are located throughout the United States; a defendant convicted in federal court may be incarcerated in any federal prison. However, less than 10 percent of all U.S. prisoners are held in federal prisons.

State and Local Level Courts

Most criminal justice activity is conducted under the auspices of state and local governments. Law enforcement at the state level is mostly decentralized to the counties, cities, and towns. The state police exercise authority over the major state highways and over unincorporated rural areas. They often have other limited functions, including the maintenance of criminal records. State attorneys general, unlike the U.S. attorney general, usually have little or no prosecutorial authority, although they may be responsible for arguing criminal appeals and defending post-conviction petitions. The prosecution is a county-level function. Most prosecutors, called district attorneys (DAs), are elected. Each county has a jail that holds defendants awaiting trial as well as defendants convicted of minor crimes called “misdemeanors” (crimes punishable by a maximum jail term of one year). Probation departments are usually organized at the county level as well. There are more than 20,000 independent police departments that belong to local governments. Most of these departments serve small towns and have fewer than 20 officers. In contrast, big-city police departments are

huge. For example, the New York City Police Department, the nation's largest, has approximately 38,000 officers. Defendants in state court who are convicted of felonies and sentenced to imprisonment are incarcerated in state-operated prison systems, usually called the "department of corrections."

2.2 SUBSTANTIVE CRIMINAL LAW

State Substantive Criminal Law

While rooted in English common law, American substantive criminal law is statutory. There are no common-law crimes in the United States. In other words, the law of crimes is decided by the state legislatures (for each state) and by Congress (for the federal government). Most states, but not the federal government, have a comprehensive "code" of substantive criminal law made up of general principles of criminal responsibility, laws defining the particular criminal offenses, and laws defining excuses and justifications.

Two-thirds of the states have adopted in whole or in part the Model Penal Code (MPC), which was drafted in the 1950s and 1960s by the American Law Institute, a prominent law reform organization. The MPC is the most influential work in American substantive criminal law. One of the most deeply rooted principles in American criminal law is that there can be no criminal responsibility without culpability or blameworthiness. Under the MPC, culpability, sometimes referred to as *mens rea* or "state of mind," is satisfied by a showing of purpose, knowledge, recklessness, or negligence, all of which are carefully defined by the code. Except in the case of minor offenses and some regulatory crimes, the MPC requires that there be specified culpability for every element of an offense (conduct, attendant circumstances, result). Criminal codes set out the prohibitions that constitute the law of crimes—offenses against a person (e.g., murder and rape); offenses against property (e.g., theft and arson); offenses against public order (e.g., disorderly conduct and rioting); offenses against the family (e.g., bigamy and incest); and offenses against public administration (e.g. bribery and perjury).

Federal Substantive Criminal Law

Which crimes are considered federal, and which are considered state? There is no clear answer to this question. Indeed, criminal conduct cannot be sorted into these two baskets. When a single act or course of conduct violates both federal and state criminal laws, it is even possible for both governments to prosecute because, under the "dual sovereignty" doctrine, the double jeopardy prohibition does not apply to separate prosecutions by separate sovereigns.

In theory, congressional power is limited to the powers expressly enumerated in Section 1 of the Constitution. Offenses like counterfeiting U.S. currency, illegally entering the United States, treason, and violation of constitutional and federal statutory rights are obviously within the federal government's core jurisdiction. But, utilizing its expansive powers under the commerce

clause and other elastic provisions, Congress has passed federal criminal laws dealing with drug trafficking, firearms, kidnapping, auto theft, fraud, and scores of other ordinary crimes.

The reach of federal criminal law grew inexorably throughout the 20th century. The Supreme Court has rarely found that Congress lacked authority to pass a federal criminal law. Today, federal criminal law can be used to prosecute many offenses that traditionally were regarded as a state responsibility. In practice, however, the great constraint on the reach of federal criminal law is resources. The FBI and other federal law enforcement agencies, as well as federal prosecutors, can investigate and prosecute only a small fraction of all the crimes that potentially fall within their purview.



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2.3 OVERVIEW OF THE CRIMINAL PROCEDURE

Every state and the federal government also has its own criminal procedural rules. The Federal Rules of Criminal Procedure are written by judicial advisory committees and promulgated by the Supreme Court, subject to amendment by Congress. State criminal procedural rules are usually defined by the state legislatures. Of the 23 separate rights noted in the first eight amendments to the Constitution, 12 concern criminal procedure. Before World War II, these rights were held only to protect the individual against the federal government. Since World War II, practically all of these rights have been incorporated through the Fourteenth Amendment's due process clause and applied to state law enforcement as well. The federal Constitution sets a floor, not a ceiling, on the rights of the citizenry against police, prosecutors, courts, and prison officials. The states may grant more rights to criminal defendants. For example, states such as New York are substantially more protective of the rights of criminal suspects and criminal defendants than is the U.S. Supreme Court.

In American legal parlance, criminal procedure refers to the constitutional, statutory, and administrative limitations on police investigations—searches of persons, places, and things; seizures and interrogations—as well as to the formal steps of the criminal process. Both the Fourth and Fifth Amendments protect the citizenry, not just criminals and criminal suspects, from over-reaching police activity.

Due Process

The Fifth Amendment's due process clause, among other rights, guarantees a presumption of innocence. The government must prove guilt beyond a reasonable doubt. Fifth Amendment “due process,” confers on defendants a broad array of protections and rights. The amendment also protects defendants against double jeopardy (being tried more than once for the same crime by the same authority), and against being required to testify against themselves in criminal cases.

Right to Counsel

The Sixth Amendment guarantees defendants a “speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.” It also entitles defendants to be confronted by (and to cross-examine) the witnesses against them and to have the “assistance of counsel” for their defense. The right to counsel begins when the suspect becomes the accused, that is at the initiation of judicial proceedings. If the accused is indigent, the judge assigns him/her a defense counsel at the first court appearance. A U.S. Supreme Court decision—*Gideon v. Wainwright* (1963) —held that the government must appoint defense lawyers for indigents accused of felonies. Later cases extended that ruling to cover all cases where the defendant could be sent to jail or prison.



The Verdict: *Gideon v. Wainwright*

Watch this video to learn more about the importance of the Supreme Court decision in this landmark case: [Gideon v. Wainwright](#).



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Bail and Pre-Trial Detention

If the accused pleads not guilty, the judge must decide on pre-trial release and, if so, whether bail or other conditions ought to be imposed. Historically, the courts have held that a defendant ought to be released unless he presents a risk of flight. Typically, despite the supposed link between bail and assuring appearance at trial, judges set a high bail for individuals arrested for serious offenses because they are concerned about public safety, i.e., the defendant committing more crimes if released. Federal law permits pre-trial detention without bail in certain situations where the court finds that the defendant poses a serious threat of future danger to the community and that no combination of release conditions can reasonably assure community safety.

Formal Accusation and the Grand Jury - Indictment

American prosecutors have extensive discretion over whether to charge, what to charge and how many charges to bring against an arrestee. However, most prosecutors dismiss charges against a substantial percentage of arrestees at an early point in the process because:

- the arrestee's conduct did not constitute a crime;
- while there was a crime, it was too insignificant to prosecute;
- while there was a crime, it is not provable against this person at this point; and
- while there was a crime, the prosecutor believes that pre-trial diversion to a treatment or other program is the most appropriate disposition.

Until the trial begins, the prosecutor may voluntarily dismiss the charges against the accused without prejudice, and thus can bring the same charges at a later date. The Sixth Amendment provides that there shall be no criminal prosecution except upon indictment by a grand jury. A grand jury is an investigative body that determines whether there is sufficient evidence to indict. However, the Supreme Court has held that this is one of the few rights included in the Bill of Rights that is not binding on the states. Thus, each state can decide for itself whether to use a grand jury to initiate the formal criminal proceeding.

The accused must be arraigned and formally charged within a short period of time. At the arraignment, the judge reads the formal charges and with respect to each charge, asks the defendant to plead guilty, not guilty, or not guilty by reason of insanity. Most states also permit a plea of *nolo contendere* (no contest) which, for practical purposes, is equivalent to a guilty plea. A plea of not guilty can subsequently be changed to a plea of guilty. Only in limited circumstances can a guilty plea be withdrawn.

Preliminary Hearing – Information^x

While the grand jury is a way to formally charge and determine if enough evidence exist to proceed to trial, the more common method is called a preliminary hearing. Also known as a

preliminary examination, preliminary inquiry, evidentiary hearing, or probable cause hearing is a formal hearing after the district attorney has filed a complaint outlining the charges against the defendant. In a preliminary hearing, like the grand jury hearing, the district attorney must present enough evidence to a judge and demonstrate probable cause the crime was committed by the defendant.

At a preliminary hearing, two key questions must be shown by the district attorney.

1. There is probable cause the crime occurred, and it is within the court's jurisdiction.
2. There is probable cause to believe the defendant charged with the crime committed the crime.

If the judge determines the district attorney has proven probable cause to both questions, the defendant is "held to answer" the charges proven in the preliminary hearing. It is important to understand, that all the charges outlined in the complaint must be found true. If the district attorney fails to prove probable cause, the case will cease. Additionally, if the district attorney only proves certain charges, those charges that were not proven cannot proceed to trial. At the end of the preliminary creates a new charging document called the *information* which identifies the charges that were proven and will proceed to trial.

Grand Jury Indictment v. Preliminary Hearing

The district attorney decides whether they will take the case to the Grand Jury or Preliminary hearing. So how or why does the district attorney chose one process or another? There are key differences to each process. The district attorney often uses the process appropriate to the specific issues of the case. The Grand Jury process is held outside of the public view. The defendant and his counsel are not present for the presentation of the evidence. However, the district attorney must prove their case to a panel of grand jurors. This is not an adversarial process, and the district is the only one presenting evidence. However, the district attorney is required to present exculpatory evidence (evidence that suggests the defendant may not be guilty). In contrast, the preliminary hearing is a public hearing and both the defendant, and his attorney are present for the evidentiary hearing. It is an adversarial process, and the defense counsel may cross-examine the district attorney's witnesses. It also gives the defense counsel an opportunity to preview the state's case against the defendant. The district attorney only must prove probable cause to the judge as opposed to a jury panel.

The district attorney with examine all these procedural requirements to determine how to best manage their case. For example, in high profile cases, the district attorney may not want all the crime details available to the public before the actual trial, or they may want to protect the accused from damaging information if no charges are filed, or it may be used to protect the witnesses and allow them to feel more comfortable to testify more freely and truthfully. Of course, the secrecy of the grand jury process has some significant issues. Some critics indicate

the grand jury process is a “rubber stamp” for the prosecution and they do not evaluate the evidence as critically as a judge would making it easier for an indictment.

Pre-Trial Motions

The rules of criminal procedure provide that the defendant and his or her attorney have a certain number of days to make pre-trial motions challenging the legal sufficiency of the indictment or information or seeking the suppression of evidence. In addition, the defendant may move for the limited discovery of certain evidence held by the prosecutor. Under most states’ rules, the defense, if it makes the request, has a right to a copy of any statements made by the accused, copies of scientific tests, and a list of the prosecution’s witnesses. In some jurisdictions, the defendant must notify the prosecution in advance of its intent to rely on certain defenses such as an alibi or insanity.

Plea Bargaining

The American practice of “plea bargaining” is often misunderstood. The practice might more accurately be referred to as a system of guilty plea “discounts.” More than 90 percent of convictions are the result of guilty pleas. For most defendants who plead guilty, there has been no “bargaining.” Rather, the defendant has accepted the prosecutor’s offer to drop some charges in exchange for the defendant’s plea of guilty to one or more remaining charges. At the federal level, there is a tradition of “charge bargaining,” that is, the prosecutor drops the most serious charge, and the defendant pleads guilty to a lesser one. In some counties and cities, the judge explicitly offers sentencing discounts. For example, the defendant is promised a 3-year minimum, 5-year maximum prison term if he/she pleads guilty before the trial takes place; however, he/she will face a 5–10-year minimum, 15-year maximum prison term if found guilty at trial.

Right to Trial

The defendant has a right to a public trial. Thus, American courtrooms are open to the public, including journalists. Indeed, the Supreme Court has held that the defendant cannot waive the right to a public trial because the citizenry also shares this right; nor can a judge prohibit the press from reporting on criminal trials. However, this does not mean that television cameras must be allowed in the courtroom. Some states, like California, permit live television coverage of criminal trials. Supporters argue that television coverage provides legal education for a public that otherwise would never see a criminal trial. Critics contend that TV cameras in the courtroom distort the conduct of the lawyers, judge, and jurors, and alter the courtroom atmosphere. There are no cameras in federal courtrooms.

Under the Sixth Amendment, the criminal defendant has a constitutional right to a speedy trial. Statutes of limitation, not the speedy trial right, govern the delay between the commission of a crime and the filing of charges. The Constitution dictates that there must not be an undue delay between indictment and trial. The Supreme Court, however, has never specified a definite

period of time, which, if exceeded, violates this right. Every case has to be assessed individually. Every state has a speedy trial law that establishes time constraints within which the prosecution and the courts must bring the defendant to trial.

The Sixth Amendment also guarantees a criminal defendant the right to a jury trial. However, like most rights, the jury trial right may be waived. The defendant may elect a bench trial before a single judge or plead guilty. Usually, defendants have a better chance of acquittal by a jury. One-fourth to one-third of jury trials end in acquittals. But some defendants prefer a judge to a jury: because they believe a judge would be more likely to see the gaps in the prosecution's case; the judge would sentence more leniently after a "bench" trial; or that the nature of the crime would inflame the jury against the defendant.

Although not constitutionally required, in the federal system and practically every state, the jury must reach a unanimous verdict. A jury that cannot agree is called a "hung jury." In the event of a hung jury, a mistrial is declared, and the prosecution must decide whether to try the defendant again. There is no limit on how many times a defendant can be retried, but very few defendants are tried more than three times.

The Trial

Only 10 percent or less of American criminal cases are resolved by trials. The criminal trial is based upon the adversary system. The defense lawyer vigorously represents his/her client, whether or not he believes him guilty. The prosecutor represents the state and the people but also bears an ethical responsibility to act as a minister of justice.



Pin It! Justice and Law: Adversarial vs. Inquisitional Systems

Learn more about the differences between adversarial and inquisitional systems in this video: [adversarial vs. inquisitional systems](#).



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According to the Supreme Court, the Constitution requires that, in order to find the defendant guilty, the factfinder, whether jury or judge, must determine that the prosecution has proven

every element of the offense beyond a reasonable doubt. This is the meaning of the oft-quoted maxim that the “defendant is presumed innocent.”

Both sides have the right to call their own witnesses and to subpoena witnesses who will not appear voluntarily. The lawyers subject their own witnesses to direct examination and their adversary’s witnesses to cross-examination. The judge, but not the jurors, may ask the witnesses questions, but in practice, the lawyers ask practically all the questions and the judge acts as an impartial umpire. A witness may refuse on Fifth Amendment grounds to testify if he/she has a well-founded belief that the testimony could incriminate him/her. The prosecution may grant the witness immunity and then may compel the witness to answer every question. (The defense has no such power.) Immunity extends to any crime the witness admits to, as well as to any crime that investigators uncover as a result of the witness's immunized testimony.

Sentencing

The legislatures, courts, probation departments, parole boards, and, in some jurisdictions, sentencing commissions all play a role in the sentencing process. In the first instance, criminal sentences, or at least the maximum permissible sentence for each offense, are prescribed by legislatures. State sentencing statutes vary considerably and sometimes the same state has different types of sentencing statutes for different crimes. The sentence is imposed by the judge after a sentencing hearing at which the prosecutor and defense attorney argue for the sentence each thinks is appropriate. The defendant is usually given an opportunity to address the court prior to the sentence. In some jurisdictions, the victim or the victim’s representatives may address the court as well. The defense lawyer is likely to emphasize the defendant’s remorse, family responsibilities, good job prospects, and amenability to out-patient treatment (if necessary) in the community; the prosecution is likely to emphasize the defendant’s prior criminal record, injuries to the victim, and the victim’s family, and the need to deter other would-be offenders.

The judge is advised by the probation department, which independently investigates the defendant’s background, prior criminal record, circumstances of the offense, and other factors. The judge does not have to make formal factual findings and need not write an opinion explaining or justifying the sentence. As long as the sentence is within the statutory range, it cannot be appealed.

The Eighth Amendment rules out “excessive bail” for defendants and prohibits “cruel and unusual punishments.” This last prohibition has been interpreted by the courts to limit the kinds of punishments that can be inflicted. In 1972, the death penalty statutes of 38 states were effectively voided based on this constitutional provision. Some 40 states then passed new death penalty statutes in uniformity with the Supreme Court’s decisions. Neither Congress nor the states can pass laws that violate the Constitution.

Sanctions

Probation is the most common sentence meted out by American criminal court judges. In effect, the defendant avoids prison as long as he/she keeps out of trouble and adheres to the probation department's rules, regulations, and reporting requirements. The judge determines how long the probationary term will last; several years is not uncommon. The judge may also impose special conditions, like participating in a drug treatment program, maintaining employment or staying in school, if the offender is a juvenile.

Imprisonment is a very widely used sentence; in 2004, on any given day there were more than 2 million persons in U.S. prisons and jails. Each state and the federal government has its own prison system. The prison department classifies (according to danger risk, escape risk, age, etc.) offenders and assigns them to an appropriate maximum-, medium-, or minimum-security penal institution.

Forfeiture of property has increased dramatically as a criminal sentence in recent years, especially in drug and organized crime cases. Typically, forfeiture laws provide that, as part of the criminal sentence, the judge may order the defendant to forfeit any property used in the crime (including car, boat, plane, and even house) and/or the proceeds of his/her criminal activity (business, bank accounts, securities, etc.).

Fines are less frequently imposed by U.S. courts. When they are imposed, it is usually in addition to other sanctions. Historically, the size of fines has been low, indeed, much lower than the fee a private criminal lawyer charges. Recently, however, maximum fines have increased dramatically. When fines are imposed, the Supreme Court has held that a defendant cannot be imprisoned for failure to pay the fine, unless the failure is willful.

Appeal and Post-Conviction Remedies

The Constitution does not guarantee a convicted offender a right of appeal, but every jurisdiction allows at least one appeal as a right, and many states have two levels of appellate courts and two levels of appeals. For some second-level appeals, the court has the discretion to hear only those cases that it chooses. Because of the guarantee against double jeopardy, the prosecution may not appeal a not-guilty verdict. Thus, an acquittal stands, even if it was based upon an egregious mistake by the judge in interpreting the law or upon an incomprehensible factual finding by the judge or jury.

After an offender's state court appeals have been exhausted, he/she may file a habeas corpus petition in federal district court alleging that he/she is being held in state custody in violation of his/her federally guaranteed statutory or constitutional rights. (Federal prisoners may also petition the federal courts for post-conviction relief in the event, for example, that new evidence which could not have been discovered before trial, demonstrates innocence.) The right of habeas corpus is guaranteed by the Constitution and implemented by a federal statute. In some limited circumstances, an offender who was unsuccessful in the first habeas corpus

proceeding may bring additional habeas corpus petitions alleging other constitutional violations.



Pin It! Habeas Corpus
Learn more about Habeas Corpus in this video: [habeas corpus](https://www.youtube.com/watch?v=habeas_corpus).



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Parole, Remission and Commutation

Traditionally, parole boards have played a major role in releasing offenders from prisons. Each state has its own parole board whose members are appointed by the governor. The parole board is usually one component of a large parole agency that supplies post-prison supervision to offenders after they are released from prison. The point at which a prisoner is eligible for parole is a matter of state law, so there is considerable variation among the states.

In a sentencing system in which the judge only specifies a maximum sentence, the prisoner might, for example, become eligible for parole after serving one-third of the sentence. Members of the parole board typically hold brief interviews with the prospective parolees at the prison. The board is generally interested in the prisoner's adjustment within the prison, but it will invariably consider the facts of the crime and the prisoner's previous criminal record.

Finally, the governor of each state has the power to pardon or commute the sentences of offenders in that state. The president of the United States has similar authority for federal offenders. Frequently, the law provides for the appointment of a pardon board, which sifts through petitions, conducts investigations, and makes affirmative recommendations to the chief executive. Governors, especially in the most prolific death sentencing states, are frequently called upon to commute death sentences. Unlike in many countries, general amnesties are not a part of American law or tradition.



CHAPTER 3: SOURCES AND LIMITATIONS OF CRIMINAL LAW

OVERVIEW

In Chapter Three, the sources of law and rights of the offender are explored. When understanding the sources of law, make sure to understand both substantive criminal law and procedural criminal law. These concepts were provided in Chapter Two, but we build on the understanding in Chapter Three. Substantive criminal defines the crimes and punishments while procedural establishes the procedures for arrest, collection of evidence, interrogations, and the criminal court processes. Understanding the sources of law is vital to understanding the process. The criminal court process relies on various sources of law to guide its procedures. Another key principle to understanding the criminal court process is to understand the rights of the accused. The court must ensure the rights of the accused are abided by so the process is fair and just. The chapter finishes up by providing the function and limitations of the law. In this section, the chapter identifies what constitutes a civil, criminal, or moral wrong and classifies laws.

OBJECTIVES

- Explain the sources of law for the criminal court processes.
- Identify the rights provided to defendants through the Constitution.
- Explain how and why society needs laws.
- Identify the different types of wrongs (civil, criminal & moral).
- Explain how crimes are classified based on the seriousness of the offense.

KEY TERMS

criminal law, common law, statutory law, administrative law, case law, procedural criminal law, substantive criminal law, 5th Amendment, 6th Amendment, 8th Amendment, civil wrong, criminal wrong, moral wrong, classification of crimes, mala in se crimes, mala prohibita crimes.

CRITICAL THINKING

1. Evaluating and understanding the function of case law is vital to the learning the criminal court process. Using the website Oyez or Justia US Law, research an influential criminal court case law. Select a case from the list below and provide the following information: facts of the case (case name, parties, what happened, and judgement),

issues (what is in dispute), holding (the applied rule of law), and rationale (reason for the holding). Choose from the following cases:

- a. Knowles v. Iowa (1998)
 - b. Indianapolis v. James (2001)
 - c. Kyllo v. United States (2001)
 - d. Ferguson v. City of Charleston (2001)
 - e. Groh v. Ramirez (2004)
 - f. Hudson v. Michigan (2006)
2. After examining case law, explain how case law provides clarification, expectations, or interpretation of the Constitution. Why is the Supreme Court so important to the criminal court process? Select one of the Constitutional Amendments discussed in the chapter, and using the internet, conduct a search of case law that addresses the amendment. For example: 5th Amendment Search – Case law and the 5th Amendment
 3. “Society uses laws (rules designed to control citizens’ behaviors) so that these behaviors will conform to societal norms, cultures, mores, traditions, and expectations.” As our society continues to become more heterogeneous and more norms/cultures are present, how does the criminal process keep pace with the changes in society? How do we protect the historical intentions of the Constitution considering the changing nature of society? What are the restrictions and potential conflicts that occur?

3.1 THE SOURCES OF LAW^{xi}

The primary function of substantive criminal law is to define crimes, including the associated punishment. The procedural criminal law sets the procedures for arrests, searches and seizures, and interrogations. In addition, it establishes the rules for conducting trials. Where does criminal law come from? In this module, we examine the foundations of law and focus on the rights of the accused.



Pin It! Sources of Law in the United States

Learn more about the sources of law in the US: [sources of law](#).



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Common Law^{xii}

The term *common law* can be disturbingly vague for the student. That is because different sources use it in several different ways with subtle differences in meaning. The best way to get a grasp on the term's meaning is to understand a little of the history of the American legal system. Common law, which some sources refer to as *judge-made law*, first appeared when judges decided cases based on the legal customs of medieval England at the time. It may be hard for us to imagine today, but in the early days of English common law, the law was a matter of *oral* tradition. That is, the definitions of crimes and associated punishments were not written down in a way that gave them binding authority.

By the end of the medieval period, some of these cases were recorded in written form. Over a period, imported judicial decisions became recorded on a regular basis and collected into books called reporters. The English-speaking world is forever indebted to Sir William Blackstone, an English legal scholar, for collecting much of the common law tradition of England and committing it to paper in an organized way. His four-volume set, *Commentaries on the Laws of England*, was taken to the colonies by the founding fathers. The founding fathers incorporated the common law of England into the laws of the Colonies, and ultimately into the laws of the United States.

In modern America, most crimes are defined by statute. These statutory definitions use ideas and terms that come from the common law tradition. When judges take on the task of interpreting a statute, they still use common law principles for guidance. The definitions of many crimes, such as murder and arson, have not deviated much from their common law origin. Other crimes, such as rape, have seen sweeping changes.

One of the primary characteristics of the common law tradition is the importance of precedent. Known by the legal Latin phrase *stare decisis*, the doctrine of precedence means that once a court makes a decision on a particular matter, they are bound to rule the same way in future cases that have the same legal issue. This is important because a consistent ruling in identical factual situations means that everyone gets the same treatment by the courts. In other words, the doctrine of *stare decisis* ensures equal treatment under the law.

Constitution*

(*We will go into greater depth on the Constitutional Rights of the accused in Section 3.2)

When the founding fathers signed the Constitution, they all agreed that it would be the supreme law of the land; the Framers stated this profoundly important agreement in Article VI. After the landmark case of *Marbury v. Madison* (1803), the Supreme Court has had the power to strike down any law or any government action that violates constitutional principles. This precedent means that any law made by the Congress of the United States or the legislative

assembly of any state that does not meet constitutional standards is subject to nullification by the Supreme Court of the United States.

Every state adopted this idea of constitutional supremacy when creating its constitutions. All state laws are subject to review by the high courts of those states. If state law or government practice (e.g., police, courts, or corrections) violates the constitutional law of that state, then it will be struck down by that state's high court. Local laws are subject to similar scrutiny.

Statutory Law

Statutes are written laws passed by legislative assemblies. Modern criminal laws tend to be a matter of statutory law. In other words, most states and the federal government have moved away from the common-law definitions of crimes and established their own versions through the legislative process. Thus, most of the criminal law today is made by state legislatures, with the federal criminal law being made by Congress. Legislative assemblies tend to consider legislation as it is presented, not in subject order. This chronological ordering makes finding the law concerning a particular matter very difficult. To simplify finding the law, almost all statutes are organized by subject in a set of books called a code. The body of statutes that comprises the criminal law is often referred to as the criminal code, or less commonly as the penal code.

Administrative Law

The clear distinction between the executive, legislative, and judicial branches of government becomes blurry when U.S. government agencies and commissions are considered. These types of bureaucratic organizations can be referred to as semi-legislative and semi-judicial in character. These organizations have the power to make rules that have the force of law, the power to investigate violations of those laws, and the power to impose sanctions on those deemed to be in violation. Examples of such agencies are the Federal Trade Commission (FTC), the Internal Revenue Service (IRS), and the Environmental Protection Agency (EPA). When these agencies make rules that have the force of law, the rules are collectively referred to as administrative law.

Court Cases

When the appellate courts decide a legal issue, the doctrine of precedence means that future cases must follow that decision. This means that the holding in an appellate court case has the force of law. Such laws are often referred to as case law. The entire criminal justice community depends on the appellate courts, especially the Supreme Court, to evaluate and clarify both statutory laws and government practices against the requirements of the Constitution. These legal rules are all set down in court cases.



Pin It! *How to Research Case Law*

Learn more about what case law is and the processes of researching case law in this video: [how to research case law](#).



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3.2 THE RIGHTS OF THE SUSPECT^{xiii}

In addition to protecting the personal freedoms of individuals, the Bill of Rights protects those suspected or accused of crimes from various forms of unfair or unjust treatment. The prominence of these protections in the Bill of Rights may seem surprising. Given the colonists' experience of what they believed to be unjust rule by British authorities, however, and the use of the legal system to punish rebels and their sympathizers for political offenses, the impetus to ensure fair, just, and impartial treatment to everyone accused of a crime—no matter how unpopular—is perhaps more understandable. What is more, the revolutionaries, and the eventual framers of the Constitution, wanted to keep the best features of English law as well.

In addition to the protections outlined in the Fourth Amendment, (we will go into more depth in the 4th amendment in the next module), which largely pertain to investigations conducted before someone has been charged with a crime, the next four amendments pertain to those suspected, accused, or convicted of crimes, as well as people engaged in other legal disputes. At every stage of the legal process, the Bill of Rights incorporates protections for these people.



Pin It! *The Bill of Rights*

Learn more about the Bill of Rights in this video: [the Bill of Rights](#).



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The Fifth Amendment

Many of the provisions dealing with the rights of the accused are included in the Fifth Amendment; accordingly, it is one of the longest in the Bill of Rights.



Definitive! The Fifth Amendment

The Fifth Amendment states in full:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The first clause requires that serious crimes be prosecuted only after an indictment has been issued by a grand jury. However, several exceptions are permitted as a result of the evolving interpretation and understanding of this amendment by the courts, given the Constitution is a living document. First, the courts have generally found this requirement to apply only to felonies; less serious crimes can be tried without a grand jury proceeding. Second, this provision of the Bill of Rights does *not* apply to the states because it has not been incorporated; many states instead require a judge to hold a preliminary hearing to decide whether there is enough evidence to hold a full trial. Finally, members of the armed forces who are accused of crimes are not entitled to a grand jury proceeding.

The Fifth Amendment also protects individuals against double jeopardy, a process that subjects a suspect to prosecution twice for the same criminal act. No one who has been acquitted (found not guilty) of a crime can be prosecuted again for that crime. But the prohibition against double jeopardy has its own exceptions. The most notable is that it prohibits a second prosecution only at the same level of government (federal or state) as the first; the federal government can try you for violating federal law, even if a state or the local court finds you not guilty of the same action. For example, in the early 1990s, several Los Angeles police officers accused of brutally beating motorist Rodney King during his arrest were acquitted of various charges in a state court, but some were later convicted in a federal court of violating King's civil rights.

The double jeopardy rule does not prevent someone from recovering damages in a civil case—a legal dispute between individuals over a contract or compensation for an injury—that results from a criminal act, even if the person accused of that act is found not guilty. One famous case from the 1990s involved former football star and television personality, O. J. Simpson. Simpson, although acquitted of the murders of his ex-wife Nicole Brown and her friend Ron Goldman in a criminal court, was later found to be responsible for their deaths in a subsequent civil case and as a result, was forced to forfeit most of his wealth to pay damages to their families.

Perhaps the most famous provision of the Fifth Amendment is its protection against self-incrimination, or the right to remain silent. This provision is so well known that we have a phrase for it: “taking the Fifth.” People have the right not to give evidence in court or to law enforcement officers that might constitute an admission of guilt or responsibility for a crime. Moreover, in a criminal trial, if someone does not testify in his or her own defense, the prosecution cannot use that failure to testify as evidence of guilt or imply that an innocent person would testify. This provision became embedded in the public consciousness following the Supreme Court's 1966 ruling in *Miranda v. Arizona*, whereby suspects were required to be informed of their most important rights, including the right against self-incrimination, before being interrogated in police custody. However, contrary to some media depictions of the Miranda warning, law enforcement officials do not necessarily have to inform suspects of their rights before they are questioned in situations where they are free to leave.

Like the Fourteenth Amendment's due process clause, the Fifth Amendment prohibits the federal government from depriving people of their “life, liberty, or property, without due process of law.” Recall that due process is a guarantee that people will be treated fairly and impartially by government officials when the government seeks to fine or imprison them or take their personal property away from them. The courts have interpreted this provision to mean that government officials must establish consistent, fair procedures to decide when people's freedoms are limited; in other words, citizens cannot be detained, their freedom limited, or their property is taken arbitrarily or on a whim by police or other government officials. As a result, an entire body of procedural safeguards comes into play for the legal

prosecution of crimes. However, the Patriot Act, passed into law after the 9/11 terrorist attacks, somewhat altered this notion.

The final provision of the Fifth Amendment has little to do with crime at all. The *takings clause* says that “private property [cannot] be taken for public use, without just compensation.” This provision, along with the due process clause’s provisions limiting the taking of property, can be viewed as a protection of individuals’ economic liberty: their right to obtain, use, and trade tangible and intangible property for their own benefit. For example, you have the right to trade your knowledge, skills, and labor for money through work or the use of your property, or trade money or goods for other things of value, such as clothing, housing, education, or food.

The greatest recent controversy over economic liberty has been sparked by cities’ and states’ use of the power of eminent domain to take property for redevelopment. Traditionally, the main use of eminent domain was to obtain property for transportation corridors like railroads, highways, canals and reservoirs, and pipelines, which require fairly straight routes to be efficient. Because any single property owner could effectively block a particular route or extract an unfair price for land if it was the last piece needed to assemble a route, there are reasonable arguments for using eminent domain as a last resort in these circumstances, particularly for projects that convey substantial benefits to the public at large.

However, increasingly eminent domain has been used to allow economic development, with beneficiaries ranging from politically connected big businesses such as car manufacturers building new factories to highly profitable sports teams seeking ever-more-luxurious stadiums. And, while we traditionally think of property owners as relatively well-off people whose rights don’t necessarily need protecting since they can fend for themselves in the political system, frequently these cases pit lower- and middle-class homeowners against multinational corporations or multimillionaires with the ear of city and state officials. In a notorious 2005 case, *Kelo v. City of New London*, the Supreme Court sided with municipal officials taking homes in a middle-class neighborhood to obtain land for a large pharmaceutical company’s corporate campus. The case led to a public backlash against the use of eminent domain and legal changes in many states, making it harder for cities to take property from one private party and give it to another for economic redevelopment purposes. Eminent domain has once again become a salient issue in the context of President Trump’s proposed border wall. To build the wall, the federal government is attempting to use the doctrine to seize a wide swath of property, including religious grounds.

Some disputes over economic liberty have gone beyond the idea of eminent domain. In the past few years, the emergence of on-demand ride-sharing services like Lyft and Uber, direct sales by electric car manufacturer Tesla Motors, and short-term property rentals through companies like Airbnb have led to conflicts between people seeking to offer profitable services online, states and cities trying to regulate these businesses, and the incumbent service providers that compete with these new business models. In the absence of new public policies

to clarify rights, the path forward is often determined through norms established in practice, by governments, or by court cases.

The Sixth Amendment

Once someone has been charged with a crime and indicted, the next stage in a criminal case is typically the trial itself, unless a plea bargain is reached.



Definitive! *The Sixth Amendment*

The Sixth Amendment contains the provisions that govern criminal trials; in full, it states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].”

The first of these guarantees is the right to have a speedy, public trial by an impartial jury. Although there is no absolute limit on the length of time that may pass between an indictment and a trial, the Supreme Court has said that excessively lengthy delays must be justified and balanced against the potential harm to the defendant. In effect, the speedy trial requirement protects people from being detained indefinitely by the government. Yet the courts have ruled that there are exceptions to the public trial requirement; if a public trial would undermine the defendant’s right to a fair trial, it can be held behind closed doors, while prosecutors can request closed proceedings only in certain, narrow circumstances (generally, to protect witnesses from retaliation or to guard classified information). In general, a prosecution must also be made in the “state and district” where the crime was committed; however, people accused of crimes may ask for a change of venue for their trial if they believe pre-trial publicity or other factors make it difficult or impossible for them to receive a fair trial where the crime occurred.

Most people accused of crimes decline their right to a jury trial. This choice is typically the result of a **plea bargain**, an agreement between the defendant and the prosecutor in which the defendant pleads guilty to the charge(s) in question, or perhaps to less serious charges, in exchange for more lenient punishment than he or she might receive if convicted after a full trial. There are a number of reasons why this might happen. The evidence against the accused may be so overwhelming that conviction is a near-certainty, so he or she might decide that avoiding the more serious penalty (perhaps even the death penalty) is better than taking the

small chance of being acquitted after a trial. Someone accused of being part of a larger crime or criminal organization might agree to testify against others in exchange for a lighter punishment. At the same time, prosecutors might want to ensure a win in a case that might not hold up in court by securing convictions for offenses they know they can prove while avoiding a lengthy trial on other charges they might lose.

The requirement that a jury is impartial is a critical requirement of the Sixth Amendment. Both the prosecution and the defense are permitted to reject potential jurors who they believe are unable to fairly decide the case without prejudice. However, the courts have also said that the composition of the jury as a whole may in itself be prejudicial; potential jurors may not be excluded simply because of their race or sex, for example.

The Sixth Amendment guarantees the right of those accused of crimes to present witnesses in their own defense (if necessary, compelling them to testify) and to confront and cross-examine witnesses presented by the prosecution. In general, the only testimony acceptable in a criminal trial must be given in a courtroom and be subject to cross-examination; hearsay, or testimony by one person about what another person has said, is generally inadmissible, although hearsay may be presented as evidence when it is an admission of guilt by the defendant or a “dying declaration” by a person who has passed away. Although both sides in a trial have the opportunity to examine and cross-examine witnesses, the judge may exclude testimony deemed irrelevant or prejudicial.

Finally, the Sixth Amendment guarantees the right of those accused of crimes to have the assistance of an attorney in their defense. Historically, many states did not provide attorneys to those accused of most crimes who could not afford one themselves; even when an attorney was provided, his or her assistance was often inadequate at best. This situation changed as a result of the Supreme Court’s decision in *Gideon v. Wainwright* (1963). Clarence Gideon, a poor drifter, was accused of breaking into and stealing money and other items from a pool hall in Panama City, Florida. Denied a lawyer, Gideon was tried and convicted and sentenced to a five-year prison term. While in prison—still without the assistance of a lawyer—he drafted a handwritten appeal and sent it to the Supreme Court, which agreed to hear his case. The justices unanimously ruled that Gideon, and anyone else accused of a serious crime, was entitled to the assistance of a lawyer, even if they could not afford one, as part of the general due process right to a fair trial.

The Supreme Court later extended the *Gideon v. Wainwright* ruling to apply to any case in which an accused person faced the possibility of “loss of liberty,” even for one day. The courts have also overturned convictions in which people had incompetent or ineffective lawyers through no fault of their own. The *Gideon* ruling has led to an increased need for professional public defenders, lawyers who are paid by the government to represent those who cannot afford an attorney themselves, although some states instead require practicing lawyers to represent poor defendants on a pro bono basis (essentially, donating their time and energy to the case).

The Seventh Amendment

The Seventh Amendment deals with the rights of those engaged in civil disputes; as noted earlier, these are disagreements between individuals or businesses in which people are typically seeking compensation for some harm caused. For example, in an automobile accident, the person responsible is compelled to compensate any others (either directly or through his or her insurance company). Much of the work of the legal system consists of efforts to resolve civil disputes.



Definitive! *The Seventh Amendment*

The Seventh Amendment, in full, reads:

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

Because of this provision, all trials in civil cases must take place before a jury unless both sides waive their right to a jury trial. However, this right is not always incorporated; in many states, civil disputes—particularly those involving small sums of money, which may be heard by a dedicated small claims court—need not be tried in front of a jury and may instead be decided by a judge working alone.

The Seventh Amendment limits the ability of judges to reconsider questions of fact, rather than of law, that were originally decided by a jury. For example, if a jury decides a person was responsible for an action and the case is appealed, the appeals judge cannot decide someone else was responsible. This preserves the traditional common-law distinction that judges are responsible for deciding questions of law while jurors are responsible for determining the facts of a particular case.

The Eighth Amendment



Definitive! *The Eighth Amendment*

The Eighth Amendment says, in full:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Bail is a payment of money that allows a person accused of a crime to be freed pending trial; if you “make bail” in a case and do not show up for your trial, you will forfeit the money you paid. Since many people cannot afford to pay bail directly, they may instead get a *bail bond*, which

allows them to pay a fraction of the money (typically 10 percent) to a person who sells bonds and who pays the full bail amount. (In most states, the bond seller makes money because the defendant does not get back the money for the bond, and most people show up for their trials.) However, people believed likely to flee or who represent a risk to the community while free may be denied bail and held in jail until their trial takes place.

It is rare for bail to be successfully challenged for being excessive. The Supreme Court has defined an excessive fine as one “so grossly excessive as to amount to a deprivation of property without due process of law” or “grossly disproportional to the gravity of a defendant’s offense.” In practice, the courts have rarely struck down fines as excessive either.

The most controversial provision of the Eighth Amendment is the ban on “cruel and unusual punishments.” Various torturous forms of execution common in the past—drawing, and quartering, burning people alive, and the like—are prohibited by this provision. Recent controversies over lethal injections and firing squads to administer the death penalty suggest the topic is still salient. While the Supreme Court has never established a definitive test for what constitutes cruel and unusual punishment, it has generally allowed most penalties short of death for adults, even when to outside observers the punishment might be reasonably seen as disproportionate or excessive.

In recent years the Supreme Court has issued a series of rulings substantially narrowing the application of the death penalty. As a result, defendants who have mental disabilities may not be executed. Also, defendants who were under eighteen when they committed an offense that is otherwise subject to the death penalty may not be executed. The court has generally rejected the application of the death penalty to crimes that did not result in the death of another human being, most notably in the case of rape. And, while permitting the death penalty to be applied to murder in some cases, the Supreme Court has generally struck down laws that require the application of the death penalty in certain circumstances. Still, the United States is among the ten countries with the most executions worldwide.

At the same time, however, it appears that the public mood may have shifted somewhat against the death penalty, perhaps due in part to an overall decline in violent crime. The reexamination of past cases through DNA evidence has revealed dozens in which people were wrongfully executed. For example, Claude Jones was executed for murder based on 1990-era DNA testing of a single hair that was determined at that time to be his; however, with better DNA testing technology, it was later found to be that of the victim. Perhaps as a result of this and other cases, seven additional states have abolished capital punishment since 2007. As of 2015, nineteen states and the District of Columbia no longer apply the death penalty in new cases, and several other states do not carry out executions despite sentencing people to death. It remains to be seen whether this gradual trend toward the elimination of the death penalty by the states will continue, or whether the Supreme Court will eventually decide to follow former Justice Harry Blackmun’s decision to “no longer... tinker with the machinery of death” and abolish it completely.

3.3 FUNCTIONS & LIMITATIONS OF LAW^{xiv}

Law is a formal means of social control. Society uses **laws** (rules designed to control citizens' behaviors) so that these behaviors will conform to societal norms, cultures, mores, traditions, and expectations. Because courts must interpret and enforce these rules, laws differ from many other forms of social control. Both formal and informal social control has the capacity to change behavior. Informal social control, such as social media (including Facebook, Instagram, and Twitter) has a tremendous impact on what people wear, how they think, how they speak, what people value, and perhaps how they vote. Social media's impact on human behavior cannot be overstated, but these informal controls are largely unenforceable through the courts; they are not considered the law.



Pin It! Deviance: Crash Course Sociology

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Laws and legal rules promote social control by resolving basic value conflicts, settling individual disputes, and making rules that even our rulers must follow. Kerper (1979) recognized the advantages of law in fostering social control and identified four major limitations of the law. First, she noted, the law often cannot gain community support without the support of other social institutions.



The Verdict: *Brown v. Board of Education*

The United States Supreme Court case of *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954) declared racially segregated schools unconstitutional. The decision was largely unpopular in the southern states, and many had decided to not follow the Court's holding. Ultimately, the Court had to call in the National Guard to enforce its decision requiring schools to be integrated

Second, even with community support, the law cannot compel certain types of conduct contrary to human nature. Third, the law’s resolution of disputes is dependent upon a complicated and expensive fact-finding process. Finally, the law changes slowly.

Lippman (2015) also noted that the law does not always achieve its purposes of social control, dispute resolution, and social change, but rather can harm society. He refers to this as the “dysfunctions of law.”

“Law does not always protect individuals and result in beneficial social progress. Law can be used to repress individuals and limit their rights. The respect that is accorded to the legal system can mask the dysfunctional role of the law. Dysfunctional means that the law is promoting inequality or serving the interests of a small number of individuals rather than promoting the welfare of society or is impeding the enjoyment of human rights.”

Similarly, Lawrence Friedman has identified several dysfunctions of law: legal actions may be used to harass individuals or to gain revenge rather than redress a legal wrong; the law may reflect biases and prejudices or reflect the interest of powerful economic interests; the law may be used by totalitarian regimes as an instrument of repression; the law can be too rigid because it is based on a clear set of rules that don’t always fit neatly (for example, Friedman notes that the rules of self-defense do not apply in situations in which battered women use force to repel consistent abuse because of the law’s requirement that the threat be immediate); the law may be slow to change because of its reliance on precedent (he also notes that judges are also concerned about maintaining respect for the law and hesitate to introduce change that society is not ready to accept); that the law denies equal access to justice because of inability to pay for legal services; that courts are reluctant to second-guess the decisions of political decision-makers, particularly in times of war and crisis; that reliance on law and courts can discourage democratic political activism because individuals and groups, when they look to courts to decide issues, divert energy from lobbying the legislature and from building political coalitions for elections; and finally, that law may impede social change because it may limit the ability of individuals to use the law to vindicate their rights and liberties.

3.4 CIVIL, CRIMINAL, & MORAL WRONGS.



Critical Thinking... *What’s the Difference*

This section is about people committing crimes—engaging in behavior that violates the criminal law—and how society responds to these criminal behaviors. Crimes are only one type of wrong. People can also violate civil law or commit a moral wrong and not be guilty of any crime whatsoever. So, what do you think are some differences between a civil wrong, a criminal wrong, and a moral wrong?

Civil Wrongs

A civil wrong is a private wrong, and the injured party's remedy is to sue the party who caused the wrong/injury for general damages (money). The plaintiff (the injured party) sues or brings a civil suit (files an action in court) against the defendant (the party that caused the harm). Plaintiffs can be individuals, businesses, classes of individuals (in a class action suit), or government entities. Defendants in civil actions can also be individuals, businesses, multinational corporations, governments, or state agencies.

Civil law covers many types of civil actions or suits including torts (personal injury claims), contracts, property or real estate disputes, family law (including divorces, adoptions, and child custody matters), intellectual property claims (including copyright, trademark, and patent claims), and trusts and estate laws (which covers wills and probate).

The primary purpose of a civil suit is to financially compensate the injured party. The plaintiff brings the suit in his or her own name, for example, Sam Smith versus Joe Jones. The amount of damages is theoretically related to the amount of harm done by the defendant to the plaintiff. Sometimes, when the jury finds there is particularly egregious harm, it will decide to punish the defendant by awarding a monetary award called punitive damages in addition to general damages. Plaintiffs may also bring civil suits called injunctive relief to stop or "enjoin" the defendant from continuing to act in a certain manner. Codes of the civil procedure set forth the rules to follow when suing the party who allegedly caused some type of private harm. These codes govern all the various types of civil actions.

In a civil trial, the plaintiff has the burden of producing evidence that the defendant caused the injury and the harm. To meet this burden, the plaintiff will call witnesses to testify and introduce physical evidence. In a civil case, the plaintiff must convince or persuade the jury that it is more likely than not that the defendant caused the harm. This level of certainty or persuasion is known as the preponderance of the evidence. Another feature in a civil suit is that the defendant can cross-sue the plaintiff, claiming that the plaintiff is actually responsible for the harm.

Criminal Wrongs

Criminal wrongs differ from civil or moral wrongs. Criminal wrongs are behaviors that harm society as a whole rather than one individual or entity specifically. When people violate the criminal law there are generally sanctions that include incarceration and fines. A crime is an act, or a failure to act, that violates society's rules. The government, on behalf of society, is the plaintiff. A criminal wrong can be committed in many ways by individuals, groups, or businesses against individuals, businesses, governments, or with no particular victim.

Criminal laws reflect a society's moral and ethical beliefs. They govern how society, through its government agents, holds criminal wrongdoers accountable for their actions. Sanctions or remedies such as incarceration, fines, restitution, community service, and restorative justice

program are used to express societal condemnation of the criminal's behavior. Government attorneys **prosecute**, or file charges against, criminal defendants on behalf of society, not necessarily to remedy the harm suffered by any particular victim. The title of a criminal prosecution reflects this: *State of California v. Jones*, *The Commonwealth v. Jones*, or *People v. Jones*.

In a criminal jury trial (a trial in which a group of people selected from the community decides whether the defendant is guilty of the crime charged) or a bench trial (a trial in which the judge decides whether the defendant is guilty or not), the prosecutor carries the burden of producing evidence that will convince the jury or judge beyond any reasonable doubt that the criminal defendant committed a violation of law that harmed society. To meet this burden, the prosecutor will call upon witnesses to testify and may also present physical evidence suggesting the defendant committed the crime. Just as a private individual may decide that it is not worth the time or effort to file a legal action, the state may decide not to use its resources to file criminal charges against a wrongdoer. A victim (a named injured party) cannot force the state to prosecute the wrongdoing. Rather, if there is an appropriate civil cause of action—for example, wrongful death—the injured party will need to file a civil suit as a plaintiff and seek monetary damages against the defendant.

Moral Wrongs

Moral wrongs differ from criminal wrongs. “Moral law attempts to perfect personal character, whereas criminal law, in general, is aimed at misbehavior that falls substantially below the norms of the community.”¹ There are no codes or statutes governing violations of moral laws in the United States.

Overlap of Civil, Criminal, and Moral Wrongs

Sometimes criminal law and civil law overlap and an individual's action constitute both a violation of criminal law and civil law. For example, if Joe punches Sam in the face, Sam may sue Joe civilly for civil assault and battery, and the state may also prosecute Joe for punching Sam, a criminal assault and battery. Consider the case involving O.J. Simpson. Simpson was first prosecuted in 1994 for killing his ex-wife and her friend (the criminal charges of murder). After the criminal trial in which the jury acquitted Simpson, the Brown and Goldman families filed a wrongful death action against Simpson for killing Nicole Brown and Ronald Goldman. The civil jury found Simpson responsible and awarded compensatory and punitive damages in the amount of \$33,500,000. Wrongful death is a type of **tort**. Torts involve injuries inflicted upon a person and are the types of civil claims or civil suits that most resemble criminal wrongs.

Sometimes criminal behavior has no civil law counterpart. For example, the crime of possessing burglary tools does not have a civil law equivalent. Conversely, many civil actions do not violate criminal law. For example, civil suits for divorce, wills, or contracts do not have a corresponding

¹ Gardner, T.J. (1985) *Criminal Law: Principles and Cases* (3rd ed., pp.7). West Publishing Company.

criminal wrong. Even though there is certainly an overlap between criminal law and civil law, it is not a perfect overlap. Because there is no legal action that can be filed for committing a moral wrong, there really is not any overlap between criminal wrongs, civil wrongs, and moral wrongs.

3.5 CLASSIFICATION OF LAW

In this section of the module, we turn to the various ways that criminal law has been classified. Classification schemes allow us to discuss aspects or characteristics of the criminal law. Some classifications have legal significance, meaning that how a crime is classified may make a difference in how the case is processed or what type of punishment can be imposed. Some classifications historically mattered (had legal significance), but no longer have much consequence. Finally, some classifications have no legal significance, meaning the classification exists only to help us organize our laws.



Pin It! *What is a Felony?*

What makes a felony a felony? Learn more about what qualifies as a felony in this video: [what is a felony](#).



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Classifications Based on the Seriousness of the Offense

Legislatures typically distinguish crimes based on the severity or seriousness of the harm inflicted on the victim. The criminal's intent also impacts the crime's classification. Crimes are classified as felonies or misdemeanors. Certain, less serious, behavior may be classified as criminal violations or infractions. The term offense is a generic term that is sometimes used to mean any type of violation of the law, or it is sometimes used to mean just misdemeanors or felonies. Although these classification schemes may seem pretty straightforward, sometimes states allow felonies to be treated as misdemeanors and misdemeanors to be treated as either felonies or violations. For example, California has certain crimes, known as wobblers, that can

be charged as either felonies or misdemeanors at the discretion of the prosecutor upon consideration of the offender's criminal history or the specific facts of the case.

The distinction between felonies and misdemeanors developed at common law and has been incorporated in state criminal codes. At one time, all felonies were punishable by death and forfeiture of goods, while misdemeanors were punishable by fines alone. Laws change over time, and as capital punishment became limited to only certain felonies (like murder and rape), new forms of punishment developed. Now, felonies and misdemeanors alike are punished with fines and/or incarceration. Generally, felonies are treated as serious crimes for which at least a year in prison is a possible punishment. In states allowing capital punishment, some types of murder are punishable by death. Any crime subject to capital punishment is considered a felony. Misdemeanors are regarded as less serious offenses and are generally punishable by less than a year of incarceration in the local jail. Infractions and violations, when those classifications exist, include minor behavior for which the offender can be cited, but not arrested, and fined, but not incarcerated.

The difference between being charged with a felony or misdemeanor may have legal implications beyond the length of the offender's sentence and in what type of facility an offender will be punished. For example, in some jurisdictions, the authority of a police officer to arrest may be linked to whether the crime is considered a felony or a misdemeanor. In many states the classification impacts which court will have the authority to hear the case. In some states, the felony-misdemeanor classification determines the size of the jury.

Classifications Based on the Type of Harm Inflicted

Almost all state codes classify crimes according to the type of harm inflicted. The Model Penal Code uses the following classifications:

- Offenses against persons (homicide, assault, kidnapping, and rape, for example)
- Offenses against property (arson, burglary, and theft, for example)
- Offenses against the family (bigamy and adultery, for example)
- Offenses against public administration (e.g., bribery, perjury, escape)
- Offenses against public order and decency (e.g., fighting, breach of peace, disorderly conduct, public intoxication, riots, loitering, prostitution)

Classifications based on the type of harm inflicted may be helpful for the purpose of an organization, but some crimes such as robbery may involve both harms to a person and property. Although generally, whether a crime is a person or property crime may not have any legal implications when a person is convicted, it may matter if and when the person commits a new crime. Most sentencing guidelines treat individuals with prior person-crime convictions more harshly than those individuals with prior property-crime convictions. That said, it is likely that the defense will argue that it is the facts of the prior case that matter not how the crime was officially classified.

Mala in se vs. Mala Prohibita Crimes

Crimes have also been classified as either *mala in se* (inherently evil) or *mala prohibita* (wrong simply because some law forbids them). *Mala in se* crimes, like murder or theft, are generally recognized by every culture as evil and morally wrong. Most offenses that involve injury to persons or property are *mala in se*. All of the common law felonies (murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary) were considered *mala in se* crimes. *Mala prohibita* crimes, like traffic violations or drug possession, are acts that are crimes not because they are evil, but rather because some law prohibits them. Most of the newer crimes that are prohibited as part of a regulatory scheme are *mala prohibita* crimes.

Substantive and Procedural Law

Another classification scheme views the law as either substantive law or procedural law. Both criminal law and civil law can be either substantive or procedural. Substantive criminal law is generally created by statute or through the initiative process and defines what conduct is criminal. For example, substantive criminal law tells us that Sam commits theft when he takes Joe's backpack if he did so without Joe's permission if he intended to keep it. Substantive criminal law also specifies the punishment Sam could receive for stealing the backpack (for example, a fine of up to \$500.00 and incarceration of up to 30 days). The substantive law may also provide Sam a defense and a way to avoid conviction. For example, Sam may claim he reasonably mistook Joe's backpack as his own and therefore can assert a mistake of fact defense. Procedural law gives us the mechanisms to enforce substantive law. Procedural law governs the process for determining the rights of the parties. It sets forth the rules governing searches and seizures, investigations, interrogations, pretrial procedures, and trial procedures. It may establish rules limiting certain types of evidence, establishing timelines, as well as require the sharing of certain types of evidence and giving a certain type of notice. The primary source of procedural law is judicial interpretations of the federal constitution and state constitutions, but state and federal statutes, particularly those adopting rules of evidence, also provide much of our procedural law.



CHAPTER 4: CRIMINAL INVESTIGATION^{xv}

OVERVIEW

A vital aspect of the criminal court process is ensuring the criminal investigation is conducted correctly, fairly, and according to procedural rules. The previous chapters laid the foundation for an understanding of the criminal processes (due process, fundamental fairness, equal justice), the protection of rights, and sources of law. This chapter starts to apply these concepts to the collection of evidence to ensure they can be used in a criminal trial. As you will begin to see, evidence that shows guilt of a defendant could be excluded if these processes are not followed. It is essential we learn the necessary processes and procedures to ensure evidence is admissible in court.

OBJECTIVES

- Identify the different types of evidence that may be collected in a criminal investigation.
- Explain the probative value of evidence.
- Differentiate the types of evidence - direct evidence and circumstantial evidence.
- Differentiate the types of evidence - inculpatory evidence, exculpatory evidence, and corroborative evidence.
- Differentiate criminal profiling and racial profiling.
- Explain what a Terry Stop is and why police use this investigatory tool.
- Explain the controversy in the use of Terry Stops.

KEY TERMS

probative value, relevant evidence, direct evidence, circumstantial evidence, inculpatory evidence, exculpatory evidence, corroborative evidence, disclosure of evidence, witness evidence, hearsay evidence, search and seizure of evidence, exclusion of evidence, criminal profiling, racial profiling, Terry Stops.

CRITICAL THINKING

1. In the following video, we [examine eyewitness testimony](https://www.youtube.com/watch?v=3BvY23X) (if you are accessing a print version of this book, use the following short url: bit.ly/3BvY23X). Watch the video and then determine the probative value of testimony. Provide an example of when eyewitness testimony could have a high level of probative value and an example of low probative value. Be sure to explain define probative value.

2. You are a juror on a trial. You are provided these jury instructions on evidence presented. “Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact. You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence. In the trial, the following evidence is provided:
 - a. Security camera footage showing a person breaking into a store and stealing items.
 - b. Harassing emails or text messages a defendant sent to a person who was later assaulted.
 - c. An audio recording of a person admitting to committing a crime.
 - d. A person’s browser history showing how he or she searched for information about the tools used to commit the crime of which he or she is accused.
 - e. Ballistics tests that show a bullet was fired by a specific firearm.

Identify whether the evidence above is direct or circumstantial. What probative value (weight) do you give each evidence type and why?

3. With the plethora of television crimes shows, many criminal techniques and evidence types are often inadequately portrayed or misrepresented. For this critical thinking exercise, you will examine the issue of reliability of criminal profiling. Your friend has just watched a new crime show that used criminal profiling to convict a defendant of a decades old murder. They know you are taking a criminal justice course on criminal court processes and wants to know what you **know** about criminal profiling. Explain the use of criminal profiling in a criminal investigation and as court room evidence. How are they similar, and what are the limitations of criminal profiling?
4. In this section, we identify a new concern of racial profiling. Knowing the issues of racial profiling in technology, what impacts could this have on the admissibility of evidence obtained through facial recognition software?
5. Does the use of Terry Stops violate the 4th amendment? Identify the key procedures of Terry Stops that avoids violating the 4th amendment. Then provide an example of one situation that may occur where you would properly use a Terry Stop to search a person.

INTRODUCTION TO CRIMINAL INVESTIGATION

Before we can begin the criminal court process, we must have a criminal investigation to collect evidence of guilt. In this module, we will look at the role the police/law enforcement plays in collecting evidence for presentation in the trial. As we progress in this course, you will see how vital it is that officers understand the rights of suspects and the importance of following criminal court processes and procedures. If an officer fails to properly collect evidence, that

evidence could be excluded from the court and a guilty person could go free. Or evidence could be falsely obtained and an innocent person could be found guilty. This is one of the worst things that could occur because our country was founded on specific principles to ensure all citizens are treated fairly and just in the criminal court.

4.1 COLLECTING EVIDENCE^{xvi}

The term “evidence,” as it relates to the investigation, speaks to a wide range of information sources that might eventually inform the court to prove or disprove points at issue before the trier of fact. Sources of evidence can include anything from the observations of witnesses to the examination and analysis of physical objects. It can even include the spatial relationships between people, places, and objects within the timeline of events. From the various forms of evidence, the court can draw inferences and reach conclusions to determine if a charge has been proven beyond a reasonable doubt. Considering the critical nature of evidence within the court system, there is a wide variety of definitions and protocols that have evolved to direct the way evidence is defined for consideration by the court.



Pin It! *Crime Scene Investigation and Evidence Collection*

Learn more about what investigating a crime scene and collecting evidence entails in this video: [crime scene investigation and evidence collection](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3HkhT6U*

In this module, we will look at some of the key definitions and protocols that an investigator should understand to carry out the investigative process:

- The probative value of the evidence
- Relevant evidence
- Direct evidence
- Circumstantial evidence
- Inculpatory evidence

- Exculpatory evidence
- Corroborative evidence
- Disclosure of evidence
- Witness evidence
- Hearsay evidence
- Search and seizure of evidence
- Exclusion of evidence

The Probative Value of Evidence

Each piece of relevant evidence will be considered based on its “probative value,” which is the weight or persuasive value that the court assigns to that particular piece of evidence when considering its value towards proving a point of fact in question for the case being heard. This probative value of evidence goes towards the judge, or the judge and jury, reaching their decision of proof beyond a reasonable doubt in criminal court, or proof within a balance of probabilities in civil court.

Eyewitness Evidence

A competent, compellable, independent, eye witness with excellent physical and mental capabilities, who has seen the criminal event take place and can recount the facts will generally satisfy the court and provide evidence that has high probative value. In assessing the probative value of witness evidence, the court will consider several factors that we will discuss in more detail in our chapter on witness management. These include:

- The witness type as either eyewitness or corroborative witness.
- The witness competency to testify.
- The witness compellability to testify.
- The level of witness independence from the event.
- The witness credibility is based on an assessment of physical limitations.

Physical Evidence

The court will also generally attribute a high probative value to physical exhibits. The court likes physical evidence because they are items the court can see and examine to interpret the facts in issue for proof beyond a reasonable doubt. Physical evidence can include just about anything, such as weapons, fingerprints, shoe prints, tire marks, tool impression, hair, fiber, or body fluids. These kinds of physical exhibits of evidence can be examined and analyzed by experts who can provide the court with expert opinions that connect the item of evidence to a person, place, or criminal event. This allows the court to consider circumstantial connections of the accused to the crime scene or the accused to the victim. For example, in the case where the fingerprints of a suspect are found at a crime scene, and a DNA match of a murder victim’s blood is found on that suspect’s clothing, forensic connections could be made and, in the

absence of an explanation, the court would likely find this physical evidence to be relevant and compelling evidence with high probative value.

Relevant Evidence

Relevant evidence speaks to an issue before the court in relation to the charge being heard. Relevant evidence includes both direct evidence and indirect circumstantial evidence. For either direct or indirect circumstantial evidence to be considered relevant to the court, it must relate to the elements of the offense that need to be proven. If the evidence does not relate to proving the place, time, identity of the accused, or criminal acts within the offense itself, the evidence will not be considered relevant to the charge. The prosecution may present evidence in the form of a physical exhibit that the court can see and examine to consider, or they may present evidence in the form of witness testimony, in which case the witness is telling the court what they perceived within the limits of their senses.



Pin It! Evidence Law: The Rule of Relevance and Admissibility of Character Evidence

Learn more about the purpose of the rule of relevance as well as the admissibility of character evidence in this video: [evidence law](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3xtc8iT*

Direct Evidence

Direct evidence is evidence that will prove the point in fact without interpretation of circumstances. It is any evidence that can show the court that something occurred *without the need for the judge to make inferences or assumptions to reach a conclusion*. An eyewitness who saw the accused shoot a victim would be able to provide direct evidence. Similarly, a security camera showing the accused committing a crime or a statement of confession from the accused admitting to the crime could also be considered direct evidence. Direct evidence should not be confused with the concept of direct examination, which is the initial examination and questioning of a witness at trial by the party who called that witness. And, although each

witness who provides evidence could, in theory, be providing direct testimony of their own knowledge and experiences, that evidence is often not direct evidence of the offense itself.

Circumstantial Evidence

Indirect evidence, also called circumstantial evidence, is all other evidence, such as the fingerprint of an accused found at the crime scene. Indirect evidence does not by itself prove the offense, but through interpretation of the circumstances and in conjunction with other evidence may contribute to a body of evidence that could prove guilt beyond a reasonable doubt. Strong circumstantial evidence that only leads to one logical conclusion can sometimes become the evidence the court uses in reaching belief beyond a reasonable doubt to convict an accused. It requires assumptions and logical inferences to be made by the court to attribute meaning to the evidence.

- Circumstantial evidence demonstrates the spatial relationships between suspects, victims, timelines, and the criminal event. These spatial relationships can sometimes demonstrate that an accused person had a combination of intent, motive, opportunity, and/or the means to commit the offense, which are all meaningful features of criminal conduct.
- Circumstantial evidence of intent can sometimes be shown through indirect evidence of the suspect planning to commit the offense, and/or planning to escape and dispose of evidence after the offense. A pre-crime statement about the plan could demonstrate both intent and motive, such as, “I really need some money. I’m going to rob that bank tomorrow.”
- Circumstantial evidence of conflict, vengeance, financial gain from the commission of the offense can also become evidence of motive.
- Circumstantial evidence of opportunity can be illustrated by showing a suspect had access to a victim or a crime scene at the time of the criminal event, and this access provided the opportunity to commit the crime.
- Circumstantial evidence of means can sometimes be demonstrated by showing the suspect had the physical capabilities and/or the tools or weapons to commit the offense.

Presenting this kind of circumstantial evidence can assist the court in confirming assumptions and inferences to reach conclusions assigning probative value to connections between the accused and a person or a place and the physical evidence. These circumstantial connections can create the essential links between a suspect and the crime.

There are many ways of making linkages to demonstrate circumstantial connections. These range from forensic analysis of fingerprints or DNA that connect an accused to the crime scene or victim, to witness evidence describing criminal conduct on the part of an accused before, during, or after the offense. The possibilities and variations of when or how circumstantial evidence will emerge are endless. It falls upon the investigator to consider the big picture of all

the evidence and then analytically develop theories of how events may have happened. Once a reasonable theory has been formed, evidence of circumstantial connections can be validated through further investigation and analysis of physical exhibits to connect a suspect to the crime.

Inculpatory Evidence

Inculpatory evidence is any evidence that will directly or indirectly link an accused person to the offense being investigated. For an investigator, inculpatory evidence can be found in the victim's complaint, physical evidence, witness accounts, or the circumstantial relationships that are examined, analyzed, and recorded during the investigative process. It can be anything from the direct evidence of an eyewitness who saw the accused committing the crime, to the circumstantial evidence of a fingerprint found in a location connecting the accused to the victim or the crime scene.

Naturally, direct evidence that shows the accused committed the crime is the preferred inculpatory evidence, but, in practice, this it is frequently not available. The investigator must look for and interpret other sources for evidence and information. Often, many pieces of circumstantial evidence are required to build a case that allows the investigator to achieve reasonable grounds to believe and enables the court to reach their belief beyond a reasonable doubt.

A single fingerprint found on the outside driver's door of a stolen car would not be sufficient for the court to find an accused guilty of car theft. However, if you added witness evidence to show that the accused was seen near the car at the time it was stolen, and a security camera recording of the accused walking off the parking lot where the stolen car was dumped, and the police finding the accused leaving the dumpsite where he attempted to toss the keys of that stolen car into the bushes, the court would likely have proof beyond a reasonable doubt.

If an abundance of inculpatory circumstantial evidence can be located for presentation to the court that leads to a single logical conclusion, the court will often reach their conclusion of proof beyond a reasonable doubt, unless exculpatory evidence is presented by the defense to create reasonable doubt.

Exculpatory Evidence

Exculpatory evidence is the exact opposite of inculpatory evidence in that it tends to show the accused person or the suspect did not commit the offense. It is important for an investigator to not only look for inculpatory evidence but also consider evidence from an exculpatory perspective. Considering evidence from the exculpatory perspective demonstrates that an investigator is being objective and is not falling into the trap of tunnel vision. If it is possible to find exculpatory evidence that shows the suspect is not responsible for the offense, it is helpful for police because it allows for the elimination of that suspect and the redirecting of the investigation to pursue the real perpetrator.

Sometimes, exculpatory evidence will be presented by the defense at trial to show the accused was not involved in the offense or perhaps only involved to a lesser degree. In our previous circumstantial case of car theft, there is a strong circumstantial case; but what if the defense produces the following exculpatory evidence where:

- A tow truck dispatcher testifies at the trial and produces records showing the accused is a tow truck driver;
- On the date of the car theft, the accused was dispatched to the site of the car theft to assist a motorist locked out of his car;
- The accused testifies that he only assisted another male to gain entry to the stolen car because he could see the car keys on the front seat;
- The accused explains that, after opening the car, he agreed to meet this male at the parking lot where the car was left parked;
- He accepted the keys of the stolen car from the other male to tow the vehicle later to a service station from that location;
- When approached by police, he stated that he became nervous and suspicious about the car he had just towed; and
- He tried to throw the keys away because he has a previous criminal record and knew the police would not believe him.

Provided with this kind of exculpatory evidence, the court might dismiss the case against the accused.

Having read this, you may be thinking that this exculpatory evidence and defense sounds a little vague, which is the dilemma that often faces the court. If they can find guilt beyond a reasonable doubt, they will convict, but if the defense can present evidence that creates reasonable doubt, they will make a ruling of not guilty. Experienced criminals can be very masterful at coming up with alternate explanations of their involvement in criminal events, and it is sometimes helpful for investigators to consider if the fabrication of an alternate explanation will be possible. If an alternate explanation can be anticipated, additional investigation can sometimes challenge the untrue aspects of the alternate possibilities.

Corroborative Evidence

The term corroborative evidence essentially refers to any type of evidence that tends to support the meaning, validity, or truthfulness of another piece of evidence that has already been presented to the court. A piece of corroborative evidence may take the form of a physical item, such as a DNA sample from an accused matching the DNA found on a victim, thus corroborating a victim's testimony. Corroborative evidence might also come from the statement of one independent witness providing testimony that matches the account of events described by another witness. If it can be shown that these two witnesses were separated and

did not collaborate or hear each other's account, their statements could be accepted by the court as mutually corroborative accounts of the same event.

The courts assign a great deal of probative value to corroborative evidence because it assists the court in reaching their belief beyond a reasonable doubt. For investigators, it is important to not just look for the minimum amount of evidence apparent at the scene of a crime. The investigation must also seek out other evidence that can corroborate the facts attested to by witnesses or victims in their accounts of the event. An interesting example of corroborative evidence can be found in the court's acceptance of a police investigator's notes as being *circumstantially corroborative* of that officer's evidence and account of the events. When a police investigator testifies in court, they are usually given permission by the court to refer to their notes to refresh their memory and provide a full account of the events. If the investigator's notes are detailed and accurate, the court can give significant weight to the officer's account of those events. If the notes lack detail or are incomplete on significant points, the court may assign less value to the accuracy of the investigator's account.

For the court, detailed notes properly made at the time corroborate the officer's evidence and represent a circumstantial guarantee of trustworthiness for the officer's testimony (McRory, 2014).

Disclosure of Evidence

It is important for an investigator to be aware that all aspects of their investigation may become subject to disclosure as potential evidence for court. A person who's been formally accused of a crime is normally entitled to certain kinds of evidence, statements, and information. The defendant has a right to receive this kind of material, called "discovery" before trial, however; the prosecution or police's duty to relinquish discovery is normally ongoing throughout the trial process.

The United States Constitution does require that the prosecution discloses to the defense exculpatory (minimizes guilt) evidence within its control. In 1963 the United States Supreme Court decided a case *{Brady v. Maryland}* in which the Court held that it's a violation of due process for the prosecution to suppress evidence that the defense has requested which is material to guilt or favorable to the accused. *Brady* has been codified in most states, meaning it is a violation of law for a prosecutor to intentionally withhold discovery.

In the disclosure process, the decision to disclose or not to disclose is the exclusive domain of the prosecutor and, although police investigators may submit information and evidence to the prosecutor with the request that the information is considered an exception to the disclosure rules, the final decision is that of the Court. That said, even the decision of the Court may be challenged by the defense and that then becomes a final decision for the Judge. The prosecutor will ask the police to provide full disclosure of the evidence gathered during their investigation.

The list of what should form part of a normal disclosure will typically include:

- Charging document
- Particulars of the offense
- Witness statements
- Audio/video evidence statements by witnesses
- Statements by the accused
- Accused's criminal record
- Expert witness reports
- Notebooks and Police reports
- Exhibits
- Search warrants
- Authorizations to intercept private communications
- Similar fact evidence
- Identification evidence
- Witnesses' criminal records
- Reports to the Court recommending charges
- Witness impeachment material

It is worth stressing that police notes and reports relating to the investigation are typically studied very carefully by the defense to ensure they are complete and have been completely disclosed. Disclosure will also include investigation notes and reports that relate to alternate persons considered, investigated, and eliminated as suspects in the crime for which the accused is being tried. If alternate suspects were identified and not eliminated during the investigation, that lack of investigation may form the basis for a defense to the charge.

For an investigator, the requirement to comply with disclosure is one of the best reasons to make sure notes and reports are complete and accurately reflect the investigation and actions taken during the investigation. From the court's perspective, there will never be any excuse for a police investigator to intentionally conceal or fail to disclose evidence or information.

Witness Evidence

Witness evidence is evidence obtained from any person who may be able to provide the court with information that will assist in the adjudication of the charges being tried. This means that witnesses are not only persons found as victims of a crime or on-scene observers of the criminal event. They may also be persons who can inform the court on events leading up to the crime, or activities taking place after the crime.

These after-the-crime activities do not just relate to the activities of the suspect, but also include the entire range of activities required to investigate the crime. Consequently, every police officer involved in the investigation, and every person involved in the handling, examination, and analysis of evidence to be presented in court, is a potential witness.

Issues relating to the collection of witness evidence will be discussed in more detail in Chapter 7 on Witness Management.

Hearsay Evidence

Hearsay evidence, as the name implies, is evidence that a witness has heard as communication from another party. In addition to verbal communication, legal interpretations of the meaning of hearsay evidence also include other types of person-to-person communication, such as written statements or even gestures intended to convey a message.



Pin It! Hearsay Evidence
Learn more about what qualifies evidence as “hearsay evidence” and how it is handled in this video: [hearsay evidence](https://www.youtube.com/watch?v=hearsay_evidence).



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Hearsay evidence is generally considered to be inadmissible in court at the trial of an accused person for several reasons; however, there are exceptions where the court will consider accepting hearsay evidence. The reasons why hearsay is not openly accepted by the court include the rationale that:

- The court generally applies the best-evidence rule to evidence being presented and the best evidence would come from the person who gives the firsthand account of events;
- The original person who makes the communication that becomes hearsay is not available to be put under oath and cross-examined by the defense;
- In hearing the evidence, the court does not have the opportunity to hear the communicator firsthand and assess their demeanor to gauge their credibility; and
- The court recognizes that communication that has been heard and is being repeated is subject to interpretation. Restatement of what was heard can deteriorate the content of the message.

The court will consider accepting hearsay evidence as an exception to the hearsay rule in cases where:

- There is a dying declaration
- A witness is the recipient of a spontaneous utterance
- The witness is testifying to hearsay from a child witness who is not competent

Dying Declarations

Exceptions to the hearsay rule include the dying declaration of a homicide victim. This type of declaration is allowed since it is traditionally believed that a person facing imminent death would not lie. This is a delicate area because in cases where the victim of a serious assault is in danger of dying, the investigator may have the opportunity to gain evidence by taking a statement from that victim; however, that statement would need to include some acknowledgment by the victim that they believed they are in imminent danger of dying.

4.2 CRIMINAL PROFILING^{xvii}

Criminal profiling is synonymous with offender profiling both of which are useful investigative tools used in policing (Woodhams and Toye, 2007). Profiling's purpose is to identify likely suspects that are correlated with criminal characteristics and patterns. Berg (200) maintains that a Psychological profiler relies heavily upon perpetrators' methods of operation or evidence left at a crime scene to identify a person's personality or state of mind. The process is not new and dates back to the Jack the Ripper murder campaign in 1888 and has evolved to applications including but not limited to predictive profiling, sexual assault offender profiling, and behaviors recognizable and related to criminal conduct (Canter, 2004).

What is Criminal Profiling?^{xviii}

Offender profiling has been defined in many ways by various scholars based on their backgrounds. Similarly, offender profiling is known by various names such as psychological profiling, criminal profiling, criminal investigative analysis, crime scene analysis, behavioral profiling, criminal personality profiling, sociopsychological profiling and criminological profiling.

As Canter has noted, 'offender profiling' is a term coined by the FBI in the 1970's to describe their criminal investigative analysis work. He maintained that "when FBI agents first began this work, they invented a new term to grace their actions: offender profiling. By doing so they created the impression of a package, a system that was sitting waiting to be employed, rather than the mixture of craft, experience, and intellectual energy that they themselves admit is at the core of their activities.

Canter sees offender profiling as 'criminal shadows'. He maintained that a criminal "leaves psychological traces, tell-tale patterns of behavior that indicate the sort of person he is. Gleaned from the crime scene and reports from witnesses, these traces are more ambiguous and subtle than those examined by the biologist or physicist. They cannot be taken into a laboratory and dissected under the microscope. They are more like shadows, which undoubtedly are connected to the criminal who cast them, but they flicker and change, and it

may not always be obvious where they come from. Yet, if they can be fixed and interpreted, criminal shadows can indicate where investigators should look and what sort of person they should be looking for.

Canter and Heritage also maintained that "a criminal leaves evidence of his personality through his actions in relation to a crime. Any person's behavior exhibits characteristics unique to that person, as well as patterns and consistencies which are typical of the subgroup to which he or she belongs".

Ainsworth defined offender profiling as "the process of using all the available information about a crime, a crime scene, and a victim, in order to compose a profile of the (as yet) unknown perpetrator. For Davies, "offender profiling (more technically known as Criminal Investigative Analysis) is the name given to a variety of techniques whereby information gathered at a crime scene, including reports of an offender's behavior is used both to infer motivation for an offence and to produce a description of the type of person likely to be responsible.

Geberth sees a criminal personality profile as "an educated attempt to provide investigative agencies with specific information as to the type of individual who may have committed a certain crime. Turvey, writing from a behavioral evidence analysis point of view, defined offender profiling as "the process of inferring the personality characteristics of individuals responsible for committing criminal acts. For Grubin, offender profiling refers to "information gathered at a crime scene, including reports of an offender's behavior, used both to infer motivation for an offence and to produce a description of the type of person likely to be responsible".

Put simply, offender profiling is a crime investigation technique whereby information gathered from the crime scene, witnesses, victims, autopsy reports and information about an offender's behavior is used to draw up a profile of the sort of person likely to commit such crime. It is a complementary technique and is usually taken up when no physical traces were left at the crime scene. Offender profiling does not point to a specific offender. It is based on the probability that someone with certain characteristics is likely to have committed a certain type of crime.

Rationale for Profiling

There are two operating words in offender profiling: *modus operandi* (method of operation) and behavior. The *modus operandi* could lead to clues about the offender. There is the idea that an offender is likely to commit a particular type of crime in a particular or similar pattern. Thus, offender profiling is based on the premise that the *modus operandi* may lead to clues about the perpetrator and that the crime scene characteristics may point to the personality of the perpetrator. Behavior helps to predict the personality type or the motives for the crime. Therefore, the single most important thing that a pro filer looks for at a scene of crime is anything that may point to the personality of the offender.

The rationale behind this approach is that behavior reflects personality, and by examining behavior the investigator may be able to determine what type of person is responsible for the offense. II When profiling, the profiler notes the physical description, individual traits, any odd behavior and remarks or records of anything that the offender said or did during the attack. Also, to be noted are information about the steps the offender used to avoid being detected, method of killing, or the way he approaches his victims, as well as notes about the offender's gender, age group, race, occupation, and criminal records.

The Purpose/Goals of Profiling

Offender Profiling is mainly used when the offender did not leave any physical trace at the crime scene. It is used to narrow down the suspects list. As Douglas and Olshaker have pointed out, "criminal profiling is used mostly by behavioral scientists and the police to narrow down an investigation to those who posses certain behavioral and personality features that are revealed by the way a crime was committed,,¹³. Continuing, Douglas and Olshaker also maintained that "the primary goal is to aid local police in limiting and refining their suspect list so that they can direct their resources where they might do the most good".

"Another key use of a profile, is, when necessary, to go proactive, which means letting the public become a partner in crime solving. The unknown suspect may have displayed some sort of odd behavior to those close to him that will indicate his involvement with the crime. Getting the public, and hopefully those people to be aware of what they have seen, telling them to come forward may solve the case".

Offender Profiling in the Courtroom

Offender profiling is a crime investigation technique based on probabilities, stereotypes, suspicion, and assumptions. It does not point to a specific offender as being responsible for a specific offense. Offender profiling only generalizes. As such it is not a method sufficiently reliable to prove the guilt or innocence of an accused. There are no questions as to the usefulness of offender profiling in crime investigations. Where there are question marks and problems are when it is being introduced into the courtroom as evidence. The reliability and validity of offender profiling cannot be ascertained at the moment by any objective method.

The nature of offender profiling does not lend this technique to any form of reliable testing. There is the problem of replicating a crime scene. No one can state with certainty that one offender will commit all crimes in the same manner or exhibit the same characteristics at subsequent crimes. Offenders, especially serial offenders, will learn from experiences, media, from victim responses, and then may change their method of operation. They may also develop new fantasies; hence the signature aspects of their crime may change.

The current position in United States courts is that offender profiling and its derivatives have been admitted in many cases and have been excluded in many others. There has been a lot of inconsistencies. There are several problems with the use of criminal profiling as courtroom

evidence. In some of the cases where offender profiling or its derivatives were admitted, it is surprising that the reliability of this technique was never questioned. Some of the courts appeared to have been taken in by the credentials of the profilers at the expense of assessing the reliability and validity of this technique. The fact that a technique is useful in crime investigation does not render it a reliable tool for courtroom use. Utility does not equal/amount to reliability.

4.3 RACIAL PROFILING^{xix}

Racial profiling is stereotyping. In short, racial profiling is the act of suspecting criminal activity based solely on the color of a person's skin or their minority status, or their ethnic origin (Warren, & Farrell, 2009).



Definitive! *Racial Profiling*

According to the American Civil Liberties Union (ACLU),

“Racial profiling refers to the practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion, or national origin. Criminal profiling, generally, as practiced by police, is the reliance on a group of characteristics they believe to be associated with crime. Examples of racial profiling are the use of race to determine which drivers to stop for minor traffic violations (commonly referred to as ‘driving while black or brown’), or the use of race to determine which pedestrians to search for illegal contraband.”

While racial profiling has been reduced in recent years, new advances in technology have contributed to the concern of potential racial profiling in face recognition technology.

Modern Face Recognition Technology^{xx}

We unlock our iPhones with a glance and wonder how Facebook knew to tag us in that photo. But face recognition, the technology behind these features, is more than just a gimmick. It is employed for law enforcement surveillance, airport passenger screening, and employment and housing decisions. Despite widespread adoption, face recognition was recently banned for use by police and local agencies in several cities, including Boston and San Francisco. Why? Of the dominant biometrics in use (fingerprint, iris, palm, voice, and face), face recognition is the least accurate and is rife with privacy concerns.

Police use face recognition to compare suspects' photos to mugshots and driver's license images; it is estimated that almost half of American adults – over 117 million people, as of 2016 – have photos within a facial recognition network used by law enforcement. This participation occurs without consent, or even awareness, and is bolstered by a lack of legislative oversight. More disturbingly, however, the current implementation of these technologies involves

significant racial bias, particularly against Black Americans. Even if accurate, face recognition empowers a law enforcement system with a long history of racist and anti-activist surveillance and can widen pre-existing inequalities.

Inequity in Face Recognition Algorithms

Face recognition algorithms boast high classification accuracy (over 90%), but these outcomes are not universal. A growing body of research exposes divergent error rates across demographic groups, with the poorest accuracy consistently found in subjects who are female, Black, and 18-30 years old. In the landmark 2018 “Gender Shades” project, an intersectional approach was applied to appraise three gender classification algorithms, including those developed by IBM and Microsoft. Subjects were grouped into four categories: darker-skinned females, darker-skinned males, lighter-skinned females, and lighter-skinned males. All three algorithms performed the worst on darker-skinned females, with error rates up to 34% higher than for lighter-skinned males (Figure 1). Independent assessment by the National Institute of Standards and Technology (NIST) has confirmed these studies, finding that face recognition technologies across 189 algorithms are least accurate on women of color.

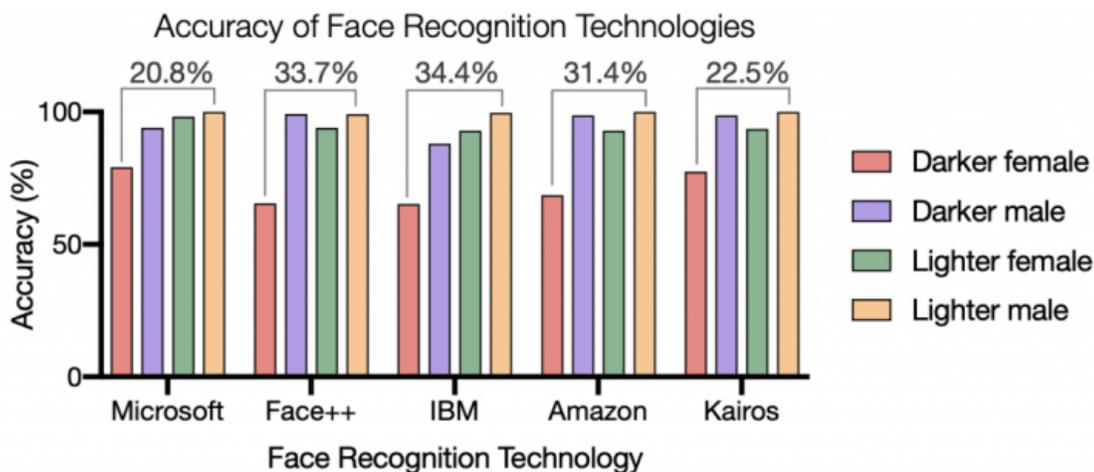


Figure 4.1. Auditing five face recognition technologies. The Gender Shades project revealed discrepancies in the classification accuracy of face recognition technologies for different skin tones and sexes. These algorithms consistently demonstrated the poorest accuracy for darker-skinned females and the highest for lighter-skinned males.²

These compelling results have prompted immediate responses, shaping an ongoing discourse around equity in face recognition. IBM and Microsoft announced steps to reduce bias by modifying testing cohorts and improving data collection on specific demographics. A Gender Shades re-audit confirmed a decrease in error rates on Black females and investigated more algorithms including Amazon’s Rekognition, which also showed racial bias against darker-skinned women (31% error in gender classification). This result corroborated an earlier

² This [image](#) is licensed under [CC BY NC-SA 4.0](#)

assessment of Rekognition's face-matching capability by the American Civil Liberties Union (ACLU), in which 28 members of Congress, disproportionately people of color, were incorrectly matched with mugshot images. However, Amazon's responses were defensive, alleging issues with auditors' methodology rather than addressing racial bias. As Amazon has marketed its technology to law enforcement, these discrepancies are concerning. Companies that provide these services have a responsibility to ensure that they are equitable – both in their technologies and in their applications.

4.4 TERRY STOPS^{xxi}

Terry v. Ohio is the Supreme Court Case that provides for police officers to use their training, experience, knowledge, skill, and observation to intercede on behalf of the public into criminal conduct. None the less it is a court-sanctioned form of profiling, specifically criminal profiling that as contended early on in this discussion is the basis of other forms of profiling, both positive and negative. In brief, an experienced Cleveland police officer (detective) observed the conduct of three men that rose to the level of casing a store in preparation to commit a robbery. The police officer acting on reasonable suspicion removed the trio from an automobile and patted them down. The pat-down revealed what appeared to be weapons on two of the culprits and resulted in a search that confirmed the officer's suspicions. The court held that in these circumstances an over-the-clothes pat down to provide safety for the officer is sufficient and does not rise to the level of a seizure but rather a stop and frisk is not a search (White, 2007).

The preceding is an example of descriptive common sense police work that orchestrated profiling at differing levels. In recent years Racial Profiling is on highways and streets solely based on race which is a form of police misconduct. However, an officer acting on observed conduct that raises the suspicions of the police that criminal activity may be afoot is criminal profiling and occurs hundreds if not thousands a time daily across this country. If not for profiling, what would constitute a reason for a stop? How much police work would be done? It is in this manner that criminal thinking is apparent in behaviorism or mannerisms that create suspicions. Further criminal thinking is important in all fashions of profiling however the type and manner of Terry Stops are critical to day-to-day operations.

Since Terry, the court rendered rulings regarding stops based on race, ethnic origin, or minority status. In 1975, *U.S. v. Brignoni-Ponce* was decided. The facts of the case relate that Felix Humberto Brignoni-Ponce was traveling in his vehicle and was stopped by border patrol agents because he appeared to be Mexican (Oyez.org, 1974). The questioning by agents and other passengers revealed the illegal status of the occupants. The court ruled that the information gleaned from the interviews was inadmissible due to lack of probable cause by agents in the initial stop. The actions of the agents were a violation of the Fourth Amendment.

However, in subsequent matters, the court ruled to the contrary. The U.S. Supreme Court determined in 1993 that disparity in conviction rates is not necessarily unconstitutional unless

data demonstrates that defendants of another race similarly situated are disparately impacted (U.S. v. Armstrong, 1993). In another case, Whren v United States (1996), police stopped a truck for failing to use a turn signal, and upon approaching the vehicle police observed Whren in possession of crack cocaine. The court sustained the prosecution finding that police did not violate the Fourth Amendment, regardless of the pretext of the officers. An observable traffic infraction provided license and privilege for police to act.

Having stated the purpose of this article it is essential to provide a description of criminal profiling as detailed in current research and then the brief discussion of Terry Stops criminal profiling. According to Hatch-Maillette, Scalora, Huss & Baumgartner (2001):

Individuals who demonstrate heavy involvement with the legal system are an undeniably important population to consider in terms of economic, social, and ethical issues. To the extent that knowledge of these people can be amassed, researchers and clinicians can begin to address the financial and societal burdens experienced by those who are indirectly or directly affected by our criminal justice system. One way in which our understanding can increase is by systematically examining the thought content of criminal offenders in hopes of detecting patterns in specific categories of cognitions that are indigenous to the type of crime committed (p.115).

stop and frisk.' in a smaller font. Below the text is a large QR code with a white circle containing a lowercase 'b' in the center. At the bottom of the graphic, it says: '*If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3zBeQWg'" data-bbox="112 456 875 755"/>

The Verdict: *Why Stop-and-Frisk Is Legal: Terry v. Ohio*
Learn more about the court case that created the precedent behind stop-and-frisk in this video: [stop and frisk.](#)

**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3zBeQWg*

4.5 A CRITICAL LOOK AT TERRY STOPS^{xxii}

Stop and Frisk is defined as the brief, non-intrusive, warrantless stop by police of a suspect who the officer believes the suspect is armed and dangerous (Busby, 2017). These stops are also referred to as Terry stops due to the 1968 Supreme Court Case of Terry V. Ohio. However, in practice, these stops are seldom ever brief or non-intrusive. For example, the state of New York

unfairly targeted young black males with their Stop & Frisk program (New York Civil Liberties Union, 2018). There has been much debate between civil rights activists and police organizations regarding when a Stop and Frisk search becomes a violation of our Fourth Amendment protections against unreasonable searches. This debate can be seen in the differing opinions of the Supreme Court cases of *Rodriguez V. United States* and *Utah V. Strieff*. *Rodriguez V. United States* determined that a drug-sniffing dog being used for the purposes of a Terry stop was unconstitutional (Harvard Law Review, 2017). *Utah V. Strieff*, however, determined that evidence obtained via a Terry stop coupled with the discovery of an untainted warrant allowed the evidence discovered to be admissible in court (Harvard Law Review, 2015).

The use of Stop and Frisk by the New York Police Department has been a controversial practice since its inception in 2002. The New York Civil Liberties Union has gathered data regarding these stops since 2002 and every year, 80-90% of all stops target Blacks or Latinos between the ages of 14-24 with over 70% being innocent every year (New York Civil Liberties Union, 2018). When this power is abused by officers, police management, and politicians, citizens face disparate treatment and potential unconstitutional action. Supporters of the program, tout the program's propensity to decrease crime and claim that the unbalanced percentage of minorities being stopped accurately reflects the cities crime statistics (Madhani, 2018). Critics of the system claim that it has both failed to reduce crime, and that it gives officers too much flexibility in their searches with the low standard of reasonable suspicion (New York Civil Liberties Union, 2018).



CHAPTER 5: SEARCH WARRANTS^{xxiii}

OVERVIEW

In this chapter, you will learn the search warrant process and provide specific details on the types and usage of search warrants. We must understand the protections afforded to citizens under the 4th Amendment and the right to privacy. Building on those concepts, this chapter will provide an understanding of how warrants are issued and the different types of warrants. Not all searches conducted by police require a warrant the procedure for warrantless searches is explained in this chapter.

OBJECTIVES

- Identify the concept of privacy and how it pertains obtaining a search warrant.
- Identify the different types and uses of warrants.
- Explain how the advances in technology have affected the search warrant process.
- Identify the circumstance where officers may not need to obtain a search warrant to gather evidence.
- Explain the plain-view doctrine and open field rule.

KEY TERMS

right to privacy, search warrant, reasonable/reasonableness, probable cause, particularity requirement, knock and announce, night service, no knock warrants, sealing orders, nondisclosure orders, out of jurisdiction orders, out of county warrants, out of state warrants, special master's procedure, searches by experts, anticipatory warrants, computer search warrant, covert warrants, Steagald warrant, email search warrant, warrant reissuance, releasing seized evidence, subpoena duces tecum, consent searches, searches incident to arrest, exigent circumstances, plain view doctrine, open field, vehicle searches.

CRITICAL THINKING

1. One of the key concepts of search warrant is the right to privacy. While not ever stated in the Constitution, the framers of the Constitution wanted to protect its citizens from unlawful invasions of privacy. However, officers also have a duty to protect citizens from criminal activity and must collect evidence. In your own word, explain how the search warrant process protects individual's privacy and still allows police officers to investigate crime. (Hint, identify reasonableness and probable cause).

2. In this section, we learned that officers many obtain specific warrants based on the type of investigation they are conducting. For this critical thinking question, identify a scenario (criminal investigation) where you would use these types of warrants. Make sure to identify the cause or reason and include that information in your response.
 - a. Night service warrant
 - b. No-knock warrant
 - c. Nondisclosure order
 - d. Special Master Procedure
 - e. Anticipatory search warrant
 - f. Covert search warrant
 - g. Steagald search warrant
3. Not every investigation requires a search warrant, in certain criminal investigations, officers can conduct searches without a warrant. For example, consent searches allow officer to search without a warrant. In this scenario, you are an officer and conducted a consent search of a person’s home. The wife gave consent to search the house and during your search, you uncover evidence of child pornography. (Evidence uncovered includes photographs and printed emails). However, during the search, the husband comes home and denies consent to search.
 - a. Do you continue to search? Why or why not?
 - b. You are on the stand during an evidentiary hearing and the defense counsel is trying to have the photos and emails excluded from evidence. How do you testify to the ensure the evidence is admitted into trial? Provide key points to a lawful consent search.

5.1 OBTAINING A SEARCH WARRANT



Definitive! *The Fourth Amendment*

The Fourth Amendment states in full:

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

When a crime is committed, the law enforcement agencies will begin the investigation process and seeks to obtain evidence to prove the guilt of a suspect. One of the primary methods to obtain this evidence is through search warrants. Officers must obtain information properly in order for it to be used in a trial. Evidence that is obtained improperly by officers may be excluded from trial due to the exclusionary rule (which will be discussed in detail later in the course). One of the worst things that can happen in policing is when good evidence proving the guilt of an offender is seized improperly and excluded from a trial. This section will provide

information on how to properly secure a search warrant so the evidence is obtained legally for use in a trial.

Right to Privacy^{xxiv}

To understand how the Constitution of the United States limits criminal law, it is important to consider the right to privacy. Shockingly, the term “privacy” never appears in the Constitution. Yet, over the years, the Supreme Court has said that several of the rights that are explicitly stated in the constitution come together to create a right to privacy. In the world of procedural law, it must be remembered, if the Supreme Court of the United States says it, it is so.

The right to privacy places a limit on many forms of police conduct, from searches to arrest. It is important, however, to understand there is a limit to how far the right goes. It is not absolute. The police are not prohibited from interfering with a citizen’s privacy interest, but it must be **reasonable** when they do so.

When it comes to the police conducting searches of people, vehicles, homes, offices and anywhere else a person has a right to privacy, the idea of reasonableness comes down to probable cause. Probable cause means that there is sufficient evidence to make a reasonable person would believe that the person is doing something contrary to the law.

An officer desiring to conduct a search needs probable cause for the search to be lawful. Because society expects police officers to find evidence and arrest criminals, they may be overzealous in determining whether they do or do not have probable cause. As a general rule, the evidence establishing probable cause must be submitted to an **impartial magistrate**, and if the magistrate agrees that probable cause exists, then he or she will issue a **search warrant**.

Probable Cause

For a warrant to be issued, the magistrate must determine that probable cause exists. This has to be in the form of a sworn statement called an **affidavit**. When determining probable cause for a search, the reasonableness test used by the courts considers the experience and training of police officers. That is, the test is not merely what a *reasonable person* would believe, but what a *reasonable police officer* would believe in light of the evidence as well as the officer’s training and experience. Note that the standard for establishing probable cause is *more likely than not*. This is a far lesser standard than the proof beyond a reasonable doubt standard required for a conviction in criminal court.

The Particularity Requirement

Another requirement for a search warrant to be valid is that it must particularly describe the person or thing to be seized. There are many supreme court cases that establish what this means in particular circumstances. As a general rule regarding search warrants, it means that the place to be searched is sufficiently described that it cannot be confused with some other place.

Obtaining and Executing a Search Warrant

The warrant application process varies in exact detail from jurisdiction to jurisdiction. Often, the Supreme Court of the state in which the warrant is sought provides the details in a legal document known as the **Rules of Criminal Procedure**. The basic rules, however, are dictated by the Supreme Court as interpretations of the Fourth Amendment. All of the officer's evidence must be contained in an affidavit. The rules also dictated how a warrant must be executed. As a general rule, the warrant must be served during daylight hours, and officers must identify themselves as officers and request entry into the place to be searched. This identification requirement is known as ***knock and announce***.

5.2 SEARCH WARRANT PROCEDURES

There is perhaps no profession that is more susceptible to changing circumstances than law enforcement. This means that law enforcement officers must know how to adapt. One task in which adaptability is especially important (although frequently overlooked) is the writing of search warrants and affidavits. That is because every search warrant must be customized to fit the unique circumstances of the crime under investigation, the place being searched, the people who live or work in the location, the nature of the evidence being sought, and any difficulties that the search team might encounter.

For instance, officers may have well-founded concerns about their safety or evidence destruction that make it necessary to execute the warrant late at night or to make a no-knock entry. Officers might also need to keep the contents of the affidavit secret to protect the identity of an informant or to prevent the disclosure of confidential information. Although less common, it is sometimes necessary to obtain a covert warrant or an anticipatory warrant, or a warrant to search something in another county or state, or a warrant to search the confidential files of a lawyer or physician.

All of these things are doable. But because they add to the intrusiveness of the search, they must be authorized by the judge who issues the warrant. And to obtain authorization, officers must know exactly what information judges require and how it must be presented.

Before we discuss these requirements, it should be noted that we have incorporated these and other special procedures into new search warrant forms that officers and prosecutors can download from our website. The address is the following: [link to Alameda County District Attorney's website for law enforcement officers and prosecutors](#) (click on Publications). To receive copies via email in Microsoft Word format, send a request from a departmental email address to POV@acgov.org.

Night Service

Officers are ordinarily prohibited from executing warrants between the hours of 10 P.M. and 7 A.M. That is because late-night entries are "particularly intrusive," especially since officers, may

need to make a forcible entry if, as is often the case, the occupants are asleep and are thus unable to promptly respond to the officers' announcement. Still, the courts understand there are situations in which the added intrusiveness of night service is offset by other circumstances, usually the need to prevent the destruction of evidence or to protect the search team from violence by catching the occupants by surprise. For this reason, California law permits judges to authorize an entry at any hour of the day or night if there is "good cause."

Good Cause to Obtain a Night Service Warrant

- Good cause exists if there is reason to believe that:
- some or all of the evidence on the premises would be destroyed or removed before 7 A.M.,
- night service is necessary for the safety of the search team or others, or
- there is some other "factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified."

Like probable cause, good-cause must be based on facts contained in the affidavit or at least reasonable inferences from the facts. "[T]he test to be applied," said the Court of Appeal, "is whether the affidavit read as a whole in a common-sense manner reasonably supports a finding that such service will best serve the interests of justice."

Because specific facts are required, good cause to believe that evidence would be destroyed or removed cannot be based on generalizations or unsupported allegations. For example, the courts have rejected arguments that good cause existed merely because the affiant said "the property sought will be disposed of or become nonexistent through sale or transfer to other persons," or because "drug distributors often utilize the cover of darkness to conceal their transportation and handling of contraband," or because the warrant authorized a search for evidence (such as drugs) that can be quickly sold or consumed. Accordingly, the court in *People v. Mardian* ruled that "an affiant's averment that in his experience (generally) particular types of contraband are easily disposed of does not, in itself, constitute a sufficient showing for the necessity of a nighttime search." The question, then, is what types of circumstances will suffice? In the case of evidence destruction, the following have been deemed sufficient:

- The suspects were selling drugs or stolen property from the residence at night.
- The suspect had become aware that he was about to be arrested or that a search of his home was imminent, and it was therefore reasonably likely that he would immediately try to move or destroy the evidence.
- The suspect was planning to vacate the premises early the next morning.
- Stolen food, liquor, and cigarettes were consumed at a party in the residence the night before the warrant was executed.

- The suspect had been released on bail in the early evening, the evidence in his house was “small in size and easily disposed of,” and the only way to keep him from destroying it would have been to assign “police resources in an all-night vigil.”
- The warrant authorized a search for valuable stolen property which the suspects had the ability and motive to quickly sell or abandon.

As for officer safety, good cause must also be based on facts, not unsupported assertions. As the Court of Appeal explained, “[A]llegations in an affidavit with respect to the safety of officers must inform the magistrate of specific facts showing why nighttime service would lessen a possibility of violent confrontation, e.g., that the particular defendant is prepared to use deadly force against officers executing the warrant.” Thus, in *Rodriguez v. Superior Court* the court ruled that good cause was not shown based merely on a statement that “any time you got people dealing in drugs there’s always a danger of being shot or hurt.”

One other thing about night service: If officers enter before 10 P.M. they do not need the authorization to continue the search after 10 P.M.

HOW TO OBTAIN AUTHORIZATION:

There are essentially four things the affiant must do to obtain authorization for night service:

1. **STATE THE FACTS:** The affiant must set forth the facts upon which “good cause” is based. Although the affidavit need not contain a separate section for this purpose, it is usually helpful to the judge; e.g., *For the following reasons, I hereby request authorization to execute this warrant at any hour of the day or night . . .*
2. **NOTIFY JUDGE:** When submitting the affidavit to the judge, the affiant should notify him or her that he is requesting night service authorization based on facts contained in the affidavit.
3. **JUDGE REVIEWS:** As the judge reads the affidavit looking for probable cause, he or she will also look for facts that tend to establish good cause for night service.
4. **AUTHORIZATION GIVEN:** If the judge finds that good cause exists, he or she will authorize night service on the face of the warrant, [21 \(Links to an external site.\)](#) usually by checking an authorization box or by inserting words such as the following: *Good cause having been demonstrated, this warrant may be executed at any hour of the day or night.*

No-Knock Warrants

[Violent knocks on the front door]

“Police with a search warrant! Open the door or we’ll kick it in.”

Blanca ran into the bathroom and emptied an envelope containing cocaine into the swirling bowl.

“Is that everything?” he said. “I think so,” she said.

That was fiction. It was a scene from the novel *To Live and Die in L.A.* But similar scenes are played out every day in real life when officers knock, give notice, and wait for a “reasonable” amount of time before making a forcible entry. Because this delay provides the occupants with the time they need to destroy evidence or arm themselves, the knock-notice requirement has been a continuing source of friction between the courts and law enforcement. As the Court of Appeal observed:

[A]lthough one purpose of the [knock-notice] requirement is to prevent startled occupants from using violence against unannounced intruders, the delay caused by the statute might give a forewarned occupant exactly the opportunity necessary to arm himself, causing injury to officers and bystanders... Since one has no right to deny entry to the holder of a search warrant in any event, critics ask, what public policy requires that entry be delayed while police engage in meaningless formalities?

While it is debatable whether the knock-notice requirements are “meaningless,” we are concerned here with explaining how officers can, when necessary, obtain authorization to enter without giving notice.

A judge who issues a search warrant may authorize a no-knock entry if there was “sufficient cause” or “reasonable grounds”. As the United States Supreme Court explained:

When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a “no-knock” entry.

WHAT ARE “REASONABLE GROUNDS”?

Reasonable grounds for a no-knock warrant exist if the affidavit establishes reasonable suspicion to believe that giving notice would

- be used by the occupants to arm themselves or otherwise engage in violent resistance,
- be used by the occupants to destroy evidence, or
- be futile.

Like good cause for night service, grounds for no-knock authorization must be based on facts, not unsupported conclusions or vague generalizations. Thus, in *Richards v. Wisconsin* the United States Supreme Court ruled that an affidavit for a warrant to search a drug house was insufficient because it was based solely on the generalization that drugs can be easily destroyed. In contrast, the following circumstances have been deemed adequate:

- The suspect had a history of attempting to destroy evidence, including a “penchant for flushing toilets even when nature did not call.”

- The suspect told an informant that, if he knew the police “were around,” he would destroy the drugs he was selling and that “he would not get caught again with the evidence.”
- The premises, which contained a “large amount” of crack, were protected by a steel door.
- The house was a “virtual fortress.”
- The house “was equipped with security cameras and floodlights.
- The suspect displayed a firearm during previous drug sales and had “exhibited abnormal and unpredictable behavior—specifically, answering the door wearing only a pair of socks— while wielding a chambered semi-automatic pistol in a threatening manner.”
- The suspect’s rap sheet showed “assaultive” behavior in the past, possession of guns, and a prior altercation with an officer.

PROCEDURE FOR OBTAINING AUTHORIZATION

The usual procedure for obtaining a no-knock warrant is as follows:

1. SET FORTH THE FACTS: The affidavit must include the facts upon which the request is made. Although it need not contain a separate section for this purpose, it will be helpful to the judge; e.g., *I hereby request authorization for a no-knock entry for the following reasons . . .*
2. NOTIFY JUDGE: When submitting the affidavit to the judge, the affiant should notify him or her that he is requesting no-knock authorization.
3. JUDGE REVIEWS: As the judge reads the affidavit looking for probable cause, he or she will also look for facts establishing grounds for a no-knock entry.
4. AUTHORIZATION GIVEN: If the judge determines that grounds for a no-knock warrant exist, he or she will authorize a no-knock entry on the face of the warrant; e.g., *Good cause having been demonstrated in the affidavit herein, the officers who execute this warrant are authorized to make a forcible entry without giving notice unless a change in circumstances negates the need for non-compliance.*

Two other things should be noted about no-knock warrants. First, although officers are not required to re-evaluate the circumstances before entering, they are not permitted to make a no-knock entry if, before entering, they become aware of circumstances that eliminated the need for it. Second, if the judge refused to issue a no-knock warrant, officers may nevertheless make an unannounced entry if, upon arrival, they become aware of circumstances that constituted grounds to do so.

Sealing Orders

Search warrants, including their supporting affidavits and any incorporated documents, become a public record when they are returned to the court or, if not executed, ten days after they were issued. But because public disclosure may have serious adverse consequences, the affiant

may apply for a sealing order which would require that all or part of the affidavit be kept confidential until further order of the court.

GROUNDINGS FOR SEALING ORDERS

In most cases, sealing orders are issued for either of the following reasons:

1. **PROTECT INFORMANT'S IDENTITY:** If the warrant is based wholly or in part on information from a confidential informant, the judge may seal the parts of the affidavit that would reveal or tend to reveal his identity.
2. **PROTECT "OFFICIAL INFORMATION":** An affidavit may be sealed if it tends to disclose "official information," which is defined as confidential information whose disclosure would not be in the public interest; e.g., information obtained in the course of an ongoing criminal investigation; information that would tend to reveal the identity of an undercover officer, a citizen informant, a confidential surveillance site, or the secret location of VIN numbers.

PROCEDURE

To obtain a sealing order, the affiant must do the following:

1. **DETERMINE SCOPE OF ORDER:** The first step is to determine whether it is necessary to request the sealing of only certain information, certain documents, or everything.
2. **SEGREGATE CONFIDENTIAL INFORMATION:** If the affiant is requesting that only part of the affidavit be sealed, he will present the judge with two affidavits for review: one containing information that may be disclosed; the other containing information that would be subject to the sealing order. The latter affidavit should be clearly identified by assigning it an exhibit number or letter, then writing that number or letter in a conspicuous place at the top of the document; e.g., Exhibit A.
3. **REQUEST ORDER:** The affiant should state in the affidavit that he is seeking a sealing order; e.g., *For the following reasons, I am hereby requesting that Exhibit A be sealed pending further order of the court . . .*
4. **PROVING CONFIDENTIALITY:** The affiant must explain why the sealing is reasonably necessary. To prove that the sealed information would tend to disclose the identity of a confidential informant, the affiant should explain why the informant or his family would be in danger if his identity was revealed. To prove that sealed information is covered under the "official information" privilege, the affiant should set forth facts demonstrating that the information was "acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."
5. **JUDGE ISSUES ORDER:** If the affiant's request is granted, the judge will sign the sealing order. Although the order may be included in the warrant, it is better to incorporate it into a separate document so that it is not disclosed to the people who are served with the warrant. A sealing order is available on our website.

6. WHERE SEALED DOCUMENTS MUST BE KEPT: All sealed documents must be retained by the court, unless the judge determines that court security is inadequate. In such cases, the documents may be retained by the affiant if he submits proof that the security precautions within his agency are sufficient, and that his agency has established procedures to ensure that the sealed affidavit is retained for ten years after final disposition of noncapital cases, and permanently in capital cases.

Nondisclosure Orders

Officers will frequently utilize a search warrant to obtain the records of a customer of a financial institution, phone company, or provider of an email or internet service. If, as in most cases, they do not want the customer to learn about it, they may ask the issuing judge for a temporary nondisclosure order. Such an order may ordinarily be issued if the affiant demonstrates that disclosure would seriously jeopardize an ongoing investigation or endanger the life of any person.

A nondisclosure order should appear on the warrant to help ensure that the people who are served with the warrant will be aware of it. The following is an example of such an order: *Pending further order of this court, the employees and agents of the entity served with the warrant are hereby ordered not to disclose information to any person that would reveal, or tend to reveal, the contents of this warrant or the fact that it was issued.*

Out-of-Jurisdiction Warrants

It is not unusual for officers to develop probable cause to believe that evidence of the crime they are investigating is located in another county or state. If they need a warrant to obtain it, the question arises: Can the warrant be issued by a judge in the officers' county? Or must it be issued by a judge in the county or state in which the evidence is located? The rules pertaining to out-of-jurisdiction warrants are as follows.

OUT-OF-COUNTY WARRANTS

A judge in California may issue a warrant to search a person, place, or thing located in any county in the state if the affidavit establishes probable cause to believe that the evidence listed in the warrant pertains to a crime that was committed in the county in which the judge sits. As the California Supreme Court explained, “[A] magistrate has jurisdiction to issue an out-of-county warrant when he has probable cause to believe that the evidence sought relates to a crime committed within his county and thus pertains to a present or future prosecution in that county.”

For example, in *People v. Easley* officers who were investigating a double murder in Modesto (Stanislaus County) obtained a warrant from a local judge to search for evidence of the crimes in Easley's homes and cars in Fresno County. In ruling that the judge had the authority to issue the warrant, the California Supreme Court said:

[T]he search warrant sought evidence relating to two homicides committed in Stanislaus County. The magistrate had probable cause to believe that evidence relevant to those crimes might be found in the defendant's residences and automobiles. He, therefore, had jurisdiction to issue a warrant for an out-of-county search for that evidence.

Not surprisingly, out-of-county search warrants are especially common in drug trafficking cases because sellers seldom restrict their operations to a single county. Thus, in such cases, a warrant may be issued by a judge in any county in which some illegal act pertaining to the enterprise was committed. For example in *People v. Fleming* an undercover Santa Barbara County sheriff's deputy bought cocaine from Bryn Martin in Santa Barbara. The deputy later learned that Martin's supplier was Scott Fleming, who lived in Los Angeles County. The deputy then obtained a warrant from a Santa Barbara judge to search Fleming's house, and the search netted drugs and sales paraphernalia.

Fleming, who was tried and convicted in Santa Barbara County, argued that the evidence should have been suppressed, claiming that the judge lacked the authority to issue the warrant. But the California Supreme Court disagreed, pointing out that because both sales were negotiated in Santa Barbara County, and because a person can be prosecuted in any county in which "some act of a continuing crime occurs," the judge "acted within his jurisdiction in issuing the warrant in question."

Two procedural matters. First, an out-of-county warrant must be directed to peace officers employed in the issuing judge's county. For example, a warrant to conduct a search in Santa Clara County issued by a judge in Alameda County should be headed, *The People of the State of California to any peace officer in Alameda County*. Second, although the warrant may be executed by officers in the issuing judge's county, it is standard practice to notify and request assistance from officers in whose jurisdiction the search will occur.

OUT-OF-STATE WARRANTS

California judges do not have the authority to issue warrants to search a person, place, or thing located in another state. Consequently, officers who need an out-of-state warrant must either travel to the other state and apply for it themselves or, more commonly, request assistance from an officer in that state. Because the officers who are requesting assistance should complete as much of the paperwork as possible, they should ordinarily do the following:

1. Write an affidavit establishing probable cause for the search and sign it under penalty of perjury. (As discussed below, this affidavit will become an attachment to the affidavit signed by the out-of-state officer.)
2. Write an affidavit for the out-of-state officer's signature in which the out-of-state officer simply states that he is incorporating the California officer's affidavit and that it was submitted to him by a California officer; e.g., *Attached hereto and incorporated by reference is the affidavit of [name of California officer] who is a law enforcement officer employed by the [name of California officer's agency] in the State of California. I declare*

under penalty of perjury that the foregoing is true. (The reason the out-of-state officer must not sign the affidavit establishing probable cause is that will have no personal knowledge of the facts upon which probable cause was based.)

3. Attach the California officer's probable-cause affidavit to the out-of-state officer's unsigned affidavit.
4. In a separate document, write the following:
 - a. Descriptions of the person, place, or thing to be searched.
 - b. Descriptions of the evidence to be seized.
 - c. A suggested court order pertaining to the disposition of seized evidence; e.g., *All evidence seized pursuant to this warrant shall be retained by [name of California officer] of the [name of California officer's agency] in California. Such evidence may thereafter be transferred to the possession of a court of competent jurisdiction in California if it is found to be admissible in a court proceeding.*
5. Email, fax, or mail all of these documents to the out-of-state officer.

Upon receipt of these documents, the out-of-state officer should do the following:

1. Prepare a search warrant in accordance with local rules and procedures using the descriptions provided by the California officer, and incorporating the order that all seized evidence be transferred to the California officer.
2. Take the search warrant and affidavit (to which the California officer's affidavit has been attached) to a local judge.
3. In the judge's presence, sign the affidavit in which he swears that the incorporated and attached affidavit was submitted to him by a California law enforcement officer.

If the judge issues the warrant, it will be executed by officers in whose jurisdiction the search will occur. Those officers will then give or send the evidence to the California authorities.

Special Master Procedure

A search for documents in the office of a lawyer, physician, or psychotherapist (hereinafter "professional") is touchy because these papers often contain information that is privileged under the law. Still, officers can obtain a warrant to search for them if the search is conducted in accordance with a protocol—known as the "special master procedure"—that was designed to ensure that privileged communications remain confidential.

Before going further, it should be noted that the law in this area has changed. In the past, officers in California were required to implement this procedure only if the suspect was a client or patient of the professional; i.e., the professional was *not* the suspect. In 2001, however, the California Supreme Court essentially ruled that this procedure must be employed in all searches

of patient or client files because, even if the professional was the suspect, he or his custodian of records is ethically obligated to assert the confidentiality privilege as to all files that officers intend to read.

As we will now discuss, under the mandated procedure the files must be searched by an independent attorney, called a “special master,” who is trained in determining what materials are privileged. Accordingly, officers will ordinarily utilize the following protocol:

1. **AFFIANT REQUESTS SPECIAL MASTER:** The affiant will state in the affidavit that he believes the search will require the appointment of a special master; e.g., *It appears that the requested search will implicate the confidentiality of privileged communications. Accordingly, pursuant to Penal Code section 1524(c) I request that a special master be appointed to conduct the search.*
2. **SPECIAL MASTER APPOINTED:** If the warrant is issued, the judge will appoint a special master whom the judge will select from a list of qualified attorneys compiled by the State Bar.
3. **SPECIAL MASTER EXECUTES WARRANT:** Officers will accompany the special master to the place to be searched. When practical, the warrant must be executed during regular business hours. Upon arrival, the special master will provide the professional (or custodian of records) with a copy of the warrant so that the professional will know exactly what documents the special master is authorized to seize. The special master must then give the professional an opportunity to voluntarily furnish the described documents. If he fails or refuses, the special master—not the officers—will conduct the search while the officers stand by.
4. **PRIVILEGED DOCUMENTS SEALED:** If the special master finds or is given documents that are described in the warrant, he will determine whether they are confidential. If not confidential, he may give them to the officers. But if they appear to be confidential, or if the professional claims they are, he must (a) seal them (e.g., put them in a sealed container); (b) contact the clerk for the issuing judge and obtain a date and time for a hearing to determine whether any sealed documents are privileged; and (c) notify the professional and the officers of the date, time, and location of the hearing.

Note that if a hearing is scheduled, officers should immediately notify their district attorney’s office or city attorney’s office so that a prosecutor can, if necessary, attend and represent the officers and their interests.

Search Conducted by an Expert

While most searches are conducted by officers, there are situations in which it is impossible or extremely difficult for officers to do so because the evidence is such that it can best be identified by a person with certain expertise. When this happens, the affiant may seek

authorization to have an expert in such matters accompany the officers and conduct the search himself. For example, in *People v. Superior Court (Moore)* officers were investigating an attempted theft of trade secrets from Intel and, in the course of the investigation, they sought a warrant to search a suspect's business for several items that were highly technical in nature; e.g., "magnetic data base tape containing Intel Mask data or facsimile for product No. 2147 4K Ram." The affiant realized that "he could not identify the property due to its technical nature without expert assistance," so he requested such assistance in the affidavit. The request was granted.

As the Court of Appeal explained, when the warrant was executed "none of the officers present actually did any searching, since none of them knew what the items described in the warrant looked like. Rather, at the direction of the officer in charge, they stood and watched while the experts searched"; and when an expert found any of the listed evidence, he would notify the officers who would then seize it. The court summarily ruled that such a procedure was proper.

Note that if the search will be conducted by *officers*, they do not need the authorization to have an expert or other civilian accompany them and watch. And if the civilian sees any seizable property, he will notify the officers who will take it; e.g., burglary victim identifies the stolen property.

Anticipatory Search Warrants

Most search warrants are issued because officers have probable cause to believe that evidence of a crime is presently located in the place to be searched. There is, however, another type of warrant—known as an "anticipatory" or "contingent" warrant—that is issued *before* the evidence has arrived there. Specifically, an anticipatory search warrant may be issued when officers have probable cause to believe that the evidence—although not currently on the premises— will be there when a "triggering event" occurs. In other words, the occurrence of the triggering event demonstrates that the evidence has arrived and, thus, probable cause now exists. As the Fourth Circuit put it, the triggering event "becomes the final piece of evidence needed to establish probable cause."

The courts permit anticipatory warrants because, as the court noted in *U.S. v. Hugoboom*, without them officers "would have to wait until the triggering event occurred; then, if time did not permit a warrant application, they would have to forego a legitimate search, or, more likely, simply conduct the search (justified by exigent circumstances) without any warrant at all."

Although there are no restrictions on the types of evidence that may be sought by means of an anticipatory warrant, most are used in conjunction with controlled deliveries of drugs or other contraband.

As the First Circuit observed, "Anticipatory search warrants are peculiar to property in transit. Such warrants provide a solution to a dilemma that has long vexed law enforcement agencies:

whether, on the one hand, to allow the delivery of contraband to be completed before obtaining a search warrant, thus risking the destruction or disbursement of evidence in the ensuring interval, or, on the other hand, seizing the contraband on its arrival without a warrant, thus risking suppression.’

Procedure

The procedure for obtaining an anticipatory warrant is essentially the same as that for a conventional warrant, except that the affidavit must also contain the following:

1. DESCRIPTION OF TRIGGERING EVENT: The affidavit must contain an “explicit, clear, and narrowly drawn” description of the triggering event; i.e., the description should be “both ascertainable and preordained” so as to “restrict the officers’ discretion in detecting the occurrence of the event to almost ministerial proportions.”
2. TRIGGERING EVENT WILL OCCUR: The affidavit must establish probable cause to believe the triggering event will, in fact, occur; and that it will occur before the warrant expires.
3. PROBABLE CAUSE WILL EXIST: Finally, it must appear from the affidavit that the occurrence of the triggering event will give rise to probable cause to search the premises.

WHERE THE DESCRIPTION MUST APPEAR

Although the United States Supreme Court has ruled that the triggering event need not be described on the face of the warrant, the warrant should at least indicate that the judge determined that it may be executed when the triggering event occurs, and not, as in conventional warrants, on any day before the warrant expires. Consequently, language such as the following should be added to the warrant: *Having determined that probable cause for this search will result when the triggering event described in the supporting affidavit occurs; and, furthermore, that there is probable cause to believe that this triggering event will occur; it is ordered that this warrant shall be executed without undue delay when the triggering event occurs.*

CONTROLLED DELIVERIES

As noted, most of the cases in which anticipatory warrants have been utilized involved controlled deliveries of drugs or other contraband, usually to the suspect’s home. In these situations, the triggering event will commonly consist of delivery of the evidence directly to the suspect’s residence by the Postal Service, a delivery company such as UPS or FedEx, an undercover officer, or an informant under the supervision of officers. Probable cause may also be found when there was strong circumstantial evidence that the contraband would be delivered to the premises; e.g., undercover officers had previously purchased drugs there, or if intercepted contraband consisted of a quantity of drugs that was “too great an amount to be sent on a whim.”

THE “SURE AND IRREVERSIBLE COURSE” RULE

There is one other issue that must be addressed. Some courts have ruled that, when the triggering event is a controlled delivery, it is not sufficient that there is probable cause to believe the triggering event will occur, i.e., that there is a fair probability that the contraband will be taken to the place to be searched. Instead, it must appear that the contraband was on a “sure and irreversible course” to the location. The theoretical justification for this “requirement” is, according to the Seventh Circuit, “to prevent law enforcement authorities or third parties from delivering or causing to be delivered contraband to a residence to create probable cause to search the premises where it otherwise would not exist.”

Based on the complete absence of any proof (or even a suggestion) that anyone had actually engaged in such blatantly illegal conduct, it appears the court’s concern was based on nothing more than its overwrought imagination. Moreover, the “sure course” requirement is plainly contrary to the Supreme Court’s ruling that only probable cause is required; i.e., that grounds for an anticipatory warrant will exist if “it is now probable that contraband, evidence of a crime, or a fugitive will be on the described premises when the warrant is executed.” It is therefore likely that, because the “sure and irreversible course” requirement establishes a standard higher than probable cause, it is a nullity.

Furthermore, there has never been a need for a “sure course” requirement because the cases in which it has been applied to invalidate a search could have been decided without it on grounds that the affidavit simply failed to establish probable cause to believe the evidence would be taken to the place to be searched. In fact, almost all cases in which the courts have invalidated searches based on a “sure course” transgression have involved controlled deliveries in which (1) the evidence was initially delivered to a location other than the suspect’s home (e.g., a post office box), or was intercepted before it reached the suspect’s home; (2) the affidavit failed to establish probable cause to believe it would be taken to the suspect’s home; and (3) there was no independent probable cause linking the suspect’s home to the criminal activity under investigation. Thus, in these cases, the affidavits would have failed irrespective of the “sure course” deficiency because they did not establish probable cause to believe the evidence would be taken to the place to be searched. The case of *U.S. v. Rowland* demonstrates the uselessness of the “sure course” concoction. In *Rowland*, postal inspectors intercepted child pornography that had been mailed to Rowland’s post office box. So they obtained an anticipatory warrant that authorized a search of Rowland’s home when the package was picked up and brought inside. The court ruled, however, that the warrant was invalid, not because of a “sure course” violation, but because the affidavit simply lacked facts that established a fair probability that the evidence would, in fact, be taken to Rowland’s house. As the court pointed out, “The affidavit stated: ‘It is anticipated that [Rowland], after picking up the tapes from the post office box, will go to his place of employment and after work to his residence.’ The affidavit contained no information suggesting that Rowland had previously transported contraband from his private post office box to his home or that he had previously stored

contraband at his home. Nor, did the affidavit provide any facts linking Rowland’s residence to suspected illegal activity.”

Warrants to Search Computers

Although computer searches are notoriously complex, the procedure for obtaining a warrant to search a computer is not much different than any other warrant. In fact, there are only three significant differences: (1) the manner of describing the hardware to be searched and the data to be seized (we covered those subjects in the Spring 2011 edition), (2) obtaining authorization for an off-site search, and (3) incorporating search protocols.

IS AN OFF-SITE SEARCH NECESSARY?

As a practical matter, it will almost always be necessary to conduct a computer search off-site unless officers plan to conduct only a superficial examination; e.g., they will be trying to locate the listed information by conducting a simple word search or merely looking at the names of directories and files. As the federal courts have observed, because it is “no easy task to search a well-laden hard drive,” the “practical realities of computer investigations preclude on-site searches.”

IS OFF-SITE AUTHORIZATION NECESSARY?

Although some courts have ruled that officers do not need express authorization to conduct the search off-site, the better practice is to seek it. This is especially so when, as is usually the case, officers know when they apply for the warrant that an off-site search may be necessary.

HOW TO OBTAIN AUTHORIZATION

To obtain authorization for an off-site search, the affiant must explain why it is necessary. Here’s an example:

Request for Off-Site Search Authorization: For the following reasons, I request authorization to remove the listed computers and computer-related equipment from the premises and search them at a secure location:

- *The amount of data that may be stored digitally is enormous, and I do not know the number or size of the hard drives and removable storage devices on the premises that will have to be searched pursuant to this warrant.*
- *The listed data may be located anywhere on the hard drives and removable storage devices, including hidden files, program files, and “deleted” files that have not been overwritten.*
- *The data may have been encrypted, it may be inaccessible without a password, and it may be protected by self-destruct programming, all of which will take time to detect and bypass.*
- *Because data stored on computers can be easily destroyed or altered, either intentionally or accidentally, the search must be conducted carefully and in a secure environment.*

- *To prevent alteration of data and to ensure the integrity of the search, we plan to make clones of all drives and devices, then search the clones; this, too, will take time and special equipment.*
- *A lengthy search at the scene may pose a severe hardship on all people who [live][work] there, as it would require the presence of law enforcement officers to secure the premises while the search is being conducted.*

The affiant should then add some language to the proposed search warrant that would authorize an off-site search, e.g., *Good cause having been established in the affidavit filed herein, the officers who execute this warrant are authorized to remove the computers and computer-related equipment listed in this warrant and search them at a secure location.*

As a final note, if the warrant was executed within ten days after it was issued, officers do not need specific authorization to continue searching after the warrant expires. Officers must, however, conduct the search diligently.

UTILIZING PROTOCOLS

If officers expect to find seizable files intermingled with non-seizable files, they may—but are not required to—seek authorization to conduct the search pursuant to a protocol. Generally speaking, a protocol sets forth the manner in which the search must be conducted so as to minimize examinations and seizures of files that do not constitute evidence. For example, a protocol might require “an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches.”

Covert Search Warrants

Covert search warrants, commonly known as “sneak and peek” warrants, authorize officers to enter a home or business when no one is present, search for the listed evidence, then depart—taking nothing and, if all goes well, leaving no clue that they were there. Covert warrants are rarely necessary, but they may be useful if officers need to know whether evidence or some other items are on the premises, but the investigation is continuing and they do not want to alert the suspects that investigators are closing in. Covert warrants may also be helpful to identify the co-conspirators in a criminal enterprise before officers start making arrests.

THE “NOTICE” REQUIREMENT

The main objection to covert warrants is that the people whose homes and offices are searched are not immediately notified that a search has occurred. But the United States Supreme Court has described this objection as “frivolous,” pointing out that instant notification is not a constitutional requirement, as demonstrated by the delayed-notice provisions in the federal wiretap law. Still, because notice must be given eventually, some federal courts have required that the occupants of the premise be given notice of the search within seven days of its execution, although extensions may be granted. Note that the Ninth Circuit has ruled that a

judge may authorize a delay of over seven days if the affiant makes a “strong showing of necessity.” While California courts have not yet ruled on the legality of this procedure, it seems to provide a reasonable solution to the notification concerns.

TO OBTAIN AUTHORIZATION

The following procedure, adapted from the federal courts, should suffice to obtain a covert entry warrant in California:

1. **DEMONSTRATE REASONABLE NECESSITY:** In addition to establishing probable cause to search, the affidavit must demonstrate that a covert search is reasonably necessary. Note that reasonable necessity does not exist merely because a covert search would facilitate the investigation or would otherwise be helpful to officers.
2. **ADD SPECIAL INSTRUCTIONS:** Instructions, such as the following, should be added to the warrant: *The evidence described in this warrant shall not be removed from the premises. An inventory of all evidence on the premises shall be prepared to show its location when discovered. Said evidence shall also be photographed or videotaped to show its location. Compliance with the receipt requirement of Penal Code § 1535 is excused until unless an extension is granted by this court. Within two days after this warrant is executed, the following shall be filed with this court: (a) the inventory, and (b) the original or copy of all photographs and/or videotapes.*

Steagald Search Warrants

A *Steagald* warrant is a search warrant that authorizes officers to enter a home, business office, or other structure for the purpose of locating and arresting a person who (1) is the subject of an outstanding arrest warrant, and (2) does not live on the premises. For example, officers would need a *Steagald* warrant to search for the arrestee in the home of a friend or relative. In contrast, only an arrest warrant (a conventional warrant or a *Ramey* warrant) would be necessary to enter the arrestee’s home to make the arrest.

The reason that officers need a *Steagald* warrant (or consent or exigent circumstances) to enter a third person’s home is that, otherwise, the homes of virtually everyone who knows the arrestee would be subject to search at any time until the arrestee was taken into custody.

As we will now discuss, a judge may issue a *Steagald* warrant if the affidavit demonstrates both probable cause to arrest and search.

PROBABLE CAUSE TO ARREST

There are two ways to establish probable cause to arrest:

1. **WARRANT OUTSTANDING:** If a conventional or *Ramey* arrest warrant is outstanding, the affiant can simply attach a copy to the affidavit and incorporate it by reference;

e.g., *Attached hereto and incorporated by reference is a copy of the warrant for the arrest of [name of arrestee]. It is marked Exhibit A.*

2. **PROBABLE CAUSE:** If an arrest warrant has not yet been issued, the affidavit for the *Steagald* warrant must establish probable cause to arrest, as well as probable cause to search. (In such cases, the *Steagald* warrant serves as both an arrest and search warrant.)

PROBABLE CAUSE TO SEARCH

There are two ways to establish probable cause to search.

1. **ARRESTEE IS INSIDE:** Establish probable cause to believe that the arrestee was inside the residence when the warrant was issued and would still be there when the warrant was executed.
2. **ANTICIPATORY SEARCH WARRANT:** Establish a fair probability that the arrestee would be inside the residence when a “triggering event” occurs (e.g., when officers see the arrestee enter), and that there is probable cause to believe the triggering event will occur; e.g., the arrestee has been staying in the house for a few days. The subject of anticipatory search warrants was covered earlier in this article.

Email Search Warrants

While most warrant applications are made by submitting hard copies of the affidavit and warrant to the issuing judge, California law has long permitted officers to seek warrants via telephone and fax. More recently, however, officers were given the added option of obtaining search warrants by email. And because the email procedure is so easy (and the others are so cumbersome), phone and fax warrants are now virtually obsolete.

Before setting forth the email procedure, it is necessary to define two terms that have been added to this area of the law:

Digital signature: The term “digital signature” means “an electronic identifier, created by the computer, intended by the party using it to have the same force and effect as the use of a manual signature.”

Electronic signature: The term “electronic signature” means “an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.”

The following is the procedure established by California statute that officers must implement to obtain a warrant by email:

1. **PREPARE AFFIDAVIT AND WARRANT:** Complete the affidavit and search warrant as an email message or in a word processing file that can be attached to an email message.

2. **PHONE JUDGE:** Notify the on-call judge that an affidavit and search warrant has been prepared for immediate transmission by email.
3. **OATH:** Before the documents are transmitted, the judge administers the oath to the affiant over the telephone.
4. **AFFIANT SIGNS:** Having been sworn, the affiant signs the affidavit via digital or electronic signature.
5. **AFFIANT TRANSMITS DOCUMENTS:** After confirming the judge’s email address, the affiant sends the following by email: (a) the affidavit (including any attachments), and (b) the warrant.
6. **CONFIRMATION:** The judge confirms that all documents were received and are legible. Missing or illegible documents must be re-transmitted. Affiant confirms that the digital or electronic signature on the affidavit is his.
7. **JUDGE READS AFFIDAVIT:** The judge determines whether the facts contained in the affidavit and any attachments constitute probable cause.
8. **JUDGE ISSUES WARRANT:** If the judge determines that probable cause to search exists, he or she will do the following: (a) Sign the warrant digitally or electronically; (b) note the following on the warrant: (i) the date and time it was signed, and (ii) that the affiant’s oath was administered over the telephone; and (c) email the signed warrant to the affiant.
9. **AFFIANT ACKNOWLEDGES RECEIPT:** The affiant acknowledges that he received the warrant.
10. **AFFIANT PRINTS HARD COPY:** The affiant prints a hard copy of the warrant.
11. **DUPLICATE ORIGINAL CREATED:** The judge instructs the affiant over the telephone to write the words “duplicate original” on the hard copy.
12. **PROCESS COMPLETE:** The duplicate original is a lawful search warrant.

Warrant Reissuance

A warrant is void if not executed within ten days after it was issued. If the warrant becomes void, a judge cannot simply authorize an extension; instead, the affiant must apply for a new warrant, which includes submitting a new affidavit. The required procedure is, however, relatively simple.

Specifically, if the information in the original affidavit is still accurate, the affiant can incorporate the original affidavit by reference into the new one—but he must explain why he believes the information is still

correct; e.g., *Affidavit for Reissuance of Search Warrant: On [insert date of the first warrant] a*

warrant (hereinafter Warrant Number One) was issued by [insert name of the judge who issued it] authorizing a search of [insert a place to be searched]. A copy of the affidavit upon which Warrant Number One was based is attached hereto, incorporated by reference, and marked "Exhibit A". For the following reasons, Warrant Number One was not executed within 10 days of issuance: [Explain reasons]. I am not aware of any information contained in Exhibit A that is no longer accurate or current. Consequently, I believe that the evidence listed in Warrant Number One is still located at the place to be searched, and I am hereby applying for a second search warrant identical in all material respects to Warrant Number One. I declare under penalty of perjury that the foregoing is true and correct.

If any information in the original affidavit is no longer accurate, it must be deleted. If there have been new developments or circumstances that may have undermined the existence of probable cause, the additional information must be included in the new affidavit. If new developments have strengthened probable cause, officers should ordinarily include them in the new affidavit.

Other Special Procedures

RELEASING SEIZED EVIDENCE

When officers seize evidence pursuant to a search warrant, the evidence is technically in the custody and control of the judge who issued the warrant. Consequently, the officers cannot transfer possession of the evidence to officers from another agency or any other person unless they have obtained a court order to do so. (We have posted such a court order on our website.) If, however, the property was seized by mistake, officers do not need court authorization to return it to the owner.

INSPECTION OF DOCUMENTS BY OTHER AGENCY

If officers from another agency want to make copies of documents seized pursuant to a warrant, they should seek an "Order to Examine and Copy Documents Seized by Search Warrant." (We have also posted a form for this purpose on our website.) This order should be supported by an affidavit establishing probable cause to believe the documents are evidence of a crime that the outside agency is investigating. The order should, if possible, be issued by the judge who issued the warrant.

SUBPOENA DUCES TECUM

Officers have occasionally asked whether they can obtain evidence by means of a subpoena duces tecum instead of a search warrant. Although the subpoena procedure may be quicker, a subpoena duces tecum is not a practical alternative for the following reasons. First, unless the subpoena is issued in conjunction with a criminal investigation conducted by a grand jury, it may be issued only if (1) the defendant had already been charged with the crime under

investigation, and (2) the officers are seeking evidence pertaining to that crime. Second, a person who is served with a subpoena must deliver the documents to the court, not to officers.

5.3 SEARCHES WITHOUT WARRANTS^{XXV}

There are also times in which law enforcement may conduct searches for evidence/property without a warrant. Certain circumstances arise in police work that allows officers to conduct searches. In this section, we are going to examine the conditions that allow police to search without a warrant.

Consent Searches

Government officials may conduct a search without a warrant or probable cause based upon an individual's consent, so long as that consent (1) was voluntary and (2) came from someone authorized to give it. Any evidence discovered during a lawful consent search may be seized and admitted at trial. Consent may be express or implied and need not be knowing and intelligent, even though it constitutes a waiver of Fourth Amendment rights.

To determine whether consent was given voluntarily, courts examine the totality of the circumstances. Factors that weigh on the court's determination of voluntariness include: (1) the consenting individual's knowledge of the constitutional right to refuse consent; (2) the consenting individual's age, intelligence, education, and language ability; (3) the degree to which the consenting individual cooperates with the police; (4) the consenting individual's attitude about the likelihood of the discovery of contraband; and (5) the length of detention and the nature of questioning, including police threat of physical punishment or other coercive behavior.

No single factor is dispositive. Moreover, the influence of drugs, intoxication, and mental agitation does not automatically render consent involuntary. Additionally, persons in lawfully detained vehicles do not have to be advised that they are free to leave before giving voluntary consent. The prosecution bears the burden of proving voluntary consent. Whether consent was voluntary is a question of fact reviewed under a clearly erroneous standard.

Consent is not voluntary if given only in acquiescence to a claim of lawful authority. Therefore, a search may not be justified based on consent given only after the official conducting the search asserts possession of a warrant or the possibility of obtaining a warrant if necessary. In addition, consent cannot justify a search conducted in reliance upon a warrant if a court subsequently determines that the warrant was invalid.

Consent to search is generally invalid if an illegal search or seizure occurred before consent was given. If, however, consent to search is given under conditions sufficiently attenuated from an illegal arrest or search, evidence discovered during the subsequent search will not be suppressed.

In addition, to express consent, consent may be implied by the circumstances surrounding the search, the person's prior actions or agreements, or the person's failure to object to the search.

Generally, anyone who has a reasonable expectation of privacy in the place or effects being searched can consent to a warrantless search, and any person with common authority over or other sufficient relationship to the place or effects being searched can give valid consent. However, if two residents are present during the search of their dwelling and one expressly denies consent, the other's consent is not valid. Courts recognize common authority to consent in each person whose mutual use of the property demonstrates “joint access or control for most purposes.” The law presumes that other users of the property assume the risk that areas under common control may be searched. The prosecution bears the burden of establishing that common authority exists.

Moreover, a warrantless search is valid when law enforcement personnel rely on a person's “apparent authority” to consent to the search if the reliance is in good faith and is reasonable based on all facts known by police at the time of the search. Some courts have held that even if a third party is acting as an informant or other agent of the government, that person may still consent to a warrantless search if otherwise empowered to consent.

The scope of a consent search may not exceed the scope of the consent given. The scope of consent is determined by asking how a reasonable person would have understood the conversation between the officer and the suspect or third party when consent was given. Generally, the express object of a search defines the scope of consent, unless the suspect or third party giving consent expressly limits its scope.

Consent to search may be revoked if a person effectively withdraws consent before the search is completed, and police may not continue searching based on prior consent.

Searches Incident to Arrest^{xxvi}

When conducted incident to a lawful custodial arrest, a full search of the arrestee's person for both weapons and evidence is permitted. In addition, police may search containers and other items found on the arrestee's person and any items or areas within the person's immediate control at the time of the arrest. However, the search of the arrestee's person may not be unreasonably intrusive.

When police make a valid arrest of a recent occupant of a vehicle, police may search the passenger compartment of the vehicle only (1) “when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle” or (2) “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” Authorization to search a vehicle's passenger compartment also extends to any containers found therein.

Although police must conduct searches incident to arrest reasonably promptly, a substantial delay may be appropriate based on the circumstances surrounding a particular arrest. Searches incident to arrest conducted immediately before formal arrest are valid only if probable cause to arrest existed prior to the search. If the probable cause to arrest derives from a warrantless search, then the search is not justifiable as a search incident to arrest.

In general, an arrest does not justify a search of the arrestee's entire home. In *Maryland v. Buie*, however, the Supreme Court held that officers may conduct a limited protective sweep of “closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” This sweep may extend to a non-adjoining area only if officers have a “reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” The protective sweep may only entail a cursory inspection of those spaces in which a person may be found and cannot last longer than is reasonably necessary to dispel suspicion of danger.

Exigent Circumstances

Government agents may conduct a warrantless search or seizure if (1) probable cause supports the search or seizure and (2) “exigent circumstances” exist. Exigent circumstances include imminent destruction of evidence, a threat to the safety of law enforcement officers or the general public, “hot pursuit” of a suspect by police, or the likelihood that a suspect will flee before the officer can obtain a warrant.

Conducting a warrantless search or seizure to preserve evidence is justified if the police reasonably believe that unless they immediately conduct a warrantless search, the evidence is in imminent danger of being removed or destroyed. Because narcotics can be destroyed easily, criminal investigations involving narcotics often result in warrantless searches or seizures based on exigent circumstances. If exigent circumstances do not compel an immediate warrantless search, police may secure a residence to prevent the destruction or removal of evidence before obtaining a search warrant.

If police reasonably believe that their safety or the safety of others—including that of a suspect—is threatened, they may enter a dwelling and conduct a full warrantless search. In the course of such a search, police are restricted to places where they reasonably believe inherently dangerous items are present. The police may also search a residence in which a violent crime has occurred if they reasonably believe victims or dangerous persons are present. Other dangers to the public may also constitute exigent circumstances. For example, a burning building or an imminent fire hazard may justify a warrantless entry into that building to extinguish the fire or eliminate the hazard. Officials at the scene of a fire or explosion do not need a warrant to remain in the building for a reasonable time after the fire has been extinguished to investigate the cause, to search for victims, or to prevent further damage. However, once the cause has been established, officials must secure a warrant to conduct a further search for evidence.

Warrantless searches may also be justified by the exigency of hot pursuit if the pursuing officers have probable cause to arrest the fleeing suspect. The Supreme Court has stated that “hot pursuit” means some sort of a chase, but it need not be an extended hue and cry “in and about [the] public streets.” The hot pursuit justification for a search is not valid unless officers make an immediate and continuous pursuit of the suspect from the crime scene. The scope of a search justified by hot pursuit is only as broad as necessary to prevent the suspect from resisting arrest or escaping.

A warrantless entry or arrest may be justified if the police have reason to believe that a suspect will flee before they can obtain a warrant. The permissible scope of such a search is only as broad as necessary to prevent the suspect from resisting arrest or escaping. Beyond the specific examples of exigent circumstances listed above, courts will consider several factors in deciding whether an exigent-circumstances search or seizure was proper. First, courts may consider the gravity of the offense that prompts a search or seizure. Second, police must demonstrate that the search was conducted in a reasonable manner, which requires a showing that a telephone warrant was unavailable or impractical for the searching officers. Third, the police may not engage or threaten to engage in conduct that violates the Fourth Amendment to create an exigency and subsequently use that exigency to justify a warrantless search or seizure. However, police generally do not have a duty to alleviate potential exigencies.

In determining whether exigent circumstances justify a warrantless entry, courts examine the totality of circumstances during the period immediately preceding the search.

Plain-View and Open Field

In certain situations, police may seize evidence that is in plain view without a warrant. First, the police must not “violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.” Thus, police may lawfully seize evidence in plain view when executing a search warrant or arrest warrant and when conducting a lawful warrantless search. Second, the incriminating character of the evidence seized must be immediately apparent, and police may not disturb or further investigate an item to discern its evidentiary value without probable cause. To establish probable cause, however, police may lawfully engage in investigatory action not considered a search under the Fourth Amendment.

Warrantless seizures of evidence based on the plain view doctrine may be valid even if the officers expected to find the seized evidence. The plain view doctrine also permits police to seize a container if its incriminating character is immediately apparent, and police may search inside the container if its contents are in plain view. In *Minnesota v. Dickerson*, the Court expanded the plain view doctrine to include a “plain touch” corollary. Several courts have also adopted “plain smell” and “plain hearing” corollaries.

Vehicle Searches^{xxvii}

Most of the exceptions to the warrant requirement above do not, for one reason or another, require probable cause. An **automobile search** is an interesting hybrid because it does require probable cause to obtain a warrant, even though the officer is not obligated to actually obtain the warrant. The court allows this compromise because of the inherent mobility of vehicles. The criminal suspect could simply drive away from the officer and was required to leave the scene and go obtain a warrant. Merely citing the driver for a traffic violation, however, is not sufficient to establish probable cause for a lawful search.

To preserve evidence and to protect officers from hidden weapons, officers are allowed to search a person after they have been arrested. Such a search is known as a *search incident to arrest*. As an extension of this idea, the officer may search the area immediately surrounding the arrested person. That is the area immediately under the arrestee's control. The Court has ruled the fact that the suspect is in handcuffs and could not reach for a weapon is immaterial.



CHAPTER 6: DEFINING SEARCH WARRANTS AND THE EXCLUSIONARY RULE^{xxviii}

OVERVIEW

This chapter focuses on the search warrant procedure and what can happen if a warrant is not conducted properly. Proper criminal investigation and the ability to obtain evidence are vital to ensure the proper person is arrested, tried in a court of law, and convicted. However, this could be jeopardized if the proper search and seizure procedures are not followed. While search warrants initially may seem like a straightforward process, this chapter will show there are many requirements to properly obtaining a search warrant collect evidence. If not followed properly, evidence obtained illegally (or in violation of the policies) could result in the evidence being excluded from trial. Even if that evidence is conclusive evidence of guilt. Additionally, the advancement of technology has impacted the search warrant process. As you will see, a citizen's expectation of privacy guides many of the search warrant procedures. By the end of this chapter, you should be able to identify the rules in obtaining a search warrant, how technological advancements have changed and shaped the search warrant process, the court cases that guide the search warrant process, what can occur if evidence is obtained improperly and the situations where evidence can be seized without a warrant.

OBJECTIVES

- Identify the purpose of the 4th Amendment and protections from unlawful searches.
- Identify the exceptions to obtaining a search warrant.
- Explain the history and evolution of the 4th Amendment and the search warrant process.
- Identify the important Supreme Court cases that guide search warrant procedure.
- Explain what happens to the evidence if a search warrant is not served properly or evidence is collected without a warrant or a legal exception.
- Explain what a consent search is and how to ensure consent is not coerced.

KEY TERMS

Searches, seizures, search warrant, consent, reasonable expectation of privacy, probable cause, exclusionary rule, “fruit of the poisonous tree,” “good faith exception,” inevitable discovery,

right to privacy, Foreign Intelligence Surveillance Act of 1978 (FISA), Electronic Communications Privacy Act of 1986 (ECPA), Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, independent source doctrine, attenuation doctrine, evidence admissible for impeachment, qualified immunity, “reasonable man,” reasonable expectation of privacy, consent searches

CRITICAL THINKING

1. To what extent should constitutional standards governing searches in private spaces, such as our homes, as opposed to searches in public settings, such as airports, differ under the Fourth Amendment? Why? How should distinctions between private and public spaces be defined?
2. The founders of our country could never envision the world we live in today and the technological advancements which exist today. After reviewing the history and development of the 4th amendment, identify how technology has impacted the right to privacy and police searches.
3. Exclusionary Rule Questions: As we learned in this section, if evidence is obtained improperly, it will be excluded from trial. Unless the attorney provides an exception to the rule. In the following scenarios, identify if the evidence will be allowed into court or not, and why. Identify the exception to the exclusionary rule.
 - a. EXAMPLE (1): The police illegally search D’s car and find drugs. Are the drugs admissible into evidence?
 - b. EXAMPLE (2): The police conduct an illegal search of D’s home and find a map showing the location of a well-hidden, remotely located outdoor marijuana field. The police go to the field and seize the marijuana. Is the evidence admissible?
 - c. EXAMPLE (3): The police conduct an illegal search of D’s home and find a map showing the location of an outdoor marijuana field located 50 feet behind the loading dock of a busy commercial strip. The police go to the field and seize the marijuana.
 - d. EXAMPLE (4): Officer Brady illegally searches Donald’s barn and discovers documents identifying Donald as the culprit behind an internet scam. The next day a confidential informant e-mails Officer Brady the same documents.
 - e. EXAMPLE (5): The police perform an illegal search of Fred’s residence and discover stolen goods. On the counter they find a notepad on which Fred wrote the following: Reminder - place newspaper ad “Computer stuff for sale; cheap and hot! Call Fred 555-1234.” Based on this, the police call the number and that leads them to more evidence against Fred.
 - f. EXAMPLE (6): Officer Careful executes a search in accordance with a search warrant obtained from Judge Hatchet. Unknown to Officer Careful, Judge Hatchet issued the warrant after an incorrect finding of probable cause.

- g. EXAMPLE (7): Judge E. Doe issues a warrant based on Officer Ellay's sworn testimony that he saw Al Bronco removing stolen shoes from his trunk and carrying them into his home in Big Town, California. The warrant is made out for "that property owned by Mr. Al Bronco in Big Town, California." Unbeknownst to Judge E. Doe, Al owns several houses in Big Town, one in which his mother lives and the others which he rents out. Officer Ellay is aware of this and executes the search of the intended home.

Answers:

- a. Example (1) – No. The drugs will be excluded as evidence in the case against D in accordance with the Exclusionary Rule.
 - b. Example (2) – No. Under the doctrine of "fruit of the poisonous tree," the marijuana will be excluded as evidence in the case against D as it stemmed directly from an illegal search.
 - c. Example (3) – Yes, the marijuana may be admitted as evidence by a court. Although the police were led to the field by information discovered during an illegal search, a court could find that discovery was inevitable, given the field's proximity to heavily used areas and the fact that the field was not well hidden. If discovery of the evidence was "inevitable", the evidence may be admitted, as it was not then the illegal search that caused the evidence to be found. "Inevitable" is a strong word, and to admit evidence under this exception, a court must find that police would have discovered the evidence whether or not they conducted the unreasonable search.
 - d. Example (4) - Yes, the documents are admissible. The documents are admissible as evidence because there was an independent source for the evidence besides the illegal search. If the police had an independent source of knowledge of the evidence aside from the fruits of the illegal search, then the doctrine will not exclude the discovered evidence.
 - e. Example (5) – No. The discovery was not inevitable as the ad never ran. It can not be used because there was no independent source of knowledge, and it was not "inevitable" discovery. The evidence will be excluded.
 - f. Example (6) – Yes, the evidence is admissible. "Good Faith Exception." Although the search was illegal, the evidence is not tainted and does not fall under the Exclusionary Rule because Officer Careful acted in good faith upon the Judge's finding. If otherwise relevant and admissible, the evidence may be considered.
 - g. Example (7) No. Because the warrant is not "precise on its face," Officer Ellay's search cannot be said to be in good faith and this exception to the Exclusionary Rule will not apply. Any evidence discovered from the search or stemming there from will be excluded.
4. In its 1979 decision in *Smith v. Maryland*, the Supreme Court ruled in favor of the government, observing that "this Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third

parties.” The Smith ruling also made reference to another Fourth Amendment case decided three years earlier, *United States v. Miller*, that involved warrantless government access of a suspect’s bank records. In *Miller*, the Supreme Court had also found in favor of the government. Considering social media, if a suspect puts information about a crime on Facebook, does the officer need a search warrant to admit the information as evidence in a trial? Why or why not?

5. Imagine this scenario: You’re driving home. Police pull you over, allegedly for a traffic violation. After you provide your license and registration, the officer catches you off guard by asking: “Since you’ve got nothing to hide, you don’t mind unlocking your phone for me, do you?” Of course, you don’t want the officer to copy or rummage through all the private information on your phone. But they’ve got a badge and a gun, and you just want to go home. You comply. As he starts scrolling through your phone, he finds something interesting and says “what is this?” You immediately say give me my phone back, you can’t look at my phone anymore!” The officer arrests you and you are charged with a misdemeanor. In court, your attorney argues the evidence was illegally obtained and should be excluded. Why?

6.1 THE PURPOSE OF THE 4TH AMENDMENT

The Fourth Amendment sits at the boundary between general individual freedoms and the rights of those suspected of crimes. We saw earlier that perhaps it reflects James Madison’s broader concern about establishing an expectation of privacy from government intrusion at home. Another way to think of the Fourth Amendment is that it protects us from overzealous efforts by law enforcement to root out crime by ensuring that police have good reason before they intrude on people’s lives with criminal investigations.

The text of the Fourth Amendment is as follows:

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

The amendment places limits on both *searches* and *seizures*: Searches are efforts to locate documents and contraband. Seizures are the taking of these items by the government for use as evidence in a criminal prosecution (or, in the case of a person, the detention or taking of the person into custody).

In either case, the amendment indicates that government officials are required to apply for and receive a search warrant prior to a search or seizure; this warrant is a legal document, signed by a judge, allowing police to search and/or seize persons or property. Since the 1960s, however, the Supreme Court has issued a series of rulings limiting the warrant requirement in situations where a person can be said to lack a “reasonable expectation of privacy” outside the home.

Police can also search and/or seize people or property without a warrant if the owner or renter consents to the search, if there is a reasonable expectation that evidence may be destroyed or tampered with before a warrant can be issued (i.e., exigent circumstances), or if the items in question are in plain view of government officials.

Furthermore, the courts have found that police do not generally need the warrant to search the passenger compartment of a car or to search people entering the United States from another country.



Figure 5.1. State police officer conducting traffic stop near Walla Walla, WA.³



The Verdict: *Arizona v. Gant*

Learn more about the importance of this decision by reading about the [*Arizona v. Gant*](#), 556 U.S. 332 (2009) case.



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³ This [image](#) is licensed under [CC-BY 4.0](#)

When a warrant is needed, law enforcement officers do not need enough evidence to secure a conviction, but they must demonstrate to a judge that there is probable cause to believe a crime has been committed or evidence will be found. Probable cause is the legal standard for determining whether a search or seizure is constitutional or a crime has been committed; it is a lower threshold than the standard of proof at a criminal trial.

Critics have argued that this requirement is not very meaningful because law enforcement officers are almost always able to get a search warrant when they request one; on the other hand, since we wouldn't expect the police to waste their time or a judge's time trying to get search warrants that are unlikely to be granted, perhaps the high rate at which they get them should not be so surprising.

What happens if the police conduct an illegal search or seizure without a warrant and find evidence of a crime? In the 1961 Supreme Court case *Mapp v. Ohio*, the court decided that evidence obtained without a warrant that didn't fall under one of the exceptions mentioned above could not be used as evidence in a state criminal trial, giving rise to the broad application of what is known as the exclusionary rule, which was first established in 1914 on a federal level in *Weeks v. United States*.



The Verdict: *Mapp v. Ohio*

Watch this video to learn more about the landmark court cases related to the exclusionary rule: [Mapp v. Ohio and Weeks v. United States](#).



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The exclusionary rule doesn't just apply to evidence found or to items or people seized without a warrant (or falling under an exception noted above); it also applies to any evidence developed or discovered as a result of the illegal search or seizure.

For example, if the police search your home without a warrant, find bank statements showing large cash deposits on a regular basis, and discover you are engaged in some other crime in which they were previously unaware (e.g., blackmail, drugs, or prostitution), not only can they not use the bank statements as evidence of criminal activity—they also can't prosecute you for the crimes they discovered during the illegal search. This extension of the exclusionary rule is

sometimes called the “fruit of the poisonous tree,” because just as the metaphorical tree (i.e., the original search or seizure) is poisoned, so is anything that grows out of it.



The Verdict: *Silverthorne Lumber Co. v. United States*
Watch this video to learn more about the landmark court case, [Silverthorne Lumber Co. v. United States](#).



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However, like the requirement for a search warrant, the exclusionary rule does have exceptions. The courts have allowed evidence to be used that was obtained without the necessary legal procedures in circumstances where police executed warrants they believed were correctly granted but in fact were not (“good faith” exception), and when the evidence would have been found anyway had they followed the law (“inevitable discovery”).

The requirement of probable cause also applies to arrest warrants. A person cannot generally be detained by police or taken into custody without a warrant, although most states allow police to arrest someone suspected of a felony crime without a warrant so long as probable cause exists, and police can arrest people for minor crimes or misdemeanors they have witnessed themselves.

6.2 HISTORY AND EVOLUTION OF THE 4TH AMENDMENT^{xxix}



Pin It! *Search and Seizure*
Learn more about search and seizure in this video: [search and seizure](#).



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As we will see throughout this course, the Constitution has set the foundations of our rights, but it is case law that helps define the meaning and application of these rights. The 4th amendment is no different. It is important to understand the foundation and structure and then examine the case law which has shaped the 4th amendment over time. There are several cases and legislation that have had a serious impact on the interpretation and application of the 4th amendment over time. This section will review the case law decisions and legislation that have allowed the 4th amendment to grow and evolve.



Pin It! *Fourth Amendment: Exceptions to the Warrant Requirement*

In these two videos, learn more about the fourth amendment and exceptions to the requirement for warrants.

- [fourth amendment \(part i\)](#)



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- [fourth amendment \(part ii\)](#)



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History^{xxx}

The history of privacy rights in the United States begins with the ratification of the Bill of Rights in 1791. An effort spearheaded by James Madison, the passage of the Bill of Rights offered new protections for the American people from overreach by the newly formed (and much more centralized) federal government. It included specific guarantees of personal freedoms and rights and placed clear limitations on the federal government's power. One such protective amendment, and the one this analysis will focus on, is the Fourth Amendment. In general, the Fourth Amendment prohibits unreasonable and unwarranted searches and seizures so common in the Colonies under British dominion. It also protects against arbitrary arrests and is the basis of American law regarding search warrants, stop-and-frisk, safety inspections, and wiretaps, and other forms of surveillance.

Originally, the Fourth Amendment enforced the notion that "each man's home is his castle," secure from unreasonable searches and seizures of property by the government. But over the course of American history, the Supreme Court has delivered several rulings that have transformed the meaning of the Fourth Amendment to apply to modern technology available to law enforcement and the federal government. In these cases, it has generally been decided by the Court that an officer or agency must demonstrate to a judge that there exists "probable cause" to search or seize property and can only engage in that search or seizure upon attaining a warrant. According to the Legal Information Institute at Cornell University Law School, probable cause exists when there is "a reasonable basis for believing that a crime may have been committed (for an arrest) or when evidence of the crime is present in the place to be searched (for a search)." However, cases of "exigent circumstances" (circumstances in which a law enforcement officer has probable cause but no sufficient time to secure a warrant) may justify a warrantless search or seizure. Probable cause was enshrined in judicial doctrine in 1983 in *Illinois v. Gates*, 462 U.S. 213 in which the Court viewed it as a "practical, non-technical" judgment that calls upon the "factual and practical considerations of everyday life on which reasonable and prudent men act."

For acting as the Amendment that safeguards Americans' privacy, something is notably lacking from the text of the Fourth Amendment: the word "privacy" is never mentioned. In fact, nowhere in the Bill of Rights, or anywhere in the Constitution, is a discussion of privacy or privacy rights present. The first real mention of a fundamental "right to privacy" in the American legal community is in an article published in the Harvard Law Review in 1890 by Samuel Warren and Louis Brandeis entitled "The Right to Privacy." In it, Warren and Brandeis argue for what they call "the right to be let alone,"⁵ and argue for the existence of the fundamental principle that "the individual shall have full protection in person and in property."

The next chapter in the history of American privacy rights comes from the Supreme Court in the case *Olmstead v. United States*, 277 U.S. 438 (1928). New technology had brought about new questions regarding citizens' privacy, the meaning of probable cause, and the right of government agencies to access citizens' information. The plaintiff in the case, Roy Olmstead, was a suspected bootlegger. Without judicial approval, federal agents installed wiretaps in the basement of Olmstead's building and in the streets near his home. Olmstead was convicted with evidence obtained from the wiretaps. Olmstead petitioned, and his case eventually reached the Supreme Court. The question before the Court was: did the use of evidence disclosed in wiretapped private telephone conversations violate the recorded party's Fourth Amendment rights? In a 5-4 decision, the Court ruled against Olmstead. In the majority opinion, Justice William Howard Taft wrote:

[The Fourth Amendment] does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

The Supreme Court understood privacy violations as physical intrusions, and because the evidence obtained was provided by devices installed outside of Olmstead's home, it did not involve a physical trespass onto Olmstead's property. As the Olmstead case demonstrated, focusing on physical intrusions was an outmoded way to determine the scope of Fourth Amendment protection. Unless the Court modernized its test for determining when the Fourth Amendment would apply, it would become effectively obsolete. This modernization finally came forty years later, in *Katz v. United States*, 389 U.S. 347 (1967).

Acting on a suspicion that Katz was transmitting gambling information over the phone to clients in other states, federal agents installed an eavesdropping device in a public phone booth used by Katz. Based on recordings of his end of the conversations, Katz was convicted. On appeal, Katz argued that the recordings could not be used as evidence against him. The question before the Court was: does the Fourth Amendment protection against unreasonable search and seizures require the police to obtain a search warrant in order to wiretap a public payphone? In a 7-1 decision that overturned the Olmstead ruling, the Court ruled that Katz was entitled to Fourth Amendment protection for his conversations and that a physical intrusion into the area he occupied was unnecessary to bring the Amendment into play. In the majority opinion, Justice Potter Stewart outlined the dramatic shift in the judicial doctrine concerning privacy:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposed to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.⁹

In a concurring opinion, Justice John Marshall Harlan explained that the Fourth Amendment should apply whenever a person exhibits an “actual (subjective) expectation of privacy” that “society is prepared to recognize as ‘reasonable.’” The “reasonable expectation” that Justice Harlan mentioned gave birth to the “reasonable expectation of privacy test,” which protects people from warrantless searches of places or seizures of objects that have a subjective expectation of privacy that is deemed reasonable in public norms. With one decision, the Court had successfully incorporated the right to privacy, previously a theoretical right, into American law. It took nearly eight decades, but the fundamental “right to be let alone” discussed by Brandeis and Warren in 1890 had finally been made law.

With the right to privacy now enshrined in the courts, it was time for the legislature to act. With technology rapidly changing, it soon became clear that the next arena of privacy rights litigation would involve electronic information. The legislature passed two bills in the twentieth century that further regulated the federal government’s ability to surveil its civilians. These were the Foreign Intelligence Surveillance Act of 1978 (FISA) and the Electronic Communications Privacy Act of 1986 (ECPA). Both FISA and the ECPA were meant to update surveillance laws with new technology in mind but were drafted in the years just prior to the internet age. The advent of the internet and a new interconnected, global society rendered many of the provisions of these acts obsolete. The Patriot Act of 2001 took advantage of these discrepancies, as will be discussed later.

The first act of Congress to address citizens’ electronic right to privacy was FISA, passed after two congressional investigations found that the executive branch had consistently abused its power and conducted domestic electronic surveillance unilaterally against journalists, civil rights activists, members of Congress, and others in the name of national security. Mindful of the threat unchecked electronic surveillance posed to Americans’ privacy, Congress strictly limited FISA’s scope so that it could only be used if the “primary purpose” of government surveillance of Americans was the gathering of foreign intelligence.

After the 9/11 attacks, the state of citizens’ electronic privacy changed tremendously. With both a judicial as well as a legislative conception of privacy rights in mind, I will now begin a discussion regarding how the Patriot Act updated, and in some ways rolled back, protections of citizens’ electronic privacy.

H.R. 3126: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 was signed into law by President George W. Bush on October 26th, 2001, just forty-five days after the Twin Towers fell. The final preamble of the bill reads as follows:

An Act to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.

The Act gave law enforcement permission to search a home or business without the owner's or the occupant's consent or knowledge, expanded the powers of the Federal Bureau of Investigation (FBI) to search telephone, email, and financial records without a court order, and, perhaps most notably, granted immense freedom to the National Security Agency (NSA) to collect domestic and international communications of Americans without a warrant based on probable cause. The Act also greatly expanded and altered the provisions of both the ECPA and FISA, the two greatest legislative protections for Americans' electronic privacy.

The history of privacy rights in America is a rich and complex one, ebbing and flowing with monumental historical events. Though the "right to privacy" did not make it into the Constitution verbatim, the Framers sowed the seeds of this right in their protection from unreasonable searches and seizures present in the Fourth Amendment. Through the legal genius of Justice Brandeis, this now-fundamental right transformed from a legal theory published in a Harvard Law Review article to a fully incorporated and enforceable civil liberty in Katz. The twentieth century posed new challenges and questions regarding privacy in an increasingly electronic world, and the legislature did its duty by updating laws to meet the standards of judicial doctrine. In the face of new threats, most notably the scourge of global terrorism, the legislature again acted by passing the Patriot Act. In doing so, it passed legislation that, in some cases, lacked clear constitutional grounds. Though Congress may have had Americans' best interest in mind, we have seen the Act come under fire from both sides of the aisle, and some provisions of the Act go contrary to the rulings of the Court. The story of privacy rights in America is not unique, but it does show both the beauty and the danger of the American federal system. At its best, the legislature and the judiciary work in tandem, ensuring security but never compromising liberty; however, as we have seen with the Patriot Act, the two branches are no strangers to conflict.

6.3 THE EXCLUSIONARY RULE AND THE EXCEPTIONS^{xxx}

Overview*

(*We will go into greater depth on the Exclusionary Rule in future modules)

The exclusionary rule prevents the government from using most evidence gathered in violation of the United States Constitution. The decision in *Mapp v. Ohio* established that the exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment. The decision in *Miranda v. Arizona* established that the exclusionary rule applies to improperly elicited self-incriminatory statements gathered in violation of the Fifth Amendment and to evidence gained in situations where the government violated the

defendant's Sixth Amendment right to counsel. However, the rule does not apply in civil cases, including deportation hearings. See *INS v. Lopez-Mendoza*.

Derivatives of Excluded Evidence

If evidence that falls within the scope of the exclusionary rule led law enforcement to other evidence, which they would not otherwise have located, then the exclusionary rule applies to the newly discovered evidence, subject to a few exceptions. The secondarily excluded evidence is called the “fruit of the poisonous tree.”

Though the rationale behind the exclusionary rule is based on constitutional rights, it is a court-created remedy and deterrent, not an independent constitutional right. The purpose of the rule is to deter law enforcement officers from conducting searches or seizures in violation of the Fourth Amendment and to provide remedies to defendants whose rights have been infringed. Courts have also carved out several exceptions to the exclusionary rule where the costs of exclusion outweigh its deterrent or remedial benefits. For example, the good-faith exception, below, does not trigger the rule because excluding the evidence would not deter police officers from violating the law in the future.

Good Faith Exception

Under the good-faith exception, evidence is not excluded if it is obtained by officers who reasonably rely on a search warrant that turns out to be invalid. See *Arizona v. Evans*. Also, in *Davis v. U.S.*, the U.S. Supreme Court ruled that the exclusionary rule does not apply when the police conduct a search in reliance on binding appellate precedent allowing the search. Under *Illinois v. Krull*, evidence may be admissible if the officers rely on a statute that is later invalidated. In *Herring v. U.S.*, the Court found that the good-faith exception to the exclusionary rule applies when police employees erred in maintaining records in a warrant database.

Independent Source Doctrine

Evidence initially obtained during an unlawful search or seizure may later be admissible if the evidence is later obtained through a constitutionally valid search or seizure. *Murray v. U.S.* is the modern interpretation of the independent source doctrine, originally adopted in *Nix v. Williams*. Additionally, some courts recognize an “expanded” doctrine, in which a partially tainted warrant is upheld if, after excluding the tainted information that leads to its issuance, the remaining untainted information establishes probable cause sufficient to justify its issuance. See, for example, the South Dakota Supreme Court decision in *State v. Boll*.

Inevitable Discovery Doctrine

Related to the independent source doctrine, above, and also adopted in *Nix v. Williams*, the inevitable discovery doctrine allows admission of evidence that was discovered in an unlawful search or seizure if it would have been discovered in the same condition anyway, by an independent line of investigation that was already being pursued when the unlawful search or seizure occurred.

Attenuation Doctrine

In cases where the relationship between the evidence challenged and the unconstitutional conduct is too remote and attenuated, the evidence may be admissible. See *Utah v. Strieff*. *Brown v. Illinois*, cited in *Strieff*, articulated three factors for the courts to consider when determining attenuation: temporal proximity, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.

Evidence Admissible for Impeachment

The exclusionary rule does not prevent the government from introducing illegally gathered evidence to “impeach,” or attack the credibility of, defendants’ testimony at trial. The Supreme Court recognized this exception in *Harris v. New York* as a truth-testing device to prevent perjury. Even when the government suspects perjury, however, it may only use tainted evidence for impeachment, and may not use it to show guilt.

Qualified Immunity

Due to qualified immunity, the exclusionary rule is often a defendant's only remedy when police officers conduct an unreasonable search or violate their Miranda rights. Even if officers violate a defendant's constitutional or statutory rights, qualified immunity protects the officers from a lawsuit unless no reasonable officer would believe that the officers' conduct was legal.

6.4 CLOSER EXAMINATION OF THE THIRD-PARTY DOCTRINE^{xxxii}

One might be surprised to learn how much authority the “reasonable man” wields in the judiciary. The Supreme Court defers to the judgment of this reasonable man when it distinguishes between police brutality and justified conduct and when it determines negligence in tort law. In 2018, the U.S. Court of Appeals for the Second Circuit even used the “reasonable man” test to decide whether “Whole Grain” Cheez-Its were labeled deceptively. (They were.)

While those domains are certainly important, perhaps the reasonable man’s greatest responsibility is differentiating between information that is entitled to privacy and information that is not. Specifically, the reasonable man is charged with determining whether a citizen’s

personal digital records (such as bank records, phone records, and smart device data) can be accessed by the authorities without a warrant.



Pin It! *Reasonable Expectation of Privacy*

Learn more about reasonable expectation of privacy in this video: [reasonable expectation of privacy](#).



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The Supreme Court applies a reasonable expectation of privacy test to determine when police need a warrant to collect someone's personal records. If it is "reasonable" to expect that the information in question will remain private, then the police need a warrant to access it. But expecting information that is shared with third parties to remain private has consistently been considered unreasonable by the Court. Because a "reasonable expectation of privacy" doesn't attach to records stored by third parties, the police do not need a warrant to collect that information. Common examples of these third parties include phone service providers, financial institutions, and parent companies of smart technologies that store data, such as Amazon, Nest, and Google. The Court's rationale is that information relinquished to a third party cannot reasonably be expected to remain private and thus is not protected by the Fourth Amendment. A famous application of this logic was the Supreme Court's ruling that the Fourth Amendment allows for the warrantless collection of garbage from outside of a suspect's home. So, in terms of Fourth Amendment protection, is the trash at the end of your driveway equivalent to your banking records? In the eyes of the Supreme Court, the answer is yes.

This standard has come to be known as the Third Party Doctrine, and it has already been used to allow the warrantless collection of email records, banking records, and internet browsing data. Consideration of this issue is important because as we continue to integrate advanced technologies into our daily lives, the Third Party Doctrine has the potential to erode our Fourth Amendment protection from searches and seizures conducted without a warrant.



Pin It! *What Is the Third-Party Doctrine?*

Learn more about third-party doctrine in this video: [third-party doctrine](#).



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The Third-Party Doctrine spawned from Justice Harlan’s “Reasonable Expectation of Privacy Test,” first promulgated in *Katz v. United States* (1967). However, there is a critical distinction between the Third Party Doctrine and the Reasonable Expectation of Privacy Test. The Test established that citizens are entitled to Fourth Amendment protections only if the government violates that citizen’s “reasonable expectation of privacy.” By contrast, the Third Party Doctrine argues that any information shared with a third party is automatically ineligible for Fourth Amendment protection because it lacks any reasonable expectation of privacy by virtue of its relinquishment.

The Third-Party Doctrine and Reasonable Expectation of Privacy Test are fully compatible in some—perhaps even most—situations. Suppose, for instance, that during a celebratory dinner, you discuss your latest bank heist with your accomplice. If the conversation is loud enough that patrons sitting in the next booth overhear your conversation and report you to the police, you cannot claim that your Fourth Amendment right was violated. There is no reasonable expectation of privacy when openly discussing your crimes in public. The tension between the Doctrine and the Test only emerges when the third-party information in question can reasonably be expected to remain private.

Today, third parties have access to more data than ever before. Americans unwittingly share heaps of data with third parties daily: Every phone call, email, text, ATM withdrawal, and debit card purchase that you make is shared with a third party. If you have a smartphone, your location is automatically shared with a third party. Any conversation that you have with an Amazon Alexa is stored in the cloud (a third party). If you happen to install a Nest Learning Thermostat in your home, it “can use sensors and your phone’s location to check if you’ve left, then set itself to an Eco Temperature to save energy.”⁹ If we view this energy-saving technique through the lens of the Third Party Doctrine, we quickly see that law enforcement agents can legally check whether someone was home at a particular time by subpoenaing Nest and then examining that specific person’s Nest records.

6.5 CONSENT SEARCHES^{xxxiii}

Government officials may conduct a search without a warrant or probable cause based upon an individual's consent, so long as that consent (1) was voluntary and (2) came from someone authorized to give it. Any evidence discovered during a lawful consent search may be seized and admitted at trial. Consent may be express or implied and need not be knowing and intelligent, even though it constitutes a waiver of Fourth Amendment rights.

To determine whether consent was given voluntarily, courts examine the totality of the circumstances. Factors that weigh on the court's determination of voluntariness include: (1) the consenting individual's knowledge of the constitutional right to refuse consent; (2) the consenting individual's age, intelligence, education, and language ability; (3) the degree to which the consenting individual cooperates with the police; (4) the consenting individual's attitude about the likelihood of the discovery of contraband; and (5) the length of detention and the nature of questioning, including police threat of physical punishment or other coercive behavior.

No single factor is dispositive. Moreover, the influence of drugs, intoxication, and mental agitation does not automatically render consent involuntary. Additionally, persons in lawfully detained vehicles do not have to be advised that they are free to leave before giving voluntary consent. The prosecution bears the burden of proving voluntary consent. Whether consent was voluntary is a question of fact reviewed under a clearly erroneous standard.

Consent is not voluntary if given only in acquiescence to a claim of lawful authority. Therefore, a search may not be justified based on consent given only after the official conducting the search asserts possession of a warrant or the possibility of obtaining a warrant if necessary. In addition, consent cannot justify a search conducted in reliance upon a warrant if a court subsequently determines that the warrant was invalid.

Consent to search is generally invalid if an illegal search or seizure occurred before consent was given. If, however, consent to search is given under conditions sufficiently attenuated from an illegal arrest or search, evidence discovered during the subsequent search will not be suppressed.

In addition, to express consent, consent may be implied by the circumstances surrounding the search, the person's prior actions or agreements, or the person's failure to object to the search.

Generally, anyone who has a reasonable expectation of privacy in the place or effects being searched can consent to a warrantless search, and any person with common authority over or other sufficient relationship to the place or effects being searched can give valid consent. However, if two residents are present during the search of their dwelling and one expressly denies consent, the other's consent is not valid. Courts recognize common authority to consent in each person whose mutual use of the property demonstrates "joint access or control for most purposes." The law presumes that other users of the property assume the risk that areas

under common control may be searched. The prosecution bears the burden of establishing that common authority exists.

Moreover, a warrantless search is valid when law enforcement personnel rely on a person's "apparent authority" to consent to the search if the reliance is in good faith and is reasonable based on all facts known by police at the time of the search. Some courts have held that even if a third party is acting as an informant or other agent of the government, that person may still consent to a warrantless search if otherwise empowered to consent.

The scope of a consent search may not exceed the scope of the consent given. The scope of consent is determined by asking how a reasonable person would have understood the conversation between the officer and the suspect or third party when consent was given. Generally, the express object of a search defines the scope of consent, unless the suspect or third party giving consent expressly limits its scope.

Consent to search may be revoked if a person effectively withdraws consent before the search is completed, and police may not continue searching based on prior consent.



CHAPTER 7: THE ARREST^{xxxiv}

OVERVIEW

This chapter will focus on the arrest process and procedure. Similar to the search warrant process, officer must follow proper procedures to ensure the arrest is valid. This chapter examines key concepts such as probable cause and reasonable suspicion and the totality of circumstances. These terms are vital to understanding when and how an arrest can take place. It will also explore how officers can gain intelligence to make an arrest. Officers use many sources to gain information before making an arrest to ensure they have probable cause. This chapter examines key concepts on how officers develop probable cause through the information gathering process.

OBJECTIVES

- Be able to define the key concepts of arrest - probable cause and reasonable suspicion.
- Demonstrate an understanding of when probable cause is necessary and when reasonable suspicion is necessary.
- Identify the methods an officer can use to build probable cause such as totality of circumstances, common sense, suspicious activities, unique circumstances, information known to officers, and mistakes of fact/law.
- Demonstrate an understanding of “specific and articulable facts” to support probable cause and reasonable suspicion.
- Identify the rights of an arrestee.
- Identify what constitutes a false arrest.

KEY TERMS

probable cause, reasonable suspicion, “fair” probability, specific & articulable” facts, totality of circumstances, common sense, “legal but suspicious” activities, multiple incriminating circumstances, unique circumstances, inferences, hunches, mistakes of facts, false arrest.

CRITICAL THINKING

1. In the following example, determine if the officer has probable cause. Officer Johnson arrives at Simpson's Jewelry store moments after it's been robbed. He sees broken glass inside the store. A man claiming to be Simpson, the owner, is on the scene. He holds what look like keys to the store and seems distressed. He tells Johnson that a man, approximately 6'5" tall and weighing over 300 pounds, held up the store at gunpoint

and escaped with rings and watches in a small brown paper bag. A few minutes later, less than a mile away from the jewelry store, Officer Johnson pulls a car over for speeding. The driver matches the description of the robber, and on the seat next to him is a small brown paper bag and a couple of watches with the price tags attached. Does the officer have probable cause to search the man and the car? If so, what facts support probable cause? Same situation as above. Officer Johnson contacts the store owner who indicates his store has been robbed by gunpoint. Officer Johnson walks around the corner and sees a man fitting the description provided by the victim. He doesn't see a brown bag or jewelry but notices the man is making furtive action, the man is trying to hide something in his waist band. Does the officer have reasonable suspicion or probable cause? Support your position using the key terms and concepts above.

2. Using the scenarios about, provide how you used totality of circumstances, common sense, legal, but suspicious activities, and multiple incriminating circumstances to determine probable cause or reasonable suspicion.
3. Officers often use unique circumstance during criminal investigations to develop probable cause to obtain a search warrant or make an arrest. The court will use an officers training and experience. In this critical thinking exercise, you will demonstrate how you use inferences to draw conclusions in your daily life. This is the process officers use (through their education, training, and experience) to develop conclusions to demonstrate probable cause/reasonable suspicion. In this critical thinking exercise, pretend you are an officer and identify a situation where you would use an **inference** to draw a **conclusion** a crime has been committed or an arrest should be made.
 - i. Making **inferences** is the process of figuring out missing information from information that IS included. Inferences can be made using an officers training, education, and experience, but it must be "articulable" meaning you can explain it, it can't be a "gut feeling or hunch." To infer is a thinking process of reading between the lines. Officers can use behaviors, information, intelligence, training, education, and other articulable facts.
 - ii. **Conclusions** are the judgments or decisions reached based on information learned. It requires reasoning or deep thinking and observation skills. Drawing conclusions is deeper than an inference. In fact, making inferences helps us draw conclusions.
4. A police officer can arrest a person without an arrest warrant when the person commits an offense in the presence of the officer and the officer has probable cause to believe that a suspect committed a felony. Based on the scenario presented in critical thinking question 6.1, you have the suspect in custody and are making an arrest. Identify what your next steps would be after placing the handcuffs on the suspect. Outline the process from handcuffing to booking, making sure you follow the rights of the arrestee.

7.1 IDENTIFYING PROBABLE CAUSE

Although there is certainly more to probable cause and reasonable suspicion than just principles, it's a good place to start. It is ordinarily a bad idea to begin a module by admitting that the subjects to be discussed cannot be usefully defined. But when the subjects are probable cause and reasonable suspicion, and when the readership is composed of people who have had some experience with them, it would be pointless to deny it. Consider that the Seventh Circuit once tried to provide a good legal definition but concluded that, when all is said and done, it just means having "a good reason to act." Even the Supreme Court— whose many powers include defining legal terms— decided to pass on the probable cause because, said the Court, it is "not a finely-tuned standard" and is actually an "elusive" and "somewhat abstract" concept. As for reasonable suspicion, the uncertainty is even worse. For instance, in *United States v. Jones*, the First Circuit would only say that it "requires more than a naked hunch."

But this imprecision is actually a good thing because probable cause and reasonable suspicion are ultimately judgments based on common sense, not technical analysis. Granted, they are *important* judgments because they have serious repercussions. But they are fundamentally just rational assessments of the convincing force of information, which is something the human brain does all the time without consulting a rule book. So instead of being governed by a "neat set of rules," these concepts mainly require that officers understand certain principles— principles that usually enable them to make these determinations with a fair degree of consistency and accuracy.

First, however, it is necessary to explain the basic difference between probable cause and reasonable suspicion, as these terms will be used throughout this module. Both are essentially judgments as to the existence and importance of evidence. But they differ as to the level of proof that is required. In particular, probable cause requires evidence of higher quality and quantity than reasonable suspicion because it permits officers to take actions that are more intrusive, such as arresting people and searching for things. In contrast, reasonable suspicion is the standard for lesser intrusions, such as detentions and pat searches. As the Supreme Court explained:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quality or content than that required to establish probable cause but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

What Probability is Required?

When people start to learn about probable cause or reasonable suspicion, they usually want a number: What probability percentage is required? Is it 80%? 60%? 50%? Lower than 50? No

one really knows, which might seem strange because, even in a relatively trivial venture such as sports betting, people would not participate unless they had some idea of the odds.

Nevertheless, the Supreme Court has refused to assign a probability percentage to these concepts because it views them as nontechnical standards based on common sense, not mathematical precision. “The probable cause standard,” said the Court, “is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of circumstances.” Similarly, the Tenth Circuit observed, “Besides the difficulty of agreeing on a single number, such an enterprise would, among other things, risk diminishing the role of judgment based on situation-sense.” Still, based on inklings from the United States Supreme Court, it is possible to provide at least a ballpark probability percentage for probable cause. Reasonable suspicion, on the other hand, remains an enigma.



Pin It! *Privacy Probable Cause vs. Reasonable Suspicion*

Learn more about the difference between probable cause and reasonable suspicion in this video: [probable cause vs. reasonable suspicion](#).



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Probable Cause

Many people assume that probable cause requires at least a 51% probability because anything less would not be “probable.” While this is technically true, the Supreme Court has ruled that, in the context of probable cause, the word “probable” has a somewhat different meaning. Specifically, it has been said that probable cause requires neither a preponderance of the evidence nor “any showing that such belief is correct or more likely true than false,” and that it requires only a “fair” probability, not a statistical probability. Thus, it is apparent that probable cause requires something less than a 50% chance. How much less? Although no court has tried to figure it out, we suspect it is not much lower than 50%.

Reasonable Suspicion

As noted, the required probability percentage for reasonable suspicion is a mystery. Although the Supreme Court has said that it requires “considerably less [proof] than a preponderance of the evidence” (which means “considerably less” than a 50.1% chance), this is unhelpful because a meager 1% chance is “considerably less” than 51.1% but no one seriously thinks that would be enough. Equally unhelpful is the Supreme Court’s observation that, while probable cause requires a “fair probability,” reasonable suspicion requires only a “moderate” probability. What is the difference between a “moderate” and “fair” probability? Again, nobody knows. What we do know is that the facts need not rise to the level that they “rule out the possibility of innocent conduct.” As the Court of Appeal explained, “The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity.” We also know that reasonable suspicion may exist if the circumstances were merely indicative of criminal activity. In fact, the California Supreme Court has said that if the circumstances are consistent with criminal activity, they ‘demand’ an investigation.”

7.2 DEVELOPING PROBABLE CAUSE

Basic Principles

Having given up on a mathematical solution to the problem, we must rely on certain basic principles. And the most basic principle is this: Neither probable cause nor reasonable suspicion can exist unless officers can cite “specific and articulable facts” that support their judgment. This demand for specificity is so important that the Supreme Court called it the “central teaching of this Court’s Fourth Amendment jurisprudence.” The question, then, is this: How can officers determine whether their “specific and articulable” facts are sufficient to establish probable cause or reasonable suspicion? That is the question we will address in the remainder of this article.

The Totality of the Circumstances

Almost as central as the need for facts is the requirement that, in determining whether officers have probable cause and reasonable suspicion, the courts will consider the totality of circumstances. This is significant because it is exactly the opposite of how some courts did things many years ago. That is, they would utilize a “divide-and-conquer” approach which meant subjecting each fact to a meticulous evaluation, then frequently ruling that the officers lacked probable cause or reasonable suspicion because none of the individual facts were compelling. This practice officially ended in 1983 when, in the landmark decision in *Illinois v. Gates*, the Supreme Court announced that probable cause and reasonable suspicion must be based on an assessment of the convincing force of the officers’ information as a whole. “We must be mindful,” said the Fifth Circuit, “that probable cause is the sum total of layers of

information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the laminated total. Thus, in *People v. McFadin* the court responded to the defendant's "divide-and-conquer" strategy by utilizing the following analogy:

The defendant would apply the axiom that a chain is no stronger than its weakest link. Here, however, there are strands that have been spun into a rope. Although each alone may have insufficient strength, and some strands may be slightly frayed, the test is whether when spun together they will serve to carry the load of upholding [the probable cause determination].

Here is an example of how the "totality of the circumstances" test works and why it is so important. In *Maryland v. Pringle*, an officer made a traffic stop on a car occupied by three men and, in the course of the stop, saw some things that caused him to suspect that the men were drug dealers. One of those things was a wad of cash (\$763) that the officer had seen in the glove box. He then conducted a search of the vehicle and found cocaine. But a Maryland appellate court ruled the search was unlawful because the presence of money is "innocuous." The Supreme Court reversed, saying the Maryland court's "consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken."

Common Sense

Not only did the Court in *Gates* rule that probable cause must be based on a consideration of the totality of circumstances, but it also ruled that the significance of the circumstances must be evaluated by applying common sense, not hypertechnical analysis. In other words, the circumstances must be "viewed from the standpoint of an objectively reasonable police officer." As the Court explained:

Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Legal, but Suspicious, Activities

It follows from the principles discussed so far that it is significant that officers saw the suspect do something that, while not illegal, was suspicious considering other circumstances. As the Supreme Court explained, the distinction between criminal and non-criminal conduct "cannot rigidly control" because probable cause and reasonable suspicion "are fluid concepts that take their substantive content from the particular contexts in which they are being assessed." For example, in *Massachusetts v. Upton*, the state court ruled that probable cause could not have existed because the evidence "related to innocent, non-suspicious conduct or related to an event that took place in public." Acknowledging that no single piece of evidence was conclusive, the Supreme Court reversed, saying the "pieces fit neatly together." Similarly, the Court of

Appeal noted that seeing a man running down a street “is indistinguishable from the action of a citizen engaged in a program of physical fitness.” But it becomes “highly suspicious” when it is “viewed in the context of immediately preceding gunshots.”

Another example of how noncriminal activities can become highly suspicious is found in *Illinois v. Gates*. It started with an anonymous letter to a police department saying that a local resident, Lance Gates, was a drug trafficker; and it explained in some detail the procedure that Gates and his wife, Sue, would follow in obtaining drugs in Florida. DEA agents followed both of them (Gates flew, Sue drove) and both generally followed the procedure described by the letter writer. This information led to a search warrant and Gates’ arrest. On appeal, he argued that the warrant was not supported by probable cause because the agents did not see him or his wife do anything illegal. It didn’t matter, said the Supreme Court because the “seemingly innocent activity became suspiciously in light of the initial tip.”

Multiple Incriminating Circumstances

Here is a principle that, while critically important, is often overlooked or under-appreciated: The chances of having probable cause or reasonable suspicion increase exponentially with each additional piece of independent incriminating evidence that comes to light. This is because of the unlikelihood that each “coincidence of information” could exist in the absence of a fair or moderate possibility of guilt.

For example, in a Kings County murder case probable cause to arrest the defendant was based on the following: When the crime occurred, a car similar to the defendant’s “uniquely painted” vehicle had been seen in a rural area, two-tenths of a mile from where a 15-year old girl had been abducted. In addition, an officer saw “boot prints and tire prints” nearby, and “he compared them visually with boots seen in, and the treads of the tires of the defendant’s car, which he knew was parked in front of defendant’s hotel and registered to defendant. He saw the condition of the victim’s body; he knew that defendant had a prior record of conviction for forcible rape. He also knew of the victim’s occasional employment as a babysitter at the farm where the defendant worked.” In ruling that these pieces of independent incriminating evidence constituted probable cause, the California Supreme Court said:

The probability of the independent concurrence of these factors in the absence of the guilt of the defendant was slim enough to render suspicion of the defendant reasonable and probable.

Similarly, in a case from Santa Clara County, a man named Anthony Spears, who worked at a Chili’s in Cupertino, arrived at the restaurant one morning and “discovered” that the manager had been shot and killed before the restaurant had opened for the day. During their investigation, sheriff’s deputies learned that Spears had left home shortly before the murder even though it was his day off, there were no signs of forced entry, and that Marlboro cigarette butts (the same brand that Spears smoked) had been found in an alcove near the manager’s office. Moreover, Spears had given conflicting statements about his whereabouts when the

murder occurred; and, after “discovering” the manager’s body, he told other employees that the manager had been “shot” but the cause of death was not apparent from the condition of the body.

Based on this evidence, detectives obtained a warrant to search Spears’ apartment and the search netted, among other things, “large amounts of blood-stained cash.” On appeal, Spears argued that the detectives lacked probable cause for the warrant but the court disagreed, saying, “[W]e believe that all of the factors, considered in their totality, supplied a degree of suspicion sufficient to support the magistrate’s finding of probable cause.”

While this principle also applies to reasonable suspicion to detain, a lesser amount of independent incriminating evidence will be required. The following are examples from various cases:

- The suspect’s physical description and his clothing were similar to that of the perpetrator.
- In addition to a description similarity, the suspect was in a car similar in appearance to that of the perpetrator.
- The suspect resembled the perpetrator and he was in the company of a person who was positively identified as one of two men who had just committed the crime.
- The suspect resembled the perpetrator plus he was detained shortly after the crime occurred at the location where the perpetrator was last seen or on a logical escape route.
- In addition to resembling the perpetrator, the suspect did something that tended to demonstrate consciousness of guilt; e.g., he lied to officers or made inconsistent statements, he made a furtive gesture, he reacted unusually to the officer’s presence, he is attempting to elude officers.
- The suspect resembled the perpetrator and possessed the fruits of the crime.
- The number of suspects in the vehicle corresponded with the number of people who had just committed the crime, plus they were similar in age, sex, and nationality.

Unique Circumstances

The odds of having reasonable suspicion or probable cause also increase dramatically if the matching or similar characteristics were unusual or distinctive. As the Court of Appeal observed, “Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others.”

For example, the courts have taken note of the following unique circumstances:

- The suspect and perpetrator both had bandages on their left hands;
- The suspect and perpetrator were in vehicles of the same make and model with tinted windows and a dark-colored top with light-colored sides. Conversely, the Second Circuit

noted that “when the points of similarity are less unique or distinctive, more similarities are required before the probability of identity between the two becomes convincing.”

7.3 UNIQUE CIRCUMSTANCES

Inferences Based on Circumstantial Evidence:

As noted earlier, probable cause and reasonable suspicion must be based on “specific and articulable facts.” However, the courts will also consider an officer’s inferences as to the meaning or significance of the facts so long as the inference appeared to be reasonable. It is especially relevant that the inference was based on the officer’s training and experience. In the words of the Supreme Court, “The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.” Or, as the Court explained in *United States v. Arvizu*:

The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.

For example, in *People v. Soun*, the defendant and three other men killed the owner of a video store in San Jose during a botched robbery. The men were all described as Asian, but witnesses provided conflicting descriptions of the getaway car. Some said it was a two-door Japanese car, but one said it was a Volvo “or that type of car.” Two of the witnesses provided a partial license plate number. One said he thought it began with 1RCS, possibly 1RCS525, or 1RCS583. The other said he thought it was 1RC(?)538.

A San Jose PD officer who was monitoring these developments at the station made two inferences:

(1) the actual license plate probably began with 1RCS, and (2) the last three numbers included a 5 and an 8. So he started running these combinations through DMV until he got a hit on 1RCS558, a 1981 Toyota registered in Oakland. Because the car was last seen heading toward Oakland, officers notified OPD and, the next day, OPD officers stopped the car and eventually arrested the occupants for the murder. This, in turn, resulted in the seizure of the murder weapon. On appeal, one of the occupants, Soun, argued that the weapon should have been suppressed because the detention was based on nothing more than “hunch and supposition.” On the contrary, said the court, what Soun labeled “hunch and supposition” was actually “intelligent and resourceful police work.”

Similarly, in *People v. Carrington* the California Supreme Court ruled that police in Los Altos reasonably inferred that two commercial burglaries were committed by the same person based on the following: “the two businesses were located in close proximity to each other, both businesses were burglarized on or about the same date, and in both burglaries, blank checks were stolen.”

Hunches and Unsupported Conclusions

It is well known that hunches play an important role in solving crimes. “A hunch,” said the Ninth Circuit, “may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction.” Still, hunches are absolutely irrelevant in determining the existence of probable cause or reasonable suspicion. In other words, a hunch “is not a substitute for the necessary specific, articulable facts required to justify a Fourth Amendment intrusion.”

The same is true of unsupported conclusions. For example, in ruling that a search warrant affidavit failed to establish probable cause, the court in *U.S. v. Underwood* noted that much of the affidavit was “made up of conclusory allegations” that were “entirely unsupported by facts.” Two of these allegations were that officers had made “other seizures” and had “intercepted conversations” that tended to prove the defendant was a drug trafficker. “[T]hese vague explanations,” said the court, “add little if any support because they do not include underlying facts.”

Information Known to Other Officers

Information is ordinarily irrelevant unless it had been communicated to the officer who acted on it; i.e., the officer who made the detention, arrest, or search, or the officer who applied for the search or arrest warrant. To put it another way, a search or seizure made without sufficient justification cannot be rehabilitated in court by showing that it would have been justified if the officer had been aware of information possessed by a colleague. As the California Supreme Court explained, “The question of the reasonableness of the officers’ conduct is determined on the basis of the information possessed by the officer at the time a decision to act is made.”

There is, however, an exception to this rule known as the “official channels rule” by which officers may detain, arrest, or sometimes search a suspect based solely on an official request to do so from another officer or agency. Under this rule, officers may also act based on information transmitted via a law enforcement database, such as NCIC and CLETS.

Although the officers who act upon such transmissions are seldom aware of many, if any, of the facts known to the originating officer, this does not matter because, as the U.S. Supreme Court pointed out, “[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.”

For example, in *U.S. v. Lyons* state troopers in Michigan stopped and searched the defendant’s car based on a tip from DEA agents that the driver might be transporting drugs. On appeal, Lyons argued that the search was unlawful because the troopers had no information as to why she was suspected of carrying drugs. But the court responded “it is immaterial that the troopers were unaware of all the specific facts that supported the DEA’s reasonable suspicion analysis.

The troopers possessed all the information they needed to act—a request by the DEA (subsequently found to be well-supported).”

Note that, although officers “are entitled to presume the accuracy of information furnished to them by other law enforcement personnel,”⁶¹ [\(Links to an external site.\)](#) the officers who disseminated the information may later be required to prove in court that they had received such information and that they reasonably believed it was reliable.

Information Inadmissible in Court

In determining whether probable cause or reasonable suspicion exists, officers may consider both hearsay and privileged communications. For example, although a victim’s identification of the perpetrator might constitute inadmissible hearsay or fall within the marital privilege, officers may rely on it unless they had reason to believe it was false. As the Court of Appeal observed, “The United States Supreme Court has consistently held that hearsay information will support the issuance of a search warrant.... Indeed, the usual search warrant, based on a reliable police informer’s or citizen informant’s information, is necessarily founded upon hearsay.” On the other hand, information may not be considered if it was inadmissible because it was obtained in violation of the suspect’s constitutional rights; e.g., an illegal search or seizure.

Mistakes of Fact and Law

If the probable cause was based on information that was subsequently determined to be inaccurate or false, the information may nevertheless be considered if the officers reasonably believed it was true. As the Court of Appeal put it, “If the officer’s belief is reasonable, it matters not that it turns out to be mistaken.” Or, in the words of the Supreme Court, “[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable.”

The courts are not, however, so forgiving with mistakes of law. This is because officers are expected to know the laws they enforce and the laws that govern criminal investigations. Consequently, information will not be considered if it resulted from such a mistake, even if the mistake was made in good faith. As the California Supreme Court explained, “Courts on strong policy grounds have generally refused to excuse a police officer’s mistake of law.” Or, as the Ninth Circuit put it, “If an officer simply does not know the law and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable.”



Pin It! The Fourth Amendment: The Requirement of Probable Cause

To learn more about the fourth amendment and the requirement for probable cause, watch this video: [the fourth amendment: the requirement for probable cause](#).



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7.4 RIGHTS OF THE ARRESTEE^{XXXV}

As with other criminal justice processes, the arrestee also has specific rights upon arrest. The rights of a person being arrested fall under the Fifth, Sixth and Eighth Amendment.

- "No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...." (Fifth Amendment).
- "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Sixth Amendment).
- "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted." (Eighth Amendment).

Once a person is arrested, the officer is required to provide the person taken into custody their rights. Commonly known as the Miranda Rights, the following admonishment must be provided.

1. You have the right to remain silent
2. Anything you say can and will be held against you in a court of law.
3. You have the right to an attorney, if you cannot afford an attorney, one will be appointed to you free of charge.
4. Do you understand these rights? (The arrestee must verbally provide they understand the rights as explained)

If these rights are not provided to the arrestee, any statements made could be inadmissible in a criminal trial. Officers must also respect the rights. Officers cannot force or coerce statements from the arrestee. If they decline to talk, and invoke their right to remain silent, the officer

must cease questioning. An arrested person has the right to be informed about the grounds for arrest and about the factual circumstances and legal classification of the crime he or she is suspected of committing.

After being taken into custody, the arrestee also has the right to make a phone call to an attorney and a family member within a reasonable amount of time. If custody status changes or the arrestee is moved to a new facility, they must be allowed to make a phone call to notify their attorney and family member.

The arrestee must be arraigned within 48 hours from arrest, excluding weekends. If a person is arrested on Monday, they must be arraigned by Wednesday. However, if the arrest occurs on Thursday, they will be arraigned on Monday.

7.5 USE OF FORCE CONTINUUM^{xxxvi}

Most law enforcement agencies have policies that guide their use of force. These policies describe an escalating series of actions an officer may take to resolve a situation. This continuum generally has many levels, and officers are instructed to respond with a level of force appropriate to the situation at hand, acknowledging that the officer may move from one part of the continuum to another in a matter of seconds.

Examples of a Use-of-Force Continuum

An example of a use-of-force continuum follows:

- **Officer Presence — No force is used. Considered the best way to resolve a situation.**
 - The mere presence of a law enforcement officer works to deter crime or diffuse a situation.
 - Officers' attitudes are professional and nonthreatening.
- **Verbalization — Force is not-physical.**
 - Officers issue calm, nonthreatening commands, such as "Let me see your identification and registration."
 - Officers may increase their volume and shorten commands in an attempt to gain compliance. Short commands might include "Stop," or "Don't move."
- **Empty-Hand Control — Officers use bodily force to gain control of a situation.**
 - *Soft technique.* Officers use grabs, holds and joint locks to restrain an individual.
 - *Hard technique.* Officers use punches and kicks to restrain an individual.
- **Less-Lethal Methods — Officers use less-lethal technologies to gain control of a situation.**
 - *Blunt impact.* Officers may use a baton or projectile to immobilize a combative person.
 - *Chemical.* Officers may use chemical sprays or projectiles embedded with chemicals to restrain an individual (e.g., pepper spray).

- *Conducted Energy Devices (CEDs)*. Officers may use CEDs to immobilize an individual. CEDs discharge a high-voltage, low-amperage jolt of electricity at a distance.
- **Lethal Force — Officers use lethal weapons to gain control of a situation. Should only be used if a suspect poses a serious threat to the officer or another individual.**
 - Officers use deadly weapons such as firearms to stop an individual's actions.

Articulating Use of Force^{xxxvii}

It is important to understand the use of force continuum is not a chart for directed action or a step-by-step guide for response to a potentially violent situation. This means if you engage in a situation you may use any level of force to gain compliance of a situation. For example, if you engage a suspect who is being verbally resistive, this means he/she is only verbalizing they do not intend to comply, the officer may use a lower level of force to get the suspect to comply such as verbal commands, or empty hand controls. However, if this same suspect is armed with a weapon or significantly larger/stronger than the officer, there may be justification to increase the use of force to gain the suspect's compliance.

Similar to probable cause and reasonable suspicion, the use of force application is judged by the officer's articulation of facts. What facts were present from the officer's perspective to justify the use of force used? Multiple considerations are taken into account when determining what level of force is necessary, level of cooperation to officer commands, size, and distance between the officer and suspect, is the suspect armed or has weapons close/available, is the officer alone, or are other officers present, and is the suspect alone, how far away is officer back up, etc. This is just an example of some of the considerations used to determine what level of force is necessary.

In addition, an officer does not have to follow the levels in order. What this means is if an officer starts using verbal commands and the suspect draws out a weapon, the officer does not have to go through all the levels of force. The officer can pass over hand controls, hard techniques, or the less-lethal forms (pepper spray, baton, and/or taser) and go straight to deadly force (firearm) depending on the threat (weapon) present. All incidents that require the use of force are investigated and documented. This means the officer must prepare a report and identify all factors which guided his or her decision to use force to gain compliance. In the report, the officer provides the articulable facts they used to determine the level of force necessary to gain the suspect's compliance.

7.6 USE OF FORCE DURING ARREST^{xxxviii}

Police officers have the power to use force if deemed necessary. If an officer uses more force than required for the situation, this brings up many red flags. The Violent Crime Control and

Law Enforcement Act of 1994 authorized the Civil Rights Division of the U.S. Department of Justice (DOJ) to initiate civil actions against policing agencies if the use of force utilized is excessive or constitutes a pattern of depriving individuals of their rights.

One additional issue in police use of force situations is that it is difficult to measure. There are many types of force police can use. The force utilized varies from going hands-on to pepper spray, taser, ASP baton, control holds or takedowns, to deadly force. Every situation is different because it involves human beings and can be interpreted differently from those involved to those standing on the sidelines.

Vehicle Pursuits

Vehicle pursuits have dramatically changed over the last decade. It used to be commonplace for officers to engage in several vehicle pursuits during one shift. Officers would get in a vehicle pursuit for many reasons, stemming from locating a rolling stolen vehicle to a driver failing to stop after running a stop sign. Vehicle pursuits have at a minimum, two four-to-five thousand-pound deadly weapons (a.k.a., the vehicles) that are driven recklessly (most times), chasing one another. The morgue has seen large numbers of fatalities due to vehicle pursuits. Victims range from an innocent person in a crosswalk at the wrong time when the vehicle police were pursuing hit the victim, or the innocent person driving across an intersection with a green traffic light struck while the pursuing vehicle runs a red traffic light. There are many sad stories of the innocent victim killed because the police decided to pursue a vehicle with lights and sirens when the vehicle being pursued refused to pull over.

Because of the many senseless fatalities, many police departments have updated their vehicle pursuit policies and procedures. Although the policies of each department do differ in minor areas, most departments have chosen to only approve a vehicle pursuit in dire situations. Such a situation fitting that description would be if the driver of the fleeing vehicle were actively engaging in behavior that was placing other citizens in immediate dire harm.

7.7 DOES THE MILITARIZATION OF POLICE CONTRIBUTE TO USE OF FORCE ISSUES? ONE STUDY FINDS YES.^{xxxix}

On June 19, 2018, a rookie police officer in suburban Pittsburgh, Pennsylvania, stopped a silver Chevy Cruz that matched the description of a vehicle involved in an earlier crime. While the driver exited the car and got on the ground, 17-year-old Antwan Rose and another passenger ran. The officer fired three shots at Rose, striking him with all three. He died in hospital.

The basic storyline of this incident is all too familiar now: a police officer (or several) confronts a civilian with suspicion of some wrongdoing. The civilian fails to comply, actively resists, or

simply moves too quickly and is killed. In the case of the 2016 shooting death of Philando Castile in Minnesota, a police officer—again during a traffic stop, this time for a broken brake light—drew his weapon and fired six times as Castile reached for his driver’s license. Similar to Antwan Rose, on March 18th in California, Stephon Clark fled police on foot, but eventually surrendered. A police officer shot him after mistaking his phone—which was in his hand, raised above his head—for a gun.

Why do some police officers resort to lethal force so quickly? Why do police kill, even in situations where their lives—or the lives of others—do not seem to be in danger? The militarization of American law enforcement has become the topic of much discussion—among scholars, in the media, and in the general public—over the last several years, and has become the target of those who desire reforms to reduce the number of civilian deaths. However, most of the scholarship on militarization is limited, either focusing on certain specific behaviors that result from militarization, on the existence of police Special Response Teams (also known as Special Weapons and Tactics or SWAT teams) as a way to capture the spread of militarization, or on county-level, but geographically narrow and theoretically limited, use of federal programs that allow police departments to acquire surplus military equipment.

In new research, I argue that militarization is a psychological process that affects individual officers as well as departments. This process involves the adoption of a more militaristic world view, where militarism is the emphasis on the use of force as an acceptable—or even desirable—option to address problems. Militarization may affect the behavior of individual officers in one, or both, or two ways.



Pin It! *Why the Police Look and Act like the Military*

To learn more about differences and similarities in police and military functionality, watch this video: [why the police look and act like the military](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3xJzYZ1*

Imagine that, when a police officer encounters a civilian or suspect, every possible action that officer may take is on a continuum from least to most violent. Of course, not every possible action is legally or morally acceptable, so on that continuum, there is a window of options the

officer believes to be acceptable choices for initiating the encounter. From that window, the officer picks an initial action. If the civilian complies, the process ends. If the civilian resists, the officer escalates, moving more to the violent end of the continuum with each action until reaching a resolution. Militarization either moves the window of acceptable options toward the most violent side, moves the officer's initial choice of action within that window toward the more violent side, or both. The result is that officers reach lethal force more quickly.

Militarized police departments see themselves not as public servants upholding the law, but as an army fighting a war against a dangerous and invisible enemy and occupying territory that is hostile to them. To carry out these actions, the leaders of those departments desire military equipment—vehicles, weapons, body armor, and so forth—because it provides better protection from the enemy and promotes both more efficient use of force and more fear among the public. And, when departments are more militarized, their officers should kill more people.

My statistical analysis supports this argument, controlling for other possible drivers of police killings such as the racial composition of the area, the total population, the level of poverty, and the rate of violent crime, using cross-national data that includes law enforcement agencies from over 40 states quarterly from the last quarter of 2014 to the last quarter of 2016. I find that, as a police department's militarization increases, so does the number of civilians killed.

Figure 1 displays the expected number of police killings at varying levels of militarization, which I measure using police department acquisitions through the federal '1033' program. This is a program that allows law enforcement agencies to obtain surplus military equipment from the federal government, paying only the cost of transport. Think of it as a backward Amazon Prime: the item is free, but they pay for shipping. I obtained data on the number of civilians killed by police for this period from Fatal Encounters, a project collecting information about victims of police violence since 2000.



CHAPTER 8: INTERROGATION, SELF- INCRIMINATION & CONFESSIONS^{xl}

OVERVIEW

This chapter examines interrogations, self-incriminating statements, and confessions. Interrogations, similar to other criminal investigation practices, are governed by rules and procedures to ensure due process and equal justice. The goal of interrogation is to obtain a statement of guilt from a guilty suspect or to prove the potential suspect's innocence in the crime. This chapter also examines how and why false confessions occur, and how to prevent them. Juvenile suspects are a unique population when conducting interview and interrogations. This chapter also explores how to properly interview juvenile suspects and the unique considerations officers must consider when conducting interrogations.

OBJECTIVES

- Identify the difference between a confession and an incriminating statement.
- Explain the importance of Miranda, and interrogations.
- Identify the differences between questioning, interviewing, and interrogating.
- Explain how officers evaluate the outcome of interrogations.
- Explain the common reasons people may confess to a crime they did not commit.
- Identify the research on juvenile's developmental and cognitive abilities and how this affect's the way officers question juveniles.

KEY TERMS

5th Amendment, interrogation, self-incrimination, confession, interviewing, questioning, interrogation, exoneration, deception, conscience, minimizing involvement, surrender to overwhelming evidence, false confession, confessor enlisted to take the blame, sacrificial confessor, mentally ill false confessor,

CRITICAL THINKING

1. After watching [the interrogation of the kayak murder suspect](#), identify any concerns you have about the manner the interrogation was conducted.
2. You are interrogating a suspect; he offers an explanation that he was involved but did not commit the murder you are investigating. The suspect is providing an alternate

explanation of the evidence. As the investigator, what are the ways/techniques you can use to get the suspect provide incriminating evidence of guilt?

3. In this critical thinking exercise, you are interviewing three suspects. They have all plead guilty to the crime. Do you accept their confession?
 - a. Bill is a 45-year-old man. He works at his family's gas station and likes to build models. He always wanted to be a police officer, but was unable to pass the written exam. He has an IQ of 70. After a recent murder occurred near the family gas station, officers began questioning him. Bill was very eager to discuss his day and wanted to be helpful in the officer's investigation. Soon he starts offering explanations on the killer's motives. Some of Bill's statements align with the evidence, others do not. Bill is arrested and taken to the police station for interrogation at which time he confesses to the murder. Could this be a false confession? If so, what type?
 - b. Stacy is the mother of a 17-year-old son named Steven. She has been in long-term abusive relationship with Kevin. Kevin was murdered by gunshot at point blank range. There are both separated and questioned. Stacy confesses to murdering Kevin, Steven denies murdering Kevin. However, gunshot residue conducted on both Stacy and Steven reveal no residue on Stacy's person, Steven has slight gunshot residue on his shirt, but none on his hands. Stacy was also at work at the time. Stacy is adamant she was the one who killed Kevin. Could this be a false confession? If so, what type?
 - c. There was a recent shooting in a high crime area know for gang activity. A 12-year-old girl is killed by a 40-caliber bullet. During the investigation, you stop a car containing 3 suspects, Tamera, a female age 21, her 25-year-old boyfriend Carl, and Tamera's 15-year-old brother Phillip. Located in the car is a 40 caliber Glock handgun. Just before you approach the car, you see Tamera say something in Phillip's ear. You were unable to hear what was said, but see Phillip nod his head and look down. All three suspects are separated and questioned. Tamera and Carl deny shooting the gun. Phillip immediately confesses to shooting the gun that killed the 12-year-old girl. Could this be a false confession? If so, what type?
4. You are investigating a crime and one of the suspects is a 14-year-old girl. Knowing the requirements for interrogating a juvenile. What is the first thing you need to do to ensure the evidence/testimony collected is admissible. How would you determine if she understood her rights to remain silent? What questions would you ask her?

INTRODUCTION

The Fifth Amendment is also the source of a person's right against self-incrimination (no person "shall be compelled in any criminal case to be a witness against himself"). The debate over the limits of this right has given rise to immense literature. In broadest outline, the right against

self-incrimination means that the prosecutor may not call a defendant to the witness stand during the trial and may not comment to the jury on the defendant's failure to take the stand. Moreover, a defendant's confession must be excluded from evidence if it was not voluntarily made (e.g., if the police beat the person into giving a confession). In *Miranda v. Arizona*, the Supreme Court ruled that no confession is admissible if the police have not first advised a suspect of his constitutional rights, including the right to have a lawyer present to advise him during the questioning. *Miranda v. Arizona*, 384 US 436 (1966). These so-called Miranda warnings have prompted scores of follow-up cases that have made this branch of jurisprudence especially complex.

In this chapter, we will examine the interviewing, questioning, and interrogation of suspects as information gathering techniques police use to aid them in investigations. In modern-day policing, interviewing, questioning, and interrogation techniques are measured, objective, and ethical. They are aimed at the goal of discovering the truth; not just getting a confession to a crime. This is a contrast to earlier times of policing when techniques called the "third degree" sometimes involved threats, intimidation, coercion, and even physical violence. Fortunately, these "third-degree" techniques were identified in the United States by the Wickersham Commission in 1931, as being unlawful police practices that caused false confessions and miscarriages of justice, where suspects were sometimes wrongfully convicted and imprisoned (Head, 2010).

Emerging from this, police forces across North America, who were using the "third-degree" techniques to varying extents, started moving towards less oppressive and less aggressive methods of interrogating suspects (Gubrium, 2002).

While there has been a significant evolution to more objective and ethical practices, the courts still remain vigilant in assessing the way police interview, question, and interrogate suspects during criminal investigations. The courts expect the police to exercise high standards using practices that focus on the rights of the accused person and minimize any physical or mental anguish that might cause a false confession. In meeting these expectations, the challenges of suspect questioning and interrogation can be complex, and many police agencies have trained interrogators and polygraph operators who undertake the interrogation of suspects for major criminal cases. But not every investigation qualifies as a major case, and frontline police investigators are challenged to undertake the tasks of interviewing, questioning, and interrogating possible suspects daily. The challenge for police is that the questioning of a suspect and the subsequent confession can be compromised by flawed interviewing, questioning, or interrogation practices. Understanding the correct processes and the legal parameters can make the difference between having a suspect's confession accepted as evidence by the court or not. With the above in mind, this chapter will focus on several salient issues, including:

- The progression from interviewing to questioning to interrogating, and how this progression relates to investigative practices

- The junctures that demonstrate the need to change from interviewing a witness to questioning a detained suspect to interrogating an arrested suspect
- The issues of physical and mental distress, and how to avoid the perception of officer-induced distress during an interrogation
- The seven elements to review to prepare an interrogation plan
- The five common reasons arrested suspects waive their right to silence and provide statements and confessions
- The interrogation strategies to initiate statements using the motivations within the five common reasons
- The three types of false confessor and strategies to deal with false confessions
- The additional rights of young offenders and practices required to meet the investigative obligations under Canada's *Youth Criminal Justice Act*
- Ancillary offense recognition

8.1 INTERVIEWING, QUESTIONING, AND INTERROGATING^{xli}

Police investigations can be dynamic, and the way events unfold and evidence is revealed can be unpredictable. This premise also holds true for interviewing, questioning, interrogating suspects. Players in a criminal event may be revealed as suspects at different stages of the investigation. To properly secure and manage the statement evidence that is gained during interactions with suspects or possible suspects, it is important for investigators to understand the actions that should be taken at each stage, while remembering that interviewing, questioning, and interrogating are terms that refer to separate stages in the process of gathering verbal responses from a suspect or a possible suspect. But each stage is different in relation to when and how the information gathering process can and should occur. The differences between these three stages needs to be defined in the mind of the investigator since they will move through a process of first interviewing, then questioning, and finally interrogating a suspect. When this progression occurs, the investigator needs to recognize the changing conditions and take the appropriate actions at the correct junctures to ensure that, if a confession is obtained, it will be admissible at trial. Given this, let us examine the operational progression of these three stages and identify the circumstances that make it necessary to switch from one stage to the next.

Interviewing

A possible suspect is the first stage and the lowest level of interaction. In fact, the person is not even definable as a suspect at this point. As pointed out in our chapter on witness management, suspects often report criminal events while posing as witnesses or even victims of the crime. The investigator receiving a statement report from such a person may become suspicious that they are not being truthful; however, until those suspicions are confirmed by

evidence that meets the test of forming reasonable grounds for belief, the investigator may continue to talk to this possible suspect without providing any Section 10 Charter or cautions. There is a unique opportunity at that point to gather the poser's version of events, including any untrue statements that may afford an opportunity to later investigate and demonstrate a possible fabrication, which is by itself a criminal offense. The transition point for an investigator to move from interviewing a witness or victim to detaining and questioning the person as a possible suspect should occur when real evidence is discovered giving the investigator reasonable grounds to suspect that the person is involved in the event. Discovering real evidence and gaining "reasonable grounds to suspect" creates an obligation for the investigator to stop interviewing the person who then becomes a suspect. At this point, the person who is a suspect should be detained for the suspected offense and provided the appropriate Section 10 Charter and Statement Caution before proceeding with the questioning of the suspect.

Questioning

A suspect is the next level of interaction. For a suspect to be questioned, there will be some type of circumstantial evidence that allows the investigator to detain that suspect. In our previous scenario of the young man found at 3 AM standing under the tree in a residential area at the border of an industrial complex one block away from the building where a break-in was confirmed to have taken place, that young man was properly detained, chartered, and warned for the investigation of the break-in. However, there was no immediate evidence that could link him to that actual crime at that point. He was only suspected by the circumstantial evidence of time, conduct, and proximity to the event. He was obligated to provide his name and identification. If he had tried to leave, he could have been arrested for obstructing a police officer in the execution of duty. The investigator at the scene of that incident would have questioned this suspect, and by his rights under the 5th Amendment, the suspect would not be obliged to answer questions.

This right to not talk does not preclude the investigator from asking questions, and the investigator should continue to offer the suspect an opportunity to disclose information that may be exculpatory and enable the investigator to eliminate that person as a suspect in the crime being investigated. As an example of this, again, consider our young man who was detained when found standing under the tree near a break-in. If that man had answered the question what are you doing here by stating that he lived in the house just across the street, and when he heard the break-in alarm, he came outside to see what was happening, this would greatly reduce suspicion against the young man once this statement was confirmed. Subsequent confirmation by a parent in the home that they had heard him leave when the alarm sounded could eliminate him as a suspect and result in his release.

Interrogating

Interrogation is the most serious level of questioning a suspect, and interrogation is the process that occurs once reasonable grounds for belief have been established, and after the suspect has

been placed under arrest for the offense being investigated. Reasonable grounds for belief to make such an arrest require some form of direct evidence or strong circumstantial evidence that links the suspect to the crime. Of course, where an arrest is made, the suspect will be provided with their Miranda rights and the police caution, as per the following:

“You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?”

8.2 EVALUATING THE EVIDENCE (INTERROGATION)

Exoneration

After making an arrest, an objective investigator must always be prepared to hear an explanation that will challenge the direct evidence or the assumptions of the circumstantial evidence that led to the reasonable grounds for belief to make that arrest. The best reason an arrested suspect can be offered to answer questions is to be exonerated from the crime. It is possible, and it does occur, that persons are arrested for a crime they have not committed. Sometimes, they are wrongly identified and accused by a victim. Other times, they are incriminated by a pattern of circumstantial evidence that they can ultimately explain. The interrogation following the arrest is an opportunity for the suspect to put their version of events on the record, and to offer an alternate explanation of the evidence for investigators to consider. Exoneration is not just an interrogation strategy; it is the duty of an objective investigator to offer a suspected person the opportunity to make an explanation of the evidence that led to their arrest. This can be initiated by offering the suspect the proposition, “This is the evidence that led to your arrest. If there is an alternate explanation for this evidence, please tell me what that is.” In some cases, the statements made by the suspect will require additional investigation and confirmation of facts to verify the exoneration. Conducting these investigations is also the duty of an objective investigator.

Deception to Outsmart the System

Some experienced criminals or persons who have committed well-planned crimes believe that they can offer an alternate explanation for their involvement in the criminal event that will exonerate them as a suspect. An investigator may draw answers from this type of suspect by offering the same proposition that is offered for exoneration. This is the opportunity for a suspect to offer an alibi or a denial of the crime and an alternate explanation or exonerating evidence. It can be very difficult for a suspect to properly explain away all the evidence. Looking at the progression of the event, an interrogator can sometimes ask for additional details that the suspect cannot explain. The truth is easier to tell because it happened, and the facts will

line up. In contrast, a lie frequently requires additional lies to support the untrue statement. Examining a statement that is believed to be untrue, an interrogator can sometimes ask questions that expose the lies behind the original lie.

Conscience

As much as the good guys versus the bad guys' concept of criminal activity are commonly depicted in books and movies, experienced investigators can tell you that people who have committed a criminal offense often feel guilt and true regret for their crime. This is particularly true of persons who are first-time offenders and particularly young offenders who have committed a crime against a person.

Suspects fitting this category may be identified by their personal profile, which typically includes no criminal record, no police record or limited police record of prior investigations, evidence of poor planning, or evidence of emotional/spontaneous actions in the criminal event.

Suspects who fit this profile may be encouraged to talk by investigators who have reviewed the effect that the criminal act has had on the victim or the victim's family. Following this review of victim impact, the investigator can accentuate the suspect's lack of past criminal conduct, while making the observation that the suspect probably feels really bad about this. Observing the suspect during this progression, a suspect affected by guilt will sometimes exhibit body language or facial expressions of concern or remorse. Responses, such as shoulders slumping, head hung down, eyes tearing up, or avoiding eye contact, can indicate the suspect is ashamed and regretful of the crime. Observing this type of response, an investigator may move to a theme of conversation that offers the suspect the opportunity to clear their conscience by taking responsibility for their actions and apologizing or by taking some other action to right the wrong that has been done.

Explanation to Minimize Involvement

Suspects who have been arrested will sometimes be willing to provide an additional explanation of their involvement or the events to reduce their level of culpability or blame for the crime. In cases where multiple suspects have been arrested for a crime, one of those suspects may wish to characterize their own involvement as peripheral, sometimes as being before the fact or after the fact involvement. Examples of this would be a person who left the door unlocked for a break-in to take place or merely driving the getaway car. These less involved suspects hope to gain a reduced charge or even be reclassification as a witness against their co-accused. In such cases, where multiple suspects are arrested, the investigator can initiate this strategy by offering the proposition, "If you have only a limited or minimal level of involvement in this crime, you should tell me about that now."

Surrender to Overwhelming Evidence

The arrested suspect in a criminal investigation waiting in custody for interrogation has plenty to think about. Even the most experienced criminals will be concerned about how much evidence the police have for proving their connection to the crime. In the process of presenting a suspect with the opportunity to address the evidence that has been collected, an additional strategy can sometimes be engaged where there is a large volume of incriminating evidence or undeniable direct evidence, such as eyewitnesses or strong forensic evidence for circumstantial connections of the suspect to the crime. In such cases, if the interrogator can reveal the evidence in detail to the suspect, this disclosure may result in the suspect losing hope and making a confession to the crime. Although this tendency to surrender to overwhelming evidence may seem illogical, it does happen. Sometimes, this surrender has more to do with the conscience and shame of the crime, but other times, the offender has just lost the energy to resist what they perceive to be a hopeless fight. As counter-intuitive as this may seem, research has found that the suspect's perception of the strength of police evidence is one of the most important factors influencing their decision to confess to the police (Gudjonsson & Petursson, 1991). More recent research has shown that the stronger the evidence, the more likely a suspect was to confess (Gudjonsson, 2015).

8.3 EXAMINING FALSE CONFESSIONS

As noted at the beginning of this chapter, the goal of ethical interviewing, questioning, and interrogation is to elicit the truth, and the truth can include statements that are either inculpatory confessions of guilt or exculpatory denial of involvement in a crime. Whenever an investigator has interrogated a suspect, and a confession of guilt has been obtained, that investigator needs to take some additional steps to ensure that the confession can be verified as truthful before it goes to court. These additional steps are required because, although the investigator has not used any illegal or unethical techniques, the court will still consider whether the accused, for some reason, has confessed to a crime they did not commit. A skilled defense lawyer will often present arguments alleging that psychological stresses of guilt or hopelessness from exposure to overwhelming evidence have been used to persuade a suspect to confess to a crime they did not commit. In such cases, it is helpful for the court to hear any additional statements made by the accused, such as those that reveal that the suspect had direct knowledge of the criminal event that could only be known to the criminal responsible.

In police investigations, there are many details of the criminal event that will be known to the police through their examination of the crime scene or through the interview with witnesses or victims. These details can include the actual way the crime was committed, such as the sequence of events, the tools used in the crime; or the means of entry, the path of entry/exit, along with other obscure facts that could only be known by the actual perpetrator. There are opportunities in a crime scene examination for the investigator to observe one or more unique facts that can be withheld as "hold back evidence." This hold-back evidence is not made part of

reports or media release and is kept exclusively to test for false confessions. Confessing to the crime is one thing, but confessing to the crime and revealing intimate details is much more compelling to the court. Regardless of the effort and care that investigators take to not end up with a false confession, they still occur, and there are some more common scenarios where false confessions happen. It is important for an investigator to consider these possibilities when a confession is obtained. These situations are:

- ***The confessor was enlisted to take the blame*** — On occasions where persons are part of organized crime, a person of lower status within the group is assigned or sacrificed to take the blame for a crime in place of a person of higher status. These organizational pawns are usually persons with a more minor criminal history or are young offenders, as they are likely to receive a lesser sentence for the offense.
- ***The Sacrificial Confessor*** — Like the confessor enlisted in an organized criminal organization, there is another type of sacrificial confessor; the type who steps forward to take the blame to protect a friend or loved one. These are voluntary confessors, but their false confession can be exposed by questioning the confessor about the hold back details of the event.
- ***The Mentally Ill False Confessor*** — This type of false confessor is encountered when there is significant media attention surrounding a crime. As Pickersgill (2015) noted, an innocent person may voluntarily provide a false confession because of a pathological need for notoriety or the need to self-punish due to guilt over an unrelated past offense. Additionally, those suffering from psychosis, endogenous depression, and Munchausen Syndrome may falsely confess to a crime they did not commit (Abed, 2105). As with other false confessors, these people can be discovered using hold-back detail questioning.

8.4 INTERVIEWING JUVENILES^{xlii}

According to the Department of Justice the voluntariness of a confession is vital in determining if it will be admissible into trial. In determining the validity and voluntariness, the following is considered. “A juvenile has both a right to counsel and a privilege against self-incrimination in juvenile delinquency proceedings. In re Gault, 387 U.S. 1, 32-55 (1979). A juvenile may waive his Fifth Amendment rights and consent to interrogation. Fare v. Michael C., 442 U.S. 707 (1979). The question of whether a waiver is voluntary and knowing is one to be resolved on the totality of the circumstances surrounding the interrogation. The court must determine not only that the statements were not coerced or suggested, but also that they were not the products of ‘ignorance of rights or of adolescent fantasy, fright, or despair.’ In re Gault, 387 U.S. at 55. Among the factors to be considered are the juvenile's age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving them. Fare v. Michael C., 442 U.S. at 725. For applications of the totality of the circumstances approach involving

juveniles, see *United States v. White Bear*, 668 F.2d 409 (8th Cir. 1982); *United States v. Palmer*, 604 F.2d 64 (10th Cir. 1979); *West v. United States*, 399 F.2d 467 (5th Cir. 1968). Since confessions by juveniles are given even closer scrutiny than those by adults, Miranda warnings are probably an essential threshold requirement for voluntariness. The presence and co-signature of a parent or guardian is not required for a voluntary waiver, although it is a factor to be considered and will help dispel any notion that the juvenile was coerced.^{xliii}

Many of these provisions are designed to ensure the rights of juveniles are protected. A significant amount of research in developmental and neurological science has demonstrated that the process of cognitive brain development continues into adulthood, and that the human brain undergoes “dynamic changes throughout adolescence and well into young adulthood” (see Richard J. Bonnie, et al., *Reforming Juvenile Justice: A Developmental Approach*, National Research Council (2013), page 96, and Chapter 4). As a result of this, officers must be very diligent in their questioning of juvenile suspects. Officers must recognize that juveniles are not as responsible or mature as adults, they often lack the life experiences, judgement and get involved in risky situations they may be unable to handle. According to California’s SB 395, “Custodial interrogation of an individual by the state requires that the individual be advised of his or her rights and make a knowing, intelligent, and voluntary waiver of those rights before the interrogation proceeds. People under 18 years of age have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiver. Additionally, a large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions.”

As a result, an officer must be skilled in the interrogation of juvenile suspects. The officer’s process of assessment will be questioned and examined by the court before any statement made by a youth is admitted as evidence. During this examination, the court will determine from the evidence whether the youth fully understood the rights being explained to them. An officer presenting evidence of having conducted a proper assessment of an accused youth should have notes reflecting the conversations and specific observations of the youth’s responses to satisfy the court that adequate efforts were made to ensure that the youth did understand their rights. Good evidence of understanding can be achieved by asking the youth to repeat, summarize, or paraphrase their understanding of the rights that were explained to them.

California Welfare and Institution Code sec. 625.6 reads:

“625.6.

- a. Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

- b. The court shall, in adjudicating the admissibility of statements of a youth 15 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with subdivision (a).
- c. This section does not apply to the admissibility of statements of a youth 15 years of age or younger if both of the following criteria are met.
 - i. The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat.
 - ii. The officer's questions were limited to those questions that were reasonably necessary to obtain that information.



CHAPTER 9: IDENTIFYING INFORMATION

OVERVIEW

In Chapter 10, we examine eyewitness testimony, forensic evidence, and expert testimony. Eyewitness testimony is often thought of as valid evidence, and most time it is. However, research is demonstrating that human memory can be fallible and may result in misidentification. Many factors influence misidentification and often it is not purposeful. It can result from the way our brain stores memories, it could be from the way the eyewitness is interviewed, or through misinformation. Forensic evidence is vital to many criminal investigations. It has been invaluable in not only solving violent crimes, but also non-violent crimes such as computer hacking and fraud and embezzlement. Forensic evidence often requires expert testimony to provide the court with detailed and specific information to the court. They are often called on to be expert witnesses or hired as consultants to contribute specialized knowledge and advice in their field of expertise. This chapter will explore legal aspects of forensic evidence and the need for expert witnesses.

OBJECTIVES

- Explain the impact of memory storage, suggestibility, and the misinformation effect has on witness accuracy.
- Explain false memories and how this affects the reliance on eyewitness testimony.
- Identify the main steps in crime scene management (STAIR)
- Identify the legal aspects of forensic evidence.
- Identify how had DNA has impacted the criminal court process.
- Explain what an expert witness is, and what are their roles and responsibilities in the criminal court process.

KEY TERMS

memory construction, memory reconstruction, suggestibility, eyewitness misidentification, misinformation effect, repressed memories, false memories, physical evidence, forensic evidence, criminal investigation, DNA analysis, nucleotides - cytosine, guanine, thymine, adenine, expert testimony

CRITICAL THINKING

1. Watch the following video and [explain how anxiety and leading questions by police](#) can affect witness identification. How does this impact the criminal court process? Should jury instructions include more information on eyewitness reliability? Why or why not?
2. Becoming the teacher, create a practice test on the Misinformation Effect. For this critical thinking question, you will create three (3) practice questions around Elizabeth Loftus. Create both the question and answers for each question. Make sure to highlight the key information learned in section 9.2 – The Misinformation Effect.
3. Physical evidence is vital in the court so proper crime scene investigation is vital. In this critical thinking example, pretend you are the detective investigating a bank robbery. Using the STAIR technique, identify the steps you would take when processing the scene. How would you manage the witnesses?
4. Forensic evidence is a constant evolving and developing. Conduct a Google Scholar search to identify a new forensic evidence method and explain the evidence type and usage. A search example is shown below.

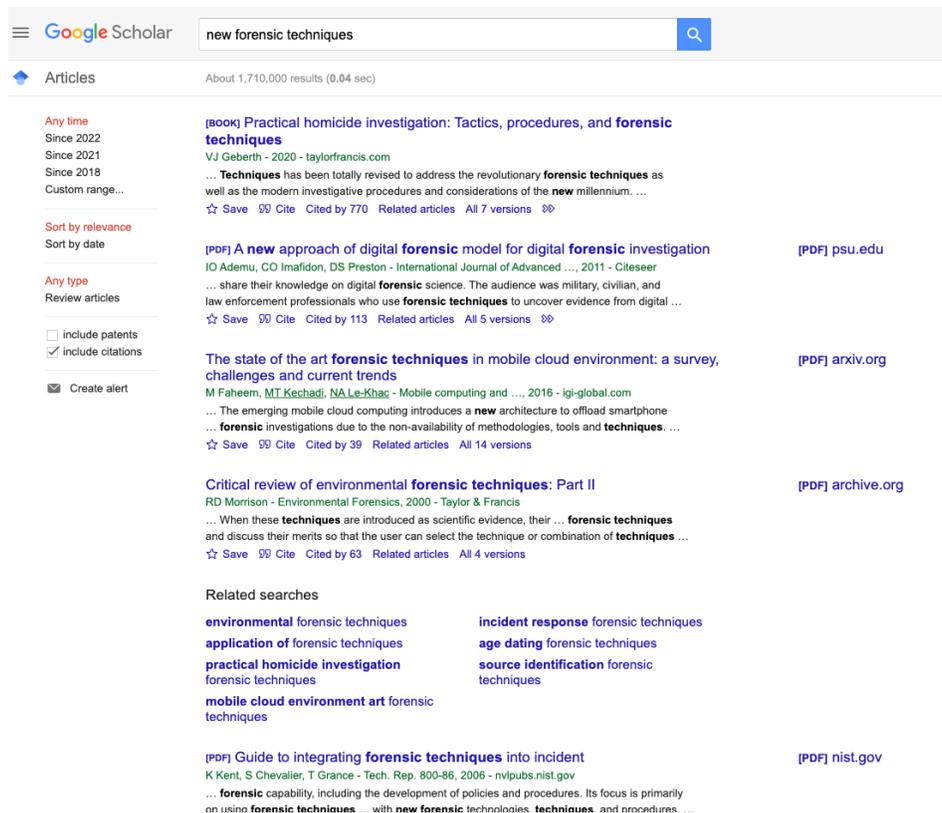


Figure 9.1. Example of Google Scholar Search⁴

⁴ This image by Tabitha Raber is licensed under [CC BY 4.0](#)

9.1 EYEWITNESS IDENTIFICATION

Memory Construction and Reconstruction

The formulation of new memories is sometimes called construction, and the process of bringing up old memories is called reconstruction. Yet as we retrieve our memories, we also tend to alter and modify them. A memory pulled from long-term storage into short-term memory is flexible. New events can be added and we can change what we think we remember about past events, resulting in inaccuracies and distortions. People may not intend to distort facts, but it can happen in the process of retrieving old memories and combining them with new memories (Roediger and DeSoto, in press).

Suggestibility

When someone witnesses a crime, that person's memory of the details of the crime is very important in catching the suspect. Because memory is so fragile, witnesses can be easily (and often accidentally) misled due to the problem of suggestibility. Suggestibility describes the effects of misinformation from external sources that lead to the creation of false memories. In the fall of 2002, a sniper in the DC area shot people at a gas station, leaving Home Depot, and walking down the street. These attacks went on in a variety of places for over three weeks and resulted in the deaths of ten people. During this time, as you can imagine, people were terrified to leave their homes, go shopping, or even walk through their neighborhoods. Police officers and the FBI worked frantically to solve the crimes, and a tip hotline was set up. Law enforcement received over 140,000 tips, which resulted in approximately 35,000 possible suspects (Newseum, n.d.).

Most of the tips were dead ends until a white van was spotted at the site of one of the shootings. The police chief went on national television with a picture of the white van. After the news conference, several other eyewitnesses called to say that they too had seen a white van fleeing from the scene of the shooting. At the time, there were more than 70,000 white vans in the area. Police officers, as well as the general public, focused almost exclusively on white vans because they believed the eyewitnesses. Other tips were ignored. When the suspects were finally caught, they were driving a blue sedan.

As illustrated by this example, we are vulnerable to the power of suggestion, simply based on something we see on the news. Or we can claim to remember something that in fact is only a suggestion someone made. It is the suggestion that is the cause of the false memory.

Eyewitness Misidentification

Even though memory and the process of reconstruction can be fragile, police officers, prosecutors, and the courts often rely on eyewitness identification and testimony in the

prosecution of criminals. However, faulty eyewitness identification and testimony can lead to wrongful convictions.

How does this happen? In 1984, Jennifer Thompson, then a 22-year-old college student in North Carolina, was brutally raped at knifepoint. As she was being raped, she tried to memorize every detail of her rapist's face and physical characteristics, vowing that if she survived, she would help get him convicted. After the police were contacted, a composite sketch was made of the suspect, and Jennifer was shown six photos. She chose two, one of which was of Ronald Cotton. After looking at the photos for 4–5 minutes, she said, "Yeah. This is the one," and then she added, "I think this is the guy." When questioned about this by the detective who asked, "You're sure? Positive?" She said that it was him. Then she asked the detective if she did OK, and he reinforced her choice by telling her she did great. These kinds of unintended cues and suggestions by police officers can lead witnesses to identify the wrong suspect. The district attorney was concerned about her lack of certainty the first time, so she viewed a lineup of seven men. She said she was trying to decide between numbers 4 and 5, finally deciding that Cotton, number 5, "Looks most like him." He was 22 years old.

By the time the trial began, Jennifer Thompson had absolutely no doubt that she was raped by Ronald Cotton. She testified at the court hearing, and her testimony was compelling enough that it helped convict him. How did she go from, "I think it's the guy" and it "Looks most like him," to such certainty? Gary Wells and Deah Quinlivan (2009) assert it is suggestive police identification procedures, such as stacking lineups to make the defendant stand out, telling the witness which person to identify, and confirming witnesses choices by telling them "Good choice," or "You picked the guy."

After Cotton was convicted of the rape, he was sent to prison for life plus 50 years. After 4 years in prison, he was able to get a new trial. Jennifer Thompson once again testified against him. This time Ronald Cotton was given two life sentences. After serving 11 years in prison, DNA evidence finally demonstrated that Ronald Cotton did not commit the rape, was innocent, and had served over a decade in prison for a crime he did not commit.



Pin It! *Eyewitness Evidence*

To learn more about eyewitness evidence, watch these two videos:

- [eyewitness evidence \(part i\)](#)



**If you are accessing a print version of this book, type the following short url into your browser to visit part i: bit.ly/3zxCQcR*

- [eyewitness evidence \(part ii\)](#)



**If you are accessing a print version of this book, type the following short url into your browser to visit part ii: bit.ly/3OaETaL*

Ronald Cotton's story, unfortunately, is not unique. There are also people who were convicted and placed on death row, who were later exonerated. The Innocence Project is a non-profit group that works to exonerate falsely convicted people, including those convicted by eyewitness testimony. To learn more, you can visit [The Innocence Project website](#).



The Verdict: *The Elizabeth Smart Case – Preserving Eyewitness Memory*

Contrast the Cotton case with what happened in the Elizabeth Smart case. When Elizabeth was 14 years old and fast asleep in her bed at home, she was abducted at knifepoint. Her nine-year-old sister, Mary Katherine, was sleeping in the same bed and watched, terrified, as her beloved older sister was abducted. Mary Katherine was the sole eyewitness to this crime and was very fearful. In the coming weeks, the Salt Lake City police and the FBI proceeded with caution with Mary Katherine. They did not want to implant any false memories or mislead her in any way. They did not show her police line-ups or push her to do a composite sketch of the abductor. They knew if they corrupted her memory, Elizabeth might never be found. For several months, there was little or no progress on the case. Then, about 4 months after the

kidnapping, Mary Katherine first recalled that she had heard the abductor’s voice prior to that night (he had worked one time as a handyman at the family’s home) and then she was able to name the person whose voice it was. The family contacted the press and others recognized him—after a total of nine months, the suspect was caught, and Elizabeth Smart was returned to her family.

9.2 THE MISINFORMATION EFFECT^{xliv}

Cognitive psychologist Elizabeth Loftus has conducted extensive research on memory. She has studied false memories as well as recovered memories of childhood sexual abuse. Loftus also developed the misinformation effect paradigm, which holds that after exposure to incorrect information, a person may misremember the original event.

According to Loftus, an eyewitness’s memory of an event is very flexible due to the misinformation effect. To test this theory, Loftus and John Palmer (1974) asked 45 U.S. college students to estimate the speed of cars using different forms of questions (Figure 2). The participants were shown films of car accidents and were asked to play the role of the eyewitness and describe what happened. They were asked, “About how fast were the cars going when they (smashed, collided, bumped, hit, contacted) each other?” The participants estimated the speed of the cars based on the verb used.



Pin It! *The Misinformation Effect*

To learn more about misinformation and how it can affect people, watch this video: [the misinformation effect](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3MSqrmG*

Participants who heard the word “smashed” estimated that the cars were traveling at a much higher speed than participants who heard the word “contacted.” The implied information about speed, based on the verb they heard, had an effect on the participants’ memory of the accident. In a follow-up one week later, participants were asked if they saw any broken glass

(none was shown in the accident pictures). Participants who had been in the “smashed” group were more than twice as likely to indicate that they did remember seeing glass. Loftus and Palmer demonstrated that a leading question encouraged them to not only remember the cars were going faster but to also falsely remember that they saw broken glass.

Studies have demonstrated that young adults (the typical research subjects in psychology) are often susceptible to misinformation, but that children and older adults can be even more susceptible (Bartlett & Memon, 2007; Ceci & Bruck, 1995). In addition, misinformation effects can occur easily, and without any intention to deceive (Allan & Gabbert, 2008). Even slight differences in the wording of a question can lead to misinformation effects. Subjects in one study were more likely to say yes when asked “Did you see the broken headlight?” than when asked, “Did you see a broken headlight?” (Loftus, 1975).

Other studies have shown that misinformation can corrupt memory even more easily when it is encountered in social situations (Gabbert, Memon, Allan, & Wright, 2004). This is a problem particularly in cases where more than one person witnesses a crime. In these cases, witnesses tend to talk to one another in the immediate aftermath of the crime, including as they wait for the police to arrive. But because different witnesses are different people with different perspectives, they are likely to see or notice different things, and thus remember different things, even when they witness the same event. So when they communicate about the crime later, they not only reinforce common memories for the event, they also contaminate each other’s memories for the event (Gabbert, Memon, & Allan, 2003; Paterson & Kemp, 2006; Takarangi, Parker, & Garry, 2006).

The misinformation effect has been modeled in the laboratory. Researchers had subjects watch a video in pairs. Both subjects sat in front of the same screen, but because they wore differently polarized glasses, they saw two different versions of a video, projected onto a screen. So, although they were both watching the same screen, and believed (quite reasonably) that they were watching the same video, they were actually watching two different versions of the video (Garry, French, Kinzett, & Mori, 2008).

In the video, Eric the electrician is seen wandering through an unoccupied house and helping himself to the contents thereof. A total of eight details were different between the two videos. After watching the videos, the “co-witnesses” worked together on 12 memory test questions. Four of these questions dealt with details that were different in the two versions of the video, so subjects had the chance to influence one another. Then subjects worked individually on 20 additional memory test questions. Eight of these were for details that were different in the two videos. Subjects’ accuracy was highly dependent on whether they had discussed the details previously. Their accuracy for items they had *not* previously discussed with their co-witness was 79%. But for items that they *had* discussed, their accuracy dropped markedly, to 34%. That is, subjects allowed their co-witnesses to corrupt their memories for what they had seen.

Controversies over Repressed and Recovered Memories

Other researchers have described how whole events, not just words, can be falsely recalled, even when they did not happen. The idea that memories of traumatic events could be repressed has been a theme in the field of psychology, beginning with Sigmund Freud, and the controversy surrounding the idea continues today.

Recall of false autobiographical memories is called false memory syndrome. This syndrome has received a lot of publicity, particularly as it relates to memories of events that do not have independent witnesses—often the only witnesses to the abuse are the perpetrator and the victim (e.g., sexual abuse).

On one side of the debate are those who have recovered memories of childhood abuse years after it occurred. These researchers argue that some children's experiences have been so traumatizing and distressing that they must lock those memories away in order to lead some semblance of a normal life. They believe that repressed memories can be locked away for decades and later recalled intact through hypnosis and guided imagery techniques (Devilley, 2007).

Research suggests that having no memory of childhood sexual abuse is quite common in adults. For instance, one large-scale study conducted by John Briere and Jon Conte (1993) revealed that 59% of 450 men and women who were receiving treatment for sexual abuse that had occurred before age 18 had forgotten their experiences. Ross Cheit (2007) suggested that repressing these memories created psychological distress in adulthood. The Recovered Memory Project was created so that victims of childhood sexual abuse can recall these memories and allow the healing process to begin (Cheit, 2007; Devilly, 2007).

On the other side, Loftus has challenged the idea that individuals can repress memories of traumatic events from childhood, including sexual abuse, and then recover those memories years later through therapeutic techniques such as hypnosis, guided visualization, and age regression.

Loftus is not saying that childhood sexual abuse doesn't happen, but she does question whether or not those memories are accurate, and she is skeptical of the questioning process used to access these memories, given that even the slightest suggestion from the therapist can lead to misinformation effects. For example, researchers Stephen Ceci and Maggie Brucks (1993, 1995) asked three-year-old children to use an anatomically correct doll to show where their pediatricians had touched them during an exam. Fifty-five percent of the children pointed to the genital/anal area on the dolls, even when they had not received any form of a genital exam.

Ever since Loftus published her first studies on the suggestibility of eyewitness testimony in the 1970s, social scientists, police officers, therapists, and legal practitioners have been aware of the flaws in interview practices. Consequently, steps have been taken to decrease the

suggestibility of witnesses. One way is to modify how witnesses are questioned. When interviewers use neutral and less leading language, children more accurately recall what happened and who was involved (Goodman, 2006; Pipe, 1996; Pipe, Lamb, Orbach, & Esplin, 2004). Another change is in how police lineups are conducted. It's recommended that a blind photo lineup be used. This way the person administering the lineup doesn't know which photo belongs to the suspect, minimizing the possibility of giving leading cues. Additionally, judges in some states now inform jurors about the possibility of misidentification. Judges can also suppress eyewitness testimony if they deem it unreliable.

More on False Memories

In early false memory studies, undergraduate subjects' family members were recruited to provide events from the students' lives. The student subjects were told that the researchers had talked to their family members and learned about four different events from their childhoods. The researchers asked if the now undergraduate students remembered each of these four events—introduced via short hints. The subjects were asked to write about each of the four events in a booklet and then were interviewed two separate times. The trick was that one of the events came from the researchers rather than the family (and the family had actually assured the researchers that this event had *not* happened to the subject). In the first such study, this researcher-introduced event was a story about being lost in a shopping mall and rescued by an older adult. In this study, after just being asked whether they remembered these events occurring on three separate occasions, a quarter of subjects came to believe that they had indeed been lost in the mall (Loftus & Pickrell, 1995). In subsequent studies, similar procedures were used to get subjects to believe that they nearly drowned and had been rescued by a lifeguard, or that they had spilled punch on the bride's parents at a family wedding, or that they had been attacked by a vicious animal as a child, among other events (Heaps & Nash, 1999; Hyman, Husband, & Billings, 1995; Porter, Yuille, & Lehman, 1999).

More recent false memory studies have used a variety of different manipulations to produce false memories in substantial minorities and even occasional majorities of manipulated subjects (Braun, Ellis, & Loftus, 2002; Lindsay, Hagen, Read, Wade, & Garry, 2004; Mazzoni, Loftus, Seitz, & Lynn, 1999; Seamon, Philbin, & Harrison, 2006; Wade, Garry, Read, & Lindsay, 2002). For example, one group of researchers used a mock-advertising study, wherein subjects were asked to review (fake) advertisements for Disney vacations, to convince subjects that they had once met the character Bugs Bunny at Disneyland—an impossible false memory because Bugs is a Warner Brothers character (Braun et al., 2002). Another group of researchers photoshopped childhood photographs of their subjects into a hot air balloon picture and then asked the subjects to try to remember and describe their hot air balloon experience (Wade et al., 2002). Other researchers gave subjects unmanipulated class photographs from their childhoods along with a fake story about a class prank, and thus enhanced the likelihood that subjects would falsely remember the prank (Lindsay et al., 2004).

Using false feedback manipulation, we have been able to persuade subjects to falsely remember having a variety of childhood experiences. In these studies, subjects are told (falsely) that a powerful computer system has analyzed questionnaires that they completed previously and has concluded that they had a particular experience years earlier. Subjects apparently believe what the computer says about them and adjust their memories to match this new information. A variety of different false memories have been implanted in this way. In some studies, subjects are told they once got sick on a portion of a particular food (Bernstein, Laney, Morris, & Loftus, 2005). These memories can then spill out into other aspects of subjects' lives, such that they often become less interested in eating that food in the future (Bernstein & Loftus, 2009b). Other false memories implanted with this methodology include having an unpleasant experience with the character Pluto at Disneyland and witnessing physical violence between one's parents (Berkowitz, Laney, Morris, Garry, & Loftus, 2008; Laney & Loftus, 2008).

Importantly, once these false memories are implanted—whether through complex methods or simple ones—it is extremely difficult to tell them apart from true memories (Bernstein & Loftus, 2009a; Laney & Loftus, 2008).



Critical Thinking... *Eyewitness Testimony*

Jurors place a lot of weight on eyewitness testimony. Imagine you are an attorney representing a defendant who is accused of robbing a convenience store. Several eyewitnesses have been called to testify against your client. What would you tell the jurors about the reliability of eyewitness testimony?

9.3 PHYSICAL EVIDENCE^{xlv}

The court will also generally attribute a high probative value to physical exhibits. The court likes physical evidence because they are items the court can see and examine to interpret the facts in issue for proof beyond a reasonable doubt. Physical evidence can include just about anything, such as weapons, fingerprints, shoe prints, tire marks, tool impression, hair, fiber, or body fluids. These kinds of physical exhibits of evidence can be examined and analyzed by experts who can provide the court with expert opinions that connect the item of evidence to a person, place, or the criminal event. This allows the court to consider circumstantial connections of the accused to the crime scene or the accused to the victim. For example, in the case where the fingerprints of a suspect are found at a crime scene, and a DNA match of a murder victim's blood is found on that suspect's clothing, forensic connections could be made and, in the absence of an explanation, the court would likely find this physical evidence to be relevant and compelling evidence with high probative value.

Types of Physical Evidence^{xlvi}

- Fingerprints

- Shoe Prints
- Tire Tracks
- Firearms (bullets, bullet casings)
- Hair (may contain DNA)
- Fibers
- Body Fluid (blood, semen, saliva) - all containing DNA

Crime Scene Management^{xlvii}

Crime scene management skills are an extremely significant task component of investigation because evidence that originates at the crime scene will provide a picture of events for the court to consider in its deliberations. That picture will be composed of witness testimony, crime scene photographs, physical exhibits, and the analysis of those exhibits, along with the analysis of the crime scene itself. From this chapter, you will learn the task processes and protocols for several important issues in crime scene management. These include

1. Note taking
2. Securing a crime scene
3. Evidence management
4. Scaling the investigation to the event

Note Taking

Although other documents will be created by the investigator to manage the crime scene, no other document will be as important to the investigator as the notebook. The notebook is the investigator's personal reference for recording the investigation.

Many variations of police notebooks have emerged over the years. The court will sometimes even accept police notes that have been made on a scrap of paper if that was the only paper available at the time. However, beyond extreme circumstances, in operational investigations, the accepted parameters of a police notes and notebooks are:

- A book with a cover page that shows the investigators name, the date the notebook was started, and the date the notebook was concluded
- Sequential page numbers
- A bound booklet from which pages cannot be torn without detection
- Lined pages that allow for neat scripting of notes
- Each entry into the notebook should start with a time, date, and case reference
- Blank spaces on pages should not be left between entries and, if a blank space is left, it should be filled with a single line drawn through the space or a diagonal line drawn across a page or partial page space
- Any errors made in the notebook should only be crossed out with a single line drawn through the error, and this should not be done in a manner that makes the error illegible.

In court, the investigator's notebook is their best reference document. When testifying, the court will allow an investigator to refer to notes made at the time to refresh their memory of events and actions taken. When an investigator's notebook is examined by the court, notes consistent with the investigator's testimony provide the court with a circumstantial assurance or truthfulness that the evidence is accurate and truthful (McRory, 2014). Alternately, if critical portions of the investigation are not properly recorded or are missing from the notebook, those portions of the evidence will be more closely scrutinized by the defense. The court may give those unrecorded facts less weight in its final deliberations to decide proof beyond a reasonable doubt.

Integrity of the Crime Scene

As part of crime scene management, protecting the integrity of the crime scene involves several specific processes that fall under the Tasks category of the STAIR Tool. These are tasks that must be performed by the investigator to identify, collect, preserve, and protect evidence to ensure that it will be accepted by the court. These tasks include:

1. Locking down the crime scene
2. Setting up crime scene perimeters
3. Establishing a path of contamination
4. Establishing crime scene security

When an investigator arrives at a crime scene, the need to protect that crime scene becomes a requirement as soon as it has been determined that the criminal event has become an inactive event and the investigator has switched to a strategic investigative response. As you will recall from the Response Transition Matrix, it is sometimes the case that investigators arrive at an active event in tactical investigative response mode. In these cases their first priority is to protect the life and safety of people, the need to protect the crime scene and its related evidence is a secondary concern. This is not to say that investigators attending in tactical investigative response mode should totally ignore evidence or should be careless with evidence if they can protect it; however, if evidence cannot be protected during the tactical investigative response mode, the court will accept this as a reality.

Evidence Management

The STAIR tool (See graphic below) provides the process used in crime scene management. It is the analysis and process that must occur to establish connections between the victims, witnesses, and suspects in relation to the criminal event. The crime scene is often a nexus of those events and consequently, it requires a systematic approach to ensure that the evidence gathered will be acceptable in court.

Exhibits, such as blood, hair, fiber, fingerprints, and other objects requiring forensic analysis, may illustrate spatial relationships through evidence transfers. Other types of physical evidence may establish timelines and circumstantial indications of motive, opportunity, or means. All

evidence within the physical environment of the crime scene is critically important to the investigative process. At any crime scene, the two greatest challenges to the physical evidence are contamination and loss of continuity.

Contamination of Evidence

Contamination is the unwanted alteration of evidence that could affect the integrity of the original exhibit or the crime scene. This unwanted alteration of evidence can wipe away original evidence transfer, dilute a sample, or deposit misleading new materials onto an exhibit. Just as evidence transfer between a suspect and the crime scene or the suspect and the victim can establish a circumstantial connection, contamination can compromise the analysis of the original evidence transfer to the extent that the court may not accept the analysis and the inference that the analysis might otherwise have shown.

Scaling the Investigation to the Event

Not every crime scene is a major event that requires an investigator to call out a team and undertake the crime scene and evidence management processes that have been described in this book. Often, for minor crimes, a single investigator will be alone at the crime scene and will engage in all the roles described, albeit on a far smaller scale. When this process is being undertaken by a single investigator on a smaller scale, the issues of diagram, security log, and exhibit log may be limited to data and illustrations in the notebook of the investigator.

It is important to stress that each of the tasks below needs to be considered and addressed for every crime scene investigation, no matter how big or how small. Specifically:

- The crime scene must be secured, preserved, and recorded until evidence is collected
- Existing contamination must be considered and recorded
- Cross-contamination must be prevented
- Exhibits must be identified, preserved, collected, and secured to preserve the chain of continuity.

Large scale or small scale, all these issues must be considered, addressed, and recorded to satisfy the court that the crime scene and the evidence were handled correctly.

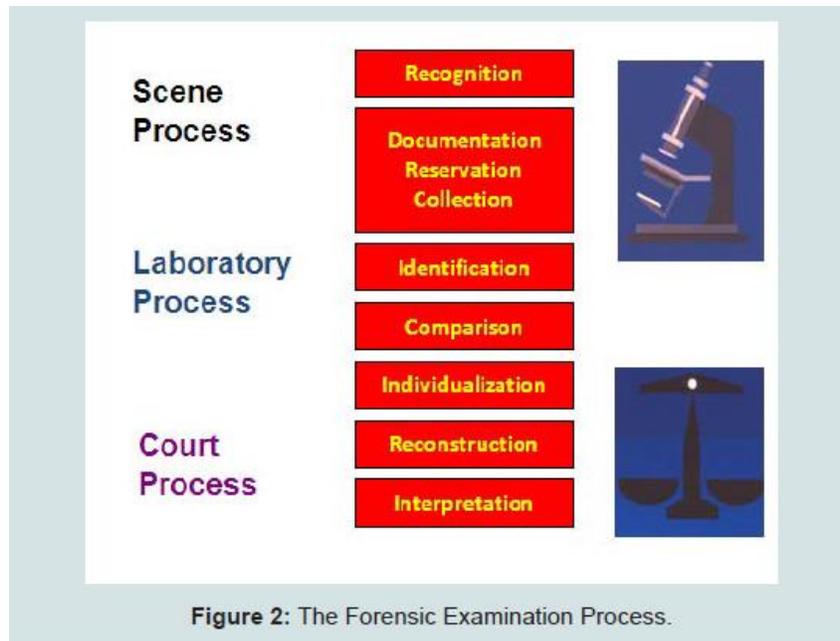


Figure 9.2 The Forensic Examination Process⁵

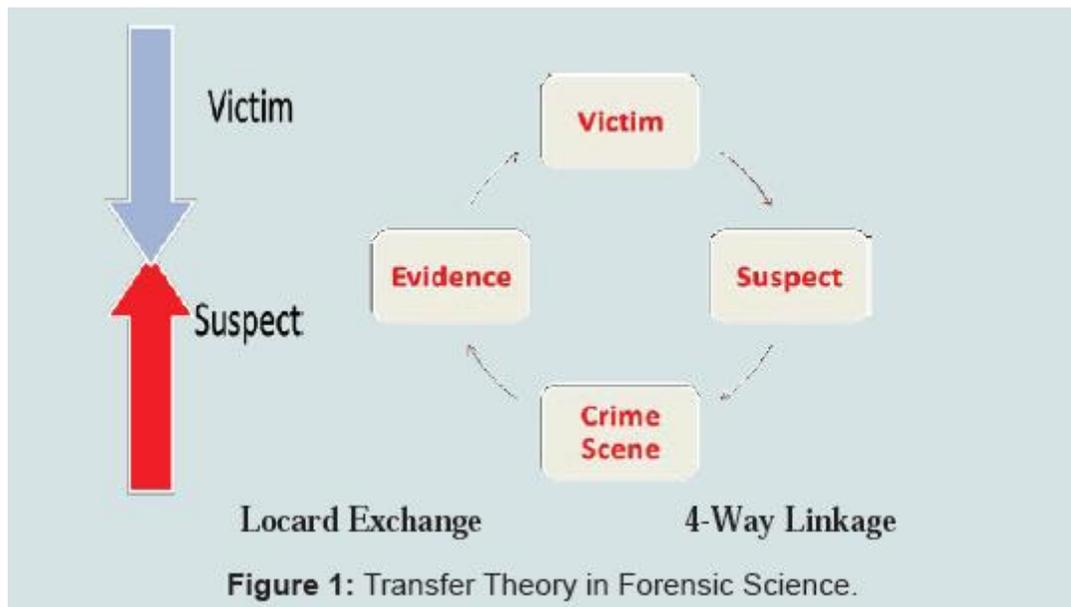


Figure 9.3 Diagram of the Transfer Theory⁶

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Figure 9.4 The Stair Tool guides the investigative process⁷

9.4 LEGAL ASPECTS OF FORENSIC EVIDENCE

Forensic science is simply defined as the application of science to the law or legal matters. In today's CSI and Forensic Files world, this area of science is much more widely known to the general public. However, it is also misunderstood due to Hollywood's resolve to complete every case within the context of a one-hour, commercials included, pseudo-real-life crime drama. When the actual real-life judicial system needs science to resolve a question, the person who is called upon to bring science into the courtroom is often a forensic scientist. The law and science are strange bedfellows. Science is an empirical method of learning, anchored to the principles

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of observation and discovery as to how the natural world works. Scientific knowledge increases human understanding by developing experiments that provide the scientist with an objective answer to the question presented. Through the scientific method of study, a scientist systematically observes physical evidence and methodically records the data that support or not support the scientific process. The law, on the other hand, starts out with at least two competing parties with markedly different views who use the courthouse as a battleground to argue factual issues within the context of constitutional, statutory, and decisional law.

Forensics involves the application of knowledge and technology from different scientific disciplines in jurisprudence. These are, for example, biology, pharmacy, chemistry, medicine, etc., and each of them applies in the present, increasingly complex legal proceedings in which the required knowledge and skills of experts from these areas to prove offenses. For the purposes of this article, we will hold on the biology or forensic biology, which is the most important branch of DNA analysis. Forensic biology deals with serological and DNA analysis of physiological fluids in the human body in order to identify and individuate people, animals, and microorganisms. It should be added that the application of certain procedures dates back to the earliest history of medicine, but it is still used today. These are, for example, methods in which the examination of the body (depending on its conditions) can determine gender, race, age of the person, analysis of the tooth, or the determination of blood group testing, and the presence of specific antibodies in the body.

The development of medicine throughout history has formed the special branches that now make up modern medicine. With them were created and profiles of experts whose work made a significant contribution to medical practice, but also in medicine as a scientific discipline. Thanks to their academic and professional achievements, medicine today can provide answers to questions that were once unimaginable.

DNA analysis indicates a molecule containing nucleotides with the elements that determine the development and functioning of all living beings. DNA analysis is used to cause the blood, hair follicles, saliva, or semen linked to the suspects to commit crimes.

In the criminal sense, DNA analysis confirms the fundamental principle of modern criminology, and that is “no perfect crime”. This sends a clear message to perpetrators and potential perpetrators that any criminal offense will be revealed and the perpetrator will be punished.



Pin It! *Analyzing Forensic Evidence*

To learn more about how forensic evidence is analyzed, watch this video: [analyzing forensic evidence](#).



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Criminal Investigation

Criminal investigation deals with the offense as a real phenomenon, and in the investigation, they included actions that should clarify all issues related to the appearance of the offense, the offender, the victim, and other circumstances. The criminal investigation includes microanalysis of criminal offense because it directly reconstructed the actual structure of the offense.

Criminal Investigation is microanalysis, the reconstruction of the past - a possible criminal offense. The research directly reconstruction the real, objective, and subjective structure of the offense.

The application of science to the legal arena is fundamentally one of reconstruction, that is, trying to assist in determining what happened, where it happened when it happened, and who was involved. It is not concerned with, and cannot determine, why something happened (the motivation). When science is applied in this way, the adjective “forensic” is added, which means that it is applicable to a court of law. Forensic analysis is performed on evidence to assist the court in establishing physical facts so that criminal or civil disputes can be resolved. The legal question determines the direction of scientific inquiry. It is the job of the forensic scientist to translate the legal inquiry into an appropriate scientific question and to advise the judiciary on the capabilities and limitations of current techniques.

In forensic science, the laws of natural science are considered in making a determination about the state of a piece of physical evidence at the time of collection. Using the scientific method, inferences are made about how the evidence came to be in that state. These inferences then limit the events that may or may not have taken place in connection with said evidence. The law defines elements of a crime; science contributes information to assist in determining whether an element is present or absent.

The first few minutes of a crime scene’s processing can be the most critical moments of an entire investigation. At no other period will the investigators be closer to the moment the crime was committed. Investigators will never have the area more pristine or more unfettered from

contamination. In those first few minutes, fingerprints, shoe prints, tire prints, trace evidence, and the state of the victim are all at their most informative. And yet, at no other time are mistakes more likely made that can potentially jeopardize the successful prosecution of the crime's perpetrator.

Once the area is secure, investigators can then perform an initial walk-through in which they try to glean an understanding of the nature and scope of the crime and determine what evidence should be collected and from where. Prior to removing any evidence, however, it should be photographed or videotaped to document its state and its position within its surroundings. Much of the crime scene can also be recorded by 3D laser scanning to give investigators an even more refined image of the crime scene and its overall layout.

To fully appreciate the potential value of physical evidence, the investigator must understand the difference between class and individual characteristics. Characteristics of physical evidence that are common to a group of objects or persons are termed class characteristics. Regardless of how thoroughly examined, such evidence can be placed only into a broad category; an individual identification cannot be made because there is a possibility of more than one source for the evidence. Examples of this type of evidence include all unworn Nike athletic shoes of a particular model, the new, unmarked face of a manufacturer's specific type of hammer, and soil. In contrast, evidence with individual characteristics can be identified, with a high degree of probability, as originating with a particular person or source. The ability to establish individuality distinguishes this type of physical evidence from that possessing only class characteristics. Some examples of evidence with individual characteristics are fingerprints, palm prints, and footprints.

Conceptually, the distinction between class and individual characteristics is clear. But as a practical matter, the crime scene technician or investigator often may not be able to make this differentiation and must rely on the results yielded by crime laboratory examination. Thus, although the investigator must recognize that physical evidence that allows for individualization is of more value, he or she should not dismiss evidence that appears to offer only class characteristics, because it may show individual characteristics through laboratory examination. Furthermore, a preponderance of class-characteristic evidence tying a suspect (or other items in the suspect's possession) to the scene strengthens the case for prosecution. Note also that occasionally class-characteristic evidence may be of such an unusual nature that it has much greater value than that ordinarily associated with evidence of this type. In an Alaska case, a suspect was apprehended in the general area where a burglary had been committed; the pry bar found in his possession contained white stucco, which was of considerable importance since the building burglarized was the only white stucco building in that town. Finally, class-characteristic evidence can be useful in excluding suspects in a crime, resulting in a more effective use of investigative effort.

DNA Analysis

All cells, other than mature red blood cells, contain a nucleus that is where the body's DNA is located. The DNA molecule is a double helix, each strand being composed of four bases, or nucleotides: cytosine, guanine, thymine, and adenine. They are usually referred to by the first letter of their name: C, G, T, and A. The two strands are held together by chemical bonding in which T always pairs with A and G always pairs with C. A gene is a part of the DNA strand in which the order of C, G, T, and A is ultimately responsible for defining which amino acids are assembled in the synthesis of a specific protein. All of the DNA in a cell is known as the genome, and there are approximately 3 billion base pairs in the human genome. This description applies only to nuclear DNA.

The history and role of deoxyribonucleic acid (DNA) as the material that carries the genetic blueprint of all biological organisms have been known since Crick and Watson's research that was published in 1953. However, the basis of its use in forensic science is much more recent, beginning just 5 years before the Pitchfork case. Subsequent research showed that genes occupied only a very small part of the total material in a DNA molecule, and in 1980 Dr. Ray White and colleagues at the University of Utah found that some parts of the noncoding DNA were highly variable between individuals. White, a geneticist, suggested that these regions could be used in parentage testing. Dr. Jeffreys went further and showed how the variability could be used to type blood and body fluids in criminal cases.

DNA analysis is used in forensics for linking suspects to samples of blood, hair, saliva, or semen. It is used to prove guilt or innocence, and in a variety of cases that require the identification of human remains, determine maternity and paternity, establish matching organ donors and recipients, etc.

Blood patterns can be very helpful in the investigation of homicides. Passive drops, transfer/contact patterns, swipe patterns, wipe patterns, and void patterns are examples of characteristic patterns to note. Passive drops, also known as 90-degree blood drops, indicate the blood source was at a 90-degree angle from the surface of the body. Ninety-degree blood drops are not likely to be the decedent's blood and should be collected. Transfer/contact patterns are also important blood patterns. These patterns appear when a bloody surface is transferred to another surface. This type of pattern may indicate an area where the assailant's DNA is transferred to the decedent. Swipe patterns are similar to transfer patterns, but the transfer pattern is directional. Directionality may be seen as pattern feathering at the edge where movement ended. Wipe patterns are similar to swipe patterns, except that the wet blood isn't transferred; it is already present as another object moves through the stain.

DNA analysis begins by extracting DNA from samples of blood, hair, saliva, semen, or tissue. This is, in scientific terms, a simple procedure, but problems may occur due to poor quality or small amounts of samples. By using special techniques and careful analysis, it is possible to

separate the DNA of several people, or called “mixed of DNA” but the results are often insufficient for its conclusion.

The tools of molecular biology now enable forensic scientists to characterize biological evidence at the DNA level. These DNA typing techniques and their genetic markers are more sensitive, more specific, and more informative than the available battery of protein markers. Currently, the methods available to the forensic scientist include restriction fragment length polymorphism (RFLP) typing of a variable number of tandem repeat (VNTR) loci and amplification of the number of target DNA molecules by the polymerase chain reaction (PCR) and subsequent typing of specified genetic markers. Any material, including a hair follicle that contains nucleated cells potentially can be typed for DNA polymorphisms. There are a few reports of successful DNA typing of hairs, but these hairs usually contain sheath material. However, telogen phase hairs contain very little quantity of DNA such that most DNA markers cannot be detected, even with the use of PCR.

When sexual assault is alleged, the perpetrator’s pubic hair provides a link between the victim and the perpetrator. Taken alone, it does not prove the allegation. In concert with other evidence, however, it may prove that the sexual assault was, indeed, perpetrated by a certain individual. Likewise, dirt, paint chips, or blunt force injuries may link the victim to a scene or weapon. Such evidence may also lead investigators to discover the scene location or the object used as a weapon. For instance, a patterned injury of a belt buckle, may lead to the actual belt used and possibly to its owner.

Semen comprises seminal fluid with or without the presence of spermatozoa. Samples containing spermatozoa are rich in DNA and DNA analysis of such samples, where sperm are visible, is nearly always successful using polymerase chain reaction (PCR) techniques. A differential lysis treatment is commonly used on samples of this type in order to separate the female epithelial material from the spermatozoa, thus simplifying the interpretation of the resultant DNA profiles.

Saliva is a secretion of the mouth that is important in digestion and comprises cells and secretions from the salivary and parotid glands. Saliva has a high proportion of water and a low level of dissolved substances and cellular material, which can make it difficult to locate visually. Saliva is commonly encountered as a source of DNA evidence.

DNA extraction has two main aims: first, to maximize the yield of DNA from a sample and in sufficient quantity to permit a full DNA profile to be obtained – this is increasingly important as the sample size diminishes; and, second, to extract DNA that is pure enough for subsequent analysis: the level of difficulty here depends very much on the nature of the sample. Once the DNA has been extracted, quantifying the DNA is important for subsequent analysis.

The first step in any DNA extraction method is to break the cells open in order to access the DNA within. Although DNA may be isolated by ‘boiling’ cells, this rather crude means of disrupting the cell does not produce DNA that is always of sufficient quality and purity to be

used in downstream analytical techniques such as polymerase chain reaction (PCR) amplification. DNA isolated by simple boiling generally fails as a substrate for further analysis because it has not been sufficiently separated from structural elements and DNA-binding proteins, and these impurities compromise downstream procedures. In order for DNA to be released cleanly, the phospholipid cell membranes and nuclear membranes have to be disrupted in a process called lysis, which uses a detergent solution (lysis buffer), often containing the detergent sodium dodecyl sulfate (SDS), which disrupts lipids and thus disrupts membrane integrity. Lysis buffer also contains a pH-buffering agent to maintain the pH of the solution so that the DNA stays stable: DNA is negatively charged due to the phosphate groups on its structural backbone, and its solubility is charge-dependent and thus pH-dependent. Proteinases, which are enzymes that digest proteins, are generally added to lysis buffer in order to remove proteins bound to the DNA and to destroy cellular enzymes that would otherwise digest DNA upon cell lysis. The lysis procedure sometimes calls for the use of heat and agitation in order to speed up the enzymatic reactions and lipid solubilization.



Pin It! *Forensic Science and Crime Scene Investigation*

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Expert Testimony

The court determines the expert, ex officio, or at the request of the parties, and in the case of civil proceedings, the party has the possibility to propose the presentation of evidence by expert testimony.

An expert is a person invited to the court using their expertise, submit their present observations or findings and opinion on the facts that may be relevant to determining the truth of the allegations that are the subject of proof.

The term “expert” means an expert whose professional (not jurisprudence) knowledge helps resolve legal issues. A lawyer is obliged to consult with an expert witness on any matter for which there is no solution on professional competence. Thus, the expert may be a member of each profession: engineer, sculptor, composer, an art historian, but also a doctor. The doctor is called upon as an expert in all cases where the subject of discussion physical or mental health, or their death.

The Court will take the evidence by expert testimony when to establish or clarify any facts necessary expertise which the court does not have.

Before the start of expertise, the expert witness will be called an expert to study the subject of his testimony carefully to accurately present everything he knows and finds, and to present his opinion impartially and in accordance with the rules of science and the skills. It will be particularly alert to perjury is a criminal act too. The court before which the procedure is managed by expert testimony, expert shows items that will study, puts his questions and seek explanations on its findings and opinion. An expert may be given clarifications, and he may be allowed to review documents. An expert may propose that evidence be presented or acquire objects and data that are of importance to the opinions and findings. If he is present at the crime scene investigation, reconstruction, or other investigative proceedings, the expert may propose that certain circumstances be clarified or that the test person asked certain questions.



Pin It! *What is an Expert Witness?*

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Responsibility of Forensic Experts

Contemporary law enforcement has greatly expanded its ability to solve crimes by the adoption of forensic techniques and procedures. Today, crimes often can be solved by detailed examination of the crime scene and analysis of forensic evidence. The work of forensic

scientists is not only crucial in criminal investigations and prosecutions, but is also vital in civil litigations, major man-made and natural disasters, and the investigation of global crimes. The success of the analysis of the forensic evidence is based upon a system that emphasizes teamwork, advanced investigative skills and tools (such as GPS positioning, cell phone tracking, video image analysis, artificial intelligence, and data mining), and the ability to process a crime scene properly by recognizing, collecting and preserving all relevant physical evidence.

Recognition of physical evidence is a vital step in the process. If potential physical evidence is not recognized, collected or properly preserved and tested, the forensic value of the evidence may be greatly reduced or even lost forever. Numerous routine and high profile cases have demonstrated the harsh reality that despite the availability of current crime scene technologies, specialized equipment, and sophisticated forensic laboratory analysis, the effective utilization of physical evidence in crime-solving is only as good as the knowledge and integrity of the crime scene personnel and the objective legal system that supports those functions. In some cases, evidence has been falsified or results tainted, misleading the justice system.

Social and ethical implications of computers are fast deep and irreversible. Mankind stepped into the information age - an age of sharing knowledge and integration of the system where the information quality and speed of decision-making decisive parameters. Traditional jobs from the industrial era disappear and reappear as new, automatized jobs with contemporary technologies. Computers more than any other technologies affect, directly or indirectly, developments in telecommunications, genetic engineering, medicine, and atomic physics. The biggest changes in daily life brought results like developing artificial intelligence, multimedia, and robotics. However, it is equally important to understand all the potential risk factors of the coming changes in the social and personal life, which bring modern Internet and other related technologies, such as: invasion of privacy, high-tech crime, and the difficulties of maintaining security information, protection of intellectual property in the digital environment, the inevitable bugs in the development of complex software, automatization and dehumanization of labor, abuse information for the realization of political and economic power, too much dependence on complex technology, blurring the physical reality with virtuality and create even greater depending on the people of the computer and the Internet and the appearance of bio-digital (nano) technology, where researchers are trying to develop a computer instead of electronics used biological cells as the supporting technology.

How can we connect forensics, artificial intelligence, and high-tech crime? Intelligent forensics is an inter-disciplinary approach, which makes use of technological advances and applies resources in a more intelligent way to solve/help an investigation. Intelligent forensics encompasses a range of tools and techniques from artificial intelligence, computational modeling, and social network analysis in order to focus digital investigations and reduce the amount of time spent looking for digital evidence.

The application of intelligence in computer forensics investigations takes on a number of components at various stages of the investigation life cycle—the gathering of digital evidence,

the preservation of digital evidence (evidential integrity and evidential continuity), the analysis of digital evidence, and the presentation of that evidence. In each of these stages, the skill and knowledge of the computer forensics investigator is fundamental to the success of any investigation. However, it is hoped that the application of artificial intelligence to digital forensic investigations will provide a useful set of tools to the investigator to address complex issues and more importantly will address the issues associated with speed and volume (size of data being investigated rather than the backlog of cases which is a separate issue) of digital investigation cases, by identifying the most relevant areas for investigation and excluding areas where results are less likely. This approach has been used previously to a certain extent by the application of hash algorithms to eliminate dormant files and “static” systems files from digital investigations.



CHAPTER 10: CRIMINAL COURT PLAYERS

OVERVIEW

Throughout this textbook, a theme should emerge. The American criminal justice system was designed to protect the innocent. One of the worst things that could happen is an innocent person be convicted for a crime they did not commit. Therefore, the due process and procedures are in place to protect the innocent. In this chapter, we examine official misconduct. When erroneous convictions take place, it is sometimes the result of official misconduct. The National Registry of Exonerations (NRE) is a public database for known wrongful conviction exonerations in the U.S. As of 2020, the NRE has documented 2601 exonerations, and of those exonerations, the majority are misidentification by eyewitnesses and a result of official misconduct. This module will look at the different types of misconduct. Additionally, the module will go into greater detail on the use of the exclusionary rule.

OBJECTIVES

- Identify each type of official misconduct (police, prosecutorial, judicial, forensic, and inadequate defense) and how it affects the justice system.
- Explain how false convictions contribute to the actual offender not being brought to justice. (Tunnel vision in the justice system)
- Explain how forensic evidence has had an enormous effect not only on the exoneration of innocent offenders but also how forensic misconduct has falsely convicted others.
- Identify the purpose of the exclusionary rule and how it attempts to reduce official misconduct.
- Identify the limitations and exceptions of the exclusionary rule.

KEY TERMS

National Registry of Exonerations (NRE), perjury, official misconduct, three components of criminal justice error – mistakes, malpractice & misconduct, police misconduct, prosecutorial misconduct, inadequate legal defense, judicial misconduct, forensic misconduct, exclusionary rule, 5th Amendment, exceptions to the exclusionary rule.

CRITICAL THINKING

1. After this chapter, do you feel enough steps have been made to ensure official misconduct is reduced? Make sure to identify the impact of qualified immunity on official misconduct. What are the concern and benefits of qualified immunity?
2. There are both limitation and concerns of the Exclusionary Rule. What are the limitations of the exclusionary rule? What are the concerns you have about the exclusionary rule and its limitations?
3. Select one of the exceptions to the exclusionary rule and the corresponding case law. Summarize the exception and impact of the case law on the exception.

10.1 JUDGES AND COURT STAFF^{xlvi}

In their 1977 book, *Felony Justice: An organizational analysis of criminal courts*, James Eisenstein and Herbert Jacob, coined the term “courtroom workgroup.” They specifically referred to the cooperative working relationship between prosecutors, defense attorneys, and judges in working together (as opposed to an adversarial relationship that the public might expect) to efficiently resolve most of the cases in the criminal courts. This chapter more generally uses the term to include all the individuals working in the criminal courts—judges, attorneys, and the variety of court staff.

The accusatory phase (the pre-trial phase) and adjudicatory phase (the trial phase) of the criminal justice process include individuals who regularly work together in the trial courts. The prosecutor files the accusatory instrument called either an information or an indictment, and represents the state in plea bargaining, on pretrial motions, during the trial, and in the sentencing phase. The defense attorney represents the defendant after charges have been filed, through the pre-trial process, in a trial, and during sentencing, and maybe on the appeal as well. Judges, aided by several court personnel, conduct the pretrial, trial, and sentencing hearings. Prosecutors, defense counsel, and judges perform different roles, but all are concerned with the judicial process and the interpretation of the law. These law professionals are graduates of law schools and have passed the bar examination establishing their knowledge of the law and their ability to do legal analysis. As persons admitted by the state or federal bar associations to the practice of law, they are subject to the same legal codes of professional responsibility, disciplinary rules, and ethical rules and opinions for lawyers. Although the American criminal justice system is said to represent the adversarial model, the reality is that prosecutors, defense attorneys, judges, and court staff work with cooperation and consensus rather than conflict. This is understandable when considering the common goal of efficient and expedition case processing and prescribed and agreed-upon rules for achieving those goals.



Pin It! *Being a Judge*

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Trial Judges: Misperceptions and Realities

Trial court judges are responsible for presiding over pre-trial, trial, and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize the release, sentence offenders, engage in pre-sentence conferences with attorneys, work with court clerks, bailiffs, jail staff, etc. Trial judges have considerable, but not unlimited, discretion. In addition to the ethical and disciplinary rules governing all attorneys in the state, trial judges are subject to judicial codes of conduct. Judges are bound by the applicable rules of law when deciding cases and writing their legal opinions. Some rules governing judges are flexible guidelines while other rules are very precise requirements.

During the pretrial phase, judges make rulings on the parties' motions, such as motions to exclude certain physical or testimonial evidence, motions to compel discovery, and motions to change venue. Because most cases are resolved prior to trial through plea-bargaining, one important judicial function is taking the defendant's guilty plea.

At trial, if the defendant elects to waive a jury, there is a bench trial, and the judge sits as the "trier of fact." Like jurors in a jury trial, the judge has considerable discretion when deciding what facts were proven (or not) by the parties and what witnesses he or she finds credible. When the defendant elects for a jury trial, the jury decides what the facts are. In either a bench or jury trial, the trial judge rules: on the admissibility of evidence (whether a jury is entitled to hear certain testimony or look at physical evidence), whether witnesses are competent, whether privileges exist, whether witnesses qualify as experts, whether jurors will be excused from jury service, etc. At the end of the jury trial, the judge gives a set of jury instructions to the jurors which informs them on the law that applies to the case they are deciding.

If the defendant is convicted, then the judge will impose the sentence. Except for death penalty cases, jurors are generally not involved with sentencing the defendant. Judges have perhaps the broadest discretion in their role imposing sentences. However, with more states enacting mandatory minimums and sentence guidelines, judicial discretion has been severely curtailed.

“In the eyes of most Americans, the judge is the key player in the courtroom workgroup. The symbolism and ceremony of a criminal trial reinforce this view. The judge is seated on a raised bench, robed in black, and wields a gavel to maintain order in the courtroom. Moreover, the participants and spectators—including the defense attorney and the prosecutor—are commanded to ‘all rise’ when the judge enters or leaves the courtroom. It is no wonder, then that the judge is seen as the most influential person in court.

This view of the judge, though accurate to some degree, is misleading for at least two reasons. First, although the judge clearly plays an important role—in many cases, the lead role—in state and federal criminal courts, other actors play significant supporting roles. This is particularly the case in the majority of criminal cases that are settled by plea, not trial. In these cases, the key player may be the prosecutor rather than the judge. A second reason why the traditional view of the judge is misleading is that it is based on an inaccurate assessment of the role of the judge. Judging involves more than presiding at trials. In fact, most of what judges do during a typical day or week is something other than presiding at trials—reading case files, conducting hearings, accepting guilty pleas, pronouncing sentences, and managing court dockets.”

The role played by the judge, in other words, is both less influential and more varied than the traditional view would have people believe.

Judicial Clerk, Law Clerk, and Judicial Assistants

Generally, judges have one or two main assistants. These individuals are known as “judicial clerk”, “clerk of court”, “law clerk”, or “judicial assistant”. Of course, there may be several court clerks who interact each day with all the judges in the courthouse, but generally, judges have only one or two judicial assistants who work directly with them. The clerk of court works directly with the trial judge and is responsible for court records and paperwork both before and after the trial. Usually, each judge has his or her own clerk. The clerk prepares all case files that a judge will need for the day. During hearings and the trial, these clerks record and mark physical evidence introduced in the trial, swear in the witnesses, or administer the oath to the witness, take notes cataloging the recordings, etc. In some jurisdictions, the law clerks are lawyers who have just completed law school and may have already passed the bar exam. In other jurisdictions, the law clerks are not legally trained but may have specialized paralegal training or legal assistant training.

Local and State Trial Court Administrators

Local and state trial court administrators oversee the administration of the courts. These administrators’ responsibility includes hiring and training court personnel (clerks, judicial

assistants, bailiffs), ensuring that the court caseloads are efficiently processed, keeping records, sending case files to reviewing courts, ensuring that local court rules are being implemented, and working with the local and state bar associations to establish effective communications to promote the expedient resolutions of civil and criminal cases.

Indigency Verification Officers

The Indigency Verification Officer (IVO) is a court employee who investigates defendants' financial status and determines whether they meet the criteria for court-appointed counsel. More than 75% of all individuals accused of a crime qualify as indigent. How poor a defendant must be to qualify for a court-appointed attorney varies from place to place, and each IVO uses a screening device that takes into consideration the cost of defense in the locality as well as the defendant's financial circumstances. One difficulty in qualifying for a court-appointed attorney is having equity in a home that cannot be easily sold quickly enough to provide resources for the defendant to hire an attorney. Another difficulty for indigency verification officers is getting the information needed from defendants who may be suffering from mental health issues.

Bailiffs

Bailiffs are the court staff responsible for courtroom security. Bailiffs are often local sheriff deputies or other law enforcement officers (or sometimes former officers), but they can also be civilians hired by the court. Sometimes, courts will use volunteer bailiffs. Bailiffs work under the supervision of the trial court administrator. During court proceedings, bailiffs or clerks call the session to order, announce the entry of the judge, make sure that public spectators remain orderly, keep out witnesses who might testify later (if the judge orders them excluded upon request of either party), and attend to the jurors. As courtroom security becomes a bigger concern, law enforcement officers are increasingly used as bailiffs, and they are responsible for the safety of the court personnel, spectators, witnesses, and any of the parties. In some communities, law enforcement bailiffs may transport in-custody defendants from the jail to the courthouse and back. In most jurisdictions today, bailiffs screen people for weapons and require them to silence cell phones before allowing them to enter the courtroom.

Jury Clerk

The jury clerk sends out jury summons to potential jurors, works with jurors' requests for postponements of jury service, coordinates with the scheduling clerk to make sure enough potential jurors show up at the courthouse each day there is a trial, schedules enough grand jurors to fill all the necessary grand jury panels, arranges payment to jurors for their jury service, and arranges lodging and meals for jurors in the rare event of jury sequestration.

Court Clerks and Staff

Court structure varies from courthouse to courthouse, but frequently court staff is divided into units. For example, staff may be assigned to work in the criminal unit, the civil unit, the traffic unit, the small claims unit, the juvenile unit, the family unit, or the probate unit. In smaller communities, there may be just a few court clerks who “do it all”. With the trend towards specialized courts (drug courts, mental health courts, domestic violence courts, and veteran courts), staff may specialize in and/or rotate in and out of the various units. Court staff are expected to have a vast knowledge of myriad local court rules and protocols, statutes, and administrative rules that govern filing processes, filing fees, filing timelines, accounting, record maintenance, as well as a knowledge of general office practices such as ordering supplies, mastering office machinery, and ensuring that safety protocol is established and followed. Recently, many courts have transitioned to electronic filing of all documents, usually managed through a centralized state court system. This transition presents challenges to court staff as they learn the new filing software, keep up with new filings, and archive the past court documents.

Scheduling Clerk

The scheduling clerk, or docketing clerk, set all hearings and trials on the court docket. The scheduling clerk notes the anticipated duration of trials (most trials are concluded within one day), speedy trial constraints, statutory and local court rules time frames, etc. The role of the scheduling clerk is extremely important, and an experienced scheduling clerk contributes to the overall efficiency of the legal process. Ineffective or inefficient scheduling causes delay, frustration, and may impede the justice process. Part of scheduling, or docketing, is keeping track of law enforcement officers’ and defense attorneys’ scheduled vacations. In addition, the scheduling clerk must be mindful of the judges’ calendars which should track scheduled vacation time and training days, and also needed desk time, the time necessary for resolving cases they have taken under advisement. (Note that trial judges can either decide “from the bench”, meaning they will rule immediately on the issues before them during the hearing, or after taking the case under advisement, meaning they will rule through a written decision/opinion letter after spending time researching the law, reviewing the parties’ written pleadings, and considering the oral arguments).

10.2 THE PROSECUTOR^{xlix}

Prosecutors play a pivotal role in the criminal justice system and work closely with law enforcement officials, judges, defense attorneys, probation and parole officers, victims’ services, human services, and to a lesser extent, with jail and other corrections officers. The authority to prosecute is divided among various city, state, and federal officials. City and state officials are responsible for prosecutions under local and state laws, and federal officials for prosecutions under federal law. Associate Justice Robert Jackson, while he was the U.S.

Attorney General addressed the Conference of United States Attorneys (federal prosecutors) in Washington, D.C. on April 1, 1940, and stated,

“The qualities of a good prosecutor are . . . [elusive and . . . impossible to define]. ...

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen’s friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret sessions, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. ...

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. . . .

There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn’t blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases because no prosecutor can even investigate all of the cases in which he receives complaints. If the department of justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

... A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”



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State Prosecuting Attorneys

Prosecutors represent the citizens of the state, not necessarily a particular victim of a crime. States vary in how they organize the groups of attorneys hired to represent the state's interest. Ordinarily, the official with the primary responsibility for prosecuting state violations is the local prosecutor who is referred to as the "district attorney", "county attorney", or "state's attorney". Local prosecutors are usually elected from a single county or a group of counties combined into a prosecutorial district. In many states, the state attorney general's office has the authority that trumps over the local prosecutors' authority, but in practice, the state attorney general rarely intervenes in local matters. The state attorney general's office will intervene, for example, if there is a conflict of interest or when requested by the district attorney. It is not uncommon for a small local prosecutor's office faced with the prosecution of a major, complex, time-consuming trial, to request the aid of the attorney general's office. In these smaller offices, there may be insufficient resources to handle complicated prosecutions and still keep up with the day-to-day filings and cases.

The prosecuting attorney and the attorney general ordinarily are the only officials with authority to prosecute violations of state law. City attorneys may be hired to prosecute city ordinances, but these attorneys primarily specialize in civil matters. When city attorneys and prosecuting attorneys have different policies for treating minor offenses, the result may be disparate, or different, treatment of similarly situated offenders. This raises a concern of inconsistent application of the law. Additionally, different county prosecutors may follow different policies on which matters they will charge, the use of diversion programs, the use of plea bargaining, and the use of certain trial tactics. To limit some of these differences, some states have used statewide training, and district attorneys' conferences. Still, the policies and practices are far from uniform.

Generally, assistant prosecutors, called deputy district attorneys, are hired as “at will” employees by the elected district attorney. Historically, the political party of the applicant was a key criterion, and newly elected prosecutors would make a virtual clean sweep of the office and hire outsiders from the former office. Now, most offices hire on a non-partisan, merit-oriented, basis.

Most states require that the prosecutor be a member of the state bar. Some states also require that he or she have several years in the practice of law. Deputy district attorneys, on the other hand, are frequently fresh out of law school. They may have limited knowledge of state criminal law, as law school is designed to teach lawyers to enter any new field and educate themselves.

Federal Prosecuting Attorneys

Prosecutors in the federal system are part of the U.S. Department of Justice and work under the Attorney General of the United States. The Attorney General does not supervise individual prosecutors and relies on the 94 United States Attorneys, one for each federal district. U.S. Attorneys are given considerable discretion, but they must operate within general guidelines prescribed by the Attorney General. The U.S. Attorneys have a cadre of Assistant U.S. Attorneys who do the day-to-day prosecution of federal crimes. For certain types of cases, approval is needed from the Attorney General or the Deputy Attorney General in charge of the Criminal Division of the Department of Justice. The Criminal Division of the Department of Justice (DOJ) operates as the arm of the Attorney General in coordinating the enforcement of federal laws by the U.S. Attorneys.

Selection and Qualifications of Prosecutors

Most local prosecuting attorneys are elected in a partisan election in the district they serve. State attorney generals may also have significant prosecutorial authority. They are elected in forty-two states, appointed by the governor in six states, appointed by the legislature in one state, and appointed by the state supreme court in another. State attorney generals serve between two to six-year terms, which can be repeated. Federally, senators from each state recommend potential U.S. Attorney nominees who are then appointed by the President with the consent of the Senate. U.S. Attorneys tend to be of the same political party as the President and are usually replaced when a new President from another party takes office.



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Prosecutor's Function

Prosecutors arguably have more discretion than any other official in the criminal justice system. They decide whether to charge an individual or not. Much has been written about the prosecutor's broad discretion and the constraints on his or her discretion. If they choose not to prosecute, this is referred to as *nolle prosequi*, and this decision is largely unreviewable. Spohn and Hemmens (2012, p. 123) concluded in their review of the studies on prosecutor's charging decisions that "these highly discretionary and largely invisible decisions reflect a mix of (1) legally relevant measures of case seriousness and evidence strength and (2) legally irrelevant characteristics of the victim and the suspect."

Prosecutors guide the criminal investigation and work with law enforcement to procure search and arrest warrants. Following arrest, prosecutors continue to be involved with various aspects of the investigation. Roles include: meet with the arresting officers, interview witnesses, visit the crime scene, review the physical evidence, determine the offenders prior criminal history, make bail and release recommendations, appear on pretrial motions, initiate plea negotiations, initiate **diversions** (pre-trial contracts between the government and the defendant which divert cases out of the system), work with law enforcement officers from other states who seek to extradite offenders, prepare the accusation to present to the grand jury, call witnesses and present a *prima facie* case (present enough evidence which, when un rebutted by the defendant, shows that the defendant committed the crime) at a preliminary hearing, represent that state at arraignments and status conferences, conduct the trial, and, upon conviction, make sentencing recommendations while representing the state at the sentencing hearing.

In many communities, the prosecutor is the spokesperson for the criminal justice system and appears before the legislature to recommend or oppose penal reform. Prosecutors make public speeches on crime and law enforcement, take positions on requests for clemency for cases they have prosecuted, work extensively with victims' services offices, which may be an arm of the prosecutor's office. In some communities, the prosecutor is also responsible for representing

the local government in civil matters and may represent the state in civil commitment proceedings and answer accident claims, contract claims, and labor relation matters for the county. However, only a few counties have prosecutors still perform this function. U.S. Attorneys still have substantial responsibilities for representation of the U.S. government in civil litigation, and there is generally a civil division, a criminal division, and an appellate division of the U.S Attorneys' office.

The American Bar Association (ABA) standards indicate that “the prosecutor’s [ethical] duty is to seek justice”. This means that the state should not go forward with prosecution if there is insufficient evidence of the defendant’s guilt or if the state has “unclean hands”, for example, illegally conducted searches or seizures or illegally obtained confessions. Ethical and disciplinary rules of the state bar associations govern prosecutors who must also follow state and constitutional directives when they prosecute crimes.

10.3 DEFENSE COUNSEL¹

The Sixth Amendment to the U.S. Constitution provides, “The accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” Most state constitutions have similar provisions. Historically, the right to counsel meant that the defendant, if he or she could afford to hire an attorney, could have an attorney’s assistance during his or her criminal trial. This right has developed over time and now includes the right to have an attorney’s assistance at all critical stages in the process, or at all criminal proceedings that may substantially affect the right of the accused. Importantly, the right to assistance of a defense counsel has been held to require that the state pay the costs of the defense counsel when a person is indigent or has insufficient financial resources to pay.

Privately Retained Defense Attorneys

Individuals accused of any infraction or crime, no matter how minor, have the right to hire counsel and have them appear with them at trial. The attorney must be recognized as qualified to practice law within the state or jurisdiction, and generally, criminal defendants do well to hire an attorney who specializes in criminal defense work. However, because many criminal defendants don’t have enough money to hire an attorney to represent them, the court will need to appoint an attorney to represent them in criminal cases.

Appointed Counsel

Federal and state constitutions do not mention what to do when the defendant wants but cannot afford an attorney’s representation. Initially, the Court interpreted the Sixth Amendment as permitting defendants to hire an attorney who would assist them during the trial. Later, the Court held that the Due Process Clause of the Fifth and Fourteenth Amendments includes the right to a fair trial, and a fair trial includes the right to the assistance of counsel. In *Powell v. Alabama*, 287 U.S. 45, at 58 (1932), the Court concluded that the focus

on trial was too narrow. It stated, “[T]he most critical period of the proceeding[s] against the defendants might be that period from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation are vitally important. Defendants are as much entitled to . . . [counsel’s] aid during that period as at the trial itself.”

Powell also dealt with the need for states to provide representation to defendants who could not afford to hire counsel in those cases where fundamental fairness required it. In a statement that led to the dramatic extensions to the right to counsel, the Court continued,

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has a small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

Powell was decided in 1932, and because of television and the multitude of crime drama programs, people probably know more about the criminal justice process than ever imagined by the *Powell* court. Nevertheless, the Court’s admonitions still ring true. Not too many non-lawyers know how to conduct themselves at trial, challenge the state’s evidence, make evidentiary objections, or file proper pretrial motions with the rudimentary knowledge gained from watching television. One could consult with the many great Internet sources that are easily accessible, however, many individuals charged with crimes have limited education and lack the sophistication to distinguish between those sources that are applicable to their case and which are not.

Between *Powell* (1932) and the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court decided when the appointment of counsel was necessary for a fair trial in state prosecutions on a case-by-case basis. In *Gideon*, however, the Court held that this case-by-case-approach was inappropriate. It held that the state had to provide poor defendants access to counsel in every state felony prosecution. Lawyers in serious criminal cases, it said, were “necessities, not luxuries”. Since *Gideon*, the Court has extended the obligation to provide counsel to state misdemeanor prosecutions that result in the defendant receiving a jail term. The Court found that the legal problems presented in a misdemeanor case often are just as complex as those in felonies. In two cases, *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979), the Court tied the right to counsel in misdemeanor cases to the defendant’s actual incarceration. Because it is difficult to predict when a judge will want to incarcerate a person convicted of a misdemeanor, this approach is difficult to implement. Many states instead

appoint counsel to an indigent defendant charged with a crime where a possible term of incarceration could be imposed.

The Court left it for the lower courts to decide when a person is indigent. Lower courts have generally held that the financial resources of a family member cannot be considered. Also, courts cannot merely conclude that because a college student is capable of financing his or her education that he or she is capable of hiring an attorney. A person does not have to become destitute in order to be classified as indigent. An indigent defendant may have to pay back the court-appointed attorney's fees if they are convicted or enter a plea. In practice, most courts collect appointed attorneys' fees at a standard rate and much reduced from the actual costs of representation as part of the fines that a convicted defendant must pay. When acquitted, defendants are not required to pay the state back for the attorney fees.



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Public Defenders, Assigned Attorneys, and Defense Attorney Associations

Most states now have public defenders' offices. Because public defenders and assistant public defenders handle only criminal cases, they become the specialists and have considerable expertise in representing criminal defendants. Public defender offices frequently have investigators on staff to help the attorneys represent their clients. In some states, courts appoint or assign attorneys from the private bar (not from the public defender's office) to represent indigent defendants. The mixed system uses both assigned counsel, or associations of private attorneys who contract to do indigent criminal defense, and public defenders. For example, the public defender's office may contract with the state to provide 80% of all indigent representations in a particular county. The remaining 20% of cases would be assigned to the

association of individual attorneys who do criminal defense work- some retained clients, some indigent clients-or private attorneys willing to take indigent defense cases.

In practice, there is no purely public defender system because of “conflict cases.” Conflicts exist when one law firm tries to represent more than one party in a case. Assume, for example, that Defendant A conspired with Defendant B to rob a bank. One law firm could not represent both Defendant A and Defendant B. Public defender offices are generally considered one law firm, so attorneys from that office could not represent both A and B, and the court will have to assign a “conflict” attorney to one of the defendants.

When Does a Defendant Have the Right to Assistance of an Attorney?

Critical Stages of the Criminal Justice Process

In *White v. Maryland*, 373 U.S. 59 (1963), the Court found that defendants are entitled to the right to counsel at any critical stage of the proceeding, defined as a stage in which he or she is compelled to make a decision which may later formally be used against him or her. The Court has found the following court procedures to be critical stages:

- The initial appearance in which the defendant enters a non-binding plea—*White v. Maryland*, 373 U.S.59 (1963).
- A preliminary hearing—*Coleman v. Alabama*, 399 U.S. 1 (1970).
- A lineup that includes a previously indicted defendant—*Wade v. United States*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967).

During Other Proceedings

The Court has extended the right to counsel to psychiatric examinations, juvenile delinquency proceedings, civil commitments proceedings, and probation and parole hearings (see, below). Further, the court in *Estelle v. Smith*, 451 U.S. 454 (1981), held that a defendant charged with a capital crime and ordered by the court to be examined by a psychiatrist, to evaluate possible future dangerousness, was entitled to consult with counsel. Similarly, in *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Court found prejudicial error occurs when defense counsel was not appointed to represent a defendant subjected to a psychiatric evaluation. The Court further held that counsel must be made aware of the projected psychiatric evaluation before it occurs.

During Probation and Parole Revocation Hearings

In *Mempa v. Rhay*, 389 U.S. 128 (1967), 17-year-old Mempa was placed on probation for two years after he pleads guilty to “joyriding”. About four months later, the prosecutor moved to have the petitioner’s probation revoked alleging that Mempa had committed a burglary while on probation. Mempa, who was not represented by counsel at the probation revocation hearing, admitted being involved in the burglary. The court revoked his probation based on his

admission to the burglary. The U.S. Supreme Court held that Mempa should have had counsel to assist him in his hearing.

Five years later, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the state sought to revoke the defendant's probation. Originally, Gagnon was sentenced to fifteen years of imprisonment for armed robbery, but the judge had suspended the imposition of sentence and placed him on seven years of probation. The Court found that the probation revocation hearing did not meet the standards of due process. Because a probation revocation involves a loss of liberty, the probationer was entitled to due process. The Court did not adopt a *per se* rule that all probationers must have the assistance of counsel in every revocation hearings, but rather stated:

"We find no justification for a new, inflexible constitutional rule with respect to the requirement of counsel. We think rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of sound discretion by the state authority charged with responsibility for administering the probation and parole system. . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely and colorable claim. . . In passing on a request for the appointment of counsel, the responsible agency should also consider, especially in doubtful cases, whether probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal shall be stated succinctly in the record."

At Some Post-Trial Proceedings

The Sixth Amendment's right to the assistance of counsel does not stop when the jury finds the defendant guilty. When an out-of-custody defendant is found guilty at the end of a trial, the judge may remand the defendant to custody- has the bailiff take the defendant into custody and transport them to the jail- and revokes conditions of bail if there had been any. Counsel must assist the defendant through the end of the sentencing hearing, and the defendant's attorney has the legal obligation to make post-trial motions to preserve the defendant's rights.

The Court has distinguished between the defendant's right to the assistance of counsel on mandatory appeals and discretionary appeals. In *Douglas v. California*, 372 U.S. 353 (1963), the Court found that indigent counsel should be provided to individuals when an appellate court must review their appeal or an appeal of right. Once the first appeal has been dismissed or resolved, however, *Ross v. Moffitt*, 417 U.S. 600 (1974), holds that indigent defendants do not have a right to appointed counsel for discretionary review in either the state supreme court or with the U.S. Supreme Court. The *Ross* majority reasoned that the defendant did not need an attorney to have "meaningful access" to the higher appellate courts because all the legal issues would have already been fully briefed in the intermediate appellate court. Additionally, the

Court noted that the concept of equal protection does not require absolute equality. The majority opinion states,

“We do not believe that the Due Process Clause requires North Carolina to provide the respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State’s point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant’s guilt. Under these circumstances “reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him” (Citations omitted).

By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State’s prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being “hauled into court” by the State and stripped of his presumption of innocence, but rather as a word to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant’s consent, it is clear that the State need not provide any appeal at all. The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. . . . (Citations omitted.)

The facts show that respondent ... received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had “once been presented by a lawyer and passed upon by an appellate court.” We do not believe that it can be said, therefore, that a defendant in respondent’s circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage, he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials . . . would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review” (Citations omitted).

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of

North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. (Emphasis added). The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think the respondent was given that opportunity under the existing North Carolina system."

Similarly, prisoners have a limited right to legal assistance for the purpose of filing writs of habeas corpus. In *Bounds v. Smith*, 430 U.S. 817 (1977), the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law". Prisons can meet this obligation by training prisoners to be paralegal assistants to work under a lawyer's supervision or by using law students, paralegals, and volunteer lawyers. Again, it may seem inconsistent that the court requires more for habeas corpus relief than it does for discretionary review on appeals. The difference lies in the nature of habeas corpus as a collateral attack, or side attack, where the claim is often being advanced for the first time and therefore the need for legal assistance may be greater.

Functions of Defense Attorneys

Defense lawyers investigate the circumstances of the case, keep clients informed of any developments in the case, and take action to preserve the legal rights of the accused. Some decisions, such as which witnesses to call, when to object to evidence, and what questions to ask on cross-examination, are considered to be strategic ones and may be decided by the attorney. Other decisions must be made by the defendant, most notably, after getting advice from the attorney about the options and their likely consequences. Defendants' decisions include whether to plead guilty and forego a trial, whether to waive a jury trial, and whether to testify on their own behalf.

The ABA Standards relating to the Defense Function established basic guidelines for defense counsel in fulfilling obligations to the client. The primary duty is to zealously represent the defendant within the bounds of the law. Defense counsel is to avoid unnecessary delay, to refrain from misrepresentations of law and fact, and to avoid personal publicity connected with the case. Fees are set on the basis of the time and effort required by counsel, the responsibility

assumed, the novelty and difficulty of the question involved, the gravity of the charge, and the experience, reputation, and ability of the lawyer.

Tricky Issues in Representation

Defendants sometimes want to have a friend or family member speak up for them, but the Court will not permit that. The right to counsel means the right to be represented by an attorney, someone legally trained and recognized as a member of the bar association. Similarly, defendants may not necessarily get the attorney of their choice. For example, in *Wheat v. United States*, 486 U.S. 153 (1988), one defendant who wanted to be represented by the same attorney who was representing his accomplice/co-conspirator in a complex drug distribution conspiracy was not allowed to have that attorney. The Court disallowed his application for the appointment of counsel noting that irreconcilable and un-waivable conflicts of interest would be created since there was the likelihood that the petitioning defendant would be called to testify at a subsequent trial of his co-defendant and that his co-defendant would be testifying in petitioner's trial. On the other hand, in *United States v. Gonzalez-Lopez*, 553 U.S. 285 (2008), the Court reversed the defendant's conviction because the trial court erroneously deprived the defendant of his choice of counsel. The defendant, Gonzales-Lopez, had hired counsel from a different state, and during pretrial proceedings, the judge and the counsel had some disagreements. The judge then prohibited the attorney from taking part in the defendant's trial. The Court found that a trial judge violated the defendant's Sixth Amendment rights.

Defendants cannot repeatedly "fire" their appointed counsel as a stall tactic, and, at some point, the court will not allow the defendant to substitute attorneys and will require the defendant to work with whatever attorney is currently assigned. A defendant may not force an unwilling attorney to represent him or her, but a court does have the discretion to deny an attorney's motion to withdraw from representation after inquiring about counsel's reasons for wishing to withdraw. This may present an ethical dilemma for the attorney because professional rules of responsibility require that even when an attorney withdraws from a case, he or she must still maintain attorney-client confidence. If, for example, the attorney knows that the defendant insists on taking the stand and presenting perjured testimony, the attorney must withdraw. But, at the same time, the attorney cannot discuss with the court why he or she needs to withdraw. At some point in the inquiry, after the judge has asked and the attorney has talked around the subject, the judge hopefully catches on, and the judges will allow the attorney to withdraw.

Effective Assistance of Counsel

Defendant's attorneys must provide competent assistance and should not harm the defendant's case by their legal representation. According to *McMann v. Richardson*, 397 U.S. 759 (1970), the right to counsel means the right to effective assistance of counsel. The constitutional standard for evaluating effective assistance was determined in *Strickland v. Washington*, 466 U.S. 688 (1984). The *Strickland* decision looked at two aspects of the

representation to determine whether counsel was ineffective. First, the defense attorney's actions were not those of a reasonably competent attorney exercising reasonable professional judgment; and second, the defense attorney's actions caused the defendant prejudice, meaning that they adversely affected the outcome of the case (i.e., they likely caused the jury to find the defendant guilty).

Courts may be more inclined to find ineffective assistance of counsel in a death penalty case than other run-of-the-mill cases. For example, the Court found the defense attorneys provided ineffective assistance in the sentencing portion of the defendant's death penalty trial for the murder of a 77-year-old woman because they had failed to conduct an adequate "social history" investigation of the defendant's life and had not presented information to the jury they did have which showed that defendant had been subject to regular sexual abuse as a child. *Wiggins v. Smith*, 539 U.S. 510 (2003). The Court stated,

"In finding that Schlaich and Nethercott's investigation did not meet Strickland's performance standards, we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that reasonable professional judgments support the limitations on investigation... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.

Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to defense counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*."

Waiving Counsel

Sometimes, a defendant wishes to waive counsel and appear pro se, or represent him or herself at trial. The Court, in *Faretta v. California*, 422 U.S. 806 (1975), held that the Sixth Amendment includes the defendant's right to represent himself or herself. The *Faretta* Court found that, where a defendant is adamantly opposed to representation, there is little value in forcing him or her to have a lawyer. The Court stressed that it was important for the trial court to make

certain and establish a record that the defendant knowingly and intelligently gave up his or her rights.

“Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish he knows what he is doing, and his choice is made with eyes open.”

In *McKaskle v. Wiggins*, 465 U.S. 168, at 174 (1984), the Court held that a “defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.” The constitutional right to self-representation does not mean that the defendant is free to obstruct the trial, and a judge may terminate self-representation by a defendant who is obstructing the process. Frequently, judges will assign a standby counsel to assist defendants. Stand-by counsel is an attorney who can be available to answer questions of a pro se defendant, and if necessary, standby counsel can step in if the defendant is engaging in misconduct.

10.4 CONCLUSION

Court jurisdiction determines where a case will be filed, and which courthouse has the legal authority to hear a case. Jurisdiction can be based on geography, subject matter, or seriousness of the offense. Jurisdiction is also divided between trial courts (original jurisdiction) and appellate courts (appellate jurisdiction).

More than 51 court systems operate in the United States. We have a dual court system comprised of federal trial and appellate courts and state trial and appellate courts. Federal and state courts have similar hierarchical structures with cases flowing from lower trial courts through intermediate courts of appeals and up to the supreme courts.

Defendants who wish to appeal their convictions are entitled to have their cases reviewed at least once, a mandatory appeal of right in the intermediate courts of appeal. After that, the review is discretionary and rare. Appellate courts generally affirm the decision of the trial courts but may also reverse and remand the case back to the trial court if they determine that prejudicial error occurred. At the intermediate appellate court level, judges most frequently affirm the trial court’s decision without writing an opinion, but sometimes the judges will write opinions informing the parties of their decision and the reasons for holding as they did. Judges don’t always agree, and at times, judges will write dissenting opinions or concurring opinions. Appellate court opinions become precedent that must be followed in the trial courts.

Judges, prosecutors, defense attorneys work together along with court clerks, bailiffs, and other court staff to process tens of thousands of cases daily in trial courts across the nation. Judges, prosecutors, and defense attorneys play an important role in the criminal justice process. Although few cases actually go to trial, and the vast majority of criminal cases are resolved in

the trial courts at the pre-trial stage, the defendants must be represented by an attorney at critical stages in the process, and at the government's expense if they cannot afford to hire an attorney unless they have voluntarily waived the right and wish to represent themselves.



CHAPTER 11: OFFICIAL MISCONDUCT & THE EXCLUSIONARY RULE

OVERVIEW

In this chapter, the focus is on the roles each criminal justice professional plays in the court process. By now you are probably very familiar with the individual roles, but in this module, we take a more in-depth look at how and what they do. It will also examine some of the lesser known, however, vital roles played by professionals.

OBJECTIVES

- Identify the roles and responsibilities of the court professionals.
- Identify the misconceptions and realities of the role of a trial judge.
- Identify the different types of defense counsel.
- Explain what pro se and standby counsel is.
- Identify when a defendant has a right to counsel.

KEY TERMS

accusatory phase, adjudicatory phase, bench trial, trier of fact, diversion, jury instructions, swearing in the witness, defense counsel, conflict, revocation hearing, appeal of right, pro se, standby counsel, *Powell v. Alabama*, *Gideon v. Wainwright*,

CRITICAL THINKING

1. Many think the most powerful person in the courtroom is the judge, however, they are not the most powerful. Which courtroom player has the most power and discretion? Use the information in the article [The American Prosecutor – Power, Discretion and Misconduct by Angela Davis](#).
2. The American Bar Association the prosecutor's [ethical] duty is to seek justice. You are prosecuting a criminal case and have physical evidence that points to the guilt of your suspect. However, you have an independent eyewitness who places the suspect at another location during the crime. You are not sure of the validity of the eyewitness, and you believe their memory may be false. Do you turn over the witness information to the defense counsel? Why or why not?
3. You work for the public defender's office. The court recently detained a second suspect (Defendant B) in a robbery case. Defendant A is already being represented by the public

defender's office. The court wants to try both defendants' together, but Defendant B cannot afford an attorney and the court tries to appoint Defendant B to the public defender's office. Can the public defender's office represent both cases? Why or why not?

11.1 OFFICIAL MISCONDUCT^{li}

The crime of official misconduct occurs when a public servant performs (or fails to perform) an act relating to the public servant's office, knowing that the act constitutes an unauthorized exercise of the public servant's official function. The statute covers both malfeasance and nonfeasance. In other words, a public servant can commit the crime by acting improperly as well as failing to act properly.

Official misconduct is a specific intent crime. To be guilty, the public servant must act or refrain from acting with a conscious objective to obtain a benefit or to deprive another person of a benefit. Mere negligent behavior or awareness that a person is being harmed or deprived of a benefit will not establish the requisite culpability.

A public servant also commits official misconduct if the public servant knowingly fails to perform a duty imposed by law or which is clearly inherent in the nature of their office. Thus, returning to the court clerk example, if the court clerk fails to file a lien against a friend's property in order to prevent the lienholder from perfecting their security interest, the clerk would be guilty of official misconduct.

Police Misconduct^{lii}

Police officers have a considerable amount of power. With one fell swoop, an officer can take a person's freedom away. That is a tremendous amount of power. An officer is also given the authority to carry a gun and for protection of either the officer or a person, take the life of a citizen as well. These decisions are dangerous, and unfortunately, at times there are officers who not only overstep their boundaries but jump directly in the pit of corruption.

While the media paints a picture that most police officers are corrupt, this could not be further from the truth. The Bureau of Justice confirmed that only 0.02% of the police officers in the U.S. engage in some type of corruption. While the media makes money selling stories, the police story that starts the five-o'clock news is not always true. When the media covers a police shooting for instance, the investigation has not been completed, therefore the only answer the police department will have for the media is 'no comment.' A cover-up then comes to mind; however, when the investigation is completed weeks to months later, the media is not always as interested in the story, especially if there was no police corruption. Even more importantly it takes two-years to basically train a new police officer. The same police officer then continually trains every month to ensure the knowledge of current laws and many other tactics are up to date. Unless one is a trained commissioned law enforcement officer, there is no way the public,

nor media can truly understand why an officer acted and responded the way he or she did, unless they experienced the exact same circumstance.

No matter the profession, whether it is an actor, a cashier, a president of a non-profit organization, or a police officer, corruption can occur. The focus on law enforcement is more dramatic due to the glamour of the type of work performed. Either way, corruption should not be condoned and if it does occur, the reaction must be swift and stern. Those in law enforcement hold a badge which grants the carrier the authority to take away a person's rights therefore, the authority that comes with the badge should NEVER be taken for granted.

Grass Eaters

In 1970, The Knapp Commission coined the terms “**meat eaters**” and “**grass eaters**” after an exhaustive investigation into New York Police Department corruption. Police officers that were grass eaters accepted benefits. Whether it was a free coffee at the local coffee shop, fifty percent off lunch, or free bottled water from the local convenience store, these cops would take the freebie and not attempt to do the right thing by explaining why they cannot accept the benefit and then pay for the benefit. By accepting benefits, the officer was, in turn, agreeing that whoever gave the benefit, i.e., coffee, or lunch, etc., was to receive something in return. What if the coffee shop wanted the officer to patrol their shop every morning between the busy hours of six and seven a.m.? Would that be fair to other coffee shop owners that did not give free coffee to the officer? [\[1\]](#)

Meat Eaters

These officers expected some tangible item personally from those served, in order to do their job. Whether it was money ‘shakedown’ to ensure a convenience store was not robbed, or the officer felt there was nothing wrong with stealing from a drug dealer during a drug raid; ‘no one would notice a pound of cocaine missing, right?’ These officers felt entitled and were aggressive in making sure they got what they thought was theirs. If a person has the lifelong goal of being a police officer, then that same person will want to protect the innocent from those criminals that aim to do them harm.

Noble Cause Corruption

Noble-cause corruption is a lot more commonplace than many think. Many officers work twenty-five years and may never see another cop steal something, but they will see noble-cause corruption. Most officers join the force to make the world a better place in one way or another. While officers understand they cannot solve everything alone, they do think they can make a difference. The **noble cause** is the goal that most officers have to make the world a better and safer place to live. “I know it sounds corny as hell, but I really thought I could help people. I wanted to do some good in the world, you know? That’s what every cop answered when asked why he became a police officer. [\[2\]](#)

Officers sign on and get hired wanting and striving to do the right thing. However, it is a slippery slope that the officer continually slides on from the academy, through field training, and on into the deeper parts of a police career

This is the Slippery-Slope Model of Noble-Cause Corruption:

1. **“Forget everything you learned in training (school); I’ll show you how we really do it out here.”** This is what an officer often first hears from a TO (training officer). The statement is only superficially about the lack of utility of higher education. What it is actually about is loyalty and the importance of protecting the local group of officers with whom the officer works.
2. **Mama Rosa.** It looks like a free meal. This is not to test willingness to graft, but whether an officer is going to be loyal to other officers in the squad. It also serves to put officers together out of the station house.
3. **Loyalty Back-up.** Here, an officer is tested to see if he or she will back up other officers. This is more involved because officers may have to ‘testify’ (give false testimony), dropsy (remove drugs from a suspect during a pat-down and then discover them in plain sight on the ground), the shake (similar to dropsy, only conducted during vehicle stops), or stiffing-in a call. These are like NC (noble-cause) actions, and may indeed be NC actions, but their purpose is to establish loyalty.
4. **Routine NC (Noble-Cause) Actions Against Citizens.** Magic pencil skills increase penalties by shifting the crime upwards. Protect fellow officers with fictitious charges. Construct probable cause. Illegal searches of vulnerable citizens.
5. **I am the Law.** This is the belief that emerges over time, in which officers view what they do as the right thing to do. This is the practical outcome of the old adage ‘power corrupts, and absolute power corrupts absolutely.’ A police officer does not have absolute power, but he or she has the backing of the legal system in almost all circumstances. Behavior can become violent, as with the Rampart CRASH unit.” [\[3\]](#)

Therefore, every officer can start out wanting to save the world somehow, but when the real-world job of an officer starts to take hold, it is a problematic grasp to release.

Prosecutorial Misconduct^{liii}

Prosecutorial misconduct — especially the unlawful withholding of exculpatory evidence from the defense — is a serious concern of the criminal justice system, yet prosecutors themselves are hardly ever held accountable. Internal discipline is not often effective and criminal prosecutions are incredibly rare. Due to the Supreme Court’s creation of the doctrine of absolute immunity — prosecutors can never be held civilly liable, even for the most egregious, willful misconduct. This is concerning especially since the prosecution carries so much power in our criminal justice system, especially given the immense leverage they can bring to bear on defendants to coerce them into accepting pleas.



Pin It! *Prosecutorial Misconduct and Absolute Immunity*

Learn more about absolute immunity and examples of prosecution: [absolute immunity](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3Qh9Ivr*



The Verdict: *Brady v. Maryland*

Learn more about this landmark Supreme Court case determining whether the prosecution must turn over exculpatory evidence: [Brady v. Maryland](#).



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Pin It! *Judicial Misconduct*

Now that you have reviewed official, police, and prosecutorial misconduct, learn more about judicial misconduct: [judicial misconduct](#)



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11.2 THE EXCLUSIONARY RULE^{liv}

The exclusionary rule is a legal principle in the United States holding that evidence collected or analyzed in violation of the defendant's [constitutional rights](#) is sometimes inadmissible for criminal prosecution. This may be considered an example of a prophylactic rule formulated by the judiciary in order to protect a constitutional right. However, in some circumstances, the exclusionary rule may also be considered to follow directly from the constitutional language. For example, the Fifth Amendment commands that no person "shall be deprived of life, liberty or property without due process of law."

The exclusionary rule is grounded in the Fourth Amendment and is intended to protect citizens from illegal searches and seizures. The exclusionary rule is also designed to provide a disincentive to prosecutors and police who illegally gather evidence in violation of the Fifth Amendment of the Bill of Rights. The exclusionary rule furthermore applies to violations of the Sixth Amendment, which guarantees the right to counsel.

Most states have their own exclusionary remedies for illegally obtained evidence under their state constitutions and/or statutes. This rule is occasionally referred to as a legal technicality because it allows defendants a defense that does not address whether the crime was actually committed. In this respect, it is similar to the explicit rule in the Fifth Amendment protecting people from double jeopardy. In strict cases, when an illegal action is used by police/prosecution to gain any incriminating result, all evidence whose recovery stemmed from the illegal action can be thrown out from a jury.

The exclusionary rule applies to all persons within the United States regardless of whether they are citizens, immigrants (legal or illegal), or visitors.



Pin It! *What is the Exclusionary Rule?*

To learn more about the Exclusionary Rule and how it is implemented, watch this video: [Exclusionary Rule](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3aMW9V1*

Limitations of the Rule

The exclusionary rule was passed in 1917, and does not apply in a civil case, a grand jury proceeding, or a parole revocation hearing.

Even in a criminal case, the exclusionary rule does not simply bar the introduction of all evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments.

The exclusionary rule is not applicable to aliens residing outside of U.S. borders. In *United States v. Alvarez-Machain*, 504 U.S. 655, the Supreme Court decided that property owned by aliens in a foreign country is admissible in court. Prisoners, probationers, parolees and persons crossing U.S. borders are among those receiving limited protections. Corporations, by virtue of being, also have limited rights under the Fourth Amendment (see corporate personhood).

Criticism of the Rule

The exclusionary rule as it has developed in the U.S. has been long criticized, even by respected jurists and commentators. Judge Benjamin Cardozo, generally considered one of the most influential American jurists, was strongly opposed to the rule, stating that under the rule, "The criminal is to go free because the constable has blundered."

11.3 EXCEPTIONS TO THE EXCLUSIONARY RULE - IMPORTANT CASE LAW^{lv}

There are exceptions to the exclusionary rule and how these exceptions are defined is often through Supreme Court decisions. Each type of exception to the exclusionary rule is listed below. They include the Attenuations Doctrine, Inevitable Discovery Doctrine, and the Plain View Doctrine. The exception and significant case law that helped shape the criminal court policy and procedures for the court in deciding the admissibility of evidence are provided below. Select the links to understand the key information of each case and how it is used to determine the admissibility of evidence seized.

Attenuation Doctrine



The Verdict: *Utah v. Strieff*

Visit the following link to learn more facts of the case and the decision in this Supreme Court case: [Utah v. Strieff](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3zGl2wh*

Inevitable Discovery Doctrine



The Verdict: *Nix v. Williams*

Visit the following link to learn more facts of the case and the decision in this Supreme Court case: [Nix v. Williams](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/39pvUDT*

Plainview Doctrine



The Verdict: *Murray v. United States*

Visit the following link to learn more facts of the case and the decision in this Supreme Court case: [Murray v. United States](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3b0IECw*

More Exceptions to the Exclusionary Rule



Pin It! *Five Exceptions to the Exclusionary Rule*

Now that you are familiar with the Exclusionary Rule, as well as Supreme Court decisions and case law that form some important exceptions, watch this video to learn about more exceptions: [five exceptions to the Exclusionary Rule](#).



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3aVb6EO*

Identifying the Exceptions to the Exclusionary Rule^{lvi}

Please remember that the analysis for the exclusionary rule does not end when we determine that it applies in a particular case. Once the judge determines the exclusionary rule applies, then the judge must ask if any exceptions exist. There are five exceptions which may be analyzed in response to the exclusionary rule being triggered. The first exception is the **Attenuation Doctrine**. Attenuation Doctrine is defined as “[a] rule that excludes or suppresses evidence obtained in violation of an accused person’s constitutional rights. The rule providing that evidence obtained by illegal means may nonetheless be admissible if the connection between the evidence and the illegal means is sufficiently remote.”

The Attenuation Doctrine was first identified in *Nardone v. U.S.* (1939) when the government used indirect evidence of illegal wiretapping. The court held that a “sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.”

The Supreme Court revisited and reintroduced the Attenuation Doctrine in *Wong Son* (1963) when the court held that the governmental agent’s unlawful entry of the first defendant’s home tainted any subsequent statements made by the defendant.[65] Thus, the court deems evidence admissible when the connection between the police misconduct is weak “or has been interrupted by an intervening circumstance so that the violation is not served by suppression.”

In determining if the attenuation rises to the level of a valid exception, the court in *Brown v. Illinois* (1975) three relevant factors:

1. The amount of time between the unconstitutional conduct and the discovery of evidence. Generally, the closer in time the more likely the evidence will likely be suppressed.

2. The presence of intervening circumstances. Here, the intervening circumstance was the discovery of the valid arrest warrant.
3. The court evaluates the purpose and flagrancy of the official misconduct. The more flagrant the misconduct the more it needs to be deterred. Negligence, errors in judgment etc., are not enough. Systemic or recurrent police misconduct is required.

Thus, Attenuation Doctrine may apply if the exclusionary rule is triggered, and the three relevant factors are met. If this analysis occurs and the attenuation doctrine applies, then the evidence is deemed admissible.

Another exception to the exclusionary rule is the **Inevitable Discovery Doctrine**. This rule is defined when the "... evidence obtained indirectly from an illegal search is admissible, and the illegality of the search is harmless, if the evidence would have been obtained nevertheless in the ordinary course of police work." This exception was first noted in *Nix v. Williams* (1984) when the court held that the defendant's statement, identifying where the body of his victim was located, was obtained illegally. The court supported its holding with the Inevitable Discovery Doctrine as "the discovery and condition of the victim's body was properly admitted at respondent's second trial on the ground that it would ultimately or inevitably have been discovered even if no violation of any constitutional provision had taken place." It is important to note that the burden shifts to the prosecution to establish "by a preponderance of evidence that the information ultimately or inevitably would have been discovered by lawful means." The sole purpose of the exclusionary rule is to address police misconduct, but if the evidence is discovered regardless of the misconduct, then it should be admissible. Therefore, the evidence obtained by illegal means is admissible, if a legal means of obtaining the evidence is available.

Next, we examine **Independent Source Doctrine** as an exception to the Exclusionary Rule. This Doctrine allows evidence illegally obtained to be admitted, if the evidence could be obtained by an autonomous line of investigation. The Independent Source Doctrine is defined as "... the evidence obtained by illegal means may nonetheless be admissible if that evidence is also obtained by legal means unrelated to the original illegal conduct." The court in *Murray v. U.S.* and *Nix* emphasized that evidence illegally obtained can be determined clean if it would have been discovered in the same condition anyway through legal means not related to the original illegal source. Similar to the Inevitable Discovery Doctrine, the burden shifts to the prosecution to establish the valid independent source of the evidence. To this end, the evidence would be admissible if the Independent Source Doctrine is applied.

Additionally, the **Good Faith Doctrine** is an exception to the exclusionary rule. It states that "...evidence obtained under a warrant later found to be invalid (especially because it is not supported by probable cause) is nonetheless admissible if the police reasonably relied on the notion that the warrant was valid." [74] The Supreme Court upheld law enforcement agent's illegal seizure of a large quantity of drugs based upon the agent's belief that the warrant was sufficient in *U.S. v. Leon* (1984). [75] Although the court determined that the warrant was insufficient for the seizure, the court indicated that its analysis that the exclusionary rule should

be weighed in circumstances where law enforcement agent's do not exhibit bad behavior, but instead really act in good faith. To this end, evidence is admissible if the Good Faith Doctrine is applied to law enforcement's reliance on a legal statute later deemed invalid.

Finally, the **Harmless Error Doctrine** is noted as an exception to the exclusionary rule. Harmless Error Doctrine is defined as "[t]he doctrine that an unimportant mistake by a trial judge, or some minor irregularity at trial, will not result in a reversal on appeal." The Harmless error doctrine is distinguished from all other exceptions as it addresses mistakes by trial judges, whereas the other exceptions address mistakes raised by law enforcement agents. Of all of the exceptions to the Exclusionary Rule mentioned above, Epps posits that defendants raise the harmless error doctrine more than any other exception. Unfortunately, courts continue to acknowledge a lack of continuity within the test or approach for harmless error. According to Epps, Chapman (1967) reminds us that harmless error is a difficult concept for the courts to navigate as the automatic reversal test does not apply to all harmless error cases. Additionally, harmless error is dubbed a mystery as the process remains elusive. Judicially created, harmless error integrates the necessary constitutional protections in the criminal trial procedure as well as adverse policies that underpin criminal statutes. Harmless error appears to be more palatable because of its intentional flexibility. Courts continue to struggle with implementation as a consensus surrounding standard of application remains. Therefore, Pondolfi notes courts should engage in a specific analysis which includes examining their explicit constitutional support, legislative reinforcement, and historical weight. As a result, evidence is admissible if the Harmless Faith Doctrine is applied to such cases as such as mistakenly allowing the jury to hear prejudicial testimony, and then attempting to correct the record by striking the same testimony, while ordering the jury to ignore the same testimony.

Although the analysis of police misconduct spans the Exclusionary Rule exceptions - Attenuation, Independent Source, Inevitable Discovery, Good Faith, and Harmless Error - one additional aspect should be examined. When illegally evidence is deemed inadmissible after a motion to suppress is denied, all evidence which followed the initial illegal evidence, is inadmissible as well. In fact, this legal concept is referred to as **fruit of the poisonous tree**.

Fruit of the Poisonous Tree

As we close the loop in the analysis of the Exclusionary Rule, the understanding of the exceptions and the admissibility of any evidence obtained because of the illegal search requires examination of one additional doctrine. Most constitutional scholars agree that fruit of the poisonous tree is a legal extension of the Exclusionary Rule.

The Fruit of the Poisonous Tree as a legal concept was first applied in *Silverthorne v. U.S.* (1920), when the court noted that the "Fourth Amendment protects a corporation and its officers from compulsory production of the corporate books and papers for use in a criminal proceeding against them when the information upon which the subpoenas were framed was derived by the Government through a previous unconstitutional search and seizure."

However, Justice Felix Frankfurter didn't create the term Fruit of the Poisonous Tree until almost 20 years after *Silverthorne v. U.S.* (1939).^[82] The Fruit of the Poisonous Tree Doctrine is dependent upon the status of the originally tainted evidence.

Fruit of the Poisonous Tree is defined as “[t]he rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the “fruit”) was tainted by the illegality (the ‘poisonous tree’).” ^[83] Similar to the exclusionary rule, fruit of the poisonous tree must follow the analysis regarding exceptions. If a defendant alleges the evidence is subject to the fruit of the poisonous tree, then the evidence will be admissible if independent source, inevitable discovery, attenuation, good faith and/or harmless error applies. Under this doctrine, if the defendant's drugs are located because of an unreasonable search and seizure of his car, the drugs seized are also inadmissible as the drugs were the “fruit” (direct extension) of the original tainted search.

Operationally, law enforcement agents who perform their job functions enjoy legal protections from being personally sued by a defendant. Critics of qualified immunity believe qualified immunity supports illegal and unconstitutional activity of law enforcement agents, creating a difficult environment for other law enforcement agents who approach their work both legally and constitutionally. As a result of law enforcement's overreliance on qualified immunity, the exclusionary rule may prove to be the sole relief available to defendants who allege violations of their constitutional rights involving unreasonable search and seizures. In fact, qualified immunity will even apply to law enforcement agents who violate a defendant's rights. Therefore, Cornell Law School Legal Information Institute asserts, illegally obtained evidence against a defendant is allowed except in scenarios where the defendant demonstrates its authority for standing to properly object to the noted illegal activity

11.4 MICHAEL F. MURRAY, PETITIONER V.

UNITED STATES OF AMERICA

JAMES D. CARTER, PETITIONER V. UNITED

STATES OF AMERICA

Facts of the Case

On April 6, 1983, federal law enforcement agents tailing Michael F. Murray and James D. Carter for suspicion of illegal drug activities saw the two drive large vehicles into a warehouse in South Boston. When Murray and Carter left, the agents saw a tractor-trailer rig and a large container. The agents arrested Murray and Carter and lawfully seized their vehicles, which contained marijuana. Several agents then returned to the warehouse, forced entry without a search warrant, and found numerous wrapped bales of what was later confirmed to be marijuana. The

agents did not disturb the bales and kept the warehouse under surveillance until they obtained a search warrant. In applying for the search warrant, the agents did not mention the unwarranted entry or the information they had obtained. Approximately eight hours later, the agents obtained the warrant, entered the warehouse, and seized the bales along with the notebooks indicating the destinations of the marijuana.

Before the trial, Murray and Carter moved to suppress the evidence discovered in the warehouse and argued that the warrant was invalid because it was based on information obtained in the previous unwarranted entry. The district court denied the motion and the U.S. Court of Appeals for the First Circuit affirmed.

Question

Does the Fourth Amendment require the suppression of evidence viewed in plain sight prior to an illegal entry that was later discovered in the course of a properly warranted search?

Conclusion

No. Justice Antonin Scalia delivered the opinion of the 4-3 plurality. The Court held that evidence that would be excluded under the Fourth Amendment is admissible if it comes from an independent source. If the police obtained information unlawfully but the evidence in question comes from an untainted source, it is still admissible. Because the officers, in this case, obtained a lawful warrant without relying on the information they obtained illegally, the evidence seized in the warranted entry can be considered to have come from an independent source and therefore not subject to exclusion.

Justice Thurgood Marshall wrote a dissenting opinion where he argued that the independent source exception is limited to cases in which the evidence in question stemmed from a wholly independent source. He argued that courts must keep in mind the incentives that police officers have to hide the use of illegal methods in obtaining evidence, and they must use a high standard of proof when determining whether evidence came from a truly independent source. Justice John Paul Stevens and Justice Sandra Day O'Connor joined in the dissent. In his separate dissent, Justice John Paul Stevens wrote that court decisions that incentivize police officers to obtain evidence through illegal means move further away from the true meaning of and protections offered by the Fourth Amendment.

Justice William J. Brennan, Jr. and Justice Anthony M. Kennedy did not participate in the decision or discussion of this case.



CHAPTER 12: PRETRIAL COURT PROCESS AND PLEA AGREEMENTS

OVERVIEW

In Chapter 12, we examine the criminal court pretrial processes. The pretrial court process is an important part of the process because the decisions made during this phase could have a significant impact on the trial. The pretrial phase is governed by laws covering the initial appearance of the defendant before a judge or magistrate; the securing of defense counsel, the arraignment process (in which the defendant is informed of the charges which have been filed by the state); the process in which the court determines whether to release the defendant pre-trial either with some financial surety (posting bail) or on his or her own recognizance and with court-determined conditions imposed (for example, not having contact with the alleged victim); the selection and use of a grand jury or preliminary hearing processes (in which either a grand jury or a judge determines whether there is sufficient evidence that a felony has been committed); any pretrial motions such as motions to suppress evidence (for examples, asking the court not to let the government use evidence it may have obtained illegally through a search or getting a confession), motions to challenge a subpoena, motions to change venue (to move the trial), motions to join or sever cases (for example if two or more individuals are charged with the offense, should the trials be held together or separately). During the pretrial phase, prosecutors and defendants through their defense attorneys will engage in plea bargaining and will generally resolve the case before a trial is held. The plea agreement process resolves approximately 97% of criminal matters so it is vital to understand the process and procedure.

OBJECTIVES

- Identify the different types of hearing that occur in the pre-trial phase of the criminal justice process.
- Explain the difference between a preliminary hearing (information) and a grand jury (indictment).
- Identify the pros and cons of the plea agreement process.
- Identify what information scientific research is showing on plea agreements and defense counsel.

KEY TERMS

complaint, indictment, bail determination, preliminary hearing, grand jury, discovery, exculpatory evidence, true bill, plea agreement, Missouri v Frye, Lafler v Cooper, suppression of evidence, motion to change venue, motion to join or sever cases.

CRITICAL THINKING

1. You are defense counsel, and the defendant is accused of a very high-profile kidnapping case. You do not feel the defendant will receive a fair trial due to the media coverage.
 - a. What motion would you file at the pretrial case. Same case, but a now you believe evidence obtained by police may have been obtained illegally.
 - b. What motion would you file in this example at the pretrial hearing?
2. You are the district attorney and are prosecuting a suspected case of embezzlement committed by the mayor. Do you conduct a preliminary hearing or a grand jury hearing in this matter? Why? Support your answer with information in this chapter.
3. The plea agreement process is supposed to be a “win-win” situation for the justice system as both sides (district attorney and defense counsel) can negotiate the outcome. The court wins because many cases can be resolved without a lengthy trial. However, explain how the outcome could be affected by the district attorney “stacking charges” in a case. How can the process be affected if the defendant cannot afford bail and must be detained during the trial process?

12.1 PRETRIAL PHASE^{lvii}

The pretrial phase is governed by laws covering the initial appearance of the defendant before a judge or magistrate; the securing of defense counsel, the arraignment process (in which the defendant is informed of the charges which have been filed by the state); the process in which the court determines whether to release the defendant pre-trial either with some financial surety (posting bail) or on his or her own recognizance and with court-determined conditions imposed (for example, not having contact with the alleged victim); the selection and use of a grand jury or preliminary hearing processes (in which either a grand jury or a judge determines whether there is sufficient evidence that a felony has been committed); any pretrial motions such as motions to suppress evidence (for examples, asking the court not to let the government use evidence it may have obtained illegally through a search or getting a confession), motions to challenge a subpoena, motions to change venue (to move the trial), motions to join or sever cases (for example if two or more individuals are charged with the offense, should the trials be held together or separately). During the pretrial phase, prosecutors and defendants through their defense attorneys will engage in plea bargaining and will generally resolve the case before a trial is held.

12.2 MISDEMEANOR VS. FELONY PRETRIAL PROCESS



Pin It! *Pretrial Processes*

Visit the [website of the San Bernardino County Superior Court of California](#) to learn about the similarities and differences in pretrial processes for misdemeanor and felony cases.



**If you are accessing a print version of this book, type the following short url into your browser to visit this source: bit.ly/3BTNmfN*

12.3 PRELIMINARY HEARING (INFORMATION) VS. GRAND JURY (INDICTMENT)^{lviii}

Another important aspect to understand and differentiate is the difference between the preliminary hearing or having a grand jury. These are two ways the district attorney demonstrates he or she has enough evidence to proceed with a trial. But they are very different in how they accomplish this goal. In felony cases, the police report and complaint are not enough to go to trial. The district attorney must prove probable cause that the defendant committed the crime they are accused of, they must prove probable cause for each charge.

Preliminary Hearing

At the preliminary hearing, the prosecution will present their evidence to prove the person named in the complaint has committed the offenses they are charged to have committed. Often times this is done by having the officers who investigated the crime come and testify in court. Because this is a preliminary hearing and not a full trial, there are differences in the prosecutor's ability to provide evidence. For example, an officer can provide information

(evidence) they were told or heard during the investigation. Because the prosecutor has a lower burden of proof at the preliminary hearing, it is relatively easy for them to prove to the judge there is probable cause to hold the defendant over for a formal trial. The defense attorney may also cross-examine the witnesses (police investigators) and attempt to discredit or "poke holes" in the prosecution's evidence. During this time, the defense also gets an idea of the evidence and may seek to suppress evidence through an exclusionary hearing after the preliminary hearing. The judge will then evaluate the evidence provided by the prosecutor to prove the charges in the complaint. The judge may find all the charges were proven or may find the prosecutor was only able to prove specific charges. Once it has been determined which charges have been proven, the prosecutor then submits the information to the court with the specific charges that will go to trial.

Grand Jury

The grand jury process is used less frequently by the prosecution and is the second way to formally charge a person with a criminal offense. Unlike the preliminary hearing, this hearing is not a public hearing. The grand jury is a legal body that has the ability to investigate possible criminal activity and bring formal charges against a defendant. In California, the grand jury is composed of 11-19 members from the general public who volunteer to serve on the jury for one year. And unlike a jury on a trial, not all jurors have to agree there is enough probable cause to believe the defendant committed the offenses charged by the prosecution. For example, if there were 16 jurors, only nine would have to believe there was enough probable cause to issue a verdict. Similar to the preliminary hearing, the prosecution presents their evidence to the jury to establish probable cause. The defense attorney and defendant are often not present at this hearing and therefore are not able to cross-examine the witnesses. The defense counsel will receive a transcript of the hearing.

After the prosecution, the jury will deliberate on the evidence provided to determine if there is probable cause to proceed to trial. If a minimum of nine grand jurors believe probable cause exists, they will provide a true bill. A true bill is the written decision of the juror and from there, an indictment will be drafted identifying all of the charges that will proceed to trial. The indictment is the same filing as the information found during the preliminary hearing and is the legal document that formally charging the defendant.

In California, a vast majority of criminal cases use the preliminary hearing process. So why does the prosecutor decide to take some cases to the grand jury? One of the biggest considerations is the fact the grand jury process is held in private. This allows the prosecution to maintain control over the evidence they have to prove the defendant's guilt. The defense counsel is provided discovery which outlines the information provided by the police during the investigation process, but unlike the preliminary hearing, the defense counsel does not get a chance to view testimony or cross-examine the witnesses. Additionally, all witnesses provide their testimony separately so no one hears the testimony other than the jurors, court reporter,

and prosecution. This can also be useful in the event a witness later changes their testimony at trial or is coerced to change their testimony. A record will be maintained of all evidence presented in the grand jury hearing.

Critical Look at the Grand Jury Process - Exculpatory Evidence

In California, the prosecution must present any exculpatory evidence to the grand jury. Exculpatory evidence is any evidence that may prove the defendant did not commit the offense. However, since the defendant and defense counsel are not present, and this hearing is held in secrecy, who ensures that the prosecution presents this evidence to the grand jury? This is one of the criticisms of the grand jury process. It is important to know that on average the grand jury will present a "true bill" on the charges brought before them, 95-99% of the time.

Why the Prosecution Uses the Grand Jury Process Over the Preliminary Hearing Process

When the prosecution is asked why they use the grand jury process over the preliminary process, there are a number of reasons they identified.

- The public is highly interested in the case and if held in open court during a preliminary hearing. Using the grand jury eliminates the public hearing details of a crime before a trial. This may be important to ensure the prospective jury is not tainted by evidence that may or may not be admissible during trial.
- A preliminary hearing may take longer than a grand jury hearing.
- To protect child witnesses or timid witnesses who would be cross-examined by the defense counsel in a preliminary hearing.
- To gauge the performance of a witness on the stand.
- Because the hearing is in private, the defendant may be unaware of the pending criminal proceedings and the witness can be protected from potential violence and also may prevent the defendant from fleeing the jurisdiction.
- To protect the identity of undercover officers or public officials.
- In cases where there may be official misconduct. The grand jury is held in secrecy so a hearing can be conducted into potential official misconduct without public scrutiny.



Pin It! Preliminary Hearings in CA Criminal Cases

To learn more about the process of preliminary hearings in California criminal cases, watch this video: [preliminary hearings in CA criminal cases](#).



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Pin It! *What is a Grand Jury?*

- To learn more about a grand jury and how it functions, watch this video: [what is a grand jury.](#)



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Find more information on the California Grand Jury system here: [California Grand Jury system.](#)

12.4 PLEA AGREEMENTS

In the United States, the vast majority of criminal justice cases are handled through the plea agreement process. After the defendant is arraigned, further hearings are set including an opportunity to resolve the case through a plea agreement. This process is usually negotiated in private, and out of view of the public and even the defendant. The prosecution, defense counsel, and a judge will often meet to determine if a resolution can be met. The district attorney will often agree to a reduction in the charges or offense if the defendant agrees to plead early and avoid a lengthy trial. The benefit to the defendant is they will often be able to

serve a reduced sentence or potential credit for time served and immediate release onto community supervision (probation or parole). This is a big incentive, especially for those defendants who were not able to afford bail and are in jail pending the trial process. Some criticize this process and indicate defendants who may be innocent will accept the plea agreement, especially if offered credit for time served. However, the defendant may not understand all of the consequences that come from a guilty plea. If the crime was a felony, these have long-term consequences which include impacts on their employment, housing, voting rights, and the ability to possess a firearm. Additionally, if placed on community supervision, if they violate probation, they could be sentenced to prison and have no right to dispute the offense as they already plead guilty.

12.5 KEY SUPREME COURT CASES ON PLEA AGREEMENTS

Missouri v. Frye^{lix}

Facts of the Case

Missouri prosecutors offered Galin Edward Frye two deals while seeking his conviction for driving while his license was revoked, but his lawyer never told Frye about the offers. Frye pleaded guilty to a felony charge and was sentenced to three years in prison. He appealed, saying his lawyer should have told him about the previous deals. A Missouri appeals court agreed. Prosecutors contend that not knowing about the deals they offered doesn't mean that Frye didn't know what he was doing when he decided to plead guilty.

Question

Can a defendant who validly pleads guilty assert a claim of ineffective assistance of counsel by alleging that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms?

Conclusion

Yes. In a 5-4 decision written by Justice Anthony Kennedy, the Court held that the Sixth Amendment requires defense attorneys to communicate formal plea offers from the prosecution. Justice Kennedy looked to *Hill v. Lockhart* and *Padilla v. Kentucky*; in both cases, a prisoner claimed his guilty plea was invalid because counsel provided incorrect advice pertinent to the plea. While acknowledging that a defendant has no right to receive a plea offer, Justice Kennedy noted that the vast majority of both federal and state convictions are the result of guilty pleas. Justice Kennedy finally held that Frye must show a reasonable probability he would have accepted the initial plea and that neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.

Justice Antonin Scalia, joined by Chief Justice John Roberts, Justice Clarence Thomas, and Justice Samuel Alito, dissented. Justice Scalia argued that Frye was not denied his constitutional right to a fair trial because the counsel's mistake did not deprive him of any substantive or procedural right. He further questioned the speculative nature of the majority's tests for effective counsel in plea bargaining.

***Lafler v. Cooper*^x**

Facts of the Case

Anthony Cooper was convicted of shooting a woman in the thigh and buttocks after missing a shot to her head. The U.S. Court of Appeals for the 6th Circuit overturned the conviction after Cooper claimed ineffective assistance of counsel. His lawyer told him not to take a plea offer, thinking that there could not be a finding that Cooper intended to murder his victim. But Cooper was convicted of assault with intent to murder and other charges. The appeals court said the incorrect advice equals unconstitutional ineffective assistance and ordered Cooper released. But Michigan officials argue that Cooper got a fair trial, and that the verdict should not be thrown out because of his lawyer's mistake.

Question

Is a state habeas petitioner entitled to relief when his counsel deficiently advises him to reject a favorable plea bargain, but the defendant is later convicted and sentenced pursuant to a fair trial?

Conclusion

Yes. In a 5-4 decision, Justice Anthony M. Kennedy delivered the majority opinion, vacating the Sixth Circuit judgment and returning the case for reconsideration. The Court held that the Michigan court applied the wrong standard when it rejected Cooper's claim to ineffective assistance of counsel. The proper test under *Strickland v. Washington* is whether absent the ineffective counsel, a defendant would have accepted an offered plea that was less severe than his eventual sentence, and the trial court would have accepted the terms of that plea. The majority also held that the proper remedy is not specific performance of the original plea. On remand, the prosecution should re-offer the plea and, if the defendant accepts it, the trial court can decide how to amend the original sentence.

Justice Antonin Scalia wrote a dissent, stating that there is no right to habeas relief when counsel's advice caused a defendant to have a full and fair trial. A criminal defendant has no right to a plea bargain, so rejecting the plea did not deprive Cooper of any procedural right. Justice Clarence Thomas joined in the Scalia dissent. Chief Justice John G. Roberts, Jr. joined in the dissent except for Justice Scalia's assertions that the majority's decision elevates the plea bargain to a constitutional right. Justice Samuel A. Alito wrote a separate dissent criticizing the majority's "opaque discussion of the remedy...."

12.6 EMPIRICAL RESEARCH ON PLEA AGREEMENTS

An Exploratory Analysis of Criminal Defense Attorneys in Plea Negotiations and Client Counseling^{lxi}

As plea bargains have proliferated in the criminal justice system, scholars have been working to better understand their mechanics. There have been a few recent examinations of plea bargaining, but the literature lacks qualitative research that gives the defense sufficient attention. Using a sample of courtroom practitioners in one large, urban county, we examine defense attorney bargaining and client counseling tactics. Results demonstrate that defense attorneys use a variety of strategies for negotiation, including sharing humanizing information about their clients with the prosecutor and utilizing delay tactics. Results also suggest that attorneys counsel their clients about plea offers in varying ways and that they are not in full agreement regarding the level of autonomy to give their clients. Overall, results support some prior literature but also prompt questions of other widely held beliefs, such as the idea that all courtroom actors endorse “going rates” as the prevailing norm in the courtroom. Although there are likely some expectations for typical punishments, these results also point to individual defense attorneys' ability to alter the trajectory of a criminal case through their negotiation and client counseling strategies. We conclude that more research is necessary on defense counsel strategies and how they may impact case processing and outcomes.

Though a criminal trial is a constitutional right afforded to every American citizen, almost all of today's criminal cases are resolved through a guilty plea; this is often a negotiated plea agreement that must be approved by a judge (Pastore & Maguire, 2005; Schulhofer & Nagel, 1989). Due to their prevalence, how these pervasive agreements come to fruition is a key empirical question. Assessing the fairness of plea bargaining as a vehicle for justice (see e.g., Bibas, 2016) is assuredly an important question, however, it is necessary to understand the actual mechanics of how these decisions are made before deeper analyses can occur. This paper adds to extant guilty plea literature by closely examining a crucial part of the courtroom workgroup: defense counsel. There is currently little research focusing on the defense's role in case processing, which leaves gaps in knowledge regarding the process of plea negotiation. Using interviews from court actors with a focus on defense attorneys, our research examines plea negotiation in one large urban county and concentrates on defense attorney negotiation and client counseling strategies.



Pin It! *Plea Agreement Defense*

Learn more about criminal defense attorneys' plea negotiation process: [Plea Agreement Defense](#).



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CHAPTER 13: TRIAL AND CONVICTION

OVERVIEW

All the previous chapters have laid the foundation to understand the trial process. This chapter examines the trial process and legal defense. The trial phase is governed by laws covering speedy trial guarantees, the selection and use of petit jurors (trial jurors); the rules of evidence (statutory and common law rules governing the admissibility of certain types of evidence such as hearsay or character evidence, the competency and impeachment of witnesses, the existence of any privilege, and the exclusion of witnesses during the testimony of other witnesses); the right of the defendant compulsory process (to secure favorable testimony and evidence); the right of the defendant to cross-examine any witnesses or evidence presented by the government against him; fair trials free of prejudicial adverse pre-trial or trial publicity; fair trials which are open to the public; and the continued right of the defendant to have the assistance of counsel and be present during his or her trial. Legal defenses are also very important to understand. This module will explore the different types of criminal defenses.

OBJECTIVES

- Identify the steps in a criminal court trial.
- Define the burden of proof
- Distinguish the civil and criminal burden of proof
- Compare circumstantial and direct evidence in a trial
- Explain the jury selection process.
- Identify the different types of defenses that can be used in a criminal trial.

KEY TERMS

Burden of proof, burden of production, burden of persuasion, beyond a reasonable doubt, bench trial, preponderance of evidence, beyond a reasonable doubt, presumption of innocence, inference, presumption, rebuttable or irrebuttable, circumstantial evidence, direct evidence, opening statement, witness examination, objections, hearsay, relevance, closing arguments, jury instructions, jury deliberations, verdict, legal defenses, insanity defense, entrapment, self-defense, involuntary intoxication, mistake, necessity, duress.

CRITICAL THINKING

1. A friend is required to do jury duty and knows you are study the criminal court process. He wants to understand the process better. He asks why there are so many

requirements such as the right to a speedy trial, rules of evidence, and the right to a jury trial. Provide him with the reason we have so many protections.

2. Read about [Patterson v. New York](#), 432 U.S. 197 (1977). In Patterson, the defendant was on trial for murder. New York law reduced murder to manslaughter if the defendant proved extreme emotional disturbance to a preponderance of evidence. Did the US Supreme Court hold that it is constitutional to put this burden on the defense, rather than forcing the prosecution to disprove extreme emotional disturbance beyond a reasonable doubt? Which part of the Constitution did the Court analyze to justify its holding?
3. You are the defense attorney, and the district attorney has rested their case. Do you have to present a defense? Explain why you may decide not to have the defendant testify or provide evidence to the jury. Can the jury hold this against the defendant?
4. Legal defenses can mitigate or eliminate guilt in a crime. For example, the district attorney may prove the defendant committed the act (*actus reus*) but not *mens rea* (guilty mind). Explain how someone who killed another person could be found not guilty. Use a legal defense example that could reduce (mitigate) or eliminate guilt in the case of murder.

13.1 THE TRIAL PROCESS^{lxii}

The trial phase is governed by laws covering speedy trial guarantees, the selection and use of petit jurors (trial jurors); the rules of evidence (statutory and common law rules governing the admissibility of certain types of evidence such as hearsay or character evidence, the competency and impeachment of witnesses, the existence of any privilege, and the exclusion of witnesses during the testimony of other witnesses); the right of the defendant compulsory process (to secure favorable testimony and evidence); the right of the defendant to cross-examine any witnesses or evidence presented by the government against him; fair trials free of prejudicial adverse pre-trial or trial publicity; fair trials which are open to the public; and the continued right of the defendant to have the assistance of counsel and be present during his or her trial.



Pin It! *What Happens when a Criminal Case Goes to Trial?*

To learn more about the process once a criminal case has gone to trial, watch this video: [what happens when a criminal case goes to trial](#).



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13.2 THE BURDEN OF PROOF^{lxiii}

The key to the success of a civil or criminal trial is meeting the burden of proof. A failure to meet the burden of proof is also a common ground for appeal. In this section, you learn the burden of proof for the plaintiff, prosecution, and defendant. You also are introduced to different classifications of evidence and evidentiary rules that can change the outcome of the trial.

Definition of the Burden of Proof

The burden of proof is a party's responsibility to prove a disputed charge, allegation, or defense (Yourdictionary.com, 2010). The burden of proof has two components: the burden of production and the burden of persuasion. The burden of production is the obligation to present evidence to the judge or jury. The burden of persuasion is the duty to convince the judge or jury to a certain standard, such as beyond a reasonable doubt, which is defined shortly. This standard is simply a measuring point and is determined by examining the quantity and quality of the evidence presented. "Meeting the burden of proof" means that a party has introduced enough compelling evidence to reach the standard defined in the burden of persuasion.

The plaintiff or prosecutor generally has the burden of proving the case, including every element of it. The defendant often has the burden of proving any defense. The trier of fact determines whether a party met the burden of proof at trial. The trier of fact would be a judge in a nonjury or bench trial. In a criminal case, the trier of fact is almost always a jury because of the right to a jury trial in the Sixth Amendment. Jurors are not legal experts, so the judge explains the burden of proof in jury instructions, which are a common source of appeal.

Burden of Proof in a Civil Case

Burdens of proof vary, depending on the type of case being tried. The plaintiff's burden of proof in a civil case is called preponderance of evidence. Preponderance of evidence requires the

plaintiff to introduce slightly more or slightly better evidence than the defense. This can be as low as 51 percent plaintiff to 49 percent defendant. When preponderance of evidence is the burden of proof, the judge or jury must be convinced that it is “more likely than not” that the defendant is liable for the plaintiff’s injuries. Preponderance of evidence is a fairly low standard, but the plaintiff must still produce more and better evidence than the defense. If the plaintiff offers evidence of questionable quality, the judge or jury can find that the burden of proof is not met, and the plaintiff loses the case.

The defendant’s burden of proof when proving a defense in a civil case is also preponderance of evidence. For example, in the O. J. Simpson civil case, O. J. Simpson failed to meet the burden of proving the defense of alibi. The defendant does not always have to prove a defense in a civil case. If the plaintiff does not meet the burden of proof, the defendant is victorious without having to present any evidence at all.

Burden of Proof in a Criminal Prosecution

The prosecution’s burden of proof in a criminal case is the most challenging burden of proof in law; it is beyond a reasonable doubt. Judges have struggled with a definition for this burden of proof. As Chief Justice Shaw stated nearly a century ago, “[w]hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge (Commonwealth v. Webster, 2010).”

In general, the prosecution’s evidence must overcome the defendant’s presumption of innocence, which the Constitution guarantees as due process of law (In re Winship, 2010). This fulfills the policy of criminal prosecutions, which is to punish the guilty, not the innocent. If even a slight chance exists that the defendant is innocent, the case most likely lacks convincing and credible evidence, and the trier of fact should acquit the defendant.

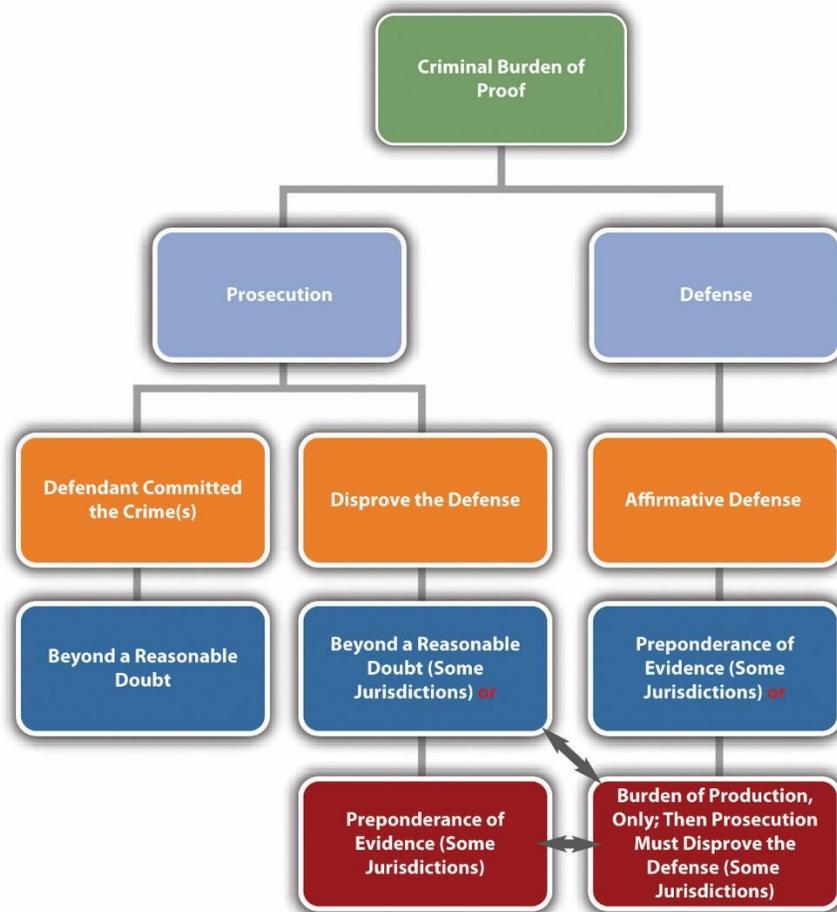


Figure 13.1 Diagram of the Criminal Burden of Proof⁸

Example of a Failure to Meet the Burden of Proof

Ann is on trial for first-degree murder. The only key piece of evidence in Ann’s trial is the murder weapon, which was discovered in Ann’s dresser drawer during a law enforcement search. Before Ann’s trial, the defense makes a motion to suppress the murder weapon evidence because the search warrant in Ann’s case was signed by a judge who was inebriated and mentally incompetent. The defense is successful with this motion, and the judge rules that the murder weapon is inadmissible at trial. The prosecution decides to proceed anyway. If there is no other convincing and credible evidence of Ann’s guilt, Ann does not need to put on a defense in this case. The prosecution will fail to meet the burden of proof and Ann will be acquitted.

⁸ This image is licensed under [CC-NC-SA 3.0](https://creativecommons.org/licenses/by-nc-sa/3.0/)

Inference and Presumption

Parties can use two tools to help meet the burden of proof: inference and presumption. Jury instructions can include inferences and presumptions and are often instrumental in the successful outcome of a case.

An inference is a conclusion that the judge or jury may make under the circumstances. An inference is never mandatory but is a choice. For example, if the prosecution proves that the defendant punched the victim in the face after screaming, “I hate you!” the judge or jury can infer that the punch was thrown intentionally.

A presumption is a conclusion that the judge or jury must make under the circumstances. As stated previously, all criminal defendants are presumed innocent. Thus, the judge or jury must begin any criminal trial concluding that the defendant is not guilty.

Presumptions can be rebuttable or irrebuttable. A party can disprove a rebuttable presumption. The prosecution can rebut the presumption of innocence with evidence proving beyond a reasonable doubt that the defendant is guilty. An irrebuttable presumption is irrefutable and cannot be disproved. In some jurisdictions, it is an irrebuttable presumption that children under the age of seven are incapable of forming criminal intent. Thus, in these jurisdictions’ children under the age of seven cannot be criminally prosecuted (although they may be subject to a juvenile adjudication proceeding).

Circumstantial and Direct Evidence

Two primary classifications are used for evidence: circumstantial evidence or direct evidence.

Circumstantial evidence indirectly proves a fact. Fingerprint evidence is usually circumstantial. A defendant’s fingerprint at the scene of the crime directly proves that the defendant placed a finger at that location. It indirectly proves that because the defendant was present at the scene and placed a finger there, the defendant committed the crime. Common examples of circumstantial evidence are fingerprint evidence, DNA evidence, and blood evidence. Criminal cases relying on circumstantial evidence are more difficult for the prosecution because circumstantial evidence leaves room for doubt in a judge’s or juror’s mind. However, circumstantial evidence such as DNA evidence can be very reliable and compelling, so the prosecution can and often does meet the burden of proof using only circumstantial evidence.

Direct evidence directly proves a fact. For example, eyewitness testimony is often direct evidence. An eyewitness testifying that he or she saw the defendant commit the crime directly proves that the defendant committed the crime. Common examples of direct evidence are eyewitness testimony, a defendant’s confession, or a video or photograph of the defendant committing the crime. Criminal cases relying on direct evidence are easier to prove because there is less potential for reasonable doubt. However, direct evidence can be unreliable and is not necessarily preferable to circumstantial evidence. If an eyewitness is impeached, which

means he or she loses credibility, the witness’s testimony lacks the evidentiary value of reliable circumstantial evidence such as DNA evidence.

Table 13.1. Comparison of Circumstantial and Direct Evidence in a Burglary Case

Evidence	Circumstantial	Direct
Fiber from the defendant’s coat found in a residence that has been burglarized	Yes	No—directly proves presence at the scene , not that the defendant committed burglary
GPS evidence indicating the defendant drove to the burglarized residence	Yes	No—same explanation as fiber evidence
Testimony from an eyewitness that she saw the defendant go into the backyard of the burglarized residence	Yes	No—could prove trespassing because it directly proves presence at the scene , but it does not directly prove burglary
Surveillance camera footage of the defendant purchasing burglar tools	Yes	No—does not directly prove they were used on the residence
Cell phone photograph of the defendant burglarizing the residence	No	Yes—directly proves that the defendant committed the crime
Witness testimony that the defendant confessed to burglarizing the residence	No	Yes—directly proves that the defendant committed the crime
Pawn shop receipt found in the defendant’s pocket for items stolen from the residence	Yes	No—directly proves that the items were pawned, not stolen

13.3 TRIAL^{lxiv}

After many weeks or months of preparation, the prosecutor is ready for the most important part of his job: the trial. The trial is a structured process where the facts of a case are presented to a jury, and they decide if the defendant is guilty or not guilty of the charge offered. During trial, the prosecutor uses witnesses and evidence to prove to the jury that the defendant committed the crime(s). The defendant, represented by an attorney, also tells his side of the story using witnesses and evidence.

In a trial, the judge — the impartial person in charge of the trial — decides what evidence can be shown to the jury. A judge is similar to a referee in a game, they are not there to play for one side or the other but to make sure the entire process is played fairly.

Jury Selection

At trial, one of the first things a prosecutor and defense attorney must do is the selection of jurors for the case. Jurors are selected to listen to the facts of the case and to determine if the defendant committed the crime. Twelve jurors are selected randomly from the jury pool (also called the “venire”), a list of potential jurors compiled from voter registration records of people living in the Federal district.

When selecting the jury, the prosecutor and defense attorney may not discriminate against any group of people. For example, the judge will not allow them to select only men or only women. A jury should represent all types of people, races, and cultures. Both lawyers are allowed to ask questions about their potential biases and may excuse jurors from service. Each side is allowed to excuse certain potential jurors without providing a reason by using a limited number of “peremptory challenges.”



Pin It! *Jury Service Overview*

To learn more about the Constitutional right to trial by jury and how those juries are selected, watch this video: [jury service](#).



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Opening Statements

Opening statements allow the prosecutor and the defense attorney to briefly tell their account of the events. These statements usually are short like an outline and do not involve witnesses or evidence. The prosecutor makes an opening statement first because the Government has the burden of proving that the defendant committed the crime.

Presentment of Cases

Witness Examination

Following opening statements, the prosecutor begins direct examination of his first witness. This is the prosecutor's initial step in attempting to prove the case, and it can last from a few minutes to several days. During direct examination, the prosecutor can introduce evidence such as a weapon or something from the crime scene.

Following the prosecutor's examination of a witness, the defense attorney has an opportunity to cross-examine or ask questions to the same witness. The purpose of cross-examination is to create doubt as to the credibility of the witness.

After the defense attorney cross-examines the witness, the prosecutor asks the witness final questions to clarify any confusing testimony for the jury. This is called redirect examination. Once the process of direct examination, cross-examination, and redirect of all the witnesses is complete, the prosecutor rests his case. After the prosecutor rests, no more witnesses can be called to the stand or evidence introduced by the government.

After the Government rests, the defense has the opportunity to present witnesses and evidence to the jury. The defense also has the option of not having the defendant testify. There is no burden upon the defendant to prove that they are innocent. It is the government's responsibility to prove the defendant committed the crime as detailed in the indictment. The fact that a defendant did not testify may not be considered by the jury as proof that the defendant committed the crime. The defense may also waive his case. If the defense does not put on any evidence, the jury cannot assume that the defendant is guilty simply because they did not put on a defense. The decision to put on a defense is solely up to the defendant and the defense attorney. However, the defense will usually present its own version of the case.

Objections

During direct or cross-examination, either attorney can make an objection to a question or a piece of evidence to the judge. For example, a prosecutor or defense attorney may object to the wide range of the direct examination because it is beyond the knowledge of the witness, the attorney may be arguing with the witness rather than asking questions, or the witness may be talking about things irrelevant to the case.

Common objections include:

- Hearsay – Statement by a witness who did not see or hear the incident in question but learned about it through secondhand information such as another's statement, a newspaper, or a document.
- Relevance – Testimony and evidence presented at trial must be relevant to the case.

The judge decides the outcome of an objection, sometimes after allowing attorneys on both sides to comment before making a ruling. The judge either “sustains” the objection so that the action stops, or they “overrule” the objection and allows the action to continue.

Closing Arguments

After the defense’s direct testimony and cross-examination by the prosecutor of all the witnesses, the defense rests, and the prosecutor and defense attorney prepare for closing arguments.

Closing arguments are the final opportunity for the prosecutor and the defense attorney to talk to the jury. These arguments allow both attorneys to summarize the testimony and evidence and ask the jury to return a verdict of guilty or not guilty.

Jury Instructions

Following the closing arguments, the judge “charges the jury,” or informs them of the appropriate law and of what they must do to reach a verdict.

Jury Deliberations & Announcement of the Verdict

After being charged, the jury goes into deliberation, the process of deciding whether a defendant is guilty or not guilty. During this process, no one associated with the trial can contact the jury without the judges and lawyers. If the jury has a question on the law, they must write a note to the judge, which the judge will read in court with all parties present. In federal criminal trials, the jury must reach a unanimous decision in order to convict the defendant.

After they reach an agreement on a verdict, they notify the judge, the lawyers, and the defendant in open court. Everyone is present in court for the reading of the verdict. The United States Marshals Service is present during trial to protect the judge and prosecutors from potential harm. If the defendant is found not guilty, they are usually free to go home.

13.4 LEGAL DEFENSES^{lxv}

To successfully obtain a conviction, the prosecutor must show all of the elements of the crime beyond a reasonable doubt in criminal court. This is not the end of it in some cases. It must also be shown (if the issue is raised) that the *actus reus* and the *mens rea* were present, but also that the defendant committed the act without justification or excuse. Both justifications and excuses are species of legal defenses. If a legal defense is successful, it will either mitigate or eliminate guilt.

A *justification* consists of a permissible reason for committing an act that would otherwise be a crime. Under normal circumstances, for example, it would be a crime to shoot a man dead on the street. If, however, the man was a mugger and had the shooter at knifepoint, then the

justification of self-defense could be raised. A justification means that an act would normally be wrong, but under the circumstances, it was the right thing to do. An excuse is different.

The Insanity Defense

The term insanity comes from the law; psychology and medicine do not use it. The everyday use of the term can be misleading. If a person acts abnormally, they tend to be considered by many as “crazy” or “insane.” At law, merely having a mental disease or mental defect is not adequate to mitigate guilt. It must be remembered that Jeffery Dahmer was determined to be *legally* sane, even though everyone who knows the details of his horrible acts knows that he was seriously mentally ill. To use insanity as a legal excuse, the defendant has to show that he or she lacked the capacity to understand that the act was wrong, or the capacity to understand the nature of the act. Some jurisdictions have a not guilty by reason of insanity plea.

The logic of the insanity defense goes back to the idea of *men's rea* and culpability. We as a society usually only want to punish those people who knew what they were doing was wrong. Most people believe that it is morally wrong to punish someone for an unavoidable accident. Likewise, society does not punish very young children for acts that would be crimes if an adult did them. The logic is that they do not have the maturity and wisdom to foresee and understand the nature of the consequences of the act. Put in oversimplified terms, if a person is so crazy that they do not understand that what they are doing is wrong, it is morally wrong to punish them for it.

Over the years, different courts in different jurisdictions have devised different tests to determine systematically if a criminal defendant is legally insane. One of the oldest and most enduring tests is the M’Naghten rule, handed down by the English court in 1843. The basis of the M’Naghten test is the inability to distinguish right from wrong. The Alabama Supreme Court, in the case of *Parsons v. State* (1887), first adopted the Irresistible Impulse Test. The basic idea is that some people, under the duress of a mental illness, cannot control their actions despite understanding that the action is wrong.

Today, all of the federal courts and the majority of state courts use the substantial capacity test developed within the *Model Penal Code*. According to this test, a person is not culpable for a criminal act “if at the time of the crime as a result of mental disease or defect the defendant lacked the capacity to appreciate the wrongfulness of his or her conduct or to conform the conduct to the requirements of the law.” In other words, this test contains the awareness of the wrongdoing standard of M’Naghten as well as the involuntary compulsion standard of the irresistible impulse test.

It is a Hollywood myth that many violent criminals escape justice with the insanity defense. In fact, the insanity defense is seldom attempted by criminal defendants and is very seldom successful when it is used. Of those who do successfully use it, most of them spend more time

in mental institutions than they would have spent in prison had they been convicted. The insanity defense is certainly no “get out of jail free card.”

Entrapment

Entrapment is a defense that removes the blame from a person who commits a criminal act when convinced to do so by law enforcement. In other words, people have the defense of entrapment available when police lure them into crime. A valid entrapment defense has two related elements: There must be a government inducement of the crime, and the defendant’s lack of predisposition to engage in the criminal conduct. Mere solicitation, however, to commit a crime is not inducement. Inducement requires a showing of at least persuasion or mild coercion.

Self-Defense

As a matter of political theory, the right to use force is handed over to the government via the social contract. This power to use force is entrusted to law enforcement. Thus, when force is called to end a confrontation, people should call the police. There are times, however, when the police are not available in emergencies. In these rare instances, it is permissible for the average citizen to use force to protect themselves and others from violent victimization.

The legality of using force in self-defense hinges on reasonableness. Whether a use of force decision was a reasonable one will always depend on the circumstances of each individual situation. The amount of force used should be the minimum likely to repel the attack. The defense also requires that the danger be imminent. In other words, the use of force cannot be preemptive or retaliatory. Generally, deadly force can only be used to prevent loss of life. Some jurisdictions allow the use of non-deadly force to prevent thefts.

Intoxication

While there is some logic to the idea that being intoxicated diminishes a person’s capacity to develop *mens rea*, it usually serves to enhance rather than mitigate criminal culpability. There are some jurisdictions that allow voluntary intoxication as a factor that mitigates culpability, such as when a murder in the first degree is reduced to murder in the second degree.

Involuntary intoxication is another matter. If a defendant has been given a drug without their knowledge, then a defense of involuntary intoxication may be available.

Mistake

It is often said, “Everybody makes mistakes.” The law recognizes this, and mistakes can sometimes be a defense to a criminal charge. Mistakes made because the situation was not really the way the person thought it was are known as mistakes of fact. These can be a criminal defense. Mistakes as to matters of law (**mistakes of law**) can never be used as a criminal defense. There is a presumption in American law that everyone knows the criminal law. This

may seem like a preposterous assumption but consider the alternative. If a defendant could mount a defense by claiming that he or she did not know the act was criminal, then everyone could commit every crime at least once and get away with it by claiming that they did not know. For this reason, the law has to presume that everybody knows the law.

Necessity

The defense of necessity is based on the idea that it is sometimes necessary to choose one evil to prevent another, such as when the property is destroyed to save lives. The necessity defense is sometimes referred to as the lesser of two evils defense because the evil that the actor seeks to prevent must be greater harm than the evil that he or she does to prevent it. In most jurisdictions, the defense will not be available if the person created the danger they were avoiding.

Duress

Duress, sometimes known as coercion, means that the actor did the criminal act because they were forced to do so by another person by means of a threat. The idea is that while the actor commits the *actus reus* of the offense, the *mens rea* element, the criminal intent, was that of the person that coerced the actor to commit the crime. The effect of a successful duress defense is a matter of state law, so may be different in different jurisdictions. Most jurisdictions require that the actor have no part in becoming involved in the situation.

13.5 THE VERDICT^{lxvi}

In a criminal trial, the burden of proof is on the government. Defendants do not have to prove their innocence. Instead, the government must provide evidence to convince the jury of the defendant's guilt. The standard of proof in a criminal trial gives the prosecutor a much greater burden than the plaintiff in a civil trial. The defendant must be found guilty "beyond a reasonable doubt," which means the evidence must be so strong that there is no reasonable doubt that the defendant committed the crime.

Not Guilty^{lxvii}

If the jury finds the defendant not guilty, it is called an "acquittal" and the defendant will be released. The defendant can never be tried again for the same crime. This is called "double jeopardy." A finding of not guilty is not the same as a finding of innocence. It simply means that the jury was not convinced that the defendant was guilty beyond a reasonable doubt. The arrest will still show on the defendant's record, along with the acquittal. If a defendant was wrongfully arrested and charged, and he or she wants to get the arrest removed from her or his record, a hearing to determine the factual innocence of the defendant must be held in front of a judge. It is often much harder to prove factual innocence than to raise a reasonable doubt about guilt.



CHAPTER 14: SENTENCING, APPEALS, AND HABEUS CORPUS

OVERVIEW

In this final module, we review the sentencing and appeals process of the criminal court process. Sentencing is a complex process that defines the application of sentencing principles depending on the offense and specific circumstances of the crime and offender. The latitude that a judge has in imposing sentences can vary widely from state to state. This is because state legislatures often set the minimum and maximum punishments for particular crimes in criminal statutes. The law also specifies alternatives to incarceration that a judge may use to tailor a sentence to an individual offender. The appeals process is a very important component of the criminal justice process. An appeal is a claim that some procedural or legal error was made in the prior handling of the case. It does not evaluate the weight of evidence or guilt/innocence. The focus is on legal errors. This is an important concept to understand.

OBJECTIVES

- Explain the factors that influence the sentencing recommendation (aggravating & mitigating circumstances, victim impact statement).
- Identify the difference between consecutive and concurrent sentencing.
- Explain the various sentences that can be imposed.
- Identify how mandatory minimum sentences and sentencing guidelines have affected sentencing.
- Explain the appeals process, the standards of review, and appellate decisions.

KEY TERMS

appeal, concurrent sentence, consecutive sentence, day fine, electronic monitoring, intensive supervision probation (ISP), community service, home supervision/house arrest boot camps, asset forfeiture, death penalty, probation, post-release community supervision (California), mandatory supervision (California) Scarlet-Letter Punishments, Sentencing Reform Act of 1984, determinate sentencing, indeterminate sentencing, good time, presentence investigation report, Proportionality Doctrine, mandatory minimum sentencing.

CRITICAL THINKING

1. You are a probation officer tasked with completing a presentence investigation report on a defendant. Review the cases below and identify potential aggravating and/or mitigating circumstances.
 - a. **PRESENT OFFENSE NARRATIVE:** On December xx, 2020, at approximately 2:15 pm, Austin Police Department (APD) Officer K. and Officer P. responded to a report of a forgery passing at ABC Cash Express located at 517 A Ave. Upon arrival they met with Mary Smith who stated that a female, identified as Melanie Miller, the defendant, was attempting to cash a fake 7-11 check worth \$2962.30. Mary called the Bank of America to confirm if the check was real. Bank of America told her that the account number on the check did not exist. Mary advised the defendant, who also presented a letter trying to prove that the check was good. Mary added that the paper used for the check was regular paper, not paper that is consistent in the preparation of checks. She continued to state that the business has cashed valid 7-11 checks in the past and the check number was too small. When Mary told the defendant and her cousin, identified as Esther Jones, that she was calling the police, the defendant and Jones got scared and left the scene. The defendant (and Jones) returned to the scene and explained to Officer K. and Officer P. how she got the check. The defendant stated that she enrolled herself in a Yahoo post for a Christmas job or to receive financial assistance for Christmas. She stated that she got paid in many ways, including gift cards and this check with number 0009999337. The defendant said that the check was delivered from Canada. The letter that came with the check was from Alliance Processing Center. It was an Award Notification Letter telling the defendant that she had won \$50,000 and that they were mailing her an assistance check of \$2962.30 to help her pay for tax and administrative expenses involved with her winnings. The defendant was upset and stated that she did not know that the check was not real. The defendant stated that she did not know who sent her the check and did not have an explanation for why the check was stated to be from Dallas, TX, but mailed from Canada. It should be noted that the phone number on the check returns to Ontario, Canada, not Texas.

Table 14.1. SUMMARY OF CRIMINAL HISTORY: (PRIOR RECORD)

DATE	ARRESTING AGENCY	OFFENSE	DISPOSITION
06/00/02	PD, Austin, TX	Credit Card Abuse	12/00/02, Three years probation
03/00/03	SO, Travis County	Theft by Check	07/00/03, 20 days Travis County Jail
02/00/06	PD, Austin, Texas	Burglary of Habitation	07/00/06, 10 years Shock Probation 04/00/88, Revoked, 90 days Travis County Jail
10/00/07	PD, Austin, Texas	Theft	02/00/08, 60 days Travis County Jail
11/00/07	PD, Austin, Texas	Theft	02/00/08, 60 days Travis County Jail
08/00/07	PD, Austin, Texas	Forgery by Possession with Intent to Pass	01/00/88, Eight years TDCJ
11/00/14	Park Police, Texas	Theft of Property	11/00/15, 4 days Travis County Jail
01/00/15	PD, San Marcos, TX	Criminal Mischief	03/00/15, Fined

- b. Sources available to this department indicate that the defendant has been convicted of three prior felony offenses and served two prior terms of probation for Credit Card Abuse and Burglary of Habitation. There was no record found for the Credit Card Abuse probation. The Burglary of Habitation probation term was revoked on 04/00/88 due to committing the subsequent offense of Forgery by Possession with Intent to Pass on 08/00/87 and failure to report as directed.
 - c. PENDING CASES: None.
 - d. VICTIM IMPACT STATEMENT: Victim: None
 - e. Loss: None
2. Read [United States v. P.H.E, Inc.](#), 965 F.2d 848 (1992). In P.H.E., Inc., the defendant never went to trial but was indicted. The defendant challenged the indictment, which was upheld by the trial court. The government claimed that the Court of Appeals for the Tenth Circuit could not hear an appeal of the trial court’s decision, because there was never a “final judgment.” Did the Circuit Court agree? Why or why not?
 3. What does the Supreme Court look for when deciding whether to grant certiorari? Identify the reasons or cause to take a criminal court case to the Supreme Court.

14.1 SENTENCING PHASE

Sentencing^{lxviii}

In most jurisdictions, the judge holds the responsibility of imposing criminal sentences on convicted offenders. Often, this is a difficult process that defines the application of sometimes

very complex sentencing principles depending on the offense and specific circumstances of the crime and offender. The latitude that a judge has in imposing sentences can vary widely from state to state. This is because state legislatures often set the minimum and maximum punishments for particular crimes in criminal statutes. The law also specifies alternatives to incarceration that a judge may use to tailor a sentence to an individual offender.

Presentence Investigation

Many jurisdictions require that a presentence investigation take place before a sentence is handed down. Most of the time, the presentence investigation is conducted by a probation officer and results in a presentence investigation report. This document describes the convict's education, employment record, criminal history, present offense, prospects for rehabilitation, and any personal issues, such as addiction, that may impact the court's decision. The report usually contains a recommendation as to the sentence that the court should impose. These reports are a major influence on the judge's final decision.

Victim Impact Statements

Many states now consider the impact that a crime had on the victim when determining an appropriate sentence. A few states even allow the victims to appear in court and testify. Victim impact statements are usually read aloud in open court during the sentencing phase of a trial. Criminal defendants have challenged the constitutionality of this process on the grounds that it violates the Proportionality Doctrine requirement of the Eighth Amendment, but the Supreme Court has rejected this argument and found the admission of victim statements constitutional.



Pin It! *Crime Victim's Rights: What You Need to Know*

To learn more about the rights of someone who is the victim of a crime, watch this video: [crime victim's rights](#).



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Pin It! Do Victim Impact Statements Impact Criminal Sentencing

To learn more about the how influential victim impact statements are in regard to criminal sentencing, watch this video: [victim impact statements](#).



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The Sentencing Hearing

Many jurisdictions pass final sentences in a phase of the trial process known as a sentencing hearing. The prosecutor will recommend a sentence in the name of the people or defend the recommended sentence in the presentence investigation report, depending on the jurisdiction. Defendants retain the right to counsel during this phase of the process. Defendants also have the right to make a statement to the judge before the sentence is handed down.

Influences on Sentencing Decisions

The severity of a sentence usually hinges on two major factors. The first is the seriousness of the offense. The other, which is much more complex, is the presence of aggravating or mitigating circumstances. In general, the more serious the crime, the harsher the punishment.

Aggravating Circumstances

According to Cornell School of Law/Legal Information Institute, “aggravating circumstances refer to factors that increase the severity or culpability of a criminal act. Typically, the presence of an aggravating circumstance will lead to a harsher penalty for a convicted criminal. Some generally recognized aggravating circumstances include the heinousness of the crime, lack of remorse, and prior conviction of another crime. Recognition of particular aggravating circumstances varies by jurisdiction. A mitigating factor is the opposite of an aggravating circumstance, as a mitigating factor provides reasons as to why punishment for a criminal act's ought to be lessened.”

Using Aggravating Circumstances

In *Cunningham v. California*, 549 U.S. 270 (2007), the Supreme Court held that a jury may only use aggravating circumstances to impose a harsher sentence than usual when the jury had

found those factors to be true beyond a reasonable doubt. The Cunningham court, however, also stated that prior convictions do not to be proven beyond a reasonable doubt.

California Rules of Court - Circumstances in Aggravation Rule 4.421.

Circumstances in aggravation include factors relating to the crime and factors relating to the defendant.

1. Factors relating to the crime, whether or not charged or chargeable as enhancements include that:
 - a. The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;
 - b. The defendant was armed with or used a weapon at the time of the commission of the crime;
 - c. The victim was particularly vulnerable;
 - d. The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;
 - e. The defendant induced a minor to commit or assist in the commission of the crime;
 - f. The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;
 - g. The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;
 - h. The manner in which the crime was carried out indicates planning, sophistication, or professionalism;
 - i. The crime involved an attempted or actual taking or damage of great monetary value;
 - j. The crime involved a large quantity of contraband; an
 - k. The defendant took advantage of a position of trust or confidence to commit the offense.
 - l. The crime constitutes a hate crime under section 422.55 and:
 - m. No hate crime enhancements under section 422.75 are imposed; and
 - n. The crime is not subject to sentencing under section 1170.8.

(Subd (a) amended effective May 23, 2007; previously amended effective January 1, 1991, and January 1, 2007.)

2. Factors relating to the defendant include that:

- a. The defendant has engaged in violent conduct that indicates a serious danger to society;
- b. The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
- c. The defendant has served a prior term in prison or county jail under section 1170(h);
- d. The defendant was on probation, mandatory supervision, post release community supervision, or parole when the crime was committed; and
- e. The defendant's prior performance on probation, mandatory supervision, post-release community supervision, or parole was unsatisfactory.

(Subd (b) amended effective January 1, 2017; previously amended effective January 1, 1991, January 1, 2007, and May 23, 2007.)

3. Other factors statutorily declared to be circumstances in aggravation or that reasonably relate to the defendant or the circumstances under which the crime was committed.

Mitigating Circumstances

According to Cornell School of Law/Legal Information Institute: "Mitigating Circumstances are any fact or circumstance that lessens the severity or culpability of a criminal act. Mitigating factors include an ability for the criminal to reform, mental retardation, an addiction to illegal substances or alcohol that contributed to the criminal behavior, and past good deeds, among many others. Recognition of particular mitigating factors varies by jurisdiction."

California Rules of Court - Circumstances in Mitigation Rule 4.423.

Circumstances in mitigation include factors relating to the crime and factors relating to the defendant.

1. Factors relating to the crime include that:
 - a. The defendant was a passive participant or played a minor role in the crime;
 - b. The victim was an initiator of, willing participant in, or aggressor or provoker of the incident;
 - c. The crime was committed because of an unusual circumstance, such as great provocation, that is unlikely to recur;
 - d. The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense;
 - e. The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;
 - f. The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim;

- g. The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal;
- h. The defendant was motivated by a desire to provide necessities for his or her family or self; and
- i. The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the abuse does not amount to a defense.

(Subdivision (a) amended effective May 23, 2007; previously amended effective January 1, 1991, July 1, 1993, and January 1, 2007.)

- 2. Factors relating to the defendant include that:
 - a. The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes;
 - b. The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime;
 - c. The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process;
 - d. The defendant is ineligible for probation and but for that ineligibility would have been granted probation;
 - e. The defendant made restitution to the victim; and
 - f. The defendant's prior performance on probation, mandatory supervision, post release community supervision, or parole was satisfactory.

(Subd (b) amended effective January 1, 2017; previously amended effective January 1, 1991, January 1, 2007, and May 23, 2007.)

- 3. Other factors statutorily declared to be circumstances in mitigation or that reasonably relate to the defendant or the circumstances under which the crime was committed.

Concurrent versus Consecutive Sentences

It is not uncommon for a person to be indicted on multiple offenses. This can be several different offenses or a repetition of the same offense. In many jurisdictions, the judge has the option to order the sentences to be served concurrently or consecutively. A concurrent sentence means that the sentences are served at the same time. A consecutive sentence means that the defendant serves the sentences one after another.

According to Cornell School of Law/Legal Information Institute: "Multiple prison terms are to be served one after another after the defendant is convicted of the corresponding criminal offenses. That is, when convicted of multiple offenses, judges may sentence the defendant to serve the sentences back-to-back. Consecutive sentences are distinct from concurrent sentences, whereby convicted defendants serve for a duration equal to the length of the

longest sentence. Thus, concurrent sentences are typically considered more favorable for defendants. For example, if a defendant is convicted and sentenced for two six-year sentences and one three-year sentence, he/she would only serve six years under concurrent sentencing but would serve fifteen years under consecutive sentencing. For either type of sentence to apply, the defendant must be convicted of multiple sentences. According to the Supreme Court case *Oregon v. Ice*, judges often have the discretion to decide between the types of sentencing. Judges may select concurrent sentencing out of mercy, plea bargaining, or other reasons. Consecutive sentences can also be referred to as ‘cumulative sentences.’

Types of Sentences

A sentence is the punishment ordered by the court for a convicted defendant. Statutes usually prescribe punishments at both the state and federal levels. The most important limit on the severity of punishments in the United States is the Eighth Amendment.

The Death Penalty

The death penalty is a sentencing option in thirty-eight states and the federal government. It is usually reserved for those convicted of murders with aggravating circumstances. Because of the severity and irrevocability of the death penalty, its use has heavily circumscribed by statutes and controlled by case law. Included among these safeguards is an automatic review by appellate courts.

Incarceration

The most common punishment after fines in the United States is the deprivation of liberty known as incarceration. Jails are short-term facilities, most often run by counties under the auspices of the sheriff’s department. Jails house those awaiting trial and unable to make bail, and convicted offenders serving short sentences or waiting on a bed in a prison. Prisons are long-term facilities operated by state and federal governments. Most prison inmates are felons serving sentences of longer than one year.

Probation

Probation serves as a middle ground between no punishment and incarceration. Convicts receiving probation are supervised within the community and must abide by certain rules and restrictions. If they violate the conditions of their probation, they can have their probation revoked and can be sent to prison. Common conditions of probation include obeying all laws, paying fines and restitution as ordered by the court, reporting to a probation officer, not associating with criminals, not using drugs, submitting to searches, and submitting to drug tests.

The heavy use of probation is controversial. When the offense is nonviolent, the offender is not dangerous to the community, and the offender is willing to make restitution, then many agree

that probation is a good idea. Due to prison overcrowding, judges have been forced to place more and more offenders on probation rather than sentencing them to prison.

Intensive Supervision Probation (ISP)

Intensive Supervision Probation (ISP) is similar to standard probation, but requires much more contact with probation officers and usually has more rigorous conditions of probation. The primary focus of adult ISP is to provide protection of the public safety through close supervision of the offender. Many juvenile programs, and an increasing number of adult programs, also have a treatment component that is designed to reduce recidivism.

Boot Camps

Convicts, often young men, sentenced to boot camps live in a military-style environment complete with barracks and rigorous physical training. These camps usually last from three to six months, depending on the particular program. The core ideas of boot camp programs are to teach wayward youths discipline and accountability. While a popular idea among some reformers, the research shows little to no impact on recidivism.

House Arrest and Electronic Monitoring

The Special Curfew Program was the federal courts' first use of home confinement. It was part of an experimental program—a cooperative venture of the Bureau of Prisons, the U.S. Parole Commission, and the federal probation system—as an alternative to Bureau of Prisons Community Treatment Center (CTC) residence for eligible inmates. These inmates, instead of CTC placement, received parole dates advanced a maximum of 60 days and were subject to a curfew and minimum weekly contact with a probation officer. Electronic monitoring became part of the home confinement program several years later. In 1988, a pilot program was launched in two districts to evaluate the use of electronic equipment to monitor persons in the curfew program. The program was expanded nationally in 1991 and grew to include offenders on probation and supervised release and defendants on pretrial supervision as those who may be eligible to be placed on home confinement with electronic monitoring (Courts, 2015).

Today, most jurisdictions stipulate that offenders sentenced to house arrest must spend all or most of the day in their own homes. The popularity of house arrest has increased in recent years due to monitoring technology that allows a transmitter to be placed on the convict's ankle, allowing compliance to be remotely monitored. House arrest is often coupled with other sanctions, such as fines and community service. Some jurisdictions have a work requirement, where the offender on house arrest is allowed to leave home for a specified window of time in order to work.

Fines

Fines are very common for violations and minor misdemeanor offenses. First-time offenders found guilty of simple assaults, minor drug possession, traffic violations and so forth are sentenced to fines alone. If these fines are not paid according to the rules set by the court, the offender is jailed. Many critics argue that fines discriminate against the poor. A \$200 traffic fine means very little to a highly paid professional but can be a serious burden on a college student with only a part-time job. Some jurisdictions use a sliding scale that bases fines on income known as day fines. They are an outgrowth of traditional fining systems, which were seen as disproportionately punishing offenders with modest means while imposing no more than “slaps on the wrist” for affluent offenders.

This system has been very popular in European countries such as Sweden and Germany. Day fines take the financial circumstances of the offender into account. They are calculated using two major factors: The seriousness of the offense and the offender’s daily income. The European nations that use this system have established guidelines that assign points (“fine units”) to different offenses based on the seriousness of the offense. The range of fine units varies greatly by country. For example, in Sweden, the range is from 1 to 120 units. In Germany, the range is from 1 to 360 units.

The most common process is for court personnel to determine the daily income of the offender. It is common for family size and certain other expenses to be taken into account.

Restitution

When an offender is sentenced to a fine, the money goes to the state. Restitution requires the offender to pay money to the victim. The idea is to replace the economic losses suffered by the victim because of the crime. Judges may order offenders to compensate victims for medical bills, lost wages, and the value of the property that was stolen or destroyed. The major problem with restitution is actually collecting the money on behalf of the victim. Some jurisdictions allow practices such as wage garnishment to ensure the integrity of the process. Restitution can also be made a condition of probation, whereby the offender is imprisoned for a probation violation if the restitution is not paid.

Community Service

As a matter of legal theory, crimes harm the entire community, not just the immediate victim. Advocates see community service as the violator paying the community back for the harm caused. Community service can include a wide variety of tasks such as picking up trash along roadways, cleaning up graffiti, and cleaning up parks. Programs based on community service have been popular, but little is known about the impact of these programs on recidivism rates.

“Scarlet-letter” Punishments

While exact practices vary widely, the idea of scarlet-letter punishments is to shame the offender. Advocates view shaming as a cheap and satisfying alternative to incarceration. Critics

argue that criminals are not likely to mend their behavior because of shame. There are legal challenges that have kept this sort of punishment from being widely accepted. Appeals have been made because such punishments violate the Eighth Amendment ban on cruel and unusual punishment. Others have been based on the idea that they violate the First Amendment by compelling defendants to convey a judicially scripted message in the form of forced apologies, warning signs, newspaper ads, and sandwich boards. Still other appeals have been based on the notion that shaming punishments are not specifically authorized by State sentencing guidelines and therefore constitute an abuse of judicial discretion (Litowitz, 1997).

Asset Forfeiture

Many jurisdictions have laws that allow the government to seize property and assets used in criminal enterprises. Such a seizure is known as forfeiture. Automobiles, airplanes, and boats used in illegal drug smuggling are all subject to seizure. The assets are often given over to law enforcement. According to the FBI, “Many criminals are motivated by greed and the acquisition of material goods. Therefore, the ability of the government to forfeit property connected with criminal activity can be an effective law enforcement tool by reducing the incentive for illegal conduct. Asset forfeiture takes the profit out of crime by helping to eliminate the ability of the offender to command resources necessary to continue illegal activities” (FBI, 2015).

Asset forfeiture can be both a criminal and a civil matter. Civil forfeitures are easier on law enforcement because they do not require a criminal conviction. As a civil matter, the standard of proof is much lower than it would be if the forfeiture was a criminal penalty. Commonly, the standard for such a seizure is probable cause. With criminal asset forfeitures, law enforcement cannot take control of the assets until the suspect has been convicted in criminal court.

Appeals

An appeal is a claim that some procedural or legal error was made in the prior handling of the case. An appeal results in one of two outcomes. If the appellate court agrees with the lower court, then the appellate court affirms the lower court’s decision. In such cases, the appeals court is said to uphold the decision of the lower court. If the appellate court agrees with the plaintiff that an error occurred, then the appellate court will overturn the conviction. This happens only when the error is determined to be substantial. Trivial or insignificant errors will result in the appellate court affirming the decision of the lower court. Winning an appeal is rarely a “get out of jail free” card for the defendant. Most often, the case is remanded to the lower court for rehearing. The decision to retry the case ultimately rests with the prosecutor. If the decision of the appellate court requires the exclusion of important evidence, the prosecutor may decide that a conviction is not possible.

Sentencing Statutes and Guidelines

In the United States, most jurisdictions hold that criminal sentencing is entirely a matter of statute. That is, legislative bodies determine the punishments that are associated with

particular crimes. These legislative assemblies establish such sentencing schemes by passing sentencing statutes or establishing sentencing guidelines. These sentences can be of different types that have a profound effect on both the administration of criminal justice and the life of the convicted offender.

Indeterminate Sentences

Indeterminate sentencing is a type of criminal sentencing where the convict is not given a sentence of a certain period in prison. Rather, the amount of time served is based on the offender's conduct while incarcerated. Most often, a broad range is specified during sentencing, and then a parole board will decide when the offender has earned release.

Determinate Sentences

A determinate sentence is of a fixed length and is generally not subject to review by a parole board. Convicts must serve all of the time sentenced, minus any good time earned while incarcerated.

Mandatory Sentences

Mandatory sentences are a type of sentence where the absolute minimum sentence is established by a legislative body. This effectively limits judicial discretion in such cases. Mandatory sentences are often included in habitual offender laws, such as repeat drug offenders. Under federal law, prosecutors have the powerful plea-bargaining tool of agreeing not to file under the prior felony statute.



Pin It! *Sentencing Reform in America: An Overview and Conversation*

To learn more about the goal of sentencing reform in America and the reasons behind it, watch this video: [sentencing reform in America](#).



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Sentencing Guidelines

The Sentencing Reform Act of 1984 was passed in response to congressional concern about fairness in federal sentencing practices. The Act completely changed the way courts sentenced federal offenders. The Act created a new federal agency, the U.S. Sentencing Commission, to set sentencing guidelines for every federal offense. When federal sentencing guidelines went into effect in 1987, they significantly altered judges' sentencing discretion, probation officers' preparation of the presentence investigation report, and officers' overall role in the sentencing process. The new sentencing scheme also placed officers in a more adversarial environment in the courtroom, where attorneys might dispute facts, question guideline calculations, and object to the information in the presentence report. In addition to providing for a new sentencing process, the Act also replaced parole with "supervised release," a term of community supervision to be served by prisoners after they completed prison terms (Courts, 2015).

When the Federal Courts began using sentencing guidelines, about half of the states adopted the practice. Sentencing guidelines indicate to the sentencing judge a narrow range of expected punishments for specific offenses. The purpose of these guidelines is to limit judicial discretion in sentencing. Several sentencing guidelines use a grid system, where the severity of the offense runs down one axis, and the criminal history of the offender runs across the other. The more serious the offense, the longer the sentence the offender receives. The longer the criminal history of the offender, the longer the sentence imposed. Some systems allow judges to go outside of the guidelines when aggravating or mitigating circumstances exist.

14.2 POST-CONVICTION PHASE (APPEALS PHASE) ^{lxix}

The post-conviction phase is governed by rules and laws concerning the time period in which direct appeals must be taken; the defendant's right to file an appeal of right (the initial appeal which must be reviewed by an appellate court) and right to file a discretionary appeal; the defendant's right to have the assistance of counsel in helping to file either the appeal of right or a discretionary appeal. The post-conviction phase is also governed by rules and laws concerning the defendant's ability to file a writ of habeas corpus (a civil suit against the entity who is currently holding the defendant in custody) or a post-conviction relief suit (a civil suit similar to a habeas corpus suit but one which can be filed by the defendant regardless of if he or she is in custody). The post-conviction phase would also include any probation and parole revocation hearings.



Pin It! *Five Common Grounds to "Appeal" a Criminal Case*

To learn more about appealing a criminal case and common situations in which to appeal, watch this video: [five common grounds to appeal a criminal case.](#)



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The Appeals Process^{lxx}

The government cannot appeal a jury's decision by acquitting the defendant or finding the defendant not guilty. Thus, most criminal appeals involve defendants who have been found guilty at trial. The government may appeal a court's pretrial ruling in a criminal matter before the case is tried, for example, a decision to suppress evidence obtained in a police search. This is called an interlocutory appeal. Although the defendant is permitted to appeal after entering a guilty plea, the only basis for his or her appeal is to challenge the sentence given. When the defendant appeals, he or she is now referred to as the appellant, and the State is the appellee. (Note that often the court will use the words, petitioner and respondent. The petitioner is the party who lost in the last court who is petitioning the next level court for review; the respondent is the party who won in the last court). In routine appeals, the primary function of appellate courts is to review the record to discern if errors were made by the trial court before, during, or after the trial. No trial is perfect, so the goal is to ensure there was a fair, albeit imperfect, trial. Accordingly, the appellate courts review for fundamental, prejudicial, or plain error. Appellate courts will reverse the conviction and possibly send the case back for a new trial when they find that trial errors affected the outcome of the case. A lower court's judgment will not be reversed unless the appellant can show that some prejudice resulted from the error and that the outcome of the trial or sentence would have been different if there had been no error. By reviewing for error and then writing opinions that become case law, appellate courts perform dual functions in the criminal process: error correction and lawmaking.

Appellate judges generally sit in panels of three judges. They read the appellant's brief (a written document filed by the appellant), the reply brief (a written document filed by the appellee), and any other written work submitted by the parties or friend of the court amicus curiae briefs. Amicus curiae are individuals or groups who have an interest in the case or some sort of expertise but are not parties to the case. The appellate panel will generally listen to very short oral arguments, generally twenty minutes or less, by the parties' attorneys. During these oral arguments, it is common for the appellate judges to interrupt and ask the attorneys

questions about their positions. The judges will then consider the briefs and arguments and the panel will then meet and deliberate and decide based on majority rule. If the appellate court finds that no error was committed at trial, it will affirm the decision, but if it finds there was an error that deprived the losing party of a fair trial, it may issue an order of reversal. When the case is reversed, in most instances, the court simply will require a new trial during which the error will not be repeated. This is called a remand. In some cases, however, the order of reversal might include a direction to dismiss the case completely, for example when the appellate court concludes that the defendant's behavior does not constitute a crime under the law in that state. When reading an opinion, also known as decisions, from an appellate court, you can tell the procedural history of a case (i.e., a roadmap of where the case has been: what happened at trial, what happened as the case was appealed up from the various appellate courts).

Standards of Review

You have just learned that one function of the appellate courts is to review the trial record and see if there is a prejudicial or fundamental error. Appellate courts do not consider each error in isolation, but instead, they look at the cumulative effect of all the errors during the whole trial. Appellate court judges must sometimes let a decision of a lower court stand, even if they personally don't agree with it. Sports enthusiasts are familiar with the use of instant/video replay, and it provides us a good analogy. Officials in football, for example, will make a call, a ruling on the field, immediately after a play is made. This decision, when challenged, will be reviewed, and the decision will be upheld unless there is "incontrovertible evidence" that the call was wrong. When dealing with appeals, how much deference to show the lower court is the essence of the standard of review. Sometimes the appellate courts will give great deference to the trial court's decision, and sometimes the appellate courts will give no deference to the trial court's decision. How much deference to give is based on what the trial court was deciding—was it a question of fact, a question of law, or a mixed question of law and fact.

The appellate court will allow a trial court's decision about a factual matter to stand unless the court clearly got it wrong. The appellate court reasons that the judge and jury were in the courtroom listening to and watching the demeanor of the witnesses and examining the physical evidence. They are in a much better position to determine the credibility of the evidence. Thus, the appellate court will not overturn findings of fact unless it is firmly convinced that a mistake has been made and that the trial court's decision is clearly erroneous or "arbitrary and capricious." The arbitrary and capricious standard means the trial court's decision was completely unreasonable and it had no rational connection between the facts found and the decision made. The lower court's finding will be overturned only if it is completely implausible in light of all of the evidence. One court noted, "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."⁹

⁹ *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949).

Sometimes the law requires, or at the parties' request, that a trial judge or jury makes a special finding of fact. Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations that are better made by the trial judge sitting in the courtroom listening to the evidence and observing the demeanor of the witnesses. It is not enough that the appellate court may have weighed the evidence and reached a different conclusion unless the decision was clearly erroneous, the appellate court will defer to the trial judge.

Trial judges often make discretionary rulings., for example, whether to allow a party's request for a continuance or to allow a party to amend its pleadings or file documents late. In these matters of discretion, the appellate court will only overturn the trial judge if they find such a decision was an abuse of discretion. The lower court's judgment will be termed abuse of discretion only if the judge failed to exercise sound, reasonable, and legal decision-making skills. A trial court abuses its discretion, for example, when: it does not apply the correct law, erroneously interprets a law, rests its decision on a clearly inaccurate view of the law, rests its decision on a clearly erroneous finding of a material fact, or rules in a completely irrational manner. Abuse of discretion exists when the record contains no evidence to support the trial court's decision.

When it comes to questions of law, the appellate courts employ a different standard of review called *de novo* review. *De novo* review allows the appellate court to use its own judgment about whether the trial court correctly applied the law. Appellate courts give little or no deference to the trial court's determinations and may substitute their own judgment on questions of law. Questions of law include interpretation of statutes or contracts, the constitutionality of a statute, the interpretation of rules of criminal and civil procedure. Trial courts presume that laws are valid and do not violate the constitution, and the burden of proving otherwise falls on the defendant. Trial courts sometimes get it wrong. *De novo* review allows the court to use its own judgment about whether the court correctly applied the law. Appellate judges are perhaps in a better position to decide what the law is as the trial judge since they are not faced with the fast pace of the trial and have time to research and reflect.

Sometimes the trial court must resolve a question in a case that presents both factual and legal issues. For example, if police stop and question a suspect, there are legal questions, such as whether the police had reasonable suspicion for the stop or whether the questioning constituted an "interrogation", and factual questions, such as whether police read the suspect the required warnings. Mixed questions of law and fact are generally reviewed *de novo*. However, factual findings underlying the lower court's ruling are reviewed for clear error. Thus, if the application of the law to the facts requires an inquiry that is "essentially factual," review is for clear error.

In reviewing the trial court record, the appellate court may discover an error that parties failed to complain about. Generally, appellate courts will not correct errors that aren't complained about, but this is not the case when they come upon plain error. Plain error exists "[w]hen a

trial court makes an error that is so obvious and substantial that the appellate court should address it, even though the parties failed to object to the error at the time it was made.” If the appellate court determines that the error was evident, obvious, clear, and materially prejudiced a substantial right (meaning that it was likely that the mistake affected the outcome of the case below in a significant way), the court may correct the error. Usually, the court will not correct plain error unless it led to a miscarriage of justice.

The selection of the appropriate standard of review depends on the context. For example, the de novo standard applies when issues of law tend to dominate in the lower court’s decision. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters tend to dominate or control the court’s decision. The controlling standard of review may determine the outcome of the case. Sometimes the appellate court can substitute its judgment for that of the trial court and overturn a holding it does not agree with, but other times, it must uphold the lower court’s decision even if it would have decided differently.

Appellate Decisions

In most appeals filed in the intermediate courts of appeal, the appellate panel will rule but not write a supporting document called a written opinion stating why it ruled as it did. Instead, the appellate panel will affirm the lower court’s decision without an opinion (colloquially referred to as an AWOP). Sometimes, however, appellate court judges will support their decisions with a written opinion stating why the panel decided as it did and its reasons for affirming (upholding) or reversing (overturning) the lower court’s decision. The position and decision by the majority of the panel (or the entire court when it is a supreme court case), is, not surprisingly, called the majority opinion. Appellate court judges frequently disagree with one another, and a judge may want to issue a written opinion stating why he or she has a different opinion than the one expressed in the majority opinion. If a particular judge agrees with the result reached in the majority opinion but not the reasoning, he or she may write a separate concurring opinion. If a judge disagrees with the result and votes against the majority’s decision, he or she will write a dissenting opinion. Sometimes opinions are unsigned, and these are referred to as per curiam opinions. Finally, if not enough justices agree on the result for the same reason, a plurality opinion will be written. A plurality opinion controls only the case currently being decided by the court and does not establish a precedent that judges in later similar cases must follow.

14.3 FEDERAL APPELLATE REVIEW OF STATE CASES^{lxxi}

Through petitions for writ of certiorari, the U.S. Supreme Court will be in a position to review cases coming to it from the state courts. Because the review is discretionary, the Court will

generally accept review only when these cases appear to involve a significant question involving the federal constitution. As a case works its way through the state appeals process, the state courts may have made rulings about both the federal constitution and its own state constitution. Depending on the case and how the state opinions were written, the U.S. Supreme Court may find it difficult to determine whether the state interpreted its own constitution, in which case the Court will not accept review, or whether it interpreted the federal constitution, in which case the Court may accept review.



The Verdict: *Michigan v. Long* - Will the Supreme Court Accept Review?

The U.S. Supreme Court in *Michigan v. Long*, 463 U.S. 1032, at 1040-1041 (1983), explained that the Court will “weigh in” on a state court matter

“when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

This approach obviates [*does away with*] in most instances the need to examine state law in order to decide the nature of the state court decision and will at the same time avoid the danger of our rendering advisory opinions. It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. ‘It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.’”

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