

The Evolution of U.S. Criminal Law

by James B. Jacobs

In this primer on the U.S. criminal justice system, James B. Jacobs, Warren E. Burger professor of law at New York University (NYU) and director of the Center for Research in Crime & Justice at the NYU School of Law, explains the structure and basic jurisprudence of U.S. criminal law procedure. But its essential nature, he says, is grounded in the U.S. Constitution and the Bill of Rights. It is the Constitution that inspires the federal-state structure of the system and that serves as the ultimate authority on what is permissible.

THE FOUNDATION of U.S. criminal procedure is the U.S. Constitution, including the first 10 Amendments, which form the Bill of Rights. The Constitution guarantees all persons living in the U.S. fundamental rights, freedoms and liberties. Chief among these, as far as U.S. criminal law is concerned, is that defendants are entitled to a presumption of innocence. Defendants do not have to prove their innocence. The government must prove their guilt beyond a reasonable doubt. Rights such as these frame the federal-state system prescribed in the Constitution. Of particular importance are the Fifth, Sixth and Eighth Amendments.

The Fifth Amendment 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. Most significantly, it also protects defendants' rights of "due process," a phrase of vast significance in the Bill of Rights that, especially in the 20th century, was interpreted by the courts to confer on defendants a broad array of protections and rights.



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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. This last protection also has been expanded over the years to, in effect, guarantee all defendants adequate counsel in criminal trials.

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 were rewritten to pass constitutional muster. Currently, 38 states have a death penalty statute. But the example serves to illustrate that it is the U.S. Constitution that is supreme in the U.S. system, not U.S. criminal law *per se*. Neither Congress nor the states can pass laws that violate the Constitution.

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.

The Federal System

There are over 20 specialized federal law enforcement agencies, most of which are in the Departments of Justice and Treasury. The most prominent federal law enforcement agencies are the Federal Bureau of Investigation and the Drug Enforcement Administration (in the Department of Justice) and the Bureau of Alcohol, Tobacco and Firearms, the Secret Service and the Customs Service (in the Department of the Treasury). 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 94 judicial districts in the United States. They prosecute only federal crimes in federal courts. As presidential appointees, U.S. 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 central office of the Department of Justice also includes special prosecutorial units with nationwide authority in such matters as organized crime, war crimes, anti-trust 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.

Criminal Justice at the State and Local Levels

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 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. 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 or less). 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 the state-operated prison system, usually called the "department of corrections."

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 intent, 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 a 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 (according to which a person may not be tried twice for the same offense), 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 with-

in 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, racketeering, auto theft, fraud, and so forth.

The Supreme Court has rarely found that Congress lacked authority to pass a federal criminal law. Partially because of this, the reach of federal criminal law grew inexorably throughout the 20th century. 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.

Criminal Procedure

Every state and the federal government have their 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.

Right to Counsel

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.

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 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

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 is 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 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.

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 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, before the trial begins 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 cameras (still, moving or television) must be allowed in the court room. Some states, like California, permit live television coverage of criminal trials. Supporters argue that television coverage provides legal education for a vast public that

otherwise would never see a criminal trial. Critics contend that TV cameras in the courtroom affect 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 commission of a crime and the filing of charges. The Constitution dictates that there must not be 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.

The Constitution requires that, in order to find the defendant guilty, the fact-finder, 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 the other side's witnesses to cross-examination. The judge, but not the jurors, may ask the witnesses questions, but under the American adversary system, 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' 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. 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 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.

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 2001, on any given day there were approximately 2 million persons in U.S. prisons and jails. Each state and the federal government have their 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 (trial level) 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.

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.

Juvenile Justice in the United States

Juvenile justice consists of a wholly separate criminal law and procedure. In theory, this system of law and institutions, invented by progressive reformers at the turn of the 20th century, operates in the best interest of the child offender. Juvenile justice is meted out in juvenile or family court, not criminal court. The goal is not retribution or deterrence, but rehabilitation. The juvenile court's caseload includes children who have been abused and those whom parents or school authorities consider incorrigible.

The maximum age for processing an offender as a juvenile varies from 16 to 21 depending on the jurisdiction and, within a single jurisdiction, on the type of offense with which the offender is charged. Thus, there are statutes that permit (and in some cases mandate) treating a juvenile as an adult if the offense is a homicide or other serious crime of violence. Generally, in the juvenile justice system, the accused is treated more leniently than in the adult system even though the former provides fewer procedural rights.

In delinquency cases that reach the point of formal adjudication, the judge is required to make determinations of fact under standards that closely resemble those applicable to criminal prosecutions. The juvenile who is arrested is brought to a juvenile

detention center, separate from the adult jail and typically administered by a specialized agency of local or county government. The juvenile has no right to bail. His/her pre-trial status depends solely upon a judge's determination of whether the juvenile should remain in custody pending trial to prevent flight or to protect the community from risk of the juvenile's commission of a future offense.

The juvenile defendant is not charged with a statutory offense, but with being delinquent. However, he/she is entitled to counsel and to a presumption of innocence. Juveniles have no right to trial by jury, but approximately one-quarter of the states have enacted statutes providing for a jury trial option in juvenile cases. The jury or judge must find the juvenile defendant to be guilty beyond a reasonable doubt. In most states, the convicted juvenile offender must be released from the juvenile "reformatory" or correctional center upon reaching the age of 21. For most of the 20th century, juvenile criminal records were sealed. Now, they are commonly available to police, prosecutors and judges in adult court. These days, there is a great deal of juvenile justice law reform, mostly in the direction of treating juvenile offenders more severely and more like adult offenders.