CHAPTER 12

Criminal Justice Process: The Investigation

"For my part I think it a less evil that some criminal should escape than that the government should play an part."

— Oliver Wendell Holmes

The criminal justice process includes everything that happens to a person from arrest through prosecution and conviction to release from the control of the state. The vast majority of crimes that occur are investigated and are adjudicated, or judged, under state laws. There are, however, many federal crimes that are handled in the federal criminal justice system. The federal and state systems are similar in many ways. However, the significant differences that do exist between these systems are noted throughout this chapter.

Freedom is sometimes gained almost immediately at the police station or after time has been served in a correctional institution. Freedom may also come at any stage in between. At various points in the process, the prosecutor may drop a case for lack of evidence. A judge can also declare a mistrial if the jury is unable to reach a verdict. The criminal justice process is illustrated in Figure 12.1.

This chapter deals with the investigation phase of this process, including how the U.S. Constitution limits what police can do. The

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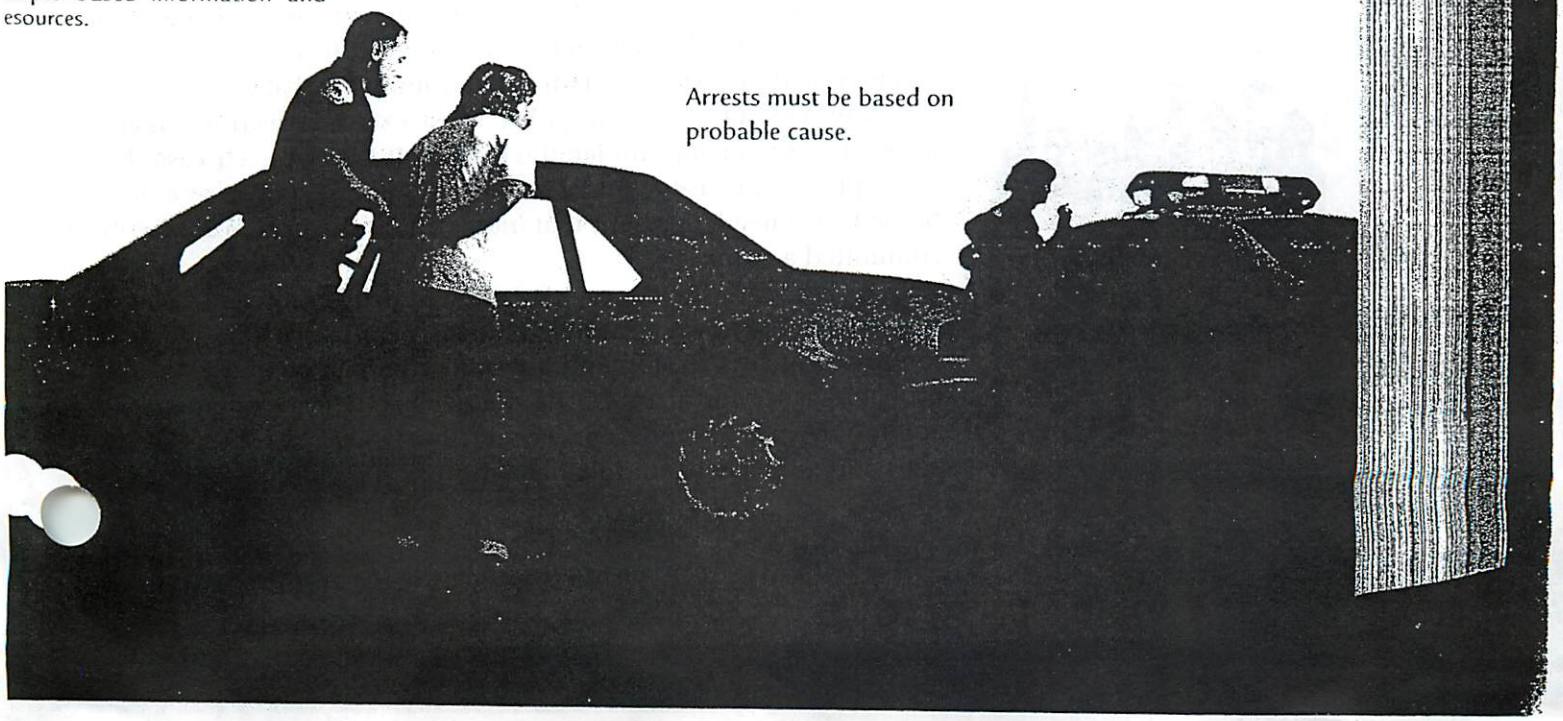


Arrests must be based on probable cause.

next three chapters cover proceedings before trial, the trial itself, and sentencing and corrections. The juvenile justice process is somewhat different from the adult criminal justice system and is discussed in Chapter 16. The final chapter of this unit examines some of the legal issues that have arisen in the criminal justice system as the United States tries to protect itself against terrorism.

Arrest

An **arrest** takes place when a person suspected of a crime is taken into custody. An arrest is considered a seizure under the Fourth Amendment, which requires that seizures be reasonable. A person can be taken into custody by a police officer in one of two ways: with an arrest warrant issued by a judge or without a warrant if there is probable cause. Someone who is taken into custody under circumstances in which a reasonable person would not feel free to leave is considered to be under arrest, whether or not he or she is told that.

An **arrest warrant** is a court order commanding that the person named in it be taken into custody. A warrant is obtained by filing a complaint before a judge or magistrate. The person filing the complaint is generally a police officer but may be a victim or a witness. The person making the complaint must also describe and swear to the facts and circumstances of the alleged crime. If, on the basis of the information provided, the judge finds probable cause to believe that an offense has been committed and that the accused committed it, a warrant will be issued. On many occasions, police do not have time to get a warrant. In certain felony cases and in misdemeanor cases, they may make a warrantless arrest in public based on probable cause.

Probable cause to arrest means having a reasonable belief that a specific person has committed a crime. This reasonable belief may be based on much less evidence than is necessary to prove a person guilty at trial. For example, suppose the police receive a radio report of a bank robbery. An officer sees a man matching the description of the bank robber waving a gun and running away from the bank. The officer would have probable cause to stop and arrest the man, but that evidence alone would likely not be enough to convict him of the crime.

There is no exact formula for determining probable cause. When arresting without a warrant, police must use their own judgment as to what is reasonable under the circumstances of each case. In all cases, probable cause requires more than mere suspicion or a hunch. Some facts must be present that indicate that the person arrested has committed a crime.

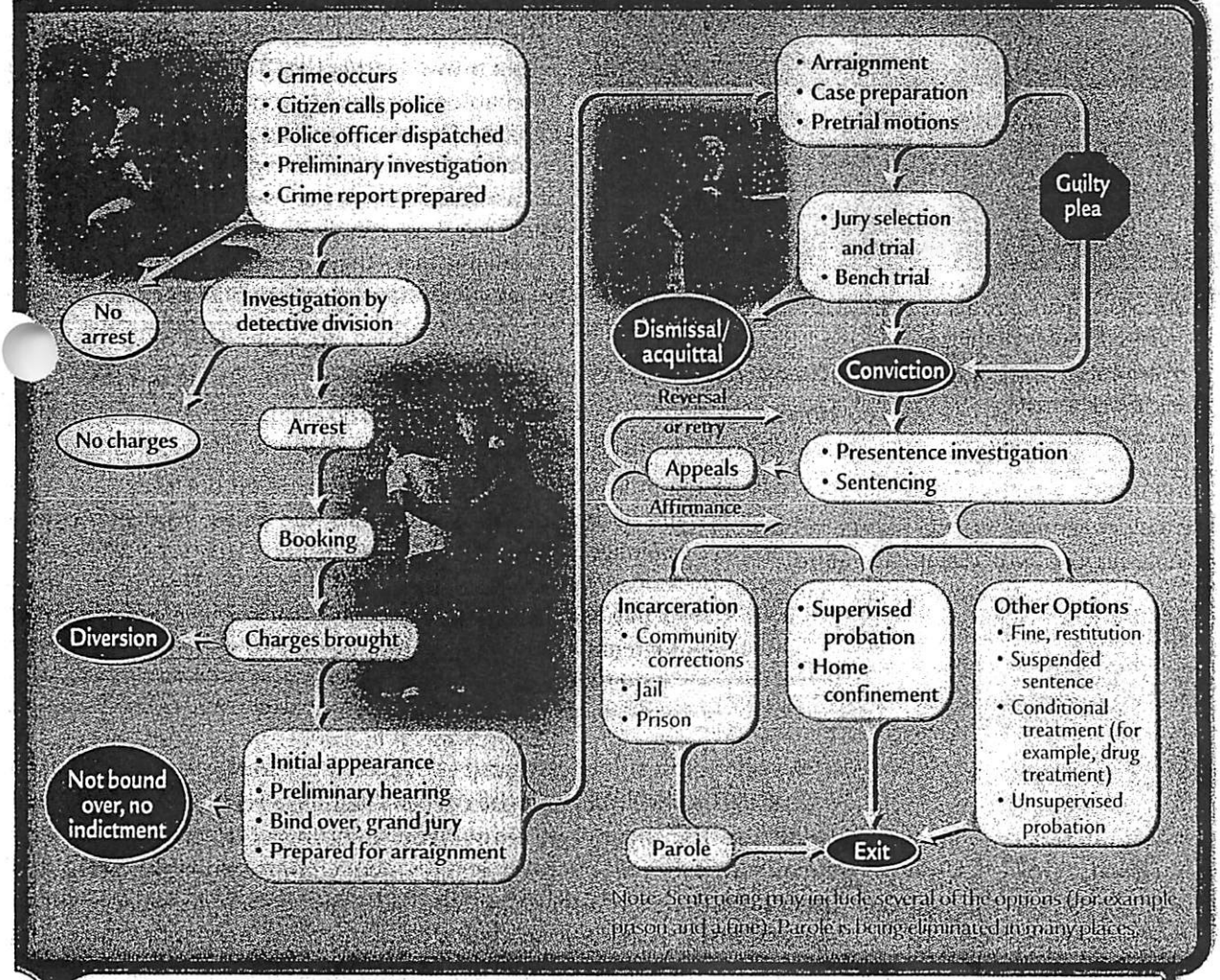
In recent years, the courts have allowed drug enforcement officials to use what is known as a **drug courier profile.** This profile is used to provide a basis to stop and question a person or to help establish probable cause for arrest. Drug courier profiles are often based on commonly held notions concerning the typical age, race, personal appearance, behavior, and mannerisms of drug couriers.

Make a chart showing the steps in your state's criminal justice system. Who could help you get the information needed to make this chart?

Some argue that it is unfair to use such factors in determining probable cause. These critics argue that individualized suspicion—as opposed to the generalized characteristics of drug couriers—should be required to establish probable cause. Others believe that drug interdiction presents unique law enforcement problems and that the use of the profiles is necessary in order to stop drug trafficking.

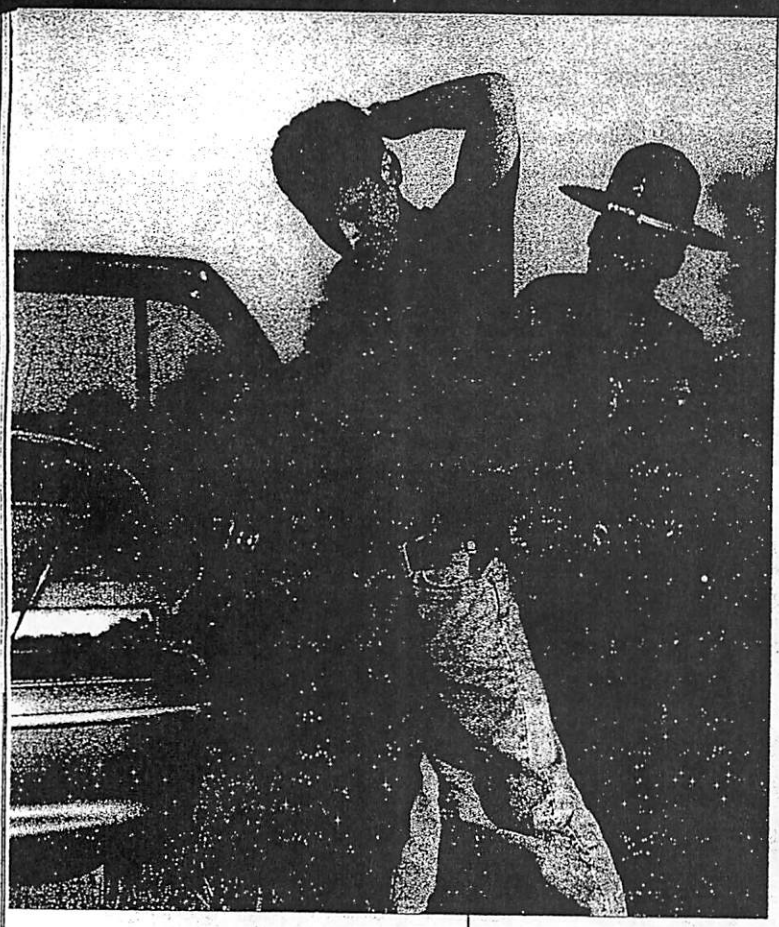
Police may establish probable cause from information provided by citizens in the community. Information from victims or witnesses can be used to obtain an arrest warrant. Police also use information from informants to establish probable cause if they can convince a judge that the information is reliable. In determining the reliability of an

FIGURE 12.1 Sequence of Events in the Criminal Justice Process



Note: Sentencing may include several of the options (for example, prison and a fine). Parole is being eliminated in many places.

The criminal justice process includes everything that happens from the arrest through prosecution, conviction, and eventual release from control by the state. **ANALYZE THE DATA** *What happens after charges are brought against the individual?*



An officer pats down a suspect's outer clothing. *When can an officer stop and frisk a person?*

informant's tip, a judge will consider all circumstances. These include whether the informant has provided accurate information in the past, how the informant obtained the information, and whether the police can **corroborate**, or confirm, the informant's tip with other information.

Problem 12.1

The police receive a tip that a drug pusher named Richie will be flying from New York City to Washington, D.C., sometime on the morning of September 8. The informant describes Richie as a tall man with reddish hair and a beard. He also tells police that Richie has a habit of walking fast and that he will be carrying illegal drugs in a brown leather bag. The police have received reliable information from this informant in the past. On the morning of September 8, the police watch all passengers arriving from New York City. When they see a man who fits the description—carrying a brown leather bag and walking fast—they arrest him. A search of the bag reveals a large quantity of cocaine.

a. Based on what you know, do you think the police had probable cause to arrest Richie? Why or why not?

b. Should the police have obtained a warrant before arresting Richie? Why or why not?

c. Assume the police have not received a specific tip but they know that crack cocaine is being brought regularly on trains from one city to another by teenagers hired by older drug dealers. They see a 16-year-old African American male arriving by train. He is alone, and is carrying a small canvas bag. Should the police be able to stop and question him? Under what circumstances should they be able to search or arrest him?

A police officer does not need probable cause to stop and question an individual on the street, but the officer must have **reasonable suspicion** to believe the individual is involved in criminal activity. Reasonable suspicion is based on even less evidence than probable cause, but must be more than a mere hunch. If the officer has reasonable suspicion that the person is armed and dangerous, he or she may do a limited pat-down of the person's outer clothing—called a **stop and frisk**—to remove any weapons the person may be carrying.

Even if a police officer does not have probable cause or reasonable suspicion, the officer may go up to any individual and ask to speak to him or her. The person may decline and continue his or her activ

the officer is not legally permitted to take the person's silence or departure into account in determining probable cause or reasonable suspicion. In all states, however, if the person runs from the police upon being asked for identification, that flight may give the officer reasonable suspicion to stop the person again, at which point the person is not free to walk away. This is especially true with stops in high crime areas.

The most common kind of arrest occurs when people do not realize they are being arrested at all. When a police officer stops a person driving a car for violating traffic laws, the driver is technically under arrest because the driver is not free to leave, but must stay until the officer releases him or her. Further, in 1997, the U.S. Supreme Court ruled that police can order all passengers out of a car when making a lawful traffic stop. The detention in this common situation is brief, usually lasting only as long as it takes the officer to check identification and registration, and typically ends when a citation (ticket) is issued for the violation.

The Case of . . .

The Unlucky Couple

After an evening at the movies, Lonnie Howard and his girlfriend, Melissa, decide to park in the empty lot behind Briarwood Elementary School. They begin talking and start drinking the beer they brought with them. After several beers, the couple is startled by the sound of breaking glass and voices from the rear of the school.

Unnoticed in their darkened car, Lonnie and Melissa observe two men loading office furniture and electronics equipment from the school into the back of a van. Quickly concluding that the men must be burglars, Lonnie decides he should leave the parking lot. He revs up his engine and roars out of the parking lot onto Main Street.

Meanwhile, unknown to Lonnie and Melissa, a silent security alarm has also alerted the local police to the break-in at the school. Responding to the alarm, Officer Vicki Ramos heads for the school. She turns onto Main Street just in time to see one vehicle—Lonnie's car—speeding away from the school.

Problem 12.2

a. If you were Officer Ramos, what would you do in this situation? If you were Lonnie, what would you do?

b. If Officer Ramos chases Lonnie, will she have probable cause to stop and arrest him?

c. How do you think Officer Ramos would act after stopping Lonnie? How do you think Lonnie and Melissa would act?

d. Role-play this situation. As Officer Ramos, decide what you would say and how you would act toward the occupants of the car. As Lonnie and Melissa, decide what you would say and how you would act toward the police officer.

e. What could Lonnie and Melissa do if they were mistakenly arrested for the burglary? What could they do if they were abused or mistreated by Officer Ramos?

f. Assume Lonnie takes a baseball bat from the back of the car and begins to wave it after being stopped by Officer Ramos. Would it be legal for Officer Ramos to use deadly force?

Steps to Take

What To Do If You Are Arrested

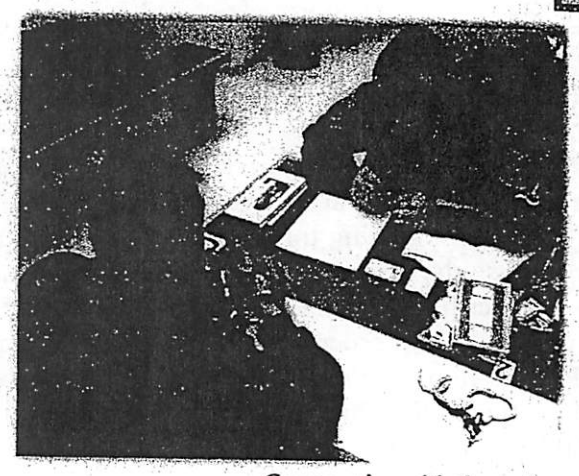
- **Do not struggle with the police.** Be polite. Avoid fighting or swearing, even if you think the police have made a mistake. Resisting arrest and assaulting a police officer are usually separate crimes that you can be charged with even if you have done nothing else wrong. If you believe you have been assaulted by the police, be sure to write down the officer's name and badge number. If possible, also write down the names and phone numbers of any witnesses.

  Give your name, address, and phone number to the police. Otherwise, keep quiet until you have spoken to a lawyer. Do not discuss your case with anyone at this point, and don't sign any statements about your case.

  You may be searched, photographed, and fingerprinted. Notice carefully what is done but do not resist. If any personal property is taken from you, ask for a written receipt.

  As soon as possible after you get to the police station, call a trusted relative or friend. Tell this person where you are, what you have been charged with, and what your bail or bond is. See Chapter 13 for information about bail.

  Please note that this information applies to adults who are arrested. When juveniles are taken into custody, parents must be notified and there is no right to bail. There may also be other differences between juvenile and adult arrest procedures and the steps you should take. See Chapter 16 for information about the juvenile justice system.



Cooperating with the police

- **When you are arrested for a minor offense, you may, in some places, be released without having to put up any money.** This is called an unsecured bond or citation release. If you do not qualify for a citation release, you may have to put up some money before release. This is called posting a cash bond or collateral. Ask for a receipt for the money.
- **When you are arrested for a serious misdemeanor or felony, you will not be released immediately.** Ask the friend or relative you have called to get a lawyer for you. If you cannot afford a lawyer, one will be appointed by the judge when you are first brought to court.

  Before you leave the police station, be sure to find out when you are due in court. *Never be late or miss a court appearance.* If you do not show up in court at the assigned time, a warrant will be issued for your rearrest.
- **Do not talk about your case with anyone except your lawyer.** Be honest with your lawyer, or he or she will have trouble helping you. Ask that your lawyer be present at all lineups and interrogation sessions. Most criminal defense lawyers recommend that you not talk to police about the crime until you speak with a lawyer.

A police officer may use as much physical force as is reasonably necessary to make an arrest. However, most police departments limit the use of deadly force to incidents involving dangerous or threatening suspects. In 1985, the U.S. Supreme Court was asked to decide whether it was lawful for police to shoot an "unarmed fleeing felony suspect." In deciding the case, the Court ruled that deadly force "may not be used unless it is necessary to prevent escape, and the officer has probable cause to believe the suspect poses a significant threat of death or serious physical harm to the officer or others."

If a police officer uses too much force or makes an unlawful arrest, the accused may bring a civil action for a violation of the federal *Civil Rights Act*. The government could also file a criminal action against the police. In addition, many local governments have processes for handling citizen complaints about police misconduct. You should know, however, that a police officer is never liable for false arrest simply because the person arrested did not commit the crime. Rather, it must be shown that the officer acted maliciously or had no

The Case of . . .

The Arrest for Seat Belt Violations

Gail Atwater was driving through the streets of her small town in Texas when Officer Turek stopped her. Her three-year-old son and five-year-old daughter were with her in the front seat of her pickup truck. None of them were wearing seat belts. Texas law allows police to make a warrantless arrest for seat belt violations or allows them to give out a citation (ticket) to the offender. The penalty under Texas law for this offense is a fine of no less than $25 and no more than $50.

The officer asked Ms. Atwater for her license and registration. She was unable to produce them, telling Officer Turek they had been stolen the day before. Turek told her she was "going to jail." Her two small children began to cry. Fortunately, a neighbor saw the incident and took the children into her home. Once the children left, Officer Turek handcuffed Ms. Atwater and took her to the police station. After an hour in jail she was taken to a magistrate who released her on bond. She eventually paid a small fine but brought a lawsuit against the town and the police department for violating her rights.

The lower federal courts found for the town. The U.S. Supreme Court agreed to review the case to determine whether or not a warrantless arrest could be made by police for a misdemeanor that did not involve a breach of the peace and that is punishable only by a fine.

Problem 12.3

a. Did Officer Turek have probable cause to believe that Gail Atwater had violated the Texas seat belt laws?

b. Do you agree or disagree with the way the officer handled the case? Would it make a difference to you if he had stopped her for a seat belt violation with her children in the past? Explain.

c. Given the circumstances of the case, was the seizure reasonable?

d. How should the Court decide this case? Give your reasons.

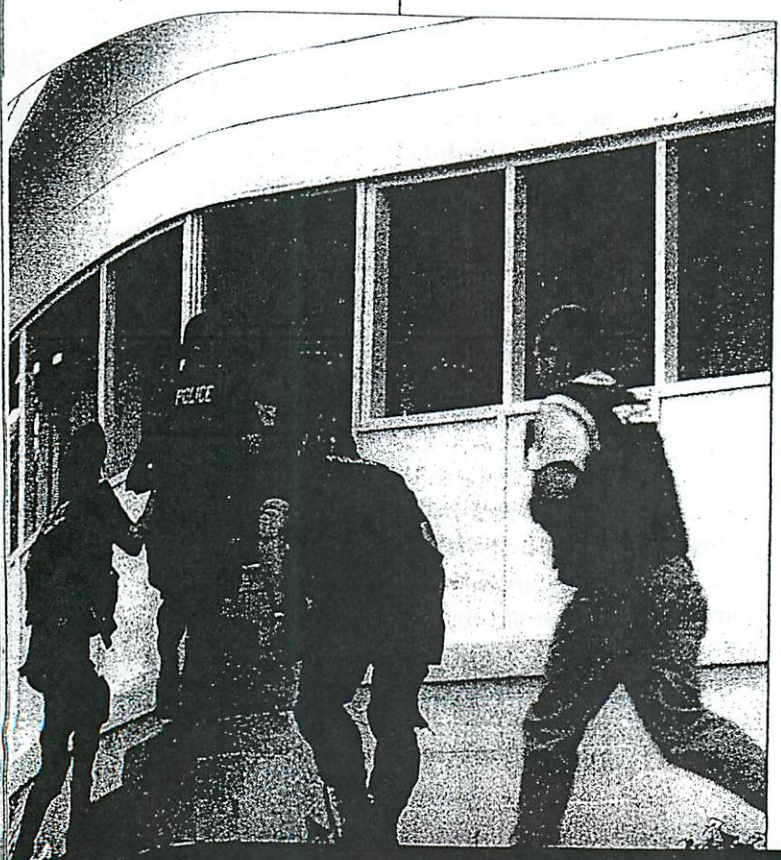
reasonable grounds for suspicion of guilt. Also, if an arrest is ruled unlawful, the evidence obtained as a result of the arrest may be used against the accused. (See Pretrial Motions: The Exclusionary Rule, on pages 161–163 in Chapter 13.)

Search and Seizure

Americans have always valued their privacy. They expect to be left alone, to be free from unwarranted snooping or spying, and to be secure in their own homes. While there is no explicit right to privacy in the U.S. Constitution, the Fourth Amendment sets out the right to be free from "unreasonable searches and seizures" and establishes conditions under which search warrants may be issued. This right, like others in the Bill of Rights, limits the power of government; it does not apply to limit actions by private citizens. If an individual violates your privacy, however, you may be able to make a claim under tort law, discussed in Unit 3.

Balanced against the individual's reasonable expectation of privacy is the government's need to gather information. In the case of the police, this is the need to collect evidence against criminals and to protect society against crime.

The Fourth Amendment does not give citizens an absolute right to privacy, and it does not prohibit all searches—only those that are unreasonable. In deciding if a search is reasonable, the courts consider the facts and circumstances of each case. Traditionally, courts have found searches and seizures of private homes to be reasonable when authorized by a valid warrant. In practice today, warrantless searches are very common (except for searches of homes) because courts have carved out many exceptions to the warrant requirement as long as the search is reasonable. These exceptions to the warrant requirement are discussed on pages 144–146.



Police officers search a house to collect evidence against criminals. What is the exclusionary rule?

The U.S. Supreme Court has considered many cases involving the reasonableness of warrantless searches. For example, it used the concept of "reasonable expectation of privacy" to help determine whether a search was reasonable or unreasonable. In one such case, the Court found that a person did not have a reasonable expectation of privacy in garbage left in a plastic bag for pickup on his front curb. The police were allowed to search this person's garbage without first obtaining a warrant.

Although the language of the Fourth Amendment is relatively simple, search and seizure law is complex. There are many exceptions to the basic rules. Once an individual is arrested, it may be up to the courts to decide whether any evidence found in a search was legally obtained. If a court finds that the search was unreasonable, then evidence found in the search cannot be used at the trial against the defendant. This principle—the **exclusionary rule**—does not mean that the defendant cannot be tried or convicted, but it does mean that evidence seized in an unlawful search cannot be used at trial.

Problem 12.4

Examine each of the following situations. Decide whether the search violates the Fourth Amendment and whether the evidence seized can be used in court. Explain your decisions.

a. The police see Dell standing at a bus stop on a downtown street, in an area where there is extensive drug dealing. They stop and search him and find drugs in his pocket.

b. After Brandon checks out of a hotel, the police ask the hotel manager to turn over the contents of the wastebasket, where they find notes planning a murder.

c. Jill's former boyfriend breaks into her apartment and looks through her desk for love letters. Instead he finds drugs, which he turns over to the police.

d. Terry is on a bus traveling from Miami to New York City. Three police officers board the bus wearing "RAID" jackets, and Terry can see that at least one is carrying a gun. One officer stands in the front of the bus partially blocking the aisle, while the other two officers eye the passengers, pick out Terry, and ask him for identification and his ticket. After returning both to him without comment, they then ask Terry for permission to search his luggage. He gives his permission. The officers open his bag and find cocaine.

e. Pamela is observed shoplifting items in a store. Police chase Pamela into her apartment building and arrest her outside the closed door of her apartment. A search of the apartment reveals a large quantity of stolen merchandise.

f. Sandi is suspected of receiving stolen goods. The police go to her apartment and ask Claire, her roommate, if they can search the apartment. Claire gives the police permission, and they find stolen items in Sandi's dresser.

Searches With a Warrant

A **search warrant** is a court order. It is obtained from a judge who is convinced that there is a **bona fide** need to search a person or place. Before a judge issues a warrant, someone, usually a police officer, must file an **affidavit**—a sworn statement of facts and circumstances—that

Law in Action

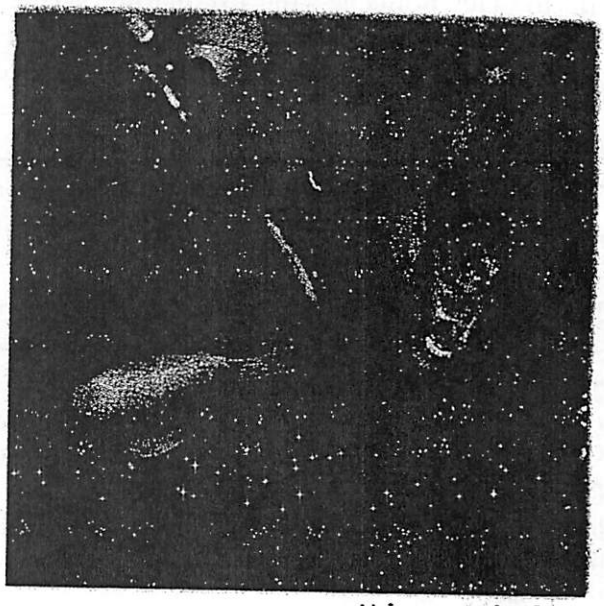
Police and the Problem of Excessive Force

While most well-trained police officers respect the rights of the citizens they protect, there is a persistent issue of police abuse in the United States. In 2001, more than 12,000 civil rights complaints were filed with the U.S. Department of Justice. The majority of these alleged abuses involved law enforcement officers. The problem appears to be more serious in urban areas. In 1998, the group Human Rights Watch issued a report based on a two-year study conducted in 14 cities. The report noted that police brutality exists because of a failure to establish effective accountability systems.

Where data are available, members of minority groups report cases of police brutality far in excess of their representation in the population. According to the report, civilian review boards in these cities—established to deal with complaints about police—lack the funding needed to monitor police adequately. The report also found that police department internal affairs units tend to operate under a cloak of secrecy, seldom releasing results of investigations to the public. In addition, the report criticizes the U.S. Department of Justice's Civil Rights Division for its lack of zeal in prosecuting police misconduct cases.

In 2000, a bill designed to curb law enforcement and police abuses was introduced in Congress. The *Law Enforcement Trust and Integrity Act* garnered strong support from police organizations and civil rights organizations, but failed to become law. It provided for many of the same recommendations made by Human Rights Watch in its 1998 report, including:

- creating national standards for training, management, and oversight of officers;
- mandatory data collection on racial, ethnic, and gender profiling in law enforcement;
- protections for due process rights of all those accused of abuses;
- new protections from abuses by the Immigration and Naturalization Service and the U.S. Customs Service; and
- whistleblower protection for officers who break the "blue code of silence" covering abuses.



Using excessive force

Problem 12.5

a. How are citizen complaints about the police handled in your community?

b. Do you have a problem with police brutality in your community?

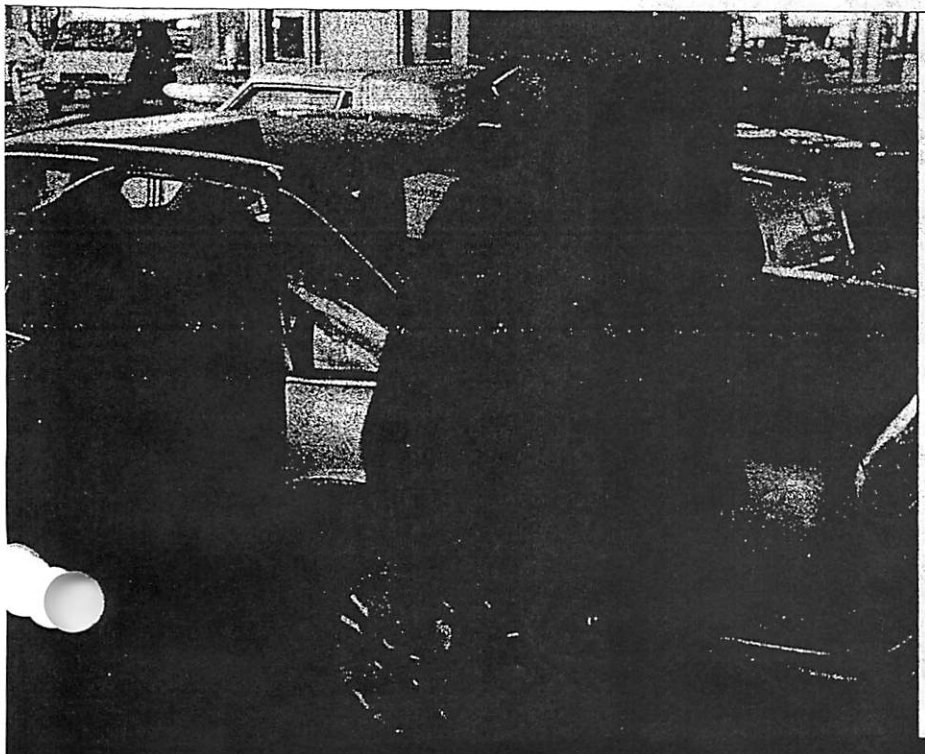
c. What do you think about the recommendations made in the 2000 congressional bill? What steps would work best to improve local police-citizen relations?

provides the probable cause to believe that a search is justified. A judge issues a search warrant, the warrant must specifically describe the person or place to be searched and the particular things to be seized.

Once the search warrant is issued, the search must be conducted within a certain number of days specified in the warrant. Also, in many states the search must be conducted only in the daytime, unless the warrant expressly states otherwise. Finally, a search warrant does not usually authorize a general search of everything in the specified place. For example, if the police have a warrant to search a house for stolen 20-inch televisions, it would be unreasonable for the police to look in desk drawers, envelopes, or other small places where such televisions could not possibly be hidden. However, the police can seize evidence related to the case and any other illegal items that are in their plain view when they are properly searching the house for the televisions.

When the police have a warrant to search a house, the Fourth Amendment's reasonableness requirement usually means that they must knock, announce their purpose and authority (i.e., that they are police officers), and request admission. Police generally cannot enter a house forcibly—even with a warrant—unless they have met this "knock and announce" test. However, the U.S. Supreme Court has allowed for "no-knock" entries when circumstances present a threat to the officers or where evidence would likely be destroyed if advance notice were given (e.g., in drug cases). But the Court also ruled that a state law authorizing no-knock warrants in all felony drug dealing cases violates the Fourth Amendment, reiterating the requirement to consider the circumstances of each particular case.

> ***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.***
>
> — **Fourth Amendment to the U.S. Constitution**



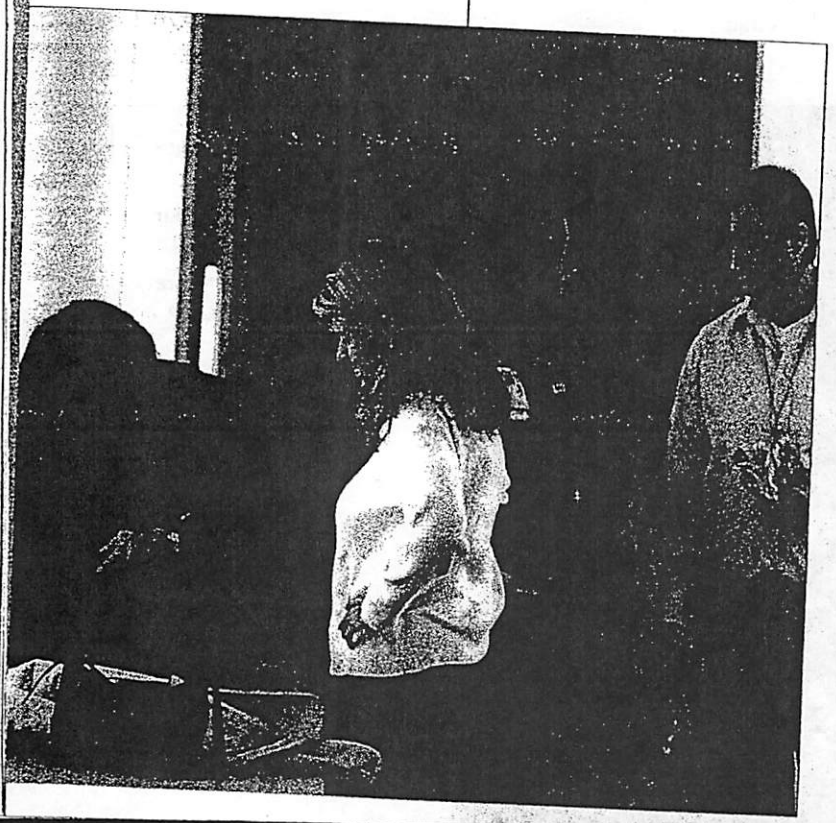
Search warrants must state the specific place to be searched and the particular items to be seized. *What other requirements must police follow with a search warrant?*

Searches Without a Warrant

According to the law, searches of private homes usually req[illegible] warrant. However, because of the number of exceptions to the Fourth Amendment warrant requirement, most searches are warrantless. These searches, however, must still be reasonable. The courts have recognized a number of situations in which searches are reasonable and may be legally conducted without a warrant.

- **Search incident to a lawful arrest.** A search that is part of, or incident to, a lawful arrest is the most common exception to the warrant requirement. This exception allows the police to search a lawfully arrested person and the area immediately around that person for hidden weapons or for evidence that might be destroyed. This is called a "grab area" search. If the arrest occurs next to the accused's car, police may also search the passenger compartment of the car, but usually not the trunk. The Supreme Court also allowed a "protective sweep" through an arrested person's home in search of other potentially armed persons.
- **Stop and frisk.** A police officer who reasonably thinks a person is behaving suspiciously and is likely to be armed may stop and frisk the suspect for weapons. This exception to the warrant requirement was created to protect the safety of officers and bystanders who might be injured by a person carrying a concealed weapon. Such a search may only be for weapons. In 1993, however, the Supreme Court said that seizing an illegal s[illegible]stance (such as drugs) during a valid frisk is reasonable if the officer's sense of touch makes it immediately clear that the object felt is an illegal one. This is known as the "plain feel" exception.
- **Consent.** When a person voluntarily agrees, the police may conduct a search without a warrant and without probable cause. Normally, a person may grant permission to search only his or her own belongings or property. In some situations, however, one person may legally allow the police to conduct a search of another person's property. For example, a parent may usually allow officers to search a child's property.
- **Plain view.** If an object connected with a crime is in plain view and can be seen from a place where an officer has a right to be, it can be seized without a warrant. For example, if an officer legally stops a car for a traffic violation and sees

These agents are authorized to search without a warrant. *Is it reasonable to search all airline passengers using a metal detector even when there is no probable cause?*



The Case of . . .

Fingers McGee

While on duty, Officer Michelle Yomoto and Officer Liam Jones received a radio report of a robbery at the Dixie Liquor Store. The report indicates only that the suspect is male, about six feet tall, and wearing old clothes. Meanwhile, Fingers McGee is finishing up some shopping at a nearby store and has just seen the owner of the Dixie Liquor Store chasing a man. The man was carrying a paper sack and what appeared to be a knife as he ran down the street. Fingers McGee thinks the man looks like Mark Johnson, a drug addict, and he thinks the man was running toward Johnson's house located at 22 Elm Street. Officers Yomoto and Jones encounter Fingers McGee on a street corner and begin to ask him questions.

Problem 12.6

a. Role-play this encounter. As the officers, decide what questions to ask McGee. As McGee, decide what to tell the officers.

b. Assume McGee tells the police what he knows. What should the police do then?

c. Should the police get a search warrant before going to Johnson's house? If they go without a warrant, do they have probable cause to arrest him? Why or why not?

d. If the police decide to enter Johnson's house, what should they do? Should they knock and announce themselves, or should they break in unannounced?

e. If the police enter the house, can they arrest Johnson? Where can they search, and what, if anything, can be seized? Role-play the scene at the house.

a gun lying on the car seat next to the driver, he may seize it without a warrant. Likewise, if an officer has gained legal entrance into a suspect's house and sees drug paraphernalia on a coffee table, the officer does not need a warrant to seize the **contraband** (illegal items).

- **Hot pursuit.** Police in hot pursuit of a suspect are not required to get a search warrant before entering a building that they have seen the suspect enter. It is also lawful to seize evidence found in plain view during hot pursuit of a suspected felon.
- **Vehicle searches.** A police officer who has probable cause to believe that a vehicle contains contraband may conduct a search of the entire vehicle, as well as any containers in the vehicle that might contain the contraband, without a warrant. This does not mean that the police have a right to stop and search any vehicle on the streets. The right to stop and search must be based on probable cause.
- **Emergency situations.** In certain emergencies, the police are not required to get a search warrant. These situations include searching a building after a telephoned bomb threat, entering a house after smelling smoke or hearing screams, and other situations in which the police do not have time to get a warrant. The

U.S. Supreme Court has also allowed warrantless entries of a person's home where the police have probable cause to believe that failure to enter immediately (i.e., before getting a warrant) will result in destruction of evidence, escape of the suspect, or harm to the police or another individual inside or outside the building. This exception has been limited by the Supreme Court to serious crimes.

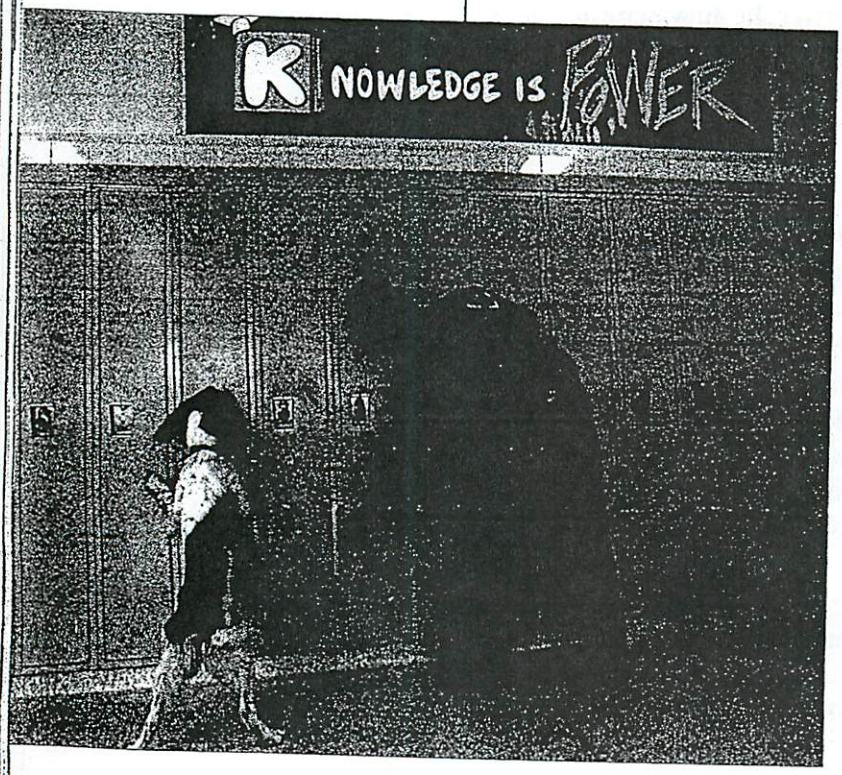
- **Border and airport searches.** Customs agents are authorized to search without warrants and without probable cause. They may examine the baggage, vehicles, purses, wallets, and similar belongings of people entering the country. Body searches or searches conducted away from the border by customs agents are allowed only where there is reasonable suspicion of criminal activity. In view of the danger of terrorist activities, security personnel and airlines are permitted to search all carry-on luggage and to search all passengers by means of fixed and hand-held metal detectors. Since the September 11, 2001 terrorist attacks, these searches can take place several times from the time a passenger enters the airport until he or she boards the flight.

Public School Searches

As you have learned, the Fourth Amendment does not protect citizens against all government searches and seizures, but only *unreasonable* searches and seizures. In its consideration of the extent to which students at public schools enjoy Fourth Amendment rights while they are at school, the U.S. Supreme Court has granted school authorities broad discretion to search students and their possessions in several situations.

The touchstone of the Court's analysis under the Fourth Amendment in criminal searches is the reasonableness, considering all the circumstances, of the particular government invasion of an individual's personal security. In the context of public schools, however, the main concern is whether a search is reasonable in the context of the school's legitimate interests. In *New Jersey* v. *TLO* (1985), an assistant principal suspected a student of violating the public high school's rule against smoking. The principal searched the student's purse, and found evidence of marijuana use. Although the Court recognized that

Although the Fourth Amendment protects students at school, the Supreme Court has given school administrators broader power than the police to search students and their possessions. *How has the Court helped schools combat the issue of drugs?*



The Case of . . .

Student Drug Testing

Tecumseh High School offers a variety of extracurricular activities for its students. These activities include choir, band, color guard, Future Farmers of America (FFA), Future Homemakers of America (FHA), and the academic team, as well as athletics and the cheerleading squad. The majority of the school's 500 students participate in one or more of these activities.

At the start of the 1998 school year, the school district adopted the Student Activities Drug Testing Policy. While the school acknowledged only a minimal problem with drugs, they adopted this policy to prevent a bigger problem from developing. The policy required drug testing of all students who participated in any school-sanctioned extracurricular activity. Specifically, in order to participate in an activity, each student had to sign a written consent agreeing to be tested for drug use on several occasions: prior to participating in the activity, randomly during the year while participating in the activity, and at any time while participating in the activity upon reasonable suspicion.

According to the policy, students to be tested at random are called out of class in groups of two or three. The students are directed to a restroom, where a faculty member serves as a monitor. The monitor waits outside the closed restroom stall for the student to produce the sample. The monitor pours the contents of the vial into two bottles. Together the faculty monitor and the student seal the bottles. The student signs a form, which the monitor places with the filled bottles into a mailing pouch in the presence of the student. The bottles are then sent to be tested at a designated laboratory. Random drug testing was conducted in this manner on approximately eight occasions during the 1998 and 1999 school years.

There are no academic penalties for refusing to take the test or for a negative result, and results of the tests are not shared with law enforcement authorities. Students who refuse to submit to the policy simply cannot participate in the extracurricular activity. In two school years, a total of 484 students were tested as part of this policy. Four students tested positive.

Two students—neither a student athlete—challenged this policy in federal court as a violation of their right to privacy. The trial court sided with the school, but the federal court of appeals reversed the decision. The school board has appealed to the U.S. Supreme Court, which has agreed to hear the case.

Several years earlier, the U.S. Supreme Court upheld the policy of an Oregon high school to conduct random, suspicionless searches of student athletes at a high school with a serious drug problem. In that case, school officials had determined that the student athletes were among the leaders of the "drug culture" at the school.

Problem 12.7

a. How is this case like the Oregon case? How is it different? How is this case similar to and different from the *New Jersey* v. *TLO* case discussed on page 146?

b. What are the most convincing arguments for the students?

c. What are the most convincing arguments for the school?

d. How should this case be decided? Explain.

e. Assume the case is decided in favor of the school. Will this mean that schools can test all students? Faculty and staff? Should schools be able to test everyone for drugs? Explain.

student does have a reasonable expectation of privacy while at scho it nevertheless upheld the search. Instead of requiring that the scho have probable cause to suspect a student of criminal activity (as in a traditional criminal search), the school authority only needs to have reasonable suspicion to believe that a search will turn up evidence that the student is violating either school rules or the law.

Because drug use is a serious issue in schools today, courts have given schools great discretion in devising ways to combat the problem. For example, the courts allow schools to search student lockers on the theory that lockers belong to the school and that students do not have a reasonable expectation of privacy in property owned by the school. Most courts have also allowed drug-sniffing dogs to enter schools to search for drugs. However, the courts have usually been reluctant to allow strip searches of students suspected of drug use, finding such searches to be unreasonable.

Suspicionless Searches

Searches and seizures are usually unreasonable if there is no individual suspicion of wrongdoing. For example, the police could not search all the people gathered at a street corner if they suspected that only one of the individuals possessed evidence of a crime. They could search only the person upon whom their individual suspicion is focused so that the privacy rights of the others are protected.

However, the U.S. Supreme Court has recognized some limited ci cumstances in which this requirement of individualized suspicion nee not be met. For example, the court has upheld suspicionless searches conducted in the context of a program designed to meet special needs beyond the goals of routine law enforcement. These special circumstances include fixed-point searches at or near borders to detect illegal aliens, and mandatory drug and alcohol tests for railroad employees who have been involved in accidents. The Court found these searches to be reasonable and in support of a special need beyond ordinary law enforcement. These searches continue to be controversial because they seem to depart from the Fourth Amendment's explicit requirement that searches be based on probable cause.

"Race relations between police and the community is one of the fundamental things that we must work through and 'get right' if we are to have any hope of significant and lasting progress on stopping illegal drugs, reducing youth crime and improving public safety."

— **Chief Charles Ramsey, Metropolitan Police Department, Washington, D.C.**

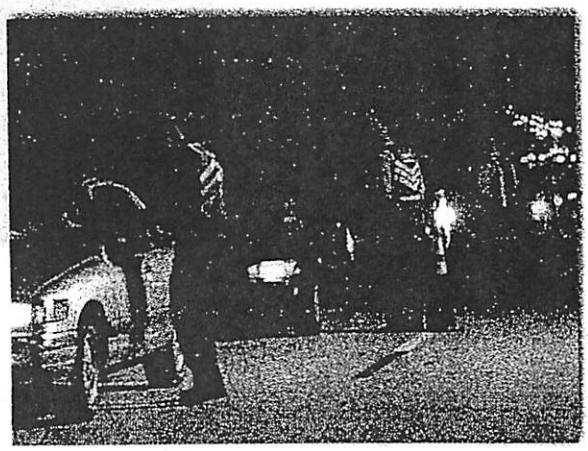
Racial Profiling in Police Investigations

Racial profiling, sometimes called racially biased policing, can be defined as the inappropriate use of race as a factor in identifying people who may break or have broken the law. Racial profiling occurs when, for example, a police officer stops a car solely because an African American is driving it, or an airport security guard selects an "Arab-looking" person to be searched because of his or her appearance. Critics of racial profiling, including civil rights advocates and some police professional organizations, say that

YOU BE THE JUDGE

Police Searches Without Individualized Suspicion

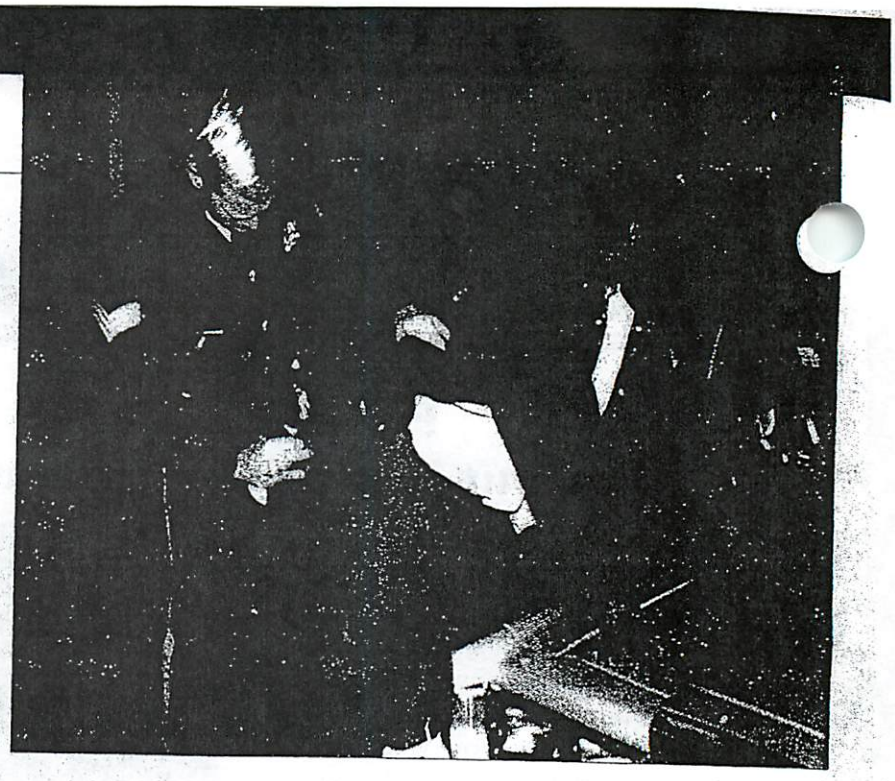
Each of the cases below deals with the policy of allowing the government to conduct searches that are not based on individualized suspicion of criminal wrongdoing. Analyze the facts carefully. Balance the individual's interest in privacy against the government's justification for conducting the searches. Then decide whether or not the U.S. Supreme Court should allow each search.



A sobriety checkpoint

a. In early 1986, the Michigan Department of State Police established a sobriety checkpoint pilot program. All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. If an officer detected any signs of intoxication, the driver would have his or her driver's license and car registration checked. If warranted, the officer could decide to conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their journey immediately. The program was carried out on only one night. During the hour-and-fifteen-minute duration of the checkpoint's operation, 126 vehicles passed through the checkpoint, with an average delay of approximately 25 seconds per vehicle. Two drivers were detained for field sobriety testing, and one of the two was arrested for driving under the influence of alcohol. A third driver who drove through without stopping was pulled over by an officer in an observation vehicle and arrested for driving under the influence. Before any further checkpoints could be carried out, several drivers filed a lawsuit claiming that the checkpoints created an unreasonable seizure of their vehicles in violation of their Fourth Amendment rights.

b. In August 1998, Indianapolis began to operate checkpoints in an effort to catch drug traffickers. Between August and November, the city conducted six checkpoints and stopped a total of 1,161 vehicles. At the checkpoint, police would stop a group of cars at random and inform the drivers that they were being detained briefly. One officer would ask the driver for license and registration information and check for evidence of the driver's impairment. Another officer would conduct a plain view search of the inside of the vehicle from outside, while a trained dog would sniff around the outside of the car for drugs. Unless this procedure produced evidence of probable cause, the drivers were able to leave, typically within five minutes. These stops resulted in 104 arrests, about half of which were for drug offenses. Several drivers who were detained sued the city for violation of their Fourth Amendment rights.



Racial profiling is a controversial issue. *When is it appropriate for a police officer to use race in deciding whom to stop?*

violates people's constitutional right to equal protection before the law and presumption of innocence. They also say it is an ineffective law enforcement tactic, it reinforces racial stereotypes in society, and it creates negative relations between police and citizens.

The general rule is that it is inappropriate for an officer to stop a person solely because of his or her race. However, in some situations officers may appropriately use race as one factor among others deciding whom to stop. For example, if an eyewitness to a robbery describes the robber as an African American man, a police officer may use race as a factor in deciding to stop an African American man that she sees running from the immediate vicinity.

Problem 12.8

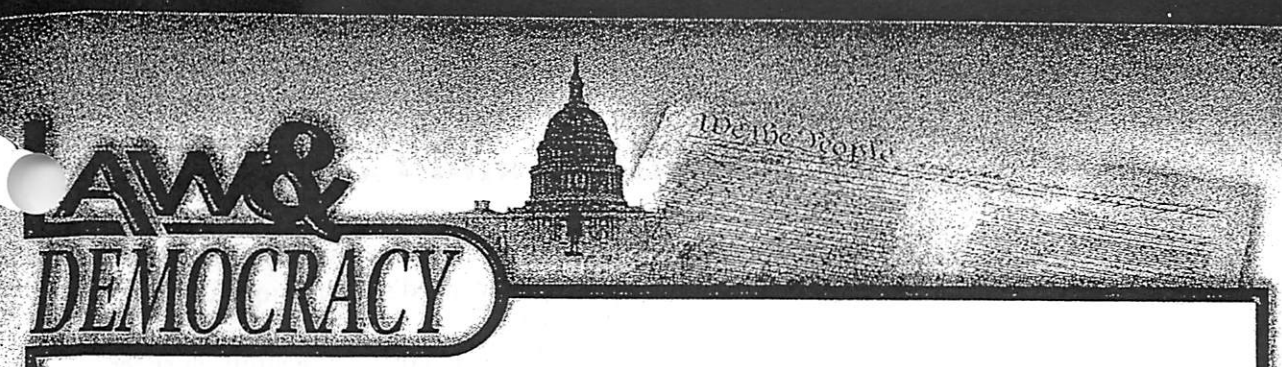
Determine if race was appropriately or inappropriately used as a factor in making each of the following decisions. Give your reasons.

a. After a terrorist attack, the government decides to use more telephone wiretaps to gather information in communities that have mosques.

b. In a neighborhood where several African Americans have been arrested for recent burglaries, a police officer searches an African American youth who is walking down the street.

c. A man reports overhearing two Spanish-speaking men in a coffee shop planning to rob a specific jewelry store the next day. The witness could not see the men's faces and does not know their names. The next day the police go to the store and question two "Latino-looking" men who are sitting in a car outside.

d. A woman entering the United States holds a passport from a country with which the United States was recently at war. A customs agent detains her for questioning.



What Should Be Done About Racial Profiling?

A committee of state legislators is meeting to discuss solutions to the problem of racial profiling. A study by the state government shows that African American drivers are 35 percent more likely to be stopped and searched by police than drivers of other races. A survey of people who have been pulled over in the state shows that an overall majority of people felt that they were stopped for legitimate reasons. However, one in three African Americans and one in four Latinos felt they had been unfairly stopped. Many complained of abusive treatment by police.

Assume you are a state legislator on the committee trying to solve these problems. Read the following excerpts from proposals offered by committee members.

Gomez: The problem is that police are not used to dealing with people from other cultures and have stereotypes of people from other races. All police should receive training on diversity and how to be culturally sensitive.

Wu: This practice has gone on so long because people are not aware of their rights. When people are stopped, they should immediately be told why and be given a card that lists their rights and a business card listing the name and contact information for the officer.

Letaliano: Police officers are not being disciplined for their inappropriate behavior because the police chiefs are unaware of what is going on. We need to collect data regularly to make police officers more aware of why they are really stopping people and to keep them accountable to the public. Each time a driver is stopped, the officer should be required to fill out a form detailing the time and date, driver's age, probable race, gender, and the reason for stopping the person.

Reynolds: The U.S. Constitution and state laws already prohibit searches not based on probable cause. The police department already has internal complaint procedures people can follow if they feel they were stopped because of their race. This is enough to protect citizens. To do more may make the police reluctant to stop people who may be criminals.

Al-Aziz: It's too hard for citizens to prove that they were stopped illegally. All stops by police should be videotaped so we can see how the police treat the suspect and then take disciplinary action against officers who act improperly.

Debouche: We can't rely only on laws or the police department to solve the problem. The answer is to have a board made up of citizens that hears complaints and has the power to require disciplinary action against officers who act inappropriately.

Problem 12.9

a. Which of these proposals seems most likely to help address the problem as you see it? Give your reasons.

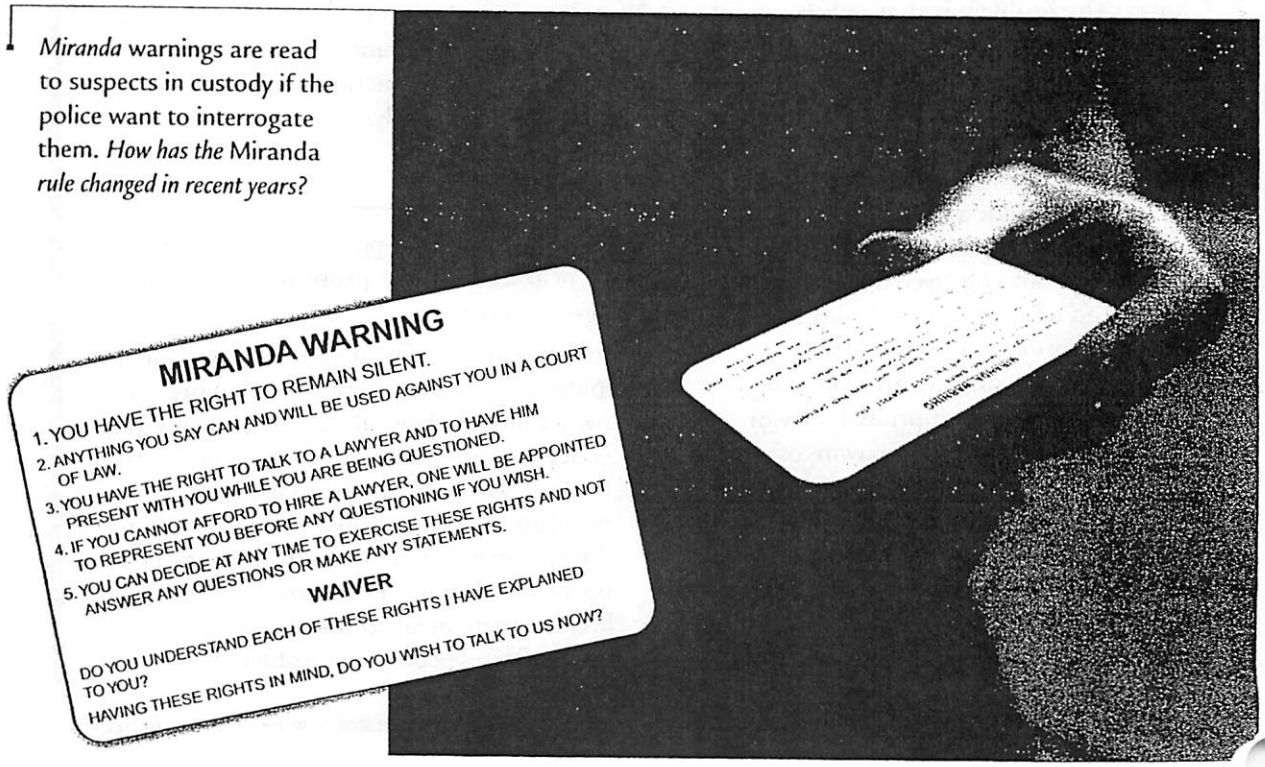
b. Invite members of your community to participate in this activity. Be sure that representatives from both law enforcement and a group concerned about racial profiling are invited. Is there evidence that racial profiling is a problem in your community? If so, what is the evidence? What can be done to deal with the problem? If it is not a problem where you live, are there measures that can be taken to keep it from becoming a problem?

Interrogations and Confessions

After an arrest is made, it is standard police practice to question, or **interrogate,** the accused. These interrogations often result in confessions or admissions. The accused's confessions or admissions are later used as evidence at trial.

Balanced against the police's need to question suspects are the constitutional rights of people accused of a crime. The Fifth Amendment to the U.S. Constitution provides citizens with a privilege against **self-incrimination.** This means that a suspect has a right to remain silent and cannot be forced to testify against himself or herself. This protection rests on a basic legal principle: the government bears the burden of proof. Suspects are not obliged to help the government prove they committed a crime or to testify at their own trial. Under the Sixth Amendment, a person accused of a crime has the right to the assistance of an attorney.

The U.S. Supreme Court has held that a confession is not admissible as evidence if it is not voluntary and trustworthy. This means that using physical force, torture, threats, or other techniques that could force an innocent person to confess is prohibited. In the case of *Escobedo* v. *Illinois*, the Supreme Court said that even a voluntary confession is inadmissible as evidence if it is obtained after the defendant's request to talk with an attorney has been denied. The Court reasoned that the presence of Escobedo's attorney could have helped him avoid self-incrimination.



Miranda warnings are read to suspects in custody if the police want to interrogate them. *How has the* Miranda *rule changed in recent years?*

The Case of . . .

Miranda v. *Arizona*

Ernesto Miranda was accused of kidnapping and raping an 18-year-old girl near Phoenix, Arizona. The girl claimed she was on her way home from work when a man grabbed her, threw her into the back seat of a car, and raped her. Ten days later, Miranda was arrested, placed in a lineup, and identified by the girl as her attacker. The police then took Miranda into an interrogation room and questioned him for two hours. At the end of the two hours, the officers emerged with a written and signed confession. This confession was used as evidence at trial, and Miranda was found guilty.

Miranda later appealed his case to the U.S. Supreme Court, arguing that he had not been told of his right to remain silent or of his right to counsel. Miranda did not suggest that his confession was false or brought about by coercion but rather that he would not have confessed if he had been advised of these rights.

Problem 12.10

a. Summarize the facts in the *Miranda* case. On what grounds did Miranda appeal his conviction?

b. Do you think Miranda's confession should have been used as evidence against him at trial? Why or why not?

c. Do you think police should be required to tell suspects their rights before questioning them?

d. Do you think suspects would confess after being warned of their rights?

Landmark Supreme Court Cases

Visit the Landmark Supreme Court Cases Web site at landmarkcases.org for information and activities about *Miranda* v. *Arizona*.

Although some defendants might ask for an attorney, others might not be aware of or understand their right to remain silent or their right to have a lawyer present during questioning. In 1966, the Supreme Court was presented with such a situation in the case of *Miranda* v. *Arizona*. In its decision, the Supreme Court ruled that Ernesto Miranda's confession could not be used at trial because officers had obtained it without informing Miranda of his right to a lawyer and his right to remain silent. As a result of this case, police are now required to inform people taken into custody of the so-called *Miranda* rights before questioning begins.

Suspects sometimes complain that they were not read their *Miranda* rights and that the entire case should therefore be dropped and charges dismissed. Failure to give *Miranda* warnings, however, does not affect the validity of an arrest. The police have to give *Miranda* warnings only if they want to use statements from the accused at the trial. In fact, in his second trial, even though the court could not use his confession as evidence against him, Miranda was convicted based on other evidence.

Where You Live

What is the practice regarding *Miranda* warnings in your area? How do the police provide warnings to people who are deaf, are mentally impaired, or speak a language other than English?

The Case of . . .

The Parolee and the Detective

Local police were investigating a burglary in a large city. They believed that the burglary had been committed by Blaine, a person who had served a prison term but was now out on parole. A detective went to Blaine's home and left him a note asking him to come down to the police station. Blaine read the note and went to the station to speak to the detective. Upon entering the detective's office, he was told that he was not under arrest. Then he was told that police were investigating a burglary at a specific address and that his fingerprints had been found at this location. At this point, Blaine confessed to the crime. The detective never read him his *Miranda* warnings, and the detective knew that Blaine's fingerprints had not been found at the scene. Before Blaine's trial on the burglary charge, he and his attorney asked the court to throw out the confession because he had not been given his *Miranda* warnings. The judge refused and, after a trial, Blaine was convicted.

Problem 12.11

a. State the issue the appeals court will have to decide.

b. What arguments can be made for Blaine? For the state?

c. Was Blaine in custodial interrogation at the time of his confession?

d. What is the purpose of *Miranda* warnings?

e. How should this case be decided?

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 to the U.S. Constitution**

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

— **Sixth Amendment to the U.S. Constitution**

The *Miranda* case has been controversial. It illustrates the delicate balance between the protection guaranteed to the accused and the protection from crime provided to society. This balance is constantly changing, and the effect of the *Miranda* case has been somewhat altered by more recent cases. In one case, the Supreme Court created a public safety exception to the *Miranda* rule. In this case, a police officer who was arresting a rape suspect in a grocery store asked the suspect where his gun was before advising him of his rights. The suspect then pointed to a nearby grocery counter, where the gun was found. The Court held that police may ask questions related to public safety before advising suspects of their rights. The Court has also limited the impact of the *Miranda* rule by strictly requiring that the person be in a condition of *custodial interrogation* before the warnings are needed. Custodial interrogation means that the person is in custody (not free to leave) and is being interrogated (questioned) by the police.

Remember that defense counsel will ask the judge before trial to exclude the results of an illegal search. Similarly, defense counsel will ask the judge at a pretrial hearing to exclude any statement given by the defendant in violation of the *Miranda* rule.

CHAPTER 13

Criminal Justice Process: Proceedings Before Trial

"Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

— *Stack* v. *Boyle* (1951)

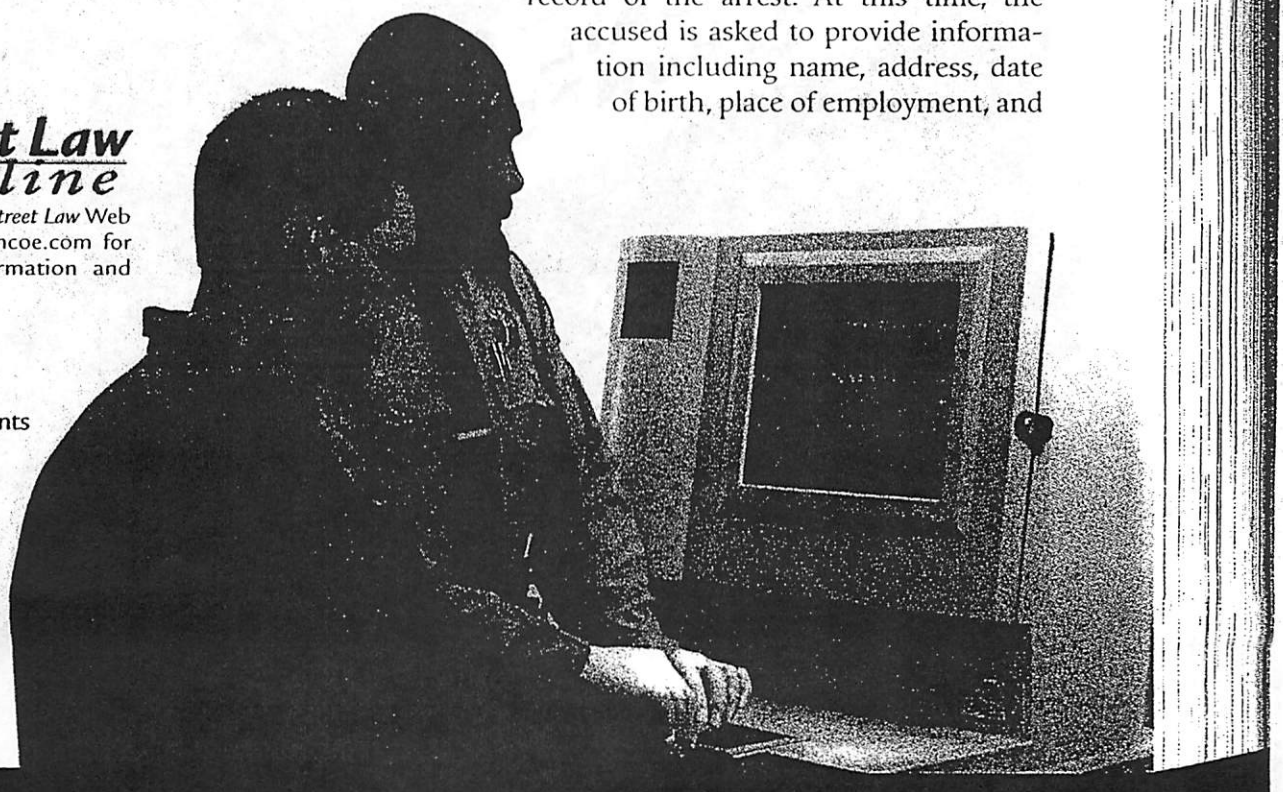
Before a criminal case reaches the courtroom, several preliminary proceedings take place. Most of these proceedings are standard for every case. Depending on the circumstances and the result of preliminary proceedings, charges may be dropped or the defendant may plead guilty. If charges are dropped or the accused pleads guilty, there will be no trial.

Booking and Initial Appearance

After an arrest, the accused is normally taken to a police station for booking. **Booking** is the formal process of making a police record of the arrest. At this time, the accused is asked to provide information including name, address, date of birth, place of employment, and

Street Law online

Visit the *Street Law* Web site at streetlaw.glencoe.com for chapter-based information and resources.



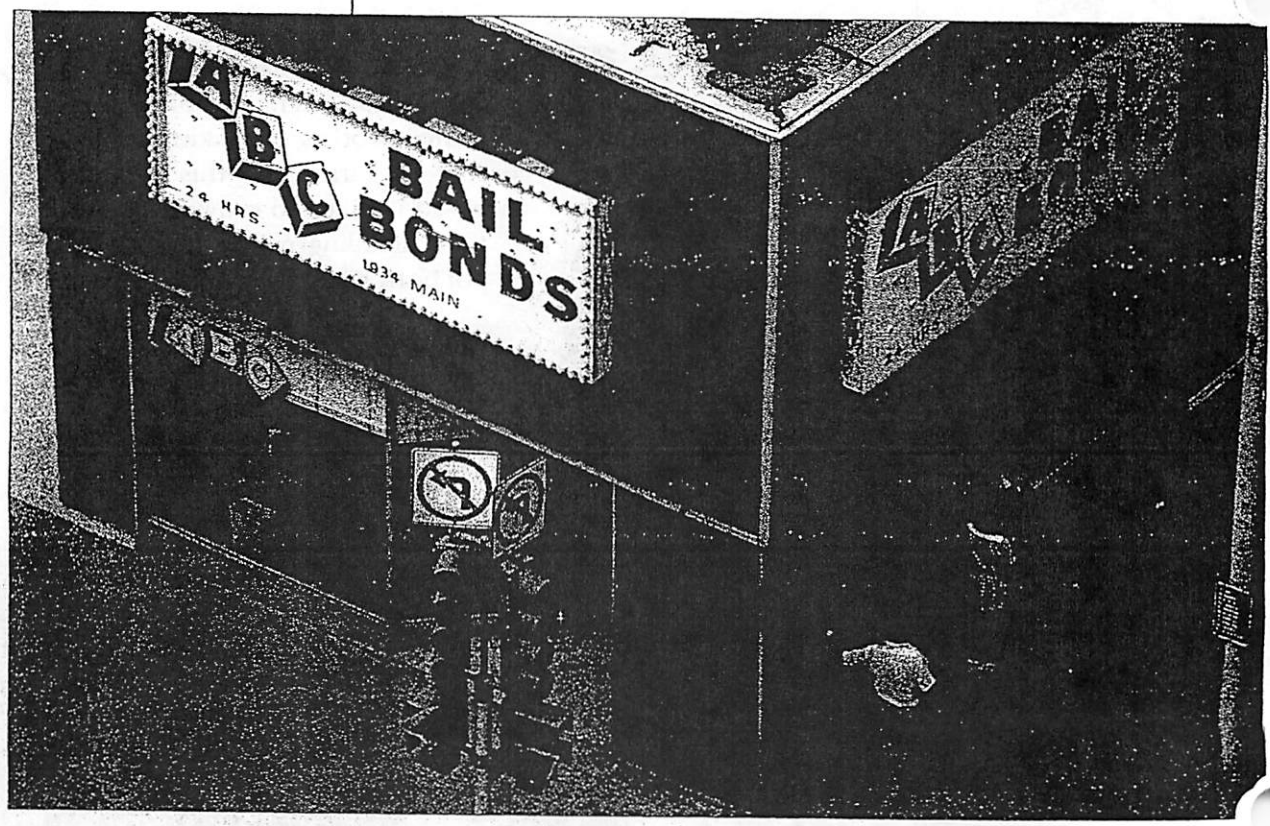
Police use fingerprints to investigate the crime.

details about any previous arrests. Then the accused is usually fingerprinted and photographed. In certain circumstances, the police are allowed to take fingernail clippings, handwriting specimens, or blood samples. Urine tests to ascertain drug use have also become a common booking requirement.

Within a limited period following arrest and booking, the accused must appear before a judicial officer (a judge or magistrate). At this initial appearance, the judge explains the defendant's rights and advises him or her of the exact nature of the charges. The defendant has an attorney appointed or is given the opportunity to obtain one. The judge may also set bail.

In a misdemeanor case, the defendant is asked at the *initial* appearance to enter a plea of guilty or not guilty. In a felony case, the procedure is somewhat different. The defendant is informed of the charges and advised of his or her rights, as in a misdemeanor case, but does not enter a plea until a later stage in the criminal process, known as the felony **arraignment.** In addition, in some jurisdictions, the defendant may be entitled to a preliminary hearing to determine if there is probable cause to believe that a crime was committed and that the defendant committed it. The arraignment and the preliminary hearing are discussed later in this chapter. The most important part of the initial appearance is deciding whether the defendant will be released from custody and, if so, under what conditions.

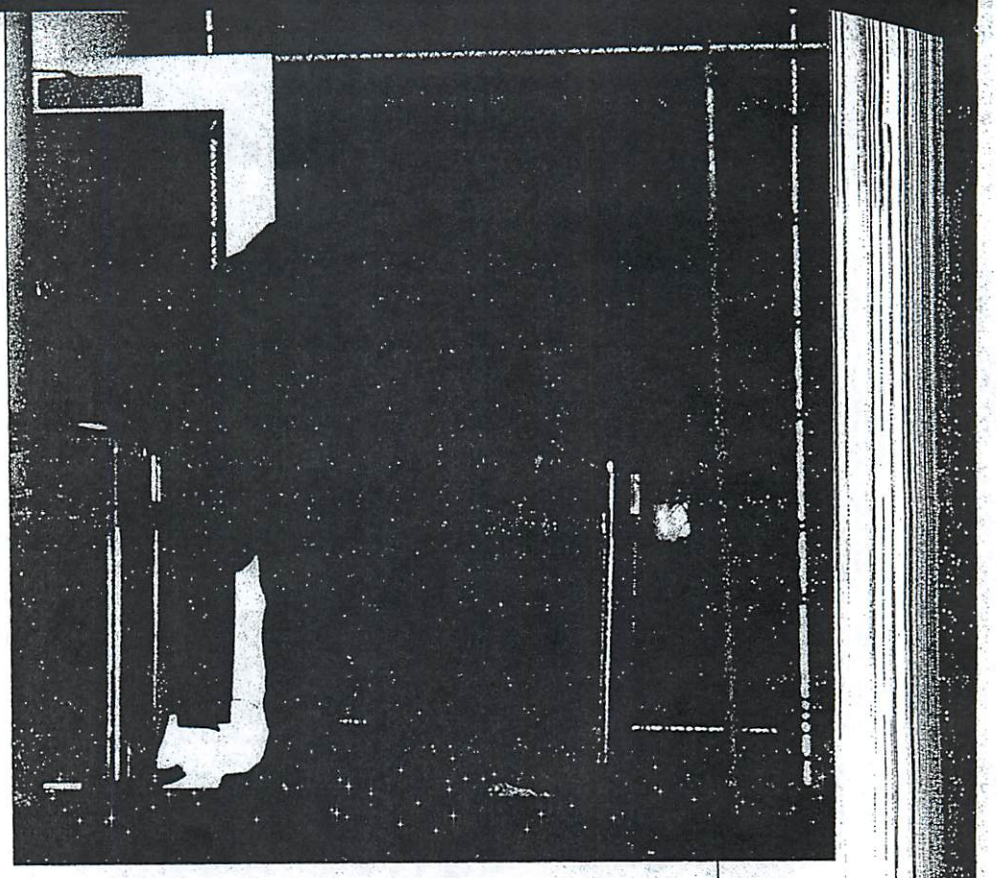
Bail bond companies have gone out of business in some places. *Why might this be?*



il and Pretrial Release

An arrested person can usually be released after putting up an amount of money known as **bail.** The purpose of bail is to assure the court that the defendant will return for trial. A constitutional right to bail is recognized in all but the most serious cases, such as murder.

Bail may be paid directly to the court. The entire amount may be required, or in some places, the defendant may be released after paying just a portion of the total amount (for example, 10 percent). If a person released on bail fails to return, the court will keep the money. If the defendant does not have the money, a bond company may put up a bail bond in exchange for a fee. For example, a defendant with bail set at $2,000 might be released after paying $200 (10 percent of the total) to the bond company. If a bond is posted, the bond company will be required to pay the amount of the bond to the court if the defendant does not report for trial.



There are several pretrial release programs that do not require a defendant to post bail. *What factors should a judge consider when determining whether a defendant will return for trial?*

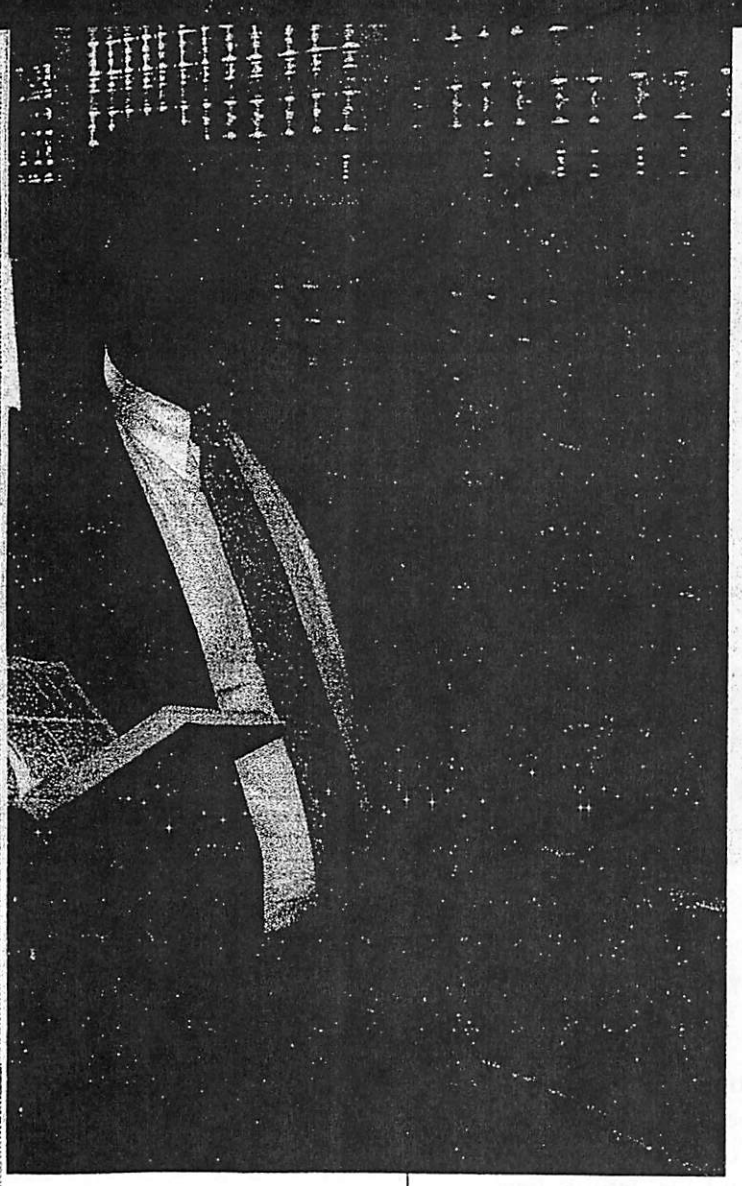
The Eighth Amendment to the U.S. Constitution states that "excessive bail shall not be required." However, a poor person unable to raise any money could be detained in jail before trial or conviction. Many people consider this unfair, and some courts and legislatures have developed programs to release defendants without requiring any money.

To be eligible for release on **personal recognizance,** or personal bond, the defendant must promise to return and must be considered a low risk of failing to show up for trial. In determining the likelihood of the defendant's return, judges consider factors such as the nature and circumstances of the offense and the accused's family and community ties, financial resources, employment background, and prior criminal record.

In addition to personal recognizance programs, courts may set a variety of nonmonetary conditions designed to ensure the return of the defendant. These conditions include placing the defendant in the custody of a third party or requiring the defendant to maintain or get a job, to reside at a certain address, or to report his or her whereabouts on a regular basis.

Despite the advantages of these programs, releasing defendants may involve problems even though they have not yet been found guilty of a crime. Statistics indicate that a large number of defendants

How does the bail system work in your locality? How difficult is it for a defendant to remain free before trial in your area?



Prosecutors conduct preliminary investigations to determine whether the defendant committed the crime. *What is included in the prosecutor's information?*

commit crimes while out on bail. As a result, some people argue that it should be made more difficult to get out on bail. In 1984, Congress passed the *Bail Reform Act*, which can prevent someone from being freed on bail if he or she is charged with a federal felony offense and believed to be dangerous. In order for this to occur, there must be a hearing, and the person being denied bail must have been charged with a violent crime or a drug offense. In addition, the individual must already have been convicted of a felony more than once. While the U.S. Supreme Court has upheld the *Bail Reform Act* as constitutional, most states have not adopted similar legislation.

Supporters of pretrial release say that it prevents punishment prior to conviction and gives defendants the freedom to help prepare their cases. Supporters also claim that the U.S. justice system rests on the presumption that defendants are innocent until proven guilty and that setting high bail or holding a person in jail before trial goes against that presumption.

Problem 13.1

a. What is the purpose of the constitutional right not to be subjected to excessive bail? Should it apply to all people who are arrested?

b. Can you think of any circumstances in which a person should be released without any bail requirements? Explain.

c. Can you think of any circumstances under which a person should not be released on bail of any kind? Explain.

d. Do you think the bail system in the United States needs reform? If so, how?

Information

In most states, a defendant will proceed to trial for a misdemeanor based on a prosecutor's **information**, which details the nature and circumstances of the charge. The information is a formal criminal charge filed with the court by the prosecutor without the aid of a preliminary hearing or a grand jury. It is based on the evidence a prosecutor collects during his or her preliminary investigation that suggests that the defendant in custody committed the crime

YOU BE THE JUDGE

Bail Hearing

The following people have been arrested and charged with a variety of crimes. For each, decide whether the person should be released and, if so, under what conditions: (1) bail (release after a certain amount of money is paid; set an amount), (2) personal recognizance (release with no money), (3) conditional release (release under certain conditions; set the conditions), (4) pretrial detention (no release).

Case 1
Name: Marta Garcia Age: 26
Charge: Possession of crack cocaine
Residence: 619 30th Street; lives alone; no family or references
Employment: Unemployed
Education: 11th grade
Criminal record: As a juvenile, five arrests, mostly misdemeanors. As an adult, two arrests for petty larceny and a conviction for possession of dangerous drugs. Probation was successfully completed.
Comment: Arrested while leaving a train station with a large quantity of crack cocaine. Urine test indicates use of narcotics.

Case 2
Name: Gloria Hardy Age: 23
Charge: Prostitution
Residence: 130 Riverside Drive, Apt. 10; lives with female roommates
Employment: Call girl; earns $2,500 per week.
Education: Completed high school.
Criminal record: Five arrests for prostitution, two convictions. Currently on probation.
Comment: Allegedly involved in prostitution catering to wealthy clients.

Case 3
Name: Stanley A. Wexler Age: 42
Charge: Possession and sale of crack cocaine
Residence: 3814 Sunset Drive; lives with wife and two children
Employment: Self-employed owner of a drugstore chain; annual salary $400,000.
Education: Completed college; holds degrees in pharmacology and business administration.
Criminal record: None
Comment: Arrested at his store by undercover police after attempting to sell a large quantity of heroin. Alleged to be a big-time dealer. No indication of drug usage.

Case 4
Name: Michael D. McKenna Age: 19
Charge: Assault
Residence: 412 Pine Street; lives alone; parents are in prison
Employment: Waiter; earns $400 per week.
Education: 10th grade
Criminal record: Six juvenile arrests (possession of marijuana, illegal possession of firearms, and four burglaries); convicted of firearms charge and two burglaries; spent two years in juvenile facility.
Comment: Arrested after being identified as assailant in a street fight. Alleged leader of a street gang. Police consider him dangerous. No indication of drug usage.

Case 5
Name: Chow Yang Age: 34
Charge: Possession of stolen mail and forgery
Residence: 5361 Texas Street; lives with common-law wife and two children by a prior marriage
Employment: Works 30 hours per week at a service station; earns minimum wage.
Education: Quit school after 8th grade.
Criminal record: Nine arrests, mostly vagrancy and drunk and disorderly conduct. Two convictions: (1) driving while intoxicated (fined and lost license) and (2) forgery (completed two years' probation)
Comment: Arrested attempting to cash a stolen Social Security check. Has a drinking problem.

question. Defendants charged with a misdemeanor are not entitled a preliminary hearing or a subsequent grand jury review. A few sta use the information system in felony prosecutions as well.

Preliminary Hearing

A **preliminary hearing** is a screening device used in more than half of the states. It is used in felony cases to determine if there is enough evidence to require the defendant to stand trial. At a preliminary hearing, the prosecutor is required to establish that a crime probably has been committed and that the defendant probably did it.

In most states, the defendant has the right to be represented by an attorney, to cross-examine prosecution witnesses, and to call favorable witnesses. If enough evidence supports the prosecutor's case, the defendant will proceed to trial. If the judge finds no probable cause to believe that a crime was committed or that the defendant committed it, the case may be dismissed. However, dismissal of a case at the preliminary hearing does not always mean that the case is over. The prosecution may still submit the case to a grand jury for further review of the charges.

Grand Jury

A **grand jury** is a group of 16 to 23 people charged with determining whether there is sufficient cause to believe that a person has committed a crime and should be made to stand trial. The Fifth Amendment to the U.S. Constitution requires that before anyone can be tried for a serious crime in federal court, there must be a grand jury **indictment**, or formal charge of criminal action. Only about 20 states regularly use grand juries instead of a preliminary hearing to determine the probability that a particular defendant committed the alleged crime. Some states utilize both procedures.

To secure an indictment, a prosecutor presents evidence designed to convince members of the grand jury that a crime has been committed and that there is probable cause to believe the defendant committed it. Neither the defendant nor his or her attorney has a right to appear before a grand jury. A judge is not present and rules of evidence do not apply. The prosecutor is not required to present all the evidence or call all the witnesses as long as the grand jury is satisfied that the evidence presented amounts to at least probable cause.

Historically, the grand jury—standing between the accuser and the accused—was seen as a guardian of the rights of the innocent. If a majority of the grand jurors do not believe that sufficient evidence has been presented by the prosecutor, there will not be an indictment, and the complaint against the defendant will be dismissed. In some instances, the grand jury system has protected citizens from being unreasonably harassed by the government.

What pretrial proceeding is used in your state for felony prosecutions? For misdemeanors? Can a prosecutor utilize more than one proceeding to bring a suspect to trial? Is this system fair?

One common pretrial motion is a request to change the location of the trial. *How might media attention influence a trial and its outcome?*

Felony Arraignment and Pleas

After an indictment or information is issued, the defendant is required to appear in court to enter a plea. If the defendant pleads guilty, the judge will set a date for sentencing. If the defendant pleads not guilty, the judge will set a date for trial and ask whether the defendant wants a jury trial or a trial before a judge alone (called a "bench trial").

Nolo contendere is a plea in which the defendant does not admit guilt but also does not contest the charges. It is equivalent to pleading guilty. The only advantage of this plea to the defendant is that it cannot be used as evidence in a later civil trial for damages based on the same set of facts. After such a plea, there is no trial. Instead, the defendant proceeds directly to the sentencing phase.

Pretrial Motions: The Exclusionary Rule

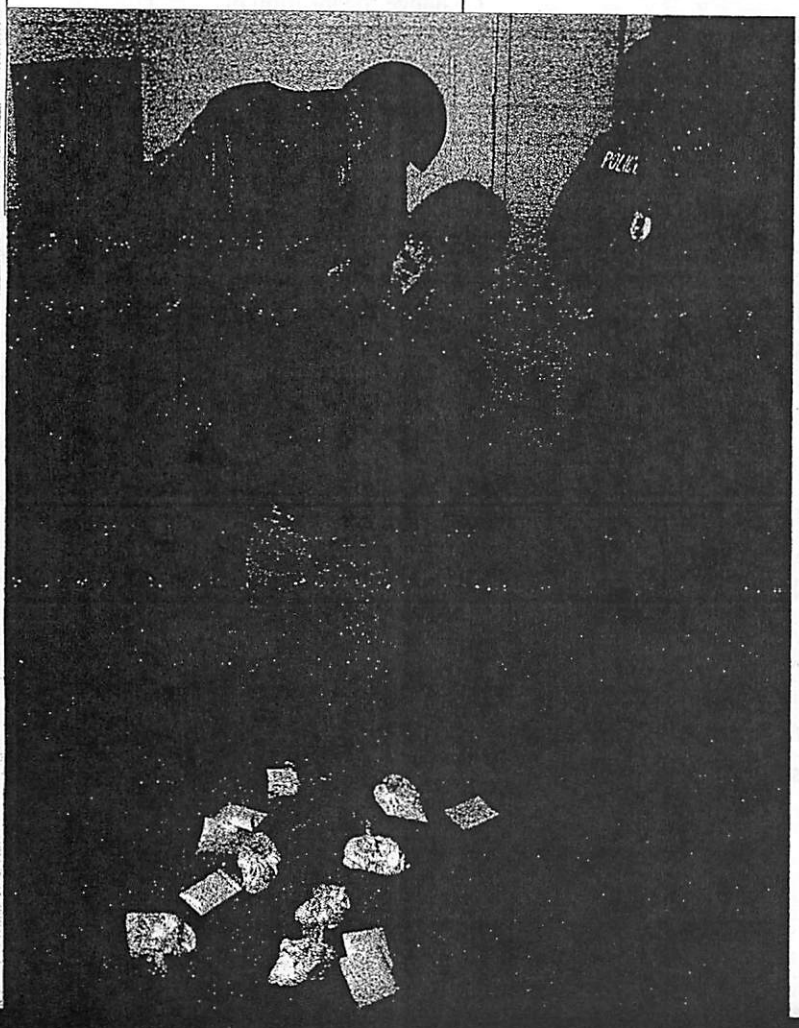
An important preliminary proceeding is the **pretrial motion.** A motion is a formal request that a court make a ruling or take some other action. Prior to trial, a defendant may file motions seeking to have the case dismissed or to obtain some advantage or assistance in preparing the case. Common pretrial motions include the following:

- **Motion for discovery of evidence.** This is a request by the defendant to examine, before trial, certain evidence in the possession of the prosecutor.

- **Motion for a continuance.** This request seeks more time to prepare the case.
- **Motion for change of venue.** This is a request to change the location of the trial to avoid community hostility, for the convenience of witnesses, or for other reasons.
- **Motion to suppress evidence.** This is perhaps the most important and controversial pretrial motion. It is a request that certain evidence not be allowed to be presented.

As you learned in Chapter 12, the Fourth Amendment protects citizens against "unreasonable searches and seizures" by the government. But it does not say what happens if the police violate the amendment. To give teeth to the amendment, the U.S. Supreme Court interpreted the amendment as requiring an exclusionary rule. This rule states that any evidence illegally seized by law enforcement officials cannot be used to convict the accused at trial. It also applies to evidence obtained from illegal questioning of the accused.

The exclusionary rule is used by criminal defense lawyers when they file a motion to suppress evidence. This motion asks the court to exclude any evidence that was illegally obtained. If the judge agrees that the evidence was obtained in violation of the accused's constitutional rights, it will be suppressed. However, this does not mean the evidence is returned to the defendant. For example, if the police illegally seize contraband, such as marijuana, the information cannot be used at trial, but the marijuana does not have to be given back to the defendant.



Police often make arrests to seize contraband or to disrupt criminal activity. *Why is the exclusionary rule controversial?*

The exclusionary rule has been used in federal courts since 1914. However, the rule was not extended to state courts until the 1961 Supreme Court case *Mapp* v. *Ohio*. This famous case made the exclusionary rule binding on the states. Over the years since the *Mapp* decision, courts have modified and reevaluated the exclusionary rule, but the basic premise remains.

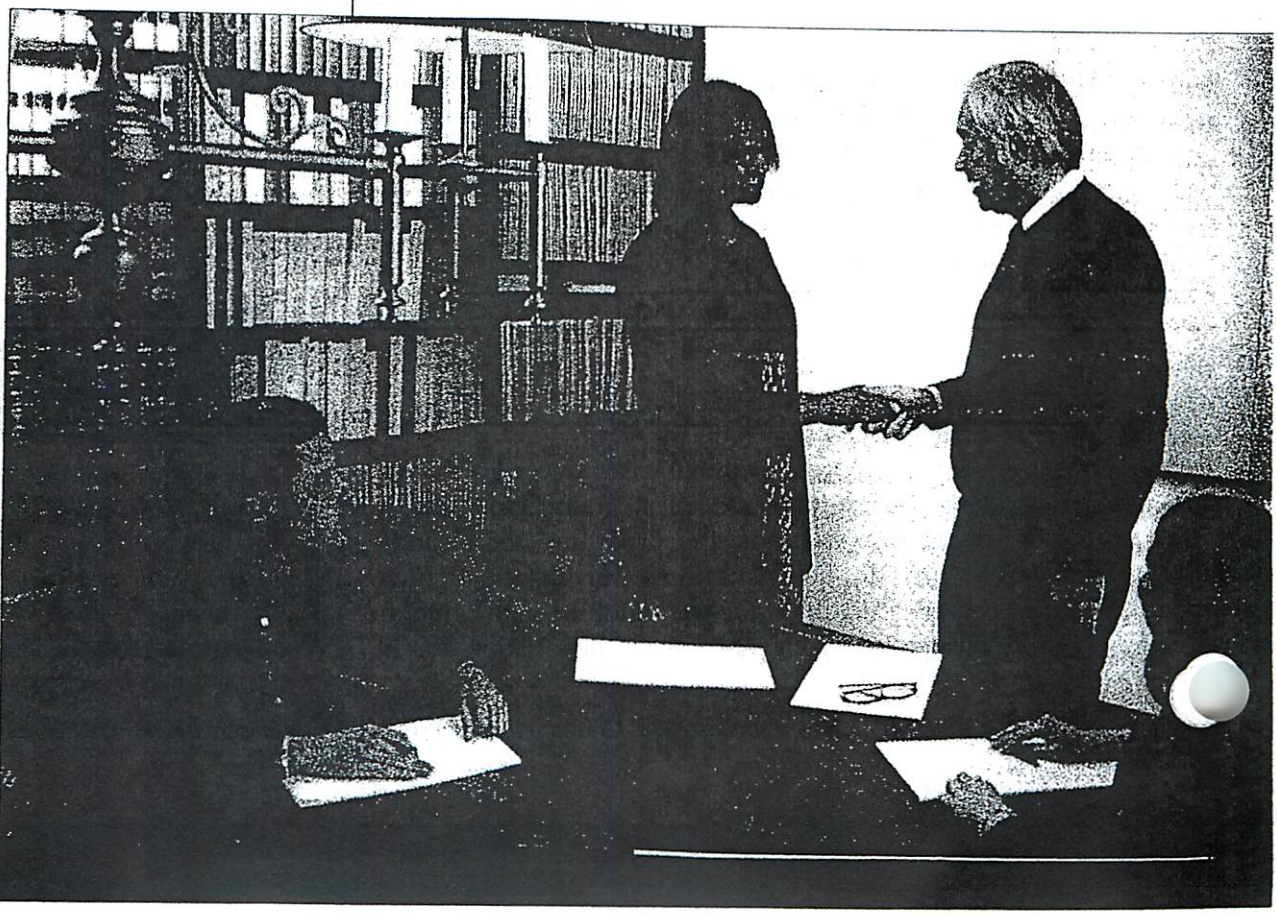
The exclusionary rule does not prevent the arrest or trial of a suspect. However, in some cases, it does mean that people who committed a crime might go free. This could happen because when an important piece of evidence is excluded from the trial, the prosecutor may not have other evidence sufficient to obtain a conviction. As a result, such a case is often dismissed or the defendant is acquitte

the accused, the defense attorney, and the prosecutor. This proc known as **plea bargaining.** It involves granting certain concessions to the defendant in exchange for a plea of guilty. Typically, the prosecution will allow the defendant to plead guilty to a less serious charge or recommend a lighter sentence on the original charge in exchange for a guilty plea. When accepting a guilty plea, the judge must decide if the plea was made freely, voluntarily, and with knowledge of all the facts. Thus, once a defendant pleads guilty, withdrawing the guilty plea and appealing the subsequent conviction are very difficult.

Plea bargaining allows the government to avoid the time and expense of a public trial. It may also benefit the defendant, who often receives a lighter sentence than if the case had resulted in a conviction at trial. Plea bargaining is controversial, however. Critics charge that plea bargaining allows dangerous criminals to get off with light sentences. Others, more concerned with the plight of the defendant, argue that the government should be forced to prove guilt beyond a reasonable doubt at trial. They say a prosecutor with a weak case can use the plea bargaining system to unfairly influence a defendant to accept a lower charge in lieu of risking a longer sentence as the result of a guilty conviction at trial. Finally, victims of crime argue that their rights are completely overlooked in the plea bargaining process.

Some places have abolished or limited plea bargaining. Without plea bargaining, some argue that the criminal justice system will be overwhelmed by the increase in cases coming to trial. Others say t eliminating plea bargaining will provide greater justice because government will drop (not prosecute) weak cases and defendants will still plead guilty when the government's case is very strong.

Many cases conclude with a plea bargain and never go to trial. *How does the process of plea bargaining work?*



The exclusionary rule is very controversial. Many people claim that it is a legal loophole that allows dangerous criminals to go free. They also point out that many other countries have no such rule; instead, those countries punish the police for violating citizens' rights. Others say the rule is necessary to safeguard our rights and to prevent police misconduct. The two major arguments in support of the rule are judicial integrity and deterrence. **Judicial integrity** is the idea that courts should not be parties to lawbreaking by the police. **Deterrence** means that police will be less likely to violate a citizen's rights if they know that illegally seized evidence will be thrown out of court.

As a practical matter, police are sometimes more concerned with arrests than with convictions. They may make arrests primarily to seize contraband, gather information, or disrupt criminal activity, regardless of whether a suspect can be convicted of the crime. Even when they are seeking a conviction, they sometimes make mistakes.

In recent years, the U.S. Supreme Court has established a "good faith" exception to the exclusionary rule. In one of the cases the Court used to establish this rule, police were seeking evidence related to a homicide. However, the magistrate who approved the search warrant signed a warrant normally used to conduct searches for drugs. The officers did not look at the warrant after it was signed by the magistrate. Technically, this warrant did not meet the requirement of describing "with particularity" the items to be seized. The Supreme Court held that the "exclusionary rule should not apply to bar evidence obtained by police acting in reasonable reliance on a search warrant, issued by a detached and neutral magistrate, that is later found to be invalid."

Problem 13.2

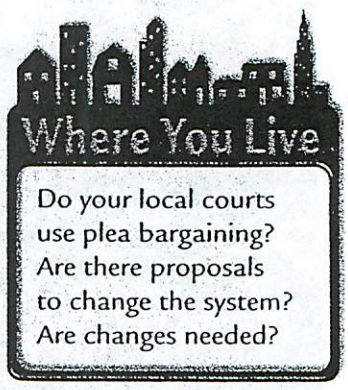
a. What is the exclusionary rule? How does it work?

b. Why do you think the Supreme Court adopted the exclusionary rule? What are some arguments in favor of the rule? Against the rule? Do you favor or oppose the rule? Explain your answer.

c. What is the good faith exception to the exclusionary rule? What are some arguments in favor of the good faith exception? Should it be extended to warrantless searches?

Plea Bargaining

Contrary to popular belief, most criminal cases never go to trial. Rather, most defendants who are convicted plead guilty before trial. In minor cases, such as traffic violations, the procedure for pleading guilty is simple. The defendant signs a form waiving the right to appear and mails the court a check for the amount of the fine. In major cases, guilty pleas result from a process of negotiation among



Law in Action

The Power of Plea Bargaining

Prosecutors play a significant role in the criminal justice system and, therefore, have an awesome responsibility to the community. They are responsible for charging wrongdoers with crimes and suggesting appropriate sentences for those who are convicted of those crimes. Prosecutors are often burdened with heavy caseloads, so they may choose to offer plea bargains to defendants in order to avoid the cost of a lengthy trial.

The ability to plea bargain places a great deal of power in a prosecutor's hands, which raises many concerns in the community on both sides of the issue. Some feel that defendants—especially those who are poor or uneducated—are taken advantage of and denied certain constitutional trial rights. People are concerned that the plea bargaining system places these defendants in an unfair and powerless position where they feel that taking a plea is their only choice to avoid a costly conviction.

Others believe that the plea bargaining system allows the government to provide for lighter sentences and to direct defendants to rehabilitation programs. It also includes the defendant in deciding the most appropriate sentence, and helps to relieve the significant burden on the state of bringing all criminals to trial.

Problem 13.3

a. Should plea bargaining be allowed? Do you think plea bargaining offers greater advantages to the prosecutor or to the defendant? Explain your answer.

b. Do you think prosecutors have a disproportionate amount of power in the plea bargaining process, forcing the defendant to accept a plea that might not be in his or her best interest?

c. Assume that a defendant who is charged with a serious felony declines a plea bargain offer but then receives a much harsher sentence upon being convicted at trial. Is he or she being unfairly punished for exercising his or her constitutional right to a trial?

d. Do you think that poor or uneducated defendants could be forced to accept plea bargains because they cannot afford to finance a costly trial?

e. What role do you think defense counsel should play in the plea bargaining process?

f. Consider the following scenario: Marty, who is 22 years old, is arrested and charged with burglarizing a warehouse. He has a criminal record, including a previous conviction for shoplifting and two arrests for auto theft. The prosecutor has evidence placing him at the scene of the crime but no other physical evidence linking him to the crime. Because of his record, if Marty is convicted, he could face up to 10 years in prison. Marty's defense attorney tells him that the prosecutor will reduce the charge to petty larceny, carrying a one-year suspended sentence and community service, in exchange for a guilty plea.

- If you were Marty, would you plead guilty to the lesser charge? Why or why not?
- Suppose Marty pleads guilty after being promised the more lenient sentence by the prosecutor, but the judge overrules the plea and assigns a longer prison term. Is there anything Marty can do about it?

g. Do you think anyone accused of a crime would plead guilty if he or she were really innocent? Explain your answer.

CHAPTER
14

Criminal Justice Process: The Trial

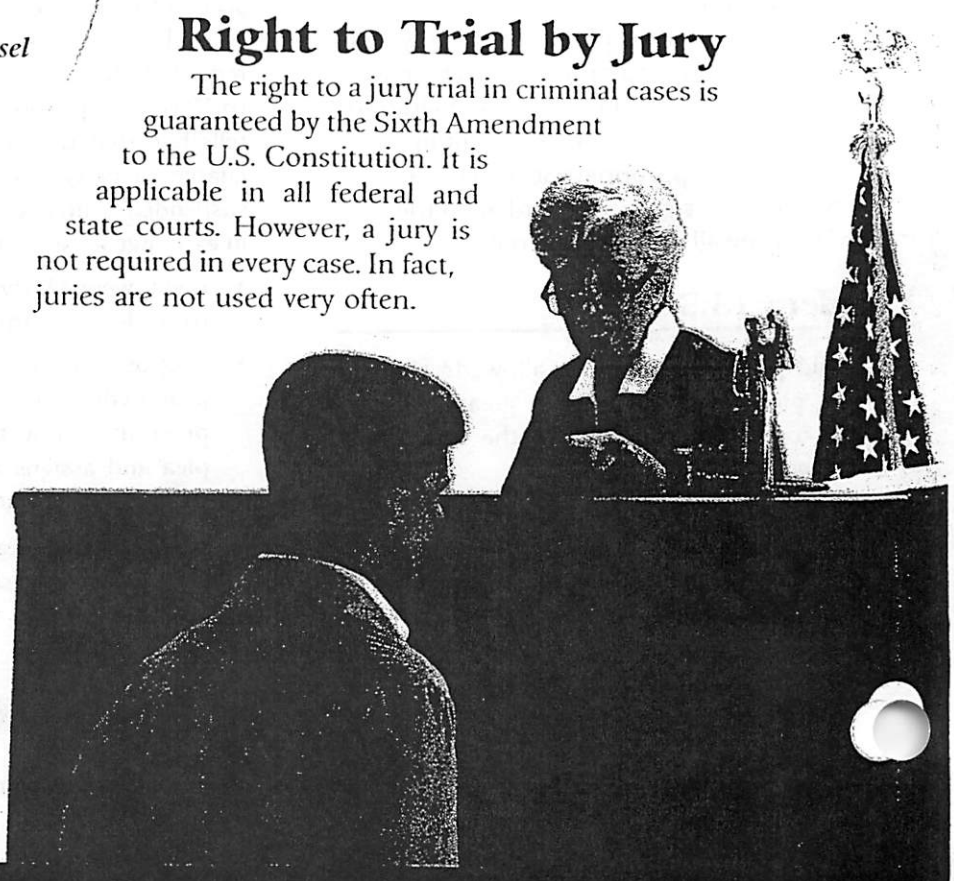
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have . . . witnesses in his favor, and to have the Assistance of Counsel for his defence.

— **Sixth Amendment to the U.S. Constitution**

Due process of law (fair procedures) means little to the average citizen unless and until he or she is arrested and charged with a crime. This is because many of the basic rights set out in the U.S. Constitution apply to people accused of crime. Accused people are entitled to have a jury trial in public and without undue delay, to be informed of their rights and of the charges against them, to confront and cross-examine witnesses, to compel witnesses to testify on their behalf, to refuse to testify against themselves, and to be represented by attorney. These rights are the essence of due process of Taken together, they make up the overall right to a fair trial.

Right to Trial by Jury

The right to a jury trial in criminal cases is guaranteed by the Sixth Amendment to the U.S. Constitution. It is applicable in all federal and state courts. However, a jury is not required in every case. In fact, juries are not used very often.



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Persons accused of a crime have a right to a trial.

Most criminal cases are resolved by guilty pleas before ever reaching trial. Jury trials are also not required for certain minor offenses—generally, those punishable by less than six months in prison. Furthermore, defendants can **waive,** or give up, their right to a jury trial and instead have their case heard by a judge (a bench trial). In some states, waivers occur in the majority of cases.

Jury panels are selected from voter registration or tax lists and are supposed to be generally representative of the community. In some communities potential jurors are also selected from drivers' license rolls. In federal courts, juries consist of 12 persons who must reach a unanimous verdict before finding a person guilty. While many states also use 12-person juries, they are not required to do this by the U.S. Constitution. The U.S. Supreme Court only requires at least 6 jurors. Similarly, most states require unanimous verdicts in criminal cases, but the Supreme Court, in interpreting the Constitution, has not required unanimous verdicts in state courts.

The Supreme Court has ruled in a number of cases that attorneys may not exclude or try to exclude prospective jurors from serving on a jury solely because of their race or gender. Racial discrimination in the selection of jurors has been especially problematic in the nation's courts, and the Supreme Court has struck down attempts by attorneys to exclude both white and African American jurors from jury panels.

Of particular concern is an attorney's use of **peremptory challenges**—a device an attorney can use a limited number of times in asking the court to exclude a particular juror without giving a reason. Under the current law, if a defendant can make a plausible case of racial bias by a prosecutor, the prosecutor must prove that he or she had a race-neutral reason for each peremptory exclusion. Once the defendant gives a counterargument, it is then up to a judge to decide whether the prosecutor's reasons are valid.

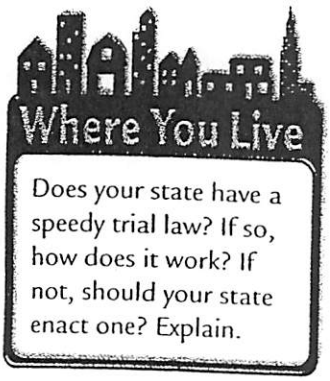
Those in favor of the system believe that it gives both sides an opportunity to be heard. They stress that appellate courts should usually defer in these matters to the decisions of trial court judges because they were able to witness the actual proceeding from start to finish. Critics argue that the system is flawed because local trial judges are often reluctant to question the motives of prosecutors in their community. Critics also claim that the deference given to trial court judges may further disadvantage defendants, especially in communities whose court systems have histories of alleged discrimination.

Problem 14.1

a. Why is the right to a jury trial guaranteed by the Bill of Rights? Why might someone choose not to have a jury trial?

b. Do you think jury verdicts should be unanimous? Why or why not?

c. Do you think juries should deliberate and come to a conclusion in private, or should this proceeding be televised and made public? Explain.



Right to a Speedy and Public Tr

The Sixth Amendment to the U.S. Constitution provides a right to a speedy trial in all criminal cases. The Constitution does not define speedy, and courts have had trouble deciding what this term means. To remedy this problem, the federal government and some states have set specific time limits within which a case must be brought to trial. Without the right to a speedy trial as an element of due process, an innocent person could await trial—possibly in jail—for years.

If a person does not receive a speedy trial, the case may be dismissed. However, defendants often waive their right to a speedy trial. They may do this because of the unavailability or illness of an important witness or because they need more time to prepare their cases. Before dismissing a case, courts will consider the cause and reasons for the delay and whether the defendant was free on bail or in jail during the pretrial period.

Law in Action

Jury Nullification

Jurors and juries have a great deal of power in the U.S. legal system. Some people see the jury box, like the ballot box, as an essential element of democracy and as a potential check on the government.

Juries determine the facts provided at trial and apply the law based on instructions given by the judge. However, there is a long history in the United States of juries sometimes disregarding the law and the judges' instructions when they believe they must do so in the interest of justice. This is called jury nullification. For example, during the nineteenth century, some juries refused to convict people who hid runaway slaves, even though it was illegal to do so at that time. Today, juries sometimes refuse to convict when they believe a law is unfair or is being enforced unfairly. One example of this might be a refusal to convict for marijuana possession when the defendant uses the drug for strictly medicinal purposes.

While legal scholars acknowledge the history of jury nullification in the United States, some experts believe that expanded use of this extraordinary power could lead to anarchy or an undermining of the rule of law. Others argue that it is an effective way for citizens (jurors) in a democracy to check abuse of power.

Problem 14.2

a. Are there laws where you live that jurors might find so unfair (or so unfairly enforced) that they would refuse to convict a defendant, even with proof beyond a reasonable doubt of guilt? If so, which laws?

b. Should juries be told by judges that they have the power to ignore the law? Why or why not?

Problem 14.3

a. Why is the right to a speedy trial important?

b. How soon after arrest should a person be brought to trial? What are some reasons for and against bringing a defendant to trial within a short time after arrest?

c. Do you think that televising criminal trials is a good idea? Explain.

Right to Compulsory Process and to Confront Witnesses

Defendants in a criminal case have a right to compulsory process for obtaining witnesses. This means that the defendant can get a **subpoena**—a court order—requiring a witness to appear in court to testify. Without this basic right, defendants would have great difficulty establishing a defense.

The Sixth Amendment provides people accused of a crime with the right to confront (be face-to-face with) the witnesses against them and to ask them questions by way of cross-examination. Although a defendant has the right to be present in the courtroom during all stages of the trial, the U.S. Supreme Court has said that this right may be restricted if the defendant becomes disorderly or disruptive. In such instances, judges have the power to remove the defendant from the courtroom, to cite him or her for **contempt of court**, or, in extreme circumstances, to have the defendant bound and gagged.

The right to confrontation is sometimes modified for child witnesses, especially in abuse cases. Many courts in these cases install closed-circuit television cameras. This practice enables the child to testify on camera in a room separate from the one in which the defendant is located.

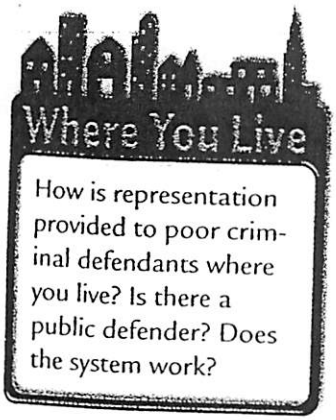
Problem 14.4

a. What are the arguments for and against closed-circuit television in child abuse cases?

b. Should it be allowed in cases involving rape or any other violent crime?

Freedom From Self-Incrimination

Freedom from self-incrimination means that you cannot be forced to testify against yourself in a criminal trial. This right comes from the Fifth Amendment and can be exercised in all criminal cases. In addition, the prosecutor is forbidden to make any statement drawing the jury's attention to the defendant's refusal to testify. While defendants in a criminal case have a right not to testify, they also have a right to



take the stand and testify if they wish. (In other countries, defe ; in criminal cases are *required* to testify.) Defense attorneys often counsel their clients not to take the stand for their own protection. For example, a defendant does not have to answer an inappropriate question if her attorney objects to it and the judge sustains, or agrees with, that objection. This is true for all witnesses, but once a defendant takes the stand, the prosecutor can use anything she says to elicit contradictory and harmful statements that can be used against her.

Related to the right against self-incrimination is the concept of **immunity.** Being granted immunity means that a witness cannot be prosecuted based on any information provided in a testimony. However, a person with immunity must answer all questions—even those that are incriminating. Prosecutors often use these laws to force people to testify against codefendants or others involved in the crime.

Problem 14.5

a. Suppose you are a defense attorney. What are the advantages and disadvantages of having a criminal defendant testify at trial?

b. If you were a member of the jury in a criminal trial, what would you think if the defendant refused to testify? Would you be affected by the judge's instruction not to draw any conclusion from this?

c. If a defendant is forced to stand in a lineup, give a handwriting sample, or take an alcohol breath or urine test, does this violate the privil against self-incrimination?

d. Do you think that U.S. law should be changed so that defendants are required to testify in criminal cases? Explain.

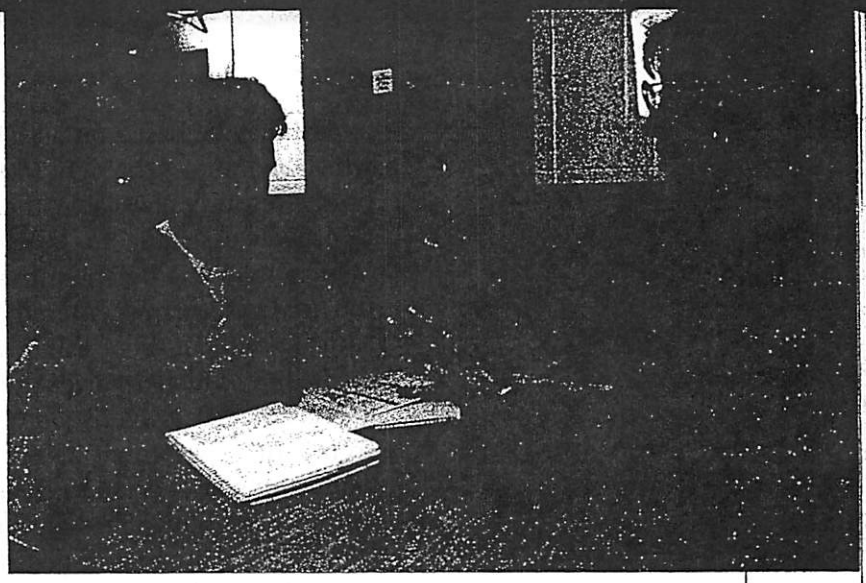
Right to an Attorney

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." At one time, this meant that, except in capital cases—those involving the death penalty or life imprisonment—a defendant had the right to an attorney only if he or she could afford one. However, in 1938, the U.S. Supreme Court required the federal courts to appoint attorneys for indigent defendants—those without financial means—in all federal felony cases. Twenty-five years later, in the case of *Gideon* v. *Wainwright* (1963), the Supreme Court extended the right to counsel to all felony defendants, whether in state or federal court. In 1972, the Supreme Court further extended this ruling by requiring that no imprisonment may occur, even in misdemeanor cases, unless the accused is given an opportunity to be represented by an attorney.

The right to the assistance of counsel is basic to the idea of a fair trial. In a criminal trial, the state (the people) is represented by a prosecutor who is a lawyer. In addition, the prosecutor's office has other resources including investigators, to help prepare the case against the accu

minimum, the defendant needs a ful lawyer to ensure a fair trial.

As a result of these Supreme Court decisions, criminal defendants who cannot afford an attorney have one appointed to them free of charge by the government. These attorneys may be either public defenders or private attorneys. The public defender's office is supported by the government. The job of the public defender's office is to represent poor people in criminal cases. Lawyers appointed by the court to handle criminal cases for indigent defendants are typically paid less than a private lawyer hired directly by a defendant. Some people criticize the overall quality of representation that poor criminal defendants receive in this country. These critics say that criminal defendants with money to hire their own lawyer have a much better chance of being found not guilty than economically disadvantaged defendants do.



It is important for a criminal defendant to have a skillful defense attorney. *In what ways can an attorney help a defendant prepare for trial?*

Problem 14.6

a. Are court-appointed attorneys as good as privately paid ones?

b. Assume a defendant wants to handle his or her own defense. Should this be allowed? Do you think this is a good idea?

c. Assume a lawyer knows that his or her client is guilty. Is it right for the lawyer to try to convince the jury the person is not guilty? Explain.

❶ How is representation provided to poor criminal defendants where you live? Is there a public defender? Does the system work?

❷ How does the criminal appeals process work in your state? Do appellate courts schedule oral arguments on criminal appeals, or do the judges make their decisions based on the briefs submitted by the parties?

Criminal Appeals

If the jury returns with a "not guilty" verdict, this is normally the end of the case. The state (prosecution) cannot appeal once the defendant has been acquitted of the offenses for which he or she was tried. If the verdict is "guilty" then the sentencing will follow.

Defendants who think they have been wrongly convicted have several options once the trial judge has entered the final judgment in the case. The defendant can ask the judge to overturn the jury's verdict and enter a verdict of not guilty or ask the judge to set aside the jury's verdict, declare a **mistrial,** and ask for a new trial. These strategies are seldom successful. The defendant can also appeal to a higher court. An appeal requests that a higher court review and change the decision of the trial court. In the appeal, the defendant can challenge the conviction or the sentencing decision.

Sometimes the defendant will want to hire a different lawyer for the appeal. This happens because lawyers who do trial work may not specialize in appellate work. It may also happen because the defendant's

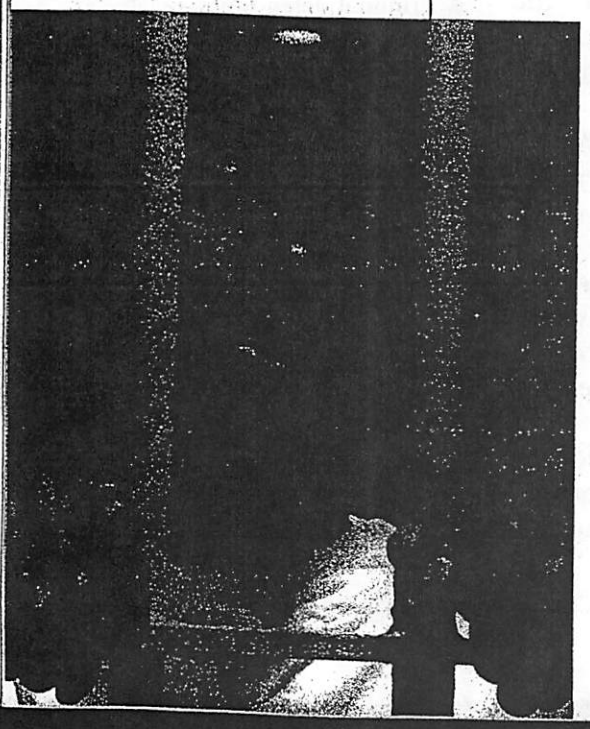
appeal may be based on an alleged violation of the Sixth Amendm which guarantees the right to effective assistance of counsel. Depending on the resources available, the public defender's office may be available to provide assistance to indigent defendants who wish to appeal.

Generally, the defendant must file a notice of appeal shortly after the final judgment is entered. This notice lets the prosecution and the court know that there will be an appeal. The appellate court then sets a schedule, which involves the preparation of legal briefs—short statements of each lawyer's side of the case. In some instances, an oral argument is presented before a panel of appellate court judges. The defendant's brief sets out the alleged errors of law at the trial that led to the conviction. The state's reply brief provides a response to those arguments. Among the possible errors are: ineffective assistance of counsel, improperly admitting evidence, giving the jury the wrong instructions, improper use of a sentencing guideline, and others.

In addition to the briefs, the appellate court receives the official trial record, which includes a transcript (what was said at the trial) and the documents and exhibits admitted into evidence by the judge. New information is not presented at the appeal. It can be expensive for the defendant to have the transcript prepared, which limits appeals. An indigent defendant, however, may be able to have a transcript prepared for free or for a small fee, depending on the state.

Remember from Chapter 5 that trial courts determine questions of fact (e.g., guilty or not guilty in a criminal case) and that appell courts determine questions of law. In order to win an appeal, defendant—now called the **petitioner** or **appellant** depending on the state's terminology—must convince the appeals court that there were serious errors of law made at the trial. Appeals courts tend to defer to trial judges and are not usually eager to overturn the result of the trial. If there are legal errors of a minor nature, then the outcome of the trial will not be changed.

In an appeal, the defendant claims that legal errors were made in his or her trial. *How does the appeals process work?*



In addition to appeals, the defendant may apply to a court for help by seeking a **writ,** which is an order from a higher court to either a lower court or to a government official, such as the warden of a jail or prison. The writ of **habeas corpus**—which literally means "to produce the body"—claims that a defendant is being held illegally and requests release. The writ can sometimes be used when an appeal could not be. For example, a defendant might use a writ to argue for his innocence based on DNA testing that occurred after the trial, a point that could not be made using an appeal.

The writ of habeas corpus can be filed with a state court for alleged state law violations or with a federal court for alleged violations of federal law. The writ of habeas corpus gives criminal defendants the right to ask for relief from confinement, but of course filing this writ does not necessarily mean that the court will grant the relief.

CHAPTER 15

Criminal Justice Process: Sentencing and Corrections

"It is insufficient to restrain the wicked by punishment unless you render them virtuous by corrective discipline."

— Inscription over the door of the Hospice of San Michele in Rome, Italy, 1704

The final phase of the criminal justice process begins with sentencing. Once found guilty, the defendant will be sentenced by the judge or, in a few states, by the jury. The sentence is perhaps the most critical decision in the criminal justice process. It can determine a defendant's fate for years or, in some cases, for life.

Imprisonment is just one of several sentencing options.

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Sentencing Options

Most criminal statutes set out a basic sentencing structure, but judges generally have considerable freedom in determining the actual type, length, and conditions of the sentence. Depending on the state, judges may choose from one or a combination of the following options:

- **Suspended sentence.** The sentence is given but does not have to be served at the time it is imposed. However, the defendant may have to serve the time later if he or she is rearrested on another charge or violates a condition of probation.
- **Probation.** The defendant is released to the supervision of a probation officer after agreeing to follow certain conditions, such as getting a job, staying drug-free, and not traveling outside of the area during the probation period.
- **Home confinement.** The defendant is sentenced to serve the term at home. Normally, the only time this defendant can leave the home is for essential purposes such as work, school, or a doctor's appointment. The defendant is sometimes required to wear an electronic monitoring device so that his or her activities can be monitored by the probation officer.
- **Fine.** The defendant must pay the government an amount of money set by the court.
- **Restitution.** The defendant is required to pay back or make up for whatever loss or injury was caused to the victim of the crime.
- **Work release.** The defendant is allowed to work in the community but must return to prison at night or on weekends.
- **Imprisonment.** The defendant is sentenced to a term in jail or prison. Some states require that a definite sentence be given, in which case the judge specifies the exact amount of time to be served (for example, two years). Some states provide for an indeterminate term, in which case the sentence is stated not as a specific number of years but as a minimum and maximum term (for example, not less than three years nor more than ten years). Some judges allow defendants in misdemeanor cases to serve short jail sentences on weekends.
- **Death.** The defendant is sentenced to die for his or her crime. In many states and in the federal court system, judges have the option of handing down the death penalty for the most heinous offenses. This controversial issue is discussed in more depth later in this chapter.

Electronic monitoring devices are often used for home confinement. *What are the advantages and disadvantages of such a sentence?*

The Case of . . .

The Three Strikes Law

California lawmakers passed the "Three Strikes" Law in March 1994, following the high-profile kidnapping and murder of 12-year-old Polly Klaas. Her abductor was a violent offender out on parole, living in the Klaas family's community. Outraged by this awful crime and eager for the legislature to get tougher on crime, California voters overwhelmingly approved Proposition 184. This law was designed to deter offenders from committing new crimes and to give longer prison terms to criminals who have been convicted of felonies in the past. By the late 1990s about 40 states had some form of recidivist statute, a law designed specifically to punish serious, repeat offenders.

Under California's Three Strikes Law, a strike is a conviction for a serious or violent felony. Once a defendant has one strike, conviction for the second strike results in the usual sentence for that crime being doubled. If a defendant is convicted of a third felony, the law requires that he or she receive a sentence of at least 25 years to life, with no possibility of parole before 25 years.

While strikes one and two must be for serious or violent felonies, *any felony conviction* will qualify as the third strike, whether or not the felony was serious or violent. In addition, certain offenses (called "wobblers") can be prosecuted as either misdemeanors or felonies, at the discretion of the prosecutor or the judge. Finally, the Three Strikes Law is retroactive and is not limited to crimes committed in California. Therefore, convictions from before the law was passed (1994) or in other states can count as strikes.

In November 1995, Leandro Andrade attempted to steal five G-rated videotapes from a Kmart, but was arrested upon leaving the store. Two weeks later, Andrade was arrested outside of another Kmart for attempting to steal more videotapes. The total value of all the tapes was approximately $150. Andrade, a longtime heroin addict, had a 15-year criminal history with five felonies and two misdemeanors on his record. None of the previous convictions were for violent offenses. Prosecutors determined that he already had two strikes under the California law when the prosecution for the Kmart thefts commenced. Under California law, petty theft with a prior conviction is one of the so-called wobblers, misdemeanors that can be prosecuted as felonies. Andrade, then 37, was convicted and sentenced to 25 years to life for *each* of the two petty theft counts (strikes three and four). According to the Three Strikes Law, those sentences must be served consecutively, not concurrently, so Andrade will not become eligible for parole for 50 years.

A federal appeals court found his sentence "grossly disproportionate" to the crime and a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Prosecutors for the state of California appealed to the U.S. Supreme Court.

Problem 15.1

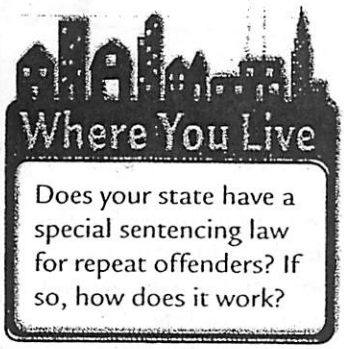
a. Why did California pass the Three Strikes Law? Why do you think these laws have become so popular in the United States?

b. What are the most convincing arguments for upholding Andrade's sentence?

c. What are the most convincing arguments for reversing the sentence?

d. How should the Court decide the Andrade case? What arguments might the dissenting justices make?

e. As a matter of public policy, do you support or oppose laws like the Three Strikes Law? What information would you need to come to a decision on this matter?



Many considerations must be made in the sentencing pr... The most critical of these are whether or not the state has fixed, or mandatory, sentencing statutes, and if so, whether or not the judge can exercise any discretion in assigning that statutory sentence. A judge who can exercise discretion may consider many factors. These include the judge's theory of corrections and what he or she thinks is in the best interest of society and the individual. In addition, most states authorize a **presentence report.** This report is prepared by the probation department, and contains a description of the offense and the circumstances surrounding it. The report also sets out the defendant's past criminal record, data on the defendant's social, medical, educational, and employment background, as well as a recommended sentence. After studying the report and listening to recommendations from the defense attorney and the prosecutor, the judge will impose sentence.

Many people criticize the system of sentencing because they think it gives too much discretion to the court. Two people who commit the same crime may receive very different sentences, which some view as an injustice. To combat the problem of inconsistency in sentencing, in 1988 Congress passed federal sentencing guidelines that listed more specifically the sentences judges should impose for certain federal crimes. These guidelines included mandatory sentences without the opportunity for parole. Many states have similar statutes that limit a judge's discretion and that impose mandatory sentences, espec... for repeat offenders. In some cases, these statutes have result... harsh sentences for seemingly minor offenses.

Critics of these federal and state guidelines argue that it is a mistake to take away a judge's discretion because many outside factors, such as poverty, lack of education, abuse, and drug addiction, contribute to criminal behavior. They believe judges should be able to consider these factors in deciding an appropriate sentence for each individual defendant. However, the U.S. Supreme Court has upheld the constitutionality of the federal sentencing guidelines. And, although the Eighth Amendment provides protection from cruel and unusual punishment, appellate courts are reluctant to overturn sentencing decisions of trial courts or sentencing guidelines established by state legislatures.

Purposes of Punishment

Over the years, the criminal sentence has served a number of different purposes, including retribution, deterrence, rehabilitation, and incapacitation. At one time, the primary reason for punishing a criminal was **retribution.** This is the idea behind the saying "an eye for an eye and a tooth for a tooth." Instead of individuals seeking revenge, society, through the criminal justice system, takes on the role of punishing those who violate its laws.

Another reason for punishing criminals is **deterrence.** Many people believe that punishment discourages the offender from committing another crime in the future. In addition, the punishment is meant to serve as an example to deter other people from committing crimes.

A third goal of punishment is **rehabilitation.** Rehabilitation means helping convicted persons change their behavior so that they can lead useful and productive lives after release. Rehabilitation is based on the idea that criminals can overcome the social, educational, or psychological problems that caused them to commit a crime and that they can be helped to become responsible members of society. Educational, vocational, and counseling programs in prisons and jails are designed to rehabilitate inmates.

Rehabilitation programs help inmates change their behavior so they can lead productive lives after release. *What kind of education and training should an inmate receive?*

A fourth reason for punishment is **incapacitation.** This means that the criminal is physically separated from the community and the community is protected as a result of this incapacitation. While confined in prison, the offender does not pose a threat to the safety of the community.

Parole

In most states, the actual length of time a person serves in prison depends on whether **parole** is granted. Parole is the release of a convicted person from prison before his or her entire sentence has been served. Depending on the state, a person might become eligible for parole after serving a minimum sentence specified by the judge or law. In other states, people automatically become eligible after serving a portion of the total sentence (for example, one-third).

Eligibility for parole is not a right but, rather, a privilege. Inmates may go before a parole board that makes the decision. Some inmates are never paroled and serve their full sentences in prison. The federal system and some states do not have a system of parole, and critics of parole say this is better, because it gives certainty to the sentence and is more likely to have a deterrent effect. Others believe inmates should be evaluated periodically and released early if there is evidence they have been rehabilitated.

At the end of 2001, nearly 6.6 million people were on probation, in jail or prison, or out on parole. This figure represents 3.1 percent of all U.S. adult residents.

Does your state have a parole system, or has it been abolished? Do you think the parole system is a good thing? Explain.

Problem 15.2

Review the information on the five defendants described in the bail hearing on page 159. Assume that each is convicted of the crime charged. Study the sentencing options on page 174 and prepare a presentence report for each of these defendants. Recommend a sentence and explain what purposes would be served by each sentence you recommend. Explain why and when each should be eligible for parole, if they should be eligible at all.

Capital Punishment

Capital punishment, also known as the death penalty, is the most controversial sentence given to defendants. It has a long history in America. The first person executed for murder among settlers in America was hanged in 1630. In colonial years, the death penalty was imposed for a number of different crimes. Gradually, however, capital punishment was restricted to the most serious crimes—usually murder and rape. In 1977, however, the U.S. Supreme Court held that the death penalty was an unconstitutional punishment for the crime of rape.

People have debated the issue of capital punishment for many years. Public protest against the death penalty gradually reduced the number of executions from a peak of 199 in 1935 to only one in 1967. For the next 10 years, executions were halted while the courts studied the legality of capital punishment.

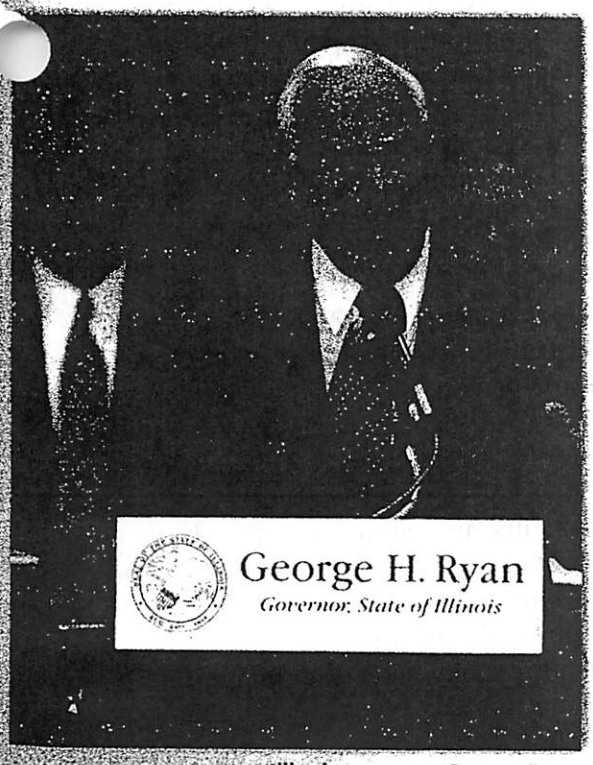
In the 1972 case of *Furman* v. *Georgia,* the U.S. Supreme Court held that the death penalty as then applied was unconstitutional because juries were given too much discretion in assigning this sentence. States then rewrote their capital punishment laws. In 1978, the Court ruled that the new laws were constitutional as long as aggravating and mitigating circumstances were considered in sentencing. Executions soon resumed. According to the U.S. Department of Justice, at the end of 2001, there were 3,581 prisoners sentenced to death. Among them:

- 1,969 were Caucasian
- 358 were Hispanic
- 1,538 were African American
- 28 were Native American
- 33 were Asian
- 13 were classified as "other race"
- 51 were women
- 2 in 3 had prior felony convictions
- 1 in 13 had prior homicide convictions
- the average education attained was 11th grade
- the average age at the time of arrest was 28 (about 13 percent were 19 years old or younger at the time of their arrest)
- the youngest person on death row was 19, and the oldest was

Law in Action

DNA and the Death Penalty

Opponents of the death penalty point out that some people sentenced to death were found to be innocent after their executions. Much of the proof of wrongful convictions has been based on DNA evidence—precise technology that has been widely available only since the 1990s. These findings have cast doubt on the guilt of many death row inmates who were sentenced prior to the availability of this conclusive evidence. In recent years, policy makers have considered how to deal with this problem in light of the possibility—even if remote—that someone might be waiting to be executed for a crime he or she did not commit.



Illinois governor George Ryan

In a stark demonstration of concern about the capital punishment system, in early 2003, Illinois governor George Ryan commuted the death sentences of all 156 inmates on Illinois's death row. This came after more than a dozen inmates were exonerated through an investigation initiated by journalism students at Northwestern University. Governor Ryan's decision followed his discovery that four other death row inmates had been tortured into confessing to crimes they did not commit. Although many of these commutations have been appealed and most have been converted to life sentences, Governor Ryan believed his decision was appropriate in light of the error-ridden system in his state, and a necessary challenge to what he believed to be "one of the great civil rights struggles of our time."

Problem 15.3

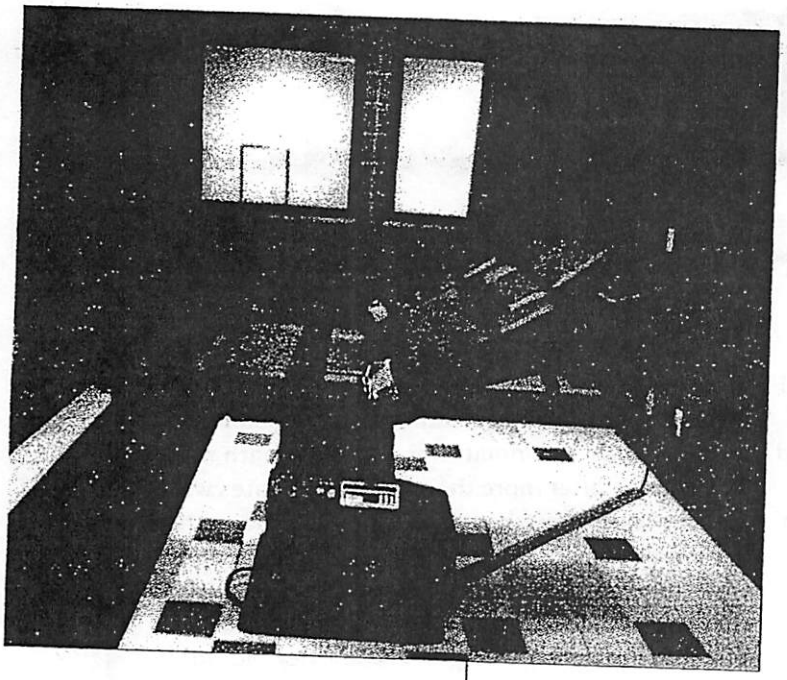
a. Do you think Governor Ryan was justified in commuting the death sentences of all death row inmates based on investigations of only a fraction of individual cases?

b. What systematic problems do you think may have led to the incarceration and sentence of those and other innocent defendants?

c. Do you favor or oppose the use of the death penalty? Explain your answer. If you favor it, to what crimes should it apply?

d. If you oppose the death penalty, what do you think is the strongest argument in favor of it? If you favor the death penalty, what do you think is the strongest argument against it?

e. How do you think states should deal with the possibility that new evidence (such as conclusive DNA evidence) could prove the innocence of someone on death row?



Many states use lethal injection as the method of execution in execution chambers such as this. *Does capital punishment deter crime?*

As of 2003, 38 states had death penalty statutes. States use various methods to carry out the death penalty, and some states use more than one method. Thirty-seven states use lethal injection, ten states use electrocution, five states use lethal gas, three states use hanging, and three states use firing squads. State-by-state death penalty information can be found on pages 619–621.

Most capital punishment laws call for a two-part trial. In part one, the jury decides guilt or innocence. The defendant usually knows if he or she may face the death penalty if convicted. If the defendant is found guilty, in part two of the trial process, the jury decides whether the defendant should receive the death penalty. The laws set forth guidelines for determining whether death or life imprisonment is appropriate. Judges and juries are required to consider both aggravating and mitigating circumstances. **Aggravating circumstances** are factors that suggest a more severe punishment is appropriate, such as a particularly gruesome murder, crimes involving children, or previous convictions of the accused. **Mitigating circumstances** are factors that suggest a less severe punishment is appropriate. Examples include a history showing that the victim had previously abused the defendant, the defendant's age, or the defendant's having no prior criminal record.

More than half of the countries in the world have abolished the death penalty either in law or in practice. Although many countries still use the death penalty, the controversy over capital punishment continues. The debate involves legal, political, and moral issues: Is the death penalty constitutional? If so, for what crimes? Is it a moral punishment for murder? Does it deter crime? Is it applied fairly?

Opponents of capital punishment claim that no one who values life can approve of the death penalty, saying "thou shalt not kill" also applies to those who carry out the death penalty. They further argue that the death penalty does not deter murder, citing statistics showing that murder rates are the same in states with the death penalty as in those without it. Opponents also argue that the death penalty is applied in an unfair manner, that members of minority groups are more likely to receive it, and that it violates the Eighth Amendment's ban against "cruel and unusual punishment."

Opponents of the death penalty agree that communities must be protected from dangerous criminals, but many feel that a sentence of life without parole is a better way to accomplish this goal. Life without parole is still a very severe punishment, communities are protected, and yet the sentence can be reconsidered if evidence of innocence is discovered after conviction.

Where You Live

Does your state have capital punishment? If so, has it been an effective deterrent to crime in your state? If your state does not have capital punishment, how does it punish those convicted of the most severe crimes?

The Case of . . .

The Death Penalty for Mentally Disabled Defendants

Daryl Atkins and an accomplice abducted Eric Nesbitt, robbed him, and drove him to an ATM where cameras recorded them forcing him to withdraw more cash. They then took him to an isolated location and shot him eight times. Atkins, who had a history of felony convictions, and his accomplice were convicted of the killing in a Virginia state court.

At the penalty phase of the trial, Atkins's lawyer presented evidence from a psychologist showing that Atkins was mildly mentally disabled. The jury imposed the death penalty and the Virginia Supreme Court upheld the sentence. The case was appealed to the U.S. Supreme Court. At issue was whether it is a violation of the Eighth Amendment's cruel and unusual punishment clause to impose the death penalty on a mentally disabled person.

Opinion A

Mentally disabled persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. However, because of their disabilities in reasoning, judgment, and impulse control, they do not act with the same level of culpability as other serious adult criminals. In 1988, when Congress enacted a federal death penalty law, it excluded persons who are mentally disabled from receiving that sentence. Since then, 18 states with death penalty laws have decided not to apply them to mentally disabled persons. Combined with the 14 states that completely reject the death penalty, this indicates a national consensus against imposing the death penalty on mentally disabled defendants. Because the Eighth Amendment prohibits punishments that are excessive, we hold that a state cannot impose the death penalty on a mentally disabled offender.

Opinion B

While it is true that 18 states have passed laws exempting mentally disabled defendants from the death penalty's application, 19 other states (including Virginia) continue to leave the question of the proper punishment of individual defendants to judges or juries familiar with the particular offender and with his or her crime. Surely a national consensus does not exist against applying the death penalty to all defendants who are mentally disabled. In determining what is cruel and unusual punishment under the Eighth Amendment, we look to state legislatures for objective evidence of contemporary values. Under our system of shared power (federalism), the best way to determine whether Atkins received an acceptable punishment is to look at the jury's decision and Virginia state laws. Neither national opinion polls nor the laws of other states should result in our reversing the opinion of the Virginia Supreme Court.

Problem 15.4

a. What happened in this case? Why was Atkins given the death penalty?

b. Based on the opinions, what are the strongest arguments for upholding the state supreme court decision? For reversing it?

c. How should this case be decided? Explain.

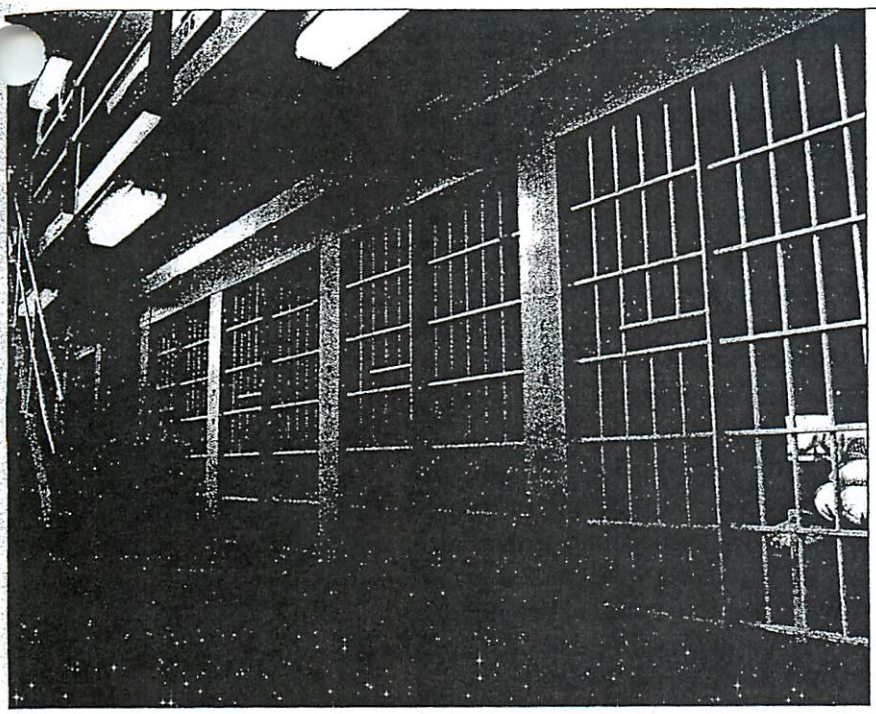
d. Assume the U.S. Supreme Court decides to overturn the Virginia Supreme Court decision. Now assume the Court is presented with a case where a 15-year-old is convicted and sentenced to death in a state that allows such sentences for juveniles. If that case is appealed to the U.S. Supreme Court, how might the justices analyze it?

Advocates of the death penalty say that killers get what they deserve. They argue that the threat of death does deter crime. They concede that studies on deterrence are inconclusive, but maintain that people fear death more than any other punishment. Advocates also point to opinion polls showing that most Americans favor capital punishment. They argue that execution protects society, saves the government money, and that the death penalty is fairly applied (the Supreme Court has upheld this view). Finally, in light of evidence that there may be innocent people on death row, many proponents are willing to consider post-conviction relief measures. These measures include an automatic appeal in the event that conclusive evidence of innocence becomes available. However, these same proponents are not willing to abolish the death penalty altogether.

For Your Information . . .

Jails and Prisons: What's the Difference?

- Jails are operated by cities and counties. They are used to detain people awaiting trial and to hold mental patients, drug addicts, alcoholics, juvenile offenders, and felons on a temporary basis as they await transfer to other facilities. Jails also hold people convicted of minor crimes for which the sentence is one year or less.
- Jails in the United States vary in size from big-city facilities holding over 1,000 inmates a day to small rural jails consisting of an office and a few cells.
- Prisons are operated by federal or state governments. They are used to incarcerate people convicted of more serious crimes, usually felonies, for which the sentence is more than one year.
- As of 2000, the federal government operated 84 prisons, state governments operated 1,558 prisons, and 26 facilities were privately run (housing mainly federal inmates).
- U.S. prisons range in size from small facilities to huge, maximum-security penitentiaries sprawling over thousands of acres.
- Some U.S. prisons are so big that they resemble small cities. For example, both Louisiana's State Prison at Angola and Michigan's State Penitentiary at Jackson house over 4,000 inmates and employ thousands of staff members.



Inmates' lives are controlled by many rules. *Should inmates lose all rights once they are sent to prison? If not, which rights should they keep?*

Corrections

When a person is convicted of a crime, state and federal governments have the right to place the offender in the corrections system. There are several treatment and punishment options available to the government. These include community corrections, halfway houses, jails, and prisons.

Life Behind Bars

A prison or jail inmate's life is controlled by many rules. Inmates are told when to get up and when to go to sleep. Mail and phone calls are screened. Access to radio, television, and books is controlled. Visitors are limited, and inmates are subject to constant surveillance and searches. Some inmates work at prison jobs, which usually pay very little. Others spend all day locked in their cells.

Until the 1960s, courts had a hands-off policy toward prisons. Inmates had few, if any, rights. Prison officials could make almost any rules they wanted. As a result, harsh treatment, solitary confinement, and beatings were all fairly common.

Over the years courts established and enforced some prisoners' rights. However, in recent years the U.S. Supreme Court has said that people who enter prison must give up certain rights. Inmates retain limited versions of some rights after entering prison. These include the right to be free from cruel and unusual punishment, the right to freedom of religion, the right to due process, the right to medical treatment, and the right of access to law libraries and the courts.

Prison Overcrowding

During the 1990s and into the twenty-first century, there was a significant increase in the number of people incarcerated in the United States. From 1995 to 2001, there was a 23 percent increase in the number of people under some form of correctional supervision (see Figure 15.1). By the middle of 2002, there were more than 1.4 million adults in U.S. prisons, with nearly 700,000 awaiting trials or serving shorter sentences in jails.

According to the U.S. Department of Justice Bureau of Justice Statistics, in the 12 months that ended June 30, 2002, the jail population went up by 34,235 inmates, a 5.4 percent increase—the largest since 1997. State prisons added 12,440 inmates, a 1 percent increase, while the federal prison system grew by 8,042 inmates, a 5.7 percent increase. The current rate of incarceration in the United States is six to ten times higher than that of most industrial nations.

This increase was caused by a get-tough-on-crime policy that resulted in more criminal defendants going to prison for longer periods. There was increasing use of mandatory sentences, a lengthening of some prison terms, and decreasing use of parole and other early-release options. As the crime rate fell into the twenty-first century, prison populations remained high because of longer sentences and a greater willingness to revoke probation and parole.

With more defendants entering the correctional system, there was a need to expand jail and prison capacity. In 2000 alone, there were 27 new state and 4 new federal institutions built, increasing the capacity of the system by more than 23,000 beds. In addition, expansions and renovations at 58 institutions increased capacity by nearly

FIGURE 15.1 Changes in the Criminal Justice System Population*

Year	Probation	Jail	Prison	Parole	Total
1990	2,670,234	405,320	743,382	531,407	4,350,300
1995	3,077,861	507,044	1,078,542	679,421	5,342,900
2001	3,932,751	631,240	1,330,980	731,147	6,592,800

*Federal and state figures combined

Source: U.S. Department of Justice, Bureau of Justice Statistics

The number of offenders in the criminal justice system increased throughout the last decade of the twentieth century. **ANALYZE THE DATA** *By how much did the number of people in prison increase between 1990 and 2001?*

Visit streetlaw.glencoe.com and click on **Textbook Update—Chapter 15** for an update of the data.

14,000 beds. The average construction cost per bed in 1996 was just $40,000, while the average cost of maintaining a person in prison was about $20,000 per year (about $56.00 per day). Today, the cost of maintaining a person in prison ranges from $15,000 to more than $50,000 per year.

Some critics of the prison-building boom argue that funds could be better spent on prevention and treatment programs. Much of the increase in the federal inmate population, for example, resulted from more aggressive prosecution in drug cases. Some argue that community-based corrections programs with drug treatment opportunities would be a more effective and less expensive way to deal with these offenders. Others contend that longer, more certain punishment has been an effective deterrent to crime and has increased public safety, as dangerous criminals have been taken off the streets and placed in secure facilities.

The growing prison population has created many problems. Overcrowding sparks fights and riots. Drug use, sexual assault, and violence are all common occurrences. Life behind bars is often dangerous and unpleasant. Many prisoners live in tiny cells under uncomfortable conditions.

In recent years, the overcrowding problems have led some states to contract with other states or the federal government to send their prisoners elsewhere. Others have looked to private corporations to run their prisons for them, claiming that private prisons can save millions of dollars and lead to better and more efficiently run institutions. Critics worry that private corporations may violate inmates' rights more often, lobby for longer sentences, and be less concerned about rehabilitation. The courts have consistently held, however, that private prison and jail operators must protect the rights of prisoners to the same extent as public correctional agencies.

Does your community have any prisons, jails, or halfway houses? Who is sent to these facilities? What are living conditions like in these institutions? Where do people from your community serve jail or prison time when they are convicted of a crime? Are there programs available in your community to help ex-convicts reenter society?

Problem 15.5

a. Should prisoners have rights? If so, what rights should they have? Make a list of these rights.

b. If you were a prison warden, what rules would you make to control the prisoners? List these rules.

c. What, if anything, should be done to reduce prison overcrowding? Should more and bigger prisons be built, or should the criminal justice system be more selective about who is locked up?

d. Should private corporations be allowed to run jails and prisons for profit? Role-play the following scenario: As the head of a corporation that runs private homes for the elderly, explain to a county sheriff why the county should hire your corporation to build and operate a new jail to replace the old, overcrowded one. Would you support the idea if you were the sheriff? Would you support the idea if you were a prisoner? A defense attorney? Explain.

Reentry programs provide counseling and long-term support. *What challenges do ex-offenders face in reentering society?*

Reentering Society

While tougher sentencing laws have put greater numbers of people behind bars, state corrections budgets stretched by this larger prison population have had to reduce some of the programs designed to help offenders reenter society once they have served their sentences. Of special concern is the need to help offenders avoid becoming repeat offenders. More than 630,000 adult offenders leave prison every year and return to their communities. More than 100,000 juveniles leave residential facilities and return to their communities. Within three years more than half of both groups typically become repeat offenders.

The U.S. Department of Justice, in collaboration with other federal agencies, has developed a comprehensive initiative to enhance comm[illegible]nity safety and reduce serious c[illegible] committed by ex-offenders. This initiative targets both adult and juvenile offenders. It is called *reentry* and has three phases. Phase one programs begin in correctional institutions and are focused on providing education, mental health services, substance abuse treatment, job training, and mentoring to convicts to psychologically prepare them to reenter society. Phase two programs focus on the actual transition from the institution back into the community, including making logistical decisions about where to live, how to find a job, and ways to reestablish ties with members of the community. This phase also provides mental health and substance abuse treatment. The final phase helps link individuals who have left the supervision of the justice system with a network of social services agencies and community-based organizations. These groups can provide long-term support and mentoring relationships between convicts and counselors.

Planning for successful reentry begins when the defendant enters the correctional system. While reentry is not an "anti-punishment" philosophy, it does recognize that the overwhelming majority of inmates will at some point return to their communities. Adequate preparation of inmates—and of the community—for reentry ca[illegible] reduce recidivism.

CHAPTER 16

Juvenile Justice

In the United States, juveniles in trouble with the law are treated differently from adults. However, this has not always been the case. In earlier times, children were thrown into jails along with adults. Long prison terms and corporal punishment (involving striking the juvenile's body) were common. Some children were even sentenced to death for crimes that seem relatively minor by today's standards.

"Better build schoolrooms for the boy than prison cells for the man."

— Eliza Cook (1817–1889)

History and Overview of Juvenile Courts

In the mid-nineteenth century, reformers began to argue that the failure of the family was the cause of delinquent behavior. In other words, parents had failed to teach their children proper values and respect for authority. The solution that evolved was for a separate juvenile court to assume the responsibility that had been the parents' job. Instead of punishing young people through the adult system, a separate juvenile court would seek to rehabilitate them by taking a moralistic approach and trying to help them learn community values.

Street Law online

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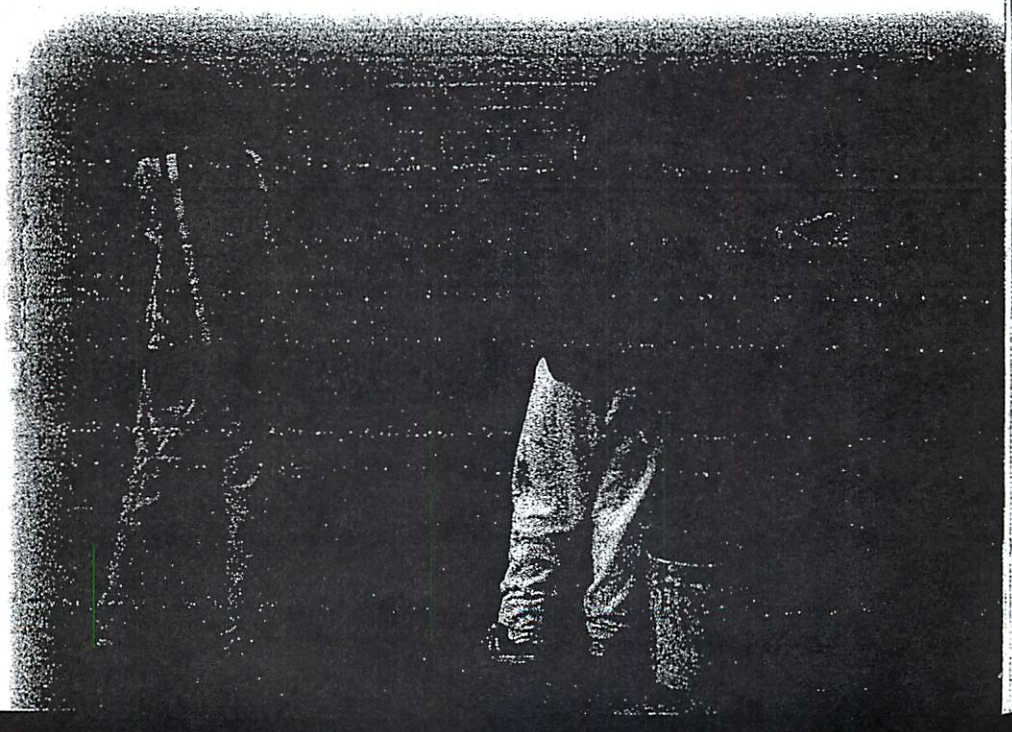
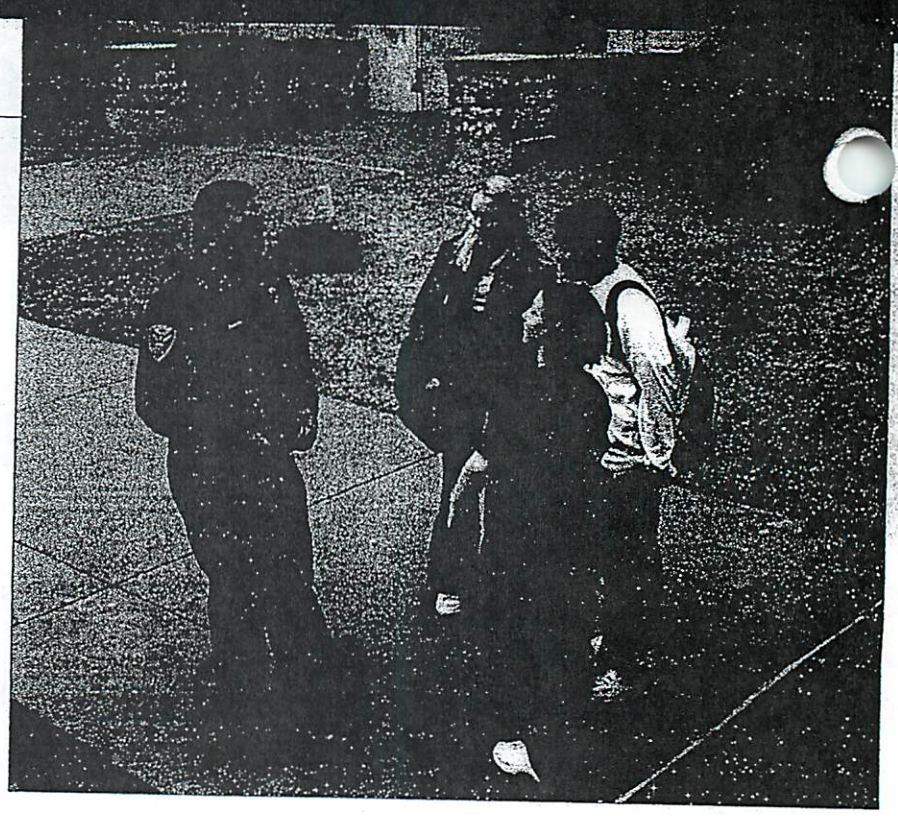


Juvenile offenders may be put to work as part of their punishment.



Truancy, or skipping school, is a status offense. *What other acts are considered status offenses?*

Under this philosophy, the first juvenile court was set up in Cook County, Illinois, in 1899. Juvenile courts were designed to be informal, allowing the court to act as a parent or guardian for the ch[illegible]. The right of the state to intervene in the life of a child is based on the concept of *parens patriae,* a Latin term meaning "parent of the country." Using this concept, the court assumed the role of a parent and was permitted to do whatever it thought was necessary to help the child. Hearings were closed to the public so the youth's identity would remain private. In addition, the juvenile court used terms different from those used in the adult court. (See the FYI feature on page 195 for a comparison of terms used in the juvenile and adult justice systems.)

Today, juvenile courts generally handle three groups of juveniles: delinquent offenders, status offenders, and neglected and abused children. **Delinquent offenders** are youths who have committed acts that would be crimes if committed by adults under federal, state, or local law. **Status offenders** are youths who have committed acts that would not be crimes if committed by adults. Status offenses include running away from home, skipping school, violating curfew, refusing to obey parents, or engaging in certain behaviors such as underage consumption of alcohol. Status offenders are considered to be unruly or beyond the control of their parents or legal guardians; they are persons or children in need of supervision (PINS or CHINS).

Neglected and **abused children** need the court's protection from a parent or guardian. A neglect case occurs when the parent or guardian is charged with failing to provide adequate food, clothing, shelter, or medical care for the child. An abuse case occurs when a child has been sexually, physically, or emotionally abused. In eit[illegible]

case, a judge must decide whether the child needs the protection of the court. The next step is to determine whether the child should remain with the family while under court protection. The judge has several options to choose from and works closely with social services agencies. Such agencies can provide a range of services, including counseling and treatment. The judge usually sets certain conditions for the child to remain with his or her family, such as participation by the parents in a counseling program or a later hearing to monitor the progress of the case. The judge may also decide to place a child with relatives or in foster care.

Some people believe parents should be held responsible for crimes committed by their children. Those in favor of these **parental responsibility laws** believe they are particularly appropriate in cases in which parents know or should know that their children are using or selling drugs or belong to juvenile gangs. In some states, parents may also be charged with **contributing to the delinquency of a minor.**

Since 1899, the juvenile justice system has continued to be defined in part by the tension between a "humanitarian" philosophy (rehabilitate the offender) and a "control" philosophy (punish the offender). This tension has played a major role in determining the current system's practices.

Problem 16.1

a. Why did reformers want to change the way children were treated?

b. What is *parens patriae*? Do you agree with this idea?

c. What is the difference between a status offender and a delinquent offender?

d. Do you favor or oppose parental responsibility laws? Explain. If you believe parents should be held criminally responsible, give three examples of situations in which this should apply.

e. Which philosophy—humanitarian or control—is more appropriate for juveniles who have been found delinquent? Should there be a balance between the two? Explain.

Who Is a Juvenile?

Before the establishment of juvenile courts, children under the age of 7 were never held responsible for criminal acts. The law considered them incapable of forming the necessary criminal intent. The law at that time also assumed that children between the ages of 7 and 14 were incapable of committing a criminal act. However, this belief could be disproved if it was shown that the child knew that the act was a crime or that it would cause harm to another and committed it anyway. Children over the age of 14 could be charged with a crime and handled in the same manner as an adult.

Does your state have a waiver law for transfer of juveniles to the adult system? At what age may a juvenile be tried as an adult? Who makes the decision? What factors must be considered?

You Be The Judge

Determining Juvenile Status

In each of the following situations, decide whether the person should be tried as a juvenile or transferred to criminal court and tried as an adult. Describe the factors you considered and the reasons for your decisions.

a. Marshall, 15, is accused of robbing an 86-year-old woman at gunpoint. He has a long juvenile record, including acts of burglary, and has bragged about the robbery.

b. Leigh, 17, is accused of killing a pedestrian while driving a stolen car. She has never been in trouble before, is remorseful about the killing, and claims that she planned to return the car after a short joyride.

c. Carter, 14, is accused of selling drugs for his older brother. According to the police, one day a customer stole the money Carter had collected for his older brother. The police claim that Carter then stabbed the customer with a knife. He has been arrested twice before for selling drugs, but the charges were dropped.

d. Angela, 15, is taken into custody by police for carrying a handgun without a license. This is the second time she has been taken into custody for a weapons violation. Her brother was killed in a drug deal one year earlier. Angela says she carries a gun because she does not feel safe at school or in her neighborhood.

Today, almost all states set age limits to determine whether a person accused of a crime will be handled in adult or juvenile court. In most states, young people are considered juveniles until age 18. However, some states set the age limit at 16 or 17.

In most states, a juvenile charged with a serious felony such as robbery, assault, rape, or murder can be tried as an adult. Some states have laws that automatically transfer a youth to adult court under certain conditions. In other states, judges have the authority to waive certain cases to adult criminal court. Still other states allow the prosecutor to make the decision, while some states require a hearing before a youth may be transferred.

At the **transfer hearing** (or **waiver hearing**), a judge usually considers: (1) the juvenile's age and past record, (2) the seriousness of the crime, and (3) the likelihood that the juvenile may be rehabilitated before the **age of majority.**

As a result of a "get-tough" attitude involving juvenile crime, many states have revised their juvenile codes to make it easier to transfer juveniles to adult court. Today, most states give juvenile courts discretionary power to designate appropriate cases for adult prosecution. Several states have provisions mandating the waiver of cases th

et certain age and offense requirements, while others designate a gory of cases in which the waiver to adult court is presumed to be appropriate, but may be challenged by the juvenile offender. Gang members who are involved in violent crime are often transferred to adult court under these provisions.

Problem 16.2

The Office of Juvenile Justice and Delinquency Prevention (OJJDP), a part of the U.S. Department of Justice, is a federal agency responsible for addressing the public safety issues of juvenile crime and youth victimization in the United States. It is guided by the *Juvenile Justice and Delinquency Act*, which was reauthorized in 2002 and designed to promote greater accountability in the juvenile justice system. Federal funds are available to state and local governments to combat juvenile crime through education and evaluation programs.

The OJJDP has determined that an effective juvenile justice system should do three main things. First, it must hold the juvenile offender accountable for delinquent acts. Second, it must enable the juvenile to become a capable, productive, and responsible citizen. Third, it must ensure the safety of the community.

a. Will carrying out these three elements make the juvenile justice system effective? Why or why not? Would you change this list in any way? If so, how?

Does your state's juvenile justice system perform each of these elements? Could any of them be done better? Explain.

c. Do any of these three elements conflict with each other? Which ones? Is it possible to do all three at once? Why or why not?

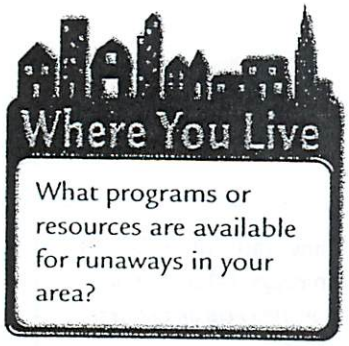
d. Do you think it should be mandatory that all juveniles who commit a serious violent crime be tried in adult criminal court? Why or why not? Should it be automatic, or should the decision be left to a judge? A prosecutor? Someone else? Explain.

Many status offenders are runaways. *Where can runaways find help on the streets?*

Status Offenses

When a juvenile court is confronted with a status offender, special problems arise. Juveniles who fall into this category are charged with being "beyond control," "habitually disobedient," truant from school, or other acts that would not be crimes if committed by an adult.

Status offenders may be emotionally troubled juveniles who n help. Many status offenders are runaways or young people with drinking and drug problems. Some are trying to escape from abusive or other difficult home situations. It is estimated that 13 million youths are on the street each day, and that 1 in 7 minors will run away each year. Nearly 70 percent of these youths are between the ages of 14 and 17, and more than 75 percent of runaways are girls. Although most runaways return home of their own accord, others are picked up by the police and referred to the juvenile court.



In recent years, a number of programs have been set up to help runaways. The primary service provider for runaway and homeless youths is a national network of runaway shelters. These include counseling centers, shelters, and a nationwide toll-free phone number that runaways can call for assistance. For example, the National Runaway Switchboard (1-800-621-4000 or www.nrscrisisline.org) provides information you can pass on to a young person living on the street. Many of these young people need to earn money. Your local runaway shelter may be able to help you and your family structure a job to fit the needs of a young person on the street. You and your family can also help by making a donation to a shelter or volunteering your time.

As a general rule, a single act of unruly behavior is not enough to support a finding that a juvenile is in need of court supervision. Rather, most states require proof that the young person is habitually disobedient or has repeatedly run away, skipped school, or been of control.

Because of problems at home, parents sometimes ask the court to file a PINS (person in need of supervision) petition against their child. Children charged with status offenses may defend their conduct by showing that it was justified or that the parents were unreasonable and at fault. In such cases, the PINS petition might be withdrawn by the court and replaced by a neglect petition against the parents.

Problem 16.3

a. Do you think courts should interfere in disputes between parents and children? If not, why not? If so, why and under what circumstances?

b. Should attendance at school be mandatory? Why or why not? What should be done about students who are chronically absent from school?

Juvenile Justice Today

In the 1960s, many people argued that the juvenile court system was providing harsher treatment than the adult system without the procedural safeguards and constitutional rights that defendants would have in adult courts. Beginning in 1966, this movement found support in the U.S. Supreme Court, and several decisions were later made th began to change the theory and operation of the juvenile justice syste

Law in Action

Hearing on a Curfew for Teens

As communities have become concerned about violence by and against young people, teen curfew laws have become popular. Some people welcome the idea of such curfews. Others feel they violate the rights of teens and are unfairly enforced.

Problem 16.4

Read the proposed curfew law:

IT WILL BE AN OFFENSE FOR PERSONS UNDER THE AGE OF 18 TO BE OUT OF THEIR HOMES FROM 11:00 P.M. TO 6:00 A.M. SUNDAY THROUGH THURSDAY NIGHTS. ON FRIDAY AND SATURDAY NIGHTS THE CURFEW SHALL BEGIN AT MIDNIGHT. VIOLATORS WILL BE FINED $100. EXCEPTIONS ARE YOUNG PEOPLE CHAPERONED BY ADULTS, ATTENDING A PLANNED COMMUNITY ACTIVITY, OR TRAVELING TO OR FROM WORK.

After reading the law, identify who in the community is likely to oppose the law. Who is likely to support the law? Then divide into five groups:

- **Group one is the city council.** You will conduct a hearing and decide whether to enact the law, change it, or not act on it, based on the testimony you hear from the community.
- **Group two is the police department.** Your group opposes the law and will testify against it. You believe the curfew will require too much time and energy to enforce and that existing laws are sufficient to combat drug abuse and violence.
- **Group three is "Families Against Violence."** Your group supports the law and will testify in favor of it. Parents and students in your group believe the curfew will reduce drug sales and use, help parents with out-of-control children, and promote family communication about following rules.

A curfew reminder

- **Group four is the local merchants association.** Your group opposes the law and will testify against it. Teens are important customers—and employees—at local stores and movie theaters, and the merchants believe the curfew will harm business.
- **Group five is the school board.** Your group supports the law and will testify in favor of it. The board members believe that students should be home doing their homework and preparing for the next school day.

Group one should meet to decide how to run the hearing and to discuss questions it will ask the other groups. The other groups should meet to further develop their testimony. Additional groups can be added to the hearing.

After the hearing, the city council should deliberate and decide whether to pass, not to pass, or to amend this law.

The Case of . . .

Gerald Gault

Gerald Gault, 15, was taken into custody and accused of making an obscene phone call to a neighbor. At the time he was taken into custody, his parents were at work and the police did not notify them of what had happened to their son. Gault was placed in a detention center. When his parents finally learned that he was in custody, they were told that there would be a hearing the next day, but they were not told the nature of the complaint against him.

Mrs. Cook, the woman who had complained about the phone call, did not show up at the hearing. Instead, a police officer testified to what he had been told by Mrs. Cook. Gault blamed the call on a friend and denied making the obscene remarks. No lawyers were present, and no record was made of what was said at the hearing.

Since juries are not allowed in juvenile court, the hearing was held before a judge, who found by a preponderance of the evidence that Gault was delinquent and ordered him sent to a state reform school until age 21. An adult found guilty of the same crime could have been sent to a county jail for no longer than 60 days.

Problem 16.5

a. Make lists of the fair and unfair things that happened to Gerald Gault. Explain your reasoning for each item.

b. How would you change the unfair things on your list to make the proceedings fairer for Gerald Gault? Why is it important to change these things?

c. What rights that adults have were not granted to juveniles in the *Gault* case?

d. Do you agree with the *Gault* decision? Why or why not? Should adults and minors have the same legal rights? Why or why not?

e. Do you think Gerald Gault's hearing wo have turned out differently if he had initi been given the rights the U.S. Supreme Court later ruled that he was entitled to?

In the *Gault* case discussed above, the U.S. Supreme Court held that juveniles should receive many of the same due process rights as adults. Specifically, the Court ruled that juveniles charged with delinquent acts are entitled to four rights: (1) the right to notification of the charges against them, (2) the right to an attorney, (3) the right to confront and cross-examine witnesses, and (4) the right to remain silent.

The *Gault* decision gave young people accused of a crime many of the same rights as adults, but it also left some unanswered questions. In the case of *In re Winship* (1970), the U.S. Supreme Court decided that juveniles charged with a criminal act must be found "delinquent by proof beyond a reasonable doubt." This is the same standard required in adult criminal court. However, in *McKeiver* v. *Pennsylvania* (1971), the Supreme Court decided that jury trials were not required in juvenile cases. In reaching this decision, the Court expressed concern that jury trials could hurt juveniles by destroying the privacy juvenile hearings.

More recently, a series of court decisions and legislative actions have changed the informality of juvenile court proceedings somewhat. Some courts even grant spectators and newspaper reporters access to juvenile court proceedings. In general, however, although juveniles now possess many of the same rights as adults, the Supreme Court has made it clear that not all of the procedures used in an adult court apply in a juvenile court proceeding.

The federal government has also played a major role in guiding the juvenile courts. The *Juvenile Justice and Delinquency Prevention Act of 1974* requires the Department of Justice to oversee changes ordered by Congress. The act required the juvenile court system to change the way in which it treated status offenders and delinquent offenders. For example, status offenders were removed from institutions, or "deinstitutionalized." Juvenile offenders remaining in institutions were separated from incarcerated adults. In addition, each state took responsibility for developing community alternatives to incarceration and for improving the juvenile justice system.

In the 1980s and 1990s, communities became concerned with both the rise in crime and a juvenile court system that was seen as being too soft on crime. The public demanded law and order and harsher penalties for juveniles as well as adults. Many proposed sending youthful offenders to military-style "boot camps" in which offenders enter the program in groups referred to as platoons or squads. Those who support such boot camps claim that the structured atmosphere is conducive to growth and change. Some critics even called for abolishing the juvenile court system altogether.

How does the juvenile justice system operate where you live? Are certain types of offenses transferred to adult court?

For Your Information . . .

Juvenile Law Terms Compared with Adult Law Terms

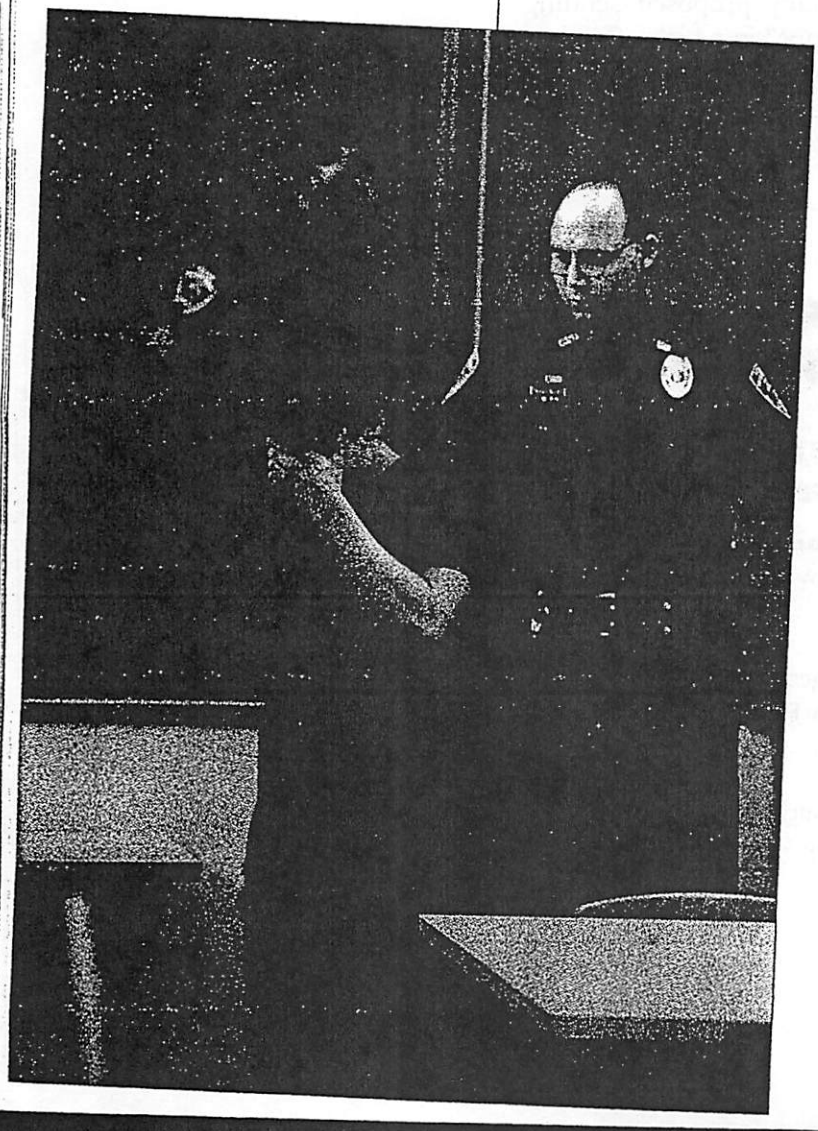
Juvenile Law Term	Corresponding Adult Law Term
Offense	Crime
Take into Custody	Arrest
Petition	File Charges
Denial	Not Guilty Plea
Admission	Guilty Plea
Adjudicatory Hearing	Trial
Found Delinquent	Found Guilty
Disposition	Sentencing
Detention	Jail
Aftercare	Parole

Instead, many states changed their laws to make it easier t se-
cute juveniles in adult criminal court. As these laws changed, there was
an increasing trend in the early 1990s to waive juvenile cases to adult
criminal courts, reflecting the preference toward harsher punishment
for juveniles. As the twenty-first century approached, however, this
trend began to decline. Perhaps the combination of these state laws
and federal initiatives illustrates that a new balance is being struck
between accountability, community safety, and programs to rehabili-
tate young people, with greater weight being given to accountability
and community safety. It is interesting to note that much of this trend
toward harsher treatment of juveniles occurred during the 1990s—
when juvenile crime rates were decreasing.

Procedures in Juvenile Court

Suppose a young person is accused of a delinquent act. What happens to this person from the time he or she is taken into custody until release from the juvenile justice system? The exact procedures vary from state to state, but the general process is similar throughout the country.

Juveniles taken into custody can be detained and referred to juvenile court. *Describe the instances in which a juvenile offender may be released.*

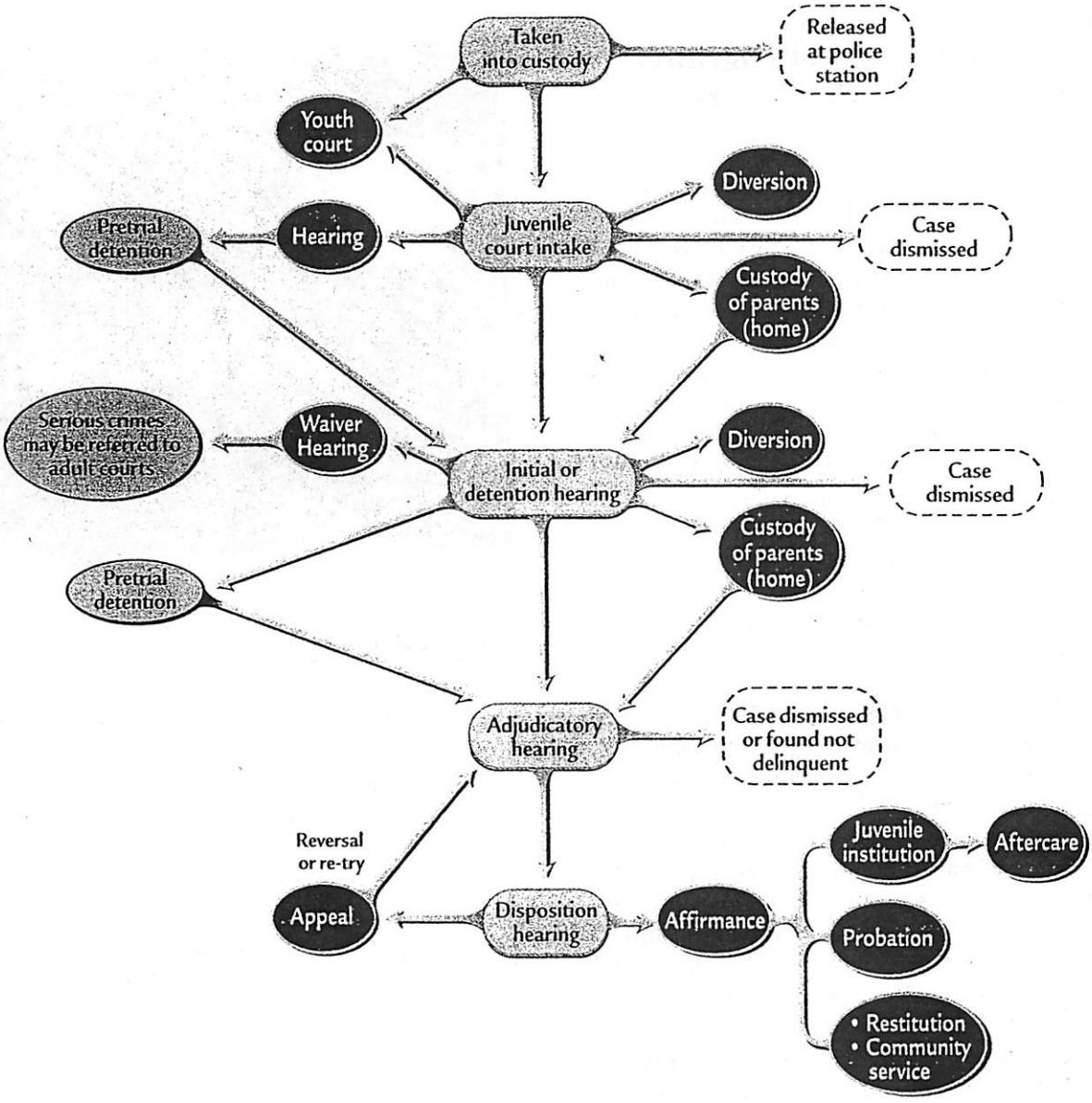


Taking into Custody On the whole, young people may be taken into custody for the same reasons the police might t
an adult. However, juveniles also ca
taken into custody for status offenses. These offenses include running away from home, truancy, promiscuity, disobeying one's parents, and other actions suggesting the need for court supervision.

After taking a juvenile into custody, the police have broad authority to release or detain the juvenile. If the offense is minor, the police may give the juvenile a warning, release the juvenile to his or her parents, or refer the case to a social services agency. If the offense is serious or if the young person has a prior record, the police may detain the youth and refer him or her to juvenile court.

Intake is the informal process by which court officials or social workers decide if a complaint against a juvenile should be referred to juvenile court. This decision is usually made after interviewing the youth and considering the seriousness of the offense, the youth's past record, family s
uation, and other factors.

Figure 16.1 The Juvenile Justice Process



Note: The juvenile justice process varies–sometimes significantly–from state to state. Dispositions may include several of these options or others.

There are several different outcomes for an offender in the juvenile justice process.
ANALYZE THE DATA *What may happen to a juvenile after he or she is taken into custody?*

For Your Information . . .

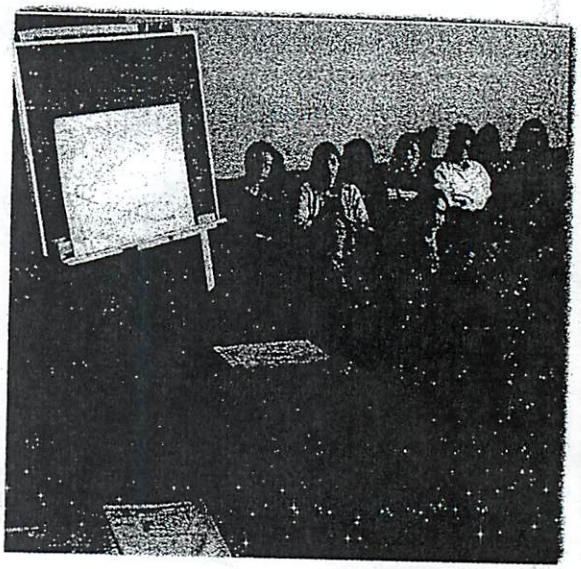
Alternative Programs—Youth Courts

Alternative programs that focus on prevention and treatment, rather than punishment, have developed within the juvenile justice system. Some of these programs divert young people out of the juvenile justice system and into services that deal with problem behaviors or difficult family or community challenges. Some diversion programs provide counseling, while others focus on education or job training. Still others provide more comprehensive services to help young people deal with their family, school, and community.

The fastest-growing alternative program is called **youth court.** As of 2003, there were more than 900 youth courts in the country. About half of the youth courts operate in the juvenile justice system, while others are situated in school or community-based settings. Although there are several different program models, the basic idea behind all youth courts is that young people sentence their peers.

In almost all youth court programs, the young person charged with an offense must admit to having committed the offense before being accepted into youth court. Typical offenses dealt with by youth courts include theft, assault, vandalism, disorderly conduct, and alcohol and marijuana use. The sentences imposed by the peer juries include community service, essays, written and oral apologies to victims, and educational workshops. Also, most youth courts require offenders to serve on juries to sentence other youth offenders.

Youth courts are based on a philosophy called **restorative justice.** The idea behind restorative justice is that problem behavior harms victims and communities and that steps should be taken to involve offenders in repairing harm and restoring broken relationships.



A youth court in progress

Problem 16.6

a. Evaluations of youth court programs show that the rate of re-offending is very low. Why do you think these programs are so successful?

b. What benefits do youth courts offer to juvenile offenders, their families, and the community? Are there disadvantages to youth courts?

c. What do you think of the idea of restorative justice? Is this the best approach in dealing with all juvenile offenders? Explain your answers.

d. In general, do you favor treatment or punishment for juvenile offenders? Does it depend on the seriousness of the crime? Give reasons for your answer.

e. Consider how federal sentencing guidelines (certain offenses require certain sentences) operate to limit the discretion of judges. Would you favor or oppose a state law like this for juveniles? Be sure to explain the reasons for your answer.

It is estimated that as many as one-third of all complaints in the enile system are disposed of during the intake process by dismissal, diversion, or transfer. Most of the cases disposed of are dismissed. Some youths are diverted, which means that they receive educational services—including, in some places, "Street Law" classes—and treatment services without going through juvenile court. In addition, a prosecutor may decide to charge a juvenile as an adult and request a waiver hearing. (Waiver hearings are discussed on page 190.)

Initial or Detention Hearing Young people who are taken into custody and formally referred to juvenile court are entitled to an **initial hearing** on the validity of their arrest and detention. At this initial hearing, the state must generally prove two things: that an offense was committed and that there is reasonable cause to believe that the accused committed it. If the state wants to further detain the juvenile, it must prove that the juvenile is a danger to himself or herself or others, is likely to run away if released, or has a past record that warrants detention. If the juvenile does not have an attorney, the court will usually assign one at this time and set a date for a hearing on the facts.

The U.S. Supreme Court has held that juveniles do not have a constitutional right to bail. No money bond is set, and the juvenile court may decide either to release juveniles to their parents or other adults or to detain them until trial. The Supreme Court justified what is referred to as **preventive detention** of juveniles on the grounds that it serves the legitimate purpose of protecting the community and the veniles themselves from the consequences of future crime. It is based on a judge's decision that a juvenile is better off in detention than in his or her own home. Federal law requires juveniles who are detained to be held separately from adults who have been accused of crimes. However, this is still not enforced in a number of places around the country.

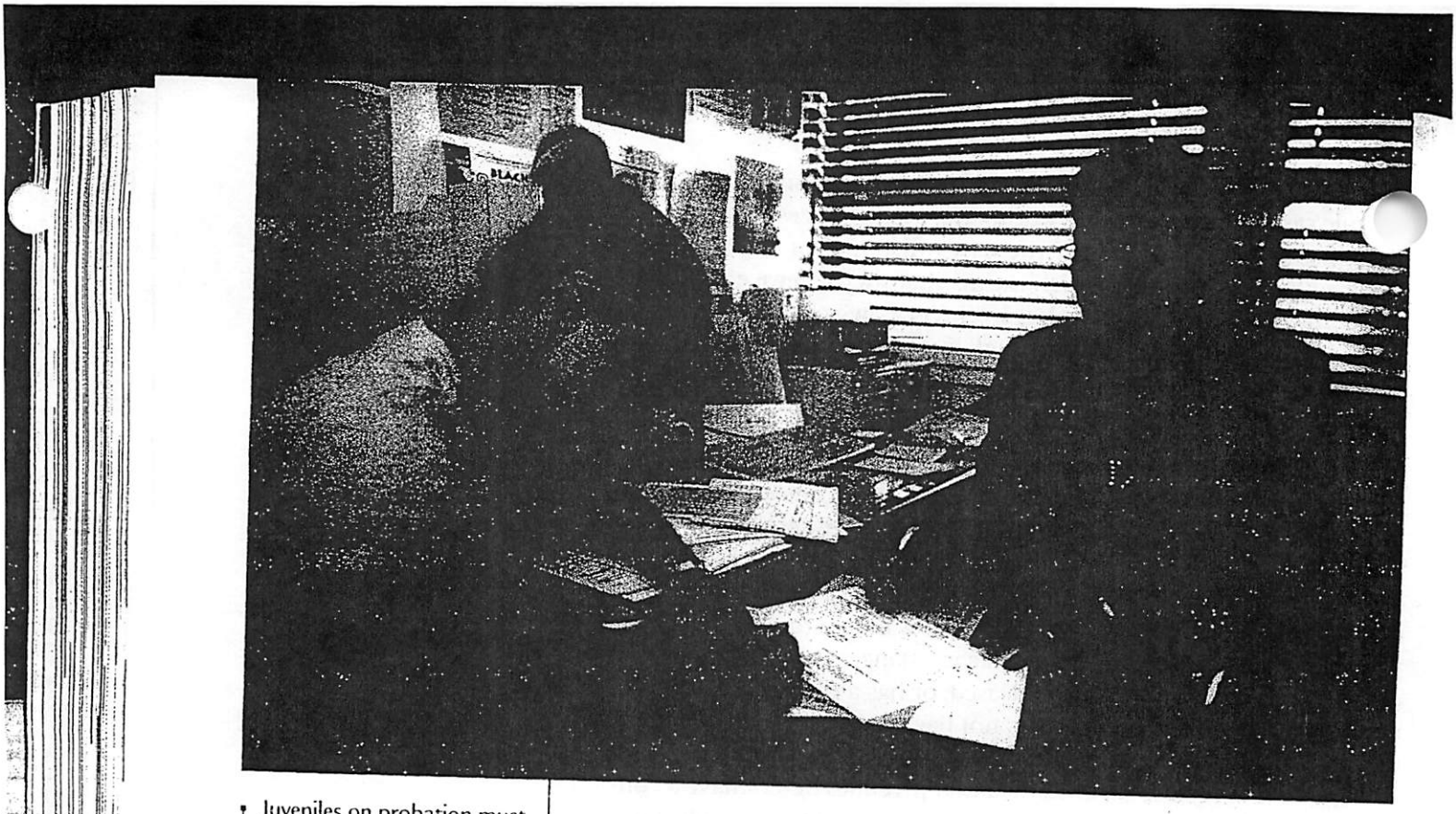
Problem 16.7

a. Should juveniles have the same right to bail as adults? Why or why not? When should they be detained?

b. Should juveniles be detained separately from adults in all cases? What if a small town only has one jail or the juvenile detention center is full?

Where are juvenile offenders placed in your state and community? What is the maximum length of time for which a juvenile can be committed to a juvenile institution? What happens to status offenders in your community?

Adjudicatory Hearing A juvenile charged with a delinquent act is given a hearing. Generally known as an **adjudicatory hearing**, its purpose is the same as that of an adult trial—to determine the facts of the case. Unlike an adult trial, however, a juvenile hearing is generally closed to the public, and the names of the accused and the details of the offense are withheld from the press. Although juveniles do not have a constitutional right to a jury trial, some states do provide for juries in juvenile cases.



Juveniles on probation must follow a set of conditions, including regular meetings with a probation officer. *What are other examples of conditions of probation?*

At the adjudicatory hearing, the juvenile, like the adult defendant, is entitled to be represented by an attorney. The attorney can examine and cross-examine witnesses, and force the prosecution to prove its case beyond a reasonable doubt. If the judge finds the juvenile nondelinquent (not guilty), he or she is free to go. If the judge decides that the facts, as set out in the petition, are true, the court will enter a finding of delinquent. This is similar to a conviction in adult proceedings.

Dispositional Hearing The dispositional hearing is perhaps the most important stage in the system for juveniles who are found delinquent. At this hearing, the judge decides what sentence, or **disposition**, the juvenile offender should receive. The judge's sentence is usually based primarily on the presentence report prepared by the probation department. This report is the result of an investigation of the juvenile's social, psychological, family, and school background.

In theory, in making their disposition, courts are supposed to provide for individualized treatment geared toward rehabilitating the juvenile offender. However, in practice, courts often balance the needs of the offender against the obligation to protect the community. Alternatives usually include probation, placement in a group home or community treatment program, or commitment to a state institution.

Probation is the most common disposition. The judge can impose a number of conditions on the juvenile on probation. For example, the juvenile might be ordered to attend school regularly, hold a steady job, attend counseling sessions at a treatment center, take weekly drug tests, be home by 8:00 P.M., or stay away from certain people. A juvenile on probation usually has to meet with a probation officer on a regula

is. If the conditions of probation are not met, the youth can be sent to court for another hearing. At that time, the judge can decide to send the juvenile to a group home or a state institution.

For serious offenses, the juvenile can be committed to a juvenile institution. Most courts have the power to place a juvenile in such an institution for an indeterminate length of time. This means that no matter what the offense, the juvenile offender can be locked up for the maximum period allowed by state law. This generally varies from one to three years. In certain cases, it lasts until the young person reaches the age of majority, and it can continue in some states until age 21. Most juveniles, however, do not serve the maximum sentence. The exact time of release is usually up to the agency that operates the institution.

Although the stated goal of any juvenile correctional institution is rehabilitation, many corrections officials say this is seldom achieved. One of the main problems is overcrowding in juvenile facilities. Up to one-half of the nation's juvenile facilities have more residents than they were designed to hold. In addition, the overrepresentation of

The Case of . . .

The 15-Year-Old Murderer

William Wayne Thompson was found by an Oklahoma jury to have actively participated at the age of 15 in the brutal murder of his former brother-in-law, Charles Keane. There was evidence that Keane had in the past physically abused Thompson and his sister. Thompson and three others kidnapped Keane, beat him, kicked him, cut his throat and chest, shot him in the head, and dumped his body into the river. Photographs of the body were described by the court as "ghastly."

It was determined at a hearing that Thompson, who had been arrested previously for a number of serious assaults, had "no reasonable prospects for rehabilitation within the juvenile justice system." He was then tried as an adult and convicted. The law of Oklahoma did not specify that any minimum age was required before the death penalty could be ordered. The judge, following the jury's recommendation, ordered the death penalty for Thompson. The sentence was appealed and upheld by the Oklahoma Supreme Court. Thompson's appeal ended up before the U.S. Supreme Court.

Problem 16.8

a. Should William Wayne Thompson have been transferred and tried as an adult? Give your reasons.

b. Are you for or against capital punishment as a possible penalty for those under the age of 16 who commit murder? Write down the two strongest reasons in support of your position. What are the two strongest arguments in support of the other position?

c. If you were on the U.S. Supreme Court, would you find imposing the death penalty on William Wayne Thompson to be "cruel and unusual punishment"? Give reasons for your position.

d. If this crime had occurred in a state without the death penalty, what would be an appropriated punishment? Explain.

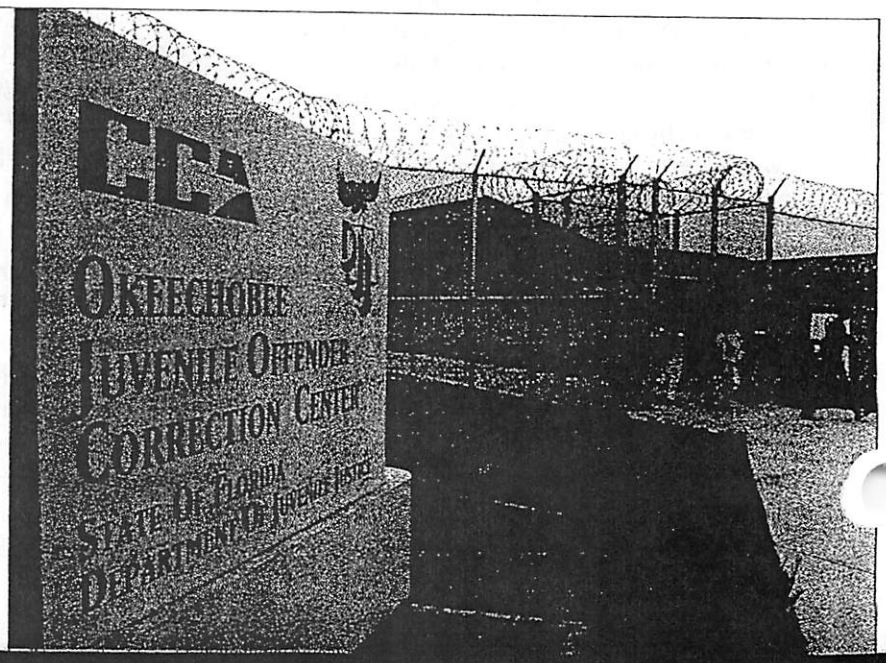
minorities has been increasing. Some critics claim that this is a re of discrimination. They say that more whites than minorities see be placed by juvenile courts in private programs to meet their special needs, while more minorities are placed in government-run juvenile facilities. Other concerns include the safety and security of the facilities, due process, and health care. The courts have also seen an increase in claims of abuse of children in training schools and detention centers.

Some juvenile justice reformers call for a new philosophy in which violent offenders would be housed in small facilities offering many services. Most other offenders, especially status offenders, would be placed in well-structured, community-based programs. Some states have already moved in this direction, and supporters say it works. Critics counter that the approach will not work, and call for tougher measures. Today, many practitioners seek a balanced approach to juvenile corrections. They consider the individual in light of community protection, offender accountability, and the development of life skills that will enable the offender to experience success once he or she is released from the juvenile justice system.

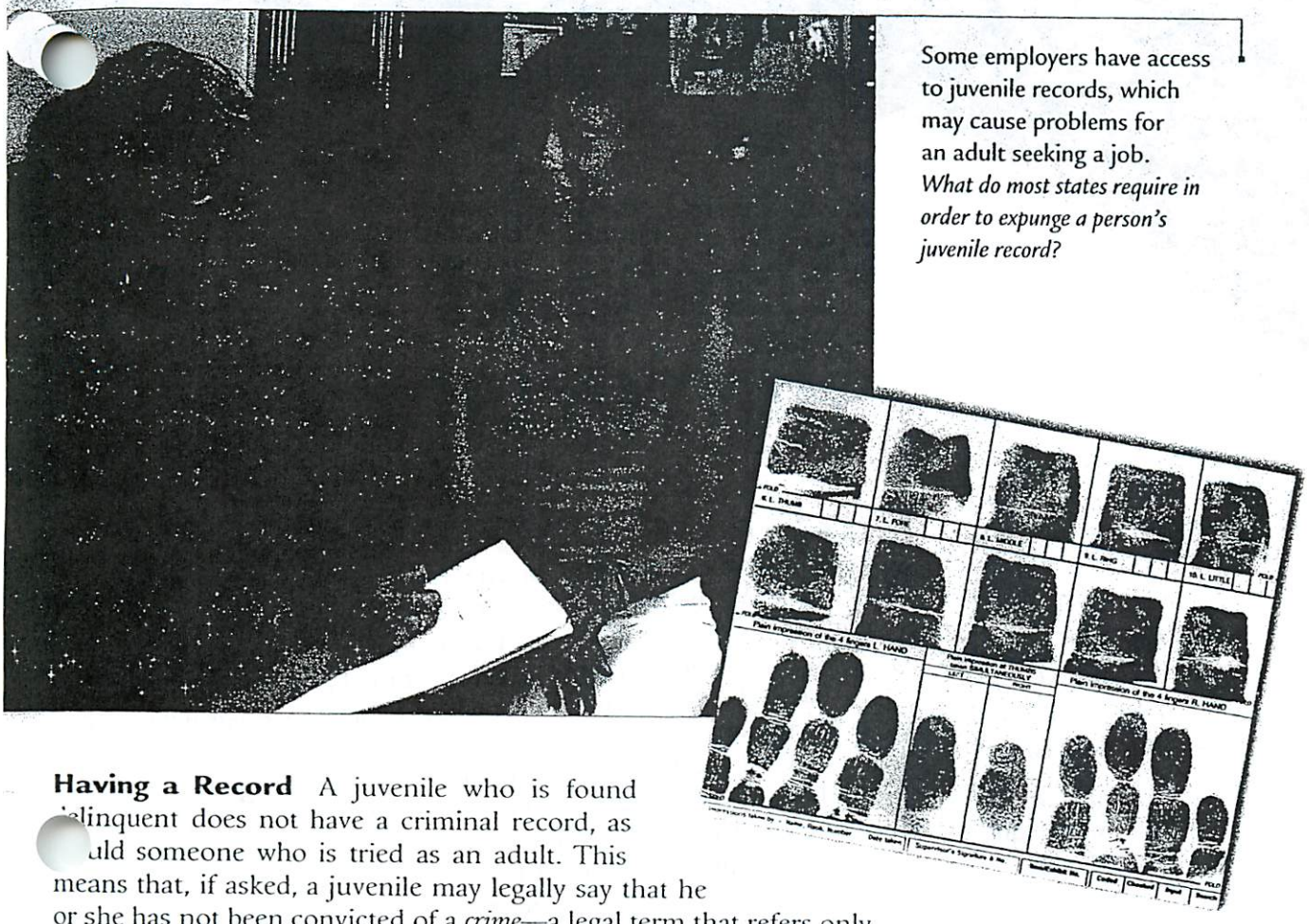
Dealing with status offenders presents special problems. Should they be taken out of the home? Should they be committed to institutions? Should they be mixed with delinquents or adult offenders? In response to these concerns, many states have removed status offenders from large institutions and placed them in foster homes, halfway houses, or other community facilities.

Postdisposition Most states give young people the right to app decisions of a juvenile court. However, because the U.S. Supreme Court has never ruled on this issue, the provisions for appeal vary greatly from state to state.

Once released from an institution, a juvenile may be placed in **aftercare**. This is the equivalent of parole in the adult system. Aftercare usually involves supervision by a parole officer who counsels the juvenile on education, jobs, vocational training, or other issues.



Although the goal of juvenile correctional facilities is rehabilitation, many claim that this is seldom achieved. *What problems limit the goal of rehabilitation?*



Some employers have access to juvenile records, which may cause problems for an adult seeking a job. *What do most states require in order to expunge a person's juvenile record?*

Having a Record A juvenile who is found delinquent does not have a criminal record, as would someone who is tried as an adult. This means that, if asked, a juvenile may legally say that he or she has not been convicted of a *crime*—a legal term that refers only to the adult system. In general, juveniles who are adjudicated do not lose any civil rights and can still register to vote upon reaching adulthood. Unfortunately, juvenile records can cause problems later. Most states restrict access to juvenile court proceedings. In many states, however, some or all information on juvenile cases becomes public record. This means that individuals, agencies, and employers may be able to access it. A juvenile record also is often considered in sentencing adults, so that defendants with no criminal record may still receive a harsher sentence if they have a juvenile record.

In a few states, juvenile records are automatically sealed or expunged (destroyed) when the juvenile reaches the age of 18 or 21, giving the individual a "clean slate." In most states, however, the record continues to exist unless the person officially requests that his or her record be expunged. To be eligible for such a request, most states require that several years have passed since the offense and that the person not have committed any further offenses during that time. If the person *with* the juvenile record meets these conditions, he or she can go before a judge to request that the record be expunged. If the judge approves the request, there will no longer be a public record of the person's involvement in the juvenile justice system.

Where You Live

In your community, are juvenile records sealed or are they destroyed? What is the procedure? Can juveniles in your state appeal decisions of the juvenile court?

CHAPTER 17

Law and Terrorism

"The laws will thus not be silent in time of war, but they will speak with a somewhat different voice."

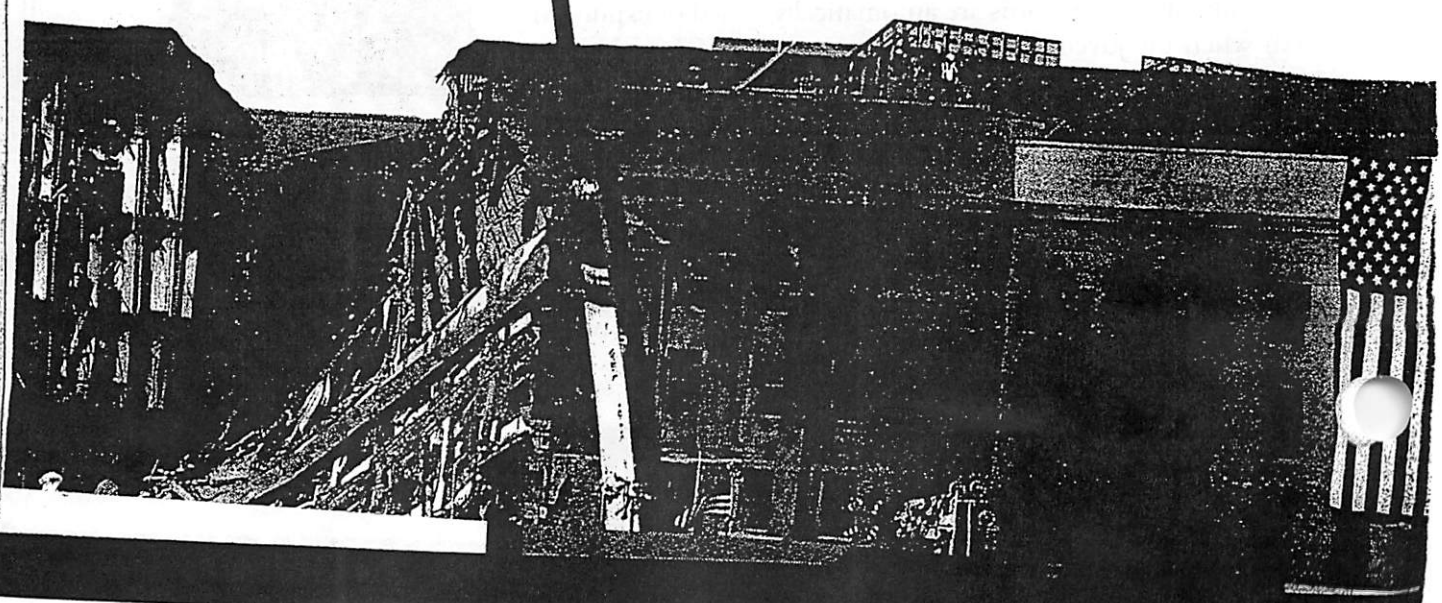
— **Chief Justice William Rehnquist, U.S. Supreme Court**

The rise of the problem of terrorism at the end of the twentieth and the beginning of the twenty-first century led President George W. Bush, Congress, state legislatures, and mayors to institute many new laws and policies. Law enforcement officials from the U.S. attorney general and the directors of the FBI and CIA to local police have all become involved in what is sometimes called "the war on terrorism."

Civil liberties groups and others have challenged many of these laws and executive actions, saying they go too far in restri[illegible] individual rights at a time when the country is not officially a[illegible]. Proponents of antiterrorism measures say that these measures are warranted. They claim the danger from terrorism to the United States is even worse than during a declared war because the enemy is hidden and so must be uncovered and arrested.

Street Law online

Visit the *Street Law* Web site at streetlaw.glencoe.com for chapter-based information and resources.



The Pentagon was one target of the terrorist attacks of September 11, 2001.

The Law in Times of War

As wartime hysteria mounted, the U.S. government rounded up thousands of people of Japanese ancestry, most of whom were U.S. citizens, and forced them into internment camps during World War II. *Does the government have the right today to relocate or keep a group such as noncitizens in detention?*

The horrific events of September 11, 2001, shook U.S. society and its people to their core. These were the largest attacks on U.S. soil since World War II. The fact that the attacks were the result of terrorism made people feel especially vulnerable. As a result of the attacks, Congress passed many new federal laws and made changes to existing laws.

President George W. Bush declared a "war on terrorism." He requested a number of new powers to enable the executive branch to find those who committed these acts of terrorism and to prevent future attacks. At the urging of President Bush, Congress passed a law called the *USA Patriot Act* in 2001. The act was intended to combat terrorism by tracing the sources of money that fund terrorist acts, finding and detaining terrorists who entered the country as immigrants, and intercepting communications among terrorist groups. The act expanded the powers of certain law enforcement and intelligence agencies such as the Department of Justice, the Federal Bureau of Investigation (FBI), and the Central Intelligence Agency (CIA). The act enabled these groups to share information among themselves, track communications on the Internet, install telephone and computer wiretaps, obtain search warrants for voice mail and e-mail messages, and access personal, educational, medical, and financial information. In 2002, Congress created the Department of Homeland Security to better coordinate antiterrorism activities across the government.

The expanded powers allowed by the *USA Patriot Act* raised key questions for U.S. society: Do these measures infringe on the rights of citizens? How much freedom and privacy are we willing to give up so that we may be more secure?

In past times of crisis, the U.S. government has taken away some of the rights of citizens, and courts have upheld some of these measures. During the Civil War, for example, President Lincoln suspended the right of prisoners to seek a *habeas corpus* petition, a legal means by which prisoners may challenge the constitutionality of their imprisonment in court. During World War I, the federal government restricted citizens' rights to criticize U.S. involvement in the war, either verbally or in writing. During World War II, the government removed more than 100,000 people of Japanese heritage, most of whom were U.S. citizens, from their homes and detained them in camps. Much of their personal property, including homes and businesses, was never returned to them. However, in 1988 the U.S. government formally apologized for the detention of Japanese Americans, and Congress approved a reparations payment for surviving detainees.

Problem 17.1

a. Is the war on terrorism similar to other wars when rights have been restricted? How is it the same? How is it different?

b. Assume you were the president after the September 11, 2001 attacks. What special powers would you want?

c. Assume you were the leader of a civil liberties organization. What civil rights would you fight hardest to protect?

Surveillance and Searches

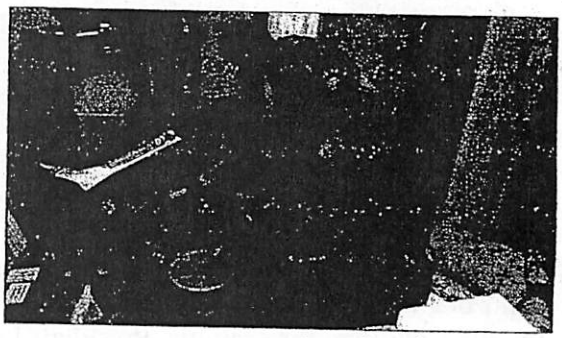
Since September 11, 2001, the government has had more power to conduct surveillance against ordinary people, much of which is provided for in the *USA Patriot Act*. Passengers in airports, for example, often have to open all of their luggage or submit to searches of their clothes, shoes, and persons. The act gives the government broader powers to intercept Internet or telephone communications of people it believes to be engaged in terrorist-related crimes.

The Case of . . .

The Sneak and Peek Search

U.S. law usually requires that a search warrant, based on probable cause, be obtained before a person's home is searched. A law enforcement officer is supposed to give the person whose premises are searched a receipt for any items that are taken as part of the search.

Maria Ramirez is originally from a country where there has been some terrorist activity against U.S. citizens. Federal officers see her at a restaurant in Chicago talking to people who are suspected of terrorism, though they have not been arrested. Federal agents come to her apartment when she is not there and look though all her letters and computer files. They make copies of some documents. The government agents do not inform her that they searched her apartment or copied documents until two weeks later.



A sneak and peek search

Problem 17.2

a. What reasons might the federal agents give for not obtaining a warrant and presenting it to Maria?

b. What arguments might Maria give that she should have been informed of the search?

c. If you were writing the law, would you allow sneak and peek searches like this in cases of suspected terrorism, or make them illegal?

The act enables law enforcement officials to call on a special court called the Foreign Intelligence Surveillance Act Court—whose records and rulings are kept completely secret—to authorize wiretaps to help gather evidence to prosecute terrorists. This court was originally set up in 1978 to authorize surveillance to gather foreign intelligence, not evidence for domestic criminal trials. For that reason, this court is not required by law to obey the rules that ordinary courts must observe to protect the rights of alleged criminals. For example, the Foreign Intelligence Surveillance Act Court can approve wiretaps to monitor an individual's communications even if the government has not proven that there is probable cause to believe the individual is involved in criminal activity.

Before the *USA Patriot Act*, evidence gathered using such wiretaps could not be used in criminal trials. In 2003, the U.S. Supreme Court let stand a lower-court ruling allowing evidence authorized secretly by the Foreign Intelligence Surveillance Act Court to be used in criminal trials. In addition, in some cases under the *USA Patriot Act*, the government can delay notifying people whose premises have been searched until after the search has taken place.

Problem 17.3

a. On a scale from one to five, with one meaning that you strongly agree and five meaning that you strongly disagree, indicate where you stand on the following statement:

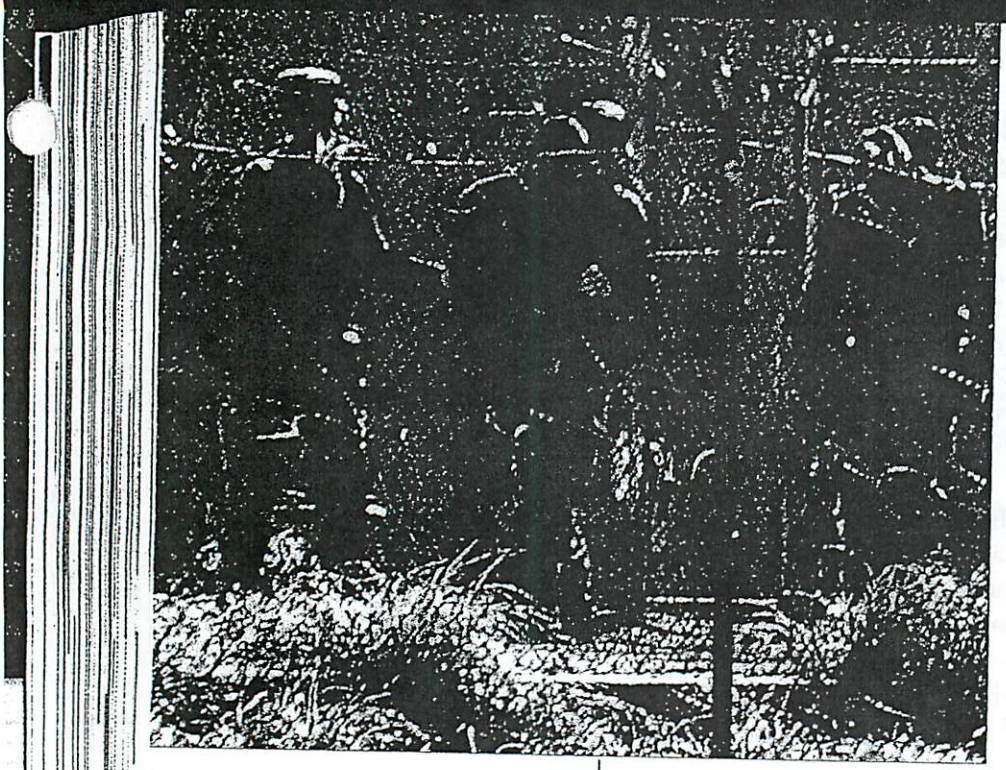
"In a time of heightened concern about domestic terrorism and national security, the government should be allowed to do whatever it believes is necessary to uncover and arrest terrorists."

b. Using the same scale, take a stand on each of the following statements. In each case, assume that Congress has proposed laws giving the federal government the power to take the following actions:

- Look at everyone's e-mail at work.
- Look at everyone's e-mail at home.
- Install surveillance cameras on all public streets.
- Plant small cameras in the homes of suspected terrorists.
- Monitor everyone's video rental records.
- Check the travel records of people coming into the country.

Detention and Interrogation

As a result of the September 11, 2001 attacks, many people suspected of terrorism have been detained inside the United States. Most have been noncitizens. Under most federal laws, noncitizens can be detained for only 24 hours without being formally charged with a crime. However, the *USA Patriot Act* allows noncitizens suspected of terrorist



The U.S. government held people suspected of being involved in terrorist activities at a U.S. military base in Cuba. *What information do you think the U.S. government wanted from the prisoners?*

activity to be detained without b formally charged with an offense for as long as it takes to either prove that the detainees are not involved in terrorism or to gather enough evidence to press charges. Many of the detained are Arab or Muslim people who were called in for questioning after the September 11 attacks.

Problem 17.4

Achmed, 26, is a university student from a country in the Middle East. He is in the United States on a student visa. He goes to his state's motor vehicle administration office to renew his driver's license. Since the September 11, 2001 attacks, federal law enforcement officials have been stationed around this facility to help gather information on possible terrorists. Achmed is pulled out of line and questioned about when and why he entered the United States. His answers sound suspicious to the officers, and they decide to detain him while they investigate his background further. He is not allowed to talk to anyone outside the det tion facility, including his family or a lawyer. He is held for four months an then is released without having been charged with a crime.

a. If you were a government official charged with locating possible terrorists, what reasons would you give for detaining Achmed?

b. Should the government be allowed to detain people for these reasons?

c. Were Achmed's rights violated? If so, how?

Unlawful Combatants

A number of people who were detained and interrogated after the September 11, 2001 attacks were called "unlawful combatants" by the U.S. government. This term refers to people who have fought against the United States but not in the context of a conflict between two internationally recognized governments. Some of these people were from a number of foreign countries and were suspected of being involved in terrorist activities in the United States and abroad. Others were believed to have direct ties to al-Qaeda, the terrorist group based in Afghanistan and responsible for the September 11, 2001 attacks. They were rounded up by the U.S. forces who entered Afghanistan to bring down al-Qaeda and its operations.

These unlawful combatants were brought to a U.S. military base i Guantánamo Bay, Cuba. The government argued that because th

was not on U.S. soil, the prisoners there need not be accorded the same rights as people in the United States who have been arrested for committing a crime. In addition, the government said it did not have to guarantee the detainees' rights under international treaties such as the Geneva Convention because the United States had not formally declared war on Afghanistan, and because the detainees were terrorists and not soldiers fighting under a legitimate foreign government. The people detained in Guantánamo Bay were questioned extensively and held in cells that critics called "small cages." During their detention, they were not allowed to see lawyers. The U.S. government said that it held these detainees under humane conditions and that torture was not used to get information from the prisoners. Torture is illegal under both U.S. law and international law through the U.N. Convention Against Torture, which the United States signed and ratified.

Rights at Trial

A person charged with terrorism could be tried in a U.S. court, where he or she would be guaranteed the full rights provided to other criminal defendants, including the right to a jury, right to a lawyer, and right to a public trial. However, various groups have voiced a number of arguments against trying terrorists in a regular criminal court. The U.S. government has argued that trying a suspected terrorist in a regular criminal court allows the defendant to use the trial as a political platform to attack the government publicly. Some defendants' rights groups say that it is impossible to guarantee a defendant in a terrorist case a fair trial in the United States because public opinion is so strong against alleged terrorists. The government also worries that such public trials might help terrorist groups learn what information the government has about them.

The U.S. government has proposed trying suspected terrorists, including unlawful combatants, in a military tribunal rather than a criminal court. Under rules issued in 2002, these tribunals—unlike criminal courts—can meet in secret and can allow hearsay as evidence. These tribunals, which consist of three or more judges, can convict defendants and authorize the death penalty if two-thirds of the judges vote that the defendant is guilty. There is no procedure to appeal a decision by a military tribunal.

Problem 17.5

In 2002, the U.S. military in Afghanistan captured Jackson, a U.S. citizen, as he was fighting there against the United States. Along with others designated as unlawful combatants, he was brought to Guantánamo Bay, Cuba. His request for a lawyer was denied. After three months in detention, he was told he will have to stand trial for terrorism. Should he be tried in a U.S. criminal court or in a military tribunal? Which would the U.S. government prefer? Which would Jackson prefer? Give your reasons.