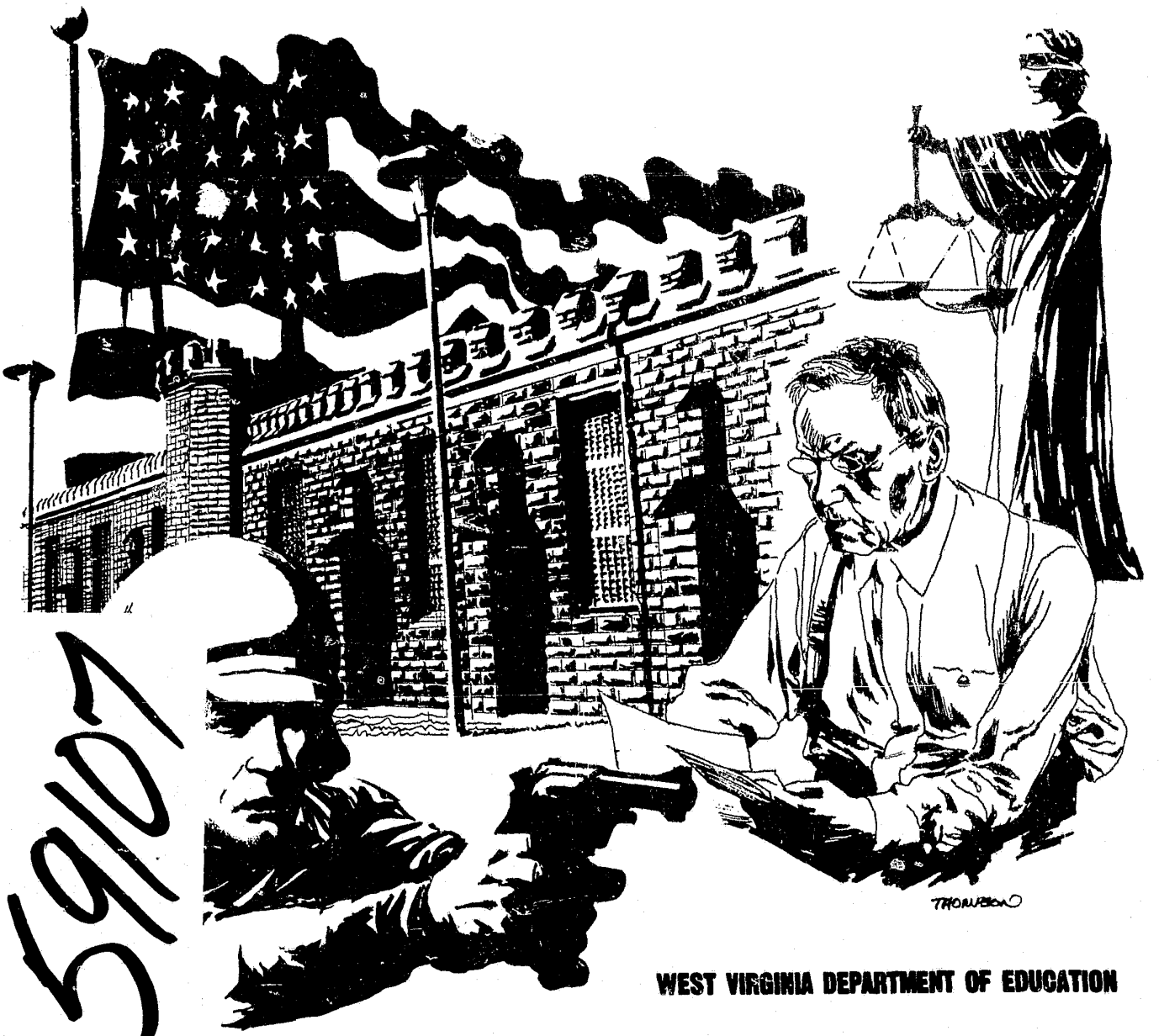
THE AMERICAN CRIMINAL JUSTICE SYSTEM:

A GENERAL SURVEY OF OUR COURTS, OUR POLICE, AND OUR CORRECTIONAL SYSTEM

TEACHERS' MANUAL



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WEST VIRGINIA DEPARTMENT OF EDUCATION

THE AMERICAN CRIMINAL JUSTICE SYSTEM:

A GENERAL SURVEY OF OUR COURTS, OUR POLICE AND OUR CORRECTIONAL SYSTEM

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1976

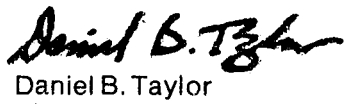
WEST VIRGINIA BOARD OF EDUCATION

EXECUTIVE OFFICES
Charleston, West Virginia 25305

FOREWORD

The fundamental principle underlying American democracy is that the citizenry ultimately controls the government. To exercise such control effectively and responsibly, our citizens must have a basic understanding of issues regarding the concept of law, the structure of the legal system and the function of our government at all levels. This document presents to the student an opportunity to examine concepts relating to the purpose and the process of the criminal justice system in America.

In order to make rational decisions regarding the function of law within our society, students must have the experience of applying the principles of justice, equality, freedom, and authority to their lives. To undertake this task is to acknowledge the need to incorporate law-related studies into the existing social studies curriculum. The possibilities for appreciative understanding of such ideals as "liberty" and "order" stem not only from an examination of our local and national leglislative bodies, but from an in-depth study of our laws, our courts, our law enforcement agencies, and our correctional systems. Young people who come to understand the system of justice will be capable of dealing with that system and will, therefore, become better able to cope with situations involving their rights and responsibilities.



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Preface

In an effort to supplement and support the student document, The *American Criminal Justice System:A General Survey of Our Courts, Our Policies, and Our Correctional System*, the following teacher's manual has been compiled. It endeavors to impart an understanding of those concepts generic to the teaching of criminal justice and suggests possible activities which would effectively reinforce those concepts. Combined, these two documents will establish the basis for a continuing effort to provide civic education to the students of West Virginia.

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CHAPTER 1

CRIMINAL JUSTICE: AN OVERVIEW

The broad purpose of criminal laws is to prevent people from doing some of the things society regards as undesirable. Some aspects about this general statement should be noted: (1) Criminal law strives toward the achievement of minimum standards of conduct. Unlike moral or religious principles, its purpose is not to promote ideal conduct. (2) The definition of criminal conduct in a given society is a reflection of the society's beliefs, values, and needs. Thus, the areas protected by criminal statutes vary from society to society. (3) Criminal laws provide for punishment of undesirable behavior, rather than rewards for desired behavior.

To carry out the purpose of criminal laws a society needs a systematic means of dealing with crime and criminals. The means are called a criminal justice system. However, if its only goals were to prevent criminal conduct and incarcerate those who commit crimes, the criminal justice system would not be like it is today. Another general goal of criminal justice in the United States, (based on the Constitution) is that a person should be subjected to punishment fairly. This is to say that the Constitution places certain restrictions on the means that can be employed to limit or to take away rights and liberties of an individual. Constitutional requirements will be discussed in Chapters II and III.

Before beginning our discussion of the nature of the criminal justice system, let us briefly deal with four topics. The topics include:

(1) Some of the harms that this society seeks to protect itself against by means of criminal laws;
(2) The relationship between social beliefs and needs and the definition of certain conduct referred to as criminal;
(3) Some theories of punishment; and
(4) The distinction between goals and functions.

A General Classification of Crimes

A. Protection from physical harm to the person, e.g., the crimes of murder, manslaughter, assault, and kidnapping.

B. Protection of property from loss, destruction, or damage, e.g., the crimes of larceny, burglary, robbery, bad checks, blackmail, arson, and malicious destruction of property.

C. Protection of reputation from injury, e.g., the crime of libel.

D. Safeguards against sexual immorality, e.g., crimes of rape, bigamy, adultery, and sodomy.

E. Protection of the government from injury or destruction, e.g., the crimes of treason, sedition, sabotage, bribery of government officials, and election crimes.

F. Protection against interference with the administration of justice, e.g., the crimes of perjury and bribery of witnesses, judges and jurors.

G. Protection of the public health, e.g., water pollution laws, food and drug laws, narcotics and liquor laws.

H. Protection of the public peace and order, e.g., public drumkenness and disorderly conduct.*

Social Values and Crime

Today, the taking of another persons life, except in self defense or in the course of a war, is a crime in almost every country. Yet, there have been societies in which it was not a crime. For example, in the

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*See *Laws for Young Mountaineers*, prepared by the Young Lawyers Section of the West Virginia State Bar for brief descriptions of the crimes mentioned and others.

Homeric period, the Greeks did not regard killing as a crime. There were a number of reasons for this fact, all of which were a function of the basic beliefs and social conditions of the people: (1) certain persons, such as slaves and non-Greeks were not regarded as fully human; (2) since the society was constantly in a state of war, it could not organize itself to punish the powerful; and (3) it was believed that private means were sufficient to avenge killings. In the Homeric period, killing was not regarded as morally wrong, except in certain circumstances, such as in violation of the guest-host relationship. The factors mentioned above help to illustrate that certain conditions, moral beliefs, and needs of a society have an impact on a society's opinions as to what is criminal and what is not.

A society may regard certain conduct criminal not because the conduct itself is perceived to be so bad, but because of certain social needs for order. For example, originally in England, libel -- stating or writing something false about another person which harmed his reputation -- was regarded as a criminal act essentially because that society needed protection against breaches of the peace that would occur when the person libeled would seek to "get even" with the person who lied about him. Today, this need is not as great, because harms resulting from libel can be remedied by civil actions and criminal libel statutes and are not considered important.

Further, social needs and values are the basis for certain affirmative defenses against criminal charges. Consider, again, the example of murder. The Old Testament command is "Thou shalt not kill." Generally, our criminal statutes are consistent with this unequivocal command. Yet, overriding social needs and values have required that we carve out exceptions to it. For example, police protection would be greatly diminished if police officers were convicted of murder for taking lives in the line of duty. Also, if people who are not responsibile for their acts, such as, the insane, were treated as murders, then basic social values would be violated. Thus, self-defense and insanity are affirmative defenses to charges of murder.

Theories of Punishment

There are a number of theories concerning the goals of criminal punishment:

A. **Prevention**. Under this theory the purpose of punishment is to give the criminal an unpleasant experience and thus deter him from committing further crimes.

B. **Restraint**. The society protects itself from dangerous persons by isolating them from society.

C. **Deterrence**. This theory is like the first, except its purpose is to use the fact that the criminal suffers for his crimes to deter others from committing future crimes, lest they suffer the same fate.

D. **Rehabilitation.** The aim is to give the criminal appropriate treatment to rehabilitate him and return him to society in such a condition that he will not need to or want to commit further crimes.

E. **Retribution**. Punishment is imposed by society on criminals in order to obtain revenge or, perhaps, because it is only fitting and just that evildoers should suffer for the harm they inflict on others.

Although the above distinctions exist, it is clear that in practice no single theory, to the exclusion of others, is the entire focus in the correctional process. There is little agreement about priorities that should exist among the various goals. Also, focusing on some goals is likely to defeat others. For example, retribution, deterrence, and prevention call for giving the criminal unpleasant experiences. So doing, no doubt, will defeat the chances of rehabilitation. The modern tendency is to place emphasis upon rehabilitation, rather than retribution. Yet confinement and prison conditions make rehabilitation difficult.

Goals and Functions

At this point it is important to note that the behavior of people and institutions typically strives toward the attainment of certain goals. However, often behavior has effects not intended by the actor. This point was alluded to at the end of our discussion of theories of punishment when we suggested that seeking to attain certain goals of punishment might conflict with other social needs.

Sociologists refer to the effects of an institution's or system's behavior as functions. Some of these effects (manifest functions) are conscious and deliberate. These are goals. Other effects (latent functions) are unconscious and unintended. For example, a goal of antigambling legislation is to suppress gambling. But an unintended effect may be to aid in the creation of an illegal empire by a gambling syndicate. We suggest that in seeking to understand the criminal justice system, its agencies, and its problems, one focus on conscious goals and unintended effects, and on the conflicts between them. Further, in considering possible solutions to problems in criminal justice one should ask, not only "Will the proposed solution solve the problem?," but, also, "What other problems might be created by the proposed solution to the original problem?"

THE CRIMINAL JUSTICE SYSTEM

A number of agencies exist to carry out the various goals of criminal justice. These agencies or institutions are interrelated. Thus, they form a system. 'System' is essentially a biological or a production metaphor. The Criminal Justice System is like the various systems in the human body because it serves various functions for a larger system or body, namely, society. Also, the various agencies are like stations on an assembly line in that the outputs of one agency, for example, evidence gathered by the police, serve as inputs for other agencies, such as, the pro prosecutor's office and the court.

The general purpose of all of the agencies, like that of the system itself, is to protect society from the harmful or dangerous behavior of some of its members; in a manner that protects their basic rights.

Before examining the inner workings of the criminal justice system, let us first take an outsider's view of the system in order to determine some general functions of the system. This survey will allow us to categorize some of the sub-systems in terms of their functions with respect to society and with respect to other sub-systems. After observing the system as an outsider, a visitor from another planet would be likely to conclude that it has three sub-systems. The components are:

A. Various Police agencies whose principal functions are to preserve order in the society and to conduct investigations of criminal conduct and apprehend suspected criminals;

B. Courts which by using an **advocacy process**, determine the guilt or innocence of persons charged with criminal conduct, and which determine the appropriate placement of those found guilty; and

C. Correctional institutions, including jails, prisons, and agencies to supervise persons on probation or parole. These institutions supervise the conduct of criminals in conditions of separation from society (jail or prison) and in society (probation or parole).

In addition to discovering these agencies and their functions our visitor would no doubt see that relationships exist among these sub-systems. For example, outputs of the police efforts (evidence and defendants) are inputs for the courts, and outputs of the courts (convicted and sentenced criminals) are inputs for the correctional institutions.

If we were to give our visitor other information about criminal statutes and about various constitutional provisions, he would better understand why certain things occur: why police conduct their investigations in certain ways; why juries are part of the court process; and why persons found guilty of different crimes are treated in varying ways.*

A number of important points about criminal justice would be missed by someone viewing the system from an outside perspective. In order to get at some of these details, let us (1) examine some parts of the system from the point of view of a person accused of a crime, and (2) examine some aspects of the roles of certain key persons in the system. In so doing, we will discover that actors in the system have a fair amount of discretion that impacts on the potential criminal. In addition, we will see that some of the problems in the system are the result of conflicting roles and functions.

The Accused and the System

Before reading this section you should examine the chart in the Appendix. We have selected a complex chart to point out the true complexity of the system. Realize that what follows is general and representative of a natural flow without interruptions. Specific details may vary from state to state.

Potential defendants are arrested by the police--sometimes after an investigation resulting from a citizen's complaint; other times as a result of a policeman's observing the offense committed. If there is probable cause to believe that the suspect has committed a felony, the arrest can occur without a warrant. Misdemeanor arrests require a warrant unless the offense is committed in the officer's presence.

The suspect is taken to the police station for review by a supervising officer. At this officer's discretion one of three things happens: (1) the case is terminated; (2) the case is assigned to detectives for further investigation; or (3) the case is prepared for presentation to the prosecuting attorney. Unless it is decided to release the suspect he is booked in the police files and either lodged in a jail or released by a magistrate on bail. Typically, the suspect is interrogated while being held.

*Topics such as these will be explored in the next two sections.

Information supporting the arrest is promptly submitted to the prosecuting attorney. His responsibility is to determine what proceedings are justified. He has a great deal of discretion at this point. He might decide not to prosecute because the evidence is not sufficient for a conviction, or he might drop it for other reasons.

If he decides to proceed towards trial, the prosecutor prepares a formal complaint identifying the defendant, specifying the charges against him, and requesting the court to issue a warrant for arrest. If the complaint is sufficient the court will issue the arrest warrant. Soon after the warrant is issued the defendant makes his initial appearance before the magistrate. At this point in felony cases, and many misdemeanor cases, the court must appoint a defense attorney if the defendant does not have one.

Procedures are truncated in misdemeanor cases--the defendant often pleads guilty at his initial appearance and is sentenced immediately. If he pleads not guilty, he may be tried immediately. In felony cases the initial appearance is only one of the intermediate steps leading to trial. At this appearance the defendant is informed of charges against him. He may seek bail, and he decides whether or not to have a preliminary hearing.

At the preliminary hearing, usually held a few weeks later, the prosecutor tries to convince the court that there is probable cause to believe the defendant committed the crime with which he is charged. If he fails, the case is dismissed. If probable cause is established a formal accusation against the defendant is prepared for submittal to a court of general jurisdiction.

In Federal courts and in about one-half of the state courts, it is mandatory that a **grand jury** of citizens hear and evaluate the state's evidence (usually the defendant is excluded from these proceedings). If the grand jury determines that a trial is justified, it returns an **indictment**. In other states, the prosecutor prepares the accusation and supporting evidence, which is called **an information**, without recourse to a grand jury. The use of **an information**, in lieu of an indictment by a grand jury, is much quicker and seems to encourage **negotiations** between the prosecutor and the defendant's attorney. This increases the number of settlements without a trial. Frequently, as a result of such negotiations, the defendant pleads guilty to a lesser charge. In some states justice by negotiations is promoted by using discovery procedures in which each side gives to the other side its evidence.

If efforts to negotiate fail, the felony case proceeds to trial. The last step prior to trial is **arraignment**, at which the court reads to the defendant the information or the indictment and asks him how he pleads. The defendant who professes innocence has a right to a trial by jury. If he waives a jury the judge acts as fact finder and renders a verdict.

At the trial the process of negotiation and attempts to compromise ends. A trial is an **adversary** proceeding. Each side seeks to persuade the **finder of fact** by presenting evidence favorable to its position. Unless the evidence indicates the defendant's guilt beyond a reasonable doubt, the fact finder's (jury's) obligation is to render a verdict of not guilty.

The judge, typically at a separate hearing, imposes the sentence upon those found guilty of committing a crime. The sentence imposed must fall within the limits set by law for the particular crime. There is a range of sentencing alternatives within each category of crime. The judge ordinarily can choose from among these alternatives according to his discretion. Generally a defendant with a past record will receive a harsher sentence.

Much is omitted in the above discussion. However, it should provide a sufficient overview for an understanding of the topics that follow. In our discussions of further topics details will be added as they are necessary.

Roles of Persons in Criminal Justice

Let us now examine some issues relating to the roles of key persons in the system. This perspective from the system perspective; nevertheless, the nature of the system and the functions it performs, for the most part, determine individual's roles within the system, much like a script determines an actor's role. For example, a jury's role is to hear evidence and decide in a disinterested way what is true; thus, it does not, in fact cannot, conduct an independent investigation to gather evidence.

For the most part, the roles of persons in the system are rather clearly defined. Thus, we shall only examine the roles of three persons: the police, the prosecuting attorney, and the defense attorney. No attempt will be made to fully discuss the roles of these individuals. Rather they will be used as examples to show:

(1) How society's expectations concerning the policeman's role, coupled with requirements of the criminal justice system, can lead to problems;

(2) How the dominant role of the defense attorney, to protect his client's interest, can lead to behavior which is potentially harmful to society; and

(3) How a role requirement, given certain problems in the system, may have the effect of denying an important right.

Police. Society expects law enforcement agencies to do a number of things. Principally they are to catch criminals, to maintain order, and to prevent crimes. Financial and time constraints make it difficult, if not impossible, to effectively accomplish all of these tasks. Expecting an individual policeman to do all of the above may lead to role conflicts, for being the type of person who effectively pursues criminals may be inconsistent with being a sympathetic and friendly maintainer of order. This problem can be lessened in large police departments by using a division of labor in which the patrolman's role is to engage in surveillance and prevention, and the detective's main task is criminal investigation and apprehension.

Still another problem can exist. The society's need for the apprehension of criminals may be internalized by the policeman to an extent that results in behavior that is inconsistent with the needs of other agencies in the system. For example, the prosecutor needs defendants who have been treated in constitutionally permissible ways and evidence that has been legally obtained. Requiring the policeman to act in constitutionally permissible ways may conflict with his perceptions of his role. It also takes additional time; thus giving him less time to engage in other expected aspects of his role.

Defense Attorney. An attorney is not obligated to defend any particular defendant, but if he does take a case he owes his client his best efforts on his behalf and is under a duty to preserve his client's confidences. This obligation includes anything his client tells him about past crimes. These duties are imposed on the lawyer's role by the American Bar Association's Canons of Professional Ethics.

Two examples will suggest how these duties may conflict with society's interest in being protected from potentially dangerous persons.

Suppose an attorney represents a juvenile who has been adjudged a delinquent at a sentencing hearing. The youth has never been in trouble before and is likely to be put on probation. The attorney has evidence which strongly suggests that the youth needs treatment and without it will be a danger to society. Yet the youth does not want the treatment and insists that the attorney seek to get him free. This situation poses a major conflict between the attorney's duty to his client and his client's needs and his duty to society's interests.

Consider another example of this conflict. Suppose an attorney represents a defendant who is charged with a minor crime. In the course of his conversations with the defendant he learns that the individual has killed a number of people and learns where the bodies are buried. Also, he believes that the man is mentally disturbed. Given the minor nature of the crime the defendant is presently charged with, he can obtain bail and is not likely, even if convicted, to go to jail. Yet the client refuses to give the attorney permission to disclose his confidential communications. Again the attorney's duty to his client raises a major problem. The Canons strongly suggest that if the attorney revealed the above facts, he would be in violation of his professional responsibility.

For the most part, the duties imposed on the attorney's role by the Canons are socially desirable. However, the Canons and the lawyer's role generally are dominated by the nature of the advocatory system. A number of questions can and should be raised concerning the desirability of this system.

The Prosecuting Attorney. The prosecuting attorney's role is different from the defense attorney's role. The latter, as we have seen, owes a primary duty to the interests of his client. The prosecuting attorney, however, is the state's agent, but his primary duty is not to convict. His duty is to promote justice. Further, he is under a duty not to suppress evidence or witnesses capable of establishing the innocence of the accused. The defense attorney merely has a duty not to withhold evidence and to disclose information about future or continuing crimes by his client.

On the whole, these respective duties are desirable. However, the prosecuting attorney has a great deal of discretion, which can be misused. Under the guise of protecting the public's interest and seeking justice, he can drop cases that should be pressed to trial. We are not suggesting that most prosecutors misuse their discretion. But the possibility for misuse exists. Given crowded court calendars there is a great deal of pressure on the prosecuting attorney to settle cases at the negotiation stage. The problem is two sided: (1) the prosecutor may unduly pressure possibly innocent defendants to plea bargain, and, thus, in effect, deny them of their right to a trial, or (2) defendants may be able to gain unjust concessions in plea bargaining.

Suggestions For Approaching Problems

In Criminal Justice

Our focusing on problems related to the roles of individuals in the criminal justice system, rather than giving detail role descriptions, had certain purposes: (1) to make the material more interesting to you; (2) to implicitly suggest a teaching method; (3) to point out the complex nature of certain problems; and (4) to propose that you as teacher and citizen engage in the process of seeking solutions to the problems. Similar goals can be attained in your teaching. Focusing on problems and discussing certain solutions leaves less time for a consideration of descriptive material, but to the extent that the goals cited above are accomplished the loss in terms of the completeness of description is, on balance, worthwhile.

We suggest that in teaching the nature of the criminal justice system you focus on problems in the system. A certain amount of descriptive material will clearly be desirable and necessary for your students. However, a merely descriptive approach to the material is not likely to give the students the kind of interest in and appreciation of the criminal justice system that will lead them, as citizens, to become interested enough in the system to seek to help correct its shortcomings. You should help students to identify problems from descriptive materials and engage them in discussions about possible solutions. For example, rather than merely pointing out that plea bargaining exists or describing how it works, you should, as we briefly do above, point out problems that result from plea bargaining and engage students in discussions of possible solutions. Further, you should help students understand that, in part at least, the extensive use of plea bargaining is a result of problems in other parts of the system, in particular crowded court dockets.

It would also be desirable to help students appreciate the fact that typically the problems are complex and that some proposed solutions can lead to the creation of other problems. For example, suppose a student regarded overcrowded prisons as a problem. He might propose that by sentencing fewer persons to prison the rehabilitation of those sentenced would be more likely. No doubt he would be correct; however, "what about those not sentenced?" Will the fact they are free cause greater problems for society? Once the student sees this problem he might decide his initial suggestion still has merit, but he should be pressed to explore ways of dealing with those not imprisoned. Possibly he can think of something between probation and prison that will both reduce the prison population and protect society; a solution that can realize desired goals without resulting in "hidden" undesirable consequences.

Some problems, for example, the failure to rehabilitate criminals, impact on society. Others, for example, the overuse of plea bargaining tends to harm society, but their cause is problems in other parts of the system, for example, overcrowded courts. Arguably, the problem of rehabilitation can be solved by treating prisoners differently. Other problems-too much discretion by the police, judges, and prosecuting attorneys or too great a use of plea bargaining--can only be solved by solving problems in other parts of the system.

Some other problems--the fact that a large per cent of criminals commit further crimes when they are released from prison and the fact that many crimes never come to the attention of the police--are primarily caused by general social problems, rather than by problems in the criminal justice system. Such problems can only be solved by bringing about changed conditions in society.

In sum, students should learn to classify problems in terms of their causes, and they should learn to consider the effects of proposed solutions so that "solutions" to one problem do not cause other problems.

CHAPTER 2

STATUTES: THE DEFINITION OF CRIME AND CONSTITUTIONAL LIMITATIONS

For the most part, criminal statutes are within the domain of state legislatures. Two exceptions to this general rule exist: common law crimes and federal crimes. The United States Constitution places certain limits upon what conduct can be labelled criminal. Thus, criminal statutes are subject to review by courts. Also, there are some general requirements of criminal statutes, some of which are imposed by the Constitution. Note that in this section **substantive** constitutional requirements are discussed. In the next chapter, constitutional criminal **procedure** will be examined.

The Common Law

The principle source of American law is the English common law. In a number of areas of law, such as tort law, contract law, and property law, the common law plays a major role. Today criminal law is almost exclusively a function of statutes.

The chief difference between a common law system and a civil law system is that the criminal law of the latter is contained entirely within a written code established by the legislature. Only those acts prescribed by the code can be considered crimes by the judiciary. In a common law jurisdiction an act not listed as criminal in a written code can be branded as criminal by a judge. Thus, there are two sources of criminal law in a common law jurisdiction. One source is the criminal code, passed by the legislature. The other source is the body of court decisions by which judges have decided that certain conduct is inimical to the public good and, therefore, criminal. This does not mean that a judge can define conduct as criminal solely on the basis of his concept of what is **just**. Typically, a common law judge bases his decisions on previous decisions, which are called **precedents**. It is fundamental to Anglo-American concepts of justice that a judge cannot simply make up the law according to his private convictions. He is under a responsibility to explain his decisions in the light of the tradition created by the judges who have preceded him.

Most American jurisdictions, while operating under very detailed criminal codes, still recognize the authority of the courts to create common law crimes. However, the common law power of the judiciary is no longer an important source of criminal law. The modern trend is to supersede the common law by the enactment of a specific and comprehensive code. The passing of such codes does not necessarily render the common law irrelevant. Many such codes use common law terms in their statutes, but do not fully define these terms. In such instances, the common law is referred to, to ascertain their meaning. Also, in jurisdictions where common law crimes have been superceded by criminal codes, common law defenses such as insanity, self-defense, infancy, coercion and necessity, still exist.

The principle argument favoring the elimination of common law crimes is that the criminal law ought to be certain. People should be able to know in advance whether they will risk criminal prosecution for engaging in a certain course of conduct. "**Due Process**," a concept which we will examine later, requires that criminal law be definite.

The principle argument favoring criminal common law is its usefulness in filling gaps in the statutory law. Occasionally, in writing its criminal code, the legislature will fail to anticipate a certain destructive act. In a jurisdiction without common law the perpetrator of such an act will go free.

An example of a common law crime is found in *Commonwealth v. Mochan* (Superior Court of Pa., 1955). *Mochan* concerned obscene phone calls made in Pennsylvania, which had no statute forbidding such conduct. The court said that such phone calls clearly affected public morality, and that that was a sufficient basis for classifying them as misdemeanors under the common law.

Such examples are rare because criminal codes are comprehensive (they make most socially harmful acts crimes) because most judges believe that it is a legislative, not a judicial task to define crime. When gaps exist in criminal codes, they involve conduct that is not very harmful and legislatures can fill such gaps if they believe it is necessary.

Federal Crimes

The United States Congress differs from state legislatures, for it can only enact legislation in areas that the Constitution gives it power in Article I, Section 8. A state legislature, on the other hand, has general jurisdiction to pass laws for the welfare of its citizens.

Congress can make acts which injure the federal government criminal. Examples of such federal crimes are crimes involving espionage, treason, murder of federal law enforcement officers, and disobedience of federal administrative regulations.

Also, since the Constitution gives Congress authority in certain areas, such as interstate commerce, it can pass criminal laws that are necessary and proper for the exercise of these powers. The commerce clause is the principle constitutional basis for federal crimes involving activity in two or more states, such as taking a stolen car across state lines for immoral purposes. The actual conduct which is being punished in these instances have primarily local impact, but the movement across state lines enables the federal law enforcement agencies to augment the effort of city or state police.

Another area in which federal criminal law is used to control behavior of primarily local impact is that of taxation. Under federal income tax law, money that is obtained by conduct violating local gambling and narcotics law is taxable income. This means that a criminal who manages to evade the state authorities still has the federal authorities to worry about. The federal crime of income tax evasion is often the means by which narcotics offenders and professional gamblers are put behind bars. Federal tax law is one of the only really effective weapons in the fight against organized crime.

There are some crimes where the federal and state authorities both have jurisdiction. An example of such a crime is the robbery of a federally insured bank. The state has jurisdiction because robbery is against state law. The federal authorities have jurisdiction because the bank was a federally insured institution.

In such situations the accused could be prosecuted by both state and federal authorities. The Fifth Amendment protection against **double jeopardy** is not violated when two convictions are achieved by separate sovereignties. There is a federal policy, however, of not prosecuting the federal charge when the state has already prosecuted for substantially the same act.

State Criminal Law and the Constitution

In the United States we have a federal system. It is based on a division of power between the nation and the states. The Federal Government is a government of **enumerated** powers. That is, Congress' authority is limited to that which the Constitution (Article I) delegates to it. State governments are governments of **residual** powers. That is, they retain all authority not granted to the nation. State legislatures have the power to enact criminal statutes in order to regulate conduct over which the Congress has not been given jurisdiction. The basis of this authority is the state's **police power** to regulate its internal affairs for the protection or promotion of its citizens' health, safety, morals, or general welfare.

Various constitutional provisions limit the state's power to create crimes. The basic limitation is found in the 14th Amendment's Due Process Clause, where it says . . . 'nor shall any State deprive any person of life, liberty, or property, without due process of law.' This means that conduct cannot be declared criminal unless it bears a substantial relationship to injury to the public. To call criminal conduct which does not injure the public, threatens the person engaging or desiring to engage in such conduct with the loss of his liberty without due process of law.

An example of a state law struck down for violating due process requirements if found in **Fenster v. Leary** (N.Y. 1967). **Fenster** involved a vagrancy statute which made it a crime to be without visible means of support while being capable of working. The court said that there was no fair, just and reasonable connection between this statute and the promotion of the health, comfort, safety, and welfare of society. Vagrancy is not conduct which seriously restricts others' rights; nor does it bear any substantial relationship to the preservation of public order. Thus, making vagrancy a crime was an invalid exercise of the state's police power.

It is a legislative function to create crimes. The judicial task is to review criminal statutes the validity of which is challenged and to determine whether they are consistent with the constitution.

The Supreme Court is extremely reluctant to strike down a state criminal statute for violating substantive due process rights. The Supreme Court operates under a strong presumption of the validity of

state legislation. Because it operates at some distance from the state, the Court usually decides to trust the state government's evaluation of conditions within its own borders.

The state courts are considerably less hesitant to pass upon the sufficiency of the relationship between certain legislation and the protection of the public. Being more familiar with local conditions, they feel entitled to consider whether legislation is actually designed to prevent a danger to the public and is an effective means of doing so. In neither case is the court permitted to substitute its judgement for the legislature's. That a court thinks the legislature has acted unwisely is not a sufficient reason to overturn state legislation. Sometimes, however, a state court will invalidate a law because the court thinks the legislature could have used less extreme measures without becoming less effective; or because the court determines that the true intention of the legislature was not to serve the public but to serve a special interest group. However, if there is an apparent legitimate purpose for the state statute, the court will uphold it.

The 'reasonable relation' test of substantive due process has never had much bearing on legislation directed at 'hard core' criminal activity such as robbery, assault, or murder. The relationship of legislation forbidding such activity to the public good is clear. The field of legislative activity on which substantive due process once had considerable bearing involved government restrictions on economic activity. Even for that purpose, the reluctance of courts to pass upon the motives and wisdom of the legislatures has rendered it pretty much obsolete.

In this section we have examined the relationship between substantive due process and the state's police power. In the next chapter we will examine procedural due process. Let us now turn to a discussion of some general requirements of criminal statutes.

Some General Requirements of Criminal Statutes

A Criminal statute must give fair warning as to the acts that are being declared criminal and the penalties that can be imposed for committing these acts. The constitutional requirement of due process demands that one not be deprived of his liberty without fair warning that such deprivation may result from the doing of certain acts. A statute which fails to give such notice will be declared void for vagueness.

This requirement puts legislators in a difficult position. As Justice Frankfurter expressed it in **Winters v. N.Y.**:

> If a law is framed with narrow particularity, too easy opportunities are afforded to nullify the purpose of the legislation. If the legislation is drafted in terms so vague that no ascertainable line is drawn in advance between innocent and condemned conduct, the purpose of legislation cannot be enforced because no purpose is defined.

If the law is too detailed, some harmful conduct goes unspecified. If it's too broad, it subjects innocent and unsuspecting people to the risk of the stigma of conviction and the loss of their liberty.

A statute is 'void for vagueness' when 'men of common intelligence must necessarily guess at its meaning and differ as to its application' (**Connally v. General Construction Co.** 269 U.S. 385, 391). Such a statute could leave the jury confused as to whether the conduct in question was intended by the legislature to be criminal. This does not mean that a statute is void if it appears vague to the man in the street. It means that one acquainted with the law, and familiar with its terms, would find the statute vague. In determining whether a statute is vague, a court is not restricted to looking at the statute itself. If court decisions have given the statute a clear and definite meaning, such judicial construction will constitute fair notice.

An example of a statute that was too narrow can be found in **Bouie v. Columbia**. In **Bouie** the defendants were accused of an act that was not contained within the statute under which they were prosecuted. The defendants, who were civil rights advocates, were convicted of criminal trespass after sitting at the lunch counter of a drug store in Columbia, South Carolina, to protest racially segregated service. On appeal, their convictions were overturned because the statute made it a crime to 'enter upon the lands of another after notice from the owner or tenant prohibiting such entry,' and the act they were convicted was not entry, but refusal to leave.

An example of a statute that was too broad is found in **Winters v. N.Y.** The statute involved in that case banned the publication of news or fiction containing 'bloodshed or lust so massed as to become

a vehicle for inciting crimes.' The Supreme Court considered the statute to be so vague and uncertain that men of common intelligence could not tell what was permitted and what was forbidden. Hence the statute was unconstitutional.

Punishment

There are two basic elements of a criminal statute: forbidden conduct and a penalty.

Penalties, as well as conduct, must be fixed by law. If the legislature prohibits certain behavior, but neglects to prescribe a penalty, no penalty can be imposed. However, if the state still has common law crimes, it would not be unconstitutional to supplement the statute with the penalty prescribed for the crime under the common law.

The notice of the penalty need not be absolutely definite. Legislatures often prescribe maximum and minimum sentences that are far apart; and the availability of plea bargaining makes it likely that the accused will pay the penalty prescribed for an act significantly less serious than the one he committed. Also, penalties are often modified by means of probation or parole. A convict will often be freed on probation before he has served any time at all.

Mental State and Action Requirement

Typically, crime requires both a criminal action and a guilty state of mind. Two exceptions to this general rule are (a) strict liability crimes (which will be discussed below); and (b) crimes which consist of omissions to act in instances where there is a legal duty to act. An example of the latter is refusing to give aid or information to a police officer upon being reasonably requested to do so.

The crime of larceny is illustrative of the general rule. Larceny consists of appropriating another's property knowing that it is not your own, with the intent to deprive its owner or possessor of it permanently. A person **intends** something when it is substantially certain to result from conduct in which he consciously engages. Intention is generally defined in terms of desiring a consequence and is distinguishable from one's **reason** for desiring a consequence, which is his **motive**. A man who steals in order to feed his hungry grandmother intends a crime, regardless of his noble motive. His motive is legally irrelevant, except insofar as it might persuade a court to deal leniently with him in handing down its sentence. There are times, however, when a good motive will exculpate. For example, if a thief's grandmother is literally starving to death, he may be excused by the defense of necessity. The importance of preserving the old woman's life will take precedence over the state's interest in preventing theft, if the defendant had no other means of securing food.

Nevertheless, the general rule is that motive is irrelevant to criminal liability. If one is justified in taking the life of another person (by the necessity of self-defense, for example) it does not matter how much he hated the person, nor how eager he was for a chance to kill him. He is not guilty of murder.

A prime example of the relevance of intent to the classification of criminal conduct is the distinction between murder and manslaughter. The difference between the two is the degree of moral culpability attached to the different intent with which each crime is committed. Manslaughter is committed without the premeditated and deliberate intent to kill that is essential to first degree murder. Thus it is considered the less blameworthy of the two acts.

The requirement of deliberation does not mean that one must have thought about the act beforehand. A split second or two of deliberation is frequently held to be enough. Manslaughter tends to be established not by showing that there was not time for the accused to form the intent to kill, but by showing that the rational faculties of the accused were overwhelmed by passion, anger, provocation, etc. But time can be a highly relevant factor when it is shown that the accused had 'ample time for any normal person to maturely and appreciatively reflect upon his contemplated act and to arrive at a cold, deliberated and premeditated conclusion.' (*People v. Wolf*, Cal, 1964) Even in a spur of the moment killing, an attitude of coolness and deliberation will tend to rebut the presence of such passion as would justify a finding of manslaughter.

In closing this section, it should be noted that criminal guilt does not require the full accomplishment of a criminal act, such as killing someone or taking their property. A criminal intent, plus definite steps towards acting out the intention, is sufficient for criminal liability. In such situations persons will be charged with attempting to commit a crime. In some crimes, such as perjury and conspiracy, the criminal act is the mere speaking of words. Also, a person can be found guilty of a crime when he en-

courages, commands, or hires another person to commit the act. Although spoken words sometimes are sufficient to constitute a criminal act, under no circumstances can a person be incriminated for his mental state alone.

Insanity -- the Voluntary Action Requirement

Attached to the requirement that there be a criminal act, as well as a criminal intention, is the requirement that the act be **voluntary**. Ordinarily, it would make no sense to hold a person criminally liable for acts that he did not intend or was not aware of. This is because the basic purpose of criminal law is to deter anti-social behavior. An awareness of the possibility of criminal punishment can deter a person only from committing **voluntary** acts. Obviously it will not deter him from doing something that he does not intend to do, and has no control over. (However, holding someone responsible for criminal acts committed while he was too drunk to know what he was doing might serve the purpose of deterring him from becoming so inebriated.)

The main example of involuntary behavior is found in the defendant who is insane. If a man acted under a delusion, or while he was unable to realize what he was doing, no useful purpose is served by holding him criminally responsible for his act. This does not mean that he should be returned to society. Sound social policy demands that he be incarcerated until he ceases to be a danger to the public. But the basis of incarceration is different than the basis of a criminal conviction, He is being restrained because he is in need of help, not because he is responsible for a blameworthy act. A similar situation is presented by the man who was fully aware of what he was doing when he committed the act for which he has been charged, but who has since undergone a deterioration of his mental state and would be unable to understand the nature of the proceedings if he were brought to trial. His situation is different from that of a person who was insane when he committed the act for which he was arrested. He was aware of what he was doing, and it would not be unfair to hold him criminally liable for it. But he is similar to the insane defendant in that the purpose of a trial, and of incarceration in prison, would be lost on him. Unable to understand why he was put on trial and incarcerated, he would probably not be deterred from future anti-social conduct by the experience. For this reason, the trials of such persons are postponed until they become competent to understand the proceedings. In the usual situation, the accused is not freed. He is incarcerated in an asylum.

Self-Defense -- A Justification for Harming Others

Sometimes an individual acting voluntarily, with full awareness of what he is doing, will be excused because of the circumstances in which he acted. For example, a person who picks up a knife and uses it to kill another person will be excused if he acted in self-defense, and the amount of force he used against him. Once cannot successfully plead self-defense if he pursued and continued attacking the deceased after the threat to his own safety had abated. For example, if the assailant attacked the accused with a knife, and the accused shot him in the shoulder, causing him to reel backwards and stagger out into the yard, the plea of self-defense would be lost to the accused if he pursued his assailant and killed him while he was attempting to retreat.

It is not absolutely essential to a claim of self-defense that one actually be in mortal danger. It is enough if he **reasonably believed** himself to be in mortal danger. For example, if A sees B walking towards him, aiming a pistol at him and threatening to shoot him, and A picks up a club and strikes B, who dies, A is entitled to an acquittal on the grounds of self-defense even after it is revealed that the pistol was not loaded. If a reasonably prudent man, in similar circumstances, would have believed himself to be in mortal danger, then the defense of self-defense is available.

It should be noted that some states will not find self-defense if the defendant used deadly force in a situation where he could have avoided using such force by retreating. However, the defendant must have known that he was capable of retreating with complete safety; and even states requiring such retreat will usually make an exception where the defendant is attacked in his own home.

Strict Liability Crimes

Sometimes a person will be subjected to criminal liability solely on the basis of an act, without regard to whether or not it was accompanied by a culpable state of mind.

For example, the Food and Drug Acts of 1906 and 1938, which were devised to keep impure and adulterated foods out of the channels of commerce, dispensed with the conventional requirement for criminal conduct. In the interest of society it places the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger *(U.S. v. Detterweich* 320 U.S. 277).

In *Detterweich*, a shipping company was convicted of a misdemeanor for what appeared to be a mere mistake in the labelling of certain drugs. The Supreme Court sustained the conviction regardless of the moral innocence of the defendants because of the extreme danger such morally innocent errors pose for the lives and health of the general public; and because of the relatively minor criminal penalties imposed.

The power of the state to create strict liability crimes is limited to imposing minor penalties for conduct involving considerable danger to the public.

The State's Burden of Proof Beyond a Reasonable Doubt

In a criminal prosecution, the **state** must prove the defendant's guilt **beyond a reasonable doubt.** In many jurisdictions, if the **defendant** raises an affirmative defense -- that is, if he says yes, I did it, but there is a reason why I must be legally excused -- he must prove this defense by a **preponderance** of the evidence.

The U.S. Supreme Court has defined 'reasonable doubt' in the following terms:

> A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and you believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to the benefit (*Holt v. U.S.* Supreme Court 2818 U.S. 245).

Proving something by a preponderance of the evidence means showing that it is **more likely than not** to be true.

Elements of the Crime

What the prosecution has to show is:
(1) That the defendant engaged in prescribed conduct;
(2) That this conduct caused, or intended to cause, the harm that the statute was intended to prevent;
(3) That he did so with a guilty frame of mind. Except in strict liability or vicarious liability crimes, the mens rea (guilty mind) must be shown to have existed at the time of the crime. Where the mens rea cannot be conclusively proven, it can often be presumed. (A defendant's **guilt** must be proven **beyond a reasonable doubt,** but the **factual elements** of the prosecution's case, such as the intent with which the accused acted, need only be proven by a preponderance of the evidence.)

Problems with proving intent arise when the defendant's actions are ambiguous. For example, consider a case where a man is estranged from his wife and is upset about her keeping company with X. While drinking in a tavern, he declares that he will shoot X if he catches him hanging around his wife again. A week later he decides to attempt a reconciliation with his wife and goes home. Finding X there, he takes out a pistol and fires three shots, at close range. All three shots miss by a considerable margin. At his trial, the man claims that he was merely trying to scare X away. How should the jury decide whether he actually committed assault with intent to kill? A person is presumed to intend the natural and probably consequences of his acts. A natural and probably consequence of shooting at someone is killing him. But a natural and probably consequence of deliberately shooting to one side of a person is merely to scare him. The jury must decide whether to infer from W's actions an intent to commit assault with a deadly weapon. W's prior remarks do not necessarily prove an intent present at the time when he pulled the trigger. If W is an expert marksman, and can hit a tin can at 20 paces with a pistol, the jury would have grounds for deciding that W had merely intended to frighten X.

In some instances, it is constitutionally permissible for a legislature to help the court by saying that certain activity will give rise to a presumption. In New York, for example, if a person is notified that his checking account has insufficient funds to cover a check he has written, and he does not make good on the check within 30 days, a presumption arises that he intended to commit fraud when he wrote the check. This presumption may, of course, be rebutted by the defendant in the course of the trial.

Affirmative Defenses

In defending against criminal charges one can maintain:
(1) he didn't do it; or
(2) he did it, but had a legal excuse.

If he takes the latter course, he is pleading an affirmative defense. In most jurisdictions, the burden of proof is on the defendant to show that he has such a defense. Some basic affirmative defenses will not be considered.

A. **Insanity**. A test frequently applied by the courts as to whether a defendant can be held insane is the McNaughton test. Under this test a court asks whether the accused, when he committed the act for which he is being tried, was laboring under such a defect of reason, due to a disease of the mind, that either he did not know that nature and quality of the act he was doing, or he did know what he was doing, but did not know it was wrong.

Another test, applied in a few jurisdictions, is the irresistible impulse test. Under this test, the defense of insanity is available when an accused did know right from wrong, but was incapable of controlling his actions because of a mental disease.

It should be noted that not all states treat insanity as an affirmative defense. Some states, and the federal courts, require the prosecution to prove the sanity of the defendant.

B. **Self-Defense**. (see above)

C. **Necessity**. The defense of necessity is available when the criminal act was a means of avoiding irreparable harm to the defendant or others. The defendant must have done no more than was necessary, and the harm he inflicts must not be disproportionate to the harm he is trying to avoid. For example, a man who is starving may be forgiven for a theft if it was absolutely necessary; but not even when shipwrecked with a group of people be forgiven by the law for killing and eating a member of the crew.

D. **Duress and Coercion**. Sometimes criminal acts committed when reasonably believing oneself to be under an immediate threat of death or serious bodily injury will be forgiven. A defendant might be forgiven for aiding a robbery if a gun is being pointed at his head. He would not be forgiven for shooting someone in this circumstance. If the crime one is forced to commit involves the causing of death or serious bodily injury, the defense is lost.

E. **Mistake of Fact**. If someone stole an article genuinely believing it to be his, he would have the defense of mistake of fact available to him. This defense is often disallowed for certain crimes. For example, in most states, it is not a defense to a charge of having sexual relations with a minor that you thought she was of legal age.

F. **Mistake of Law**. The phrase 'ignorance of the law is no excuse' is not absolutely true. The accused has a defense when he acts in reasonable reliance upon an **official** statement of the law which turns out to be erroneous. If you seek the advice of a public offiical empowered by his office to give advice on such topics and fully disclose the facts to that official, and you rely in good faith on the advice that official gives you, you will have a defense if his advice turns out to be wrong.

Discussion Topics

1. Criminal codes make criminal law more 'objective' than a system based entirely on common law would be. Would it be better if judges and juries decided individual cases of conduct without reference to criminal codes or to past cases - precedents? Would this be more likely to promote fair treatment of people accused of crime?

2. Criminal law would be more uniform if Congress passed a national criminal code. Constitutional problems aside, would this result in a better system? Should all law enforcement persons be federal employees?

3. Suppose a state decided to take severe measures to cut down traffic deaths. For example, it made 'driving 10 miles over the speed limit' a felony punishable by two years in prison. Would this violate due process? Would it if drivers were not given notice of the extent of the penalty? Suppose it were made a crime to own a car that would go over 70 miles per hour. Would this violate due process?

4. Mental states are difficult to prove. Given this fact, should a state make all crimes strict liability crimes?

5. The harm caused by an insane killer is as great as that caused by a sane one. Thus, would not it be desirable to treat these people in the same way?

6. In some cases persons judged insane spend more time in confinement than they would if they were found guilty of the crime that they were charged with. Is this fair? Should a person who is arguably insane be allowed to plead guilty to a crime? Or should a hearing to judge his sanity be required?

7. Deadly force may not be used in self-defense to resist moderate, non-deadly force. Also, when the attacker withdraws, the right to use force against him ceases. Suppose A attacks B with a knife. B shoots A in the shoulder and A stumbles out into the backyard. B pursues A with a gun. As B is about to shoot A, A stabs and kills B. Does A have the defense of self-defense?

CHAPTER 3

JUSTICE, FREEDOM AND EQUALITY: CONSTITUTIONAL CRIMINAL PROCEDURE

In the last chapter we saw an example of how a **substantive** constitutional right (the due process doctrine of sufficient state interest) limits the states' police power. In this chapter we will examine a number of **procedural** guarantees under the Constitution. We will develop in some detail the history of the Supreme Court's treatment of the Fourth Amendment's search and seizure clause. Before examining procedural protection , let us discuss a number of general topics that show the relationship of constitutional clauses to justice, freedom, and equality and that provide useful background for our examination of criminal procedure.

The Basic Structure and Purposes of the Constitution

The body of the Constitution contains seven articles: Article One establishes the form and powers of Congress (section eight enumerates the powers of Congress); Article Two deals with the presidency; Article Three creates the Supreme Court; Article Four deals with relationships among the states and between the states and the federal government; Article Five provides for procedures for amending the Constitution; Article Six establishes the Constitution and federal laws and treaties as the supreme law of the land; and Article Seven deals with the requirements for ratification of the Constitution by the states. If we just had the body of the Constitution, it is possible that we would have no Constitutional criminal procedure with respect to the states. Another possibility is that the federal government would have imposed upon the states certain procedural requirements. Arguably, the "general welfare" and the "necessary and proper" clauses of chapter eight of Article One and the "supremacy" clause of Article Six give the Congress power to establish extensive requirements and impose those requirements on the states. We saw in the last chapter that these clauses give Congress power to enact criminal laws to protect against conduct injurious to the federal government. We also saw that these clauses, combined with the interstate commerce clause, empower Congress to make criminal certain activities that are carried out in two or more states.

However, it is speculative to discuss what criminal procedures would be required based on these clauses alone, for the Constitution contains a number of amendments, some of which deal with criminal procedure. What is not mere speculation is that if Congress sought to impose criminal procedures on the states -- absent certain amendments -- many would argue that this would be an impermissible exercise of federal power.

The Bill of Rights and the 14th Amendment are the principle Constitutional bases for requiring that states adopt certain procedures in their criminal justice system.

The Bill of Rights

Although by 1787 a number of states, including Virginia, Pennsylvania, and Massachusetts, had included a Bill of Rights in their Constitutions, the initial version of the United States Constitution failed to include a Bill of Rights. This fact, at first blush, is odd, for men like James Madison, who were responsible for states' Bill of Rights and who were interested in liberty and good government (as Thomas Jefferson said in a letter to Thomas Nelson -- good government was the "whole object" of the Revolution) attended the constitutional convention.

Clearly, the majority of these men supported the basic liberties then expressed in the Declaration of Independence and now specified in the Bill of Rights. However, there were reasons for this omission. Since the federal government was created only as a government of specifically delegated powers and since it was granted no power over religion, press, or speech, or criminal law generally, there was, some believed, no need for a Bill of Rights prohibiting these powers to the federal government. There was no need to protect against a power which had not been delegated and, therefore, could not be exercised. Further, if there were specified exceptions and prohibitions on the exercise of powers not granted to the federal government, it might allow someone to argue in the future that some general power over these areas had actually been given to the federal government.

In the ratification process a principal point of debate in the states was the absence of a Bill of Rights. It was widely believed that an absence of a Bill of Rights would pave the way for an encroachment by the federal government upon the fundamental liberties of a free people. When the

first Congress convened, James Madison took the initiative and proposed certain amendments. Twelve articles finally emerged from Congress. Ten of these were ratified by the necessary three-fourths of the states and became the Bill of Rights.

The general scheme of the Bill of Rights is one of prohibition. Some clauses are **substantive** (they secure to the people certain natural rights of all men); others are **procedural** (their aim is fairness; thus they require that certain procedures be followed in criminal cases). The Bill of Rights, in that it prohibits certain actions by the federal government, differs from the structure of the main body of the Constitution, which, for the most part, grants powers to the federal government.

Let us look at some examples to clarify the distinction between substantive and procedural guarantees in the Bill of Rights. The first amendment states that "Congress shall make **no** law..."; thus it denies all power to the government to abridge the subjects named (religion, speech, press, and assembly). These rights are personal liberties -- undeniable and unqualified rights. As Mr. Justice Jackson said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

Thus, the majority cannot make laws, including criminal laws, that limit these liberties.

The Sixth Amendment is a good example of procedural rights. It does not prohibit government from taking away from wrong-doers their liberty, but it does require that certain procedures, such as, speedy and public trial by an impartial jury, confrontation of witness, and representation by counsel, exist before one's liberty can be taken away.

The Fourth Amendment can be viewed as a combination of substantive rights and procedural protections. Its basic premise is that people are free of governmental intrusions into their persons, houses, papers, and effects; however, in effect, it permits reasonable searches and seizures and specifies required procedures before a search or seizure is regarded as reasonable.

Interpretations's Role in the Bill of Rights

Two additional things should be noted about the Bill of Rights: (1) as a result of the Supreme Court's decision in Barron v. Mayor of Baltimore, 7 Pet. 243 (U.S. 1833) the Bill of Rights alone do not limit the action of state governements; and (2) courts, especially the Supreme Court, play a major role in construing the meaning of the liberties contained in the Bill of Rights in specific situations. Madison clearly saw the importance of the court's role:

> If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights. (Irving Brant, The Madison Heritage, 35 N.Y.U.L. Rev. 882, 889-900)

The Fourteenth Amendement

In light of the above two points, the Due Process clause--"No state shall...deprive any person of life, liberty or property, without due process of law"-- of the Fourteenth Amendment is very important. For under it, central clauses in the Bill of Rights have been applied to limit the actions of state governments and officials. Courts have rendered numerous decisions clarifying and, in the view of some, extending the meaning of the Bill of Rights. Before discussing how this process has occurred and citing some examples of criminal procedure, let us examine the Civil War Amendments, particularly the Fourteenth Amendment, which give rise to "civil rights"; whereas the Bill of Rights gives rise to "civil liberties."

The Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution shortly after the Civil War. The Thirteenth Amendment abolishes slavery and involuntary servitude, "except as a punishment for crime whereof the party shall have been duly convicted." The Fifteenth Amend-

ment prohibits denying the right to vote to citizens on account of race, color, or previous condition of servitude. Among other things, the Fourteenth Amendment extends citizenship to former slaves. Although these Amendments, generally, are important statements of equality and justice, only two Fourteenth Amendment clauses -- equal protection and due process -- have had an impact on criminal justice.

Both equal protection -- "No state shall . . . deny to any person within its jurisdiction the equal protection of the law" -- and due process are limits on state action. They do not apply to the federal government (although the Fifth Amendment due process clause applies to the federal government) or to the actions of private persons. They both are statements of justice; although they each focus on a different aspect of justice.

Equal protection stresses justice as equality before the law. It is not just to treat similar people in similar situations differently. So too, a state or its agencies violates equal protection when they classify people for different treatment when there is no rational basis for the classification. For example, when the classification has no valid relationship to a legitimate state purpose. Equal protection is not violated merely because the state classifies people, such as treating juvenile offenders differently from adult criminals. Thus, typically a showing or rational relationship to a legitimate governmental objective is sufficient in the face of an equal protection challenge. However, if the classification impinges upon a fundamental constitutional right, such as the right to travel interstate, or if is based on characteristics, such as color, creed, birth or status, over which the individual has no control, then the state must establish not only that it has a compelling interest which justifies the classification, but also that the classification is necessary to further the state's purpose. Thus, like justice, equal protection permits different treatment of people based on relevant characteristics, but again, like justice, it rejects the view that race or poverty are relevant characteristics for different treatment.

Two examples of the application of equal protection to strike down practices in the criminal justice system are found in Griffin v. Illinois, 351 U.S. 12 (1956) and Tate v. Short, 401 U.S. 395 (1971). Both cases involved indigents whose poverty denied them an important right. In Griffin, the Supreme Court invalidated state laws that, in effect, prevented an indigent defendant from acquiring a transcript which was necessary for an appeal of his conviction. In Tate, it struck down criminal penalties that subjected indigents to incarceration simply because of their inability to pay a fine.

Due Process is a statement of justice as basic fairness. As in the Bill of Rights there is a distinction between substantive and procedural due process. The basic purpose of procedural due process is to prevent unfair or arbitrary decisions by state officials which result in loss of rights. Thus, it requires, when there is the potential that a person will be deprived of life, liberty, or property, that he be given notice of the charges against him and a hearing. However, the nature of the hearing and the safeguards employed is a function of what fundamental fairness requires, given the individual's rights involved and the state's interest. Protective procedures in the case of a person charged with a crime are extensive; whereas, short student suspensions from school only require an informal hearing between the school official and the child.

Before turning to a discussion of the relationship between the Due Process clause and the Bill of Rights, it should be noted that the "Civil War" Amendments are a shield -- by their own force they prohibit states from doing certain things. They are also a sword, for they grant Congress the power to pass laws insuring an individual's constitutional rights from being impinged upon by states or state officials.

Due Process and the Bill of Rights

As we noted above, the Bill of Rights alone do not apply to state action. However, the Supreme Court has used the Due Process clause, in its reference to 'liberty', to incorporate some of the substantive rights and the procedural protections in the Bill of Rights to protect individuals against state action. Those clauses that have been incorporated are those that are, as Mr. Justice Brennan has stated, "of the very essence of the scheme of ordered liberty" in a free society. An example of the **selective incorporation** (as this process is called) of a substantive right is that freedom of expression may not be abridged by a state law making it an offense to distribute handbills which do not contain the names of the printer and distributor.

The scope of liberty has not been limited to the Bill of Rights, for courts have found certain criminal statutes violative of due process without finding that they constitute a threat to some freedom or right guaranteed by the Bill of Rights. We saw some examples of this in the last section, namely, in the requirements that conduct prohibited by criminal statutes must be related to an injury to the

public and, with the exception of strict liability crimes, there must be evil intentions and voluntary action before punishment can be imposed.

Due Process, then, requires that the state exercise its police power in ways that are consistent with the concepts of fundamental fairness and ordered liberty. Let us now turn to a discussion of some criminal procedures that are required by due process.

DUE PROCESS, THE BILL OF RIGHTS, AND CRIMINAL PROCEDURE: AN OVERVIEW

Criminal procedure is concerned with the legal steps through which a criminal proceeding passes, commencing with the initial investigation of a crime and concluding with the unconditional release of the offender. In Chapter One we saw some of the important steps in this process. Here we will examine some constituional requirements in this process. In the next section we will examine in more detail the Supreme Court's treatment of the exclusionary rule, which is essential to the right against unreasonable searches and seizures.

Federal and state criminal practices can differ because the federal criminal justice system is bound by all of the procedural requirements of the Bill of Rights; whereas, state systems are only bound by those incorporated by the Supreme Court. Let us first, under a number of headings, cite procedural rights that are "so fundamental to the protection of justice and liberty that 'due process of law' cannot be accorded without them, "(Duncan v. Louisianna, 391 U.S. 145, 212 1968)." Thus, the Supreme Court requires that both federal and state governments adhere to them. Secondly, we will point to some Bill of Rights procedures that states are not required to follow.

Incorporated Procedures

Arrests: The "probably cause" requirement of the Fourth Amendment only permits arrests, without a warrant, of persons who commit felonies in the arresting officer's presence, or if the felony is committed out of his presence, of persons when the officer has reasonable grounds (evidence known by the officer, not mere suspicion) to believe both in the commission of the crime and the guilt of the arrested party. All other felony arrests require a warrant of arrest issued by a judicial officer. Arrest warrants must describe in particular the person to be seized and are issued only if there is probably cause (there must be evidence that would warrant a man of reasonable caution in the belief that a crime has been committed by the named person).

Accusation: The Sixth Amendment guarantees an accused the right to be informed of the nature and cause of the accusation. Due process requires that the accused person be given notice of the specific charges against him because, without it, a fair trial would be impossible.

Jury Trial: Although the states have discretion with regard to the detailed operation of their jury system, the Sixth Amendment requires a fair tribunal. The right to an impartial jury requires that the jury be a body representative of the community, not the organ of any special group or class. A particular jury need not be composed of all types of people, but a state practice which systematically excludes certain groups, such as, daily wage earners, violates the Constitution. The right to a trial is guaranteed only in the case of "serious offenses." This is presently construed by the Superme Court to mean crimes punishable by more than six months.

Counsel: The Sixth Amendment right to counsel has two sides: (1) the right to counsel or one's choice, provided he is competent to practice in the jurisdiction, and (2) the right to court-appointed counsel, where an accused is unable to retain counsel. In Gideon v. Wainwright, the Supreme Court held that a person has the right to court-appointed counsel, if he requests one, during the trial. But the need for the assistance of counsel is not limited to the courtroom. An accused "requires the guiding hand of counsel at every step in the proceedings against him" (Powell v. Alabama, 1932). As a result of Escabedo v. Illinois (1964) and Miranda v. Arizona (1966), the right to counsel attaches as soon as a person is taken into police custody. He also has a right to counsel in order to appeal his conviction.

Due Process also requires that a mentally competent person be permitted to waive his right to counsel. Such a waiver must be shown by some positive act of the accused. It cannot be presumed from the mere failure to request counsel. For the right to counsel or a waiver of the right to be effective, a person must be advised of his right to counsel -- thus, the Miranda warning.

Fair Trial: There are constitutional guarantees, in addition to those above, in order to insure a fair trial. A criminal trial must be public. The accused has the right to be present at his trial so long as he

is not disorderly. The prosecution cannot knowingly use perjured testimony; nor can it deliberately suppress material evidence. The accused has a right, to the extent it is within governmental power, to employ compulsory process for obtaining a witness in his favor and to confront and cross-examine a witness against him at trial.

Self-Incrimination: Although the Fifth Amendment privilege against self-incrimination is viewed by some as procedural, in fact, it is much more than procedural; it is a vital safeguard of the sanctity of human personality. The privilege has been extended beyond a literal reading of the Fifth Amendment. It applies not just to the accused, but to any witness. The key element is whether the answer might tend to subject the person to a criminal penalty, not the nature of the proceeding. Thus, it applies to all governmental proceedings, not just criminal trials.

With respect to the accused criminal, but not to witnesses, the privilege has developed into a right of silence. The accused cannot be compelled to take the witness stand. The failure to testify must not give rise to an inference or presumption against the accused; nor can the court or prosecutor comment to the jury about the failure to testify.

The privilege does not apply to physical evidence, such as, fingerprints or breath tests, taken from the accused.

Non-Incorporated Procedures

Some procedures required by the Bill of Rights are so fundamental to the protection of liberty and justice that Due Process necessitates that states adopt them. In these areas the Supreme Court permits states to use alternative procedures.

Bail. Vindicates the traditional right to freedom before conviction. It promotes unhampered preparation of a defense and prevents infliction of punishment before conviction. Since the Eighth Amendment ban on excessive bail presupposes the availability of bail, in federal courts there is an absolute right to bail in noncapital cases. A few states, however, interpret the ban on excessive bail literally, that is, as referring only to the amount of bail and not to the question of when bail is to be allowed or denied. The testing of discretion in state courts to refuse or grant bail in felony cases does not violate Due Process.

The Fifth Amendment requires **grand jury indictments** in all federal prosecutions for "infamous crimes" (typically felonies). Due Process does not require states to use grand juries indictments. They can use, in their place, an information, for it preserves the basic right to a fair trial.

In federal courts the Sixth Amendment guaranty of trial by **jury** requires a twelve man jury and an unanimous verdict for conviction. Neither is required in state courts in all criminal cases, provided that the essentials of jury trials are maintained.

SEARCH AND SEIZURE AND THE EXCLUSIONARY RULE

In the preceding section we saw in a general way the impact of the Bill of Rights on state criminal procedure. Here we shall examine the Fourth Amendment search and seizure clause. There have been numerous court decisions dealing with various aspects of search and seizure. No attempt will be made to discuss all of them. Rather, two topics will be addressed: (1) "What is a **reasonable** search and seizure?" and (2) "What means have the courts developed to deter law enforcement officers from conducting unreasonable searches?" In discussing these questions we will seek to elucidate the incorporation versus the fundamental fairness approaches to Due Process. Related to this controversy concerning the impact of Due Process on state criminal procedures are questions involving standards of morality and needs of policemen. In dealing with the above two questions, the general problem faced by courts is to arrive at a proper balance between citizen's privacy and effective law enforcement. In the last section we will briefly examine two major exceptions to general principles of search and seizure that exist because of law enforcement needs.

Reasonable Searches

The Fourth Amendment does not forbid all searches and seizures. It forbids only those that are unreasonable. The general rule is that for a search to be reasonable, it must be conducted with a search warrant (a written order issued by a magistrate directing a peace officer to search a specific place for specific property and to bring the property before the magistrate) describing the place to be searched and the objects to be seized. The particularity requirement makes general searches illegal

and prevents the seizure of one thing under a warrant describing another. The warrant requirement is based on the belief that persons, their homes, their apartment, their business and their automobiles (the special nature of automobiles will be discussed below) normally should not be searched unless a policeman can convince an impartial magistrate that there is probably cause to believe that specific property that may be the object of a search, such as stolen property, is located in the specified premises.

There are a number of exceptions to the general principle that a search and seizure is unreasonable without a warrant. A warrantless search is reasonable in the following circumstances:

(1) When the search is consented to. For the consent to be effective, it must be voluntary, i.e., unequivocal, specific, and intelligently given. A consent is not voluntary if it is the product of duress or coercion.

(2) When the search is incidental to a lawful arrest. A search comes within this exception only if it is made substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. A person may be searched when validly arrested. So too, can the immediate place where he is arrested at the time of the arrest. However, if a person is arrested at his home and the officer leaves the house with the prisoner, the officer cannot return to the house and search the place of the arrest without a warrant. Nor can an officer arrest a person outside of his house and, absent an emergency, then search the house.

(3) When the search is of an abandoned premise or property.

(4) When the search is made in "hot pursuit" or in an emergency situation before an arrest. The policies which render such searches reasonable are the same as those which permit searches incidental to lawful arrests, namely, to remove from the suspect's control weapons or other things that might aid his escape and to obtain the fruits of the crime or implements used to commit the crime. However, such a search is valid only if there is probably cause before the search to make an arrest. Something found as the result of a search cannot be used as the basis for the probably cause to make the arrest. Further, searches can be only of areas within the immediate control of the suspect, i.e., the area from which he might gain possession of a weapon or destructible evidence.

(5) When that which is seized is in plain and open view. A search implies prying into hidden places for concealed objects. It is not a search to see what is potent and obvious. Thus, an officer who is invited into the defendant's home and sees a gun on a table may testify to what he saw.

Although whether or not a particular search is unreasonable depends upon the particular facts and circumstances of the case, state courts are bound by Supreme Court decisions as to what acts constitute unlawful searches and seizures. This is true because in Wolf v. Colorado (1949) the Supreme Court held that "the security of one's privacy against arbitrary intrusions by the police -- which is at the core of the Fourth Amendment -- is basic to a free society" and, thus, is enforceable against the states through the Due Process clause.

The Exclusionary Rule

Although in Wolf the court incorporated the search and seizure clause, it did not require that the states use the same method required in federal courts to deter police violations of the Fourth Amendment. In federal prosecutions the Fourth Amendment barred the use of evidence secured as a result of an illegal search and seizure (Weeks v. United States, 1914). The Wolf Court adopted the views that states should be free to develop their own means of enforcing the guarantee against unreasonable searches and seizures and that the exclusionary rule was not a command of the Fourth Amendment, but rather a judically created rule of evidence. The fact, that, at the time, only 16 states required the exclusion of illegal evidence influenced the court, for it was an indication that accepted notions of decency and justice did not require banning the evidence.

However, some police (stomach pumping against the defendant's will, to produce vomiting, so morphine capsules could be seized -- Rochin v. California, 1952) so shocks the conscience and offends the community's sense of justice that the due process clause requires that the evidence obtained be excluded from the case against the defendant. However, in Irvine v. California (1954) the court indicated its contempt for the police's conduct (making repeated illegal entries into the defendant's house to place secret microphones in the bedroom), but refused to hold that the evidence had to be excluded.

The situation, then before Mapp, was that certain searches and seizures by state and local police were a violation of the Fourth Amendment because it had been incorporated to apply to the states in

Wolf, but evidence obtained thereby was not excluded unless under an independent due process test it was obtained by conduct that offended the decencies of a civilized society. Thus, conduct violative of the Fourth Amendment by federal officers would result in exclusion of evidence in federal courts, but similar conduct by state officers would not in state courts.

In Mapp v. Ohio (1961) the Supreme Court held that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court; thereby incorporating the means of sanctioning violations of the Fourth Amendment's right of privacy that had applied in federal courts for 47 years. The principal reasons for the decision in Mapp were: (1) since Wolf many states had adopted the exclusionary rule; (2) no other means was an effective protection of the right of privacy; and (3) experience had indicated that the exclusionary rule had not rendered federal law enforcement ineffective.

Mapp is presently the law; however, in a dissenting opinion in Bivens v. Six Unknown Named Agents (1971), Chief Justice Burger indicated his dissatisfaction with the exclusionary rule. Burger's attack of the rule is based on the high price -- the release of countless guilty criminals -- it extracts from society, in light of the lack of evidence supporting the position that the rule actually deters illegal conduct by policemen. In Burger's opinion other remedies, such as money damages, would be a more effective deterrent.

It should be noted that the exclusionary rule applies not only to evidence obtained in an illegal search, but also to evidence uncovered as a result of the original evidence. For example, if a confession or object is obtained in violation of the Fourth Amendment, and it leads to other evidence both the confession or object and the other evidence will be excluded. This is known as the "Fruit of the Poisonous Tree" doctrine.

Stop and Frisk and Searches of Automobiles

When a policeman has reasonable grounds to believe that a person is armed and dangerous, and it is necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threatened harm, he can conduct, without a warrant, a limited search of the outer clothing of the person in an attempt to discover weapons which might be used to assault him. The policeman must identify himself as a policeman and make reasonable inquiries. The search would be illegal if something occurred in the initial stages of the encounter to dispel the policeman's reasonable fear for his own or other's safety.

Supporters of this "stop and frisk" rule (Terry v. Ohio, 1968) assert that it is justified because of the dangers involved in law enforcement. Opponents of the rule argue it leads to abuse. It relies too much on the intuition of the policeman and provides him with the opportunity to go on a "fishing expedition." The Terry doctrine has been extended to cover a case in which an officer based on a tip from an informant, rather than personal observation, searched a person sitting in a car and found a gun.

Since automobiles are easily moveable, the standard of reasonablness of the search of them differs from searches of houses. Typically, probably cause does not justify a warrantless search of a house, but probably cause to believe that contraband is in a car permits a search of the car. Suspicious circumstances, such as a car parked in a remote place with things scattered about in it, suggesting a scuffle, may lead to probable cause. Illegal drugs found in the car in such circumstances would be admissible.

A major problem is "Can a car stopped by a policeman for an ordinary traffic violation be generally searched, in the absence of any evidence of other illegal activity or without illegal material being in plain view in the car?" Traditionally this type of search would be illegal; however, in practice some policemen no doubt conduct such searches.

Some recent Supreme Court Decisions, in the view of some, come close to permitting this type of search. For example, in the United States v. Robinson (1973), the court upheld the legality of the following search, saying it was reasonable. The policeman had probably cause, as a result of a previous check of the person's operator's permit, to arrest the driver of a car for driving while his license was revoked. After the custody arrest the officer made a search of the defendant's person. In an inside pocket a cigarette package containing heroin was found. The custodial arrest gave rise to the authority to search, even though the officer did not fear that the person was armed.

The right to search the person without a warrant in the above situation does not presently extend to a search of the car. Nor does it extend to the right to search a person who violates a traffic rule, for which he would not be taken into custody.

Discussion Topics

1. Suppose you were asked to work on a committee to draft a new Bill of Rights. What suggestions would you make? Would you be more specific and, thus, in effect give courts less of a role, than is the Bill of Rights? What are the reasons for your additions to or deletions from the Bill of Rights?

2. Would your Bill of Rights apply to the states, or just to the federal government? Why?

3. As a result of Goss v. Lopez (1975) students have a due process right to an informal hearing with the principal before they can be suspended for periods of one to ten days. They must be told why they are being suspended and be given an opportunity to give their side of the story. Also, if they so request, they must be told what evidence there is against them. Explain why this is required. Why are persons accused of criminal conduct given more extensive procedural protections, than students are in cases of short suspensions.

4. As a result of In Re Gault, 387 U.S. 1 (1967) juveniles are guaranteed many of the procedural rights in the Bill of Rights. As we have seen adults can waive their right to an attorney. Can you think of arguments in support of the proposition that juveniles cannot waive this right?

5. There is no right to a jury trial in juvenile proceedings. Should there be? Consider arguments pro and con.

6. Consider arguments for and against the Exclusionary Rule. Do you think it effectively deters law officers from acting illegally? What method would be more effective? Do you agree with Chief Justice Burger's opinion that the costs of the Exclusionary Rule are too high?

7. What is effective consent to a police search? See the discussion of the Bumper case in Overton in the Appendix.

8. Should search and seizure rules apply to cases of searches of students and their lockers? What would be a proper test of a reasonable search in schools? Should the same rules apply to principals as do to policemen? What about probable cause? Should evidence "illegally" obtained by school officials be excluded from school suspension hearings? From criminal proceedings?

9. The Thirteenth Amendment abolishes slavery and involuntary servitude, "except as a punishment for crime whereof the party shall have been duly convicted." Does it follow from this that prisoners have no due process rights? Or does a person convicted of a crime lose only his right to freedom of action? What about the right to vote, to receive mail, to have visitors, to some privacy? What standard might be used to determine which rights prisoners retain.

CHAPTER 4

SOME BASIC SKILLS

FINDING AND READING JUDICIAL DECISIONS

No doubt you will want to read some important cases, such as Miranda v. Arizona. With some basic information cases are easy to find. Typically, cases are given the names of the parties to the law suit. For example, Miranda was the defendant at the trial, and since it was a criminal case, the State of Arizona, represented by the prosecutor, was the other party (Civil cases differ from criminal ones, in that they usually carry the name of two persons, for example, Smith v. Jones). The complete citation for Miranda is Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16L. Ed. 2d 694, 1966). The numbers before the letters refer to the volume; those after the letters refer to the page. The letters stand for various law reports in which the decision can be found. The case appears in volume 384 of the official United States reports (which includes all Supreme Court decisions) on page 436. It also appears in the Supreme Court Reporter (S.Ct) and the United State Superme Court Reports, Lawyers Edition, second series (L. Ed. 2d). (1966) is the date when the case was decided. Similar reports exist for other federal court decisions and for state court decisions. Reporters do not distinguish cases by topic, e.g., criminal or tort; rather they report decisions of certain courts chronologically. Typically, each volume includes cases for a given year.

Numerous aids exist to help you to find cases or law review articles on a given topic -- even if you do not know the name of the case -- or to find cases that have discussed or overruled a case in which you are interested. You can learn a great deal about law research by spending a half day or so in a law library, asking questions and examining various aids to research.

Let us now note some basic questions that are useful to ask about the case as you read it:

(1) What are the central facts?
(2) What is the issue (the question) the court is deciding?
(3) What is the court's holding (for whom did the court decide)?
(4) What is the court's rationale (why did it decide as it did)?
(5) What is the standard (rule of law) in the case?

Please read, with these questions in mind, People v. Overton which appears in the Appendix. Note that Judge Burke's opinion which finds for the People is the view which the majority of the judges on the New York Court of Appeals (New York's highest court) adopt. Because Judge Bergan believes that the issue should be decided in favor of Overton he dissents. The majority opinion is, ofter this case, the law on the question in New York. It, thus, is a precedent for future cases on the same or similar questions in New York. However, it is not binding on courts (state or federal) in other states, and since it involves a Constitutional question, it is not binding on United States District Courts in New York. In some cases you will find a concurring opinion. Such an opinion is written by a judge who agrees with the majority as to the holding, but disagrees about the rationale or believes a different law or Constituional clause should be the bases for the decision.

Let us now turn to a consideration of the above questions.

The Facts

You should look for two things: (1) the events which occurred that gave rise to the legal problem, and (2) what took place in lower courts that gave rise to the legal question. In this case the former is simple and the court summarizes the relevant facts. The latter starts with the defendant moving to suppress (exclude) the evidence found as a result of the locker search because the warrant was ineffective. The trial judge denied the motion. Overton appealed the denial to the Appellate Term which overturned the denial holding the search was illegal and not justifiable on a theory of the Vice Principal's consent. The State, then, appealed to the Court of Appeals which reversed the Appellate Term and sustained the denial of the motion to suppress. After this decision Bumper was decided by the United Supreme Court. Also, the Supreme Court vacated the Court of Appeals decision and told the Court of Appeals to reconsider the case in the light of Bumper.

This Issue

In this case the issue is "In light of Bumper, did the Vice Principal consent to the search and, if so, is his consent binding on the defendant?" Notice that even though the court discusses the questions of the Vice Principal's right and duty to search student lockers under certain circumstances, the issue is not "Does the Vice Principal have this right and duty?"

Holding

The court holds that there was consent (this question was discussed more fully in the first Court of Appeals decision) and that the consent is effective against the defendant. Therefore, the evidence found in the locker can be used against Overton at his youthful offender proceeding.

Rationale

The rationale is the court's arguments in support of its holding. In the first Court of Appeals' decision, the court, essentially on an **In loco parentis** argument determined that the Vice Principal had a right to open a student's locker and conclude from the Vice Principal's testimony at the trial that he consented to the opening and search of the locker. In the decision you have read the court distinguishes the facts of the case from the facts in Bumper v. North Carolina, finding no coercion (a lack of effective consent) and, thus, concludes that the evidence need not be excluded from the trial.

Standard

This is the basic point of disagreement between the majority and the dissenting opinions. The dissent maintains that the law should be, especially in light of Bumper that if a bad search warrant plays an effective role in the invasion of a defendant's privacy, the search is unlawful, even though the Vice Principal also gave his 'consent' to the search and had a general authority in the school premises. Whereas, the majority adopts the view that since the Vice Principal had a right to and, if suspicion arises, a duty to search the locker, and since his testimony indicated he consented to the search, the search was lawful, even though the warrant was defective.

You may, after reading a number of cases, develop approaches that you favor over the one above; however, the "standard" approval outlined above should prove useful to you.

INTERPRETATION OF CRIMINAL STATUTES

We have seen that courts, especially the Supreme Court, at times must decide whether or not a statute is consistent with the Constitution. They examine questions, such as, "Is there a sufficient state interest in the problem addressed by the statute?" and "Is the statute sufficiently clear so as not to violate due process?" Also, courts, typically state courts in the case of state legislation, have the power to interpret criminal statutes.

In order to help you understand cases in which the court is engaged in interpretation and to aid your reading and understanding of criminal statutes, let us note some basic principles of statutory interpretation.

If the language of a statute is plain and its meaning clear (admits on only one meaning), courts are not faced with an interpretation problem. Unless the statute violates the Constitution, courts must give effect to it, even if they believe it is unwise. An exception to the "plain meaning rule" is that courts will not apply the literal meaning of the statute if it is too harsh, foolish, or obviously worded erroneously. For example, it would be unjust and absurd to find a policeman, who legally arrests for murder a mailman while he is delivering mail, guilty of violating a federal statute making it a crime to "knowningly and willfully obstruct the passage of the mail" -- even though technically the policeman's conduct comes within the meaning of the statute.

Criminal statutes must be strictly construed, or, in some states, "according to the fair import of their terms" in light of the general purpose of the section of the law in which they are found, in favor of the defendant. The reasons for this rule is to promote the policy of fair notice. When statutes or terms in them are ambiguous, courts typically turn to two sources to clarify the meaning: (1) the use of the term in the common law and (2) the legislative intent. For example, even though the language "without due caution" suggests that mere negligent conduct is sufficient for involuntary manslaughter, a court will interpret the statute to require a high degree of negligence or recklessness because such was required for common law manslaughter. However, if the legislature has indicated a clear intent

that mere negligence is sufficient the court will so interpret the statute. Legislative history is found in legislative committee reports, in the record of the floor debate, and in commentaries written by the drafters of the law.

Typically, if two statutes are in seeming conflict and one is more specific than the other, it will be held to apply to the specific situation. Also, if one law is enacted later than another, it governs. If the legislature uses clearly different language in two parts of the same statute, e.g., "a person intentionally does X" and "a person knowingly does X," it indicates an intent to make a distinction, even though at common law, with respect to the type of crimes, these states of mind were merged.

Sometimes statutes list a number of items and end with a catch-all phrase. For example, "it is a felony for a person to transport in interstate commerce an autobmobile, truck, station wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails which he knows to be stolen." Two rules of statutory interpretation can reach different results in this type of case. One rule -- the items specified indicate the scope of the catch-all phrase -- leads to the result that airplanes are not covered because the specified vehicles are used on land. A second rule -- the expression of one exception (here trains) implicitly excludes other exceptions -- leads to the result all self-propelled vehicles, except trains, are covered.

ANALYZING CONCEPTS

We have seen that concepts, such as justice, fairness, equality, and liberty, are central to the Bill of Rights and the Fourteenth Amendment. When dealing with constitutional clauses courts are not engaging in moral discussions **per se**; nevertheless, there is a close relationship between social or public morality, individual rights and liberties, and many constitutional doctrines. Often courts are concerned with the determination of the proper scope of concepts such as liberty. For example, to decide if the non-retention of a probationary teacher without a hearing is a violation of the teacher's liberty rights under the Due Process clause, the court must determine if the scope of liberty extends to this situation.

It is likely that in teaching criminal justice, you will be faced with questions concerning the scope and meaning of justice, liberty, and equality, as well as, questions about the relationships among such concepts. Thus, let us consider a method for the analysis of concepts.

Suppose you were asked, "What is the relationship between 'knowledge' and 'truth'?" You might reply, "none." But notice we do not say, "In the middle ages men knew that the world was flat." rather we say, "They believed it was." Upon reflection you will realize that we never claim to know things that we regard as false. "John knows that X, when X is false" is a contradiction, because 'knowledge' implies 'truth'.

Let us consider another example, but this time we will pay more attention to method. What would be a **model case** of lying? Suppose John said to his mother, "I received an A in math today" when in fact he did not. This is a case of lying. It has two features: (1) it is a case of telling a falsehood, and (2) John's intent is to deceive his mother. Part of the meaning of 'lying' is saying something that is false with the intent to deceive. If you do not believe this, ask yourself "Would we ever say a person is lying when what he says is true and he does not intent to deceive?" If you do not believe this, ask yourself "Would we ever say a person is lying when what he says is true and he does not intend to deceive?" Try to think of some examples. So doing is a means of checking to see if there really is a relationship between 'lying' and the two conditions above. If there were, we would discover that we were wrong in claiming there is this relationship. Such an example would be a **contrary case**. However, none exists.

Consider another example. Typically, people believe that which they regard as true (model case). However, it is not a contradiction to say, "John believes X, but X is false," (contrary case) as it is to say "John knows X, but X is false." Thus, 'believe' and 'truth' are not related concepts; whereas 'knowledge' and 'truth' are related. This is not to say all truths are known, for truth does not imply knowledge. But knowledge does imply truth.

Let us press our analysis of 'lying' further by using a **borderline case**. Suppose a person intends to tell a falsehood in order to deceive, but inadvertently tells the truth. For example, John thought he received a C, but in fact he received an A. Did he lie to his mother? The fact that we are not sure whether or not to call this a case of lying points out this is a borderline case of the concept, 'lying'.

Borderline cases are more important when considering complex concepts like 'justice' and 'equality'. Often we are not sure whether or not a certain state of affairs is just. (Typically, courts are faced with difficult states of affairs and must decide whether or not they are consistent or inconsistent with constitutional concepts.) Before turning to a borderline case of justice, let us examine model and contrary cases.

Suppose that there were ten units of goods to be distributed and that two similar men had each contributed the same effort towards the production of the goods. It would be just to distribute five units to each man, and it would be unjust to give eight of the units to one of the men. If one man had contributed 70 percent and the other 30 percent of the effort, probably it would be just to distribute seven units to the first man and three to the second. It would be unjust to distribute the goods equally. Note that the above assumes effort is an appropriate basis for the distribution. The question of whether or not it is, in fact, appropriate, itself raises questions of justice. Nevertheless, the above indicates model and contrary cases of justice.

Let us consider some more difficult cases (borderline). Suppose four units were necessary for basic survival. Would it be just to give the man who contributed 30 percent of the effort only three units? Does justice always require a distribution according to effort or merit, or does it in certain circumstances require giving more to someone based on his need and less to others than they merit? It seems at least that justice requires that everyone receives enough to meet his basic needs, irrespective of his merit, before the remaining goods are distributed based on merit.

What does justice require in teaching? Suppose Student A can learn ten units if he receives all of your time. Student B can only learn four units if he receives all of your time. If you give them each one-half of your time, Student A will learn five units and Student B will learn two units. What is the just distribution of your time? How one answers such questions is, in part at least, related to one's view of 'equality'.

We will not pursue an analysis of 'equality'. But let us briefly raise the question of its relationship to justice. If one adopts the view, focusing on results and need, that justice demands that the teacher spend more time with Student B, then, in one sense at least, the teacher is not treating the students equally. Notice, too, that this type of problem raises questions of efficiency. To achieve the greatest amount of learning the teacher will spend all of her time with Student A. Is justice unrelated to equality or efficiency? Is it inconsistent with them? We leave it to you to struggle with such questions.

Our intent in this section was not to give an analysis of concepts; it was to show you a method of analysis. But this objective, itself, requires **doing** some analysis. This is true because the method is an examination of examples. Briefly put, the method is to start with clear examples (model cases) of the use of a concept to generate hypothesis about relationships it has with other concepts. Then test the hypothesis, by trying to think of a use of the concept in which the other concepts are not involved, for example, believing something that is false (contrary case). If it makes sense to use the concept under analysis in this way, then there is no necessary connections between the concepts. Borderline cases help you to get at the complexity of the concept.

When analyzing concepts we are dealing with relationships of meaning; not casual connections. Thus, our examples need not conform to reality in all respects. For example, the Student A and B example above, raises questions about the meaning of justice, but in some respects it is not an accurate view of reality. For, typically, learning is a function of a number of actors, not just teacher time. However, to quibble about such matters misses the point; which is to gain insight about the meaning of justice.

CHAPTER 5

TEACHING CRIMINAL JUSTICE

We have attempted to present the materials in the foregoing chapters in a way that is suggestive of a general teaching strategy. The Discussion Topics are not mere "add ons"; rather, they raise questions that can lead one, who carefully considers them, to a fuller understanding of the topics discussed. Also, implicit in our treatment of certain topics, for example, individual's roles (Chapter One) and search and seizure (Chapter Three), are problems for discussion.

Let us, here, be somewhat more specific about approaches you can use in teaching criminal justice. We do not suggest detailed "lesson plans," but we do suggest strategies for attaining the following objectives:

A. To provide an understanding of the criminal justice system.

B. To develop skills in identifying problems in the system and in thinking about possible solutions.

C. To develop an understanding of the impact that the courts and the Constitution have on criminal justice.

D. To develop dispositions in students that will result in their taking an active part, as citizens, to improve criminal justice.

These objectives are stated in terms of criminal justice; however, understandings, skills, and dispositions that are learned in the context of a criminal justice unit have general application to citizenship. Effective and principled behavior of citizens requires an ability to understand complex social systems, to identify problems and possible solutions, and to understand the role of the Constitution in our society. Moreover, principled citizen behavior requires that individuals come to appreciate the basic moral concepts embedded in our Constitution.

Under three headings -- The Problem Approach, Teaching About the Constitution, and The Citizen's Role -- we will point to ways you can use materials in this work to promote the above objections.

The Problem Approach

The purpose in discussing problems is not to discredit the criminal justice system. It is, rather, a means of assisting students to understand the nature of the system and to develop their skills in identifying problems.

A class disscussion would be one dealing with the difference between giving officials **discretion** in deciding what to do and requiring them to function within a set of **detailed rules** and **procedures**. An example of this difference can be found in different methods of grading students. Such an example could be the beginning point for examples in criminal justice. You can then turn to a discussion contrasting the prosecuting attorney's discretion in deciding how to dispose of cases with the rules imposed by the Constitution on the conduct of police officers in conducting searchers and seizures. A number of points, each of which leads to further discussion topics, can be made:

(1) The fact that giving the prosecuting attorney discretion results in an extensive use of plea bargaining. Is this desirable? Given the fact of overcrowed courts, is it necessary? (See item 8 in Bibliography. It contains an essay on the evils of plea bargaining.)

(2) The impact of the search and seizure clause on police conduct. Have the courts too narrowly limited police conduct? Would more criminals go to jail if policemen were given more discretion? Is the exclusionary rule a desirable means of deterring illegal police conduct? Should there be a similar device to check improper and unfair use of discretion by prosecuting attorneys?

(3) More generally, when should public officials be allowed to use discretion? When should they be required to follow narrow rules?

This is only one example of a discussion topic. Others are found in the Discussion Topic Sections of the first three chapters.

You should seek to go beyond the discussion of problems in two directions: (1) students should develop the ability to identify problems, and (2) they should develop an ability to propose solutions and defend them. Stress their proposal is a solution to the particular problem and to show why it will not create other problems. An example of the identifying problem would be to raise a discussion of procedural due process as it applies to persons accused of a crime, after the question of prisoners' rights. Based on what they have learned about prisons, the students should be able to identify due process problems. For example, does due process require that prisoners be given a hearing before they are punished for violating a prison rule? (See item 9 in Bibliography for discussion of prisoners' rights.) The general procedure is to teach a Constitutional doctrine or concept, show how it applies in certain contexts, and ask students to identify in other context problems that relate to the doctrine or concept.

In Chapters One and Three a number or problems are identified that can be a basis for getting students to propose solutions. For example, Justice Burger and others believe that there is a means other than the exclusionary rule to deter police misconduct. After discussing the **exclusionary rule** with students and pointing out objections to it, ask the students to propose other means of checking illegal police conduct. Press them to "think through" their proposals. For example, suppose a student suggests that when a policeman violates a person's right against unreasonable searches the person can sue the policeman for money damages. You should raise some questions about the proposal: "Would this result in persons not becoming policemen?" or "Would this make policemen so fearful of financial loss that they would not do their job properly?"

Perhaps the greatest danger that exists in focusing on problems in teaching, is a tendency to avoid discussions of problems and questions for which you do not have clear and certain answers. Realize that no one has anything more than **possible** solutions to problems, such as the ones discussed above. Nevertheless, students can learn a great deal if you engage them in discussions or problems and possible solutions. Central to teaching is the posing of questions that **engage** students in the search for solutions to complex problems in a complex world.

We have not, in the above discussion of the problem approach, cited specific methods such as "Do X with the material in Chapter Y of the student materials." Rather we have suggested an approach -- with some examples -- to teaching. There are, however some clues that you can look for to determine if you are succeeding in attaining the first two objectives cited above. Namely, if in your classes you and your students are saying things, such as "But on the other hand. . ."; "Yes, that is a good example of the point"; and 'That would work, but it violates X clause of the Constitution," it is very likely that you are succeeding.

Teaching About the Constitution

As the material in this Study Guide indicates, the Constitution has a major impact upon criminal justice. A study of the Constitution should have a central place in any unit on criminal justice. Fortunately, in addition to being important, the Constitution is also interesting to teach and learn about. Let us suggest some strategies for teaching Constitutional doctrines and concepts. First we will discuss some approaches for teaching cases. Second, we will suggest ways of thinking about moral concepts and principles that are central to the Constitution. Third, we will make some suggestions about relating topics in criminal justice to issues involving school practices and policies.

The Case Method Approach -- Merely reading the Constitution will not result in an understanding of constitutional law. This is especially true of the Bill of Rights and the Fourteenth Amendment, for they only contain basic statements of rights and guarantees. Using these basic statements the Supreme Court has "created" constitutional law. Further, since the court interprets the Constitution in light of social needs and interests, the law changes as society changes. To understand how the Court operates, as well as what the law is, students should read some cases. Cases involve real situations and involve people and are concerned with more than one point of view; thus, they tend to promote student interest and involvement in the issues. In short, there are many things that you can do with cases that are both informative and fun.

In Chapter Four we suggested some questions to raise when reading a case. You can act as discussion leader in class discussions of cases by using these questions. A useful means of deepening student's understanding of the legal principal is to use **hypotheticals**. Suppose you have discussed Rochen v. California (section on Exclusionary Rule in Chapter Three) which holds that pumping

a defendant's stomach against his will to obtain evidence violates due process. You can then either invent other situations -- for example, forced taking of blood to determine degree of intoxication -- or use facts from other cases -- for example, Irvine v. California -- and discuss with students the question, "Does this conduct violate due process?" The use of such examples sharpens the students' understanding of the cases they have read.

Another approach is to discuss the facts of a case with the students before they read the case, or before you tell them how the court decided the case. Ask the students to identify the legal problem, to identify what constitutional right is violated, and to give arguments for and against the constitutionality of the conduct or rule in question. Then, have the students read the case, or tell them about the case, giving them an opportunity to argue for or against the correctness of the court's decision. Films and filmstrips are available for use in ways we are suggesting (see Bibliography item 7). For example, Encyclopedia Britannica has a film, *The Right to Counsel: The Gideon Case*, which shows the facts, the arguments before the Supreme Court, and the court's decision. The film can be stopped at various points, such as after the showing of the facts. Before continuing the film you can raise questions, such as:

(1) With what crime was Gideon charged?
(2) What happened at his trial?
(3) Should Gideon be allowed to appeal the verdict? Why?
(4) Suppose you were Gideon's attorney, how would you argue his case?
(5) Suppose you were the State's attorney, how would you argue?

You can also use classroom dramatizations of trials or Supreme Court arguments. Students can be assigned roles, such as judge, attorney, defendant, witness and jury members.

The Constitution and Moral Principles -- Presently, in a number of states the question of teaching morality and values is being debated. Some argue schools should not deal with moral or value questions; others argue they should focus more on such topics. Yet almost all states require that constitutional principles be taught in schools. Crucial to any study of the Constitution is an understanding of and a clarification of the moral principles and concepts found in the Constitution. Dealing with moral principles and concepts in the context of discussions of the Constitution avoids what some find objectionable with the idea of schools teaching values. For dealing with fairness, justice, equality and liberty is not the teaching of **personal** values, attitudes, and beliefs about which there is a great deal of disagreement. This is not to imply that there is no disagreement concerning the way courts have decided cases, or that good reasons cannot be given, as dissenting judges give, in support of different applications of the Constitution. But it is to say that the moral principles and concepts embedded in the Constitution should be understood and debated in a rational way by citizens.

There are a number of things you can do to increase the students understanding and appreciation of constitutional principles and concepts. The discussion in Chapter Three about analysis of concepts suggests a general approach to use in clarifying the meaning of moral concepts. More specifically, you can do the following things:

A. Give students a number of definitions of concepts, such as freedom, justice, or equality. Ask them which definition best reflects their understanding of the concept. Ask them which definition best represents the meaning of concept in the Constitution.

B. Give the students examples of police conduct -- search and seizure situations would be good examples. Discuss the examples and ask "which are most consistent with fairness and liberty?" Which should be permitted? You could then point out how the courts have dealt with the topic.

C. The class could develop a "classroom Bill of Rights." You could then conduct the class according to them. Suppose there were no freedom of speech clause in the Bill of Rights written by students. You could then "punish" a student who said something that the majority of the class disagreed with. Another approach would be to divide the class into groups. Each group would draft a Bill of Rights. You, then, could conduct a "constitutional convention," giving each group a chance to argue in support of its draft.

D. Develop examples in which individuals or groups are treated unfairly or unjustly. Discuss them with students.

The Constitution Comes to School -- Many of the constitutional doctrines that we have discussed in connection with criminal justice have been applied to rules and behavior with the school context. You can develop "school fact situations" for discussion. Here are some examples:

A. We have seen that laws making the exercise of freedom of speech criminal are unconstitutional. What about a school rule requiring students to say the pledge of allegiance? Suppose a student says, "Because I do not believe this is a country of freedom and equality for all, I will not say the pledge." Can he be suspended because he violated a school rule? Or is the school rule unconstitutional? (See West Virginia v. Barnette, 319 U.S. 624, 1943) What about a student who wears a button that opposes the government's foreign policy? When can he be required to remove the button? (See Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 1969)

B. Do students have a right to procedural due process before they can be suspended? (See Goss v. Lopez, U.S. 43 L.W. 4181, 1975)

C. Do search and seizure requirements apply to searches of students or their lockers by school officials?

A discussion of such examples should make constitutional doctrines more interesting to students, as well as help them to better understand the doctrines.

The Citizen's Role

We have included in Appendix A comments of one of our friends concerning his involvement with criminal justice. You may want to use his statements as an example of citizens involvement. You can find other examples, such as the reflections of a person who has served on a jury. Persons whom you know (or know of) could be invited to your class to discuss their involvement with criminal justice. Also, you could invite persons who work in the system to your class. They could give their perceptions of the system, point out ways citizens can become involved and discuss various careers in criminal justice.

SUGGESTIONS TO TEACHERS

The daily newspaper, television newscasts, and the "law" sections of weekly news magazines such as *Time* and *Newsweek* are sources of items or mini-cases that involve various aspects of criminal justice. Students may be asked to look for cases which exemplify a specific principle or problem and class analysis and discussion may follow.

Some examples that have been found in daily newspapers are presented here to provide a frame of reference which may be useful in planning and carrying out classroom activities.

Dateline Immokalee, Florida, 1968.

Wardell Williams is an admitted killer too valuable to send to jail. Circuit Judge Harold Smith found Williams guilty, but said 100 farm workers would be unable to earn a living if Williams, a farm labor contractor, were to go to prison permanently

So Judge Smith sentenced Williams to 20 years probation and ordered him to spend two months in jail each year until 1968. "He is an employer of people," said the Judge, "when farmers need fruit pickers they deal with Williams." Farmers pay Williams and Williams then pays the workers.

Williams pleaded guilty to manslaughter in the shooting of his wife. The defense attorney asked the Judge for the unusual sentence, saying "In my opinion Williams is more valuable to society with this type of sentence than he would be resting in state prison with the taxpayers feeding him and these farm workers out of jobs."

1. What questions and problems might students identify in this case? Did it appear that fairness and justice were achieved? If a person is very important in any aspect of community life, should he be given special consideration if he commits a crime?

2. The students may search for examples of "special treatment" in criminal cases.

Dateline Oakland, Iowa, 1964.

H. L. Rose, a livestock hauler, was fined for leaving the scene of an accident, in spite of the fact that he left the crash scene to take a bleeding man to a nearby hospital. When Mr. Rose returned to the accident scene, a highway patrolman gave him a ticket for the infraction. A registered nurse was the second person to stop at the accident, and it was she who told Mr. Rose that the bleeding man should be rushed to the hospital while she stayed with another injured person who was unconscious.

In municipal court two days later, the Judge fined Mr. Rose $12.50 and costs with the comment: "It is too bad that I must find you guilty and fine you, but you did break the law and that cannot be overlooked."

Students should consider elements of fairness and justice here. Should Mr. Rose have stayed at the accident and allowed the bleeding man to die?

Dateline West Virginia, 1974.

A 25 year old Vietnam veteran was arrested on an intoxication charge at about midnight Saturday and placed in the city jail. Three hours later he was dead. Two other jail inmates said they shouted for help when the young man became terribly ill with severe stomach pains. But the city had no one on duty at the jail during the night and the Mayor said later that the city did not have enough money to have a policeman on duty at the jail at all times.

The Mayor said, also, that when a person's time comes to die he will die, so it did not matter that no one was available to assist the young man who died.

1. Does the government (city) have no responsibility for the welfare of people who are in their jails?

2. Was the young Vietnam veteran presumed innocent at the time of his death?

3. Is justice served when people who have not yet been found guilty, are left imprisoned and unattended? Would it be okay to leave jail inmates unattended if they have been found to be guilty of something?

Dateline Chicago, Illinois, 1971.

Alvin Mathes was sentenced to a 1-5 year sentence in the state penitentiary after pleading guilty to a charge of forgery. Mathes had taken a blank check from the desk of his employer, Arthur Allen, and forged Mr. Allen's signature to obtain $25.00 from a bank.

Mathes asked for leniency at the time of sentencing, claiming that his crime was no worse than that of shoplifters who get off with fines for stealing items worth more than $25.00.

1. Can you see any reason why forgery should be treated as a more serious offense than shoplifting?

2. Is the "welfare" of the community in greater danger from shoplifting or forgery? Or do you see no difference?

Dateline Athens, Ohio, 1967.

Harry Willison was arrested and charged with breaking and entering at night into the home of Ron Dowder and taking two loaves of bread and a half a ham. Willison's lawyer asked that the charge be reduced to petty larcency since the items taken were worth less than $5.00, but the prosecuting attorney refused to do so. Willison was finally found guilty of breaking and entering an occupied dwelling at night. Some student groups protested the handling of the case, saying that Willison was only trying to get something to eat. The Judge pointed out that the protesting students were apparently ignorant of the reasons for treating breaking and entering occupied dwellings as a serious crime even if nothing was stolen.

1. Why do you believe breaking and entering an occupied dwelling may be more serious than breaking and entering an unoccupied dwelling? (Possible crime against persons)

2. What reasons may be given for making breaking and entering in the night a more serious offense than breaking and entering in the day time? (Persons may be asleep there, bodily harm is more apt to result)

Dateline Eugene, Oregon, 1969.

Charges against James Henrod were reduced from grand larceny to possession of stolen goods when the prosecutor's office was unable to locate the night watchman who reportedly saw Henrod leave the Star Television Store at 2:00 a.m. Without the key witness, the prosecution stated that it could only attempt to prove that the television set which police found in Henrod's home had been stolen from the Star Store.

1. Do you understand why a prosecutor sometimes drops serious charges in favor of lesser charges?

2. If an accused person, such as Henrod, agrees to plead guilty to a lesser offense, should the prosecutor drop more serious charges and so save the taxpayers the cost of a long trial?

Dateline Dallas, 1963.

The federal government announced that it would charge Rick Ross with violating the civil liberties of the U.S. Congressman, Ken Korbett, who was shot by Ross in a local hotel lobby. U.S. Justice Department attorneys pointed out that, although the congressman was killed by the shot, they would not charge Ross with murder.

1. Why do you believe the federal government does not charge people with murder in cases where a government official is killed?

2. When can the federal government enter into investigation and prosecution of criminal acts?

Dateline Phoenix, Arizona, 1974.

Superior Court Judge Robert Gillis today revealed that he and members of his family have received many threats from persons who are angry with the Judge's decision to sentence Bill Moutre to five years probation for the slaying of his three year old stepdaughter, Anne. The Judge said that psychiatrists who examined Moutre informed him that the killer was really not a violent person and so the decision was made to not send Moutre to prison.

Moutre had earlier admitted that he had beaten the child to stop her crying and that when he feared that he had killed her, he took her to a desert area and buried her. Although Anne was discovered still alive in the shallow grave, she died soon after in a hospital.

Phoenix police have been assiged to protect Judge Gillis and his family from any possible harm that may come from people who feel that justice has not been done in the case.

Dateline Athens, Ohio, 1968.

City police expressed disgust with the dismissal of charges against Dana Jones for operating a still in his garage near Mineral, Ohio. Common Pleas Judge Bert Bayer ruled that the arresting officers had gained evidence against Jones in an illegal manner when they entered the Jones garage without a search warrant to seize bottles of moonshine and take pictures of his equipment.

Jones testified that a highway patrolman, deputy sheriff and an Athens city policeman came to his place and asked to look in the garage. He gave them a key and they let themselves in. The officers admitted that they did not have a search warrant but stopped when they saw a suspicious pipe sticking out of the garage roof.

The police feel that it is useless to arrest wrongdoers if the judges are going to let them go free due to small technicalities.

1. Discussion of this incident may be guided by questions such as:

   a. Which of the articles in the Bill of Rights guided the judge is dismissing the charges?

   b. Should police be permitted to search anyone's house and premises without a search warrant if they think something illegal is going on? What problems do you see with this?

   c. Why did the judge not see that Dana Jones was guilty even though the evidence could not be used? (Remember here that consideration of evidence and the credibility of the evidence are the bases for jury determination of innocence or guilt.)

   d. Do you think Jones should have confessed in spite of the fact that the police did not proceed in a proper way to get evidence against him? (Ethical item rather than a legal item.)

APPENDIX A

Dear Art:

As you know I've been working with a group of prisoners at the County Correctional Facility. Let me tell you a bit about my experience.

For me this experience began with a high degree of admiration for many of the residents.

Beyond my own feelings, the main pedagogical problems had to do with the physical facility and the turnover of participants (which required that new persons be brought up-to-date almost each week).

As will be seen from the following narrative some of these pedagogical problems were overcome.

After several weeks of preparatory discussions with the Commissioners and the educational rehabilitation officers of the correctional facility, the Director of the work release program and I worked out a schedule for me to engage with the male residents of the correctional facility who are in the work release program.

Beginning on January 16 and ending on May 26 there were a total of 16 sessions with the male residents of the work release program. The sessions were scheduled for one hour once a week, and in one or two instances ran to an hour and a half. Frequently, I met for an extra period of time with various individuals who wanted to continue discussing matters after the regular session was over. I made it a practice to get to the facility a half an hour early so that I would have a cup of coffee with any of the men sitting around waiting for the session to begin.

Throughout the time, a total of 25 men participated, with an ordinary attendance of 12 to 14 each week. The attendance of 12 to 14 is explained by the fact that a maximum of 14 men are involved in the work program at any particular time, and every so often men were released from prison, and hence the program, and they would be replaced by new people. Several participated in every session all the way through.

Throughout all of these sessions I got a very high degree of cooperation and helpfulness from the Director of Work Release and his staff of correctional officers assigned to the work release program. Each was extremely cooperative and helpful in making space and time available, and making me very comfortable in the facility.

The work release residents live in a separate part of the correctional facility, and have no communication whatever with the residents in the cell blocks, as they call the other area of the prison. One of their number is their cook, and that is his work release program. He does their cooking and for that he is paid as the others are paid when they go outside the prison to work their jobs. The workshop sessions were not held in the facilities, where some of the rest of the educational and rehabilitation programs go on in the facility. Our workshop sessions were held in the "living room" of the work release residents. It is a room about 20 ft. square with a large, threadbare, rug on the floor and some old, stuffed (it might be termed overstuffed) furniture and some cheap, new plastic furniture. There is also a medium sized color TV on a small table, two small end tables, one floor lamp that does not work and one that does; a light fixture in the ceiling with space for five 60 watt bulbs, with three that are actually working. The two that were not working in that light fixture were never replaced during the time that I was there. The first night that I attended the residents were being very cordial to the "visiting professor," and brought out what they considered their nicest chair. It had an unfortunate accident happen to it -- one of the legs broke as I sat down! I have described all this to point out that the living and working conditions of these men are not the best in the world. I must say, however, that these men on work release have it far better than those in the cell blocks.

I had been told by some of the people at the prison and some people not at the prison that one did not refer to it, in the first place as a prison but as a correctional facility, and that one did not refer to the persons in it as prisoners or cons or ex-prisoners or ex-cons but as residents. I found out, by the way, that the persons who are incarcerated refer to themselves as prisoners or ex-prisoners or cons or ex-cons, and do so without self-consciousness or embarrassment. They refer to the facility as the joint or the prison or they refer to the cells or the cell blocks and so on.

During the first session and continuing for a few, there was a high degree of skepticism, if not scorn or hostility, shown by most all of the residents. I explained the process of inventive education/ planning to them in terms of making use of their own creativity and their desires with regard to the future, and explained that they would be given an opportunity to articulate a specific goal, which could be developed. Many of them scoffed at the whole idea that I or anyone could, or would, or was about to do anything for them. I dealt with these attitudes as best I could. I attempted always to take their questions and any comments that they made as absolutely serious. When I asked them if they would make any statement that came to mind regarding their future, though they were free to speak or remain silent as they chose, many of the responses which were in the least positive centered on such immediate needs as jobs and money. Most responses, however, were negative, such as: "I don't know." "I don't care." or "No matter what I do, I'll be harassed by the police or other officials and, so, it doesn't matter what I want for the future." By the end of the second and third sessions I had been able to gain a few comments from them about their futures, but for the most part, they remained very terse, and seemed to be saying things either out of duty or out of despair. Certainly they seemed to have no expectation that anything much could be done about it. One or two began, though, to see that if they did express themselves, they would be taken seriously. The following is a list of statements which they made in those early sessions regarding what they would like to be doing in their future, at least one year from now. The one year time span was used in these early sessions, so they would be thinking about what they would be doing after they go out of prison, the longest sentence at Jamesville being one year.

Liston--going to school

Al--none (He would not make any statement at all)

Jerry--don't know (He said that he had never been in prison before, and now that he had been, he'd be starting his life over, and that he really didn't know what he wanted to do. He really is in despair.)

Joe--be a freelance artist (a sculptor)

Bob--to have his felony removed

Dewitt--wants to have his record erased

Don--wants to own a chain of restaurants

Lenny--never see a cop, never be harassed, live outside the law, do what I want for a year (He said his life is just like this program, it's mandatory; and he never wanted to be involved in anything that's mandatory again. He followed with a comment that if this were not a mandatory program, there would be no one in this room.)

One of the other residents said, "that's not true, at least I'd be here."

Jerry--get security, have respectability, have a good life for my family outside the state (He stated that here, with his record with so many arrests, he would be so constantly harassed by the police that there would be no way to gain what he would want.)

Clift--to be in no trouble (He stated that his goal was to be an auto mechanic, but that he was already working as one, so that wasn't really a goal.)

Ron--(a Correctional/Rehabilitation officer)--his goal was to be in graduate school full time in Social Work, and his other goal is that this work release program be removed from the county facility.

It seemed to me that the reticence and suspicion lasted beyond the fourth session. Then, when I arrived for the fifth session one of the residents, Bob, who had been rather hard on me and extremely skeptical of the process, greeted me with a real feeling of cordiality, and I noticed that the session opened on a little more vigorous, more friendly note. People began to talk about themselves, and about some of the things they had been thinking about in a more open way. During this session, George, one of the correctional officers, came in and sat down, and began to take over the conversation and began to ask people what we were doing. Liston, who was to be released the next day and cannot read or write above the fourth grade level, began to tell him what we were up to. He explained that what was up on the 24 x 36 sheets were goal statements for one year from now, and if people would put them up then the whole group would deal with them and help turn them into something that

could be worked on. Then Liston more or less directed new residents to come right out with their statements, which by the way they did, and which I repeat below. He evidenced at this point a creativity a leadership potential and an attitude which ought in some way to be developed. (Liston was released from prison the next day. He has not accepted my invitation to continue meeting with me after he got out.)

Joe--to be in his own business and showing a profit

John--to have a secure job and to own his own home

Herb--to be free

Dave--to be through with school and in college and studying drafting or carpentry

George--(Correctional Officer) to have a secure position financially and to be married and have a secure family situation.

After Liston had led this part of the discussion, George, asked each one of them in turn what he thought about some of this, and he got some fairly articulate responses. When he got to Jerry (who said that he had never been in prison before and didn't know what he wanted to do) George was sarcastic with him which I thought was unfortunate. His whole attitude was one of overseeing them, and creating a position in which he could be disciplinary. He did, however, ask a question, "If this was not compulsory how many of you would leave this room and stay away from the sessions and how many would stay in the sessions?" Of the 13, five said they would leave and eight said they would stay.

At this point I asked them if they would like to have me continue to work on these sessions for a bit longer. There was a general consensus, and though no vote was taken, it was probably the same eight to five division that the sessions should continue. Clarence asked a question one evening about problems of insurance for persons who have a record either as to felony or as to other arrests and jail sentences. I suggested that I would speak with a friend of mine who is in the insurance business, and see if he would come out and talk with them about insurance. My friend, in fact, did that and spent one of the more exciting sessions with them, answering in full and in detail any questions which they asked about insurance. He gave them valuable information about what they had to do in order to get certain kinds of insurance including, auto, liability or life insurance. He also discussed some general problems they might run into should they want to go into business. It was obvious by this time that there was a trust relationship existing between them and me, because when I sanctioned my friend's presence they immediately accepted him and he had none of the problems of making a relationship with them that I had at the outset.

One of the exciting conversations that took place with this group was when Dewitt said that he had read about some programs in California and elsewhere where residents had set up and were running their own programs of education, employment, halfway houses, etc. Dewitt asked if it would be all right if they were to discuss this whole thing and I said sure. So for an hour they entered into a very excited discussion of what they could do as ex-cons (their own term) when they got out to provide an organization in their city that would take care of family counseling problems, take care of families while the person is in prison, set up programs of education, counseling and job opportunities, employment services, all owned and operated by ex-cons. This discussion led over into the next session. Dewitt and Herbie did a little homework between the two sessions, and I met with them for supper at the facility and listened to their preparation. They came up then with a name for an organization, THIEF, which means The Humanistic Independence of Ex-Cons Futures, and they laid out quite a structure to go along with it.

This was a very imaginative, very animated series of discussions. Upon following up with Dewitt and with Herbie, I strongly suspect that nothing will happen to this particular organization since both of these men have other agendas on their minds when they get out of the facility. Dewitt wants to go on and continue his work in creative writing at a Community College where he is now a student; that is what he does for his work release program, and he has scholarship aid offered to him beyond his time of release. Herb will be going to another town where he has a job in steel construction awaiting him.

In the discussion above of THIEF, and as that gave rise to further discussion, these men in the correctional facility evidenced, as did the people in ABC (Adult Basic Education Center), a great concern for children. A concern for their own children for sure, but also a concern for children in general. They talked some about the raising of children, and John and Don together held the floor of the dis-

cussion one evening for 20 minutes to a half hour speculating as to why in a family of two, three, or four children one like them would go bad. In their own families their own brothers and sisters had never been in trouble, some of them had not gotten so much as a parking ticket, and yet out of their families, both in John's case and in Don's they had been in jail about as many years as they had been out. Both of these men were around 45 years of age. Caught at moments like this, they are men who are concerned for their own humanity and the humanity of others, and certainly the humanity of children. They'd showed at least momentarily some insight into themselves, it appears to me and what was interesting was that they were beginning to talk across the room to one another--not just replying to me, but actually talking with one another about some of these serious matters. This was certainly not always the case.

Most of the men in the facility really are competitors. The social system inside the prison, very much like other social systems, is based on who knows who and how clever someone is at maneuvering the existing bases of power and authority. They are very much aware that each one of them is a competitor toward the others. This made trying to bring this group together into a group of people who would care for one another and who would help one another clarify their goals, a very difficult thing to do, and one by no means fully accomplished. It was however accomplished in small ways. For the most part, the actual development of goals and intentions beyond their first statements didn't go very far. For a few like Bob, Clift and Jerry, who already had very clear-cut notions of their goals before they ever met me, one or two clarifying comments were made but their statements were pretty clear before they ever presented them.

Dewitt, who brought up the idea of THIEF and did the most imaginative thinking about it, and who was among the top three in imagination, articulation and the ability to make good use of the process of futures invention to take a hard look at increasing his civic literacy, worked the hardest to roadblock the process every time it came up. He simply refused in public and in private to make any comment about his future. Anytime we dealt with something that might be worked on, like THIEF or like his own possibility of being a creative writer or artist (he actually has paintings hung in several museums), and when it would be pointed out that these goals could be analyzed and put into a time frame that could be made use of, he would refuse to deal with the process.

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