

COURSE SUMMARY: COURTS AND SOCIETY

Justice Studies 103, San Jose State University

Mondays 5:30-8:15 p.m.

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Caveat: To do well on the final, knowing the following is necessary, but not sufficient. You will also need to carefully study your notes and the class readings, including the text, the reader and the handouts.

SOURCES OF LAW

	<u>Federal</u>	<u>States</u>	<u>Local</u>
People	Constitution	Constitutions Initiative/Referenda E.g. Prop. 36	Charters
Legislatures	Statutes/Codes	Statutes/Codes	Ordinances Municipal Code
Courts	Cases/Opinions Court Rules	Cases/Opinions Court Rules	
Administrative Agencies	Regulations	Regulations	Regulations/ General Orders

Note: States, and the federal government, may regulate and punish only conduct that occurs within their territorial jurisdictions.

Note Also: The federal government has had an increasing interest in regulating criminal law, a matter previously left largely to the state. Under the federal constitution, however, the federal government may only regulate domestic matters that affect interstate commerce, or matters in which the federal government has a significant interest in above and beyond that of the individual states. (See description of Lopez decision in the book.)

Dual System, or federalism, allows each state to regulate the affairs of its state, while allowing the federal government to ensure the laws of the country are enforced w/in all the states. For example, those who smoke marijuana, for medicinal purposes or not, are subject to BOTH the laws of the state in which they are (e.g. California) AND the federal government. Other examples include racial integration, the officers who beat Rodney King, outlawing of Jim Crow laws.

Double Jeopardy, the accused may be tried only once by any given jurisdiction for the same offense. California can try a defendant only once. But the federal government may try the same defendant, for the same conduct, if that conduct also violates a federal law. The same is true of

multiple states. If defendant starts a crime in state A and continues it in States B, and C, States A, B and C may all try the defendant.

WHAT IS A CRIME?

Criminal Act + Criminal Intent = Actus Reus + Mens Rea

Also:

No Ex post facto law (no "after the fact laws;" must have advance notice that conduct is criminal)
Not void for vagueness (law must be understandable to a person of ordinary intelligence)
Law may not infringe upon fundamental liberties (e.g. can't make abortion or gay sex criminal))

Felony = Prison (and fine and other monetary sanctions)

Misdemeanor = Up to a year in the county jail (and fine and other monetary sanctions)

Infractions = fine and other monetary sanctions only, no loss of liberty.

Criminal vs. Civil Wrong

Public v. Private Wrong

Potential loss of liberty

State as party in criminal action, in state's name; Victim can't control litigation

Standard of proof (beyond reasonable doubt vs. preponderance or clear & convincing)

Intent required in criminal may not be in civil (E.g. ordinary negligence enough for many civil actions like auto accident, not generally enough for criminal.)

Greater constitutional rights for criminal actions than civil (E.g. right to remain silent; right to appointed counsel)

RIGHTS OF THE ACCUSED
(Adults and Juveniles)

<u>Right</u>	<u>Federal Constitutional Amendment Guaranteeing the Right</u>
Silence	5 (Gault, but waiver?)
Innocent Until Proven Guilty	5
Protection from unreasonable search & seizure	4 (Some, watch schools & parents)
Attorney	6 (Gault)
Notice of Charges	5 & 6 (Gault)
Bail, not excessive (NOT Juveniles)	8
Probable cause must be shown before trial (for felonies) (Not Juveniles)	5
Speedy Trial	6
Public Trial (NOT Juveniles)	6 & 1
Impartial Jury (NOT Juveniles)	6
Subpoena & call witnesses to present a defense	6
Confront & Cross-examine witnesses	6 (Gault)
No double jeopardy	5
No cruel & unusual punishment	8

Adversarial vs. Inquisitorial Systems

Adversary: Two adversaries, the prosecution and the defense, put on their opposing evidence and arguments before an impartial trier of fact. Trier of fact does not investigate or present the case. Court trials and jury trials are adversarial proceedings.

Inquisitorial: Inquisitor investigates the case, calls witnesses, secures evidence and decides the case. Grand juries are said to be inquisitorial bodies who can subpoena witnesses and evidence before them.

COURTS AND THEIR ACTORS

You should be able to draw a diagram of a typical trial court, place all the actors, and define what they do.

FEDERAL AND STATE COURTS

AND THE JUDGES & PROSECUTORS WHO WORK IN THEM

	<u>Federal</u> (Question of federal law)	<u>State</u> (Question of state law)
<u>Court of Last Resort</u>	<u>U.S. Supreme Court</u> 9 Justices Nominated by Pres. Confirmed by Senate Life Term, unless impeached and removed Pros: Solicitor General Nominated by Pres. Confirmed by Senate Serves at pleasure of Pres.	<u>Calif. Supreme Court</u> 7 Justices Nominated by Gov. after review by Judicial Nominees Evaluation Commission Confirmed by Commission on Judicial Appointments Retention election every 12 years Pros: State Attorney General Statewide Election
<u>Intermediate Courts</u>	<u>Circuit Courts of Appeal</u> 3 federal judge panels Nominated by Pres. Confirmed by Senate Life Term, unless impeached and removed Pros: U.S. Attorney Nominated by Pres. Confirmed by Senate Serves at pleasure of Pres. (Jurisdiction corresponds with geographic region of the Federal District Court)	<u>CA Courts of Appeal</u> 3 state judge panels Nominated by Gov. after review by Judicial Nominees Evaluation Commission Confirmed by Commission on Judicial Appointments Retention election every 12 years Pros: State Attorney General Statewide Election

Trial Courts

U.S. District Court

1 federal judge
Nominated by Pres.
Confirmed by Senate
Life Term,
unless impeached
and removed

Calif Superior Court

1 State Judge
Elected in contested,
county-wide elections.
6 year terms
Mid-term vacancy
filled
by gubernatorial
appointment

Pros: U.S. Attorney
Nominated by Pres.
Confirmed by Senate
Serves at pleasure
of Pres.
(Jurisdiction
corresponds with
geographic region of the
Federal District Court)

Pros: District Attorney
Elected in contested,
county-wide elections.

Judicial Immunity: Judges immune from civil lawsuit for judicial acts (ordering bailiff to get & rough up someone or blatantly violating civil rights) vs. coming off bench and wailing on someone

Prosecutorial Immunity: Prosecutors immune from civil lawsuit for exercising prosecutorial duties EXCEPT in giving legal advice, or when acting more like police get qualified immunity. Even deliberately putting on false or misleading evidence or maliciously prosecuting someone w/o cause. (although bar charges)

Prosecutorial Discretion: Complete discretion whether to charge, what to charge and when, what and if to dismiss. Must not use improper methods to bring about wrongful convictions
May not conceal or misrepresent evidence.

What do Prosecutors do?

Counsel and advise police (eg line-ups, searches, pc for arrest/search)
Review search warrants before submission to judge/magistrate
Help investigate crimes, requesting investigators to collect additional evidence, test materials
Counsel and advise police and victims
Interview and prepare witnesses to testify
Negotiate pleas
Conduct trials (lots)
Legal research and writing
Advocate for sentences
(State as client vs. Victim as client)

Defense Attorneys: Right to effective assistance of counsel when incarceration imposed (none if not) at all critical stages (e.g. not pre-arraignment line-up and not pre-arraignment interrogation unless requested by D, request by lawyer not enough).

Effective assistance of counsel: trial fundamentally fair, outcome not **LIKELY** different if atty acted differently.

Right to self representation

How can a criminal lawyer represent the guilty?

The adversarial system requires it. Lawyers are not fact finders. They are advocates.

The system requires the prosecution must prove guilt beyond a reasonable doubt.

Plus, defense lawyers do not have the corner on the market of truth. How can a lawyer actually **KNOW** a defendant's true guilt or innocence?

Even if guilty, guilty of what? Much of what defense lawyers do is negotiate to ensure the crime and punishment fit what the prosecution can prove the defendant did.

Why do taxpayers pay for defense lawyers?

Adversarial system requires it.

To expect fair, just, and accurate result, both sides have attorneys.

Why do we pay for lawyers only for poor defendants and not *all* criminal defendants?

Maybe we're cheap. If someone can possibly hire a lawyer, we make them do so, particularly for less serious crimes, like misdemeanors.

Do we then put the squeeze on the middle class – as we do with bail, and health care, and taxes – expecting them to purchase more than what they can afford? What do **you** think?

Note that defense counsel has an ethical duty to represent the best interest of his/her client, to the exclusion of all other interests, including those of the lawyer. This is part of the adversarial process.

What do defense lawyers do?

Consult and advise defendants (and their families)

Investigate the crime and all defenses thereto, including:

Hire investigators to help:

Interview witnesses, good and bad

Look at crime scene

Examine seized property

Review prosecution's "discovery" and provide defense discovery to prosecutor

Hire experts to, for example, redo lab tests on blood alcohol levels, DNA tests, fingerprints, or psychological evaluations of the defendant

Prepare witness, including defendant, to testify
Research law, including all defenses to crime
Write/make motions, e.g. to reduce bail, to suppress evidence, to admit evidence,
to dismiss charges, to insist on speedy trial, to postpone trials, to force prosecutors
to turn over evidence, etc.
Negotiate with prosecutors, i.e. plea bargain.

Defendants and Victims

DEFENDANTS

Male (increasingly female),
Young
unmarried
overrep of people of color,
poor,
poorly educated,
victims of childhood abuse.

VICTIMS

Male,
Young
unmarried
overrep of people of color
poor,
Unemployed

Why is this the description of defendants? Sociology of deviance. Genes, environment. MAOA handout. Relative opportunity, what are the opportunities of people of such profiles. Or is it that our laws and law enforcement are discriminatory? We discussed examples of drug laws, caffeine vs. cocaine, and cocaine powder vs. rock cocaine. We also discussed laws against trespass do such laws, or all laws, inherently protect the haves from the have nots?

Why are the characteristics of defendants and victims so similar? Maybe because we live in a race and class stratified society so access to crime is there for race and class determined. Are criminal laws enforced only against lower classes, upper classes have other avenues of recourse. E.g. Barroom brawl vs. boardroom brawl. What reasons can you think of?

Note: the characteristics of defendants and victims is quite unlike that of courtroom workgroup.

As defendants wind their way through the criminal justice process, the population of sentenced defendant has an even higher proportion of young, minority males who are poor and poorly educated, even illiterate.

THE LIFESPAN OF A CRIMINAL LAWSUIT PART I: PRE-TRIAL

ARREST

May or may not occur after crime. Some people arrested when no crime committed. E.g. Jim Crow laws, drunk driving when no driving, etc.

An arrest is taking a person into custody in the lawfully authorized manner. (P.C. 834.)

Compare Detention Detained if a reasonable person would not feel free to leave. If the restraint employed by police goes beyond what is reasonably necessary for a detention, an arrest occurs, even though a suspect has not been formally arrested.

Generally: Handcuff + Movement = Arrest.

Who may arrest

By Police

Per arrest warrant,

Signed by judge upon showing of probable cause ordering police to arrest someone. Sought by police when upper class person to be arrested, police want assurance arrest lawful. Also issued after indictment, or for failure to appear (called bench warrant), or failure to respond to subpoena. Not ordinary course of events these days.

Without warrant (PC 836):

PC to believe arrested party committed felony, whether committed inside or outside of his/her presence, e.g. based on witness statements or other evidence/information collected

PC (not reasonable suspicion) to believe misdo committed in his/her presence

Five senses: Sight, sound, feel, smell, taste

EXCEPTION: Probable cause to arrest Misdemeanor domestic violence and misdemeanor carrying a concealed firearm in an airport may be premised on information collected both inside and outside of the officer's presence (as w/ a felony). (PC 836).

Note "probable cause," is that state of the evidence that would cause a reasonably prudent person to believe the person to be arrested committed a crime. It has also been defined as more likely than not. It is greater than "reasonable suspicion" which allows police to "detain" someone. A detention (e.g. a traffic stop, stopping

someone on the street, depriving them of their liberty to be free to leave) is supposed to be for a short time only and usually without formal restraints, such as handcuffs.

By Citizen/Private Person (PC 834)

PC misdo committed in presence

PC to believe arrested party committed felony.

- Usually in shop lifting, also misdo domestic violence.
- Citizen signs citation, officer issues citation or takes arrestee into custody

By Self: Self surrender "turn yourself in."

Arrestee (the person arrested) may or may not be taken into custody. In misdo, no likelihood of re-occurrence of crime, and D has ID, D not taken into custody if sign citation indicating promise to appear.

If taken into custody, taken to jail and "booked." Searched, Photo, fingerprint, ID number. Booking officer may then release you on your promise to appear. Or taken into jail.

Once taken into custody (not free to leave) read Miranda rights ONLY if law enforcement seeks to lawfully interrogate you. Can request to see a lawyer. One will not be appointed until in court. Law enforcement need not permit a private lawyer into see you unless you request to see him or her.

BAIL

Per Schedule

If booked into custody, bail will be set per county schedule for that offense. See sample bail schedule. No bail in capital cases.

Officer can request increase in bail per application sent to judge on call.

Arrestee may then post cash bail, or seek a bail bond. For cash bond, money returned at conclusion of case. Pay 10% (sometimes less if shop around) to bail bonds. That money is never returned even if make all court appearances.

There are also property bonds. Must show equity in property, such as real property, that is equal to twice the amount of the bail. Complicated, time consuming procedures (e.g. appraisal, mortgage statements, demonstrate clear title), but may become increasingly common as real estate values continue to climb.

Pre-trial Services Interview

If don't bail, interviewed by pretrial services.

Questions relative to release OR or reduced bail. Home? Job? Relatives? Ties to community? Research prior record.

CHARGING:

Prosecutorial discretion => what to charge, whether to charge at all, entirely up to prosecutor, DA in state system, U.S. Attorney in federal system.

In CA, the DA files a **complaint** to charge defendant.

WAIT

If arrested w/o a warrant, initial appearance is supposed to be w/in 48 hours to determine probable cause for arrest. (McLaughlin v. Co of Riverside) Juvs in CA 72 hrs. A judge's review of a police officer's statement of probable cause, without any lawyers or a hearing, is sufficient to meet McLaughlin. So in real life it can be 3 or 4 days if arrested on a Thur or Fri.

INITIAL APPEARANCES in FELONIES

(E.g. felony DV)

Why not arraignment? B/c w/ infamous crimes, i.e. felonies, prosecution must show either to a grand jury or to a judge at a contested preliminary hearing probable cause to believe defendant committed crime before can be charged.

So this is just the initial appearance where the defendant is:

- Court advises defendant individually of charges and maximum penalties

- Court appoints an attorney to indigent (poor) defendants

 - (unless defendant pleads guilty as w/ some drug charges)

- Court advises defendant individually of pre-trial rights

 - (E.g. to timely preliminary hearing for felonies)

- Court reviews bail or OR

- In CA state court will set preliminary hearing date

In CA lawyer gets police report. Discovery thus begins. Interviews client. Attorney works to get client out of jail.

COURT SET BAIL/OR

Not in capital cases.

If you are judge, what do you look for?

Safety of community vs. presumption of innocence

Seriousness of offense: likelihood of flight/safety of community (weapons/drugs/V)

Prior convictions

Re-offended while out on bail?

Likelihood of appearing (v. flight)

Prior appearance record

Ties to community

Ability to pay

PC 1275: In setting bail the court is to consider "the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case. *The public safety shall be the primary consideration.*" (Emphasis supplied.)

Note: how does this comport with the presumption of innocence?

D may post cash bail, bail bond, property bond. Property bond: equity = 2 x bail.

Conditions of release: drug testing, s/s, stay away from person/place,

Importance of release to help in defense (know how) and reduce jury prejudice

Is bail discrimination against poor or middle classes? (Cross reference sentencing)

PRELIMINARY HEARINGS & GRAND JURIES

Before standing trial FOR A FELONY, NOT A MISDEMEANOR, the prosecution must prove probable cause (more likely than not) to believe:

1. Crime was committed
2. The defendant committed it.

Why? Fifth A, efficiency (public and defendant's time and expense.) Why not misdo? Not Fifth A "infamous crime"

Flow chart and time line. (CA: Prelim w/in 10 court days (PC 859b) unless time waived by both defense and prosecution, or prosecution shows good cause OR indictment. FED must have indictment, prelim only if no indictment w/in 10 days)

Grand Juries

Secret, transcript only if indictment
only GJ, DA, * witness, reporter
"Target" not present, nor counsel
No cross-exam, just DA examines Ws
GJ may submit Qs in writing to DA
No defense presented
CA: DA must present exculpatory
evidence
Fed: Need not present exculpatory
Single Hearsay Permitted if W cop w/ 5 yrs
experience or POST certification

Returns an **indictment**

* In federal system, prosecutor is the U.S.
Attorney, not a D.A.

Preliminary Hearings

Public
before judge
Defendant present with counsel
Cross Examination

Defense may be presented
(DA* must give discovery to Def.)

Single Hearsay Permitted if W cop w/ 5 yrs
experience or POST certification

If held to answer, prosecution files an
information w/in 15 days

* In federal system, prosecutor is the U.S.
Attorney, not a D.A.

PRELIMINARY HEARINGS

Defense has right of cross-examination and may present defense evidence to help (a) establish an affirmative defense, (b) negate an element of a crime charged, or (c) impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness.

If magistrate finds PC, the defendant is bound over, or held over, for trial for the offenses the magistrate finds sufficient evidence of. If not, the defendant is released (but not immediately!).

If bound over, DA must file information w/in 15 calendar days.

Defense may waive the right to preliminary hearing. Then prosecution is limited to the charges in the complaint.

GRAND JURY

Secret proceedings, unless indictment returned.

DA advisor/director. Present during testimony, not during deliberations

Possible defendant, called "target," not present.

Defense lawyer, or lawyers for witnesses not permitted to be present

Judge not present.

Subpoena power, for people's testimony, things and documents.

California state law requires grand juries to consider exculpatory evidence w/in it reach and requires prosecutors to produce exculpatory evidence. The US constitution does not require it. Federal grand juries need not consider exculpatory evidence.

If indictment (or "true bill") returned, transcript of proceeding made available to D w/in 10 (or up to 20 days) and the public 10 days after defendant gets it. (Court may seal transcript from public if necessary to secure fair trial)

Except hearsay exception (5 years experience, or POST training) rules of evidence apply, in theory, but no one there to enforce except the DA

WHY GRAND JURY vs. PRELIM?

Politically sensitive, avoid responsibility
Avoid needlessly tarnishing rep of target
Access info can't get w/o subpoena power

ARRAIGNMENT

Information w/in 15 days of holding order
Indictment of person not before charged typically results in an arrest warrant.

Arraignment on charges. Information/Indictment provided to defendant, charges read unless formal arraignment waived. Reinformed of right to lawyer. Informed of trial rights, unless waived. Enter plea.

ARRAIGNMENT FOR MISDOS = INITIAL APPEARANCE

Misdemeanors (E.g. Petty theft, DUI, drive on suspend license) **and Infractions** (e.g. traffic tkt)
Court informs all defendants, en mass, of all rights. (See transcript in reader)
Calls individual cases. Informs of max & min penalties and likely sentence.
Asks if want attorney's assistance or if want to enter a plea. Here courts try not to appoint lawyers, but to get guilty pleas ASAP. Appoints lawyers, if requested, and if financially eligible. (No right to atty for infractions)
Many D's plead guilty w/o lawyers, in part to avoid repeated appearances, and in part to avoid cost of attorneys fees, and/or b/c they are guilty.

Lawyer will review police report provided in discovery by prosecution.
Judge will review bail if in custody.
Set date for pre-trial conference, motion, or "setting/disposition" date.

DISCOVERY

Process by which information/potential evidence is transferred from one party to another in a law suit.

Why? To ensure we find TRUTH! No surprises.

DISCOVERY REQUIRED BY US CONSTITUTION

Prosecution --> Defendant

All **exculpatory evidence** (evidence tending to point to innocence), including evidence tending to impeach (contradict) prosecution's witnesses, like their prior convictions

Defendant --> Prosecution

NOTHING.

And, defendant has privilege against self incrimination. So, gov't prohibited from forcing defendant to reveal incriminating evidence, including defendant's statements or witnesses defense will not call to testify.

CA RECIPROCAL DISCOVERY STATUTE

Prosecution --> Defense (PC 1054.1.)

W's intend to call

Ds' statements

Real evidence

Felony convictions of key witnesses (note constitution requires ALL convictions of all pros Ws be given to defense)

Statements of W's

Expert reports/statements

NOTE: Anything in the hands of the police is presumed to be in the hands of the prosecution. Can't "hide" things in police files.

Defendant --> Prosecution (PC 1054.3)

W names & address intends to call

W's statements/reports, if intends to call (NOT PROS W's STATEMENTS) (not D's)

Real evidence intends to offer

EXCEPTION: No one must give the other side "privileged" info, including attorney-client communications (see evidence lecture on privileges).

Sanctions:

- Immediate disclosure
- Contempt
- Evidence exclusion (last resort)
- Continuance
- Jury instruction
- Anything else

PRE-TRIAL MOTIONS

Motion: Request to a judge to make an order.

Examples:

1538.5: Suppress Illegally obtained evidence

Justification for Exclusionary Rule? Know two argument for and two against.

995: Dismiss Information/Indictment or charges therein

E.g. People v. Avila in Reader

Other Pre-trial motions include those relating to:

Discovery

Access to police officers' personnel files

Sanctions for destruction of evidence

Common law motion to dismiss count b/c fails to state offense or is unconstitutional

Motion to dismiss for double jeopardy

Motion to dismiss a prior conviction (e.g. b/c involuntary plea)

Disclose Confidential Informant

Discover and dismiss b/c discriminatory/selective prosecution

Dismiss for vindictive prosecution

Speedy Trial

Severance Motion (severe charges or defendants)

Change of Venue (adverse pretrial publicity)

Plea Bargaining

The system depends on it. For each felony case that goes to trial, 11 guilty pleas are entered. If all those cases demanded trials, the system would come crashing to its knees.

What:

Plea Bargain: Agreement between the prosecution and defendant in which the defendant agrees to plead guilty (giving up the right to a trial) in exchange for some benefit or leniency.

Types of Leniency:

Reduced Sentence
Reduced Number of Counts
Reduced Severity of Charges

Who:

Prosecutor	(negotiates w/ defense counsel & to lesser extent the judge)
Defense Counsel	(negotiate favorable deal, must forward ALL offers from prosecution to defendant, advises client on merits/demerits of offer)
Defendant	(agrees to or refuses prosecutor's offer)
Judge	(particularly in sentence negotiations; some judges more active in pushing parties to deal than others)

When:

Any time up until the jury reaches a verdict

Why:

Defendant: To gain the benefit of the deal, e.g. reduced punishment from maximum exposure, even if actually innocent. Avoid expense of trial if hired counsel.

Note Alford plea: U.S. Supreme Court allows defendants to plead guilty even if actually innocent, including in death penalty cases. In Alford, the defendant pled guilty, while asserting his innocence, b/c prosecution had agreed he would be spared the death penalty if he did. Some trial judges allow defendant to enter Alford pleas, other don't and insist the defendant admit guilt or go to trial.

Prosecution: To gain certainty of conviction (avoid uncertainty of trial), avoid work of trial, make punishment fit defendant's actual conduct. Motivators include weak evidence or witnesses of weak credibility.

Judge: Avoid time and public expense of trials.

Why not:

Public, and some of those involved in the criminal justice system, are concerned that plea bargaining allows criminals to get off too easy.

Note that a big impetus (push) for plea bargaining is rigid and severe sentence structures dictated by statutes. To make the punishment fit the crime, courtroom work group engages in plea bargaining, even when outlawed by statute (e.g. P.C. 1192.7, Reader p. 180-181).

How:

When an agreement is reached (in private) the results are announced publicly, on the record. Counsel (usually but not always defense counsel) states in open court, before the judge, that a plea agreement has been reached; for example, the defendant agrees to plead guilty on the condition that he not be sentenced to prison (leaving probation and local jail time).

In felony cases, the judge then goes through a plea ceremony with the defendant stating each of his/her constitutional rights to trial (right to jury trial, to subpoena and cross-examine witnesses, to counsel, etc.), and asking the defendant if he/she understands and gives up that right. The judge further usually also asks if the defendant is under the influence of any mind-altering substance (which may include prescription meds), whether any pressure or inducement, other than that stated, has caused the defendant to change his plea. The judge states the plea agreement, or references counsel's statement of the agreement, and asks the defendant how she/he pleads. "Guilty, your honor." (Reader p. 173-179.)

The judge then states, on the record, that s/he finds a knowing, intelligent and voluntary waiver and guilty plea. In felony matters, the case is then set for sentencing at a later date.

In misdemeanors the acknowledgment and waiver of rights is usually done on paper (see book at page 299), the judge verifies in open court that those are the initials and signature of the defendant, and sentences the defendant as soon as the guilty or no contest plea is taken. Paper waivers may also be completed in felony cases, but the plea ceremony is also done orally.

Once the guilty plea is entered it is extremely difficult to get out of it. It is easier to get out of a contract to buy a car, or a marriage, or being a parent, than it is to get out of a guilty plea.

**THE LIFESPAN OF A CRIMINAL LAWSUIT
PART II: TRIAL & POST TRIAL**

TRIAL

See flow chart.

JURY SELECTION

Jury Size. At least 6. If six unanimous. Generally 12. 12 unanimous in CA (unless agree otherwise) and fed. In CA alternate jurors hear evidence, don't deliberate unless regular juror excused.

Master list

DMV, voter reg, telephone, utilities
Note problems w/ each

Venire = Panel

Note courtroom layout

Voir Dire

Types of questions. Whether by judge or lawyers or both.
Educating the jury.

Challenges

For cause, e.g. hardship, bias

Not for cause = peremptory challenges. "Thank and excuse juror no. _____"

Death penalty each side 20

Other cases > 90 days penalty, 10. Co-D extra 5, 10 joint. Pros = Sum of Defense
90 day => 6, 4 more for each co-D.

Does this process result in partial or impartial juries?

EVIDENCE

ADMISSIBLE EVIDENCE is

Relevant

Tends to make a material fact more or less probable
Probative (proving) value must outweigh

- the prejudicial effect (improper harm) of the evidence,
 - jury confusion the evidence may cause, and
 - undue consumption of time to hear the evidence
- [Cal. Evid. Code, § 352]

Material

Pertinent to a fact at issue in the case

Competent & Reliable (often goes to the weight the trier of fact may give the evidence).

For example,

- A witness may be too young to be of sufficient mental capacity to be able to correctly perceive, recall and recite the events witness.
- Polygraph tests are insufficiently reliable to be admissible.
- Hearsay is excluded b/c not reliable (unless falls into one of numerous exceptions)

Not Excluded for Public Policy Reasons

E.g. the exclusionary rule, or
Privileges (see below)

Admissible Evidence May be

DIRECT OR CIRCUMSTANTIAL

- Direct evidence directly proves (or disproves) a material fact
- Circumstantial evidence requires the trier of fact to draw an inference in order for the evidence to make a material fact more or less probable.
- Defendant may be convicted on circumstantial evidence alone.
- If from circumstantial evidence the trier of fact could draw two inferences, one pointing to guilt and one pointing to innocence, the trier of fact **MUST** choose the inference pointing to innocence.
(From the presumption of innocence and prosecution's burden to prove guilt beyond a reasonable doubt.)

TYPES OF ADMISSIBLE EVIDENCE

• Testimonial

- Lay witness. Facts of the five senses
- Expert witness. Opinion testimony allowed.
- NOT Hearsay (unless exception)
Hearsay = Any out of court statement made by anyone

- » Manner of eliciting testimony
 - Leading Questions (cross-exam), or not (direct exam)
 - Refreshing recollection (e.g. w/ police report)
- » Impeaching testimony (recall discovery requirements)
 - Prior convictions or other bad acts
 - Inconsistent statements
 - Character for dishonesty
- Real
 - Tangible
 - E.g. blood, cocaine, gun
- Documentary
 - Writings
 - The “best evidence rule” requires the actual document in controversy (or a photocopy thereof, unless opponent shows photocopy inaccurate) be admitted, not just testimony about the contents of the document.
- Demonstrative
 - Demonstrates material fact,
 - E.g. Diagrams or photograph
 - Must accurately and fairly depict material

Privileges

- 5th Amendment privilege against self incrimination
- Attorney-client
- Not to testify against lawful spouse (up to testifier)
 - Not when one spouse charged w/ crime against the other (EC 972(e)(1))
- Marital communications (either spouse may object)
 - Not when one spouse charged w/ crime against the other (EC 985)
- Physician-patient (NOT in criminal cases in California, EC 988)
- Psychotherapist-patient
- Clergy-penitent
- Sexual Assault/Domestic Violence Counselor (in CA)
- Government secrets, including confidential informants
 - but if relevant to defense, must disclose secret or dismiss case

Why do we have privileges? To help support relationships that require trust.

SENTENCING POLICY

The state of Unidus has one law: "Treat all as you would wish to be treated." Through Unidus procedures, we have found someone has violated that law. We are the Supreme Leaders of Unidus having all the best qualities of the best leaders. What should we do? Why?

What have they done? What difference does it make? Does it make any difference who they are? Whether they have priors? Does it make any difference why they did it?

Sentencing Principles

Proportionality or "Just Deserts":

Punishment for criminal wrongdoing should be proportionate to the severity of the offense.

Retribution:

"Something given or demanded in repayment; especially punishment."

Vengeance:

"The act or motive of punishing another in payment for a wrong or injury s/he has committed; retribution."

Incapacitation:

Stresses crime prevention by incapacitating wrongdoer, or potential wrong doers, typically by depriving them of the liberties necessary to commit the wrong, e.g. incarceration, locked rehabilitation centers (for drug addiction or mental disorders)

Deterrence:

We can dissuade people from committing wrongs by imposing consequences for wrongdoing.

General Deterrence: Punishing, or announcing we will punish wrongdoers discourages others from committing wrongs.

Specific Deterrence: Punishing wrongdoers will discourage them from committing more wrongs.

Rehabilitation:

Those who commit wrongs should be "treated," e.g. with education, training, and/or counseling, to restore them the productive member of society they are capable of being. May assume criminality is caused by treatable social or psychological ailments.

POSSIBLE SENTENCES:

Incarceration: Loss of liberty.

Jail

Work Furlough

Work Release

Electronic Monitoring "House Arrest"

Prison

Fines: Monetary punishment. Blood from a turnip?

Fees: Assessment for going through criminal justice process, e.g. lab fees for testing substance found on D.

Community Service: Work for the community to compensate for wrong done.

Probation. May include incarceration in county jail and many other terms and conditions: report to PO, submit to s/s and drug testing, get employment, undergo counseling, community service, etc. Distinguish from parole.

Restitution: Paying victim for losses.

(Where does civil law end and criminal law begin. Buying one's way out of punishment?)

Restitution Fine: Paying money into a fund to help victims of crime.

Registration, e.g. as sex or drug offender

Death

Sentencing Practice

Who has power to sentence?

Role of three branches.

Legislatures announce general policies. This crime gets this punishment.

Judiciary apply general policy to specific defendant and specific wrong. Exercises discretion as permitted by legislature.

Executive branches: Implement sentence, e.g. run prisons, establish parole boards, grant/deny clemency.

Indeterminate Sentencing: Judge declare max and min sentence. Actual sentence determined by parole board based, at least in part, on performance in prison, especially toward rehabilitation.

Determinate Sentencing: Term of imprisonment, imposed by judge, that has a specific duration. E.g. California law. Most felonies have a mitigated term, mid-term, or aggravated term. E.g 16 months, 2, or 3 years.

Mandatory Minimum Sentencing

E.g. Three strikes law. Text p. 388; Reader pp. 208-213

Judge has discretion to dismiss strike(s).

Strike = serious or violent felony. Numerous offenses qualify, e.g. rape, robbery, murder, arson, but also unexpected ones, e.g. residential burglary. (On what is a strike see Reader pp. 180-181, 210.)

On first strike, D need not be sent to prison under 3 Strikes (perhaps other provisions of law, e.g. "Use a gun, go to jail" laws)

After first strike, if convicted of ANY felony (e.g. 1/4 gram coke, or petty theft w/ prior petty theft), D MUST be sent to prison, and sent twice as long as s/he otherwise would have been.

After second strike (which may include 2 residential burglaries), MUST be sent to prison for 25 years to life, for any felony, including non-violent, non-serious offenses. Exception, judge strike prior serious/violent felony or felonies for sentencing purposes. (Romero motion.)

SENTENCING PROCEDURE

Conviction

Probation Report

Circumstances of crime (taken from police reports, not transcripts)

D' background

Criminal

Employment

Education

Social

(Psych/addiction eval)

D's statement re: crime and punishment

Victim's statement

Summarizes applicable law

Goes through circumstances in aggravation/mitigation check-list

Calculates credits

Makes recommendation

Copy of probation report given to defense and prosecution. Forms center of sentencing argument.

Pre-sentencing, in-chambers discussion w/ judge, pros and D atty

Public sentencing hearing. Statement by prosecution, defense, defendant, victim, in no particular order as no one has burden of proof. Probation officer usually there simply to answer questions, help judge follow complicated sentencing laws.

California Sentencing

All felonies have three terms: base, aggravated and mitigated.

Judge may admit to probation (and give up to a year jail), unless probation prohibited, or choose one of three. Must consider circumstances in aggravation and mitigation. Handout 4.420-4.442

There are also sentencing enhancements which must be alleged and proven before a jury, or admitted. E.g. prior strikes, personal possession of a firearm, gang crime. These carry specific additional consequences, e.g. no probation, term of years.

Discrimination in Sentencing?

Class:

D's not release on bail and have PD's more likely to be sentenced to prison. (Correlates w/ race). If D=white, unemployment has no impact. If D=minority, unemployment has adverse impact on sentence.

Sex:

Rapid increase in number of women incarcerated. (400% since 1985) War on drugs?
Women are sentenced more leniently b/c are convicted of less serious crimes (plea bargaining discrimination?).

Race:

Social science data all over the map
By region? By judge?

By region:

South imposes harsher sentences than the north.
Urban courts more likely to give probation or shorter sentence than rural courts.

Death penalty &:

Offender-Victim Dyad: Most to least likely to get death penalty

Victim White; Offender Black
Victim White; Offender White
Victim Black; Offender Black
Victim Black; Offender White

Impact of victim-offender relationship. Stranger murder more likely to result in death penalty.

Studies find racial discrimination in the imposition of the death penalty in the South.

In McCleskey v. Kemp social science data indicated that killer of white victim four times more likely to get death penalty than killer of black person. Court was not concerned. A majority of justice in a 5-4 vote indicated they were not concerned w/ the social science data. Not “wanton and freakish,” within realm of inevitable disparities. McCleskey did not show that HIS death sentence was the result of racism.

CALIFORNIA DRUG CASES

Types of drug cases

Marijuana

Ounce or less MJ, 11357(b) misdo, fine up to \$100

More than an ounce, 11357(c) up to 6 months and \$500

Cultivating marijuana, 11358 felony (16mo,2-3yrs)

Possess for sale, 11359 felony

Sell/Furnish/Transport: 2-3-4yrs, unless less than an ounce misdo, fine only \$100

Hash: 11357(a), wobbler: misdo 1 yr, \$500/felony 16-2-3.

Meth/LSD

Possession: wobbler: misdo 1 year, felony 16-2-3 (11377)

Possess for Sale: 16-2-3 (11378)

Sell/Furnish/Transport: 2-3-4 (11379(a)), non-contiguous county (3-6-9)

Coke/Heroin, etc.

Possession: 16-2-3 (11350)

Possess for sale: 2-3-4 (11351)

Furnish/Sell/transport: 3-4-5 (11352(a)), non-contiguous county (3-6-9)

Cocaine base “Crack”

Possess for sale: 3-4-5 (11351.5)

Under the influence, carries mandatory minimum of 90 days jail (11550)

Register as drug offender, Drug tests as condition of probation/parole/bail.

Deferred entry of judgement, aka diversion. PC 1000 et seq. (Reader pp. 104-109.)

Simple Possession/Under the influence

No prior drug offense

No prior felony conviction w/in 5 yrs

Offense does not include violence (e.g. guns)
No previous diversion w/in 5 yrs.

Then: Plead guilty w/o trial, complete counseling, stay out of trouble
→ case, arrest, conviction dismissed, except for peace officer applications

Prop 36: (Reader pp. 188-192, esp. p. 192)

If flunk diversion, or diversion ineligible, or refuse diversion (eg go to trial)

Simple possession/under the influence. No sales/manufacture
No prior "strike" offense, unless stayed out of trouble for last 5 years

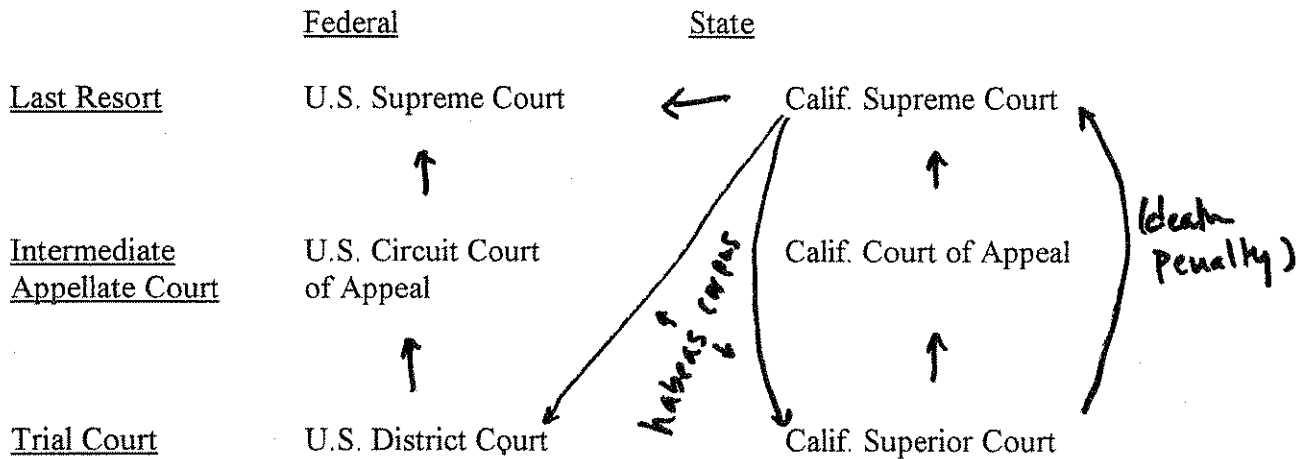
Can happen AFTER trial. Don't have to give up right to trial

Placed on probation and undergoes treatment. Usually at first AA/NA meetings (cheap)
First two drug related probation violation, e.g. test "dirty" or new drug crime, will be re-referred to probation.

Treatment likely upped, e.g. to residential, locked.

Third drug related PV or first none drug-related violation (e.g. new none-drug crime) can have probation terminated immediately, sentenced as criminal (→ jail/prison)

APPEALS AND WRITS



JUVENILE COURTS

Before 1899, juveniles were treated as adults in criminal cases as they were to a large extent in society at large. The only thing that saved them was the infancy defense, which at common law conclusively presumed that children under seven lacked criminal capacity and could not be convicted of crime. Children having reached 14 were treated as fully responsible. Children in between were rebuttably presumed to lack criminal capacity. The prosecutor could rebut this presumption w/ evidence demonstrating the child knew right from wrong. This became easier as the child neared 14.

As a consequence young children were incarcerated w/ hardened adult criminals.

The reform movement, part of the Progressive Era in the US, gave rise to juvenile courts, first in Illinois (partly b/c of the work of Jane Addams, founder of Chicago's Hull House). Juvenile courts were to:

- Emphasize Rehabilitation over punishment
- Fall w/in the court's civil jurisdiction, not criminal
- Have informal procedures
- Be secret to protect the minor's reputation, increasing the chance for rehabilitation
- Guarantee the incapacitation of minors away from adults

TERMINOLOGY FOR ADULT AND JUVENILE JUSTICE

Adult

Information/Indictment
Arrest Warrant
Incarceration Pending Trial
Arraignment
Defendant
Trial
Convicted/Conviction
Criminal/Felon
Crime
Sentence

Juvenile

Petition
Summons
Held in Detention
Initial Hearing/Arraignment
Respondent
Hearing/Adjudication/Jurisdictional Hearing
Adjudicated/Juvenile Adjudication
Delinquent/Ward
Act of Delinquency
Disposition/Placed in training school, reformatory,
group home

By 1950, people began to have concerns that the juvenile courts were not meeting their goals

In re Gault

Gerald Gault, 15 year old, together w/ a friend made a lewd phone call. Gerald was taken to the

Defense Opening → Defense Case, if any, Criminal defendant need not testify → Rebuttal by Plaintiff/Prosecution (if any) → Sur-rebuttal by Defense (If any) → Sur-sur-rebuttal → etc. →

Defense Statement if not given before
 Defense Case, if any, Criminal defendant need not testify
 Rebuttal by Plaintiff/Prosecution (if any)
 Sur-rebuttal by Defense (If any)
 Sur-sur-rebuttal

W_{D1} - Direct Exam by D
 Cross Exam by P (leading Q ok)
 Re-direct by D
 Re-cross by P
 etc.

W_{D2} - Direct Exam by D
 Cross Exam by P
 Etc.

**Charging Conference To discuss Jury Instructions → ** (Jury Instructions (Read by Judge to Jury, unless judge chooses to read after arguments)) → Closing Argument by Plaintiff/Prosecution (Opening Closing) → Closing Argument by Defense → Closing Argument by Plaintiff/Prosecution (Closing, closing) →

**Jury Instructions Read to jury, if previously instructed, closing instructions read re: deliberating. Jury given written copy as well. → **Jury Deliberations (In Secret, w/ evidence & instructions. Jury may ask judge legal questions or request read-back of testimony) → VERDICT (⇒ Penalty Phase in Death Penalty Case) → Post-trial Motions E.g. Motion for new Trial, or judgment notwithstanding the verdict, or, in civil case, to reduce damages →

Sentencing, in criminal case (by Judge, except Death Penalty) → Appeals & Writs

(** Indicates not part of court trial)