Chapter 14
Criminal Justice

Contents

Introduction

The criminal justice system may seem intimidating. Most people have never even seen the inside of a courthouse, let alone a jail. Their only experience with police officers may have been a quick stop on the highway for a speeding ticket. For people who have never before been charged with a crime, facing criminal charges is certain to be disturbing. However, our system of justice was carefully designed to prevent people from being unfairly convicted by guaranteeing many legal rights to anyone charged with a crime. This chapter will discuss those rights, provide you with a basic understanding of the steps in the criminal justice system, and suggest where you can look for more help.

It is important to be informed about the criminal law in your state. Most crimes are punishable under state, rather than federal, laws. Although all states must comply with certain federal constitutional minimums, there are considerable variations from one state to another. For example, some state constitutions provide a higher degree of personal and procedural rights to the criminally accused than others. Therefore, the information in this chapter will generally be true in most states, but may not be true in all.

The Basics of Criminal Law

Q. How do civil and criminal law differ?

A. Both criminal and civil cases involve a dispute over the rights and responsibilities of the people involved. In civil matters, the issue is usually money. In a criminal case, however, the defendant might be ordered to pay a fine or sentenced to probation, jail or prison, or even death. It is the possibility of losing life or liberty that distinguishes criminal from civil penalties.

THE CHARACTERISTICS OF SOME SERIOUS CRIMES

Crime	Definition
Homicide	Causing the death of another person without legal justification or excuse, including crimes of murder and non-negligent manslaughter and negligent manslaughter.
Rape	Unlawful sexual intercourse with a female by force, without consent, or when she is underage.
Robbery	The unlawful taking or attempted taking of property that is in the immediate possession of another, by force or threat of force.
Assault	Unlawful intentional inflicting, or

	attempted inflicting, of injury upon the person of another. Aggravated assault is the unlawful intentional inflicting of serious bodily injury or unlawful threat or attempt to inflict bodily injury or death by means of a deadly or dangerous weapon with or without actual infliction of injury. Simple assault is the unlawful intentional inflicting of less-than serious bodily injury without a deadly or dangerous weapon or an attempt or threat to inflict bodily injury without a deadly or dangerous weapon. Many states have separate categories of assault for child victims.
Burglary	Unlawful entry of any fixed structure, vehicle, or vessel used for regular residence, industry, or business, with or without force, with the intent to commit a felony or larceny.
Larceny-theft	Unlawful taking or attempted taking of property other than a motor vehicle from the possession of another by stealth, without force and without deceit, with intent to permanently deprive the owner of the property.
Motor vehicle theft	Unlawful taking or attempted taking of a self-propelled road vehicle owned by another, with the intent of depriving him or her of it, permanently or temporarily.
Arson	The intentional damaging or destroying or attempted damaging or destroying by means of fire or explosion of property without the consent of the owner, or of one's own property or that of another by fire or explosives with or without the intent to defraud.

Sources: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Bureau of Investigation, Crime in the United States, 1985.

Q. What is a citation?

A. A citation or summons (ticket) is the penalty for the least serious offenses. While most jurisdictions have decriminalized these offenses, in some municipalities a citation could result in a short jail sentence. The normal penalty is a fine, which may range from under twenty dollars to several hundred dollars. Police typically give citations for such offenses as minor traffic violations (for example, speeding, parking in a no-parking zone, or jaywalking). If the police cite you for such an offense, they will issue a ticket to you. You have the option of not contesting the citation by mailing in the ticket with the specified payment. Or if you feel the police have wrongly given

you a ticket, you have the right to contest the citation at a hearing.

Not all traffic violations are citable offenses, however. The most serious traffic violations, such as driving while intoxicated, are criminal offenses. The law classifies them as misdemeanors or felonies.

Q. What distinguishes a misdemeanor from a felony?

A. Each state has a body of criminal law that categorizes certain offenses as felonies and others as misdemeanors. These offenses generally appear in the state's "penal code," the vehicle code, or the health and safety code (for drug offenses).

Felonies are more serious crimes than misdemeanors. Robbery, kidnapping, rape, and murder are examples of felonies. Public drunkenness, resisting arrest, and simple battery are misdemeanors. However, the same offense might be either a misdemeanor or a felony, depending on its degree. Petty larceny (stealing an item worth less than a certain dollar amount) is a misdemeanor. Over that amount, the offense is grand theft (a felony). Similarly, the first offense of driving while intoxicated may be a misdemeanor. After a certain number of convictions for that same offense, the state may prosecute the next violation as felony drunk driving.

The federal government and most states classify felonies as all crimes that carry a maximum sentence of more than one year. Misdemeanors are offenses punishable by a sentence of one year or less. Some states, however, draw the line based on the place of possible confinement. If incarceration is in the state prison, the offense is a felony. If the offense is punishable by a term in jail (usually a county facility), it is a misdemeanor.

Sidebar: How to Report a Crime

Call the police and say that you wish to report a crime. If you have observed a crime or know that a crime took place, the law considers you a witness. If somebody has committed a crime against you, the law regards you as a victim. In either case, the police will want to talk to you to determine what you know about the incident so they can decide whether to investigate further. If you were in any way involved in the crime, the law might consider you a suspect. In this instance it is a good idea to call the local public defender or a lawyer in private practice before you talk to the police. A lawyer, or possibly a public defender, will be permitted to accompany you to the police station and be present to protect your interests during police questioning. Many people believe that what they say to the police is not admissible unless written down, recorded on tape, or said to a prosecutor or judge. That is not true. To be on the safe side, you should assume that anything you say to anybody but your lawyer could be used against you at trial.

The Police and Your Rights

Q. How do the police investigate crimes?

A. When the police receive a report of a crime (such as a home burglary in progress), they send investigating officers to the scene as soon as they can. If the officers arrest a suspect, they will transport that person to the police station for booking. The officer will write an arrest report, detailing when and why the officer went to the scene, along with any observations, and why the

officer arrested the suspect. The officer also will fill out a property report, detailing what items (for example, drugs or cash) the police found on the suspect during booking. The officer also will list any items of evidence found at the scene, such as tools the suspect might have used to gain access to the home.

If the crime is complex or serious, the police then assign an investigating officer (usually a detective) to the case. That officer will make a return visit to the crime scene, look for more evidence, and interview any other witnesses. If the police have not arrested anyone, the detective will analyze the evidence and try to narrow down the list of suspects. The detective will question suspects and sometimes will obtain a confession.

Q. How long may police hold suspects before filing charges?
A. If the police have probable cause to believe a person has committed a crime but have not yet brought formal charges, they may detain him or her in custody only for a short period of time (generally 24 to 48 hours). Probable cause is defined as facts sufficient to support a reasonable belief that criminal activity is probably taking place or knowledge of circumstances indicating a fair probability that evidence of crime will be found. It requires more than a mere "hunch," but less than proof beyond a reasonable doubt.

After this short period the police must release the person or bring formal charges and take him or her before a judge. However, he or she may be rearrested at a later date if the police obtain sufficient evidence.

Q. Do the police have the right to tap my telephone?
A. Yes, if they can show the court that they have probable cause that intercepting your telephone conversations is necessary to help solve certain crimes (such as treason, narcotics trafficking, wire fraud, and money laundering).

However, the law considers wiretapping to be very intrusive. Therefore, federal law closely regulates it. A court will permit wiretapping only for a limited period. The authorities (usually FBI agents) who listen to your telephone calls must make efforts to minimize this intrusion by limiting the number of intercepted calls that do not involve the investigation. An example of this would be tapping a bookie's telephone only during the hours when bets likely will be placed. After the wiretap period has ended, the authorities must inventory the calls and reveal to the court the content of the conversations they intercepted.

A less intrusive form of electronic surveillance is the pen register. This device records every number dialed from your telephone. However, a pen register simply lists telephone numbers. It does not enable anyone to listen to your conversations.

Similarly, police generally need a warrant in order to search email records.

Q. May the police search me without a warrant?
A. That depends on whether you are under arrest. If the police have lawfully arrested you, they are permitted to search you. They also are allowed to search the area under your immediate control (also known as your wingspan, or where you can reach). In the example given in the sidebar "Stopping and Frisking Suspects," the police would have the authority to seize the

cigarette pack containing drugs from your pocket if you were under arrest. They could then use that evidence against you in court.

If you are not under arrest, the police generally are not permitted to search you without a warrant. You may consent to a search if you choose, but this is not wise because it limits the range of your defense in later proceedings. Your consent, for example, will make it difficult to challenge the legality of the search at a pretrial suppression hearing. Many people feel they should consent to show the police they "have nothing to hide"--but what you consider insignificant, such as a piece of paper with a telephone number, may be incriminating evidence in the hands of the police to link you to a crime.

Sidebar: Stopping and Frisking Suspects

Do the police have the right to stop and frisk you? That depends on the circumstances. On the one hand, the Supreme Court has ruled that an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. On the other hand, suppose the police reasonably suspect that you are engaging in a criminal activity and that you may be armed and dangerous. Then they may stop you briefly to frisk you for weapons. For example, assume that the police observe you walking back and forth in front of a store after dark. They observe you looking around nervously and apparently "casing" the place to break into it. The police are permitted, under these circumstances, to stop you to conduct an outer clothing "pat-down" (also known as a "frisk") for weapons. If they feel a hard object in your pocket that might be a gun, they are permitted to reach in and remove it.

Suppose, however, that the police feel something soft in your pocket that could not possibly be a weapon. Under long-standing legal doctrine, the police have no right to seize such an item. The Supreme Court has held that a police officer conducting a pat down search for weapons is not entitled to seize an item that, based on the officer's sense of touch, bore no resemblance to a weapon.

The example above highlights weapons, but remember that the police can stop, briefly detain, and question a suspect based on reasonable suspicion of a crime, even if no weapons are suspected. The Supreme Court recently determined, for example, that persons in high crime areas may be pursued and stopped for merely running away at the sight of police. In these brief detentions, police do not have to give Miranda warnings (see "The Miranda Rule" discussion later in this chapter).

Q. Does the law permit the police to search my home or items in it?

A. You have greater rights in your home than you do in your car. (See the "Automobiles" chapter for information on car searches.) That is because the courts have decided that the law entitles people to greater "privacy rights" in their home. Therefore, the police normally cannot search your home unless they have a warrant. The warrant must specify what the police are looking for and at what location they are likely to find it. The law limits the search to areas where it is reasonable to believe the item might be. You cannot look for a bazooka in a breadbox--it is not sensible to look for a large item in a container too small to hold it.

The police do not need a warrant to search your home if you agree to the search.

Consent must be voluntary and must be given by someone who has the legal right to be in the home. Obviously, you can give consent to search your home or apartment. But you are not the only person whose consent would be valid. Your spouse could consent, as could an adult child living in your home. It is also important to note that, in seeking your consent, the police are not required to explain the consequences. For example, they need not tell you that any item in plain view or found during a search, if somehow connected to a crime, can be used against you or any other member of your household. Consent usually is not a good idea because the police may recover evidence you did not know was in your home or was linked to a crime. For example, say the police come to your home to arrest one of your relatives for a drug transaction. You knew nothing about his involvement in selling drugs, so you cooperate with the police and give them blanket permission to search your home. In your bedroom they find a large quantity of cash, which you use for your legal weekend flea market business. Despite your explanation, the officers may seize your cash under "asset forfeiture" laws and impound it as evidence of drug sales. You may lose your money--and worse, you may find yourself charged as a co-conspirator in the drug case.

Even if you do not agree to a search, the police are permitted to search your home without a warrant if there are sufficiently exigent circumstances--that is, if there is an emergency situation where the police have reason to believe someone's life is in danger, a suspect is about to escape, or you might destroy the evidence (flush illegal drugs down the toilet, for example) if they do not conduct the search immediately. In cases such as these when there is no time to get a warrant from the court, the police can search your home without permission.

A warrantless search is presumed invalid, so you have the right to challenge it in court. If the judge finds there was a valid exception to the warrant requirement, he or she will rule the evidence admissible.

On the other hand, if there was no such exception, the "exclusionary rule"--which prevents illegally obtained evidence from being introduced at the trial--will probably prevent the evidence from being used against you.

Sidebar: When Must Police Knock Before Entering

The police must execute a search warrant promptly after the court has issued it. This requirement prevents a warrant from becoming "stale" and ensures that police will not conduct a search when there is no longer reason to believe evidence of crime is still present. Some jurisdictions have a "knock-notice" requirement. This means that the police must knock on the door and announce their presence and purpose before entering the premises to search for items in the warrant.

If there are sufficiently exigent circumstances, however, the police have a right to force entry without knocking to execute the warrant. For instance, the police may not need to knock if they have evidence that doing so would place them in danger. Also, some states are beginning to pass "no knock" laws for particular searches, like drug raids.

Q. If the police stop me for drunk driving, what tests may they force me to take?

A. If the police observe you driving strangely or violating the rules of the road, they are permitted to stop your vehicle. If the police then smell alcohol on your breath or have other reason to

believe you are driving while intoxicated or under the influence of alcohol, they have the right to ask you to take certain tests. The law refers to these as "field sobriety" tests. Typical tests involve walking a straight line heel-to-toe or touching your finger to the tip of your nose with your eyes closed. If you do not perform these tests satisfactorily, the police will ask you to submit to a scientific test that shows how much (if any) alcohol is in your body. Many states will offer you one of three choices--give a blood sample, give a urine sample, or take a breathalyzer test. The breathalyzer involves blowing into a balloon attached to a machine that measures the percentage of alcohol in your breath (breath-alcohol concentration, or BAC).

The police are not allowed to force you to take these tests. However, depending on the law in your state, they might use your refusal as evidence against you in court. Also, in many states, refusal to submit to such tests will result in automatic suspension or revocation of your driver's license.

Q. After arresting me, may the police make me provide fingerprints, a handwriting sample, or a voice example?

A. Generally, yes, the police are permitted to force you to supply these. They will take your fingerprints during the "booking" procedure at the police station. The law considers handwriting samples and voice examples evidence of physical characteristics. Therefore, you may not claim that the police are forcing you to incriminate yourself through these identification procedures. The police may use these samples as evidence against you in court if they help prove that you committed a crime. For example, your handwriting may be compared to the signature on a forged check or to the writing on a note handed to a teller in a bank robbery.

Q. What are my rights if the police put me in a lineup?

A. In a lineup, several people who look somewhat similar will be shown to victims or witnesses who observed the crime. The police will ask the witnesses if they can identify anyone in the lineup as the person who committed the crime.

If formal charges have been filed against you and the police put you in a lineup, you have a right to have an attorney present to protect your rights. A lineup is not supposed to be unfairly suggestive--that is, if the victim said her assailant was approximately six feet tall with a red beard, the lineup cannot include five short, clean-shaven, dark-haired men and only one tall bearded redhead.

Similarly, the police are not permitted to suggest to the victim that a certain person in the lineup is their main suspect--for example, they may not point to one person and ask, "Could that be the man who stole your purse?"

Neither are police permitted to make such a suggestion during photographic identifications, when a witness is asked to pick the criminal from six similar photographs on a card. (However, you do not have a right to have a lawyer present during a photographic identification.)

When you are in a lineup, the police have the right to ask you to speak if the witnesses feel they can identify you by your voice. The law permits the police to have you speak the words used during the crime. They might ask you to say, for example, "Give me your money."

Sidebar: Where Police are Permitted to Make Arrests

Where the police are allowed to arrest you may depend on whether the police have a warrant for your arrest. The police make most arrests without a warrant. If you commit a misdemeanor in the officer's presence, that officer is permitted to arrest you without a warrant. If the officer has probable cause (the minimum level of evidence needed to make a lawful arrest) to believe that you committed a felony, the officer is allowed to arrest you without a warrant, even if he or she did not see you commit the crime. The law permits warrantless arrests in public places, such as a street or restaurant.

But to arrest you in a private place--your home or a friend's home, for example--the police must have a warrant or your consent unless there are exigent circumstances. There are two types of warrants: an arrest warrant and a search warrant. To arrest you in your own home, the police must have an arrest warrant. However, if they lack a warrant but have probable cause for a warrantless arrest, they are permitted to put your home under surveillance. They will then wait until you leave your home and arrest you in a public place. (When the police arrest you without a warrant, the law entitles you to a prompt hearing to determine whether there was probable cause for the arrest.) If the police wish to arrest you in someone else's home, they must name you as the "item" for which they will search.

Q. May the police use information from a confidential informant against me?

A. The law allows police to use such information if it is reliable. Confidential informants are people who supply information to the police without having their identities disclosed. The police often use such information to obtain search warrants. For example, an informant might tell the police where someone has hidden evidence of a crime. The police will provide this and other information (such as the informant's prior reliability, how the informant obtained the information, and evidence obtained from other sources that confirms the informant's story) to a judge or magistrate (a type of court official). If the judge or magistrate determines there is probable cause to believe that this evidence will be found at the location specified, the magistrate will issue a search warrant.

Q. What procedures must the police follow while making an arrest?

A. The police do not have to tell you the crime for which they are arresting you, though they probably will. They are not permitted to use excessive force or brutality when arresting you. If you resist arrest or act violently, however, the police are allowed to use reasonable force to make the arrest or keep you from injuring yourself.

While the police are arresting you, they might read you your "Miranda" rights (see "The Miranda Rules" discussion below). However, they do not have to read you these rights if they do not intend to interrogate you.

Q. When am I in custody?

A. You might be in custody even if the police do not say, "You are under arrest." Generally, the law considers you in custody when you have been arrested or otherwise deprived of your

freedom of movement in a significant way. This may occur when an officer is holding you at gunpoint or when several officers are surrounding you. Other examples are when you are in handcuffs or when the police have placed you in the back seat of a police car. The test is whether or not a reasonable person in the circumstances would have felt free to leave the scene. The most obvious example of being in custody, of course, is when the police say, "You are under arrest."

Q. What is an interrogation?
A. An interrogation might be explicit questioning, such as the police asking you, "Did you kill John Doe?" Interrogation also might be less obvious, such as comments made by the police that they know are "likely to elicit" incriminating information from you. For example, in one actual case that made it all the way to the U.S. Supreme Court, the police knew that a murder suspect was deeply religious. To get the suspect to reveal where the body was, they said, "The only way for that woman to get a decent Christian burial is if we find her body before the snowstorm tonight." When the suspect gave an indication about where the body might be found in responding to the statement, he had undergone police interrogation. The law considers this to be indirect questioning or the "functional equivalent" of interrogation.

Q. How do the police recommend that criminal charges be filed against someone?
A. Criminal cases go through a screening process before a defendant faces charges in court. This is a two-step process that begins with the police inquiry. The investigating officer (or another officer superior to the arresting officer) will review the arrest report. That officer will determine whether there is enough evidence to recommend filing charges against the arrested person. If the officer decides not to recommend filing charges, then the police will release the arrested person from jail.

If the officer decides to recommend that a charge be filed, a prosecutor (usually from the prosecuting or district attorney's office) will review the officer's recommendation. Based on the arrest report and any follow-up investigation, the prosecutor's office will decide whether to file charges and what criminal offenses to allege. These allegations will appear in a complaint (affidavit or information) filed in the court clerk's office.

Who Exercises Discretion
These criminal justice officials must often decide whether or not or how to:

Police
- Enforce specific laws
- Investigate specific crimes
- Search people, areas, buildings
- Arrest or detain people

Prosecutors

- File charges or petitions for adjudication
- Seek indictments or file informations
- Drop cases
- Reduce charges

Judges or magistrates
- Set bail or conditions for release
- Accept pleas
- Determine criminal guilt or delinquency
- Dismiss charges
- Impose sentences
- Revoke probation

Correctional officials
- Assign to correctional facility
- Award privileges
- Punish for disciplinary infractions

Paroling authority
- Determine date and conditions of parole
- Revoke parole

Source: Report to the Nation on Crime and Justice, second edition, Department of Justice, Bureau of Justice Statistics, March 1988.

Lawyers and Criminal Law

Q. If the police arrest a friend or relative, may I send a lawyer to the jail to offer help?
A. Yes, but the right to counsel is personal to the accused. This means that the person who is under arrest must tell the police that he or she wants a lawyer. In some states, if your friend waives the right to counsel and agrees to talk to the police, the police do not have to tell your friend that you are sending a lawyer. Or, in some states, if your friend has not requested a lawyer the police are even permitted to turn away the lawyer upon arrival at the station without telling your friend. The best thing you can do (should your friend telephone you) is to say that a lawyer is on the way to offer help. Tell your friend to claim the right to counsel and urge him or her not to talk to the police until the lawyer arrives.

Sidebar: The Miranda Rule
The Supreme Court recently confirmed that Miranda warnings are constitutionally required because of a 1966 case called Miranda v Arizona. When a person is in custody, some version of the Miranda rights, such as the following, is read to the individual before questioning: "You have

the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to an attorney. If you desire an attorney and cannot afford one, an attorney will be obtained for you before police questioning."

The Miranda rule was developed to protect the individual's Fifth Amendment right against self-incrimination. Many people feel obligated to respond to police questioning. The Miranda warning ensures that people in custody realize they do not have to talk to the police and that they have the right to the presence of an attorney.

If the Miranda warning is not given before questioning, or if police continue to question a suspect after he or she indicates in any manner a desire to consult with an attorney before speaking, statements by the suspect generally are inadmissible. However, it may be difficult for your attorney to suppress your statement or confession in court.

The best rule is to remain silent. You have the right to an attorney. Insist on it.

Q. When do I have a right to an attorney—before or during police interrogation?
A. You have a constitutional "right to counsel" (right to have an attorney's advice) before and during police interrogation. As soon as the police read your Miranda rights to you, tell them you want a lawyer. Do not answer any questions. Say nothing until your attorney arrives. If the police place you in a lineup, the law entitles you to have a lawyer present if you have been formally charged. This right continues at all your court appearances.

Q. How do I find a lawyer?
A. If you have one, call your family lawyer immediately. If your family lawyer does not do criminal work, he or she may be able to recommend another lawyer who does. If you cannot afford an attorney, tell the police you wish to have a lawyer appointed on your behalf. A counsel for the defense--whether private, a public defender, or assigned--will be appointed on your behalf. The first chapter in this book, "When and How to Use a Lawyer," discusses this topic in greater detail. Above all, say nothing else to the police until your lawyer arrives.

Q. What should I tell my lawyer?
A. You should tell your attorney the truth. Your lawyer has to know exactly what happened in order to defend you effectively. Tell your lawyer as many details as you can remember. Anything you tell your attorney is confidential and will be kept secret. The law refers to this as the attorney-client privilege.

However, a lawyer also has an ethical obligation to the court. An attorney may not lie to the court for you or knowingly offer a false defense. In practical terms, that means that if you tell your attorney you did not commit the crime but were present when it happened, your attorney cannot bring in alibi witnesses who will falsely testify that you were with them in another state when the crime took place.

Sidebar: Admissible Confessions
A lot of people believe that only written, signed confessions are admissible as evidence. This is not true. Oral and unsigned written confessions are also admissible.

Whether you may withdraw a confession that you made before a lawyer arrived depends on whether you gave up your right to a lawyer and your right not to talk. If you voluntarily talked to the police after they read you your Miranda rights, you might have waived (given up) your right to counsel and protection against self-incrimination. The prosecution probably could use the confession against you in court.

However, if the police continued to question you after you told them you wanted a lawyer, your confession probably would not be admissible in court. In either case, your lawyer might be able to persuade the judge to suppress (exclude) the confession as evidence.

Remember that you are permitted to change your mind about wanting a lawyer. If you voluntarily begin to talk to the police, then tell them that you want a lawyer present, the questioning must stop immediately. Or if you have talked to the police once, you may refuse to talk to them a second time until a lawyer arrives.

Q. May I represent myself without a lawyer?

A. While you do not have a right to represent yourself on appeal, you do have a right to represent yourself before trial, and the court may even allow you to act as an attorney in your own defense at trial**.** The law refers to self-representation as pro se representation. If you request to proceed pro se, the judge will determine whether you are mentally and physically able to represent yourself, decide whether you are making an informed and voluntary decision to give up your constitutional right to counsel, and determine whether you are aware of the dangers and disadvantages of self-representation.

Those dangers are many. It is not a good idea for untrained people to try to represent themselves in criminal cases. The opponent will be a skilled prosecutor who has conducted many trials. The judge or jury will not necessarily be sympathetic toward you simply because you decided to "go it alone."

Some defendants choose to represent themselves because they feel they can do a better job than a lawyer whom the court has appointed to represent them free of charge. This simply is not true. First, any lawyer is sure to know more than you do about the legal system. Lawyers must complete a three- or four-year program in law school and pass a rigorous bar examination. Second, do not think that the public defender is an inadequate lawyer who could not get a "real job" in a law firm. Many top law students choose public-interest work because they want to help people.

In addition, most people charged with a crime are too close emotionally to their own problems. Therefore, they cannot maintain the clear, coolheaded thinking that is necessary in court. Even lawyers charged with a crime usually hire another attorney to represent them. This follows the old saying, "A lawyer who represents himself has a fool for a client."

By representing yourself, you are giving up a very important constitutional right: the right to counsel. If you represent yourself and are convicted, you cannot claim that your incompetence as a lawyer denied you effective assistance of counsel.

For these reasons, self-representation is a risk that most criminal defendants should not take. Remember that you have the right to dismiss your attorney for good cause. Then you could

change lawyers or reconsider representing yourself, if the court will allow it (though the court may require you to proceed immediately with the case, without extra time for you or your new lawyer to prepare). However, once you have experienced the complexities of the legal process, you probably will realize that you need a professional at all times to protect your interests.

Criminal Charges

Q. How are criminal charges brought against someone?

A. There are basically three ways in which formal charges may be brought: information, indictment, or citation. An information is a written document filed by a prosecutor (often the district or prosecuting attorney) alleging that the defendant committed a crime. The information may be based upon a criminal complaint, which is a petition to the prosecutor requesting that criminal charges be initiated.

An indictment is a formal charge imposed by the grand jury, which is a group of citizens convened by the court. Its function is to determine whether there is sufficient evidence to charge a person with a crime and to bring him or her to trial. The grand jury conducts its proceedings in secret and has broad investigative powers. The federal system and about half of the states use grand juries.

As noted earlier, a citation is issued by a police officer, most often for a misdemeanor or other minor criminal matter such as jaywalking, littering, or a minor traffic offense.

None of these mechanisms determine the guilt or innocence of defendants. Rather, they indicate that the issuing authority has determined that there is sufficient evidence to bring a person to trial.

Q. What does it mean if I have been charged with an "attempt"?

A. An attempt means that you had the intent to commit the crime, but for some reason you did not complete it. Usually it means that you took a substantial step to commit the crime. Suppose you went into a bank and demanded money from a teller at gunpoint. Then an alarm rang, so you ran out of the bank before you could get the money. The police would recommend you be charged with attempted robbery. In many states, the punishment for an attempt is as severe as for the completed crime.

Q. What is a conspiracy?

A. A conspiracy is an agreement between two or more people to commit a crime followed by any activity to carry out the agreement. The conspiracy itself is a separate crime. Therefore, the police are permitted to recommend that you be charged with conspiracy even if you did not complete the crime you intended to commit. Because conspiracy charges carry separate penalties, you can be convicted of both conspiracy and a crime that you or your fellow conspirators accomplished during the conspiracy (the "substantive" count). You might receive two or more sentences as a result.

Q. What is complicity or accomplice liability?

A. Complicity is the act of being an accomplice. An accomplice is someone who helps in, or in

some states merely encourages, the commission of a crime. Courts sometimes refer to such a person as an aider or abettor. This person did not commit the crime, but his or her actions helped enable someone else to do so. Examples of complicity include supplying weapons or supplies, acting as a "lookout," or driving the getaway car. Other examples are bringing the victim to the scene of the crime or signaling the victim's approach. There are many other ways a person can serve as an accomplice--for example, conspirators are accomplices to all crimes committed during the life of a conspiracy to accomplish its purposes.

Accomplice liability means that anyone who helps in the commission of a crime is as guilty as the person who committed the crime and could be punished as severely if convicted.

Initial Criminal Court Proceedings

Q. How does a defendant appear in court?
A. After formal criminal charges have been brought against the defendant through information or indictment, he or she appears before the court. A defendant on pretrial release must come to court as ordered. If the defendant is in pretrial detention, jail officers will bring him or her to court. If a defendant has not yet been arrested or detained or fails to appear, the judge issues an arrest warrant if that person is not already in custody. A police officer locates the suspect and places him or her under formal arrest.

The defendant will then have a first appearance in court (it has different names from state to state). At this hearing, the defendant is usually represented by an attorney or the judge appoints one. During this brief appearance, a judge will explain the defendant's rights and the charges in the complaint. In most jurisdictions the accused can waive the initial appearance, but it usually is not a good idea to do so without consulting with an attorney. The purpose of the first judicial appearance is to ensure that the defendant is informed of the charges and made aware of his or her legal rights.

Q. What happens next?
A. Generally, defendants charged with misdemeanors will be asked to enter a plea at the first appearance (see the later section on arraignment for more about pleas). For felony cases, the next step for defendants in most states will be the preliminary hearing (again, the name varies from state to state), a separate proceeding that occurs soon after the first appearance. This usually is a brief hearing during which the prosecutor will call only those witnesses necessary to show the judge that a crime happened and that there is a strong likelihood that the defendant committed it. Often there is just one witness, the police officer who investigated the crime or who arrested the defendant. The accused person must be present at the hearing, though the accused does not introduce evidence in his or her defense.

The preliminary hearing serves some of the functions of the grand jury, in that the judge determines whether there is enough evidence to charge the defendant with having committed a crime. (Remember that most defendants are not charged by a grand jury, but through some other mechanism.)

If the judge concludes that the state does not have sufficient evidence to support the

charges, the judge will order the charges dismissed. If the judge believes the evidence is sufficient, as is usually the case, he or she may set the amount of the defendant's bail (or in some states, if the charge is serious, deny bail altogether), depending upon the nature of the crime and whether the accused is likely to flee.

Q. How do I get out on bail until my trial?
A. Bail is money that you provide to ensure that you will appear in court for trial. If you do not have the money to post bail, a relative or friend can post bail on your behalf (or you can go to a bail bondsman, described below). After the trial ends, the court will refund the bail money, usually keeping a percentage for administrative costs.

The law does not automatically guarantee you the right to be released on bail. If the judge decides that the nature of your crime or other factors make you a danger to the public, the judge is likely to set a high bail amount or, in some states, deny bail. Then you would have to remain in jail until a judge or jury decides the case.

The judge also will consider whether you are likely to flee if the court releases you on bail. Points in your favor include strong family ties in the area, longtime local residence, and current local employment. The judge also will consider any negative information that appears about you in a pretrial release report.

If the judge decides bail is proper, the issue then becomes the amount of money that you must post for your release. Your bail may not be excessive (unreasonably high). However, there are no specific guidelines about what the amount of bail should be. Your attorney is permitted to make a request to the judge to reduce the bail or, possibly, set no bail. The term for that is releasing you on your own recognizance (often abbreviated "O.R." or "R.O.R."). This means you will not have to post any bail money. However, you will have made a binding promise to return to court on a date specified by the judge.

If the court grants you O.R. status or releases you on bail, you must reappear in court as agreed. If you do not appear, the judge could revoke your bail or O.R. status. The judge also could issue a bench warrant for your arrest. The police then will find you, take you into custody, and place you in jail. And you will lose your bail money.

Q. What role does a bail bondsman or surety play?
A. Many defendants cannot raise the entire amount of the bail. In some states, the court may release defendants after they pay ten percent of the bail. In other states, defendants may arrange for their release through a bail bondsman. In that case, a defendant typically posts 10 percent of the total bail and signs over a lien on certain belongings to a bail bondsman or surety firm representative who guarantees to pay the remainder to the court if the defendant fails to appear for trial.

Q. What is the next step in the proceedings?
A. For those charged with misdemeanors, the typical next step is to plead guilty or nolo contendere or go to trial. For those charged with felonies--assuming the judge has found enough evidence to support the charges--the case is generally then set for arraignment (called by a

different name in some states). When defendants appear for arraignment, the charges are read to them, their rights are explained, and they enter their plea. If the defendant pleads not guilty, the court will set a date for the next step in the process--the trial. (The plea of not guilty is often the first step in plea bargaining with the prosecutor.) If the defendant pleads guilty, a date will be set for sentencing, although probation, fines, or other sentences will be determined immediately for some minor crimes.

The vast majority of criminal cases eventually result in pleas of guilty or nolo contendere. Under either plea, you are guilty of the crime originally charged or of a lesser offense agreed to by the parties. Nolo contendere means "I do not contest [the charge]." On the other hand, a guilty plea is a specific admission of guilt. The practical effect is that the nolo plea avoids automatic civil liability. Let us say a nursing home operator is accused of the crime of abusing patients. If the operator pleads guilty, anyone who sues him or her for civil damages will not have to prove that the abuse occurred. However, if the operator pleads nolo contendere, the civil court will have to decide whether the acts alleged took place.

In a few jurisdictions, a defendant may elect to "stand mute" instead of making a plea. When the judge asks for a plea, the defense attorney would state, "my client stands mute." The court will enter a plea of not guilty. By standing mute, the accused avoids silently admitting to the correctness of the proceedings against him or her until that point. This leaves the defendant free to attack all previous proceedings that may have been irregular.

Q. Must the judge accept my plea?
A. A plea of not guilty must be accepted. However, a judge cannot accept a guilty plea unless he or she ensures that you understand the rights you are giving up and that you are doing so of your own will (free from coercion or threats). In many states, the judge also must determine that there is a factual basis for your plea; in other words, that you actually are guilty of the offense. Should you decide to plead guilty, the judge will ask you a series of questions in open court to ensure that your guilty plea is valid.

Q. What are plea bargains?
A. Plea bargains are legal transactions in which a defendant pleads guilty to a lesser charge or pleads guilty to the original charge in exchange for some other form of leniency. The rationale is based on the notion of "judicial economy"—plea bargains avoid the time and expense of a trial, freeing up the courts to hear other cases. The benefit to defendants is that the process is completed much sooner than it would be if they went to trial. Further, defendants are afforded a sense of certainty; they know what the outcome of their case will be, rather than taking their chances at trial.

Generally such offers are more generous in the early stages of prosecution as an incentive to the defendant to bring the case to an early conclusion. In many cases, the prosecution extends such offers at the time set for the arraignment. Such an early "disposition" of the case tends to be favored by the prosecution, the defense and the judge because it eliminates several additional court appearances that would have been required had the case continued to trial.

In certain cases, the defense would be better off waiting to thoroughly investigate the

case and consider a later offer or possible dismissal of the charges. For example, consider the case of a person charged with attempted murder because he allegedly uttered a death threat when he shot someone in the leg. An early offer might be to plead guilty to assault with a deadly weapon, which is a serious felony carrying a sentence of several years. However, after the victim testifies inconsistently at a preliminary hearing, the prosecutor realizes that he or she would not be a credible witness at trial. Rather than risk an acquittal at trial, the prosecutor may offer to plead the case down to a misdemeanor, such as negligent discharge of a weapon.

If you do not accept the offer when the prosecution first makes it, the prosecutor is allowed to reduce or withdraw the offer.

You do not have a right to have the prosecutor negotiate a plea with you or your attorney. However, prosecutors usually will offer a plea bargain to reduce their heavy caseloads. In most jurisdictions, the court has no obligation to adhere to the bargain the prosecution offers, but in many cases the judge will accept the plea if a legal basis for it is established in court (see the following section on the judge's role in plea negotiations).

Plea bargaining has become extremely commonplace. Today approximately 85 to 90 percent of all criminal cases are settled through plea bargains. The process, however, is not without its critics. Some "victims' rights" groups feel it is immoral for criminals to serve less time through plea bargaining than they would if convicted of actual crimes committed. In response to citizen pressure, some states, such as California, have passed laws severely restricting or even prohibiting plea bargaining in certain serious or violent crimes.

Q. What role does the judge play in plea negotiations?
A. The judge is under no obligation to accept all terms of the plea bargain. Before accepting your guilty plea, the judge will explain the maximum time to which you may be sentenced and the maximum fine, if any, that may be imposed. That time may exceed the sentencing recommendation of the prosecution, or the judge could impose a shorter term in the interests of justice. If you do not accept at that point, your guilty or nolo contendere plea will not be entered and you will go to trial. Most often, however, the judge will honor the plea bargain reached between the parties unless he or she feels it is unfair.

Q. Could the charges against me be dropped?
A. Yes. This is called "dismissal" of a case, which can occur for several reasons. For example, charges may be dismissed for insufficient evidence, which means the police either could not find enough evidence to link you to a crime or found evidence pointing to your innocence. Witness problems also prompt dismissals when those who observed a crime fail to appear, are reluctant to testify, or testify inconsistently. Sometimes cases are dismissed "in the interests of justice," a broad category that means the prosecutor does not feel the case is significant enough to pursue, such as minor property damage.

Sidebar: Types of Immunity
If you had some involvement in a crime with someone else, the prosecutor might agree to lesser

charges against you (and thus a shorter stay in jail) if you agree to testify against your partner. Then the court will give you a "grant of immunity." This means that the information you reveal while testifying in court will not be used to prosecute you for your involvement in the crime. Once you accept immunity, you must testify.

Talk to your attorney before you accept immunity. Different types of immunity give different protections. "Use immunity" means the prosecutor is not permitted to use what you say to help prosecute you later. "Transactional immunity" gives far greater protection. It means the prosecution will never prosecute you for the crime, even based on evidence independent of your testimony.

Evidence in Criminal Cases

Q. How may I recognize and preserve evidence to help me at my trial?

A. Physical evidence--such as a gun or a piece of clothing--can be very important in helping a judge or jury piece together what actually happened. These people were not there when the alleged crime took place. The physical evidence can provide a way to show that your version of the facts is correct.

You should preserve any items that might be useful as evidence. In fact, it is against the law to destroy evidence, whether you think the evidence will help or harm your case. In any event, let your lawyer determine whether the evidence is harmful. For example, you might believe that the prosecution will use a gun with your fingerprints as evidence against you in a shooting. However, your attorney might be able to show that the gun was too big or the trigger too hard to pull for someone of your size to have fired it. The only logical explanation then would be that you picked up the gun after the shooting. This may cause the jury to have a reasonable doubt about your guilt.

Sidebar: Overlooked Evidence

Some evidence is far less obvious than a gun. At a crime scene, tiny items such as rug fibers, hair, cigarette ashes, or matches, and even DNA samples may become important evidence in your defense. Therefore, if you are at the scene of a crime before the police arrive, leave everything undisturbed. Do not vacuum, move items, or touch anything. The police will secure the area and record everything to maintain what the law calls "crime scene integrity." Once evidence gets misplaced or damaged, a crucial link in winning your case may be lost. In addition, the judge or jury might view tampering with the evidence as an indication of your guilt.

The nature of the offense will determine the evidence to preserve. For instance, if the prosecution charges you with an economic crime such as fraud, you must preserve any important documents.

Q. What kind of evidence may the prosecution use against me at the trial?

A. The prosecution may use almost any type of legally admissible evidence that will help establish your guilt. This includes physical evidence, such as a murder weapon or items stolen during a

burglary. Testimonial evidence is likely to be used as well. That involves testimony (oral statements) from a person on the witness stand. For example, the owner of a stolen car might testify that no permission was given to anyone to take the car on the day the crime occurred. The prosecution may also introduce circumstantial evidence of a crime, such as the fact that the defendant hurriedly packed and moved out of state within hours after the crime, circumstantially indicating a consciousness of guilt--or that a man charged with killing his wife took out a $100,000 life insurance policy the day before she was slain, circumstantially indicating motive.

If a lawyer asks a witness to testify about someone else's out-of-court statement, the opposing lawyer may object that the testimony is inadmissible because it is hearsay. The problem with hearsay is that the person who made the statement is not on the stand and is unavailable for cross-examination.

To decide whether the testimony would in fact be hearsay, the court must decide why the witness is being asked the question. If the witness's testimony about someone else's out-of-court statement is being introduced to prove the truth of the out-of-court statement, it is hearsay. If it is only being introduced to prove that the out-of-court statement was made, it is not hearsay.

For example, assume Jane testifies that "John told me my husband was having an affair." If John's out-of-court statement ("Your husband is having an affair") is being introduced to prove that Jane's husband was in fact having an affair, it would be hearsay. If, on the other hand, Jane is only testifying about what John said in order to explain why she slapped him in the face, her testimony would not be hearsay. Here the only issue is whether John made the statement, not whether the statement was true.

However, there are many exceptions to the rule against hearsay, so do not be surprised to hear such statements allowed during the trial.

Sidebar: Crime Requirements

Most crime requires both a criminal act (actus reus) and a criminal mind (mens rea). Even if you committed a criminal act (injuring someone, for example), you might not have had the required mental state, or wrongful purpose.

If the facts in your case show that you did not have this intent, you might not have committed a crime. Your lawyer will help you decide which defenses apply to your case.

On the other hand, sometimes you can be convicted even if you did not have intend to commit a crime. A person who kills another unintentionally has committed a crime if their actions were reckless or sufficiently negligent. For example, if an accident occurs while you were driving under the influence of alcohol or drugs, that is vehicular homicide, even if you had no intention of harming the victim.

Witnesses

Q. Who are witnesses? What makes a good witness?

A. Witnesses might be victims or defendants who are voluntarily testifying on their own behalf. Witnesses may be presented by both the prosecution and the defense. Or a witness might be someone testifying as an impartial eyewitness to a crime, or someone with information about it. In

any event, the most important thing is to be honest. When you are on the witness stand, the law requires you to tell the truth. Answer the questions as completely as possible, but stick to the point. Do not add details that are not necessary to answer the question. If you do not understand the question, politely ask the lawyer to rephrase it. Do not answer any questions if you are unsure of the answer. If you do not know the answer, your answer should be, "I don't know." If you hear a lawyer say "objection" after a question is asked, do not answer the question. Wait until the judge rules on the objection. The judge will then tell you whether you may answer the question.

Testifying can be tiring and frustrating. Try to remain relaxed and keep a pleasant attitude. The worst thing you can do is to appear angry, lose your temper, or argue with the lawyer who is asking the questions. If the judge or jury disapproves of your behavior or attitude, they might not believe your testimony.

Sidebar: Expert Witnesses

Expert witnesses are specialists in certain fields, such as narcotics, psychology, medicine, or engineering. The prosecution or the defense may call them to testify at a trial. Their testimony is another form of evidence that the judge or jury will consider. Usually, the experts' role is to offer an opinion of what they think the evidence means when lay people are unlikely to understand that evidence without help. For example, a narcotics expert might testify that the quantity of drugs seized and the way the defendant packaged them indicate a commercial drug operation. A fingerprint expert may compare the prints lifted from a crime scene to a fingerprint sample taken from the defendant and then give a professional opinion of whether the prints "match."

Q. May the court force me to testify?

A. If you are a defendant, no. The Fifth Amendment of the U.S. Constitution gives you the right against self-incrimination.

If you are a witness or the victim of a crime, a subpoena compels you to testify, even if you "don't want to get involved." However, you may refuse to answer a question on the witness stand if you feel the answers might incriminate you, unless the district attorney has granted you immunity in exchange for your testimony--in that case, you must answer (see "Types of Immunity" on page 18 of this chapter).

Sometimes crime victims "get cold feet" and change their mind about testifying. This is especially true if the victim knows the defendant personally or is afraid of revenge. However, even if you reported the crime and later decide you want the charges dropped, the prosecutor might not agree. The prosecutor often considers a victim's wishes, but technically the injured person is only a witness. The "victims" are the people of the state where the criminal committed the crime. Therefore, it is up to the district or prosecuting attorney to decide whether to proceed with the case and whether to subpoena a witness to testify.

Q. Should I take the stand in my own defense?

A. Listen to your lawyer's advice. However, the final decision regarding whether to testify is yours. Many defendants do not testify. The judge will instruct the jury not to hold this against you because the Fifth Amendment gives you the right not to incriminate yourself.

Many defendants feel that they should testify because they are innocent and have "nothing to hide." However, any defendant who testifies is subject to tough cross-examination from the prosecutor, who may be able to put you in a very bad light. For instance, if you take the stand, the prosecutor may ask you whether you have had any prior felony convictions. You must answer truthfully. If you do not take the stand, nobody will reveal such information to the jury.

Q. Are any resources available to help witnesses?
A. Most district or prosecuting attorney's offices have "witness assistance" departments that provide a number of services to simplify the process for witnesses. They will give you directions to court and even arrange transportation for you if necessary. If you must travel a distance to testify, these departments may provide you a per diem (daily allowance) for food and lodging. Witness assistance coordinators can help you with other necessary arrangements (such as child care) so you can testify.

If testifying puts you in danger, witness protection programs are available. The police will escort you between your home and court if necessary. If you are a confidential informant in fear for your life, steps will be taken to hide your identity.

Q. Should I talk to the police if they want to question me about a criminal investigation?
A. If you are a witness to a crime, you should share your knowledge with the police. Without information from witnesses, police would be unable to solve crimes and prosecutors would be unable to convict guilty defendants in court. However, if you played a role in the crime or you think the police want to question you as a possible suspect, do not talk to the police. Tell them you want an attorney. Only after talking to a lawyer should you talk to the police.

Q. What should I do if I receive a subpoena?
A. A subpoena or summons is a legal order to appear in court or to produce certain evidence. As soon as you receive a subpoena, you should take certain steps to protect your interests. First, be sure to preserve all related documents so that you will not risk being charged with obstruction of justice. Find an attorney and speak only to him or her about the subpoena. Do not confide in friends or contact others who may be in the same situation, since they may be cooperating with the authorities and could end up testifying in court against you.

If you receive a subpoena ordering you to appear in court at a certain date and time, you must obey or risk being held in contempt of court and receiving a fine or jail sentence. A contempt finding could also mean that you have to pay certain court costs for time lost because the case could not proceed.

The court might direct another type of subpoena at an item you possess, not at you. This "subpoena duces tecum" (SDT) orders you to produce certain evidence, usually in the form of documents. Before you obey this type of subpoena, call a lawyer. Depending on the content of the documents, you might be able to fight the subpoena as forced self-incrimination. Or, based upon the items listed in the subpoena, your lawyer may be able to offer your cooperation to the authorities in an effort to show that no crime has been committed or that you were not part of it.

In some cases, your attorney may be able to negotiate a deal in which you are granted

immunity in return for producing the documents. The Supreme Court recently determined that if you respond to a government subpoena seeking discovery of sources of potentially incriminating documents in exchange for being granted immunity, the government cannot use those documents to prepare criminal charges against you.

Do not deal with the authorities yourself, however. Your attorney will need to ensure that your cooperation will not be used against you at a later date.

Defenses Against Criminal Charges

Q. What are my possible defenses?

A. One defense is an alibi. That is an explanation that at the time in question, you were not at the crime scene and could not have committed a crime there. For instance, if you were out of town on the date the crime happened, you can raise an alibi defense.

Depending on the nature of the crime, you might be able to offer the defense of entrapment. This means that in order to obtain evidence of a crime, the police induced you to commit (lured you into committing) a crime you had not been considering. This is a common defense in offenses involving the sale of drugs to an undercover agent. Precisely because it is a good defense, police work to counteract it by making sure that they file charges as a result of more than one sale.

They also rarely charge someone with an illegal purchase from an undercover agent. As a result of these precautions, the defense of entrapment does not often succeed in drug cases. As long as the prosecutors can show that the defendant was either predisposed to commit the crime or that the inducement (lure) was not outrageous, they probably will succeed over a defense of entrapment.

If the prosecutor charges you with a violent crime, you may be able to argue that you did it in self-defense.

There also are many other possible defenses. These include intoxication (you were too drunk to be able to form the "specific intent" to commit a certain crime, such as first-degree murder), mistake (you thought the purse you took was yours), insanity (you committed the crime but are legally excused because you could not understand the wrongness of your act), defense of others (you shot an assailant to stop him from killing your wife), defense of property, and many more.

Q. How does a defendant's mental health affect the legal process?

A. Under our system, it is unconstitutional to make anyone stand trial who is not mentally competent. This means defendants must be able to comprehend the nature of the charges against them and to assist properly in their own defense (such as explaining to an attorney what happened and which witnesses may be able to substantiate their account). When a defense attorney has reason to question a client's competency, he or she will ask the judge to order a psychiatric evaluation. Defendants who are found not competent may be committed to a psychiatric facility for treatment, where they will stay until they are competent to stand trial. In some states, the psychiatric patient must be released after a certain period.

Q. Is incompetence the same as an insanity defense?
A. Being incompetent for trial differs from being incompetent ("insane") at the time of the offense. Insanity is a defense to certain crimes that require proof of intent. For example, it could be argued that one who is insane cannot commit first-degree murder because his or her mind is incapable of premeditating and deliberating (planning the crime).

A few states have abolished the insanity defense but allow psychiatric evidence at trial on the issue of intent. For example, a defendant in a drug case could not have formed the intent to sell an illegal substance if he was delusional and believed that he was a doctor dispensing medication.

Most states require formal notice of plans to raise the insanity defense. Such defendants enter a plea of not guilty and proceed to trial. If convicted, such an individual may be found guilty, not guilty by reason of insanity, or in a few states, guilty but mentally ill. Defendants found not guilty by reason of insanity are placed in a mental health facility until their mental condition improves so that they are no longer a threat to themselves or the community.

Pretrial Procedures

Q. Does discovery take place in criminal cases as in civil cases?
A. "Discovery" is a process that allows the parties to learn the strengths and weaknesses of each other's case by, for example, obtaining the names and statements of witnesses the other side intends to call at trial. Because the defendant in a criminal case has certain constitutional safeguards (such as the right against self-incrimination), discovery in criminal cases is far more limited than in the civil context.

In most states, the defense's discovery power is much broader than the prosecution's. Some states, including California and Florida, have enacted reciprocal discovery laws, which allow the prosecution to ask the same questions of the defense. In all jurisdictions, however, the prosecution is required to produce all exculpatory material (that which is favorable to the defendant or tends to negate his or her guilt).

Q. Do criminal cases involve interrogatories and depositions?
A. These common civil discovery procedures are rare in criminal cases. Interrogatories are written questions about the facts and background of the case, which the opposing party must answer in writing. Depositions involve the same types of questions, but are oral examinations conducted in a conference room without a judge present. In a civil case, the parties must participate in depositions if requested by the opposing side; in a criminal case, because of the guarantees of the Fifth Amendment, it would be unconstitutional to force the accused to answer questions about the case (unless he or she elects to testify at trial). Criminal defendants also must be present at depositions in their cases (or waive that right) because of the Sixth Amendment right to be present and to confront witnesses.

Trial

Q. What happens at trial?
A. First the jury is selected (unless the defendant elects to have a trial by judge, commonly referred to as a "bench trial"). Once the jury has been impaneled (seated for the duration of the trial), the proceedings begin. Defendants have a constitutional right to a public trial.

Opening statements come first. The prosecutor addresses the jury first, explaining the nature of the case and what he or she intends to prove happened. Then the defense attorney may offer an opening statement, or may reserve opening statement until after the prosecution has rested its case.

Next the prosecution puts on its case in chief, which usually involves direct testimony by witnesses and the introduction of any physical evidence against the defendant, such as a gun or other implements of the alleged crime. Defense attorneys may cross-examine the prosecution witnesses by asking questions designed to negate the guilt of their client. After all prosecution witnesses have testified, the process repeats itself in reverse, with the defense putting on any witnesses it may have.

The defense, however, is not required to offer any witnesses, nor are defendants required to testify unless they so choose upon the advice of their attorney--the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt.

When the defense has rested, the prosecutor will give a closing argument, summing up the evidence presented against the defendant. The defense attorneys will then make their own closing argument. The prosecutor has one last chance for a rebuttal argument, addressing the points made by the defense in closing. The judge then instructs the jury on the law to apply in deciding the case.

Q. What is the role of a jury in a criminal case?
A. The jury weighs the evidence and finds the defendant guilty or not guilty. Juries are discussed more fully in the chapter titled, "How the Legal System Works." It is important to understand that you have certain rights. First, you have a right to a jury trial in serious criminal cases (for example, for crimes punishable by more than six months' imprisonment). Second, you have a right to a jury that is chosen from a fair cross-section of the community and is not biased against you. Third, you have a right to a jury from which members of certain classes or groups (for example, African-Americans) have not been systematically excluded.

Q. What are jury deliberations?
A. After closing arguments, the judge will charge the jury (give them instructions on how to apply the law to the evidence they have observed at trial). The jury then retires to a private room for deliberations, which involve discussion among the jurors as they review the evidence and attempt to reach a unanimous verdict. Deliberations are done in complete secrecy, to ensure fairness to the person on trial. If the jurors have questions, they may send a note to the judge, who will usually respond in writing to clear up any legal questions.

Sidebar: Trial by Jury or Judge
Should you exercise your right to a jury trial, or waive it in favor of a bench (judge) trial? This is a

decision that you and your lawyer must make. In "nonpetty" criminal cases punishable by more than six months imprisonment, you have the right to be tried by a jury of your peers (fellow citizens). Your chances might be better with a jury, because the prosecutor must convince each juror that you are guilty. However, juries are unpredictable. In some cases, you might stand a better chance of acquittal with a judge. Listen to your lawyer's advice.

Sentencing of Convicted Criminals

Q. If a judge or jury convicts me, how and when will the court sentence me?
A. Sentencing is a separate procedure, usually held several weeks or even months after a conviction. After the verdict is read, the judge will set a time and date for sentencing. The court will order a pre-sentencing report from the probation department. It will examine your past record and will make recommendations about your sentence.

In most states the judge has some discretion in choosing your sentence. For misdemeanors, the judge usually chooses between a fine, probation, suspended sentence, or a jail term (or a combination of these). For felonies, the choice is often between imprisonment and probation, depending on the crime.

For state offenses, the criminal code often specifies the minimum and maximum sentences for each specific crime. Often these are designated as a range, such as three to five years. For federal offenses, the court follows the strict federal sentencing guidelines. (Similar strict guidelines have been adopted by some states, including Minnesota and Michigan.)

The federal guidelines involve a complex formula that calculates an offense level based on several factors, such as the nature and complexity of the crime, any injuries to victims and the defendant's "criminal history." It then results in a certain number of "points," which gives a range of incarceration (prison) time. In some very limited instances, a federal judge might be able to sentence you to a term that varies slightly from the required guidelines. If, for example, the judge finds that your criminal history score significantly underrepresents or overrepresents the seriousness of your actions, he or she can adjust your score upward or downward, affecting the length of time you would spend in prison.

Q. Is the judge the only person who may decide the sentence?
A. In most states and in federal courts, the judge alone determines the sentence. Some states allow the jury to recommend a sentence, particularly in murder cases that carry the possibility of the death penalty. In such capital cases, the "penalty phase" becomes a mini-trial of its own, with witnesses commonly testifying about the defendant's character and family upbringing, in an effort to show why he or she should be sentenced in a certain way.

Q. What determines the sentence I will receive?
A. The primary factors are the sentencing range provided in the penal code and your prior convictions, if any. The judge may also consider any aggravating or mitigating factors. Aggravating factors, such as the violent nature of a crime or a high degree of sophistication in

planning it, suggest a tougher sentence. Mitigating factors may be a good family history, a stable employment record or any benefits you have bestowed on the community (such as volunteer work at an organization for the disadvantaged).

In addition, before imposing your sentence, the judge must allow you to make a statement. You should discuss this with your lawyer in advance. Sometimes a plea for mercy or a promise to improve your behavior will be effective at this point. However, it depends on the judge and on whether the judge believes you.

Q. Are there any alternatives to jail or prison sentences?

A. Yes. One option is monetary. The judge may order you to pay a fine as punishment, or to make restitution (repayment to a victim who lost money because of your crime). Another possibility is probation. When you are on probation, the court has released you into the community. However, you must obey the conditions set forth by the court. One example is submitting to periodic drug testing. If you violate these conditions, the court can revoke your probation and re-sentence you.

These alternatives are frequently combined. For example, a person on probation also may be required, as a term of release, to pay restitution (reimbursement) or perform community service.

A less restrictive sentence involves community service. The court could require you to donate a certain number of hours (usually hundreds or thousands) to doing service work at a community center. Often this involves working at youth facilities or lecturing at schools on the evils of your particular crime.

Another possibility is diversion, a program whose successful completion avoids a criminal conviction. Diversion programs usually are specialized alternatives, run by the prosecutor's office and agreed upon in exchange for a guilty plea. Diversion ordinarily involves your participation in a service program designed to rehabilitate you. For example, some states allow a first-time drug offender to attend a program such as Cocaine Anonymous instead of being tried and facing a prison sentence.

If the court requires you to remain in custody, you may be eligible for a residential program, such as a halfway house or a "boot camp." In a halfway house, you may be allowed to leave during the day to work at a job or go to school, but you must return to the building every evening. In a boot camp, you are housed at a prison facility and may not leave at all. However, you are segregated from the general prison population and are housed with "soft core" criminals, usually first-time offenders under the age of thirty-five. Your experience will be similar to a boot camp in the military—early morning rising and demanding physical labor during the day. You will also be allowed to attend educational or job-training classes and may receive counseling.

Q. What are my rights as a prisoner?

A. The law entitles you to fair treatment as a human being. This means your jailers may not subject you to brutality and that you are entitled to food, water, medical attention and access to the legal system. Such access includes a law library in which to do legal research and typewriters on which to prepare legal motions if you are representing yourself pro se.

If your state laws provide for a right to parole (early release from prison), you can apply for parole when you become eligible. If the parole board denies your request for parole, you must be told why and you must be given an opportunity to be heard.

Appeals of Criminal Cases

Q. May I appeal my conviction?
A. Usually a person convicted at a trial has the right to appeal the conviction at least once. (There are very few grounds for appeal if the defendant pleaded guilty.)

On appeal, the defendant can raise claims that mistakes were made in applying and interpreting the law during the trial. For example, the defendant might claim that the judge erroneously admitted hearsay testimony, gave improper jury instructions, should not have permitted the prosecution to use evidence obtained in violation of the defendant's constitutional rights, or permitted the prosecution to make improper closing arguments. If the appellate court agrees that there were significant errors in the trial, the defendant will get a new trial.

Q. What if the law changes after a court convicts me?
A. If a court convicted you for something that is no longer a crime, you might be able to have your conviction overturned. This also might be possible if a trial court denied you a right that the U.S. Supreme Court later rules is guaranteed by the U.S. Constitution. However, your rights will depend on whether the new rule or law is retroactive, that is, applied to past court decisions. As a general rule, a change in the law would be retroactive to your criminal case if the case has been appealed but not resolved at the time the law is changed. If, on the other hand, your case on appeal has been resolved, the change in the law would not be retroactive to your case, unless the change is one that directly enhances the accurate determination of your guilt or innocence.

Sidebar: Getting a Lawyer for Your Appeal
Because trial and appellate (appeals) work are two different types of legal practice, the lawyer who represented you at the trial will not automatically file or handle your appeal. You must ask your lawyer to do so, or find another one who will. If you want to appeal your conviction, be sure to specifically and clearly inform your attorney of that fact—the Supreme Court recently determined that an attorney's failure to file a notice of appeal does not necessarily constitute ineffective assistance of counsel so long as the defendant did not clearly convey his wishes on the subject. In many states, the state public defender (or another assigned counsel) generally will handle the appeal for those unable to pay.

Trials require the skills of a lawyer who has experience in the courtroom and working before juries. Appeals involve a large amount of writing and legal research, as well as the ability to argue legal doctrines before a judge.

Q. What is a habeas corpus proceeding?
A. Literally, habeas corpus means "to hold a body." A habeas corpus proceeding challenges a conviction based upon the grounds that you are being held in prison in violation of your

constitutional rights. Habeas corpus is not an appeal but a separate civil proceeding used after a direct appeal has been unsuccessful. A common constitutional challenge under habeas corpus is that defendants received "ineffective assistance of counsel" at trial, meaning that their lawyers did not do a competent job of defending them. Such a claim is difficult to prove and will require the defendant-appellant to find a different lawyer to argue the incompetence of the previous attorney. Legal arguments in a habeas case are generally done through written motions. An evidentiary hearing may be held as needed, however.

The Rights of Victims and Jurors

Q. What are my rights as a victim?
A. You have a right to a reasonable amount of effort by the police in trying to find the person who committed the crime. If they find this person, you can tell the prosecutor whether you wish to have that person prosecuted. Often the prosecutor will consider the victim's wishes, though he or she need not.

As a victim, you may be entitled to restitution, which means that the judge will order the criminal to reimburse you for any financial damages. For example, a burglar who stole your television may be ordered to return it to you or to give you enough money to buy a replacement. Most states have laws allowing restitution, but such laws are enforced in only about half of the states. Restitution is required in federal courts, however.

If you were the victim of a crime that did not involve money, your concerns may focus more on your assailant's punishment. In about two-thirds of the states, victims are allowed to make oral "victim impact statements" to the judge about how the crime has affected them and what they believe should be the criminal's sentence.

In a serious or violent crime, victims may be afraid to testify. If the defendant or someone on the defendant's behalf has tried to threaten you into not testifying, tell the police. The law entitles you to police protection, and the police will protect you to the extent they can.
If the court releases the defendant from custody, the law still entitles the victim to protection. The court has the authority to order the defendant to stay away from you and your family if you so request. The police will try to ensure that the defendant obeys this order.

In almost all states, victims are notified when their assailants are being considered for parole (early release from prison). About half of the states notify the victim if the assailant escapes from prison.

Because of the variations among the state laws and the growing victims' rights movement, model legislation has been proposed for a uniform victims' rights act, which each state would have the option of adopting.

Q. Will the court protect jurors against danger of threats or violence?
A. The law entitles jurors to such protection. Sometimes the court sequesters (houses in a hotel to isolate from outside influences) the jury throughout the trial. Police officers or court officials escort the jury to and from court. After the trial, the police will continue as best they can to ensure the safety of discharged jurors, at least for a time.

Juvenile Criminal Cases

Q. How do juvenile proceedings differ from adult criminal proceedings?

A. Because juveniles do not have a constitutional right to a jury trial unless tried as an adult, judges hear most juvenile cases. Juveniles also do not have a right to a public trial or to bail. However, the fundamental elements of due process apply in a juvenile proceeding as they do in the criminal trial of an adult. For example, a child charged in a juvenile proceeding is entitled to: notice of charges given in advance of any adjudication of delinquency; an attorney, including one paid for by the state if the family cannot afford one; the right to confront and cross-examine witnesses; and the right to assert his or her Fifth Amendment privilege against self-incrimination. Finally, the state is required to prove its charges beyond a reasonable doubt, just as in the trial of any adult on a criminal charge.

Under most state laws, juvenile offenders do not commit "crimes." They commit delinquent acts, which are acts that would constitute crimes if committed by an adult. The trial phase of a juvenile case is an adjudication hearing. This means that the judge hears the evidence and determines whether the child is delinquent. The court may then take whatever action it deems to be in the child's best interest. The purpose is to rehabilitate, not punish.

Juvenile courts usually hear cases involving persons between the ages of ten and eighteen. (The upper age may be lower in some states.) If the prosecution charges an older juvenile with a particularly serious or violent offense, the district or prosecuting attorney may request that an adult court try the juvenile as an adult. In some states, juveniles fourteen or older and charged with serious acts like murder, rape or armed robbery are handled in adult courts unless the judge transfers them to juvenile court.

Q. What is a parent's responsibility in juvenile cases?

A. Depending on the state where you live, you might be liable (legally responsible) for the acts of your child if you failed to supervise or control the child properly. For example, California recently passed a "gang parent" law that authorizes the arrest of parents of juvenile gang members who commit serious offenses. Similarly, if your teenage driver has an accident or commits a crime while driving the family car, the court may hold you responsible. One example of this is a teenager driving while intoxicated and causing injuries to another.

Abuse and Neglect

Q. Do I have a right to a lawyer if I am accused by the government of abusing or neglecting my children?

A. In some states persons may be charged with abusing or neglecting their children and may, if found guilty, lose custody of their children. In those states persons accused of those offenses are usually entitled to an appointed attorney if they cannot afford to pay for one. See the "Family Law" chapter for more information.

Where to Get More Information

Consult the "Where to Get More Information" sections at the end of the first two chapters for general information about lawyers and the legal system. Below are groups that might be of assistance to criminal defendants.

American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
Tel. (212) 944-9800
http://www.aclu.org/

The national organization can provide a variety of information on a range of issues and put you in touch with the state or local ACLU in your area.

National Association of Criminal Defense Lawyers
1627 K St., NW
12th Floor
Washington, D.C. 20006
Tel. (202) 872-8688
http://www.criminaljustice.org

This organization can put you in touch with associations of criminal justice lawyers in your state. These groups are usually located in the state capital, with names such as Arizona Attorneys for Criminal Justice, Alabama Criminal Defense Lawyers' Association, or Arkansas Association of
Criminal Defense Lawyers.

Office of the Public Defender--look in telephone book under "County Government" for state offenses or "Federal Government" for federal offenses.

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