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A BRIEF GUIDE TO UNDERSTANDING AMERICAN COURTS

BY

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A BRIEF GUIDE TO UNDERSTANDING AMERICAN COURTS

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I wish it were possible to write a detailed and personal response to each of your students but there were many more questions than I anticipated. Therefore, my answers are going to be somewhat generic and brief. These comments attempt to explain a number of features about the operation of the judicial system in the United States but occasionally discuss related issues involved in the operation of the federal system in the United States.

Courts

In the American system, there are many types of courts which differ in terms of their functions and jurisdiction.

There are numerous **State Courts** that administer state laws and there are 94 **Federal Courts** that administer Federal laws. Generally speaking most crimes in the United States are state crimes (murder, rape, assault, larceny, armed robbery, etc.) but there are **federal crimes** such as interstate flight, mail fraud, assault on a federal official, transportation of controlled or hazardous substances across state lines.

Broadly speaking, there are **courts of original jurisdiction** and there are **appellate courts** in the United States. Courts of original jurisdiction are triers of the facts and are tasked with determining answers to these questions:

- a. Was a crime committed under the elements of the law?
- b. Is there evidence beyond a reasonable doubt that the defendant committed the crime?
- c. What should the punishment be according to the law?

Civil law governs the resolution of disputes between parties over damages one or the other experiences for which they seek monetary damages, return of disputed property, or an injunction prohibiting certain practices in the future. In civil court, the parties have to hire their own attorneys but in some cases the U.S. Government might bring a civil case alleging unfair business practices or a state might seek an injunction in civil court to block a strike by teachers or state employees.

Small claims court is a special type of civil court in which a judge makes a decision when a relatively minor amount of damages are claimed. For example, a renter might sue in small claims court to recover disputed deposit funds that the owner withholds from the renter at the end of a rental agreement.

On the other end of the spectrum, large claims of damages might be brought as in a medical malpractice case alleging permanent disabilities caused by inappropriate medical treatment. In the same vein, corporations may lodge claims for patent infringement for unauthorized use of a patented item.

Probate courts exist in some states with the duty to settle estates. Many estates are routinely settled according to a will but there are some instances in which the validity of a will is contested (was a later will or docile prepared which alters the distribution of assets?) which may cause someone to seek a court review. In some states, the probate court function is part of the duties undertaken by the Superior Court.

Family courts exist in some states to deal with conflicts arising in families that are in distress. When a couple divorces or separates, who will provide child support and in what amount? Which parent will have custody of the minor children or will custody be jointly shared? Which parent will have the children with him or her for Christmas? Does the child have special needs that necessitate additional support for long-term medical treatment? Will one party to the marriage retain the house or will it be sold and the proceeds be evenly distributed between the husband and wife? The Judge will

in answering questions such as these be guided by a determination of what is in the best interest of the child. In some states, the family court function is handled as part of the district courts normal functions.

On the **federal level**, there are several specialized courts that are important. The **Court of Federal Claims** deals with lawsuits against the U.S. Government for claims of personal damages, contracts, or disputed claims over taking of land by the U.S. Government. The **U.S. Bankruptcy Court** exists to liquidate the assets and settle claims against corporations and individuals that have liabilities in excess of assets. This court offers individuals and businesses an opportunity to relieve themselves of some debts while giving creditors a fair method to receive partial payment of some of what is owed them.

Civil courts operate under different rules than criminal courts. Primary among the differences are rules as to evidence and the standard required for proof. In criminal cases, the jury must make a finding that the defendant is guilty beyond a reasonable doubt while in civil cases, the jury may make its findings upon the preponderance of the evidence. Criminal cases require unanimous jury verdicts whereas divided juries can render a verdict. Civil cases can be decided by six member juries or the parties could waive a jury trial whereas in a criminal case involving a jury the jury would involve twelve jurors.

Criminal offenses are categorized by the seriousness of the crime. An offense may be a **felony**, a **misdemeanor**, or may not rise to be a crime but rather be an **administrative offense**. Different types of courts handle each type offense.

Depending upon the complexity of the case and the assets of the accused, a **felony** trial could last anywhere from several days to several months. Felonies are crimes that involve serious crimes and the potential for extended sentences in jail. Examples include murder, armed robbery, auto theft, trafficking in controlled substances and embezzlement. Most felony cases last less than a week but high profile cases with defendants possessing considerable financial resources can last several months. Almost all felony cases involve a trial before a jury but a defendant could waive a jury trial but this would be rare for a felony case. A felony case, depending upon the state, might involve a prison sentence of six months or longer.

Misdemeanor cases tend to be heard by a judge without a jury being involved. Examples could include cases involving writing checks without sufficient funds, shoplifting, driving while impaired, public drunkenness, possession of small amounts of illegal drugs, and harassing telephone calls. Punishment upon conviction could result in a fine, probation, community service or a short sentence in jail. If drunken driving is involved, the punishment might be involve a requirement to complete an alcohol education program or a judge might require someone convicted of drunken driving to spend a weekend evening at a hospital witnessing victims being treated after automobile accidents involving drunken driving.

Examples of administrative offenses involve actions like opening a business without a license, remodeling a structure without the necessary permits, overtime parking, selling cigarettes to a minor, hunting or fishing violations, speeding, or driving a vehicle without proper insurance. Persons cited for administrative offenses typically

pay a fine that is established according a schedule and do not appear in court. However, if the person cited wishes, a court date in a misdemeanor court could be scheduled a trial held before a judge.

Some courts exist only to deal with **juvenile crimes** (normally involving persons under age 16). However, in most states cases involving juvenile cases are heard by District Courts but under special rules. For example, cases involving juveniles are almost always closed to the public and penalties imposed on juveniles differ from those imposed on adults for the same type offense. The hope is that juveniles can be rehabilitated away from a life of crime than can adults and the secrecy is the proceedings are justified as being needed in order to avoid stigmatizing the juvenile who may not have fully understood the nature of the crime committed. However, older juveniles committing heinous crimes such as murder might be tried as adults despite their age.

Almost all cases heard by a court of original jurisdiction are settled at that level and a finding of innocence or guilt rendered with a fine or penalty being imposed. However, a defendant or a losing party in a civil case may feel that the trial court erred and an appeal may be taken from the original decision.

Courts of Appeals

Courts of **appellate jurisdiction** do not rehear the case from the beginning but deal with questions of law such as:

- a. Did the judge allow evidence to be entered into the trial record that should have been excluded?
- b. Did the judge exclude evidence that should have been heard and which would have helped the defendant.
- c. Did the judge incorrectly explain to the jury what the law says when charging the jury before they began to deliberate?
- d. Did the judge misunderstand or incorrectly apply the law?
- e. Was the trial conducted in a prejudicial manner?
- f. Does the decision conflict with established precedents?
- g. Did the original court lack jurisdiction?]
- h. Was the penalty imposed excessive or unreasonable under the terms of the law?
- i. Was the defendant denied a basic right that compromised his right to a fair trial?

There are other grounds for appeal but these would be typical of the types of appeals filed from decisions of the particular trial court. In an appeal, legal briefs are filed with the court explaining the points the lawyers want the appeal to be based upon and a short hearing (perhaps 1-2 hours for each side) is held in which the lawyers make their arguments and to answer questions from the appellate judges. No jury is involved in the court of appeals cases.

The written decision of the appellate court will be a determination that the original court applied the law correctly and upholding the decision of the original court or the appeal court could reverse the decision of the trial court because of a legal defect,

possibly order a new trial or directing the original court to impose a less severe penalty.

There are state appeals courts that review the decisions of state trial courts and there are federal appeals courts that review the decisions of federal trial courts and, if a U.S. Constitutional question is involved, the federal courts of appeals may reverse a decision of a state court.

Each state has a Court of Appeals which is generally comprised of 7-11 Judges who hear appeals of cases from the state courts in that state. Most of the time, the Court of Appeals has three of the judges hear an appeal as a panel and, if needed, the entire Court of Appeals can hear a case. Each state has a court of appeals and a supreme court which decides cases under state law for that state.

The United States is divided into twelve circuits or regions for federal appeals. There are generally several states in each circuit (in the Fourth Circuit, Maryland, West Virginia, North Carolina, and South Carolina are included and this court sits in Richmond, Virginia). There is a Federal Court of Appeals for the Federal Circuit which hears appeals of decisions of the Court of International Claims and the Court of Federal Claims.

Judges on the courts of appeals do not hear evidence or hear witnesses. They rule on questions of law. Were the proper procedures followed and was the law properly applied by the judge? Was the defendant properly represented by counsel?

About 5% of the cases of a Superior State Court (i.e. a court hearing felony cases or major civil cases) will be appealed to a state court of appeals.

There is a State Supreme Court in each state. It hears appeals from the State Court of Appeals and applies the State Constitution to state cases. About five percent of the cases settled by the state court of appeals are appealed to the State Supreme Court.

The **United States Supreme Court** is comprised of nine persons nominated by the President and confirmed by the Senate. Justice John Paul Stevens is 87 years old and Chief Justice John Roberts is 52 years old. Each of the Justices of the United States Supreme Court serves for life and can only be removed by impeachment. The U.S. Supreme Court is the final arbiter of what the U.S. Constitution means and its decisions must be respected by all other courts in the United States. Presidents generally nominate persons who reflect their political beliefs but, since the justices serve for life and can only be removed for cause, they sometimes surprise the President by becoming more liberal than expected.

Under the United States Constitution, the U.S. Constitution is the **supreme law** of the land and supersedes any conflicting federal or state laws. However, it is not always clear what the Constitution means and the United States Supreme Court often renders decisions that expand or change the prevailing meaning of the law. Under the late Chief Justice Earl Warren, the United States Supreme Court was viewed as being liberal and highly activist, taking positions that expanded the meaning of the Constitution beyond its literal meaning. For example, decisions such as Gideon vs. Wainwright and Miranda vs. Arizona, the Constitution's right to counsel was

generally meant that someone who could afford a lawyer could not be denied the right to be represented, however in *Miranda* and related cases, the Supreme Court ruled that the Constitution required persons without means to hire an attorney must be provided with one even at the earliest stages of a criminal case.

Originalists are those lawyers, judges and law professors who feel that judges should be guided by the literal words of the constitution. Many conservatives argue that judges should not expand upon the meaning of the words in the Constitution and should defer to the legislative branch and the amendment process. Activist judges are those who look at what social justice might require and for ways to interpret the Constitution in ways that bring about what they view as justice.

The American system of justice is somewhat confusing to foreign observers. Each state supreme court has the authority to interpret its state constitution and set aside state laws and local ordinances if they conflict with the state constitution. Unless a federal court in the federal circuit has ruled otherwise, the State Supreme Court is the final arbiter of what the state constitution means and how it is to be applied.

However, state constitutions must be consistent with the U.S. Constitution and federal law. When a state law is deemed to be consistent with the state constitution but inconsistent with the U.S. Constitution or laws, then an appeal must be taken in the U.S. Court of Appeals for the federal judicial circuit in which the state is located. Unless overruled in a higher level of appeal, the decision of the Court of Appeals is binding on state courts in that federal circuit.

At times, different federal circuit courts of appeals will disagree, meaning that there may be differing interpretations across the United States as to what the U.S. Constitution means. Ambiguities such as this can only be resolved by the United States Supreme Court.

The United States Supreme Court receives **Certiorari** petitions which are briefs asking the court to review the decisions of a lower court or to resolve conflicts in the decisions of the various courts of appeals. It is important to note that the overwhelming portion of the cases heard by the U.S. Supreme Court are cases in which the Supreme Court has the option to hear the case or to decline to hear a case. Generally, the Supreme Court will agree to hear cases in which the circuit courts of appeals are in conflict but on other cases the court has to be convinced that a **substantial federal question** exists making it worthy of time on court's calendar. Approximately 2000 cases are filed with the U.S. Supreme Court each year but the Supreme Court chooses to hear arguments in about 100 cases during its term.

In the American system of checks and balances, it is possible for the other two branches to overrule a decision of the federal courts. If the Congress and the President agree, it is possible for them to enact a law that removes from the jurisdiction of federal courts certain types of cases. For example, some legislators angered by federal judges who ruled that telecommunications companies could be liable to customers for violations of privacy and federal laws barring disclosure of telephone and internet content without a proper warrant, are attempting to pass an amendment to the Patriot Act which immunizes the telecommunications companies

who gave information to the government, even without a warrant, when requested by federal authorities seeking information about potential terrorist activities.

At its most extreme, widespread and concerted opposition to Supreme Court rulings could result in passage of a Constitutional Amendment. This is very difficult but has happened (the Eleventh Amendment). Recently, decisions about flag burning, abortion, gay marriage, school prayer, exercise of eminent domain powers for economic development purposes, and state legislative apportionment have provoked calls for constitutional amendments but none of these proposals has yet been passed.

Judges

In the federal judiciary, the U.S. Supreme Court is the most prestigious because of its status as the final arbiters of what the Constitution means. Next in status are the various courts of appeals which make decisions affecting large portions of the country. Also important are U.S. District Court Judges who operate the trial courts handling federal crimes and civil matters within one of the 94 federal judicial districts.

Similarly, on the state level, the state supreme court is considered the most prestigious state court, followed by the state court of appeals, Superior Courts and District Courts. Among the important but lower level judicial officials in the United States are **magistrates** who issue search warrants, arrest warrants, set bonds to hold persons arrested of crimes and in some cases order an unruly person to be involuntarily committed to a psychiatric hospital for up to 72 hours for an evaluation.

Judges preside over the trial and are responsible for seeing that the trial is conducted properly and to render decisions about questions asked of witnesses and the evidence introduced. The judge must explain the law to the jurors so they know what the law is when making a decision. Judges must be lawyers and it would be common for a judge to have ten to twenty years experience before becoming a judge.

A Senior Judge is a judge who has served long enough to retire but continues to hear cases, perhaps on a reduced schedule so that he or she does not have to work 12 months a year but may take on cases when needed.

The **Chief Judge** is judge who handles administrative assignments with a judicial district. For example, Charlotte, North Carolina has something like 40 Superior Court judges. The Chief Superior Court Judge makes sure that all the judges do not take vacation at the same time, that courtrooms are properly equipped, that law books are available in the library, that a Senior Judge is contacted and asked to serve when needed. The Chief Superior Court Judge assigns judges to particular cases.

Becoming a Judge

Federal judges are nominated by the President and if confirmed by the Senate they serve for life. Once nominated, the Senate Judiciary Committee will conduct a hearing on the fitness of the nominee to serve. Senators from the home state of the judge will offer character references and information may be offered by the American Bar Association as to the qualifications of a nominee. On rare occasions, the U.S. Senate will reject the nominee put forth by the President.

Senatorial courtesy is a term that refers to the fact that a U.S. Senator can put a hold on the nomination of a Federal Judge. The reason may be ideological (i.e. the nominee is too liberal or too conservative to suit the Senator) or it may be political (i.e. the Senator wants to bargain with the President on some issue and holds up the judicial appointment until the President agrees to a compromise on the issue causing the stalemate between the Senator and the President. Normally, the decision reached within the Senate Judiciary Committee determines whether the entire Senate votes on the nominee but in rare occasions, the President may be able to use his political influence to get a vote on a nominee opposed by the Senate Judiciary Committee. Once sworn in, Federal judges can only be removed through impeachment and serve for life.

Justices of the United State Supreme Court have lifetime appointments and can only be removed by impeachment or resignation. Only one Justice, Samuel Chase has been impeached (1804) and he was acquitted by the Senate over charges that he mishandled a case while serving as a trial judge on a lower court. More recently, in 1970, then Representative Gerald Ford attempted to have Justice William O. Douglas, a noted liberal, impeached for an article he wrote for Playboy, a magazine that Representative Ford considered pornographic. Ford's effort was unsuccessful and the House of Representatives did not impeach Justice Douglas.

Sometimes disappoint the President who nominated them to the Court, however, once seated on the Court, the President is stuck with his choice. Although Presidents try to select individuals who reflect their own viewpoints, the lifetime appointment gives justices the opportunity to change their views or in some cases to think through issues in ways not possible as a civilian. A President who disagrees with the Justices can do nothing to remove them. In fact, in the landmark case, United States vs. Nixon, President Richard Nixon suffered a huge setback when the Court ruled 8-0 that the President was not immune from subpoena in a criminal proceeding in which a Special Prosecutor sought access to Presidential tapes that could shed light on whether the President engaged in a conspiracy to obstruct justice. Justices, once seated on the court, often exercise considerable independence from the President who nominated them to the Court.

State judges are chosen in a variety of ways, depending upon the state. Many, but not all, **state judges** are elected by the voters. There are no elected federal judges. Some states allow the Governor to nominate judges who must be confirmed by the state senate. Other states allow qualified lawyers to run to the office of judge.

The **Missouri Plan** is used in twelve states to select judges. An nonpartisan commission of lawyers chosen by the bar association recommends three persons to the Governor and allows him to make a choice from the three persons the lawyers determine to be qualified. If the Governor fails to act within sixty days, the commission may appoint one of its nominees. After serving one year, the person chosen by the Governor or the commission must be elected by the voters in order to retain the judgeship.

Opinion is divided over whether it is wise to have state judges elected or appointed. Some people feel that judges should be elected so that their rulers more closely reflect

the sentiment of the citizenry and judges who are viewed as liberal or “soft on crime” can be voted off the court by the citizens. On the other hand, there are critics of electing judges who object to the practice. They question whether citizens know enough about judges to make informed decisions about the judge. Should the judge be elected on the basis of trends in party voting for other offices? Should judges accept campaign contributions in order to get elected and will the campaign contributions either pose a conflict of interest or the appearance of a conflict?

Judges generally do not have to retire if they wish to continue being a judge. A judge who is mentally incapacitated or guilty of a crime could be removed but most likely there would be other judges or family members who advise the judge to step down rather than be removed.

Judges who commit a crime will be punished. Depending upon the state, a commission typically exists that can remove a judge permanently for misconduct, or the legislature can impeach and remove the judge. Sometimes a family member or close friend convinces a judge who is in trouble to resign rather than be removed. Federal judges must be impeached by the House of Representatives and convicted by the Senate because under the separation of powers a judge is immune from arrest, although if accused of a crime, the judge would not hear any cases until the validity of the charge is resolved.

Other Court Officials

The Clerk of Court is the custodian of all records of the court; he receives the documents charging a crime or initiating a lawsuit. He keeps the evidence while an appeal is being prepared. On the state level, he may act in some states as a probate judge and be charged with settling estates and supervising the execution of wills and the payment of debts against an estate.

The **Bailiff** is a state law enforcement officer who is in the courtroom to protect the judge and to see that the defendant does not flee from the courtroom. The Bailiff and his assistants will be the only persons beside the judge who may carry a firearm in the courtroom.

A **United States Marshal** is a federal law enforcement officer who protects the federal judge and the federal court, has custody of federal defendants, and executes the orders of the court, such as capturing a fleeing federal felon. Once a person has been convicted of a federal crime in a federal court, the U.S. Marshal will deliver the person to the custody of the U.S. Bureau of Prisons.

The **Sheriff** is the local law enforcement officer (almost always elected) who operates a local jail. He has custody of persons who are arrested (unless they post a bond to guarantee appearance) prior to their trial on state charges. Once a person is convicted in a state court, they will be transferred to the State Department of Corrections to serve time in a state prison.

Judges are typically paid between \$60,000 and \$170,000 annually, depending upon the jurisdiction (state judges make less than federal judges; appellate judges make more than judges in trial courts). Recently, the salaries of U.S. officials were

increased. Justices of the U.S. Supreme Court earn about \$200,000 per year with the Chief Justice making slightly more.

Highly skilled attorneys in private practice could make much more than they would serving as a judge but often consider it a part of their civic obligation to serve as a judge on a court for at least a part of their legal career.

A **court stenographer** or **recorder** is not always an employee of the court (about 60% of the court stenographers work for the government) but may be a certified private contractor who prepares a verbatim transcription of a court proceeding. The word for word account of what was said in the courtroom becomes the record of the case and will be used in preparing an appeal over rulings by the judge on evidence, prejudicial testimony, or the charge given to the jury before they begin deliberations.

Juries

Jurors are ordinary citizens who are obliged to serve when called. They will be paid a very modest amount of money while serving as a juror, something like \$35-\$50 per day. The Sheriff, the Clerk of Court or a Marshall is charged with summoning jurors from names appearing on driver's license and voter lists. There may be 150 potential jurors summoned to come to the courthouse from which a jury of twelve persons and two alternates will be seated for a trial. A potential juror may ask to be excused due to hardship but generally when called you have to serve. If you serve on a jury, you will not be summoned again for at least two years.

Voi Dire is the process of questioning persons summoned for jury duty to determine their impartiality. The lawyers will ask the prospective juror:

- a. Whether she/he is related to someone involved in the case?
- b. Had a similar experience (assault, vehicle accident, medical malpractice) like the one involved in the case?
- c. Made his or her mind up about the case or the type of crime before hearing any evidence.
- d. Other questions that shed light on the mental abilities of the prospective juror.

Preemptory challenges allow both the prosecution and defense the right to challenge prospective jurors and excuse a certain number (maybe five) and give no reason for not wanting the particular person on the juror. There are also **challenges for cause** that the lawyers can ask the judge to excuse a potential juror.

Jury tampering refers to efforts to improperly influence the jury. The judge rules on evidence during the trial and tells each juror not to discuss the case with anyone during the trial. If someone contacts a juror, bribes them, threatens them, contacts a family member to tell the juror something this is improper and generally is a crime which the judge can punish.

Sequestration is a term that refers to a judge making a determination that the jury must be sequestered (kept in the custody of the court without being allowed to go home evenings and weekends) in order to insure that the jury does not become

exposed to improper influences. Sequestration is difficult on the jurors and is only rarely used by a judge.

Jury nullification occurs when a jury ignores the instructions of the judge and basically discounts the evidence that impartially would lead to a guilty verdict. Double jeopardy (under the Fifth Amendment) almost always prevents retrying someone found innocent of a crime but someone could be found innocent in a state court and then be tried in a federal court for a related crime. For example, there could be an innocent verdict in state court for murder and a decision of guilty in a federal court. In fact, this was the outcome in Mississippi when local law enforcement personnel murdered three civil rights workers and were found innocent by a state jury but were convicted in federal court of conspiring to deprive the three of their civil rights.

A judge may set aside a verdict reached by a jury. This is very rare but could occur if the judge felt that the jury failed to do its job or was excessive in its award. The judge must find that the jury has clearly ignored the evidence and law and then make a decision on his own. Normally, a person found guilty or who loses a suit would appeal to the court of appeals and let them resolve the question but a judge could find that the jury that he has supervised throughout the trial reached a decision that is unreasonable and such that he cannot allow the jury's verdict to stand.

A **Hung Jury** is one that cannot agree on a verdict. In a criminal case, there must be a unanimous decision and if the jury cannot reach a unanimous decision it is said to be a hung jury. The judge will first tell the jurors to deliberate further and if in a reasonable time they report back that they cannot reach a decision, the judge will declare a **mistrial** which will require the entire trial to be held again before a different jury.

Grand Juries

A Grand Jury is a group of citizens who are summoned for duty to carry out certain special functions. Grand juries typically set for a term such as two years but they do not meet continuously; half the members rotate off each year in order to provide a balance between having experienced grand jurors and avoiding burdensome obligations for the small number of citizens who serve. The Grand Jury may have as many as 25 members who meet when summoned by the prosecutor. Their deliberations occur in secret and, depending upon the state, the Grand Jury may conduct investigations into corruption. In some states, grand juries are presented information by prosecutors or district attorneys seek **indictment** of a person accused of a crime but in about half the states this function is performed by a judge in a probable cause hearing.

Penalties Imposed by Courts

In **Civil Cases**, the Judge presiding over a trial must make a judgment about the damages to be awarded to the winning party in a suit. American law in civil matters generally rests on the principal of the person causing a tort (harming another person) should pay damages to the person suffering the tort. The jury may set the degree of damages but the Judge may adjust the award if he feels that the jury award is excessive. **Actual damages** cover the losses experienced by or reasonably expected

to be lost by the harmed party. These damages might involve items such as lost earnings, medical expenses, legal expenses, decreased life expectancy, future medical expenses, loss of companionship and on-going costs of remediation for a pollution case. **Punitive damages** may be awarded because the harm done to the plaintiff was predictable and willful by the defendant. For example, a drug company introducing a drug that it knew to be harmful because of its own research but nonetheless falsifying the test results and introducing the drug to the marketplace might also have to pay punitive damages in addition to actual damages. Punitive damages are based upon the assumption that only did the party cause harm but willfully caused harm.

Governments are sometimes subject to civil claims in the United States generally for personal injuries suffered by someone injured in the course of a governmental activity. Although there once was near total immunity for the government (**Sovereign immunity**) many court decisions have involved substantial awards for governmental activities which injure persons. Examples of awards being made to persons injured by actions of governmental officials include situations such as:

- a. Malicious false arrest and prosecution
- b. Use of excessive force by police causing bodily injury or death
- c. Personal injuries caused to an innocent citizen by police pursuit of a fleeing criminal
- d. Injuries arising out of inadequate warning signs being erected when making repairs to underground water lines
- e. A citizen slipping or tripping on improperly maintained public walkways
- f. Death or injuries caused to the public by an improperly caged animal in a city zoo
- g. Business interruption caused by broken water lines caused by improper operation of the city water system
- h. Denial of approval of a land use zoning permit for which an applicant would be lawfully entitled
- i. Failure of the police or fire department to respond in a reasonable time, thereby causing loss of property or life
- j. Inadequate or improper training in the use of firearms leading to innocent persons being injured when a police officer fires his service weapon
- k. Losses experienced by a person when the police break into the wrong apartment in executing a search warrant in a drug search
- l. Wrongfully dismissal of a governmental employee from his job
- m. Refusal of governmental officials to allow examination and copying of public records
- n. Pollution caused by seeping leachate from a landfill at which garbage is disposed.

Litigation against governmental agencies occurs quite often. Many lawyers will take on such cases on a **contingency fee basis**, meaning that the lawyers is paid nothing unless he wins the case. Government agencies are sometimes described as having **deep pockets** meaning that unlike an ordinary citizen who cannot pay more than he has, governments have the ability to raise taxes as needed to pay large financial judgments. However, many governmental units take out a variety of types of liability insurance to cover some of the risk to which they are exposed. Examples are **environmental liability, completed operations liability, public officials liability**

and vehicle liability. Coverage under such policies might have a sizeable deductible (such that the government pays the first \$50,000) but beyond that deductible the insurance company pays claims. Larger governmental units, such as large cities or state governments, may cover claims up to a fairly large amount (perhaps \$1,000,000) and then rely on insurance coverage for larger claims.

In **criminal cases**, the Judge will impose a sentence on the person found guilty. The types of criminal penalties vary according to the seriousness of the offense, mitigating and aggravating circumstances, and the prior record of the guilty party. The following are examples of penalties imposed in the United States in criminal cases:

- a. **Unsupervised probation.** This means that essentially the guilty party is not incarcerated but stay out of trouble during the period of the unsupervised probation or he will be brought before a judge to be given an active sentence.
- b. **Supervised probation.** The assumption is that the person found guilty of the crime may have dependents to support and may need a job in order to pay a fine or make restitution. Therefore, the judge may assign the guilty person to a probation officer who will meet with the probationer on some set interval to monitor his employment status and to complete drug testing.
- c. **Community service work.** In this situation a person found guilty of a nonviolent crime might be sentence to complete a number of hours of community work, perhaps serving meals to elderly persons at a senior center, doing trash cleanup work along roads, or helping build a playground. The judge will set a certain number of hours the guilty person has to complete under the supervision of a community service work supervisor.
- d. An **active sentence.** The judge may impose an active sentence and will likely do so for repeat offenders and persons guilty of serious crimes. In the United States, at present, there is a large number of persons currently in prison for drug offenses but active sentences would likely be given to persons found guilty of bodily crimes like assault, armed robbery, rape, murder, and kidnapping as well as serious non-bodily crimes like arson, trafficking in drugs, and embezzlement of substantial sums of money.
- e. **Capital sentences** are those in which a finding of guilty can place the accused in jeopardy of being executed for the crime. Death penalties are generally reserved in the law for cases in which the guilty party has willfully taken someone's life as in a murder rather than through irresponsible action (such as falling asleep while driving and causing an automobile accident). In the United States, there is considerable controversy over the use of the death penalty. Among the questions are whether it is morally defensible for the state to kill someone as well as questions about how the execution should be done (presently there is a Supreme Court case that argues that the so-called lethal injection method in which the person sentenced to death is administered three drugs—one to relax the person, one to paralyze the person and one to stop the heart) is cruel and unusual punishment not allowed by the United States Constitution. Other controversies involve questions about whether the trial that resulted in the imposition of the death penalty was conducted fairly—was the jury racially prejudiced, did the judge exclude exculpatory evidence, allow into evidence prejudicial or hearsay testimony, or did he incorrectly charge the jurors before they began deliberations?). Generally speaking, exhausting legal appeals and actually carrying out the imposition of a death sentence is a

process that may take 10-15 years after the original trial and will cost the state millions of dollars in legal fees for both its attorneys and those representing the guilty person who, being incarcerated, will likely have no resources to pay for appeals attorneys.

- f. **Felony murder rule.** Many states have laws that require the imposition of a death sentence on a person who is found guilty of a felony in which someone died even if the guilty person did not kill the person. For example, suppose that two people enter a bank brandishing firearms and demand the teller to hand over the money in the cash drawer. Both Party A and B have firearms and point their weapons at the people in the bank. Party A becomes excited and shoots a customer in the bank. Party B, although he did not shoot the customer, could be convicted under the felony murder rule and be sentenced to death because of his role the commission of a felony in which a person died.

Generally speaking, the law requires the judge to impose a sentence that reflects the seriousness of the crime (i.e. the legislature has classified certain crimes and set maximum penalties for various crimes) as well as **aggravating and mitigating factors**. Aggravating factors could include the heinous nature of the crime (was the victim tortured in addition to being killed, was the defendant acting under the influence of illegal drugs, were children required to watch their parents being murdered?) while mitigating factors could include accepting full responsibility for the crime, assisting police in locating other parties to the crime, the defendant's otherwise good character, the defendant was physically or sexually abused as a child, and will a less severe sentence allow the guilty person to work and make financial restitution to the victims or to society?

There is considerable public anger in the United States toward the sentences imposed on criminals by the court system. Citizens often feel that guilty persons get off with mild sentences or suffer little consequence for their actions. Still others feel that the court system imposes sentences which are not likely to be served by the guilty person (such as a fifteen year sentence or armed robbery which actually involves a person serving three years). Sometimes high profile defendants appear to be able to hire very good lawyers and literally get away with murder while ordinary persons may serve prison sentences for lesser crimes because they could not hire highly skilled attorneys.

Public outrage over what are perceived as mild sentences have led some states to pass laws calling for **mandatory minimum sentences** in which the discretion of the judge to impose a lighter sentence is circumscribed.

The American Federal System and Courts

Federalism is a system that involves the sharing of governmental power between the national government and the states. Although the **Supremacy Clause** of the United States Constitution provides that the U.S. Constitution and federal laws made in pursuance thereof are superior to state constitutions and state laws, not everything is dealt with in federal law. For example, there are state laws about murder which deal with most instances when someone kills someone. The federal laws about murder deal with killing a federal official or committing a murder on U.S. government property.

The **Supremacy Clause** of the United States Constitution places on courts and police the obligation to act in conformance with the United States Constitution. Originally, the U.S. Constitution guaranteed citizens certain rights against actions by the United States Government and its agencies. Most of those rights are contained in the Bill of Rights and even today, the Bill of Rights has great relevance. Each is important but some have particular relevance in understanding the operation of the legal system in the United States.

Although the First Amendment deals with Speech, Press, Assembly and Religion, the Speech provisions have been interpreted by the U.S. Supreme Court to prohibit postal authorities from seizing copies of D. H. Lawrence's Lady Chatterly's Lover which the postal authorities considered to violate laws against the distribution through the mail of obscene and pornographic materials. Similarly, laws used in prosecutions against burning the U.S. flag were set aside as violating the First Amendment protection of speech as were federal charges against males burning their draft registration cards in protest of the Viet Nam conflict.

The **Fourth Amendment** is quite important and originally limited the United States government and its agencies from conducting unreasonable search and seizures and searches without warrants. Numerous cases arose over the past two hundred years concerning what constitutes probable cause and what is a reasonable search. For example, can a federal drug enforcement agent enter into premises where he suspects illegal drugs are located without a warrant (no knock rule) in order to prevent evidence from being flushed down the toilet? Can an agent seize illegal drugs or guns not named in a warrant if the drugs are in plain view? Currently, there is a controversy over whether the U.S. government violated the Constitution's Fourth Amendment by demanding that telecommunications companies surrender information about telephone and internet conversations between persons suspected of being tied to terrorist organizations when the government has not obtained a warrant from a court?

The **Fifth Amendment** prohibits a person being required to testify against himself, to be tried twice put in jeopardy for life or limb for the same charge, or to be denied life or liberty without due process of law.

The **Sixth Amendment** guarantees a speedy and public trial, by an impartial jury, to be informed of the charges they face, to confront witnesses, to have compulsory process to obtain witnesses, and to have assistance of counsel for his defense.

The **Eighth Amendment** prohibits excessive bail and cruel and unusual punishment.

Originally, these rights were intended to guarantee citizens protections from the national government. However, prior to the Civil War, some legal scholars claimed that these federal guarantees did not protect citizens from actions by the state governments; citizens had rights protected by state constitutions that might be quite different than the rights protected from the Federal government by the United States Constitution.

The **Fourteenth Amendment** to the U.S. Constitution imposes upon the states the obligation to afford their citizens all the rights of U.S. Citizens. Therefore, states

must follow due process and cannot do things ruled illegal by federal courts. This includes protections guaranteed under the First, Fourth, Fifth, Sixth, and Eighth Amendments. The Tenth Amendment generally reserves to states authority to rule on questions not dealt with under the United States Constitution.

So, with respect to the **death penalty** the states may and do have laws that allow a person to be sentenced to death for certain very serious crimes. However, the U.S. Supreme Court has ordered states to follow certain procedures in applying the death penalty. At present, the U.S. Supreme allows executions, provided that certain required procedures are followed such as insuring that juries are not racially prejudiced and that the defendant is not mentally retarded.

Death penalty cases are quite controversial. It typically takes about ten-twelve years to exhaust all of the appeals prior to executing someone. The cost of executing a prisoner (because of the appeals) far exceeds the cost of keeping the person in prison for life. Many people feel that the death penalty is barbaric but others feel that society has a right to take the life of a person convicted of certain heinous crimes. Lethal injection was viewed as a more humane method of imposing the death penalty than hanging or the electric chair. Arizona allows the person to choose the method of execution and they allow use of a firing squad. Currently, a case is before the United States Supreme Court that argues that lethal injection does not work as its supporters claim and that it constitutes **cruel and unusual punishment** which is forbidden by the U.S. Constitution. Until that case is resolved, states have suspended lethal injection as a means of capital punishment.

Stare decisis is a Latin phrase that means something like to stand with the decision. This is the basis for following **precedent** which makes the law more understandable and predictable. On occasion, U.S. Supreme Court does abandon precedent and move in new directions but this is not the norm. For example, in *Plessey vs. Ferguson* in 1896, the Supreme Court ruled that “separate but equal” was acceptable but in *Brown vs. Board of Education* they struck down precedent and ruled that “separate is inherently unequal”. Some persons fervently hope that the Supreme Court will reverse *Roe vs. Wade* and make the decision about abortions a state-level decision.

Lawyers

Lawyers in the United States must be law school graduates and be licensed to practice law. There are 193 law schools in the United States that are accredited by the American Bar Association.

Admission to law school requires completion of a four year undergraduate college degree program, satisfactory grades, attaining a satisfactory score on the Law School Admissions Test, and written recommendations about an applicant from professors and possibly from a judge or lawyer.

Law schools in the United States provide a three year curriculum which is very intense. Successful completion of law school results in awarding the Juris Doctoris (J.D.) degree. Advanced legal studies beyond the J.D. degree can result in earning the Master of Laws (LL.M) and the Doctor of Jurisprudence (J.S.D); however, most

persons pursuing those advanced degrees do so to prepare for a career as a law professor.

In order to practice law, following completion of law school, it is necessary to pass the bar examination. This is a may be a multistate examination that covers federal law with components covering the decisions of the particular state or it may be a state examination on federal and state law. Successful candidates must also pass a character investigation. In order to be licensed to practice law, lawyers must be admitted to the bar in the jurisdiction in which the case is being tried. Not all the persons who graduate from law school practice law. Some become lobbyists or are involved in public policy research and teaching.

Probably most familiar to the public are lawyers who serve as **prosecutors and defense lawyers** in criminal cases and **lawyers for the Plaintiff and Defendant** in civil cases.

Prosecutors, District Attorneys, and U.S. Attorneys are lawyers who are paid from the public treasury and represent the interests of the government. These officials may exercise considerable **prosecutorial discretion** and decide whether to prosecute cases brought by the police, to seek lesser charges or to plea bargain in order to settle a case quickly without the need of a trial. U.S. Attorneys are chosen by the President and serve at his pleasure. Prosecutors and District Attorneys are governed by state law: some serve fixed terms and must stand for re-election at fixed intervals while others may be removed by a state panel for misconduct.

Public defenders are career lawyers paid for by the public to represent defendants in criminal matters when the defendant is without financial resources needed to pay for an attorney. In some states, there are not career public defenders but lawyers in private practice are assigned cases by the trial judge to represent **indigent** defendants. The state will pay the lawyer reasonable fees but not as much as the attorney could have earned representing a defendant with resources.

There are many lawyers in the United States. It is estimated that approximately 15,000 lawyers work in Washington DC but not all lawyers go to court. Some lawyers only do lobbying, others work for agencies administering rules, others handle real estate matters. Depending upon their specialization and location, lawyers in the United States earn between \$40,000 and \$4,000,000 per year. The average lawyer probably earns around \$120,000 per year.

Graduates of top law schools in the United States are hired by the top law firms in the US with starting salaries around \$150,000 plus a car and interest free loans to buy a home, plus their debt for law school may be paid by the law firm. Obviously, outside the major cities, salaries are less than in Washington, DC, New York City, Boston and other large cities.

There are still relatively few females in the law profession; about ten percent of the law school classes are made up of females but some law schools have a higher percentage. Since there are relatively few female lawyers, there are relatively few female judges.