CRIMINAL PROCEDURE
AND THE
CONSTITUTION
LEADING SUPREME COURT CASES
AND INTRODUCTORY TEXT
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Chapter 1

AN INTRODUCTION TO THE “CRIMINAL JUSTICE PROCESS”

This book presents a collection of leading Supreme Court decisions in the field of “constitutional criminal procedure”—that is, decisions dealing with application of the United States Constitution to what is commonly described as the “criminal justice process”. That process consists of a variety of different procedures, some applied by enforcement officials (police and prosecutor) and some applied by courts, through which the substantive criminal law is enforced. The Court’s opinions commonly focus on the application of a single procedure in the context of the individual case before the Court. The Court tends to refer only briefly (if at all) to other procedures that are part of the process, and only occasionally describes the overall legal and institutional structure that provides a frame of reference for its criminal procedure rulings. That backdrop is assumed to be familiar territory for the lower court judges who will have the responsibility of interpreting and applying the Court’s opinions, and the prosecutors and defense counsel who will advance legal arguments based on those opinions. We assume that it is not familiar territory for the students using this casebook, and therefore seek in this chapter to briefly describe the three key components of that backdrop—the division of lawmaking authority in the legal regulation of the criminal justice process (§ 1); the division of responsibility for the administration of the process and the range of diversity within each administrative grouping (§ 2); and the basic steps that carry the administration of the process from its starting point to its conclusion (§ 3).

SECTION 1. THE LAWMAKING STRUCTURE

1. Fifty-two lawmaking jurisdictions. Under the United States’ version of federalism, each of the fifty state governments retains the authority to enact its own criminal code. Each state also retains the power to provide for the enforcement of that criminal code through agencies and procedures that it creates. That authority has been used in each state to establish what is basically a single, general criminal justice process applicable throughout the state.1 Congress has law may allow the local government or courts to formulate additional procedural requirements that apply only to the particular county.

1. While the same criminal justice process applies throughout the state, as discussed at p. 11 infra, that process may vary with the level of the crime. Also, as to certain matters, state
added to these fifty state criminal justice processes its two distinct federal criminal justice processes. First, it has created a separate criminal justice process for the District of Columbia, used to enforce a separate criminal code that applies only in the District. Second, it has created a criminal justice process for the enforcement of the general federal criminal code, which applies throughout the country. This process utilizes national federal law enforcement agencies and relies on prosecutions brought in the federal district courts.

While the federal criminal justice system has expanded greatly over the last half of the twentieth century, the state criminal justice systems remain the source of the vast majority of criminal prosecutions. The state systems account for over 99% of the nation’s total criminal docket (i.e., all prosecutions of felonies, misdemeanors, and those local ordinance violations that carry a potential sentence of an incarceration), and roughly 96% of all prosecutions charging “major” offenses (i.e., felonies). Thus, not surprisingly, a substantial majority of the Supreme Court decisions contained in this volume review state prosecutions.

2. Diversity in state law. The presence of fifty-two lawmaking jurisdictions does not invariably produce substantial diversity in the laws of those jurisdictions. In other fields of law, the individual states have almost uniformly adhered to a single model, so that the governing law is quite similar in almost every state. That has not been the case, however, for criminal procedure. The English common law provided a common starting point for the criminal justice systems of the original states and the federal system, and continues to provide an element of commonality even to this day. However, as the common law concepts have been adjusted to accommodate new developments in the administrative structure of the process (such as the creation of police departments), and as the process has been reshaped to accommodate new concerns, various factors have led the states to take diverse approaches on common issues. Four factors, in particular, have contributed to the diversity in state law:

1. The presence of a single lawmaking jurisdiction does not invariably produce substantial diversity in the laws of those jurisdictions. In other fields of law, the individual states have almost uniformly adhered to a single model, so that the governing law is quite similar in almost every state. That has not been the case, however, for criminal procedure. The English common law provided a common starting point for the criminal justice systems of the original states and the federal system, and continues to provide an element of commonality even to this day. However, as the common law concepts have been adjusted to accommodate new developments in the administrative structure of the process (such as the creation of police departments), and as the process has been reshaped to accommodate new concerns, various factors have led the states to take diverse approaches on common issues. Four factors, in particular, have contributed to the diversity in state law:

2. Municipal, or judicial, district, thereby creating further variation.

2. The criminal laws of a state are limited in application to offenses that occurred in their entirety or in part within that state. The federal criminal law, in contrast, has a territorial reach that extends throughout the United States and its territories. However, the federal government, unlike the state governments, cannot declare an action to be criminal simply because it is contrary to the public welfare. The federal government’s regulatory authority in the criminal field, as in other fields, is limited to those subjects as to which the federal constitution grants Congress legislative authority, such as interstate and foreign commerce and the maintenance of national services (e.g., the postal service and the armed forces). As to District of Columbia, Congress’ authority is more extensive, and basically is similar to that of a state.

3. At various points in this chapter distinctions will be drawn between felony offenses and misdemeanor offenses. All but a handful of jurisdictions utilize one of the seemingly distinct standards to distinguish between felonies and misdemeanors. The federal system and roughly half of the states classify as felonies all crimes punishable by a term of incarceration of more than one year; crimes not punishable by incarceration, or punishable by incarceration for a maximum term of one year or less, are misdemeanors. Most of the remaining states look to the location of the possible sentence of incarceration. If the offense is punishable by incarceration in a penitentiary, it is a felony; offenses punishable by incarceration only in a jail are misdemeanors. States using this distinction, however, commonly also provide for possible incarceration in a penitentiary if the offense of conviction carries a maximum term of incarceration exceeding one year. Thus, both standards, in practice, will classify as felonies all offenses punishable by a term of imprisonment of more than one year.

In many states, municipal ordinances may duplicate lower-level state misdemeanors, prohibiting the same conduct and carrying the same potential penalties (including possible incarceration) as the state-law misdemeanors, but typically providing also that fines go to the municipality. These offenses generally are treated procedurally in much the same fashion as misdemeanors. See LaFave et al., supra, § 1.7(k).
lar, point toward different states adopting somewhat different legal regulations: (1) criminal procedure is not one of those areas of lawmaking in which a need for reciprocity or the interaction of transactions forces the states to seek uniformity; a lack of uniformity in the criminal justice processes of adjoining states is not likely to be a deterrent to the free flow of goods, services, or persons between the states or to restrain economic development within the state; (2) the criminal justice process must be shaped in light of the state’s administrative environment, including the demography of the population, the resources available to the process, and the structure of the institutions responsible for the administration of the process (particularly police and prosecutor agencies), and states vary considerably as to that administrative environment; (3) criminal process issues tend to be issues of high visibility and, often, high emotional content, leading to lawmaking decisions (at least legislative lawmaking decisions) that are influenced more by symbolic politics (which tend to vary with the ideological assumptions of the local constituency) than the views of those with presumed technical expertise; and (4) the integrated character of the criminal justice means that a divergence between states in their law governing one part of the process most likely will necessitate further differences at other stages of the process.

3. The unifying role of federal constitutional regulation. The Bill of Rights of the Federal Constitution includes a large number of guarantees dealing specifically with the criminal justice process—all the guarantees of the Fourth, Sixth, and Eighth Amendments, and with the inclusion of the Fifth Amendment’s due process clause (which clearly applies to criminal proceedings, although extending also to certain non-criminal proceedings), all but one of the guarantees (the “just compensation” guarantee) of the Fifth Amendment. As discussed in chapter two, these provisions originally applied only to the federal criminal justice process (and the District of Columbia process). However, as a result of a series of decisions described in chapter two, almost all of these provisions now apply as well to the states. Moreover, in its reading of the due process clauses of the Fifth and Fourteenth Amendment, the Court has carried constitutional regulation far beyond the subjects regulated by the more specific guarantees (recognizing that, as it applies to the states, due process also has a content independent of the selective incorporation of the specific guarantees noted in ch.2, § 2). The equal protection clause of the Fourteenth Amendment, in its prohibition against discrimination, provides still another layer of constitutional regulation of the criminal justice process.

Federal constitutional law regulating criminal procedure, as interpreted by the Supreme Court, is commonly described as “our most important source of criminal procedure law”. LaFave et.al., fn. 3 supra, § 1.3(b). This characterization stems in part from the fundamental character of the issues considered in the Court’s constitutional decisions and the symbolic significance of the principles announced in its rulings. The characterization also is based, in part, on the practical bearing of the Court’s constitutional rulings. Federal constitutional law is the only source of substantial legal regulation applicable to all fifty-two jurisdictions. As such it provides a common foundation that significantly shapes major portions of the process in all fifty-two jurisdictions.

4. Legislative lawmaking plays a critical role in the field of criminal procedure as every state has an extensive group of statutes regulating the criminal justice process (commonly described as a “code of criminal procedure”). Judicial lawmaking through common law rulings, once the most common form of criminal process lawmaking, today plays a very limited role. Judicial lawmaking more commonly occurs in the adoption of court rules, with roughly two-thirds of the states having a comprehensive set of court rules of criminal procedure. Of course, courts also may be viewed as engaged in judicial lawmaking in their interpretation of state constitutions, statutes, and court rules.
INTRODUCTION

Ch. 1

It should be kept in mind, however, that constitutional regulation is subject to two significant limitations insofar as it relates to achieving uniformity among the fifty-two jurisdictions. Initially, the Constitution imposes no more than a baseline standard. It prescribes procedural prerequisites that each jurisdiction must meet as a minimum, but the jurisdictions remain free to prescribe additional procedural protections if they so desire. As to almost every area of constitutional regulation, at least one jurisdiction has imposed a limitation upon governmental action more restrictive than that imposed by the federal constitution. Very often, where the Court majority has rejected an expansive view of a particular guarantee and dissenting Justices have favored that interpretation, at least a few states have adopted the expansive view under state law (in some cases, in the interpretation of state constitutional guarantees almost identical to the federal guarantee). In many areas, a substantial majority of the states have adopted standards that go beyond the constitutional minimum. Thus, while the constitutional right to jury trial allows for six person jury for the trial of non-capital felonies (see ch.24, § 1), all but six states require twelve person juries in such cases.

Second, constitutional regulation is far from comprehensive across the totality of the criminal justice process. As to some procedures, such as searches and seizures, federal constitutional regulation is quite detailed (indeed, some would argue that it rivals the Internal Revenue Code in its complexity). However, as to many other aspects of the process (e.g., the negotiation of guilty plea agreements), constitutional regulation will reach only a few major features of the particular procedure. The remaining aspects of the procedure will be regulated by state law (if regulated at all).

Thus, the cases presented in this volume, which do not cover even the totality of constitutional regulation, should not be viewed presenting anything close to a complete picture of the legal regulation of the criminal justice processes in all fifty-two jurisdictions. What those cases do illustrate are the fundamental, overarching principles that largely shape the legal regulation of this nation’s criminal justice processes and the complexities that arise in applying those principles to specific cases.

SECTION 2. THE ADMINISTRATIVE STRUCTURE

1. Administrative diversity. Throughout the Supreme Court opinions reprinted in this volume, you will find references of a generic nature to “police,” “prosecutors,” “defense counsel,” and “courts”. These are the four groups primarily responsible for the administration of the criminal justice process. Police officers, prosecutors, and judges all hold official positions within governmental units, and in describing the procedural history of the case, the Court will often refer to the position held by a particular actor in a particular governmental unit (e.g., that the arresting officer was a detective in a municipal police department). Rarely, however, will the Court go beyond that brief designation. Opinions presume familiarity with the institutional structures of the wide variety of governmental agencies that have the responsibility for performing the administrative functions of police, prosecutor, and courts. So too, as to defense counsel, the

5. As discussed below, there is considerable diversity in the institutional structures of these governmental agencies. However, with rare exceptions, constitutional regulation is geared to the function being performed without regard to differences in the structure of the governmental units assigned to the performance of that role. Indeed, to a large extent, the same is true of state law (or in the federal system, federal law). Thus, a state’s law governing police actions typically will apply to all government employees who fall within a broad definition of “peace officers,” including, for example, officers in specialized agencies that
opinions assume a familiarity with the institutional arrangements that provide counsel for defendants. This section briefly describes those institutional structures. It concentrates largely on the state systems, although significant distinctions in the administrative structure of the federal system are briefly described in the accompanying footnotes.

2. **Police agencies.** Of the four major groups involved in the administration of the state criminal justice systems, the police group is the largest and has the most diverse range of functions and most complex organizational structure.

*Fragmentation.* A key feature of the organizational structure of police agencies is the fragmentation in the allocation of policing authority. Indeed, the fifty state criminal justice systems together have almost 18,000 different agencies that can be classified as “police agencies,” in that (1) they have among their primary responsibilities the enforcement of the state criminal law, and (2) at least some of their employees have been given the special criminal justice enforcement powers that distinguish “police officers” from other personnel involved in enforcement (typically full arrest powers and weapon-carrying authority). The vast majority of these governmental agencies are units of local governments (e.g., municipal police departments or county sheriff’s offices), although there are over 1,000 agencies that are part of special geographical units (e.g., a park police department or a college campus department) or the state government. Apart from Hawaii, no state has less than 40 different police agencies and most have at least 250 different agencies.

The fragmentation of police authority invariably produces substantial variation in the exercise of that authority from one community to another within a single state. A dominant characteristic of state law regulating police conduct is its recognition of broad areas of police discretion. Typically, where the law allows the police to take a particular action only if certain prerequisites are met, it does not mandate that such action be taken simply because those prerequisites exist. An arresting officer, for example, has the authority to search the pockets of the arrested person, but also has the discretion to choose not to do so. In many instances, the law gives the officer the discretion to either act or take no action, but in others it also grants discretion to choose between two alternative paths of action (e.g., where probable cause exists, either taking the person into custody via an arrest or simply issuing a summons directing the person to appear in court at some later date).

Where state law allows for such discretionary decision-making, police agencies often seek to fill that regulatory void. In one fashion or another, they seek to channel the exercise of discretion by their individual officers. Many do so informally, through an organizational ethos that utilizes a variety of devices (e.g., training programs, socialization, and incentives) to influence the exercise of authority by individual officers. Others adopt written guidelines that are enforced internally through employment sanctions. In some instances, municipal governments have adopted ordinances that require officers in municipal police depart-

have authority in special geographical enclaves (e.g., park police), officers in general purpose municipal police departments, officers in a sheriff’s department, officers in a state highway patrol agency, and officers in a state administrative agency enforcing a limited class of offenses (e.g., liquor laws). See LaPave et al., fn. 3 supra, § 1.8(t).

6. Discretionary authority is not always the product of a grant of authority accompanied by a completely normless framework for its exercise. Discretion more often exists where the law imposes only a very limited restriction on the administrator’s choice of action (e.g., where it states that the administrator ordinarily can take action one way or another as he or she chooses, but cannot base his or her decision on a bribe). Thus, discretion has been described as analogous to a large hole in a legal-regulation doughnut.
ments to exercise or not exercise discretionary authority in a particular way. The end result is that policies on the exercise of discretion differ from one community to another (and sometimes within a community when more than one agency is exercising police authority in that community). The differences are often so substantial that commentators will describe a particular state as having many different criminal justice systems “in practice” although the “law on the books” seemingly creates a single system.

Agency responsibilities. Police agencies within the state criminal justice systems vary in their responsibilities. Some agencies, primarily at the state level, are largely limited in their responsibilities to the enforcement of the state’s entire criminal code or a portion of that code. Their agents are involved almost exclusively in investigating possible violations, collecting evidence, and apprehending offenders, often acting in conjunction with other police agencies. However, the vast majority of police agencies in the state systems are “general purpose” agencies, which gives them numerous additional responsibilities. Municipal police departments for example, also are responsible for providing basic social services (e.g., providing emergency aid), maintenance of public order (e.g., traffic control), and efforts directed at the prevention of crime (e.g., providing a physical presence through patrol activities). Sheriffs’ departments commonly add two other functions—a corrections function in the administration of jails, and a court operations function that includes serving civil process and providing court security.

The more diverse responsibilities of general purpose agencies may impact in various ways the agency’s approach to its law enforcement function. Initially, the general purpose agency must take account of the fact that, with its resources spread over a broad range of responsibilities, a large proportion of its personnel—including, in particular, its largest segment, patrol officers (who spend the bulk of their time on order maintenance and service functions)—will be relatively inexperienced in the investigation of serious crime. Second, the diverse responsibilities of the agency may lead it to adopt a somewhat different focus in its selection of officers, as the qualities needed in criminal investigation are often viewed as quite different from the qualities that lead officers to excel in performing other police roles. Third, the diverse responsibilities may lead the general purpose agency to adopt a flexible and informal style in community interactions that will work well in performing other functions, but make officers less likely to adhere closely to the formal, legalistic requirements that apply to police investigations.

Agency size. Another important variable among police agencies is the agency size. Sharp differences in agency size exist in almost every state. While a substantial majority of all local agencies have fewer than 25 officers, over one-third of all officers of local agencies are employed by the 50 departments with 1,000 or more officers.

7. In the federal system, there is far less fragmentation, but some diversity in policies does exist among the much smaller group of key police agencies. While over 60 federal agencies employ agents with the authority of sworn police officers, a group of eight agencies account for all but a small portion of the federal criminal docket. See LaFave et al., fn. 5 supra, § 1.4(e). Most of these agencies are responsible for the enforcement of a specific group of offenses (as in the case of the Drug Enforcement Agency and the Bureau of Alcohol, Tobacco, Firearms, and Explosives). The prominent exception is the Federal Bureau of Investigation. Although the agencies promulgate separately internal standards governing the exercise of discretionary authority by their respective agents, seven of the eight key agencies are subject to the executive authority of either the Attorney General or the Secretary of the Department of Homeland Security, and all federal police agencies ultimately are subject to the executive authority of the President of the United States. Differences in enforcement responsibilities and other institutional characteristics have led these officials to accept some diversity among federal police agencies in their approach to similar problems.
Agency size, particularly as to small agencies, bears a substantial correlation to differences in the organizational structure, resources, and patrol and enforcement policies of police agencies (although the community served, e.g., whether rural or suburban, adds an important further layer of distinction for small agencies). Smaller departments do not have the specialized units commonly found in the larger departments (e.g., vice, burglary), although many do utilize the oldest of all specialized groupings—a separate detective unit. Smaller departments also are far less likely to utilize proactive investigative procedures (e.g., undercover agents, decoys), or tactical patrol techniques (e.g., the aggressive pattern of stopping and incidental frisks and searches that are associated with police “crackdowns”). Because small police agencies are more likely to rely on the assistance of a centralized state agency for forensic investigations, they similarly tend to make less use of forensics than larger agencies with internal forensic units. Having less financial support, smaller agencies also are less likely to take advantage of advanced technology (e.g., in-field computers).

3. Prosecutors. All state systems separate prosecution agencies from police agencies. None simulate the federal structure, which places several of the major federal police agencies and all federal prosecutors in the same government department (Justice), under the executive authority of a single official (the Attorney General). Thus, county prosecutors, although commonly described as the “chief law enforcement officer” of the county, actually have no direct regulatory authority over the various police agencies operating in the county. Of course, the prosecutor does have the authority to refuse to proceed in a case presented by the police, and that power-base may be utilized to convince the police to discontinue practices that the prosecutor views as contrary to the public interest. That authority, however, hardly puts the prosecutor in a position comparable to a supervisory official; police are not always interested in obtaining a prosecution, and they are aware that, if they produce evidence adequate to gain a trial conviction or plea bargain as to a serious offender, the prosecutor will be under considerable pressure to go forward with the prosecution even though the police did not proceed as the prosecutor would have preferred.

In many respects, the same factors that produce organizational diversity among police agencies also produce organizational diversity among prosecution agencies. Here, differences in agency responsibility are not quite so significant, although the distinction between agencies that have responsibility only for criminal law enforcement and agencies that also have civil litigation responsibilities can occasionally contribute to the adoption of different positions on a limited range of criminal enforcement issues. On the other hand, the fragmentation of authority and differences in agency size, as in the case of police agencies, contribute substantially to diversity in the exercise of prosecutorial functions.

Fragmentation. In three states (Alaska, Delaware, and Rhode Island), the Attorney General’s office is the sole prosecution agency (although the staff may be assigned, in part, to local offices). In the remaining states, the primary responsibil-

8. As to the federal police agencies within the Department of Justice, see fn. 7 supra. Federal prosecutorial authority is exercised primarily by the offices of the United States Attorney, each of which represents the United States in criminal and civil matters in a particular federal judicial district. Although these offices are given considerable discretion, they remain subject to the final prosecutorial authority of the Attorney General (which includes the authority to overturn the decision of a United States Attorney to prosecute in a particular case). Also, the Attorney General, acting through the Criminal Division of the Justice Department, will establish prosecutorial priorities and guidelines for specific decisions (set forth largely in the United States Attorneys Manual) that bind local U.S. Attorneys as to various prosecutorial practices. In addition, prosecutions in selected fields are brought directly by the Criminal Division or other divisions (e.g., Antitrust) of the Department of Justice, rather than by U.S. Attorneys.
ity for prosecutions is vested in local prosecutors, who are local government officials (typically for individual counties or multiple-county judicial districts). These prosecutors (having a variety of titles, including “District Attorney,” “State’s Attorney,” and “County Prosecutor”) generally are elected officials, who ran for office as political party nominees. In some states, they are the only prosecuting officials. In others, the Attorney General also has separate prosecutorial authority, but that authority either will be limited to a narrow band of offenses or will be exercised only under special circumstances (e.g., where the crime has a statewide impact). In some states also, the city or county attorney has the authority to prosecute ordinance violations that carry criminal penalties (see fn. 3 supra).

The forty-seven states relying on local prosecutors have over 2,300 prosecutorial districts. Several states have over 100 districts and even smaller states are likely to have a dozen or more. As in the case of police, prosecutors are granted broad discretion in exercising their authority (particularly as to the decision to prosecute, see step 4 at p. 17 infra, and in plea negotiations, see step 14 at p. 22 infra). Not surprisingly, different prosecutor offices in the same state often will adopt quite different policies in exercising that discretion. Indeed, the fragmentation of the responsibility for prosecution is designed to produce such variations, as its purpose, in large part, is to ensure responsiveness to the particular values of the local community that elected the prosecutor.

Size. Prosecutors’ offices do not vary in size quite so dramatically as police departments, but differences are substantial and do have a bearing on organizational policies. While offices in large urban districts commonly have over a hundred assistant prosecutors, over half of all prosecutors’ offices have no more than three assistant prosecutors. Prosecutors in smaller offices have limited resources and a limited range of experience, which impacts their approach to prosecuting such offenses as multiparty conspiracies or complex white collar crimes. These offices typically do not have access to the array of non-lawyer support personnel common in large offices (e.g., victim advocates), and that may produce a difference in their approach as to still other aspects of the docket. Small offices also tend to adopt a more flexible decisionmaking process, allowing for ad hoc variations. Large offices, in contrast, often adopt fairly specific internal standards governing such basic decisions as the use of diversion (see fn.14 infra), and often create special programs for specific offenses (e.g., sex offenses) or offenders (e.g., recidivists) that seek to ensure uniform prosecutorial implementation of a clearly defined mission (e.g., obtaining the longest possible incarceration).

4. Defense counsel. Defense counsel in criminal cases may be privately retained counsel or counsel provided by the state for indigent defendants. A study of prosecutions in the 75 largest counties determined that 82 percent of state felony defendants were found indigent and received counsel provided by the state. While the percentage may be somewhat lower in some states, state-funded counsel clearly dominate representation in felony cases in all jurisdictions. In misdemeanor cases, the percentage of retained counsel probably is higher, because counsel is more readily afforded, but state-funded counsel also will represent a substantial portion of all misdemeanor defendants.

Retained counsel. Retained counsel in felony cases represent various segments of the private bar. They include general practitioners (particularly in small communities) who handle all types of litigation, big city “courthouse regulars” (primarily solo practitioners who handle heavy criminal caseloads, basically involving garden-variety charges against clients of lower economic status), corporate lawyers who handle white collar cases, and the highly publicized litigators who
represent affluent defendants in drug cases, conspiracy cases, and occasional homicide cases.

Appointment systems. Where the state provides counsel, various different delivery systems are used. The most common are: (1) appointment of an individual assigned counsel; (2) appointment of an entity that has contracted to represent indigent defendants on a bulk basis (known as a “contract-attorney” system); and (3) automatic representation by a public defender agency. Many states utilize local government funding and therefore allow the local government to select the appointment system it prefers. Where a contract-attorney or public defender system is used, it will be supplemented by individual appointments where the contract or defender office’s representation of one defendant creates a potential conflict of interest in the representation of other defendants.

The appointment process in systems relying on individual assigned counsel will vary. In some judicial districts, the appointment will be made by the court, with the judge either exercising discretion in choice or automatically rotating appointments among a panel of approved attorneys seeking appointments. In others, the court is removed from the appointment process, with a rotation system administered by an independent authority or agency that approves the panel. Contract systems may utilize a variety of different contract agencies, but such agencies most often will be a private law firm or a non-profit entity sponsored by the local bar association or the legal aid society. The contract may cover all cases or a specific number of cases, and may be based on a flat fee or an hourly fee with caps (the typical fee system for appointed counsel). Public defender agencies will be either statewide agencies (with local offices) or local government agencies. Their attorneys are government employees, engaged full time in representing indigent criminal defendants. In larger offices, other personnel include investigators and social workers.

5. Judges. Basically three levels of judges are involved in the administration of the criminal justice process. At the first level are the courts of limited jurisdiction. These courts are known by a variety of different titles, including “Justice of the Peace Courts,” “Police Courts” and “County Courts.” Because they perform many of the same functions that were assigned to “magistrates” in the English common law system, these courts often are described as “magistrate courts.” The second level consists of trial courts of general jurisdiction. These courts have a variety of different titles, including “District Court,” “Court of Common Pleas,” “Superior Court,” and “Circuit Court,” but often are described as a group as “felony trial courts” or “general trial courts.” Finally, the third tier consists of the state appellate courts. Since these courts basically have a single function, appellate review, which is discussed in section three (see step 17, p. 24 infra), and a fairly standard structure (also discussed there), our discussion here will focus on the “magistrate courts” and the “felony trial courts”.

Magistrate courts. The trial jurisdiction of magistrate courts will not extend beyond misdemeanors, and some states will exclude from that jurisdiction more serious misdemeanors. These courts, however, also have considerable additional authority that extends to offenses (e.g., felonies) that are not within their trial jurisdiction. That authority begins with matters that can occur even before the

9. All but a handful of the 94 federal districts now have either a Federal Public Defender or a Community Defender Organization (similar, but not a government entity). These organizations are supplemented by private attorneys, as each district assigns only a predetermined portion of its docket to the FPD or CDO. The private attorneys are commonly known as “panel attorneys” because they are selected from a court-approved panel of “qualified” attorneys (typically attorneys who meet certain experience requirements that evidence a defense expertise).
Once arrested, the defendant must be brought to court for a first appearance, which also is known as an "initial presentment," "arraignment on the complaint," or "preliminary arraignment" (see step 7, p. 19 infra). Although this proceeding can occur before any judge, it traditionally is the magistrate's responsibility. The magistrate's functions here include determining the conditions for pretrial release and if the person is eligible for court-appointed counsel, ensuring that steps have been taken to provide appointed counsel. If the charge is a felony, and a preliminary hearing is held (see step 8, p. 20 infra), the magistrate also will conduct that proceeding.

In most states, the magistrate judge sits on a court that is separate from the trial court, but in some states, the magistrate court is part of a consolidated trial court (i.e., the magistrate court is, in effect, a division of the trial court). In states where the magistrate court is separate, there may be several different types of magistrate courts, including some designated as courts "not-of-record". Such courts are designed to provide a swift, inexpensive, and convenient mode of disposition of minor criminal charges, with a more formal "backup" adjudication available to the defendant through a trial de novo (i.e., a new trial on both facts and law) before the trial court of general jurisdiction. Judges of magistrate courts not-of-record frequently are part-time, lay judges. In contrast to their exercise of trial jurisdiction, magistrates in a court not-of-record will have the same authority with respect to preliminary proceedings in both misdemeanor and felony cases (e.g., on the issuance of arrest warrants) as magistrates in courts of record.

**Felony trial courts.** These courts will be part of a statewide system, but they will be divided into judicial districts that consist of a single county or several contiguous counties. In most respects, felony trial courts are similar in their authority from one state to another. The primary distinction is that in some states their trial authority will include a portion of the misdemeanor docket (e.g., all misdemeanors punishable by incarceration of more than six months). The primary organizational distinction relates to the size of the court. Even where multi-county districts are utilized, there is likely to be a number of courts that have three or fewer judges. On the other side, roughly half of all state felony trial judges sit in districts with fifteen or more judges. Larger districts often use a structure that emphasizes specialization. Many utilize separate criminal and civil divisions. The criminal division may be further divided to create a special court for particular types of cases (e.g., narcotics). Some multi-judge courts assign judges to specialized calendars, dealing with such matters as pretrial motions, grand jury items, and the acceptance of pleas negotiated prior to placing a case on the trial calendar. Very often, judges are assigned to particular divisions in anticipation that they will exercise their discretion in a particular fashion that is deemed in the best interests of the court as whole (typically reflecting an interest in "moving the docket" and maintaining a degree of uniformity in the treatment of similar administrative decisions).

10. In the federal system, magistrate judges are part of the federal district court. Like state magistrates, they are judges with limited trial jurisdiction, and conduct various proceedings relating to felonies as well as misdemeanors. However, with the approval of the federal trial court (the United States District Court), their authority can be extended beyond preliminary proceedings (e.g., setting bail and issuing warrants) and also include duties that relate directly to the adjudication of felonies (e.g., ruling on pretrial motions, and presiding over jury selection with the consent of defense counsel).
SECTION 3. THE STEPS IN THE PROCESS

Supreme Court opinions almost always will describe in detail the particular procedural application that is being challenged as unconstitutional. Other procedures that were applied in the particular case commonly will be summarized briefly, so as to place the challenged procedure in context, but that summary will assume familiarity with the general procedural structure of the process (e.g., the Court will simply note that the defendant was “indicted” or “arrested,” without explaining what those steps entail). A similar approach often is taken when the Court refers to a procedure that typically would follow the contested procedure and discusses how it would be impacted by the Court’s ruling on the contested procedure. Some commentators argue that even where the Court’s opinion fails to specifically refers to other procedural steps, its ruling is likely to have taken into account the general character of at least some of those steps. They maintain that constitutional regulation, like all regulation of the criminal justice process, builds upon an understanding of the likely interplay of the procedures applied at different stages of the process. This section seeks to provide a “big picture” understanding of that interplay through an overview of the basic steps that typically carry the process from its initiation to its completion.

The specific objectives of this overview are to position each of the basic steps within the “typical” progression of the process, to introduce the relevant terminology, and to briefly describe the character of the individual procedures that may be part of the particular step. As a result of the diversity in legal regulation described in section one, there is no “standard” set of procedures that are potentially applicable to all cases in all jurisdictions. What the overview describes is the “typical” steps in the progression of a “typical felony case” in a “typical” jurisdiction. That objective incorporates several important limitations, which should be kept in mind.

Initially, the overview concentrates on procedures adopted in a substantial majority of our fifty-two lawmaking jurisdictions. Where the jurisdictions are fairly evenly divided, that division will be noted, but where only a small group of states depart from the majority position, that minority position will not be noted. In addition, the overview describes the majority position by reference only to the basic character of a procedure; it ignores variations in other aspects of the procedure. Thus, it lumps together all states requiring grand jury issuance of a charging instrument, ignoring state variations in such matters as the composition of the grand jury and the evidentiary standard applied by the grand jury in deciding to charge.

Jurisdictions often draw substantial distinctions in the procedures applied to “minor” and “major” offenses, with the critical line of distinction commonly drawn between misdemeanors and felonies (see fn. 3 supra). Our overview is limited to the processes applied to non-capital felony cases. A substantial majority of the Court’s leading criminal justice opinions have involved felony offenses (although, nationally, there are roughly 5 or 6 times as many misdemeanor prosecutions as felony prosecutions).

The exercise of discretion will determine, in part, which procedures are applied in a particular case. A procedure may be authorized under the law of a particular jurisdiction, but not required, making its use dependent upon the discretionary choice of an enforcement official (police or prosecutor), a judicial official (magistrate or trial judge), or a defendant. Our overview, in large part, looks only to whether a procedure is authorized. Where available statistics indicate that a widely authorized procedure is rarely utilized in practice in a substantial group of states, the overview will take note of that pattern of
discretionary choice. In general, however, the overview does not seek to access how often an authorized procedure actually is used in practice.

Finally, our overview will not take account of variations in chronology. It will assume the chronology that occurs in the majority of felony cases, although many felony cases do not follow that chronology. Similarly, the overview discusses each step as occupying a specific place in the progression of a case, but that is not true of all procedures. While some steps have a definite starting and ending point, others are continuing and overlap other steps in the process. Investigatory procedures, for example, do not always stop with the filing of charges, but may continue through to the initiation (and sometimes the end) of the trial. So too, the decision on pretrial release, though it comes initially at the first appearance, is subject to possible reconsideration as the case progresses.

Step 1: Pre-Arrest Investigation. The first step in the processing of what eventually may become a felony prosecution most often is a pre-arrest investigation by the police. Criminal justice analysts commonly divide pre-arrest police investigative procedures by reference to the general focus of the investigation—distinguishing between investigations aimed at solving specific past crimes which police believe to have been committed (commonly described as "reactive" investigations), and investigations aimed at unknown but anticipated ongoing or future criminal activity (commonly described as "proactive" investigations). A less common, third category of pre-arrest investigation is the investigation conducted primarily through the use of the subpoena authority of the grand jury. Each of these three categories of pre-arrest investigative activities is briefly discussed below.

Reactive Investigations. General purpose police agencies (e.g., local police departments), traditionally have devoted the vast majority of their investigative efforts to reactive investigations. This is an "incident driven" or "complaint-responsive" style of policing, flowing from various aspects of local policing, including the neighborhood patrol and the 911 emergency telephone link. The police receive a citizen report of a crime (typically from the victim or an eyewitness), or they discover through personal observations indicators of a committed crime, and they then proceed to initiate an investigation responsive to that "known crime." Depending upon the type of information that initially identifies the crime, the pre-arrest investigative activity will have one or more of the following objectives: (1) determining that the crime actually was committed; (2) determining who committed the crime; (3) collecting sufficient reliable information to support the level of probability needed to arrest that person ("probable cause");1 and (4) locating the offender so that he may be arrested. Not all cases involve significant pre-arrest investigation. In cases involving "on-scene arrests," where, for example, a patrol officer comes across an individual who is in the process of a crime and immediately arrests that person, the observation which establishes the "known offense" often is the totality of the pre-arrest investiga-

11. An investigative procedure that promises to provide information establishing probable cause most often will also provide evidence that can be used at trial to establish guilt (or, at the least, leads to such evidence). Thus, most of the investigative procedures discussed in this section serve the objectives of both pre-arrest and post-arrest investigation. Whether a particular procedure is employed before or after arrest often depends on whether (1) probable cause as to a suspect can more conveniently be obtained through another procedure, and (2) whether the police perceive a need to take the suspect into custody promptly after establishing probable cause. Police typically look first to the procedure that is most promising and most convenient in establishing probable cause. Once probable cause is established, where a prompt arrest is desirable, police ordinarily will make the arrest and then look to other investigative procedures that appear likely to produce incriminating evidence. Where a prompt arrest is not needed (or cannot be achieved due to flight of the suspect), police may turn to those other procedures prior to the arrest.
An immense range of pre-arrest investigative procedures may be utilized by the police in reactive investigations. A variety of factors—including the character of the crime, the “traces” of the offense immediately available to the investigators, police agency resources, police agency policies, and the strictness of any legal prerequisites—will determine which investigative practices will be used in a particular case. The most common pre-arrest investigative practices include: (1) interviewing of victims; (2) interviewing witnesses present when the investigating officer arrives at the scene of the crime; (3) canvassing the neighborhood for (and interviewing) still other persons with relevant information; (4) interviewing persons who are viewed as having possibly committed the crime (e.g., persons matching the reported description of the offender, persons observed acting suspiciously, or persons fitting a general profile of the likely offender), which sometimes will involve the exercise of police authority to temporarily detain the suspect (“a stop”) and pat-down the suspect’s outer-clothing for weapons (a “frisk”); (5) the examination of the crime scene and the collection of physical evidence found there (including matter that can be used in forensic comparisons, such as fingerprints); and (6) examining criminal history and other computer files for information that might be helpful in interviewing witnesses and identifying and locating suspects.

Most of the above procedures, though fairly common, are not the subject of Supreme Court opinions (or any other judicial opinions) as they are not subject to constitutional regulation (or regulation under state law). The “stop” and the “frisk” are the two notable exceptions. Various far less common pre-arrest investigative procedures are subject to constitutional regulation, and those are the procedures that have been treated in Supreme Court caselaw. Such procedures include the pre-arrest search for evidence of a crime in the dwelling or office of a suspect (typically requiring a court order authorizing the search, described as a “search warrant”), electronic surveillance aimed at intercepting incriminating conversations (also typically requiring a court order, and used in only a small fraction of 1% of all felony investigations), and providing various incentives to persons to become informants (a practice that tends to be useful only as to limited classes of offenses and offenders).

Proactive Investigations. Although general purpose police agencies traditionally have concentrated their investigative efforts on solving known crimes, those agencies also have regularly used, in a limited fashion, proactive investigations. Indeed, in recent years, many local police departments in large communities have sharply increased their utilization of proactive investigative procedures. Also, many special-function police agencies (such as the federal Drug Enforcement Administration) traditionally have devoted a quite substantial portion of their resources to proactive investigations.

Proactive investigations are aimed at uncovering criminal activity that is not specifically known to the police. The investigation may be aimed at placing the police in a position where they can observe ongoing criminal activity that otherwise would both be hidden from public view and not reported (as typically is the case with offenses that prohibit the possession of contraband or proscribe transactions between willing participants). It may be aimed at inducing persons who have committed crimes of a certain type, including many unknown to the police, to reveal themselves (as in a “fencing sting”). Proactive investigations also often are aimed at anticipating future criminality and placing police in a position to intercept when the crime is attempted. Here, the investigative technique may be
designed simply to gain information that will permit the police to predict when and where a crime is likely to be committed, or it may be designed to "induce" the criminal attempt at a particular time and place by creating a setting likely to spur into action those prone to criminality.

A variety of different procedures may be used in a proactive investigation, with the choice of procedure largely tied to the specific objective of the investigation. Deception is a common element of many proactive procedures. In traditional undercover operations, the police assume a false identity and present themselves as willing to participate in criminal activities (as where undercover agents "set-up" fencing operations or narcotics transactions). So too, deception is the key to a "decoy tactic" of providing what appears to be an easy target for victimization (e.g., a drunk with an exposed wallet or a business of the type that is readily subject to extortion). Surveillance through stakeouts, covert patrols, and electronic monitoring also rests on deception by hiding the surveillance.

Other proactive techniques rely on intrusive confrontations designed to place police in a position where they can observe what otherwise would be hidden or to elicit nervous or unthinking incriminatory responses that will provide a legal grounding for taking further investigative action (e.g., an arrest or stop). Thus, police following an aggressive motorized patrol strategy will fully utilize traffic laws to maximize stops of motorists, thereby gaining greater opportunity to peer into car windows, to ask questions, and to request consent to a search of the vehicle. Similarly, under a practice of heavy field interrogation, police will frequently approach pedestrians and initiate questions to determine who they are and what they are doing. Such intrusive confrontations are most often used on a selective basis, with police concentrating their efforts on those characteristics of the social environment that suggest to them possible criminality (e.g., high-crime neighborhood, suspicious class of persons, unusual behavior). In general, proactive investigative procedures are more resource intensive, more intrusive, arguably more likely to foster community opposition, and clearly pose more legal problems than typical reactive investigative procedures. Not surprisingly, they have received considerable attention in judicial rulings (including Supreme Court rulings), disproportionate to their limited portion of the total sum of police investigative activities.

Prosecutorial Investigations. Not all prearrest investigations are conducted by police. For certain types of crimes, the best investigatory tool is the subpoena—a court order directing a person to appear in a particular proceeding for the purpose of testifying and presenting specified physical evidence (e.g., documents) within his possession. The subpoena authority generally is available for the investigation of crime only through the grand jury, although many jurisdictions also grant a limited subpoena authority to enforcement agencies charged with regulating particular types of potentially criminal activities. The grand jury, although it tends to be known more for its screening function in reviewing the prosecution's decision to charge (see step 10), also has authority to conduct investigations into the possible commission of crimes within the judicial district in which it sits. In carrying out this function, the grand jurors, being a group of laypersons with no special expertise in investigation, quite naturally rely heavily on the direction provided by their legal advisor, who is the prosecutor. Thus, grand jury investigations become, for all practical purposes, investigations by the prosecutor.

Grand jury investigations tend to be used where (1) witnesses will not cooperate with the police (they can be compelled by subpoena to testify before the grand jury and given immunity to replace their self-incrimination privilege should they refuse to testify on that ground); (2) the critical evidence of the crime is
likely to be a “paper trail” buried in voluminous records of business dealings (as the subpoena can be used to require production of such records where the police lack the necessary probable cause predicate for obtaining those documents through a search); and (3) the area of investigation is especially sensitive, reflecting a strong need to keep the ongoing investigation from the public gaze (an objective facilitated by grand jury secrecy requirements) or to ensure public confidence in the integrity of the investigation (an objective facilitated by the participation of the lay grand jurors). Criminal investigations presenting such special needs tend to deal with crimes of public corruption (e.g., bribery), misuse of economic power (e.g., price-fixing), or widespread distribution of illegal services or goods (e.g., organized crime operations). The investigation of such offenses through the grand jury often has both reactive and proactive qualities. The investigation starts with some information (typically coming from informants or investigators) suggesting that a specific offense has been committed, but once that offense is established, the investigation often will branch out to determine whether there also exists similar or related criminal activity, not previously identified, by the same or other parties (a portion of the grand jury investigation often characterized as a “fishing expedition”).

Step 2: Arrest. Once a police officer has obtained sufficient information to justify arresting a suspect (i.e., “probable cause” to believe the person has committed a crime), the arrest ordinarily becomes the next step in the criminal justice process. While the definition of an arrest may vary with the context in which that term is used, police agencies traditionally describe an arrest as the taking of a suspect into custody for the purpose of charging him with a crime. While this definition makes the arrest the first step in the charging process, and the first step in ensuring the person’s presence at any prospective trial, it also plays an important role in the continuation of the investigation of the crime. The arrest allows for a search of arrestee’s person, which can disclose incriminating evidence, and as discussed in step 3 infra, it facilitates investigative procedures that require the participation of the suspect.

Police may have various options in dealing with a situation in which an arrest is authorized. Initially, as an alternative to a “full custody” arrest, many jurisdictions authorize a police officer to briefly detain the suspect and then release him upon issuance of an official document (commonly titled a “citation,” “summons” or “appearance ticket”) which directs the suspect to appear in court on a set date to respond to the charge specified in the document. In most communities, this release-on-citation alternative is only infrequently used (if at all) for felonies (in contrast to misdemeanors, where its use is fairly common).

Secondly, the police may have the option of making the arrest with or without an “arrest warrant” (a court order authorizing the police to arrest a particular person). In some circumstances, the law may require that the police obtain a warrant unless there is not ample time to do so. The warrant is obtained by making a showing before a judge (typically a magistrate) that there exists probable cause to believe that the prospective arrestee committed the crime for which he will be arrested. In most circumstances, the police also have the option of making an arrest without a court authorization in advance (a “warrantless arrest”), although a showing of probable cause then will have to be made subsequently to the magistrate court (see step 6 infra). When the choice is available, the clearly dominant practice in all jurisdictions is to proceed without first obtaining a warrant.

In making an arrest, the officer’s first task is to secure the arrestee, using force if necessary. The officer usually then will search the arrestee’s person and
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remove any weapons, contraband, or evidence relating to a crime (although some agencies encourage use of only a frisk, for weapons, rather than a full search, in certain situations). Under the appropriate circumstances, this “search incident to an arrest” may be extended beyond the person of the arrestee to include a contemporaneous search of: containers being carried by the arrestee (e.g. a purse or package); the passenger compartment of a vehicle and containers therein, in the case of a roadside arrest of the driver or passenger; and that portion of a room that is within the reaching distance of the arrestee where the arrest is made within a structure (e.g. a residence or office).

Once the search incident to the arrest is completed, the arrestee will be transported, by the arresting officer or other officers called to the scene, to a police station or similar “holding” facility. It is at this facility that the arrestee will be taken through a process known as “booking.” Initially, the arrestee’s name, the time of his arrival, and the offense for which he was arrested are noted in the police “blotter” or “log.” The arrestee then will be photographed and fingerprinted. After that, the arrestee ordinarily will be allowed one telephone call.

Once the booking process is complete, the arrestee will be placed in a “lockup” (usually some kind of cell) pending his subsequent presentation at a first appearance (step 7 infra). Before entering the lockup, the arrestee will be subjected to another search, often more thorough than that conducted incident to the arrest, with his personal belongings removed and inventoried. In some jurisdictions, persons arrested on lower-level felonies can gain release from the lockup by meeting the prerequisites of a “stationhouse bail program” (i.e., making a cash deposit, in an amount specified by a judicially approved “bail schedule,” and agreeing to certain conduct-restrictions, including appearance in court on a specified date).

Step 3: Post-Arrest Investigation. Not all of the post-arrest investigative procedures that may produce further evidence of criminal activity will necessarily have been designed for that purpose. Concerns such as guaranteeing officer safety and the protection of valuables play a role in several standard post-arrest investigative practices, such as the search of arrestee’s person incident to both the arrest and the placement of the arrestee in a lockup, and the search of the arrestee’s automobile where it is impounded. Most post-arrest investigative procedures, however, are aimed solely at gaining further evidence that the defendant committed the identified crime, and whether they are used depends in large part on the strength of the evidence obtained prior to the arrest. Many of these procedures could have been utilized prior to the arrest, but were postponed until after the arrest as they were not needed to establish probable cause (see fn. 11 supra). Others, however, will be procedures that build upon information and evidence that has been obtained as a result of the arrest (e.g., a forensic examination of a weapon seized in a search incident to an arrest).

One critical source made available by the arrest itself is the person of the arrestee. That source allows police, for example, to obtain eyewitness identification by placing the arrestee in a grouping of physically similar persons shown to the witness (a “lineup”); having a witness view the arrestee individually (a “showup”), or taking the arrestee’s picture and showing it to witnesses (usually with photographs of other persons in a “photographic lineup”). Similarly, the
police may obtain from the arrestee identification exemplars, such as handwriting or hair samples, that can be compared with evidence found at the scene of the crime. As the arrestee is now in police custody, police questioning of the arrestee also is greatly facilitated (although custodial interrogation does require that the arrestee be advised of certain rights, including the right not to respond, and that he agree to forego those rights).

**Step 4: The Decision to Charge.** For the vast majority of felony cases, the initial decision to charge a suspect with a crime is made when a police officer makes a warrantless arrest of the suspect. That decision may be reversed on internal review within the police department, typically by the “booking officer.” Police departments vary in their willingness to utilize that authority. Some will decide against charging (and immediately release the arrestee) only where the arrest is clearly in error, while others will more fully evaluate the available evidence, and reject proceeding where probable cause may exist but the case clearly is “weak.” As to lower-level felonies, some will decide against charging where the evidence is promising but the reviewing officer concludes that the offense can more appropriately be handled by a “stationhouse adjustment” (e.g., reconciliation with a family-member victim, or the arrestee’s willingness to become an informant). Even where the police agency provides an in-depth internal review, only a very small percentage of felony arrests will be rejected within the police department (although a somewhat larger percentage of felony arrestees are likely to have their booking charge reduced to a misdemeanor).

The ultimate authority over charging rests with the prosecutor, rather than the police. The prosecutor is engaged in an ongoing evaluation of the charge throughout the post-arrest criminal justice process, but a prosecutor’s decision not to go forward on a charge requires a different processing action depending upon whether that decision is made: (1) prior to the filing of complaint (step 5 infra); (2) after the complaint is filed, and prior to the filing of an indictment or information (step 10 infra); or (3) after the filing of the indictment or information. A decision not to proceed at the first stage simply results in the complaint not being filed (leading to the common description of that decision as a “no-paper decision”), and the release of the arrestee from police custody without any involvement of the judiciary. A decision not to proceed at the second stage commonly occurs in connection with the prosecutor’s review of the case against the defendant prior to presenting it to a magistrate at a preliminary hearing (step 8 infra) or to a grand jury (step 9 infra). This decision commonly is formalized in a prosecution motion before the magistrate to withdraw the complaint (although, where grand jury review is being used, the prosecutor can ask the grand jury to vote against indicting, which similarly terminates the prosecution). A decision not to proceed further at the third stage (i.e., following the filing of an indictment or information) requires a prosecutor’s *nolle prosequi* (“no wish to prosecute”) motion, which must be approved by the trial court. The combination of all three non-prosecution decisions typically accounts for the disposition of a significant portion of all felony arrests.

13. Complete statistics on prosecutor screening are available only for a comparatively small group of states. These statistics show considerable variation among prosecutors’ offices as to the frequency of their decisions not to prosecute at any one stage of the process. At the same time, however, the statistics present a fairly consistent picture of the significance of the totality of the non-prosecution decisions made by prosecutors through the process as a whole. For states providing statistics on the disposition of felony arrests, prosecutorial non-prosecution decisions invariably account for the second highest percentage of dispositions, trailing only guilty pleas (albeit, trailing by a wide margin, e.g., 25% non-prosecutions to 65% guilty pleas).
Prosecutorial review of the police charging decision prior to the filing of the complaint must occur in a short time span, as the arrested defendant must be brought before the magistrate within 24 or 48 hours (see step 7 infra), and the complaint must have been filed at that point. Not surprisingly, there is considerable variation among prosecutors' offices as to the scope of their review at this stage, with some largely leaving the decision to file the complaint to the police, and delaying their initial review of the charge in most felony cases until the second stage noted above.

Where a prosecutor decides against proceeding in the prosecutor's initial screening of the police department's charging decision (whether before or after the filing of the complaint), that conclusion most often will have been based upon anticipated difficulties of proof (e.g., the evidence is insufficient to convict, the victim is reluctant to testify, or key evidence was obtained illegally and therefore will not be admissible). However, the prosecutor also may decide against prosecution, even though the evidence clearly is sufficient, because there exists an adequate alternative to prosecution (e.g., the arrestee is willing to participate in a diversion program,\(^{14}\) or the arrestee is on probation and can be proceeded against more expeditiously by revoking his probation), or special circumstances render prosecution not "in the interest of justice". A decision not to proceed made on reexamination of an earlier decision to prosecute (the typical situation where the prosecutor decides to drop charges at the third stage) is most likely to be the product of a change in circumstances that has either eliminated the need for prosecution (e.g., the defendant has been convicted on other charges) or substantially reduced the likelihood of success (e.g., a critical witness is no longer available).

Where the prosecutor in the initial screening process decides in favor of criminal prosecution, other decisions also must be made. Initially, the prosecutor must determine whether the proposed charge is set at the correct level, or whether there is a need to reduce or raise the offense-level recommended by the police. In many instances, the prosecutor must also consider the potential for charging multiple separate offenses (as where the arrested person allegedly committed several separate crimes in a single criminal transaction or engaged in more than one criminal transaction). Here the prosecutor must determine whether the charging instrument should allege all offenses or simply some of the offenses (e.g., only the most serious, or only those easiest to prove). Where the prosecutor chooses to proceed on more than one charge, the law may give to the prosecutor another choice—whether to bring the charges in a single prosecution or in multiple, separate prosecutions. A similar choice must be made where several people have been arrested for their participation in same crime, as each can be proceeded against separately or the group can be prosecuted jointly through a single charging instrument naming multiple defendants.

**Step 5: Filing the Complaint.** Assuming that the police decide to charge and that decision is not overturned in a pre-filing prosecutorial review, the next step is the filing of charges with the magistrate court, which must be done prior to

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\(^{14}\) A diversion program offers the arrestee the opportunity to avoid conviction if he or she is willing to perform prescribed "rehabilitative steps" (e.g., making restitution to the victim, undertaking a treatment program). The diversion agreement operates, in effect, to place the arrestee on a probationary status without conviction. In many jurisdictions, this is achieved by the prosecutor promising not to file charges if the arrestee complies with the prescribed conditions. In others, charges initially are filed with the court, then held in abeyance for the period during which the arrestee is to meet the prescribed conditions, and dismissed with prejudice once the arrestee meets those conditions. If the arrestee fails to meet the prescribed conditions, the prosecution against the arrestee proceeds (with the charges then filed, if that had not been done previously).
the arrestee's scheduled first appearance (see step 7 infra). The initial charging instrument commonly is called a "complaint." For most offenses, the complaint will be a fairly brief document. Its basic function is to set forth concisely the allegation that the accused, at a particular time and place, committed specified acts constituting a violation of a particular criminal statute. The complaint will be signed by a "complainant," a person who swears under oath that he or she believes the factual allegations of the complaint to be true. The complainant usually will be either the victim or the investigating officer. When an officer-complainant did not observe the offense being committed, but relies on information received from the victim or other witnesses, the officer ordinarily will note that the allegations in the complaint are based on "information and belief." With the filing of the complaint, the arrestee officially becomes a "defendant" in a criminal prosecution.15

**Step 6: Magistrate Review of the Arrest.** Following the filing of the complaint and prior to or at the start of the first appearance (see step 7 infra), the magistrate must undertake what is often described as the "Gerstein review." As prescribed by the Supreme Court's decision in *Gerstein v. Pugh,* (fn. a, p. 159) if the accused was arrested without a warrant and remains in custody (or is subject to restraints on his liberty as a condition of stationhouse bail), the magistrate must determine that there exists probable cause for the offense charged in the complaint. This ordinarily is an *ex parte* determination, similar to that made in the issuance of an arrest warrant. If the magistrate finds that probable cause has not been established, she will direct the prosecution to promptly produce more information or release the arrested person. Such instances are exceedingly rare, however. Since a judicial probable cause determination already has been made where an arrest warrant was issued, a *Gerstein* review is not required in such cases (or in case in which the arrestee was indicted by a grand jury prior to his arrest).

**Step 7: The First Appearance.** An arrestee who is held in custody, or who otherwise remains subject to custodial restraints (as where released on stationhouse bail), must be presented before the magistrate court within a time period typically specified as either 24 or 48 hours. Since the arrestee is now a defendant (the complaint having been filed), and this is his initial appearance in that capacity, this proceeding before the magistrate is described in many jurisdictions as the "first appearance," (although other jurisdictions use "initial presentment," "preliminary arraignment," or "arraignment on the complaint"). Where the accused person was not arrested by the police, but issued a citation (see step 2 supra), the 24 or 48 hour timing requirement does not apply and the first appearance may be scheduled a week or more after the issuance of the citation.

The first appearance in a felony case commonly is a quite brief proceeding. Initially, the magistrate will inform the defendant of the charge in the complaint, of various rights possessed by the defendant, and of the nature of further proceedings. The range of rights and proceedings mentioned will vary from one jurisdiction to another. Commonly, the magistrate will inform the defendant of his right to remain silent, and warn him that anything he says to the court or the police may be used against him at trial. The defendant always will be informed of at least the very next proceeding in the process, which usually will be a preliminary hearing. The magistrate also will set a date for the preliminary hearing unless the defendant at that point waives his right to that hearing.

15. Where the pre-arrest investigation was conducted through the grand jury (see step 1 supra), the grand jury is likely to have issued an indictment even before the person charged in the indictment is arrestee. Here, an arrestee became a "defendant" (through the charge of the indictment) even before he was arrested.
Where the felony defendant is not represented by counsel at the first appearance, the magistrate’s responsibilities include making certain that the defendant is aware of his right to be represented by counsel, including the right to counsel funded by the state if the defendant is indigent. In some jurisdictions the indigency determination is made at the first appearance, and the magistrate initiates the appointment of state-funded counsel on a finding of indigency. In others, the indigency determination will be made prior to the first appearance, by a court administrator or public defender, and the assignment of counsel will have occurred prior to the first appearance.

One of the most important first-appearance functions of the magistrate is to fix the terms under which the defendant can obtain his release from custody pending the disposition of the charges against him. This process is still described at “setting bail,” although release today often is conditioned on non-financial requirements (e.g., curfew and a restriction on travel) rather than traditional “bail” (i.e., the posting of a security, such as cash or a bond). A person released on no more than a promise to appear at trial is said to be “released on his own recognizance.” Setting bail requires consideration of various information relating to the alleged offense (e.g., aggravating circumstances) and the offender (e.g., prior criminal history and community ties). This information may be collected prior to the first appearance (typically by a pretrial services agency) or at the first appearance itself. In many jurisdictions, various classes of arrestees are drug-tested (typically using a urine sample) as part of the pre-appearance information gathering process. Drug-testing may also be imposed as a condition of release.

Where the magistrate imposes a financial condition (e.g., requires a bailbond), and the defendant is not prepared to meet that condition, the defendant will be held in custody in a jail and will remain there until the financial condition is met or there is a final disposition of the charges. Available statistics indicate that, in metropolitan judicial districts, a substantial portion of felony defendants (e.g., 30-40%) fail to gain their release prior to the final disposition of the charges. Many jurisdictions also have a “preventive detention” exception to the setting of bail. Here, upon a necessary finding of danger or likely flight, the magistrate does not set release terms, but instead orders that the defendant continue to be held in custody pending final disposition of the charges.

**Step 8: Preliminary Hearing.** Following the first appearance, the next scheduled step in a felony case ordinarily is the preliminary hearing (sometimes called a preliminary “examination”). All but a handful of our fifty-two jurisdictions grant the felony defendant a right to a preliminary hearing, to be held within a specified period (typically, within a week or two if the defendant does not gain pretrial release and within a few weeks if released). Actual use of the preliminary hearing varies considerably from one jurisdiction to another (and sometimes from one judicial district to another in the same jurisdiction). In many jurisdictions, the prosecution, if it so chooses, can preclude a preliminary hearing by obtaining a grand jury indictment prior to the scheduled date of the hearing. Also, in some jurisdictions, defendants who intend to plead guilty commonly waive the hearing and move directly to the trial court. The end result is that preliminary hearings are held in almost all felony prosecutions in some jurisdictions, in a substantial majority in others, in a significant minority in still others, and almost never in several jurisdictions.

Where the preliminary hearing is held, it will provide, like grand jury review (see step 9 infra), a screening of the decision to charge by a neutral body. In the preliminary hearing, that neutral body is the magistrate, who must determine whether, on the evidence presented, there is sufficient evidence to send the case
forward. Ordinarily, the magistrate will already have determined that probable cause exists as part of the ex parte screening of the complaint (see step 6 supra). The preliminary hearing, however, provides screening in an adversary proceeding in which both sides are represented by counsel. Typically, the prosecution will present its key witnesses and the defense will limit its response to the cross-examination of those witnesses (although the defense has the right to present its own witnesses and may occasionally do so).

If the magistrate concludes that the evidence presented is sufficient for the prosecution to move forward (usually that it establishes probable cause), she will "bind the case over" to the next stage in the proceedings. In an indictment jurisdiction (see step 9 infra), the case is bound over to the grand jury, and in a jurisdiction that permits the direct filing of an information (see step 10 infra), the case is bound over directly to the general trial court. If the magistrate finds that the evidence supports only a lesser charge (e.g., a misdemeanor), the charge will be reduced. If the magistrate finds that the evidence is insufficient to support any charge, the prosecution will be terminated.

**Step 9: Grand Jury Review.** Although almost all American jurisdictions still have provisions authorizing grand jury screening of felony charges, such screening is mandatory only in those jurisdictions requiring felony prosecutions to be instituted by an "indictment," a charging instrument issued by the grand jury. In a majority of the states, the prosecution is now allowed to proceed either by grand jury indictment or by information at its option. Because prosecutors in these states most often choose to prosecute by information, the states providing this option commonly are referred to as "information" states. Eighteen states, the federal system, and the District of Columbia currently require grand jury indictments for all felony prosecutions. These jurisdictions commonly are described as "indictment" jurisdictions. Four additional states are "limited indictment" jurisdictions, requiring prosecution by indictment only for their most severely punished offenses (capital, life imprisonment, or both).

The grand jury typically is selected randomly from the same pool of prospective jurors (the "venire") as the trial jury. Unlike the trial jury, however, it sits not for a single case, but for a term that may range from one to several months. As in the case of the magistrate at the preliminary hearing, the primary function of the grand jury is to determine whether there is sufficient evidence to justify a trial on the charge sought by the prosecution. The grand jury, however, participates in a screening process quite different from the preliminary hearing. It meets in a closed session and hears only the evidence presented by the prosecution. The defendant has no right to offer his own evidence or to be present during grand jury proceedings.

If a majority of the grand jurors conclude that the prosecution's evidence is sufficient, the grand jury will issue the indictment requested by the prosecutor. The indictment will set forth a brief description of the offense charged, and the grand jury's approval of that charge will be indicated by its designation of the indictment as a "true bill." If the grand jury majority refuses to approve the proposed indictment, the charges against the defendant will be dismissed.

**Step 10: The Filing of the Indictment or Information.** If an indictment is issued, it will be filed with the general trial court and will replace the complaint as the accusatory instrument in the case. Where grand jury review either is not required or has been waived, an information will be filed with the trial court. Like the indictment, the information is a charging instrument which replaces the complaint, but it is issued by the prosecutor rather than the grand jury.
**Step 11: Arraignment on the Information or Indictment.** After the indictment or information has been filed, the felony defendant is “arraigned”—i.e., he is brought before the felony trial court, informed of the charges against him, and asked to enter a plea of guilty, not guilty, or, as is permitted under some circumstances, *nolo contendere* (a plea in which the defendant accepts a judgment of conviction, but does not admit guilt). In the end, most of those felony defendants whose cases reach the trial court will plead guilty. At the arraignment, however, they are likely to enter a plea of not guilty. Where there has not been a preliminary hearing, defense counsel probably will not be fully apprised of the strength of the prosecution’s case at this point in the proceedings. Also, in the vast majority of jurisdictions, guilty pleas in felony cases are the product of plea negotiations with the prosecution, and in many places, that process does not start until after the arraignment. When the defendant enters a plea of not guilty at the arraignment, the judge will set a trial date, but the expectation generally is that the trial will not be held.

**Step 12: Pretrial Motions.** In most jurisdictions, a broad range of objections must be raised by a pretrial motion. Those motions commonly present challenges to the institution of the prosecution (e.g., claims regarding the grand jury indictment process), attacks upon the sufficiency of the charging instrument, challenges to the scope, location, and timing of the prosecution (claiming improper joinder of charges or parties, improper “venue”—i.e., the case is being prosecuted in the wrong judicial district, or violation of speedy trial requirements), requests for discovery (see step 13 infra) when there is a dispute over what is discoverable, and requests for the suppression of evidence allegedly obtained through a constitutional violation. While some pretrial motions are made only by defendants who intend to go to trial, other motions (e.g., for discovery) may benefit as well defendants who expect in the end to plead guilty. Nevertheless, pretrial motions are likely to be made in only a small portion of the felony cases that reach the trial court. Their use does vary considerably, however, with the nature of the case. In narcotics cases, for example, motions to suppress are quite common. In the typical forgery case, on the other, pretrial motions of any type are quite rare.

**Step 13: Pretrial Discovery.** Pretrial discovery is the process by which the prosecution and defense mutually disclose to each other some aspects of the evidence that they probably would present at trial. Discovery is aimed not only at avoiding “trial by surprise,” but also at facilitating pretrial settlement of the case through a negotiated plea. States vary in the scope of the disclosure they require, although the prosecution universally is required to disclose substantially more than the defense. The prosecution, for example, is required to disclose certain relevant information in its possession that it does not intend to use at trial (e.g., all forensic testing, whether or not the results will be used). In jurisdictions with the narrowest discovery requirements, neither side is required to disclose the names of the witnesses it might call at trial.

**Step 14: Guilty Plea Negotiation and Acceptance.** Guilty pleas in felony cases most often are the product of a plea agreement under which the prosecution offers certain concessions in return for the defendant’s plea. The offering of concessions lies in the discretion of the prosecutor, and there is considerable variation among prosecutors’ offices as to what types of concessions will be offered to defendants charged with particular offenses. There also is considerable variation as to the negotiation process (e.g., whether the prosecutor will actually “bargain,” or simply present a “take-it-or-leave-it offer”). Where a plea is entered as result of an agreement with the prosecutor, that agreement must be set forth on the record before the trial court. The trial judge will review the agreement to
ensure that its terms are within the law, but cannot second-guess its soundness as a smaller of criminal justice policy.

The trial judge’s primary responsibility in accepting a guilty plea is to ensure that the defendant understands the legal consequences of entering a guilty plea and the terms of the plea agreement. If that understanding is present, and there exists a factual basis for the plea (typically provided by the defendant admitting in court the acts constituting the offense), the plea will be accepted and a date set for sentencing.

**Step 15: The Trial.** Assuming that there has not been a dismissal and the defendant has not entered a guilty plea (or a *nolo contendere* plea), the next step in the criminal process is the trial. In most respects, the criminal trial resembles the civil trial. There are, however, several distinguishing features that are either unique to criminal trials or of special importance in such trials. These include (1) the presumption of defendant’s innocence, (2) the requirement of proof beyond a reasonable doubt, (3) the right of the defendant not to take the stand, (4) the exclusion of evidence obtained by the state in an illegal manner, and (5) the more frequent use (by the prosecution) of incriminating statements previously made by the defendant (often to police).

As noted previously, most felony cases are likely to be disposed of either by a guilty plea or a dismissal. In the vast majority of jurisdictions, of those felony prosecutions reaching the trial court, no more than 10% will be resolved by trial. Setting aside dismissals, and looking only to guilty pleas and trials, the ratio of guilty pleas to trial quite often will be 12 to 1 or higher.

In felony cases, the defendant is entitled to a jury trial, but in many jurisdictions, for certain types of offenses, defendants commonly will waive the jury, in favor of a bench trial. Where the trial is to a jury, the verdict, whether for acquittal or conviction, in all but six states, must be unanimous. Where the jury cannot reach agreement, it is commonly described as a “hung jury”. Such a jury is discharged without reaching a verdict, and the case may be retried.

The median time frame from the arrest of the defendant to the start of the felony trial can exceed a year in judicial districts with slow moving dockets, but for most judicial districts, it is likely to fall within the range of 5–8 months. The median will be influenced, in particular, by the mix of jury and bench trials, as the time frame tends to be considerably longer for jury trials. While most jurisdictions have speedy trial requirements that impose time limits of 6 months or less, there are various excludable time periods (for factors such as witness unavailability and the processing of motions) which commonly extend the time limit by at least a few months.

In state courts, most jury trials will be completed within 2–3 days. A key variable affecting the length of the trial is the character of the crime charged, as certain types of crimes (e.g., white collar offenses and capital homicides) produce trials substantially longer than the typical felony. The prevalence of complex charges explains, in large part, why trials lasting a week or more are so common in the federal courts. In general, trials to the bench are considerably shorter, and in state courts, unlikely to last more than a day.

Whether a criminal case is tried to the bench or the jury, the odds favor conviction over acquittal. A fairly typical ratio for felony charges will be three convictions for every acquittal. That ratio may vary significantly, however, with the nature of the offense. In some jurisdictions, the rate of conviction at trial tends to be substantially lower (though still above 50%) for some crimes (e.g., rape) than for others (e.g., drug trafficking).
Step 16: Sentencing. Following conviction, the next step in the process is the determination of the sentence. In all but a handful of jurisdictions (those allowing for jury sentencing, even apart from capital punishment), the sentence determination is the exclusive function of the court. Basically three different types of sentences may be used: financial sanctions (e.g., fines, restitution orders); some form of release into the community (e.g., probation, unsupervised release, house arrest); and incarceration in a jail (for lesser sentences) or prison (for longer sentences). The process applied in determining the sentence is shaped in considerable part by the sentencing options made available to the court by the legislature. For a particular offense, the court may have no choice. The legislature may have prescribed that conviction automatically carries with it a certain sentence and there is nothing left for the court to do except impose that sentence. Most frequently, however, legislative narrowing of options on a particular offense does not go beyond eliminating the community release option (by requiring incarceration) and setting maximums (and sometimes mandatory minimums) for incarceration and fines. However, states vary considerably in shaping the court's authority to choose within available options, particularly as to the length of incarceration. Their approaches include: allowing the sentencing judge considerable discretion within a broad range set by the legislature; narrowing the range and the discretion by imposing certain mandated minimums based on specified factual findings, and channeling discretion through the use of sentencing guidelines that also depend upon factual determinations.

The process utilized in felony sentencing varies to some extent according to whether judicial discretion is broad or is channeled or limited by guideline or legislative reference to specific sentencing circumstances. In all jurisdictions, the process is designed to obtain for the court information beyond that which will have come to its attention in the course of trial or in the acceptance of a guilty plea. The primary vehicle here is the presentence report prepared by the probation department, although the prosecution and defense commonly will be allowed to present additional information and to challenge the information contained in the presentence report. The presentation of this information is not subject to the rules governing the presentation of information at trial. The rules of evidence do not apply, and neither the prosecution nor the defense has a right to call witnesses or to cross-examine the sources of adverse information presented in the presentence report or in any additional documentation presented by the opposing side. However, where the sentencing authority of the judge is restricted or channeled by the reference to specific factors, a judge commonly is required to make findings of fact as to those factors. Here, if relevant facts are in dispute, the court commonly will find it necessary to hold an evidentiary hearing and to utilize trial-type procedures to resolve that dispute.

Step 17: Appeals.16 For criminal convictions imposed by the general trial court, the initial appeal is to the intermediate appellate court. That appeal ordinarily is guaranteed as a matter of right. The defendant may seek further appellate review from the state's appellate court of last resort (usually, but not always, titled the "Supreme Court"), but review there lies in the discretion of the court. In the handful of states that have no intermediate appellate court, the initial and final appeal within the state system is to the state's court of last resort.

16. The focus here is on defense appeals from a conviction. The prosecution may appeal from certain types of dismissals, but may not appeal from an acquittal. Since the percentage of dismissals over the objection of the prosecution is low, and prosecutors do not regularly appeal such rulings (even when they could do so), prosecution appeals are infrequent as compared to defense appeals.
All states allow the convicted defendant to appeal his conviction, and many allow an appeal as to sentence as well.

The vast majority of appeals in felony cases are taken by convicted defendants who were sentenced to imprisonment. Imprisoned defendants convicted on a guilty plea are a part of this group, but their portion of the appeals is likely to be small where the appeal is limited to the conviction (the potential grounds for challenging a guilty plea conviction being considerably narrower than the potential grounds for challenging a trial conviction). Reversals of conviction on appeals as of right vary with the state, but a reversal rate in the 5-10% range is fairly typical (with the rate somewhat higher where reversals in part—not overturning the entire conviction—are included). Where the state defendant raised a constitutional issue in his state appeal, he may seek further review on that issue in the Supreme Court of the United States, but the Supreme Court grants review (by granting a petition for a “writ of certiorari”) to only a very small percentage of the defendants seeking review.

**Step 18: Collateral Remedies.** After the appellate process is exhausted, imprisoned defendants may be able to use postconviction procedures to challenge their conviction, although the grounds for challenge tend to be limited (e.g., to constitutional violations). Since these procedures are separate from the basic criminal justice process (indeed, some are viewed as civil in nature), they are described as “collateral remedies.” The primary common law collateral remedy is the writ of habeas corpus. That writ allows a convicted defendant to bring an action against the person holding him in custody (typically the prison warden), challenging that custody as based on a constitutionally invalid conviction.

Congress by statute has made the habeas writ available to state prisoners to bring habeas actions in federal courts challenging the constitutionality of their state convictions. Many of the Supreme Court opinions included in this volume review state convictions that were challenged through habeas actions filed in a federal district court, with that court's ruling subsequently appealed (by the losing party, defendant or state) to the federal Court of Appeals, and the Supreme Court than granting review of the Court of Appeals' ruling. Prior to a change in the federal habeas statute in 1996, federal courts on habeas review applied their own independent interpretation of the Constitution in determining whether the state court correctly resolved the defendant's constitutional claim. Since 1996, the review standard is whether the state court ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the supreme court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C.A. § 2254(d).