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Criminal Justice in the U.S.

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Criminal Justice in the U.S.

From the Editors

THIS ELECTRONIC JOURNAL focuses on criminal justice in the U.S. A recurring theme in all of our articles is the inherent tension between the need to swiftly and effectively prosecute crimes and the equally important need to protect the rights of all citizens. The presumption of innocence is at the heart of the U.S. system. Any defendant is presumed innocent until proven guilty beyond a reasonable doubt—the standard for all criminal trials in the U.S.

As Professor John B. Jacobs documents in our opening article, the nation's criminal law system has evolved significantly since the founding of the Republic. Jacobs, Warren E. Burger professor of law at New York University and director of its Center for Research in Crime and Justice, explains the federal-state demarcation, criminal procedure and the system of sentencing and appeals. Importantly, he also documents how the rights of Americans under the criminal justice system have expanded over the years, particularly during the last century.

The U.S. criminal justice system is now perceived as fairer and more equitable than during earlier times, particularly concerning minorities and women. This is important in and of itself. But as Tom Tyler, professor of psychology at New York University substantiates the fact that Americans perceive the system as largely just and unbiased, and in accord with their own values, helps to generate law-abiding behavior. Tyler discusses issues such as ethical motivations in compliance with the law versus the less effective tool of deterrence.

During recent decades especially, numerous states have experimented with legal reforms designed to make the criminal justice system more efficient and effective. One such reform is the emergence of "community justice"—various means of mediation between criminal and victim. Dennis Maloney, director of Community

Four of the nine Scottsboro Boys with attorney Samuel Leibowitz in 1937. Their case led to two landmark U.S. Supreme Court decisions that enhanced fundamental rights for all Americans.

Justice, a local government organization that emphasizes crime prevention and collaboration in Deschutes County, Oregon, describes the system as it exists in one jurisdiction in that Western state.

In our case study for the journal, Contributing editor David Pitts looks at the story of the Scottsboro Boys, the high profile legal case that began 70 years ago. The case is important in civil rights history to be sure. But it also is significant in the history of American jurisprudence because it led to two landmark U.S. Supreme Court decisions that enhanced fundamental rights for all Americans. The *Scottsboro Boys v. the state of Alabama* dramatically illustrates that rights under the U.S. system may be expanded not just as a result of changes in U.S. criminal law, but also because of judicial review and constitutional oversight.

The journal concludes with a variety of reference resources—books, articles and Internet sites—affording additional insights on U.S. criminal justice.

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The Evolution of U.S. Criminal Law

by James B. Jacobs

In this primer on the U.S. criminal justice system, James B. Jacobs, Warren E. Burger professor of law at New York University (NYU) and director of the Center for Research in Crime & Justice at the NYU School of Law, explains the structure and basic jurisprudence of U.S. criminal law procedure. But its essential nature, he says, is grounded in the U.S. Constitution and the Bill of Rights. It is the Constitution that inspires the federal-state structure of the system and that serves as the ultimate authority on what is permissible.

THE FOUNDATION of U.S. criminal procedure is the U.S. Constitution, including the first 10 Amendments, which form the Bill of Rights. The Constitution guarantees all persons living in the U.S. fundamental rights, freedoms and liberties. Chief among these, as far as U.S. criminal law is concerned, is that defendants are entitled to a presumption of innocence. Defendants do not have to prove their innocence. The government must prove their guilt beyond a reasonable doubt. Rights such as these frame the federal-state system prescribed in the Constitution. Of particular importance are the Fifth, Sixth and Eighth Amendments.

The Fifth Amendment protects defendants against double jeopardy (being tried more than once for the same crime by the same authority), and against being required to testify against themselves in criminal cases. Most significantly, it also protects defendants' rights of "due process," a phrase of vast significance in the Bill of Rights that, especially in the 20th century, was interpreted by the courts to confer on defendants a broad array of protections and rights.

James B. Jacobs

The Sixth Amendment guarantees defendants a "speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." It also entitles defendants to be confronted by (and to cross examine) the witnesses against them and to have the "assistance of counsel" for their defense. This last protection also has been expanded over the years to, in effect, guarantee all defendants adequate counsel in criminal trials.

The Eighth Amendment rules out "excessive bail" for defendants and prohibits "cruel and unusual punishments." This last prohibition has been interpreted by the courts to limit the kinds of punishments that can be inflicted. In 1972, the death penalty statutes of 38 states were effectively voided based on this constitutional provision. Some were rewritten to pass constitutional muster. Currently, 38 states have a death penalty statute. But the example serves to illustrate that it is the U.S. Constitution that is supreme in the U.S. system, not U.S. criminal law *per se*. Neither Congress nor the states can pass laws that violate the Constitution.

Every state and the federal government has its own "substantive criminal law" (specifying crimes and defenses) and "criminal procedure" (specifying the stages of the criminal process from arrest through prosecution, sentencing, appeal and release from prison). Each state legislature promulgates that state's criminal law, which is enforced by state and county prosecutors, adjudicated in local and state-level courts, and punished in state prisons or local jails. Congress passes federal criminal laws, which are enforced, prosecuted, adjudicated and punished by federal law enforcement agencies, prosecutors, courts, prisons and probation and parole systems.

The Federal System

There are over 20 specialized federal law enforcement agencies, most of which are in the Departments of Justice and Treasury. The most prominent federal law enforcement agencies are the Federal Bureau of Investigation and the Drug Enforcement Administration (in the Department of Justice) and the Bureau of Alcohol, Tobacco and Firearms, the Secret Service and the Customs Service (in the Department of the Treasury). These agencies are located in Washington, D.C., with field offices around the United States, and in some cases, abroad.

Federal prosecutors, called "U.S. attorneys," are appointed by the president for each of 94 judicial districts in the United States. They prosecute only federal crimes in federal courts. As presidential appointees, U.S. attorneys have a great deal of independence, but they are accountable to the U.S. attorney general, who heads the Department of Justice and who is a member of the president's Cabinet.

The Department of Justice's criminal division in Washington, D.C. provides assistance, expertise and some guidance and supervision to U.S. attorneys. The central office of the Department of Justice also includes special prosecutorial units with nationwide authority in such matters as organized crime, war crimes, antitrust and international drug trafficking; these units usually work in cooperation with U.S. attorneys.

Federal offenders are incarcerated in prisons administered by the Federal Bureau of Prisons, an agency within the Department of Justice. These prisons are located throughout the United States; a defendant convicted in federal court may be incarcerated in any federal prison. However, less than 10 percent of all U.S. prisoners are held in federal prisoners.

Criminal Justice at the State and Local Levels

Most criminal justice activity is conducted under the auspices of state and local governments. Law enforcement at the state level is mostly decentralized to the counties, cities and towns. The state police exercise authority over the major state highways and over unincorporated rural areas. They often have other limited functions, including maintenance of criminal records. State attorneys general, unlike the U.S. attorney general, usually have little or no prosecutorial authority, although they may be responsible for arguing criminal appeals and defending post-conviction petitions. Prosecution is a county-level function. Most prosecutors, called district attorneys (DAs), are elected.

Each county has a jail that holds defendants awaiting trial as well as defendants convicted of minor crimes called "misdemeanors" (crimes punishable by a maximum jail term of one year or less). Probation departments are usually organized at the county level as well. There are more than 20,000 independent police departments that belong to local governments. Most of these departments serve small towns and have fewer than 20 officers. In contrast, big city police departments are huge. For example, the New York City Police Department, the nation's largest, has approximately 38,000 officers. Defendants in state court who are convicted of felonies and sentenced to imprisonment, are incarcerated in the state-operated prison system, usually called the "department of corrections."

State Substantive Criminal Law

While rooted in English common law, American substantive criminal law is statutory. There are no common law crimes in the United States. In other words, the law of crimes is decided by the state legislatures (for each state) and by Congress (for the federal government). Most states, but not the federal government, have a comprehensive "code" of substantive criminal law made up of general principles of criminal responsibility, laws defining the particular criminal offenses, and laws defining excuses and justifications.

Two-thirds of the states have adopted in whole or in part the Model Penal Code (MPC), which was drafted in the 1950s and 1960s by the American Law Institute, a prominent law reform organization. The MPC is the most influential work in American substantive criminal law. One of the most deeply rooted principles in American criminal law is that there can be no criminal responsibility without culpability or

blameworthiness. Under the MPC, culpability, sometimes referred to as *mens rea* or "state of mind," is satisfied by a showing of intent, knowledge, recklessness or negligence, all of which are carefully defined by the code. Except in the case of minor offenses and some regulatory crimes, the MPC requires that there be a specified culpability for every element of an offense (conduct, attendant circumstances, result).

Criminal codes set out the prohibitions that constitute the law of crimes—offenses against a person (e.g. murder and rape); offenses against property (e.g. theft and arson); offenses against public order (e.g. disorderly conduct and rioting); offenses against the family (e.g. bigamy and incest); and offenses against public administration (e.g. bribery and perjury).

Federal Substantive Criminal Law

Which crimes are considered federal and which are considered state? There is no clear answer to this question. Indeed, criminal conduct cannot be sorted into these two baskets. When a single act or course of conduct violates both federal and state criminal laws, it is even possible for both governments to prosecute because, under the "dual sovereignty" doctrine, the double jeopardy prohibition (according to which a person may not be tried twice for the same offense), does not apply to separate prosecutions by separate sovereigns.

In theory, congressional power is limited to the powers expressly enumerated in Section 1 of the Constitution. Offenses like counterfeiting U.S. currency, illegally entering the United States, treason, and violation of constitutional and federal statutory rights are obviously within the federal government's core jurisdiction. But, utilizing its expansive powers under the commerce clause and other elastic provisions, Congress has passed federal criminal laws dealing with drug trafficking, firearms, kidnapping, racketeering, auto theft, fraud, and so forth.

The Supreme Court has rarely found that Congress lacked authority to pass a federal criminal law. Partially because of this, the reach of federal criminal law grew inexorably throughout the 20th century. Today, federal criminal law can be used to prosecute many offenses that traditionally were regarded as a state responsibility. In practice, however, the great constraint on the reach of federal criminal law is resources. The FBI and other federal law enforcement agencies, as well as federal prosecutors, can investigate and prosecute only a small fraction of all the crimes that potentially fall within their purview.

Criminal Procedure

Every state and the federal government have their own criminal procedural rules. The Federal Rules of Criminal Procedure are written by judicial advisory committees and promulgated by the Supreme Court, subject to amendment by Congress. State criminal procedural rules are usually defined by the state legislatures.

Of the 23 separate rights noted in the first eight amendments to the Constitution, 12 concern criminal procedure. Before World War II, these rights were held only to protect the individual against the federal government. Since World War II, practically all of these rights have been incorporated through the Fourteenth Amendment's due process clause and applied to state law enforcement as well. The federal Constitution sets a floor, not a ceiling, on the

rights of the citizenry against police, prosecutors, courts and prison officials. The states may grant more rights to criminal defendants. For example, states such as New York are substantially more protective of the rights of criminal suspects and criminal defendants than is the U.S. Supreme Court.

In American legal parlance, criminal procedure refers to the constitutional, statutory and administrative limitations on police investigations—searches of persons, places and things; seizures and interrogations—as well as to the formal steps of the criminal process. Both the Fourth and Fifth Amendments protect the citizenry, not just criminals and criminal suspects, from over-reaching police activity.

Right to Counsel

The right to counsel begins when the suspect becomes the accused, that is at the initiation of judicial proceedings. If the accused is indigent, the judge assigns him/her a defense counsel at the first court appearance. A U.S. Supreme Court decision—*Gideon v. Wainwright* (1963)—held that the government must appoint defense lawyers for indigents accused of felonies. Later cases extended that ruling to cover all cases where the defendant could be sent to jail or prison.

Bail and Pre-trial Detention

If the accused pleads not guilty, the judge must decide on pre-trial release and, if so, whether bail or other conditions ought to be imposed. Historically, the courts have held that a defendant ought to be released unless he presents a risk of flight. Typically, despite the supposed link between bail and assuring appearance at trial, judges set high bail for individuals arrested for serious offenses, because they are concerned about public safety, i.e., the defendant committing more crimes if released. Federal law permits pre-trial detention without bail in certain situations where the court finds that the defendant poses a serious threat of future danger to the community and that no combination of release conditions can reasonably assure community safety.

Formal Accusation and the Grand Jury

American prosecutors have extensive discretion over whether to charge, what to charge and how many charges to bring against an arrestee. However, most prosecutors dismiss charges against a substantial percentage of arrestees at an early point in the process because:

- the arrestee's conduct did not constitute a crime;
- while there was a crime, it is too insignificant to prosecute;
- while there was a crime, it is not provable against this person at this point; and
- while there was a crime, the prosecutor believes that pre-trial diversion to a treatment or other program is the most appropriate disposition.

Until the trial begins, the prosecutor may voluntarily dismiss the charges against the accused without prejudice, and thus can bring the same charges at a later date. The Sixth Amendment provides that there shall be no criminal prosecution except upon indictment by a grand jury. A grand jury is an investigative body that determines whether there is sufficient

evidence to indict. However, the Supreme Court has held that this is one of the few rights included in the Bill of Rights that is not binding on the states. Thus, each state can decide for itself whether to use a grand jury to initiate the formal criminal proceeding.

The accused must be arraigned and formally charged within a short period of time. At arraignment, the judge reads the formal charges and with respect to each charge, asks the defendant to plead guilty, not guilty or not guilty by reason of insanity. Most states also permit a plea of *nolo contendere* (no contest) which, for practical purposes, is equivalent to a guilty plea. A plea of not guilty can subsequently be changed to a plea of guilty. Only in limited circumstances can a guilty plea be withdrawn.

Pre-trial Motions

The rules of criminal procedure provide that the defendant and his or her attorney have a certain number of days to make pre-trial motions challenging the legal sufficiency of the indictment or information, or seeking the suppression of evidence. In addition, the defendant may move for limited discovery of certain evidence held by the prosecutor. Under most states' rules, the defense, if it makes the request, has a right to a copy of any statements made by the accused, copies of scientific tests and a list of the prosecution's witnesses. In some jurisdictions the defendant must notify the prosecution in advance of its intent to rely on certain defenses such as an alibi or insanity.

Plea Bargaining

The American practice of "plea bargaining" is often misunderstood. The practice might more accurately be referred to as a system of guilty plea "discounts." More than 90 percent of convictions are the result of guilty pleas. For most defendants who plead guilty, there has been no "bargaining." Rather, the defendant has accepted the prosecutor's offer to drop some charges in exchange for the defendant's plea of guilty to one or more remaining charges.

At the federal level, there is a tradition of "charge bargaining," that is, before the trial begins the prosecutor drops the most serious charge, and the defendant pleads guilty to a lesser one. In some counties and cities, the judge explicitly offers sentencing discounts. For example, the defendant is promised a 3-year minimum, 5-year maximum prison term if he/she pleads guilty before the trial takes place; however, he/she will face a 5–10-year minimum, 15-year maximum prison term if found guilty at trial.

Right to Trial

The defendant has a right to a public trial. Thus, American courtrooms are open to the public, including journalists. Indeed, the Supreme Court has held that the defendant cannot waive the right to a public trial because the citizenry also shares this right; nor can a judge prohibit the press from reporting on criminal trials. However, this does not mean that cameras (still, moving or television) must be allowed in the court room. Some states, like California, permit live television coverage of criminal trials. Supporters argue that television coverage provides legal education for a vast public that

otherwise would never see a criminal trial. Critics contend that TV cameras in the courtroom affect the conduct of the lawyers, judge and jurors, and alter the courtroom atmosphere. There are no cameras in federal courtrooms.

Under the Sixth Amendment, the criminal defendant has a constitutional right to a speedy trial. Statutes of limitation, not the speedy trial right, govern the delay between commission of a crime and the filing of charges. The Constitution dictates that there must not be undue delay between indictment and trial. The Supreme Court, however, has never specified a definite period of time, which, if exceeded, violates this right. Every case has to be assessed individually. Every state has a speedy trial law that establishes time constraints within which the prosecution and the courts must bring the defendant to trial.

The Sixth Amendment also guarantees a criminal defendant the right to a jury trial. However, like most rights, the jury trial right may be waived. The defendant may elect a bench trial before a single judge or plead guilty. Usually, defendants have a better chance of acquittal by a jury. One-fourth to one-third of jury trials end in acquittals. But some defendants prefer a judge to a jury, because they believe a judge would be more likely to see the gaps in the prosecution's case; the judge would sentence more leniently after a "bench" trial; or that the nature of the crime would inflame the jury against the defendant.

Although not constitutionally required, in the federal system and practically every state, the jury must reach a unanimous verdict. A jury that cannot agree is called a "hung jury." In the event of a hung jury, a mistrial is declared, and the prosecution must decide whether to try the defendant again. There is no limit on how many times a defendant can be retried, but very few defendants are tried more than three times.

The Trial

Only 10 percent or less of American criminal cases are resolved by trials. The criminal trial is based upon the adversary system. The defense lawyer vigorously represents his/her client, whether or not he believes him guilty. The prosecutor represents the state and the people, but also bears an ethical responsibility to act as a minister of justice.

The Constitution requires that, in order to find the defendant guilty, the fact-finder, whether jury or judge, must determine that the prosecution has proven every element of the offense beyond a reasonable doubt. This is the meaning of the oft-quoted maxim that the "defendant is presumed innocent."

Both sides have the right to call their own witnesses and to subpoena witnesses who will not appear voluntarily. The lawyers subject their own witnesses to direct examination and the other side's witnesses to cross-examination. The judge, but not the jurors, may ask the witnesses questions, but under the American adversary system, the lawyers ask practically all the questions and the judge acts as an impartial umpire. A witness may refuse on Fifth Amendment grounds to testify if he/she has a well-founded belief that the testimony could incriminate him/her. The prosecution may grant the witness immunity and then may compel the witness to answer every question. (The defense has no such power.) Immunity extends to any crime the witness admits to as well as to any crime that investigators uncover as a result of the witness' immunized testimony.

Sentencing

The legislatures, courts, probation departments, parole boards and, in some jurisdictions, sentencing commissions all play a role in the sentencing process. In the first instance, criminal sentences, or at least the maximum permissible sentence for each offense, are prescribed by legislatures. State sentencing statutes vary considerably and sometimes the same state has different types of sentencing statutes for different crimes. Sentence is imposed by the judge after a sentencing hearing at which the prosecutor and defense attorney argue for the sentence each thinks is appropriate. The defendant is usually given an opportunity to address the court prior to sentence. In some jurisdictions, the victim or the victim's representatives may address the court as well. The defense lawyer is likely to emphasize the defendant's remorse, family responsibilities, good job prospects and amenability to out-patient treatment (if necessary) in the community; the prosecution is likely to emphasize the defendant's prior criminal record, injuries to the victim and the victim's family, and the need to deter other would-be offenders.

The judge is advised by the probation department, which independently investigates the defendant's background, prior criminal record, circumstances of the offense and other factors. The judge does not have to make formal factual findings and need not write an opinion explaining or justifying the sentence. As long as the sentence is within the statutory range, it cannot be appealed.

Sanctions

Probation is the most common sentence meted out by American criminal court judges. In effect, the defendant avoids prison as long as he/she keeps out of trouble and adheres to the probation department's rules, regulations and reporting requirements. The judge determines how long the probationary term will last; several years is not uncommon. The judge may also impose special conditions, like participating in a drug treatment program, maintaining employment or staying in school, if the offender is a juvenile.

Imprisonment is a very widely used sentence; in 2001, on any given day there were approximately 2 million persons in U.S. prisons and jails. Each state and the federal government have their own prison system. The prison department classifies (according to danger risk, escape risk, age, etc.) offenders and assigns them to an appropriate maximum-, medium-, or minimum-security penal institution.

Forfeiture of property has increased dramatically as a criminal sentence in recent years, especially in drug and organized crime cases. Typically, forfeiture laws provide that, as part of the criminal sentence, the judge may order the defendant to forfeit any property used in the crime (including car, boat, plane and even house) and/or the proceeds of his/her criminal activity (business, bank accounts, securities, etc.).

Fines are less frequently imposed by U.S. courts. When they are imposed, it is usually in addition to other sanctions. Historically, the size of fines has been low, indeed, much lower than the fee a private criminal lawyer charges. Recently, however, maximum fines have increased dramatically. When fines are imposed,

the Supreme Court has held that a defendant cannot be imprisoned for failure to pay the fine, unless the failure is willful.

Appeal and Post-conviction Remedies

The Constitution does not guarantee a convicted offender a right of appeal, but every jurisdiction allows at least one appeal as a right, and many states have two levels of appellate courts and two levels of appeals. For some second level appeals, the court has the discretion to hear only those cases that it chooses. Because of the guarantee against double jeopardy, the prosecution may not appeal a not-guilty verdict. Thus, an acquittal stands, even if it was based upon an egregious mistake by the judge in interpreting the law or upon an incomprehensible factual finding by the judge or jury.

After an offender's state court appeals have been exhausted, he/she may file a *habeas corpus* petition in federal district (trial level) court alleging that he/she is being held in state custody in violation of his/her federally guaranteed statutory or constitutional rights. (Federal prisoners may also petition the federal courts for post-conviction relief in the event, for example, that new evidence which could not have been discovered before trial, demonstrates innocence.) The right of *habeas corpus* is guaranteed by the Constitution and implemented by a federal statute. In some limited circumstances, an offender who was unsuccessful in the first *habeas corpus* proceeding may bring additional *habeas corpus* petitions alleging other constitutional violations.

Parole, Remission and Commutation

Traditionally, parole boards have played a major role in releasing offenders from prisons. Each state has its own parole board whose members are appointed by the governor. The parole board is usually one component of a large parole agency that supplies post-prison supervision to offenders after they are released from prison. The point at which a prisoner is eligible for parole is a matter of state law, so there is considerable variation among the states.

In a sentencing system in which the judge only specifies a maximum sentence, the prisoner might, for example, become eligible for parole after serving one-third of the sentence. Members of the parole board typically hold brief interviews with the prospective parolees at the prison. The board is generally interested in the prisoner's adjustment within the prison, but it will invariably consider the facts of the crime and the prisoner's previous criminal record.

Finally, the governor of each state has the power to pardon or commute the sentences of offenders in that state. The president of the United States has similar authority for federal offenders. Frequently, the law provides for the appointment of a pardon board, which sifts through petitions, conducts investigations and makes affirmative recommendations to the chief executive. Governors, especially in the most prolific death sentencing states, are frequently called upon to commute death sentences. Unlike in many countries, general amnesties are not a part of American law or tradition.

Juvenile justice consists of a wholly separate criminal law and procedure. In theory, this system of law and institutions, invented by progressive reformers at the turn of the 20th century, operates in the best interest of the child offender. Juvenile justice is meted out in juvenile or family court, not criminal court. The goal is not retribution or deterrence, but rehabilitation. The juvenile court's caseload includes children who have been abused and those whom parents or school authorities consider incorrigible.

The maximum age for processing an offender as a juvenile varies from 16 to 21 depending on the jurisdiction and, within a single jurisdiction, on the type of offense with which the offender is charged. Thus, there are statutes that permit (and in some cases mandate) treating a juvenile as an adult if the offense is a homicide or other serious crime of violence. Generally, in the juvenile justice system, the accused is treated more leniently than in the adult system even though the former provides fewer procedural rights.

In delinquency cases that reach the point of formal adjudication, the judge is required to make determinations of fact under standards that closely resemble those applicable to criminal prosecutions. The juvenile who is arrested is brought to a juvenile detention center, separate from the adult jail and typically administered by a specialized agency of local or county government. The juvenile has no right to bail. His/her pre-trial status depends solely upon a judge's determination of whether the juvenile should remain in custody pending trial to prevent flight or to protect the community from risk of the juvenile's commission of a future offense.

The juvenile defendant is not charged with a statutory offense, but with being delinquent. However, he/she is entitled to counsel and to a presumption of innocence. Juveniles have no right to trial by jury, but approximately one-quarter of the states have enacted statutes providing for a jury trial option in juvenile cases. The jury or judge must find the juvenile defendant to be guilty beyond a reasonable doubt. In most states, the convicted juvenile offender must be released from the juvenile "reformatory" or correctional center upon reaching the age of 21. For most of the 20th century, juvenile criminal records were sealed. Now, they are commonly available to police, prosecutors and judges in adult court. These days, there is a great deal of juvenile justice law reform, mostly in the direction of treating juvenile offenders more severely and more like adult offenders.

Obeying the Law in America: Procedural Justice and the Sense of Fairness

by Tom Tyler

How does a society encourage law-abiding behavior? Does it rely on the threat of punishment only? Or does the public's sense of justice and fairness suggest other, more effective, strategies? In their studies on this topic, Tom Tyler, professor of psychology at New York University, and others have discovered that Americans, and by extension people in general, obey the law essentially because they perceive the process as fair and unbiased and in accord with their own values.

IN THE UNITED STATES, people often think of police officers and judges as being legal authorities who have a considerable amount of power, which they can use to enforce the law. They are considered authorities whose decisions are backed by the potential use of deterrence via punishment, and who are widely obeyed.

The reality of American legal authority, however, is quite different from this image in two ways. First, while it is true that Americans are generally law-abiding people, and that they are frequently willing to defer to the decisions of police officers and judges, compliance with the law cannot be taken for granted. American legal authorities have always struggled to promote the public's adherence to the law, and there are many suggestions that this struggle may be growing more difficult. In their dealings with particular citizens, U.S. police officers report increasing difficulty gaining public compliance, while judges report that it is harder to enforce judicial judgments and to bring citizen

Tom Tyler

behavior into line with court orders. In terms of the influence of law on people's everyday lives, there is evidence that, across a broad range of behaviors—ranging from paying income tax to stopping at red lights—Americans are paying less attention to the law. The magnitude of these compliance problems should not be exaggerated, but the attention of legal authorities has been increasingly directed to the need for a better understanding of why people obey the law.

The Role of Ethical Motivations in Compliance with the Law

Studies show that, interestingly, the motivation underlying everyday compliance with the law is not typically the fear of punishment for ignoring or defying the law that is the basis of deterrence models. Instead, people's primary motivations for obeying the law are found to be ethical in character. Two ethical motivations are key antecedents of compliance: legitimacy and morality.

Legitimacy refers to the belief that an authority is entitled to be obeyed. Americans typically express high levels of such perceived obligations to obey the police and the courts. For example, almost all Americans agree that they should "obey the law, even when they think it is wrong." When people view legal authorities as legitimate, they voluntarily follow their directives, even if they do not think they would be caught and punished for ignoring them.

In their book entitled, *Justice, Liability and Blame: Community Views and the Criminal Law*, Paul Robinson and John Darley explain that personal morality involves the degree to which people think that the law accords with their own feelings about what is right and wrong. In some cases, public morality is very consistent with the law. Murder is illegal, and most people also believe that it is morally wrong. However, in other cases this may not be true. With drinking, drug use, copying software, and even following parking laws, segments of the American public do not view their behavior as morally wrong, even when those behaviors are contrary to the law.

In a 1990 study on why people obey the law, I directly compared the influence of risk judgments, views about the legitimacy of legal authorities, and judgments about the morality of the law on people's everyday compliance with the law. I found that both legitimacy and morality influenced compliance with the law independently of judgments about the risk of being caught and punished for wrongdoing. The strongest influence was that of morality, the second strongest influence that of legitimacy. Risk estimates also influenced compliance, but were the weakest influence of the three outlined. In

other words, ethical judgments had the greatest influence on compliance, and risk estimates the least influence.

The Problem with Deterrence in Assuring Compliance

Other studies suggest that the threat or use of sanctions, which shapes risk estimates, also influences law-related behavior to some extent. However, as in my own study, the magnitude of that influence is usually found to be small. For example, in a review of the literature on American drug use, Robert MacCoun in an article on drugs and the law in *Psychological Bulletin*, found that approximately 5 percent of the variance in citizen drug use can be explained by citizen judgments of the likelihood of being caught and punished by the police and courts. This conclusion is typical of the findings of studies of compliance with the law—deterrence is found to have, at best, a small influence on people's behavior.

The practical consequence of this finding is that the police and the courts have difficulty in effectively enforcing the law when they can only rely on their power to punish people. Without widespread legitimacy and/or when they are enforcing laws that are inconsistent with public morality, legal authorities cannot do their jobs well. This is true of both American criminal and civil law, that is, of the efforts of legal authorities to both maintain public order and resolve disputes among citizens.

The consequences of low legitimacy are illustrated by examining the impact of the lack of trust and confidence in the police and courts widely found among minority citizens. This low legitimacy leads not only to greater law-breaking behavior among minorities, but to a general unwillingness among members of the minority community to work with the police to deal with crime-related problems. Famous examples of the problems created when the law diverges from public morality, drawn from American history, include the effort to make drinking alcohol illegal (Prohibition) and ongoing efforts to enforce laws against prostitution and gambling. Whenever the police seek to enforce laws against behavior that segments of the public do not regard as morally wrong, the job of the police becomes more difficult.

How can this issue be addressed? One possible approach would be to dramatically increase the size of police forces and to give them greater power to intrude into people's everyday lives, increasing the likelihood that people who break rules would be caught and punished for their crimes. This, in turn, would increase the estimate of the risk of getting caught, and thus discourage criminal behavior. For example, in their struggle to prevent drunk driving, some countries allow the police to set up random road blocks to stop drivers, while other countries allow the police to stop and question any citizen on the street or in a car, and even to hold people in jail without charges. It is not clear how much of an effect giving legal authorities such increased powers would actually have on public behavior, but it is possible to imagine strategies that could be used to make deterrence more effective.

There are several difficulties associated with seeking to increase the effective rule of law by strengthening deterrence. One issue is that strengthening government power in America conflicts with a longstanding emphasis on individual freedom and rights that is strongly

rooted in the American Declaration of Independence, Constitution and Bill of Rights. This democratic tradition has been coupled with a general willingness of Americans to defer to government and law, but that deference is not automatic, and suspicion about government and defiance of laws regarded as unnecessarily intrusive is another longstanding element of American political and legal culture. Increasing government power, therefore, might have the effect of undermining legitimacy and lowering compliance with the law. Another issue is whether it is realistic to think that strategies intended to change risk judgments could effectively alter public behavior. As noted, changes in risk judgments have, at best, a minor influence on such behavior.

The Role of Procedural Fairness in Gaining Compliance

Is there an alternative approach to creating and sustaining a viable legal system? Recent studies of the basis upon which the American public reacts to laws and to the decisions of legal authorities point to one important possible approach. Because the police and the courts are social regulatory authorities, they are often forced to make decisions on outcomes that people view as undesirable or even unfair. The police, for example, tell people not to do things they want to do, and enforce those orders by threats, arrests and even physical force. Judges must often enforce laws by sentencing people to pay fines or serve time in prison. It is often assumed that such undesirable outcomes will only be accepted when legal authorities are backed by the threat or use of force.

Studies of people's reactions to personal experiences with the police and courts suggest a different and much more positive image of how citizens react to decisions made by legal authorities. These studies demonstrate that people use ethical criteria to evaluate their personal experiences. In particular, they evaluate their experiences with legal authorities through a filter of procedural justice. Research consistently finds that people's primary basis for accepting or rejecting the decisions made by police officers and judges is their evaluation of the fairness of the procedures used by the authorities to make those decisions.

Consider an example. I interviewed people who appeared before judges in traffic court in Chicago, Illinois. At the time, it was a common practice to dismiss people's cases when they appeared in court in person, based upon the assumption that coming to court was punishment enough for minor offenses. So, each litigant received no fine and had no record. We might have expected people to be happy. However, I consistently found that people were angry. Why? Because they did not experience this mode of case disposition to be fair. They wanted to have a trial in which they could present their evidence and receive a legal decision about the merits of their traffic ticket. Receiving a favorable outcome was less important to them than having their day in court.

In *The Social Psychology of Procedural Justice*, E. Allan Lind and I interviewed people who engaged in personal dealings with both police officers and judges. We found repeatedly that people react strongly to their evaluations of the fairness of these legal authorities. People who feel fairly treated are more willing to accept decisions, even if those decisions are

unfavorable, and irrespective of whether they think they will be caught and punished if they do not accept them. Why is this the case? Experiencing fair procedures engages people's feelings of obligation to obey. It also leads people to view decisions as more consistent with their moral values. For these reasons, people accept these decisions more willingly. This finding is important because it suggests that people focus on ethical issues, rather than personal gains and losses, when they are reacting to their experiences with the police and the courts.

These findings suggest that legal authorities can gain acceptance for decisions if they pay attention to how those decisions are made. In a 1997 study done by Paternoster et al., further adherence to these decisions over time is higher, since people feel more personal responsibility for following them, and for obeying similar laws in the future. In the 1997 study, people who felt that they were fairly treated when they dealt with the police were found to be more likely to follow the law during a six-month period after their experience. Since the police were not present during most or all of this later time period, people were taking the responsibility to follow the law upon themselves. The experience of being fairly treated led them to consent to social regulation and they were personally committed to following the law.

What elements of procedures shape the judgments that people make about their fairness? Studies suggest that members of the public have complex models of procedural justice, often considering eight or more distinct justice issues when deciding how fair they think a legal procedure is. Four issues are typically found to be important.

- First, they value the opportunity to participate and give input when decisions are being made.
- Second, they want procedures to be neutral —unbiased, based upon factual criteria and made via the consistent application of rules.
- Third, they want to be treated with dignity and respect, and to have their rights acknowledged.
- Fourth, they want to feel that the authorities have considered their needs and concerns, and have been honest in their communications with them.

In discussions about whether or not to accept a directive from a legal authority each of these concerns is typically more important in decisions than are assessments of the fairness or favorability of the decision itself.

Implications of Procedural Justice for Establishing Legal Authority

People put different weight on these different elements depending on the nature of the issue or problem involved. So, for example, opportunities for input are especially important when authorities are trying to settle a dispute among several people. On the other hand, people's ethnicity, gender and social status do not influence their views about what makes a procedure fair. This suggests that procedural fairness may be an especially valuable mechanism through which to find solutions to disputes that cross group boundaries. Studies find that people from different economic, social or ideological groups often have very different views about what constitutes a fair outcome, and have opposing views about what type of outcome is favorable to

them and/or their group. These same people, however, will have much more in common when asked about the attributes of a fair decision-making procedure. Since the ability of a fair procedure to facilitate acceptance of decisions has been noted, it is encouraging that people seem to agree widely about what makes a procedure fair.

Similar procedural justice findings emerge when we examine people's everyday obedience to the law. People are more likely to obey the law when they have trust and confidence in the fairness of the procedures used by legal authorities and legal institutions. So, by making decisions fairly, legal authorities build a legal culture within which people feel a personal responsibility to abide by the law. Such a self-regulatory society is based upon people's feelings of responsibility and obligation to the law, and on their willingness to follow their own moral values. The key to creating and sustaining such a society is the use of fair procedures by legal authorities.

The Emergence of Community Justice

by Dennis Maloney

What if, instead of going through the tried and true way of dealing with a criminal offender, there was a more effective, more grass-roots approach? Instead of going through a lengthy trial process, at which the offender may or may not be convicted, the community could work with and through a special agency organized to mediate between criminal and victim. Dennis Maloney, director of Community Justice, a local government organization that works closely with NGO's to emphasize crime prevention and collaboration, describes the "community justice" system that is working in Deschutes County, Oregon.

CONSIDER THE following circumstance. After working late one evening, you catch the last bus. Departing the bus at your regular stop you begin your walk toward home. As you approach your home, you notice a troubling situation. You hear a group of children crying. They are standing over a woman lying on the sidewalk. As you rush to the scene, you notice what appears to be a male figure slipping away into the shadows toward the alleyway. What do you do?

I have asked this question to thousands of citizens in dozens of U.S. states. The response is consistent. First, you attend to the woman, check her vital signs and determine the nature of her injury. Second, you observe the children to find out if they too have suffered an attack. Third, you summon a neighbor to call the appropriate number for emergency assistance and to dispatch the police to locate and arrest the offender. This sequence: attending to the crime victim, taking the pulse of the surround-

Dennis Maloney

ing community, and then dealing with the offender appears to be an American protocol when responding to crime.

Flaws in the System

If this is, in fact, the series of actions that are taken at the moment the crime occurs, why does the U.S. criminal justice system appear to adhere to virtually a reverse protocol? In the United States, we appoint government financed legal services for the offender, provide counseling and therapeutic interventions and even upon incarceration, provide extensive educational and vocational services. All the while, crime victims languish to deal with their trauma through their own means. Thus, the American public has come to conclude that the criminal justice system has become so offender-focused that, in essence, we have become offender advocates. Many even perceive us to be offender advocates at the expense of victim and community needs. This paradox will never and should never be acceptable. The U.S. system has depended on incarceration as the preferred and, in many cases, the only means to hold offenders accountable for their behavior. There is growing evidence that we can more deeply impress upon the offender the personalized effects of their behavior by involving the victim throughout the proceedings. This, in turn, can actually cause a much deeper sense of offender accountability.

Let us first acknowledge that there is an absolute place for jails to control dangerous offenders during pre-trial deliberation and subsequently to punish those offenders for their wanton acts. These offenders require secure prisons for lengthy periods of time. But we also need to remember that a vast amount of victimization involves property loss at the hands of offenders with no demonstrated tendency toward violence. These crimes include such acts as theft, burglary, vandalism and passing bad checks. These crimes account for up to 90 percent of all crimes committed in the United States. In these cases, it may be far more satisfactory and certainly less costly to hold the offender directly accountable to the victim and the community.

This can be accomplished by allowing the victim to determine an appropriate level of restitution, identify a meaningful amount of community work service, and with the aid of a trained mediator, arrange for the victim to express face to face to the offender the trauma suffered as a result of the crime.

In fact, if the criminal justice system reserved prison space for dangerous person-to-person offenders and those chronic, unstoppable property offenders, we could take the savings and provide extensive and much needed

treatment service for victims. We could also finance viable crime prevention strategies, the very best way to prevent victimization.

This brings us to a third element of the U.S. criminal justice system: crime prevention. We have a system with the most comprehensive information available about the places, times, frequency and patterns of criminal activity. Yet if we look at the resources dedicated to preventing crime, we find there is great room for improvement. Just as the system, in large part, traditionally pays little attention to crime victims, so too has it paid too little attention to a genuine crime prevention discussion. The system primarily manages the movement of offenders, often relying on very expensive responses. This approach, some feel, is short-sighted.

Community Justice

In Deschutes County, Oregon, and a handful of other jurisdictions across the United States, a group of judicial officials has teamed up with local elected officials, legislative representatives and private citizens to acknowledge the system's shortfalls, and more importantly, to build a better system of criminal justice—a system we've come to identify as "community justice."

Within a community justice framework, the victim is regarded as the paramount "customer" of the justice system, offenders are held accountable in constructive and meaningful ways, and crime prevention is viewed as a high priority. Citizen participation in attending to victim needs, determining priorities, mediating restitution requirements and supervising community work service projects is central in a community justice approach. Justice system officials are careful to state that this shift can occur while remaining steadfast to due process requirements.

Deschutes County has taken several steps to demonstrate they are serious about their new vision for the justice system. Following a series of meetings convened by Presiding Circuit Court Judge Stephen Tiktin regarding the need for the local justice system to elevate victim services and crime prevention, the county emerged with an official resolution to respond to the group's leadership. This resolution in turn spurred a series of actions that have quickly moved the system toward a community justice model.

Here are some examples of ideas that have been implemented since adoption of the resolution:

To Better Serve Victims

The Deschutes County District Attorney's Office has developed a full complement of victim services. The Department attends to victims' needs from the time a crime is reported to the time the last restitution payment is made. This victim's assistance program is patterned after U.S. hospital emergency "coding." Person-to-person crimes are regarded as code blue, and the program will assure that a victim has a supportive volunteer by his/her side within minutes of a call. Lesser crimes are responded to within hours, and victims suffering minor crimes are contacted within a couple of days following the report. Victims also receive other services, such as trauma counseling, temporary housing if required, legal information and assistance with recording losses. The message is clear to crime victims, "You are an upstanding member of our

community; you have been wronged, and it is our job to do everything we can to make certain you are restored to the highest degree possible. We will stand by your side until a sense of safety returns."

The Deschutes Circuit Court has prompted a complete range of opportunities for victims to be directly involved in the justice process. The court has placed a particularly high priority on victim-offender mediation services. In this approach, victims can choose to meet face to face with offenders to explain the human consequences of their losses, state their need for recovery of financial losses and determine appropriate community service requirements. The session is facilitated by a highly trained volunteer. The newly formed Department of Community Justice coordinates the program for the court. Early results of this approach are very encouraging. Victims report a much higher level of satisfaction with mediation than with traditional judicial processes. And the agreements reached are far more durable than standard orders of probation. Offenders pay restitution at a much higher rate, approaching 90 percent compared with a national probation average of just 33 percent.

The Community Justice Department is converting positions that once focused on offender counseling to positions that emphasize victim support and counseling. The old system asked of each law enforcement referral—"What is the status of the offender? What are his/her needs? What services are required to change his/her behavior." The new system asks—"What is the situation of the victim? What is the degree of his/her hardship? What does the offender need to do to repay the victim?"

The Department continues to manage and supervise the offender's behavior. But the primary context of the supervision has to do with the offender's responsibility to restore the victim and pay the restitution. Accountability, not counseling, is the highest priority of the offender's supervision.

Managing Property Offenders More Creatively

The business community in Deschutes County has joined forces with the Department of Community Justice to form what has become known as the Merchant Accountability Board. The board was developed for several reasons:

❍ Shoplifting, retail theft and bad checks were taking a terrible toll on area merchants, in some cases threatening the viability of some small businesses.

❍ The district attorney's office was reaching a point where it could barely afford to prosecute the flood of these cases, as each prosecution was costing $600–$900 from the Department's budget for attorney fees and other staff costs. This cost was the same whether the theft was of a large sum of money or a small one.

❍ Merchants, while supportive of the county's Victim Offender Mediation Program, could not afford to take the time to go through mediation on every case.

As a result of these circumstances, the merchants put together a program in which one merchant would serve as the surrogate victim for a dozen or so cases and determine an appropriate level of restitution. In this way, the case is handled without the need for costly prosecution, the merchant victim gets an opportunity to impress upon shoplifters and petty thieves the

gravity of their effect on a small business family, and the merchants receive their restitution more quickly, and at a higher rate, than through conventional judicial processes.

Building More Viable Communities

One of the featured changes that has occurred with the Department's commitment to community justice is now to view the community service sentence as a resource to build more viable communities. Community work service has traditionally been used primarily as a punitive measure for offenders. In Deschutes County, under the umbrella of the community justice philosophy, work service is seen as a means to restore victims and the community.

Within this context, the Department has worked diligently with community nonprofit agencies to tackle an array of innovative projects. These include:

- Partnering with a local Rotary Club to help construct a child abuse center,
- Joining forces with a local anti-poverty agency to help raise money for a 70-unit transitional housing shelter,
- Working to construct a community park in honor of a former community educator, and
- Developing a formal relationship with Habitat for Humanity, where offenders have constructed homes, under the auspices of that organization.

With this approach, the community gains tangible benefits from the Department, and offenders begin to build a bond with the community thereby reducing the likelihood of vandalism on their part. The community has demonstrated overwhelming support for this approach.

Prevention Strategies

This issue may well have stirred the county's most creative thinking. In analyzing the state's juvenile corrections system, the county determined that Oregon had inadvertently created an incentive for counties to use state corrections facilities. In Oregon, the counties pay no price for use of state institutions, so in essence, there is a free option for counties to place troublesome but not necessarily dangerous juvenile offenders in state correction facilities. Not surprisingly, there is and there likely will always be, pressure to expand juvenile institutions to house the counties' juvenile offenders. While on the surface this appears financially beneficial to county governments, it only serves to boost prison populations and costs, thus threatening other essential state services such as education.

Deschutes County and the Oregon Youth Authority hammered out a way to reverse this trend. The county offered to shift to a block-grant funding base where the county would manage in its local facilities non-dangerous juvenile offenders, who would otherwise have been placed in state institutions. The local programs are paid for with funds from the block grant with the agreement that any savings can be reinvested in crime prevention strategies. And the savings can be significant, as much as several hundred thousand dollars a year. A citizens' Commission on Children and Families is managing the money. These citizens bring a strong business perspective to the program and

clearly differentiate between expenses and investments. This innovative approach won support from the state legislature and Governor John A. Kitzhaber.

If this program works and expands to other counties, Oregon will win in two ways. The current prison population can at least be restricted, and dollars once destined for costly prison operations can be reinvested in community crime prevention strategies.

These are just a few examples of efforts undertaken since the community justice initiative was launched. With citizens and victims more involved, there is an endless creative energy available to transform the criminal justice system into a community justice system.

Community justice clearly responds to victims' needs first, offers creative solutions to hold nonviolent offenders accountable and features crime prevention as an important aspect of the criminal justice system's daily activities. Central to this philosophy is the active participation of citizens in all aspects of the justice system. This citizen participation serves to expand the sense of responsibility for safer communities far beyond justice system professionals. With this new sense of ownership and responsibility, citizens willingly bring energy and resources never before made available through tax-supported means. Armed with a new philosophy and equipped with citizen-provided leadership and resources, the future looks brighter and safer for those places in pursuit of community justice.

Community Justice Resolution

Resolution No. 96–122

Whereas, the citizens of Deschutes County should be entitled to the highest level of public safety, and

Whereas, increasing rates of juvenile and adult crime pose a threat to our citizens being and feeling safe, and

Whereas, a comprehensive crime reduction strategy requires a balanced emphasis on crime prevention, early intervention and effective corrections efforts, and

Whereas, Community Justice embodies a philosophy that engages the community to lead all crime prevention and crime reduction strategies,

Now, therefore, the Deschutes County Board of Commissioners adopts Community Justice as the central mission and purpose of the county's community corrections efforts. Furthermore, the County hereby creates a Department of Community Justice to replace the Department of Community Corrections.

Be it resolved that the Department of Community Justice shall work in partnership with the County's citizenry to carry out effective crime prevention, crime control and crime reduction initiatives.

Be it further resolved that the County shall construct a Community Justice Center to provide facilities and programs for victims of crime to be restored, for offenders to be held accountable and to gain the competencies to become responsible and productive citizens, and for the community to have access to an organizational center for a broad range of crime fighting efforts.

Dated this 25th day of September 1996, by the Deschutes County Board of Commissioners.

The Scottsboro Boys and Fundamental Rights

by David Pitts

This year is the 70th anniversary of a trial that captured the imagination of the nation for almost two decades. The case of the Scottsboro Boys v. the state of Alabama *became a cause celebre, was a major precursor of the U.S. civil rights movement and led to two landmark U.S. Supreme Court rulings that enhanced fundamental rights for all Americans. The case also was a sobering reminder that rights enshrined in written constitutions are rarely immediate realities, but instead evolve over time in the light of judicial interpretation and review. Contributing editor David Pitts discusses the significance of the high court rulings in the following article. He also visited Scottsboro to talk with the mayor of the city and to ask how his town has changed since the first trials took place there in 1931.*

IN MARCH 1931, nine young black males, aged 13 to 21, riding in an open freight car through rural Alabama were jailed and put on trial—after being accused of raping two white women—Ruby Bates and Victoria Price—who also were aboard the train. The place was Scottsboro, a small hitherto little-known town that was to give its name to one of the most famous civil rights cases in American history—a story of racism, stereotypes and sexual taboos played out in the heart of a then rigidly segregated South. Eight of the nine young men were hastily convicted and sentenced to death. Roy Wright, who was just 13 years old, was spared the ultimate penalty.

The courthouse where the first trials took place still stands in the center of the town, although one resident was quick to remind a visitor that later trials were moved elsewhere in Alabama. Most people asked have only a vague knowledge of what took place here seven decades ago. Said one elderly man, "I was a boy

The Scottsboro courthouse today.

when the trials began. I vaguely remember my parents mentioning it. It was only later that I realized that an important event happened right here in this town. But I didn't realize it until civil rights became a big thing."

The Importance of the Case

The story of the Scottsboro Boys is important not only in civil rights history, but also in the evolution of constitutional law, for it was this case that led to a more wide-reaching interpretation of the Fourteenth Amendment's guarantee of "equal protection under the law" and of "due process of law." The case also expanded the scope of the Sixth Amendment's assurance of a defendant's right to "have the assistance of counsel." Specifically, the case ultimately resulted in a guarantee of adequate counsel for all Americans in all criminal trials, state or federal; and a requirement that no race or ethnic group may be excluded from juries.

The Sixth Amendment to the U.S. Constitution includes various rights intended to ensure that criminal defendants receive fair trials. A key provision is the right to be represented by a lawyer. But throughout most of the life of the Republic the right to counsel was limited to those who could afford one and also confined to crimes under federal jurisdiction. That changed with the Scottsboro Boys, who were accused of violating state, not federal law, and who were so

poor they could barely support themselves, let alone pay for a lawyer to represent them. Two lawyers were eventually provided, but they were far from adequate. One was a Tennessee real estate attorney who was drunk throughout the proceedings. The other was a local attorney who had not tried a case in decades.

The First Landmark Supreme Court Ruling

In a landmark ruling, in the Scottsboro case, *Powell v. Alabama* (1932), named after one of the nine defendants, the U.S. Supreme Court declared that poor defendants facing the death penalty must be provided with adequate counsel. The Court based its decision largely on the due process clause of the Fourteenth Amendment to the U.S. Constitution. In overturning the death sentences, the Court majority determined that the Scottsboro Boys' defense was, to say the least, inadequate. The Supreme Court ruling said that counsel was "fundamental" to due process in cases of this seriousness, whether in a state or federal court.

"In reversing the convictions," writes Donald Lively in his book, *Landmark Supreme Court Decisions*, "the Supreme Court determined that the complexities of a criminal trial require the right to have counsel present." Although *Powell v. Alabama* was a limited decision in that it applied only to capital cases, constitutional experts say it has had a substantial impact on American jurisprudence, since for the first time, a right to counsel was established for state, as well as federal, courts.

In addition, as the *U.S. Constitutional Law Dictionary* explains, "it tied the Sixth Amendment counsel clause to the states through the due process clause of the Fourteenth Amendment, albeit (to this point) only for capital cases at the trial stage." The significance of the ruling also was underlined by Maureen Harrison and Steve Gilbert in their book, *Landmark Decisions of the United States Supreme Court*. "From the beginning," they write, "our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to ensure fair trials before impartial tribunals in which every defendant stands equal before the law."

The Second Landmark Supreme Court Ruling

Alabama, however, refused to give in, and reprosecuted the Scottsboro case even though doctors who examined the women certified there had been no rape and even though Ruby Bates recanted her story a month before the new trials began. Death sentences were again returned for two of the defendants—Heywood Patterson and Clarence Norris. A second landmark U.S. Supreme Court decision—*Norris v. Alabama* (1935)—again overturned the death sentences, this time because Alabama prohibited African Americans from sitting on the juries. The unanimous decision spoke of the "the unvarying and wholesale exclusion" of blacks from the juries and called the idea that African Americans were not qualified to serve, as some had alleged, "a violent presumption."

Commenting on the Norris ruling's significance, *The Oxford Guide To U.S. Supreme Court Decisions* says the high court held "that the systematic exclusion of African Americans from service on the grand jury and trial jury denied

Four of the nine Scottsboro Boys with Samuel Leibowitz, one of the attorneys in the case. From left, Willie Robertson, Eugene Williams, Leibowitz, Roy Wright and Olen Montgomery.

African American defendants in the state courts (of Alabama) the equal protection of law guaranteed by the Fourteenth Amendment." They were, in fact, denied a fair trial by an impartial jury, writes James Goodman in his widely acclaimed book, *Stories of Scottsboro*. "In a unanimous opinion, the U.S. Supreme Court agreed with the defense that Negroes had been arbitrarily and systematically excluded from Alabama's jury rolls in violation of the equal protection clause of the Fourteenth Amendment."

Despite the two U.S. Supreme Court rulings against the prosecution, the state of Alabama once again persisted in holding more trials. Eventually five of the men were convicted and served long jail sentences, the last being released in 1950. The other four were set free. Although the U.S. Supreme Court did not save five of the Scottsboro Boys from prison, it did ensure that they were not executed. Constitutionally, the significance of the case is that the U.S. Supreme Court had committed itself to the right to adequate counsel, at least in capital cases. It also had served notice that excluding citizens from jury service based on race would not be tolerated. The 1935 *Norris v. Alabama* decision ultimately—but not immediately—led to the abolition of all-white juries throughout the South.

Later Court Decisions

With regard to the *Powell v. Alabama* decision, subsequent Supreme Court rulings strengthened the right to counsel guarantee. In *Johnson v. Zerbst* (1936), the nation's highest court declared that all defendants facing felony

charges in federal court must be provided with attorneys. Previously (since 1790), it had been the case that only persons charged with capital crimes in a federal court must be provided an attorney. In the 1940s, the right was expanded by the Court to cover many state felony defendants facing state charges less serious than those faced by the Scottsboro Boys. Many state supreme courts also acted to require that counsel be provided—in particular in felony criminal cases.

As late as 1963, however, there were still seven states that failed to require that lawyers be provided for all state felony defendants. The U.S. Supreme Court brought the entire country into line with its decision in *Gideon v. Wainwright* (1963), which applied the Sixth Amendment right to counsel to all state, as well as federal courts in felony cases. "The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trial in some countries," declared Justice Hugo Black, "but it is in ours."

The decision was the essential culmination of one of the most dramatic stories in U.S. constitutional law—chronicled in detail in the 1964 book, *Gideon's Trumpet*. "Gideon is a decision of extraordinary importance," say Lee Epstein and Thomas Walker in their widely quoted book, *Constitutional Law For A Changing America*. It brought "legal representation to a class of defendants who previously did not enjoy the services of an attorney."

Subsequent Supreme Court rulings in the late 1960s, and especially the early 1970s, broadened the universal right to counsel established in 1963. In 1972, the Court held that the right to counsel applied not only to state and federal defendants charged with felonies, but in all trials of persons who could receive a jail sentence if convicted. The nation had come a long way since nine young, frightened African Americans stood in a hot, dusty Alabama courtroom in the spring of 1931 on trial for their lives.

In the case of the Scottsboro Boys, however, the U.S. Supreme Court intervened, triggering a series of major rulings that enhanced fundamental rights for all Americans and ensuring that this particular racial drama would become legend not only in civil rights history, but also in the long evolution of American jurisprudence. It is a case that incited much passion and debate in the 1930s and that still reverberates in our own time, affirming the principle of equal protection under the law.

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The Facts of the Case and Scottsboro Today

On March 31, 1931, nine young African Americans were indicted in Scottsboro, Alabama, on charges of having raped two white girls on a railroad freight car. Doctors who examined the girls after the alleged crime said that no rape occurred. Despite that evidence, eight of the nine boys were convicted and sentenced to death by the state court. The U.S. Supreme Court in *Powell v. Alabama* (1932) and *Norris v. Alabama* (1935) reversed convictions and death sentences obtained in the local courts—in the first instance, because the defendants had not been given adequate counsel, and in the second instance, because blacks had been excluded from the juries.

Nevertheless, further prosecutions in the case continued in Alabama between 1935 and 1937. Four of the defendants were again convicted and were sentenced to lengthy prison terms. Charges against the remaining five were dropped. Andy Wright was the last to be released from jail, in 1950; 19 years, two months and 15 days since he spent his first night in jail. The alleged leader of the group, Heywood Patterson, escaped from jail in 1948, making his way to the Midwestern state of Michigan where there was no legally mandated segregation. The governor of Michigan refused to extradite him back to Alabama. Patterson's book, *Scottsboro Boy*, was published while he was a fugitive. He died of cancer in 1952 at the age of 39.

Ozzie Powell and Clarence Norris, whose names appeared in the two landmark U.S. Supreme Court decisions, were both paroled from prison in 1946. Thirty years later, Norris sought and obtained an unconditional pardon from then-Alabama Governor George C. Wallace. Wallace had previously favored the state's segregation laws, but by the 1970s, legally mandated segregation had been crushed in Alabama and the governor was seeking to make amends for past wrongs. In 1979, Norris published his own book about his ordeal titled, The Last of the Scottsboro Boys. He died in 1989, the last surviving Scottsboro Boy.

The Scottsboro Boys were championed by widely disparate groups in the 1930s, including the American Communist Party and the National Association for the Advancement of Colored People (NAACP), the nation's oldest civil rights organization. But the eventual freedom of most of the defendants was mainly the result of the work of the Scottsboro Defense Committee, an umbrella group dominated by Americans of all colors. The demonstrations and rallies that were staged in support of the Scottsboro Boys are viewed by historians as a significant precursor of the modern U.S. civil rights movement that began in the early 1950s. The U.S. Supreme Court decisions that were issued as a result of the case are considered landmark rulings that significantly expanded fundamental rights for African Americans; indeed, for all Americans.

Driving into Scottsboro today—seven decades later—there is no hint of the inflexible segregation that must have seemed inviolable in the early 1930s. The town's mayor, Ron Bailey, wants visitors to know that Scottsboro, a community of only about 15,000 people, is a very different place today than it was then. "Our town is fully integrated now; the largest percentage of our population wasn't even born when the first trials took place here," he says. "You must judge the events of 1931 in the context of the predominant mores of that time," he adds. "In 1931, there were still people living in this town who personally remembered the Civil War. Alabama recovered much more slowly than did other parts of the South, economically and otherwise.

"It is important to remember what happened in this town in 1931, but it could have happened in many places at that time," notes Bailey. "Scottsboro has changed since then and so has the South. The Scottsboro of today is progressive in terms of race. We probably have a greater percentage of interracial dating and marriages than anywhere else in Alabama. And today, our town is no longer just black and white, but multiracial. We have a growing percentage of Asians and Hispanics, for example. Race relations in Scottsboro are now much like they are in other parts of America. Things are not perfect here, but we've come a long way."

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