

Sociology 3395: Criminal Justice and Corrections

Classes 15&16: The Courts and Criminal Trial Procedure 2

Now that we have reviewed the text materials on the courts, including their functions, organization, parties, procedures, the legal rights involved, and the operation of the trial process, I want to move on to flesh out these matters a little more. Specifically, today we will review materials written by the major players in the court process, namely, Crown prosecutors, defense counsel, and judges. These materials outline the roles that each party plays in criminal proceedings, their daily routines and experiences. This is meant to bring these parties out into the open, to make their experiences more real and meaningful than can be gleaned from a mere textbook review.

We will begin by looking at the role of the Crown. We will then consider its nemesis, defense counsel. Once we have finished looking at these adversaries (and that is what they are supposed to be!) We will move on to consider the arbitrator between them - the judge.

Brian Manarin (2004): The Role of the Prosecutor:

In this piece, Brian Manarin, an experienced Ontario Crown prosecutor, discusses the various decisions that confront a Crown on a daily basis, such as the determination of the charge to be laid (including whether it is in the public interest to proceed with a charge at all), the issue of bail for the accused, and giving submissions on sentencing.

Manarin begins by noting that the vast majority of criminal allegations are tried in the provincial courts. If you picture an inverted funnel, with the provincial courts representing the wide opening and the SCC the narrow spout, you may get a better appreciation of just how busy the provincial courts are. It is with this in mind that the prosecution's role is described.

The Crown is a lawyer whose responsibilities involve the preparation and prosecution of cases for alleged criminal and quasi-criminal offences occurring within their province. Though countless statutes come into play, the pre-eminent legislation that governs the prosecution of most criminal offences is the CC. This lengthy federal statute sets out what parliament considers to be acceptable and unacceptable conduct in civilized Canadian society, and may be seen as the catalyst behind all criminal prosecutions in Canada.

Most prosecutors earn their living in the courtroom. Their lot in life focuses largely on the search for truth in the context of the trial process. Yet, it is important to note that many issues that are integral to the administration of justice don't take place there. Among other things, prosecutors' other responsibilities include drafting court documents, providing professional advice to the police, related agencies, and the general public on criminal matters. They must possess a thorough knowledge of criminal law, procedure, and the rules of evidence, as well as a strong comprehension of the workings of the Charter. Last, but not least, the prosecutor must

bring superior judgement and a healthy degree of common sense to his/her duties.

In order to better appreciate what distinguishes a prosecutor from other lawyers, we must consider his/her actual role in the prosecution process. The parties to any criminal prosecution are the Queen, on the one side, and those accused of committing the offences on the other. The Crown must ensure that the accused receives a fair trial. The goal is not to register a conviction, but to come to a just result based on the evidence presented at trial. However, while charged with such high standards, prosecutors are human and thus subject to the same fallibility as any other person in any other walk of life. Putting aside one's passions to make way for moderation and impartiality is a constant effort. Maintaining neutrality does not, however, translate into a lacklustre effort on the part of the prosecution. Rather, Crown counsel, like any other advocate, is entitled to advance his/her position forcefully and effectively.

Conversely, the defense counsel is to be openly partisan toward his/her client. It is well understood that the defense has a duty to protect the client from being found guilty and may rely on all available evidence and defenses so long as they are not false nor fraudulent. Thus, the defense is not obliged to assist the prosecution at trial, and is entitled to assume an entirely adversarial role. Whereas the Crown must disclose its case to the defense, the defense need not state in advance what specific response will be made to the allegation, who the witnesses are, or what they will say on the witness stand. Most fundamentally, an accused is presumed to be innocent until proven guilty beyond a reasonable doubt. As such, they have the right to remain silent, avoid the potential for self-incrimination, and the burden of proving guilt rests entirely on the shoulders of the Crown.

By emphasizing this distinction between the Crown and defense, the trial process as well as the prosecutor's various responsibilities should be more easily understood. Keeping this in mind, the rest of this piece lays out, in general terms, three areas that would be dealt with regularly during a normal week in the office of a Crown prosecutor: (1) Charge screening and disclosure; (2) Bail hearings; and (3) Sentencing. The trial process itself, as it is relatively rare in comparison, will not be dealt with in any direct way.

(1) *Charge Screening and Disclosure*: While there is an immediate need for policing society, there is no corresponding need to prosecute all alleged offenders. The decision to continue or terminate a prosecution is among the most difficult Crown counsel must make. They must be alert to prevent abuses of the criminal process, standing independent between the accused and overzealous police. They must weed out vindictive complaints and not become unwitting instruments of persecution. Hence, they must remain objective, exercising discretion and judgement, especially in cases that have caused public uproar, have political overtones, or that appeal to various prejudices.

Charge screening occurs when the prosecution receives its brief of the allegations from the police. Screening is an ongoing process, but must be done before a date is set for a preliminary inquiry or a trial. Each charge is screened to decide, among other things: (1) whether

there is a reasonable prospect for conviction; (2) whether it is in the public interest to discontinue a prosecution even though there is a reasonable prospect of conviction; (3) whether the proper charge has been laid; (4) whether the investigation is complete; and (5) whether an offer of diversion should be made to the accused.

If there is no reasonable prospect of conviction, a prosecution must be terminated. The test is an objective one that considers the availability and admissibility of evidence, the credibility of witnesses, and the viability of any apparent defenses. Next, the public interest must be considered. While a daunting task, certain issues should be considered regularly in this respect (e.g. seriousness of the actions, the victim's views, the ages and health status of those involved, the impact on public confidence in the administration of justice, whether national security/international relations are involved, the degree of culpability of the accused, whether this offence is common in the community, whether a conviction would be unduly harsh for this person, the cooperativeness of the accused, strength of the Crown's case, how old the allegations are, length and cost of the prosecution relative to the likely sentence, and whether any alternatives to prosecution are available).

While the police initiate charges, it is up to the Crown to decide whether the proper charge has in fact been laid or whether another charge should be substituted. This can sometimes result in reducing duplicate charges. At times it may save valuable resources by keeping a case within the jurisdiction of a provincial court judge. Indeed, a keen eye for subtle legal nuances can result in a more or less serious charge being laid than police originally contemplated.

Until an investigation is complete, neither an accused nor a Crown can truly appreciate the strengths or weaknesses of a particular case. As such, the Crown must be sure that all avenues of police investigation have been exhausted. If not, the Crown must direct the police to complete certain aspects of the investigation. Indeed, the Crown should invite the opinion of defense counsel to see if there have been other oversights by police.

Finally, Crown have the opportunity to divert charges away from the CJS. This means that no prosecution will proceed and the accused will not acquire a criminal record. Historically, prosecutors have always had the discretion to withdraw charges against an accused. Presently, diversion programs have been devised by governments, collectively known as "alternative measures" recognized by the CC. Generally, if an accused admits to his or her involvement in an offence and doesn't wish a trial, alternative measures may be used by the Crown to deal with that person if, in so doing, it would not be inconsistent with the protection of society. The interests of society and the victim are weighed in the balance. Similarly the interests of the accused are fully protected. This is accomplished by: (1) ensuring that s/he fully and freely consents; and (2) ensuring that a trial is actually held if that is what the accused desires.

Alternative measures programs may involve the diversion of charges for the mentally disordered, prostitutes and their clients, Aboriginals, Young offenders, as well as a host of other minor (and generally first time offenders). RJ is another example (though potentially wider in

scope). Each requires the completion of some program or act of contrition that satisfies the prosecution's terms and conditions. By offering alternatives, the offender will be discouraged from offending again and avoid a criminal record. The state is also spared the necessity of expending scarce resources.

(2) *Bail Hearings*: Judicial interim release ("Bail") involves the release from custody of accused so that they may maintain their liberty while awaiting trial. While, under certain circumstances, a police officer or JP can arrange a person's release, we will concentrate here on bail hearings actually held in court where a prosecutor must make the call as to whether an accused should be detained.

Imagine Monday morning bail court where, in addition to the normal volume of weekend arrests, there have been raids on illegal establishments and final "take downs" of various special police crime prevention projects resulting in further large-scale arrests. In such circumstances, the ability to make intelligent, fair, and informed decisions can be challenging. Digesting the allegations pertinent to each accused, considering the positions of the police, defense, and complainants, and considering strategy for the bail hearings themselves requires a cool head and a large measure of confidence.

The outcome of a bail hearing is often pivotal to the outcome of the case itself. Statistics have shown that over 80% of provincial court cases result in guilty plea. However, those detained without bail are even more likely to plead guilty so that they may start serving their sentences immediately. Justice through trial seems much less appealing when one is waiting for his day in court in custody. As such, it is perhaps at the bail hearing where the Crown is under the most intense pressure to be firm but fair.

At a bail hearing, it is clear that an accused will be granted bail unless the Crown can show why the detention of the accused is justified. However, there are 5 situations that can shift the onus to the accused to show why his/her detention is not justified: (1) If the accused is alleged to have committed another indictable offence while on release; (2) if the accused committed an offence involving organized crime punishable by 5+ years; (3) if the accused charged with an indictable offence is not ordinarily a resident of Canada; (4) if the accused has failed to appear in court or failed to live up to the terms of a previous release; and (5) if the accused allegedly committed or conspired to commit an offence involving the production, trafficking or importation of certain drugs.

Whether the burden is on the Crown or accused, 3 areas of concern are consistently addressed at bail hearings: (1) is detention necessary to ensure the accused's attendance in court?; (2) is it necessary for the protection and safety of the public; and (3) is detention necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity or nature of the offence, the circumstances surrounding its commission, and the potential for a lengthy term of imprisonment.

Although the CC are clear on when a prosecutor may seek to detain a person in custody until trial, these criteria should not be applied automatically. By erring on the side of caution, Crown counsel often fall short of the standards that are expected from his/her office.

(*Examples*)

1. Robbery by refugee claimant with no record - Crown suggests release
2. Second incident of domestic abuse by later remorseful husband with surety - Crown suggests conditional release
3. Accused breaches curfew by being drunk in public - while reverse onus, the likely sentence for the original charge wouldn't be custodial. Release recommended

(3) *Sentencing*: Arguably nothing is more troubling for a Crown than making submissions on sentence. The accused now stands guilty (either after a guilty plea or a trial verdict). Here the defendant is at his or her most vulnerable, but so is the Crown. The defendant is vulnerable because the passing of sentence can result in the loss of liberty as well as stigmatization for years to come. The Crown is vulnerable since the quality of justice is often measured by the submissions of the prosecution on sentence. A lack of impartiality at this most emotional stage of the proceedings can tarnish the entire office of the Crown attorney, not just the reputation of the individual prosecutor.

Yet, while a Crown at this stage is supposed to be “unconcerned” with the outcome, this should not be interpreted as apathetic - something that mean that Crown counsel had relinquished his or her responsibility for a just sentence. Thus, historically, the prosecution is expected to display a lack of concern at the end as well as the beginning of the trial process, to acquit itself without feeling or animus in order to dispassionately reach a just conclusion.

The purpose and principles of sentencing are now largely incorporated into the CC. Yet, sentencing hearings are almost entirely fact-generated and no 2 hearings are ever exactly the same. One area worthy of special comment is the conditional sentence. Recent amendments to the CC have resulted in a new type of sentence in Canada. When a defendant doesn't have to serve a minimum term of imprisonment under the CC, the court may order that s/he serve the sentence in the community. However, the court must be satisfied that so doing would be consistent with the fundamental purpose and principles of sentencing as set out in the CC.

The 1996 advent of the conditional sentence means that many offenders who traditionally went to jail are now increasingly serving their sentences in the community, subject to various conditions. So far, it has been hard for many prosecutors to accept this as: (1) it is hard to appreciate how value systems in Canadian society have shifted so dramatically that Parliament has allowed offenders who would have been jailed before to serve their sentences in the same

community whose trust they violated; and (2) due to scarce resources, the administration of criminal justice is ill-equipped to monitor or prosecute those offenders who don't live up to the conditions of their sentences in the community.

A shortcoming of the conditional sentence is that many judges, defense counsel and prosecutors view it as a second class form of punishment. It is bandied about more as a tool for plea-bargaining purposes than as a legitimate form of sentence. On anecdotal evidence alone, the disparity between the imposition of a conditional sentence upon a guilty plea as opposed to after a trial appears to be glaring.

How should Crown counsel remedy this misuse of the conditional sentence. The answer is obvious. The prosecution has a positive duty to apply the law as expressed by Parliament and to actively urge conditional sentences upon the court only whenever the circumstances dictate. This would be in keeping with the highest traditions of the Crown and entirely consistent with the expected objectivity that goes with the office. To lead by example is to conscientiously discharge the duties of the prosecution.

Conclusion: In the end, provincial courts are the lifeblood of the CJS. They have been variously described as ungovernable battlefields and as arenas of remarkable cohesion. No matter what particular view is held, there is no denying that the Crown plays an essential role in making the busiest of all Canadian courts a functional role model for the administration of justice. By maintaining an objective frame of mind, Crown counsel will continue to uphold a cornerstone of the adversarial process. It is not always an easy task.

Paul Burstein (2004) The Importance of Being an Earnest Criminal Defense Lawyer

Defense lawyers are often asked whether it bothers them to work so hard in the defense of someone they know is guilty. In this piece, Burstein responds to this question by laying out the importance of criminal defense work for society at large.

However, in order to do this, he also feels that it is important to first explain what criminal defense counsel do. Quite simply, they represent people who find themselves accused of crimes. Despite TV portrayals of trial activities, most of a defense counsel's job is spent helping clients long before their cases actually go to trial. Indeed, the vast majority of criminal cases never go to trial (only about 5-10% do). So what are defense counsel doing hanging around courthouses? They are trying to help their clients either stay out, or get out, of jail.

(1) *The client at the police station:* Under s.10(b) of the Charter, an accused has the right, on arrest or detention, to retain and instruct counsel without delay and to be informed of that right. This means that police have to tell someone who's been arrested that s/he can immediately contact a lawyer for free legal advice. When a detainee asks to speak to a lawyer, police are obliged to help, such as by providing him with a phone and phone book. When contacted in these circumstances, defense counsel will almost always urge the detainee to assert his right to remain

silent.

Contrary to popular misconception, it is not only the guilty who “confess” to the police while being held in detention. It is not at all uncommon for the “innocent” to provide the police with a false confession. It is even more common for detainees to provide the police with an account of the events that is confused or mistaken. After all, these people are being held in custody and are being interrogated by very skilled and experienced questioners. More often than not, they will confront the detainee with overblown claims of a case against the person in the hope of stimulating some sort of incriminating statement.

Accordingly, in an effort to prevent the creation of unreliable “confessions,” our law guarantees a detainee the right to remain silent upon arrest. It is the defense lawyer’s job to not only remind the detainee of that right during the first phone call, but to help the person build the courage to maintain that silence in the face of any subtle or confrontational police questioning. While most officers will back off once a detainee reminds them of this right, unfortunately not all clients, no matter how many times they come into contact with the CJS, are able to keep their mouths shut.

(2) *Release of the client on bail:* The second task of defense counsel during that first phone call from the police station is to attempt to persuade the police to allow the client-detainee to be released on bail. While the police will usually have already made a decision in this regard, there are times when defense counsel’s input can help satisfy the arresting officer that it is appropriate to release the detainee directly from the station. If not, counsel will ask when and where the detainee will be brought to court for a show-cause hearing before a JP. This must occur within a day or so of the arrest. Many people believe that the bail issue is the most important one in the criminal process. As noted above, given the long delays that occur between arrest and trial, some people will have a strong incentive to simply plead guilty - even when they are not - simply to avoid a long wait in a pretrial remand facility.

In preparation for a bail hearing, defense lawyers will need to help the client to find a surety to supervise and put up a guarantee that the person will show up in court. In many cases, defense counsel also must function as social workers or counselors and help arrange for their clients to obtain treatment, secure employment, or re-enroll in school, as the JP will want to know that the client won’t be sitting at home and watching soap operas until the trial date. JP’s often like to comment that “the devil finds work for idle hands.”

(3) *Defenses:* Following the bail hearing, defense counsel must determine whether the client has a defense to the charges s/he faces. These can be broadly divided into factual and legal defenses. The former involves a challenge to the evidence that the police have gathered in their investigation. For example, could a witness be lying? Could s/he benefit somehow from the allegations, such as receiving a lesser sentence or a monetary reward? Maybe the eyewitness was mistaken? (as is often the cases). Legal defenses, in contrast, focus on whether or not what the person is accused of doing should be considered “criminal.” Was an assault done in self-defense?

Was a crime committed under duress? In order to consider these, defense counsel will need to gather information relevant to the case, whether from police reports and witness statements obliged to be disclosed by the Crown, as well as any other information that the client and other potential witnesses might be able to provide. In addition, defense counsel may do some research into the law that governs the features of the client's case (e.g. whether an illegal search occurred, or whether 2 lovers in a parked car are legally in a "public place"). Once defense counsel has determined the nature and extent of the available defenses, s/he is ready to advise the client how next to proceed.

At this point, the client is presented with 2 options: (1) plead guilty in the hope of obtaining a more lenient sentence from the court (for being spared the time and expense of a trial); or (2) plead not guilty and contest the Crown's case at trial. Most take the former route.

The term "plea bargain" denotes that an accused, in exchange for giving up their right to a full-blown trial, receives the prosecutor's recommendation for a more lenient sentence than would normally be sought if that accused had been convicted after trial. Such bargaining is often done at the prosecutor's office, sometimes mediated by a judge. Upon learning the bottom-line offer of the Crown, defense counsel must always ask for the input of the client before accepting or rejecting it. Counsel's risk-benefit analysis of whether or not to take the plea is inevitably different than the client's, but most take it. If the client is one of the minority to decide to reject the plea bargain in favor of a trial, the court will schedule one some time down the road.

(4) *Preparing for trial*: Preparing a case for trial is much like producing a film or a play. First, you have to develop the story on which the play will be based. This doesn't mean fabricating stories, but the development of a narrative that takes into account the evidence that defense counsel believes will be accepted by the jury (or judge) at the end of the case *and* that is consistent with innocence. In a nutshell, what defense counsel does in representing a client at trial is to develop an "innocence" narrative to compete with the "guilty" narrative constructed by the police. For example, the police may not have interviewed all potential witnesses, some of whom not only cast doubt on the claim that the client is the guilty party, but that also may shed light on the true identity of the perpetrator.

This development of a competing narrative is, however, no easy task. By the time that defense counsel become involved, the prosecution narrative has already been constructed. The evidence is rarely still sitting at the scene waiting to be collected and examined. All the same, defense counsel must visit the scene of the crime to discover the competing innocence narrative. Perhaps the one feature of criminal defense work that is fairly reflected on TV is the sleuthing that defense counsel do in preparing their clients' cases (e.g. Burstein recalls visiting a seedy hotel in Toronto and discovered that a locked stairway door and slow elevator had prevented his client, a prostitute accused of murder but claiming self defense, from any quick means of escape).

The next element of the trial drama is the cast of characters, and some are just that. Who are the people who will tell their story to the jury? What is their background? Are they neutral or

do they have an axe to grind with the client? Do they have a criminal record or a history of substance abuse? Usually, as part of disclosure, the defense will be given this sort of information about potential witnesses. However, in some cases a private detective may be hired to go out and gather information about witnesses. Even then, however, defense counsel never have the investigative resources available to the police and Crown. This, in fact, is one of the principal justifications for insisting that the Crown bear the burden of proving guilt beyond a reasonable doubt.

With the storyline developed and the cast of characters defined, defense counsel must then turn to directing the play. Unlike on TV, most defense counsel don't simply wait until the Crown finishes questioning a witness and then begin cross examination. Cross examination must be carefully thought out and planned so that it does not do more harm than good. It is also important for defense counsel to maintain the jury's interest in the case: important points that arise in the middle of a long and meandering cross-examination will be lost. Lawyers must consider ways to illustrate the testimony of witnesses, such as by using diagrams, photos, or computer simulations. The ultimate efficacy of the "production" in the courtroom will depend on the time invested in its planning.

(5) *Constitutional issues:* While the outcome of most trials depends on the narratives created by the witnesses and the evidence, some trials will focus much more on the law itself. For example, the 1988 trial of Dr. Henry Morgentaler under the then criminally enforced anti-abortion laws (the old s.251 of the CC). Dr. Morgentaler's lawyer argued that it didn't really matter that Dr. Morgentaler did what he was alleged to have done, as the law itself was inconsistent with s.7 of the Charter. The SCC agreed. The Canadian government isn't allowed to make laws that violate the rights set out in the Charter and that are not seen as reasonable limits on those rights. As this example shows, a lone criminal defense lawyer, armed with nothing more than a solid legal argument, can "make" (or rather, unmake) law.

Burstein himself has raised constitutional challenges to the marijuana laws on behalf of clients. He was involved in a case, led by Professor Alan Young, that ultimately has wound its way to the SCC. He has argued that the marijuana law is in violation of s.7 of the Charter, so should be struck down (since this article was written, the SCC has made a ruling rejecting that argument).

In some instances, defense counsel will instead challenge the scope of a particular law, as opposed to the law itself (e.g. would it be possible to restrict to marijuana law only to those varieties people use to get high, allowing hemp products to be sold? What about medical marijuana?) Similarly, Burstein was involved in the challenge to the prostitution law under which the "Thornhill Dominatrix" was charged with running a common bawdyhouse on the basis that her S&M services were the equivalent of sex for hire. The argument made was that this provided psychological, rather than sexual, stimulation, so wasn't the same thing as sex for hire. This argument didn't fly.

Burstein argues that his involvement in these various constitutional challenges highlights another important feature of being a criminal defense lawyer: the need to study new disciplines beyond the confines of law. For his marijuana challenges, he had to educate himself on the psychopharmacological, sociological, criminological, botanical and historical perspectives on the criminal prohibition of marijuana. For the dominatrix case, he had to become versed in the S&M subculture in order to be able to explain it to the court and, more importantly, to be able to demonstrate why the stereotypical perception of such practices is misguided. He says that for other cases he's had to learn about psychiatry, literature, chemistry, toxicology, biology, even entomology. Such studying can be a burden of the criminal defense counsel's job. Burstein recalls spending all of his Friday evenings for weeks on end sitting in a cramped engineer's office to be taught all about digital image processing in preparation for a case. Then again, this is probably one of the great benefits of being a criminal defense lawyer: the opportunity to learn about things to which one might never otherwise be exposed.

(6) *Defending people who may well be guilty*: Despite the long hours, the limited financial rewards, and the general lack of respect from the public, Burstein says that he mostly loves his job. He meets interesting people, learns fascinating new things, and visits places he otherwise likely would never have gone. In many ways, the work is exotic and exciting.

But what about the question raised at the outset, about how he could defend someone who he "knows" is guilty. To begin with, he says that it is important to remember that our CJS, while good, is far from perfect. One need only note the increasing number of wrongful convictions that is emerging in Canada and the US. Back in 1985, everybody just "knew" that Guy Paul Morin was guilty. Over a decade later, they realized otherwise. Perception is not reality in criminal justice.

The only way to help reduce the number of wrongful convictions is to ensure that the CJS never cuts corners, no matter how heinous the crime. If someone is really guilty, the system should be able to arrive at that determination in a fair and just manner. That is, by following the same rules it always does. Everyone must be subject to the same set of rules, no matter s/he is or what s/he has been accused of doing. There are many countries where, unfortunately, that is not the case. In those places, the rules depend on who you are and who you know. Such power structures exist, in part, because there are no defense lawyers to challenge the arbitrary detention and imprisonment of people whom governments label as "criminals." While Canada is far from such examples, we must never take for granted our freedoms nor those whose job it is to defend them. Defending the "guilty" is a necessary part of ensuring that we all continue to enjoy our rights and freedoms. In short, defense lawyers keep the CJS honest.

That still leaves the question as to why defense counsel should defend "bad" people as opposed to those simply accused of doing a bad thing. For better or worse, ours is a CJS that seeks only to punish people for what they have done, not who they are. Yet, just imagine if we based our punishment decisions on whether a person was "good" or "bad." Even in such a system it would be unfair to punish those who were bad through no fault of their own (e.g. people with

fetal alcohol syndrome, or who were abused in group homes after being abandoned). This would mean that we could punish bad people only after having a trial to determine if they were bad by choice or circumstances (a situation not far from what we do now). If we did not care to make that distinction, we would have to be prepared to charge all those who may have contributed to the person's crime of being bad, such as parents, schools, peers and government. Is that really likely?

Judge David Cole (2004) A Day in the Life of a Provincial Court Judge:

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