Political Science
Legal Studies 217

The Adversarial System

Due Process

- Enshrined in Constitution
- 5th Amendment: "No person shall ... be deprived of life, liberty, or property, without due process of law;"
- 14th Amendment: "... nor shall any state deprive any person of life, liberty, or property, without due process of law;"
- Procedural due process
- Substantive due process

Adversarial Model

- Party-centered
  - Parties control the selection and presentation of evidence subject to rules of evidence
  - Right to counsel
- Adjudicator as umpire
- Confrontation of witnesses
  - Confrontation clause (6th Amendment): "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him"
- Cross-examination
American Criminal Procedure

- Knowledge of charges
- Speedy trial
- Local trial
- Public trial
- No double jeopardy
- No self-incrimination
- Compelling testimony
- No excessive bail or fines
- No cruel AND unusual punishment

Antecedents of Current System

- Writ system of common law pleadings
  - Originally built around “trespass” (legal injury involving force and violence)
  - Generalized over time to include accidental injury, economic injury, property issues, etc.
- Writ itself was an order to a defendant to take specific action to remedy wrong

Common Law Pleading

- “Forms of Action”
- Common general structure
- Specific form for specific action
- Line between what today we call civil cases and criminal cases was blurred
  - Writs would be issued as a summons for common law crimes
  - Common law crime of blasphemy
- Little opportunity for appeal
Common Law Procedure

- Initiation via writ
- Orality
- Determination of factual disputes by judge or jury
- Legal questions decided by judge
- Strict adherence to form of process
  - Grievant presented his/her case
  - Respondent presented his/her case
  - Court issued a "judgment"

Equity

- Appeals to the King's Chancellor for "equitable" or "just" action
  - Covered issues missed by common law
  - Could be used to prevent injury before it happened
- No juries for deciding fact
  - Both law and fact decided by judge
  - Judge called forth evidence
  - More opportunity for appeal
- Greater reliance on documentation

Demise of the Writ System

- Writ system inefficient and rigid
  - Based entirely on common law precedent
  - Hard to adapt to change
  - Unnecessary complexity arising from parallel Equity system of procedure
- Middle of 19th century reforms began
  - Merge law and equity
  - Replace writs with simplified system of pleading
“Code” Pleading

- Make law and legal procedure intelligible
- Make procedure logical and unitary
- New system adopted legislative process (i.e., adopting a “code”)
  - Statutory change rather than accretion of new precedent
- Field Code, New York 1848
- Federal Rules of Civil Procedure 1938

Principles of Civil Procedure

- Notice Pleadings
- Discovery
  - Access to information
- Narrow issues in dispute
- Factual disputes resolved by judge or jury
  - Civil jury used sparingly outside U.S.
- Concentrated trial process

Criminal Process

- Based on common law structure
  - Adversarial
  - Orality
  - Right to trial by jury
  - Right to counsel
  - Concentrated trial
- We have added some additional features
  - Limits on search & seizure
  - Right to plead guilty
The Theory

- Due Process Model
  - Presumption of innocence
  - Emphasis on following procedural rules
  - Emphasis on getting at truth through adversarial process
  - Protect the rights of the defendant
- The textbook model
  - What we teach children
  - What we expect if we get in trouble

Closer to Reality?

- Crime Control Model
  - Prevalence of guilt
  - Need to process cases
  - Questions concern not guilt or innocence
    - What is defendant guilty of?
    - What is the appropriate ("normal") sanction?

Formal Process

- Protect due process rights of defendant
- Bail
- Preliminary hearing
  - Probable cause
- Evidentiary hearings
  - Challenge the admissibility of evidence
- Discovery
  - Defendant has access to evidence
Trial
- Concentrated trial
- Bench or jury
- Opening statements
- Prosecution’s case
- Motion for dismissal
- Defendant’s case
- Instructions to the jury
- Closing statements
- Motions to reverse guilty verdict

Informal System
- Exclude as much evidence as possible
- “Settle the facts”
  - What is the defendant actually guilty of?
  - What is reasonable sentence in light of this determination?
- Penalties for trial
  - May be convicted of more serious offense
  - May receive a more severe sentence

Guilty Plea System
- “Plea bargaining”
  - Criminals get off
  - Innocent defendants pressured to plead guilty to avoid trial penalty
- Disposition through guilty pleas
  - Finding the appropriate resolution considering the case facts and going rates
  - Supermarket vs. flea market
Variations

- Right to jury trial
  - Limited in England to "indictable" offenses
  - Implicit plea bargaining
- Prosecution
  - Local (District Attorneys)
  - Central (Crown Prosecution Service)
- Preliminary process
  - Indictment (or equivalent) issued by prosecutor rather than grand jury
- Role of judge
  - "summing up"
- Exclusion of illegally obtained evidence

Civil Procedure in Action

- Case resolution vs. all out war
- Information sharing versus trial by ambush
- "Costs" rules
  - Fee shifting
  - English Rule
    - "Loser pays"
    - "Costs follow the event"
  - American Rule

Preliminaries

- Pleading
  - Complaint
  - Answer
  - Counterclaim, cross-claim
- Motion practice
  - Jurisdiction
  - Justiciability
    - Failure to State a Claim upon which Relief Can Be Granted
  - Summary judgment
Discovery
- Presumptive discovery
- Document production
- Depositions
- Interrogatories
- Use of discovery
  - Share information
  - Preserve testimony
  - Challenge later testimony
- Privileged information

Other Issues
- Notification (service)
- Case aggregation
  - Joinder of parties and issues
  - Class action
- Pretrial conferences
  - Scheduling
  - Settlement
- Deadlines
- Enforcement of rules
  - Rule 11 and Rule 26 sanctions

Settlement Process
- Cost rules
  - American rule vs. English rule
  - “Payment into Court”
  - “Offer of settlement”
    - "Party and party costs"
    - "Solicitor and client costs"
- Rule 68, FRCP
Trial and after

- Use of depositions in lieu of live testimony
- Evidentiary burden
  - Preponderance of the Evidence
- Judgment Not Withstanding the Verdict
- Modifying the award
  - Remittur
  - Addittur

Variations

- Presumptive discovery
- Breadth of discovery
- Juries vs. judges
- Precedential rules for determining damage awards