FOURTH EDITION

CRIMINAL PROCEDURE

MATTHEW LIPPMAN

Criminal Procedure

Fourth Edition

For NBB

Criminal Procedure

Fourth Edition

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Brief Contents

Detailed Contents

Preface

I have been fascinated by criminal procedure since I was first introduced to the subject in law school. Criminal procedure has continued to inspire me over the three decades that I have taught the course. Writing this text has been a labor of love, and I hope it conveys my passion toward this intellectually challenging field. I tell students that there are good reasons to study criminal procedure:

The American tradition. Criminal procedure provides an introduction to various provisions of the U.S. Constitution and Bill of Rights and involves a discussion of the values and legal judgments that are the foundation of American democracy.

Professional preparation. Anyone who aspires to a career in criminal justice should understand the rules that regulate areas such as interrogations, searches and seizures, and street encounters. Police officers, in particular, apply the rules of criminal procedure on a daily basis.

Academic preparation. The study of criminal procedure helps develop logical and critical thinking and analytical reading.

Public policy. Criminal procedure addresses issues that are at the heart of the public policy debate in criminal justice, including search and seizure, capital punishment, and the limits of police powers.

The study of the law. Reading Supreme Court cases in the field of criminal procedure introduces students to the leading cases in the history of the Court and provides an opportunity to read the actual judgments of some of the greatest jurists in U.S. history.

The text is organized around the theme of balancing the need to detect, investigate, prosecute, and punish crime against the constitutional commitment to protecting the rights and liberties of individuals. The text illustrates how this balance is constantly being adjusted to meet the challenges that confront society. This is a particularly interesting time to be examining the striking of this delicate balance. We have a Supreme Court that includes several recently appointed judges who are introducing new perspectives and points of view that are already impacting the law of criminal procedure. The courts also are confronting novel challenges in areas such as science and technology, terrorism, immigration, and human and narcotics trafficking.

CHAPTER ORGANIZATION

The book provides comprehensive essays that introduce each topic with edited versions of the *leading cases* on criminal procedure. Essays typically are followed by *Legal Equations* that summarize the law. The case method provides students with concrete examples and illustrations and thereby facilitates learning and teaching. Reading cases also exposes students to the actual documents that have shaped the American criminal justice system. *Questions for Discussion* follow each case. Instructors can find additional important cases on the *Student Study Site*. The chapters also feature a number of *You Decide* problems that ask students to apply the law to actual cases.

Each chapter is introduced by an *opening vignette* drawn from a case in the chapter. This is followed by a *Test Your Knowledge* feature that is intended to interest students in the material. At the end of the chapter, students will find a *Chapter Summary*, *Chapter Review Questions*, and *Legal Terminology*. Contemporary developments in the law are illustrated by a feature titled *Criminal Procedure in the News.* Students may want to further explore issues in each chapter by visiting the Student Study Site at **edge.sagepub.com/lippmancp4e**, which contains a variety of features, including a summary of the *Leading Cases* discussed in each chapter.

ORGANIZATION OF THE TEXT

The text provides comprehensive coverage of criminal procedure and includes chapters on the structure of the judicial process, the sources and constitutional development of criminal procedure, criminal investigation, remedies for violations of constitutional rights, the pretrial and trial process, sentencing and appeals, and counterterrorism. Although a standard organizational framework is used, instructors may prefer a different approach, and the book is designed to allow teachers to assign chapters in accordance with their own approach to the subject. The book is suitable for a one-semester or two-semester sequence on criminal procedure.

The fifteen chapters of the book may be divided into six sections:

1. ***The criminal justice process and the sources of criminal procedure.*** Chapter 1 discusses the structure of the criminal justice process. On the Student Study Site is an appendix on the reading of criminal cases. Chapter 2 covers the sources of criminal procedure and the Fourteenth Amendment Due Process Clause incorporation doctrine.
2. ***Searches and seizures.*** Chapter 3 discusses the Fourth Amendment and the legal tests for search and seizure. Chapter 4 covers stop and frisk, and Chapter 5 discusses arrests. Chapter 6 focuses on searches of property, and Chapter 7 covers administrative and special-needs searches.
3. ***Interrogations, lineups, and identifications.*** This section introduces two other investigative methods: interrogations in Chapter 8 and lineups and identifications in Chapter 9.
4. ***Remedies for constitutional violations.*** Chapter 10 covers the exclusionary rule, and Chapter 11 discusses civil and criminal and administrative remedies.
5. ***The pretrial and trial process, sentencing, and appeals.*** Chapter 12 addresses the pretrial process, including prosecutorial discretion, bail, and the right to counsel. Chapter 13 covers preliminary hearings, grand and petit juries, and the trial process. Chapter 14 discusses sentencing, appeals, and habeas corpus.
6. ***Counterterrorism.*** Chapter 15 discusses the challenge of adjusting criminal procedure to meet the threat of international and domestic terrorism.

In my experience, the instructors who teach criminal procedure are incredibly thoughtful and insightful. They differ in terms of their organization of the class and the cases that they believe best illustrate the concepts covered in the course. Instructors who prefer to cover the exclusionary rule or civil remedies or interrogations earlier in the course or who want to include additional cases will find that the text can be easily adapted to fit their needs.

FOURTH EDITION

I have profited in preparing the fourth edition from the comments of reviewers and colleagues and from my own experience in teaching the text. My main goals in the fourth edition were to improve the book as a resource for teaching and learning and to ensure that the text continued to cover contemporary developments in criminal procedure. The fourth edition includes a number of changes.

Cases. The U.S. Supreme Court has decided a number of significant cases that are discussed in the book. The cases address important issues including privacy, arrests, search and seizure, effective assistance of counsel, juries, plea bargaining, the exclusionary rule, pretrial motions, and habeas corpus. Many of the cases that are discussed are available on the Student Study Site. Several cases from the earlier editions have been edited to highlight the important points.

Features. The text includes a new Test Your Knowledge feature and a number of new You Decide and Criminal Procedure in the News features that explore crucial topics such as police use of deadly force, the Second Amendment and gun control, a defendant's right to a bail, racial bias in jury deliberations, searches of electronic devices, and much more. There are new criminal procedure exercises on the Student Study Site.

Topics. Several new topics have been added or expanded to reflect their growing impact on criminal procedure. These topics include technology and the home, police use of cell-site location information and body cameras, patterns and trends of *Terry* stops in major cities across the US, individuals being arrested for "Walking While Black," racial bias in the judiciary, the impact of the policies of the Trump administration on the use of drones, the detention of undocumented immigrants, and the continued operation of the detention facilities at Guantanamo.

Instructor teaching site. A password-protected site, available at **edge.sagepub.com/lippmancp4e**, features resources that have been designed to help instructors plan and teach their courses. These resources include an extensive test bank, chapter-specific PowerPoint presentations, additional You Decide questions with accompanying answers, full-text SAGE journal articles, and links to video and web resources.

Student Study Site. An open-access Student Study Site is available at **edge.sagepub.com/lippmancp4e**. This site provides access to several study tools including eFlashcards, web quizzes, additional edited cases, full-text SAGE journal articles, video and web resources, answers to the You Decide boxes in the text, and more.

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- Criminal Procedure in the News **Links**
- **Additional edited cases**

- **Leading cases** is a list and summary of important cases in each chapter.
- **Tables and figures** from the printed book are available in an easily downloadable format for use in papers, hand-outs, and presentations.
- **Web resources** are included for further research and insights.
- **Appendix** on reading and briefing cases
- **Bibliography** for each chapter

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ACKNOWLEDGMENTS

I am hopeful that the textbook conveys my passion and enthusiasm for the teaching of criminal procedure and that the book contributes to the teaching and learning of this most fascinating and vital topic. The book has been the product of the efforts and commitment of countless individuals who deserve much of the credit.

I greatly benefited from reviewers who, as noted, made valuable contributions to the manuscript. Their comments displayed an impressive insight and commitment to the educational process.

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The people at SAGE are among the most skilled professionals that an author is likely to encounter. An author is fortunate to publish with SAGE, a publisher that is committed to quality books. Jessica Miller provided intelligent suggestions and expert direction and, in my opinion, is unmatched in the field. I would also like to thank all the expert professionals at SAGE in production and design who contributed their talents, particularly Tracy Buyan, who expertly coordinated the preparation and publication of this lengthy manuscript. The text was immensely improved by the meticulous, intelligent, and insightful copyediting of Kim Husband. Laura Kearns deserves full credit for her efficient and effective work on the study site.

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I have two members of my family living in Chicago. My sister, Dr. Jessica Lippman, and niece, Professor Amelia Barrett, remain a source of encouragement and generous assistance. Finally, the book is dedicated to my late parents, Mr. and Mrs. S.G. Lippman, who provided me with a love of learning. My late father, S.G. Lippman, practiced law for seventy years in the service of the most vulnerable members of society. He believed that law was the highest calling and never turned away a person in need. Law, for him, was a passionate calling to pursue justice and an endless source of discussion, debate, and fascination.

Sara Miller McCune founded SAGE Publishing in 1965 to support the dissemination of usable knowledge and educate a global community. SAGE publishes more than 1000 journals and over 800 new books each year, spanning a wide range of subject areas. Our growing selection of library products includes archives, data, case studies and video. SAGE remains majority owned by our founder and after her lifetime will become owned by a charitable trust that secures the company's continued independence.

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An Introduction to Criminal Procedure

1

INTRODUCTION

Criminal procedure may seem like a topic that has little relationship to your life and experience. However, anyone who has been stopped by the police, searched, questioned, arrested, or prosecuted for even a minor crime likely has wondered about whether his or her rights were violated and whether the police acted in a lawful fashion. The answer can be found in the body of law that falls under the category of criminal procedure. There are good reasons to study criminal procedure.

- ***Practical usefulness.*** The study of criminal procedure helps you understand your rights on the street and in court.
- ***Professional usefulness.*** Anyone who plans a career in the criminal justice system should know about criminal procedure.
- ***Understanding of Constitution.*** Judicial decisions on criminal procedure help you understand various provisions of the U.S. Constitution and the principles of American democracy.
- ***Insight into judicial decisions.*** Judicial decisions on criminal procedure provide insight into how judges decide cases.
- ***Comprehension of public policy.*** Criminal procedure is an arena in which important issues are debated and decided.

CRIMINAL LAW AND CRIMINAL PROCEDURE

Substantive criminal law defines the factual elements of criminal offenses. To convict a defendant, the prosecutor is required to prove the criminal intent and criminal act and resulting harm beyond a reasonable doubt. A conviction for robbery, for example, requires the prosecutor to establish the intentional, forcible taking of property from the person or presence of another with the intent to permanently deprive the person of the property. Criminal procedure, on the other hand, addresses the procedures involved in the investigation, detection, and prosecution of criminal offenses. In the case of a robbery, this may entail the interrogation of suspects, identifications of suspects by eyewitnesses, searches for weapons and for items belonging to the victim, and the arrest and prosecution of the perpetrator of the crime.

The enforcement of the criminal law is influenced by criminal procedure. Criminal procedure regulates the authority of the police to stop and search individuals, interrogate suspects, and conduct lineups. Strict standards for searches, interrogations, and lineups may interfere with the ability of the police to investigate crimes and to arrest perpetrators. Prosecutors likely find it easier to obtain criminal convictions in the five states that permit juries to convict defendants based on nonunanimous verdicts rather than on the basis of unanimous verdicts.

BALANCING SECURITY AND RIGHTS

The American system of criminal procedure reflects a faith that fair procedures will result in accurate results. The system can appear to be broken when individuals who

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. Criminal law involves the definition of crimes and criminal procedure involves the investigation and prosecution of crimes.
2. Criminal procedure in the United States attempts to strike a balance between the interests in investigating and detecting crime and in convicting criminals on one hand and the interest in protecting the right of individuals to be free from intrusions into their privacy and liberty on the other hand.
3. The objectives of criminal procedure include the accuracy of results, efficiency, respect for the individual, fairness, and the promotion of mass incarceration.
4. The United States Constitution and judicial decisions interpreting the Constitution are the only sources of criminal procedure.
5. In contrast to other areas of the law, precedent plays no role in judicial decisions involving criminal procedure.
6. Judges, regardless of their personal political point of view, agree that courts should defer to elected state and federal legislators in the area of criminal procedure such as whether various crimes should be punishable by the death penalty.

(*Continued*)

(Continued)

TEST YOUR KNOWLEDGE: TRUE/FALSE

7. There is little, if any, difference between the law on the books and the law as actually enforced by the police.

Check your answers on page 15.

appear to be guilty rely on legal technicalities to gain their freedom. There nonetheless is a strong belief that individual freedom is best protected by detailed rules and procedures. We have chosen to create a criminal justice system in which individuals in power are required to follow the law rather than a system in which those in power are free to act as they see fit. The requirement that the police in most cases are required to obtain a search warrant before entering your home protects you against the police conducting searches because they have a hunch or intuition that drugs are stored in your apartment.

Of course, a system of criminal procedure that places too many legal barriers in the way of the police and prosecutors will frustrate the arrest and conviction of the guilty, while a system that places too few barriers in the path of the police may lead to coerced confessions, unnecessary searches, and false convictions. In the United States, there is an effort to create a system of criminal procedure that strikes a balance between the interests of society in investigating and detecting crime and in convicting criminals on one hand and the interest in protecting the right of individuals to be free from intrusions into their privacy and liberty on the other hand. The balance between security and rights historically has varied depending on events. In times of war and other threats to national security, the stress has been placed on the safety and security of society. At other times, the pendulum has swung toward protecting the interests of criminal suspects.

THE OBJECTIVES OF CRIMINAL PROCEDURE

In addition to balancing security against the interest of the individual, the American criminal justice system seeks to achieve a range of other objectives. Most of these values reflect the essential principles of American democracy. Keep these goals in mind as you read the textbook and think about the issues presented in each chapter.

- ***Accuracy.*** The innocent should be protected from unjust convictions, and the guilty should be convicted.
- ***Efficiency.*** The criminal justice system should process cases in a reasonable period of time so that individuals do not have the threat of prosecution hanging over them.
- ***Respect.*** The dignity of defendants and victims should be respected.
- ***Fairness.*** Individuals should view the criminal justice process as fair.
- ***Equality.*** The same quality of justice should be provided to both the rich and the poor and to various ethnic and racial groups.
- ***Adversarial.*** Defendants should have the opportunity to be represented by lawyers at crucial points in the criminal justice process.
- ***Participation.*** There is a strong commitment to participation by citizens on juries.
- ***Appeals.*** An individual's freedom should not depend on the decision of a single judge or jury. Appeals are provided to ensure that defendants' convictions are reached in a lawful fashion.
- ***Justice.*** These goals together form a criminal justice system whose procedures and results aim to provide justice for defendants and victims and to help ensure a just society.

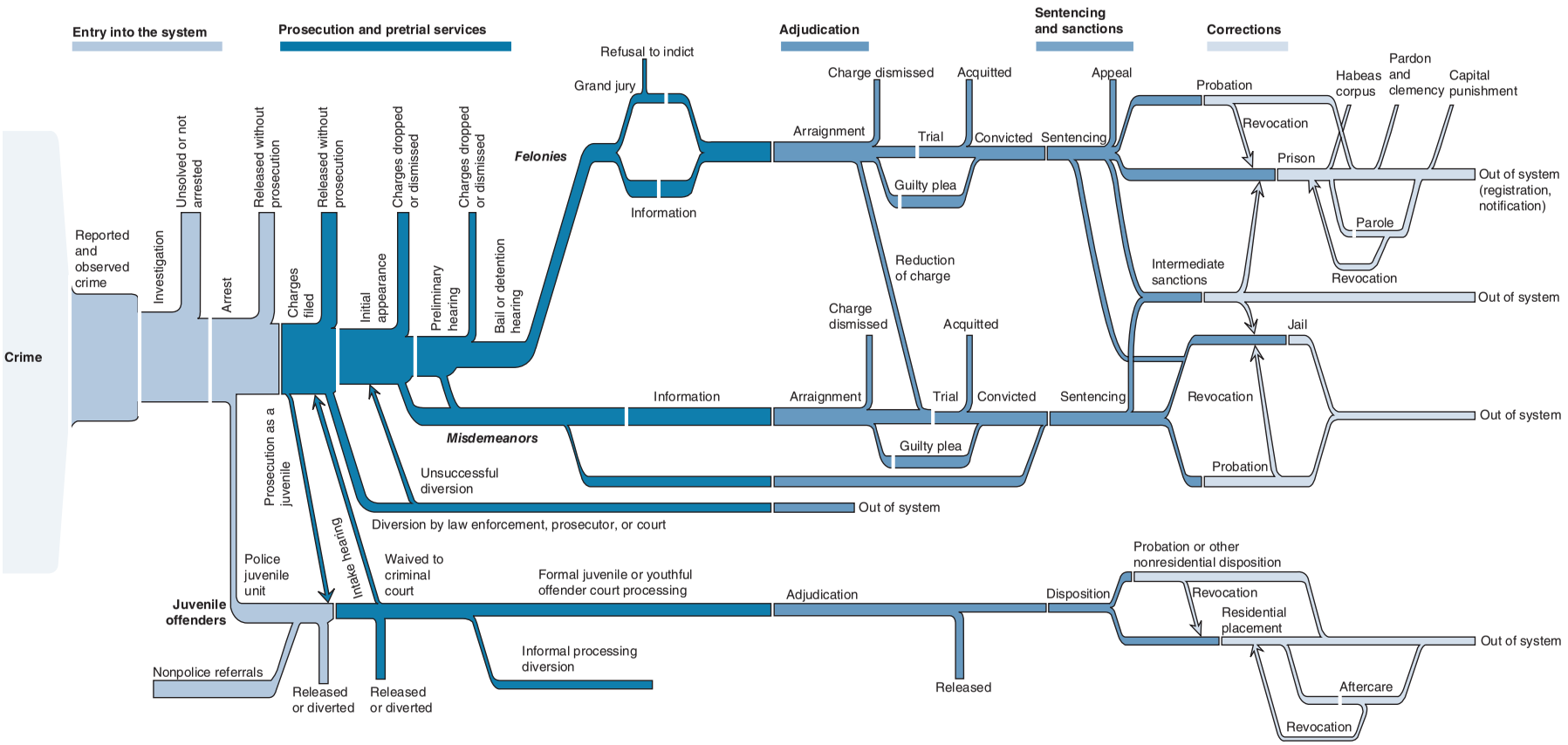
THE CRIMINAL JUSTICE PROCESS

A criminal felony in the federal criminal justice system progresses through a number of stages that are outlined in what follows. We will be exploring each phase in depth in the text. Keep in mind that this process is somewhat different in the federal criminal justice system than it is in state systems (see Figure 1.1). The

FIGURE 1.1

Criminal Justice Flow Chart

What is the sequence of events in the criminal justice system?



Source: Adapted from *The challenge of crime in a free society.* President's Commission on Law Enforcement and Administration of Justice, 1967. This revision, a result of the Symposium on the 30th Anniversary of the President's Commission, was prepared by the Bureau of Justice Statistics in 1997. Retrieved from Bureau of Justice Statistics, https://www.bjs.gov/content/largechart.cfm.

Note: This chart gives a simplified view of caseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.

striking feature of the criminal justice process is the number of procedures that exist to protect individuals against an unjustified detention, arrest, prosecution, or conviction. Individuals may be weeded out of the system because there is a lack of evidence that they committed a crime, or because a police officer, prosecutor, or judge or jury exercises his or her **discretion** and decides that there is little social interest in continuing to subject an individual to the criminal justice process. The police may decide not to arrest an individual; a prosecutor may decide not to file a charge, to file a less serious charge, or to enter into a plea bargain; the jury may acquit a defendant; or a judge may determine that the offender merits a lenient sentence.

Criminal investigation. The criminal investigation phase involves detecting and investigating criminal offenses. The questions for the police are, first, to determine whether a crime has been committed and, second, to identify who committed the crime. The police may receive reports of a crime from a victim or from an informant, or they may discover ongoing criminal activity and arrest an alleged offender at the scene of the crime. This book will discuss three important methods of criminal investigation: searches and seizures of persons and property based on warrants and warrantless searches and seizures of persons and property (Chapters 3, 4, 5, 6, and 7); interrogations (Chapter 8); and eyewitness identifications along with various methods of physical identification, such as fingerprints and DNA (Chapter 9).

Arrest. Once the police have established that there is probable cause to believe that a crime has been committed and that there is probable cause to believe that a suspect has committed a crime, they are authorized to execute an arrest of an individual and to place him or her in custody. The police may seize a suspect without a warrant or obtain an arrest warrant from a judicial official. A suspect may be searched at the time of his or her arrest (Chapters 5 and 6).

Postarrest. An individual who has been subjected to a custodial arrest will be booked at the police station or jail. This phase involves recording information regarding the arrestee and taking a mug shot and fingerprints. An individual may be subjected to an inventory of his or her possessions (Chapters 5, 6, and 12).

Postarrest investigation. Following an individual's arrest, the police may continue to engage in investigative activities designed to gather evidence of the suspect's guilt (Chapters 3 through 9).

The criminal charge. Prosecutors have the discretion to formally charge suspects with criminal offenses or to decide not to file formal charges and release suspects from custody. Prosecutors who decide to pursue cases file complaints that describe the alleged crimes and the relevant sections of the criminal code. Suspects are then brought for their first appearance before a **magistrate** (a lawyer appointed by a district court judge for an eight-year term) and are informed of the charges against them and of their rights to silence and counsel. Lawyers are appointed for indigents, and bail is fixed. In the case of a warrantless arrest, the first appearance often is combined with a ***Gerstein* hearing** to determine whether there was probable cause to arrest and to detain the suspect (Chapter 12).

Pretrial. The next step in some jurisdictions is a preliminary hearing at which a magistrate determines whether there is probable cause to believe that the defendant committed the crime charged in the complaint. The prosecutor presents witnesses, who may be cross-examined by the defense. This allows the defense to learn what some of the evidence is that will be relied on by the prosecution. The defense also may file a motion for discovery, which is a court order requiring the prosecution to turn over information, such as the results of physical examinations or scientific tests, to the defense. A determination that probable cause is lacking results in the magistrate dismissing the case. In the majority of states, a determination of probable cause to support the charge results in the prosecutor filing an **information** with the clerk of the court and the case being bound over for trial. In the federal system and in a minority of states, the case is bound over from the preliminary hearing to a grand jury. A finding of probable cause by the grand jury results in the issuance of an **indictment** against the defendant. Keep in mind that a prosecutor may decide to dismiss the complaint by filing a motion of ***nolle prosequi*** ("we shall no longer prosecute").

The next step is the arraignment, at which individuals are informed of the charges against them, advised of their rights, and asked to enter a plea. At this point, plea negotiations between the defense attorney and prosecution may become more heated, as both sides recognize that the case is headed for trial (Chapter 13).

Pretrial motions. The defense attorney may file various pretrial motions. These include a motion to dismiss the charges on the grounds that the defendant already has been prosecuted for the crime or has been denied a speedy trial, a motion to change the location of the trial, or a motion to exclude unlawfully seized evidence from the trial (Chapter 13).

Trial. The accused is guaranteed a trial before a jury in the case of serious offenses. A jury trial may be waived where the defendant pleads guilty or would prefer to stand trial before a judge. A jury generally is composed of twelve persons, although six-person juries are used in some states for less serious felonies and for misdemeanors. Most states require unanimous verdicts despite the fact that nonunanimous verdicts are permitted under the U.S. Constitution (Chapter 13).

Sentencing. Following a criminal conviction, the judge holds a sentencing hearing and establishes the defendant's punishment. There are various types of punishments available to the judge, including incarceration, fines, and probation. States have adopted a variety of approaches to sentencing that provide trial court judges with varying degrees of discretion or flexibility (Chapter 14).

Appeal. A defendant has the right to file an appeal to a higher court. The U.S. Supreme Court and state supreme courts generally possess the discretion to hear a second appeal (Chapter 14).

Postconviction. Individuals who have been convicted and have exhausted their appeals or who have failed to pursue their appeals may file a motion for postconviction relief in the form of a writ of habeas corpus, claiming that the appeals courts committed an error (Chapter 14).

Criminal procedure defines the steps to be followed by the police, prosecutors, defense attorneys, judges, and jurors at each stage in the criminal justice process and also addresses the rights of criminal suspects and defendants. Various sources, outlined in the next section, help define the procedures that must be followed by criminal justice officials and the rights of individuals in the criminal justice process.

SOURCES OF THE LAW OF CRIMINAL PROCEDURE

The law regarding criminal procedure may be found by consulting various sources.

U.S. Constitution. The U.S. Constitution is the supreme law of the land and is the central source of criminal procedure. You can find issues of criminal procedure referenced in a number of provisions of the Constitution, including the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. These provisions, as we shall see, regulate the conduct of the federal government as well as the fifty states and the District of Columbia.

Judicial decisions. The provisions of the U.S. Constitution are broadly phrased, and their meaning is interpreted and explained by the courts. The U.S. Supreme Court has the final word on the meaning of the text; for example, this Court determines what is meant by "unreasonable searches and seizures" in the Fourth Amendment. The Court cannot review every case and rule on every issue. In those instances in which the Supreme Court has not addressed an issue, we look to other courts to understand the meaning of the text of the Constitution. Keep in mind that the study of criminal procedure focuses primarily on the decisions of the U.S. Supreme Court and other federal appeals and state supreme courts.

State constitutions. State constitutions all contain provisions addressing criminal procedure that are similar to the provisions of the U.S. Constitution. The U.S. Supreme Court has the last word on the meaning of the protections that are shared by the U.S. and state constitutions. A state supreme court, however, is free to interpret a provision of its state constitution to provide greater protections than are required by the U.S. Supreme Court. For example, several state supreme courts have held that their state constitutions require that individuals be provided with an attorney during interrogations under circumstances in which the U.S. Supreme Court has held that the federal Constitution does not require that an individual be provided with a lawyer.

Common law. In interpreting the meaning of constitutional phrases such as "cruel and unusual punishment," judges look to the meaning of these terms in the English **common law**, which formed the primary basis of American law and justice in the seventeenth and eighteenth centuries.

Legislative statutes. The U.S. Congress and the fifty state legislatures have passed laws that regulate various aspects of criminal procedure. Federal statutes, for example, provide a detailed description of the requirements for obtaining a warrant and for wiretapping a suspect's phone. Federal and state laws also address jury service and jury selection.

Court rules. The U.S. Congress has authorized the U.S. Supreme Court to formulate **Federal Rules of Criminal Procedure** that provide detailed procedures for the federal criminal justice process; these cover actions from the initial filing of a complaint to the verdict phase of the trial. These rules incorporate the judgments of the U.S. Supreme Court and provide a "road map" that precisely describes how a case is to proceed from the pretrial stage to and through the trial stages. Roughly two-thirds of the states have comprehensive codes drafted by their state supreme courts that regulate criminal procedure. Federal and state courts often adopt their own local rules on how a case is to proceed.

Agency regulations. Law enforcement agencies have their own internal regulations. Police regulations typically address issues such as the conduct of interrogations and the employment of deadly force. These provisions usually are based on the requirements of the U.S. Constitution. The conduct of prosecutors may be controlled by agency guidelines that regulate the policies to be followed in charging individuals with crimes or in plea bargaining. A violation of internal regulations may result in internal disciplinary punishments.

Model codes. The American Law Institute—a group of judges, lawyers, and law enforcement professionals—has drafted a Model Code of Pre-Arraignment Procedure to help set standards for street encounters between the police and citizens prior to a formal arrest. This investigative phase of the criminal procedure process is not addressed in the Federal Rules of Criminal Procedure or in state rules of criminal procedure. The American Bar Association's Section on Criminal Justice also publishes suggested standards that address various criminal procedure issues.

Our study of criminal procedure primarily will involve reading federal and state legal decisions. The next section discusses the structure of federal and state courts. On the Student Study Site, the appendix to Chapter 1 introduces you to the process for reading a legal case.

THE STRUCTURE OF THE FEDERAL AND STATE COURT SYSTEMS

The United States has a federal system of government in which the Constitution divides powers between the federal government and the fifty state governments. As a result, there are parallel judicial systems. Federal courts address those issues that the U.S. Constitution reserves to the federal government, while state courts address issues that are reserved to the states. Federal courts, for example, have exclusive jurisdiction over prosecutions for treason, piracy, and counterfeiting. Most common law crimes are matters of state jurisdiction. These include murder, robbery, rape, and most property offenses. A state supreme court has the final word on the meaning of a state constitution or state statutes, and the U.S. Supreme Court has no authority to tell a state how to interpret matters of state concern.

The U.S. Supreme Court has recognized the **concurrent jurisdiction** or joint authority of federal and state courts over certain areas, such as claims under federal civil rights law that a law enforcement official has violated an individual's civil rights. This means that an action may be filed in either a state or a federal court.

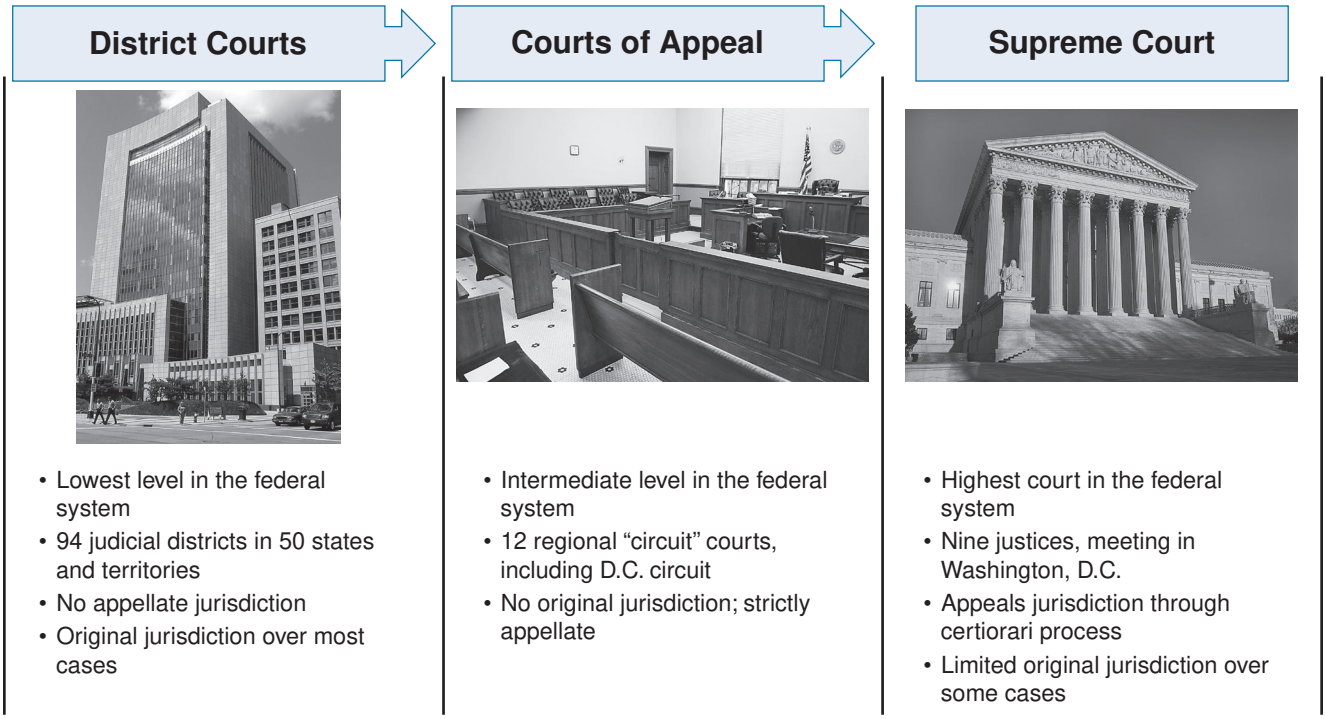
At a later point in the text, we will discuss the fact that because the federal government and a state government are separate sovereign entities, an individual may be prosecuted for the same crime in both a federal and a state court. For example, Terry Nichols was convicted in federal court of involvement in the bombing of the federal building in Oklahoma City and was given life imprisonment. He later was tried in an Oklahoma state court for the same offense and was convicted of 161 counts of murder and was sentenced to 161 life sentences. An individual also can be prosecuted in two states so long as some part of the crime was committed in each state jurisdiction.

The Federal Judicial System

Article III, Section 1 of the U.S. Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and in such "inferior Courts as the Congress may establish."

The federal judicial system is based on a pyramid (see Figure 1.2). At the lowest level are ninety-four district courts. These are federal trial courts of general jurisdiction that hear every type of case.

FIGURE 1.2
Federal Court Hierarchy



Sources: Adapted from Center for Assistive Technology and Environmental Access (CATEA). Photos from © Comstock/Stockbyte/Thinkstock Images, © iStock.com/dlewis33, and WikimediaCommons/Murad.

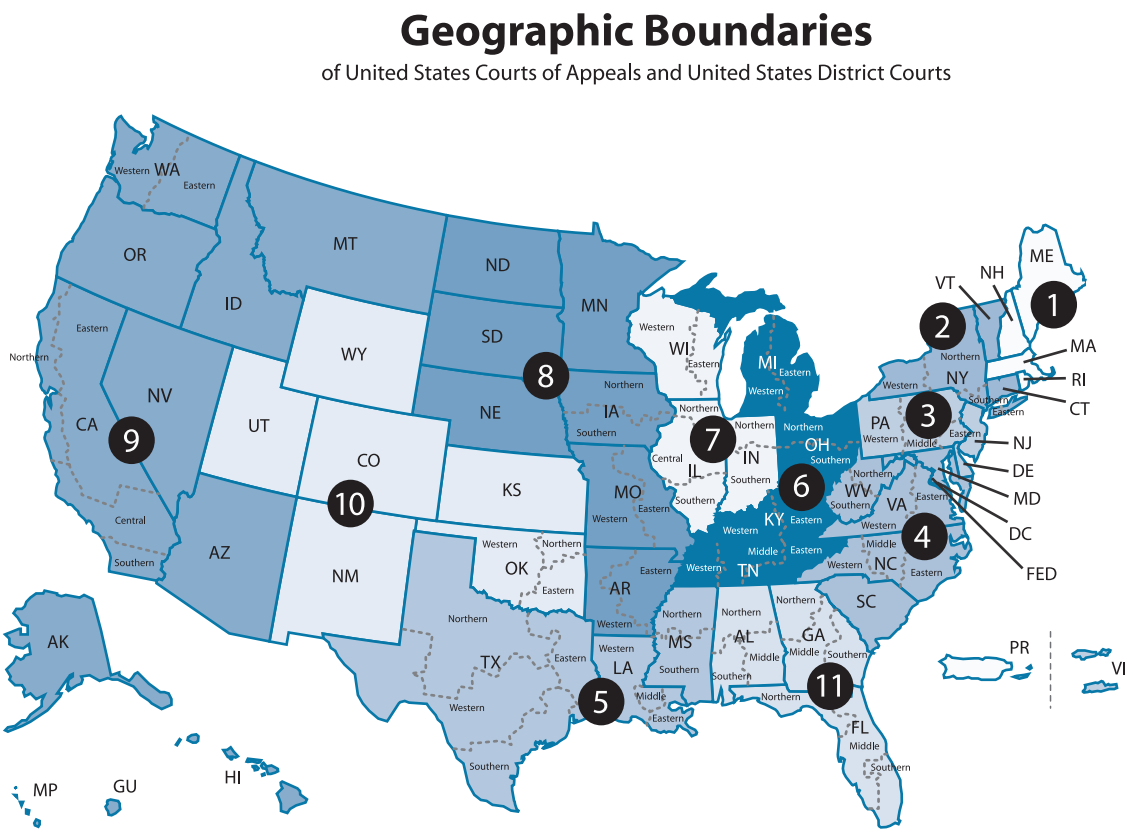
District courts are the workhorse of the federal system and are the venue for prosecutions of federal crimes. A single judge presides over the trial. There is at least one judicial district in each state. In larger states with multiple districts, the district courts are divided into geographic divisions (e.g., Eastern District and Western District). There also are judicial districts in the District of Columbia, in the Commonwealth of Puerto Rico, and for the territories of the Virgin Islands, Guam, and the Northern Mariana Islands. Appeals to district courts may be taken from the U.S. Tax Court and from various federal agencies, such as the Federal Communications Commission.

One or more U.S. magistrate judges are assigned to each district court. A magistrate judge is authorized to issue search warrants, conduct preliminary hearings, and rule on pretrial motions submitted by lawyers. Magistrates also may conduct trials for **misdemeanors** (crimes carrying criminal penalties of less than a year in prison) with the approval of the defendant.

The ninety-four district courts, in turn, are organized into eleven regional circuits (see Figure 1.3) and the District of Columbia. Appeals may be taken from district courts to the court of appeals in each circuit. The eleven regional circuit courts of appeals have jurisdiction over district courts in a geographical region. The United States Court of Appeals for the Fifth Circuit, for example, covers Texas, Mississippi, and Louisiana. The United States Court of Appeals for the Tenth Circuit encompasses Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The United States Court of Appeals for the District of Columbia hears appeals from cases involving federal agencies. A thirteenth federal circuit court of appeals has jurisdiction over the Federal Circuit in Washington, DC, and has nationwide jurisdiction over patent and copyright cases and other specialized appeals involving federal law.

Circuit courts of appeals sit in three-judge panels. In certain important cases, all of the judges in the circuit will sit **en banc**. The decisions of a court of appeals are binding on district courts within the court's circuit. In the event that an appeal is not taken from a district court decision, the district court decision will be final. The number of judges in each circuit varies depending on the size of the circuit. The Ninth Circuit, which includes California, has twenty-eight judges, while the First Circuit

FIGURE 1.3
Map of Federal Courts of Appeals



Source: Administrative Office of the U.S. Courts.

in New England has six. Courts of appeals tend to have differing levels of respect and influence within the legal community based on the reputation of the judges on the circuit. One measure of the importance of a circuit is the frequency with which the circuit court's decisions are affirmed by the U.S. Supreme Court.

The U.S. Supreme Court sits at the top of the hierarchy of federal and state courts. It is called the "court of last resort," because there is no appeal from a decision of the Supreme Court. The Supreme Court decision sets the **precedent** and is the binding authority on every state and every federal court in the United States on the meaning of the U.S. Constitution and on the meaning of a federal law. In other words, any court in the country that hears a case involving an issue on which the Supreme Court has ruled is required to follow the Supreme Court's judgment. Precedent is based on the judicial practice of following previous opinions or ***stare decisis***, which literally translates as "to stand by precedent and to stand by settled points."

The U.S. Supreme Court consists of a chief justice and eight associate justices. The Court reviews a relatively limited number of cases. In an active year, the Supreme Court may rule on 150 of the 7,000 cases it is asked to consider. These cases generally tend to focus on issues in which different federal circuit courts of appeals have made different decisions or on significant issues that demand attention. There are two primary ways for a case to reach the Supreme Court.

- ***Original jurisdiction.*** The Court has **original jurisdiction** over disputes between the federal government and a state, between states, and in cases involving foreign ministers or ambassadors. Conflicts between states have arisen in cases of boundary disputes in which states disagree over which state has a right to water or to natural resources. These types of cases are extremely rare.

- ***Writ of certiorari.*** The Court may hear an appeal from the decision of a court of appeals. The Supreme Court also will review state supreme court decisions that are decided on the basis of the U.S. Constitution. Four judges must vote to grant **certiorari** for a lower court decision to be reviewed by the Supreme Court. This is termed the **rule of four**.

The U.S. Supreme Court requires the lawyers for the opposing sides of a case to submit a **brief** or a written argument. The Court also conducts oral arguments, in which the lawyers present their points of view and are questioned by the justices. The party appealing a lower court judgment is termed the **appellant**, and the second name in the title of a case typically is the party against whom the appeal is filed, or the **appellee**.

Individuals who have been convicted and incarcerated and have exhausted their state appeals may file a constitutional challenge or **collateral attack** against their conviction. The first name in the title of the case on collateral attack is the name of the inmate bringing the case, or the **petitioner,** while the second name, or **respondent**, typically is that of the warden or individual in charge of the prison in which the petitioner is incarcerated. These habeas corpus actions typically originate in federal district courts and are appealed to the federal court of appeals and then to the U.S. Supreme Court. In a collateral attack, an inmate bringing the action files a petition for habeas corpus review, requesting a court to issue an order requiring the state to demonstrate that the petitioner is lawfully incarcerated. The ability of a petitioner to compel the state to demonstrate that he or she has been lawfully detained is one of the most important safeguards for individual liberty and is guaranteed in Article I, Section 9, Clause 2 of the U.S. Constitution.

Five of the nine Supreme Court justices are required to agree if they are to issue a **majority opinion**. This is a decision that will constitute a legal precedent. A justice may agree with the majority and want to write a **concurring opinion** that expresses his or her own view. A justice, for example, may agree with the majority decision but base his or her decision on a different reason. In some cases, four justices may agree and, along with various concurring opinions from other justices, constitute a majority. In this instance, there is a **plurality opinion**, and no single majority opinion. A justice who disagrees with the majority may draft a **dissenting opinion** that may be joined by other justices who also disagree with the majority decision. In some instances, a justice may disagree with some aspects of a majority decision while concurring with other parts of the decision. There are examples of dissenting opinions that many years later attract a majority of the justices and come to be recognized as the "law of the land." A fifth type of decision is termed a **per curiam** decision. This is an opinion of the entire court without any single justice being identified as the author.

Supreme Court justices and other federal judges are appointed by the U.S. president with the approval of the U.S. Senate, and they have lifetime appointments so long as they maintain "good behavior." The thinking is that this protects judges from political influence and pressure. There is a question whether Supreme Court justices should have limited tenure, rather than a lifetime appointment, to ensure that there is a turnover on the Court. The notion that an unelected judge should hold a powerful court appointment for many years strikes some commentators as inconsistent with democratic principles.

You should also be aware that there are a number of specialized federal courts with jurisdiction that is limited to narrow questions. Two special courts are the U.S. Court of Claims, which considers suits against the government, and the Court of International Trade, which sits in New York and decides international trade disputes and tariff claims. There are also a number of other "non–Article III" courts. These are courts that the framers of the Constitution did not provide for in Article III of the U.S. Constitution and that have been created by Congress. These courts include the U.S. Tax Court, bankruptcy courts, the U.S. Court of Military Appeals and Court of Veterans' Appeals, and the courts of administrative law judges who decide the cases of individuals who appeal an administrative agency's denial of benefits (e.g., a claim for social security benefits).

State Judicial Systems

There is significant variation among the states in the structure of their state court systems. Most follow the general structure outlined below. The organization of California courts in Figure 1.4 illustrates how one state arranges its judicial system. You may want to compare this with the structure of the judicial system in your state.

Prosecutions are first initiated or originate in **courts of original jurisdiction**. There are two types of courts in which a criminal prosecution may originate. First, there are trial **courts of limited jurisdiction**. These local courts are commonly called municipal courts, police courts, or magistrate's courts. The courts prosecute misdemeanors and in some instances specified felonies. Judges in municipal courts also hear traffic offenses, set bail, and conduct preliminary hearings in felony cases. In most instances, judges preside over criminal cases in these courts without a jury. A case in which a judge sits without a jury is termed a **bench trial**. Most jurisdictions also have specialized courts of limited jurisdiction to hear particular types of cases. These include juvenile courts, traffic courts, family or domestic courts, small claims courts, and courts that hear offenses against local ordinances.

Trial **courts of general jurisdiction** hear more serious criminal and civil cases. In some states, courts of general jurisdiction have jurisdiction over criminal appeals from courts of limited jurisdiction. This typically entails a **trial *de novo***, which means that a completely new trial is conducted that may involve the same witnesses, evidence, and legal arguments that formed the basis of the first trial. These courts of general jurisdiction commonly are referred to as circuit courts, district courts, or courts of common pleas; and they have jurisdiction over cases that arise in a specific county or region of the state. New York curiously names its court of general jurisdiction the Supreme Court.

Appeals from courts of general jurisdiction are taken in forty of the fifty states to **intermediate appellate courts**. An appeal as a matter of right may be filed to an intermediate court, which typically sits in panels of two or three judges. The court usually decides the case based on the transcript or written record of the trial from the lower court. The appeals court does not hear witnesses or consider new evidence.

The Supreme Court is the court of last resort in a state system and has the final word on the meaning of local ordinances, state statutes, and the state constitution. (Note that New York is different and refers to its court of last resort as the Court of Appeals.) A **discretionary appeal** may be available from an intermediate court. This means that the Supreme Court is not required to review the decision of a lower court and will do so at its discretion. In those states that do not have intermediate appellate courts, appeals may be directly taken from trial courts to the state supreme court. State supreme courts function in a similar fashion to the U.S. Supreme Court and hear every type of case. The U.S. Supreme Court has no authority to tell a state supreme court how to interpret the meaning of its state constitution.

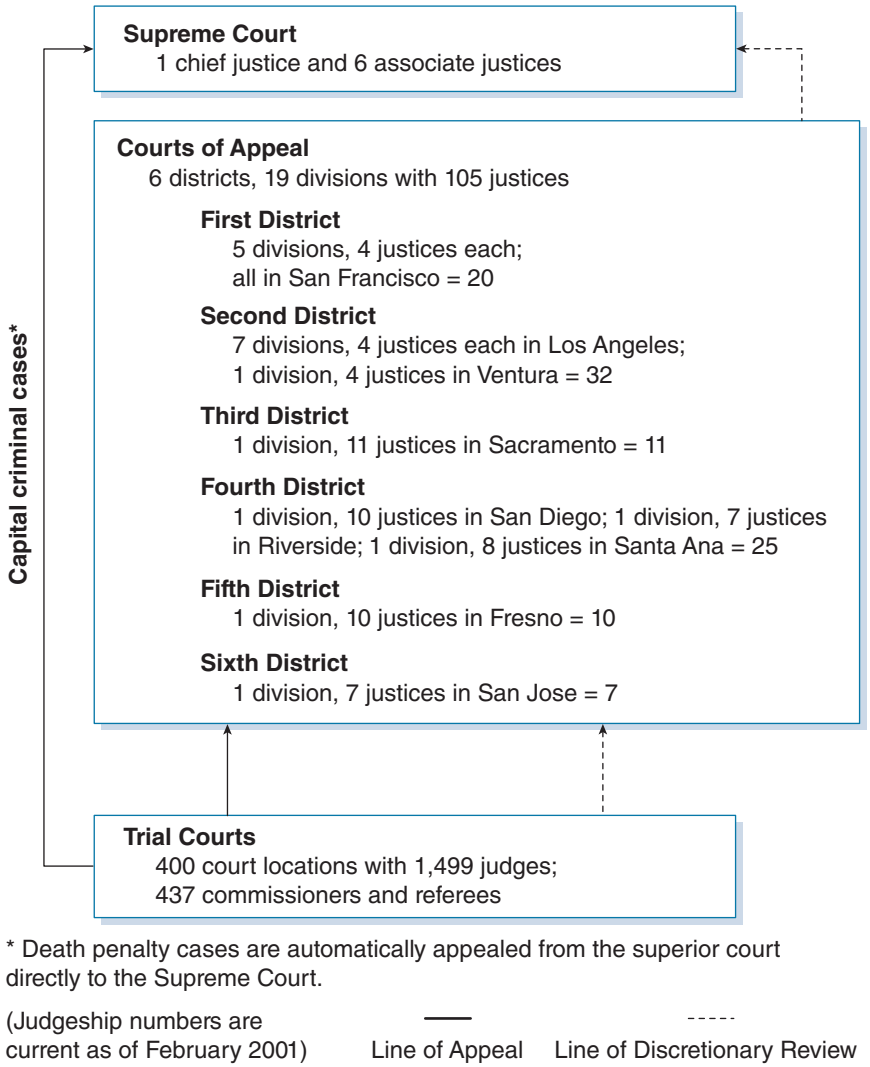
State court judges are selected using a variety of procedures. Some states elect judges in a partisan election in which judges run under the label of a political party, while other states hold nonpartisan elections in which judges are not identified as belonging to a political party. In other states, judges are elected by the state legislature. A fourth approach is appointment by the governor with the consent of the legislature. The so-called Missouri Plan provides for appointment by the governor, and following a judge's initial period of judicial service, the electorate is asked whether to retain or to reject the judge's continuation in office. A minority of states provide for the lifetime appointment of judges. Most states limit the length of the judge's term in office. In many states, different procedures are used for different courts. There is a continuing debate over whether judges should be elected or appointed based on merit and qualifications.

PRECEDENT

We have seen that courts follow *stare decisis*, which means that once a court has established a legal principle, this rule constitutes a precedent that will be followed by courts in future cases that involve the same legal issue. The advantage of precedent is that courts do not have to reinvent the wheel each time they confront an issue and, instead, are able to rely on the opinion of other judges. A judgment that is based on precedent and the existing law also takes on credibility and is likely to be respected and followed. Precedent is merely the method that all of us rely on when undertaking a new challenge: We ask how other people went about doing the same task.

Courts have different degrees of authority in terms of precedent. As noted, U.S. Supreme Court decisions constitute precedent for all other courts in interpreting the U.S. Constitution and federal laws. Circuit courts of appeals, U.S. district courts, and state courts are bound by Supreme Court precedent. Circuit courts of appeals and state supreme courts establish binding precedents within their territorial jurisdictions. In other words, a state supreme court decision constitutes precedent for all courts within the state.

FIGURE 1.4
California State Court System



Source: Superior Court of California, County of Glenn © 2009.

What if there is no precedent? A case that presents an issue that a court has never previously decided is termed a case of **first impression**. In these instances, a court will look to see how other courts have decided the issue. These other court decisions do not constitute precedent, but they are viewed as **persuasive authority**, or cases to be considered in reaching a decision. For example, a federal court of appeals will look to see how other courts of appeals have decided an issue and will view these decisions as persuasive authority rather than as **binding authority**.

A decision of the Supreme Court of California has binding authority on all lower courts in California. The decision of a lower-level California court that fails to follow precedent likely will be appealed and reversed by the Supreme Court of California. The decisions of the Supreme Court of California do not have binding authority on courts outside of California, but they may be consulted as persuasive authority. Courts are viewed as carrying different degrees of status within the legal world in regard to their persuasive authority. For example, the United States Court of Appeals for the Second Circuit in New York is viewed as particularly knowledgeable on financial matters, because the judges are experienced in deciding cases involving Wall Street, banking, and finance.

Courts are reluctant to overturn precedents, although this does occur on rare occasions. A court may avoid a precedent by distinguishing the facts of the case that it is deciding from the facts involved in the case that constitutes a precedent.

JUDICIAL PHILOSOPHY

U.S. Supreme Court decisions are the central source for interpreting the U.S. constitutional provisions addressing criminal procedure. These decisions cover areas ranging from searches and seizures to interrogations and the right to a lawyer at trial. The Supreme Court's approach to criminal procedure historically has undergone significant shifts. These changes in the Supreme Court's approach have reflected transformations in popular attitudes toward crime and criminals and, in most instances, also reflect the appointment of new justices to the bench. Scholars tend to refer to the name of the chief justice as shorthand for describing the shifting philosophy of the Supreme Court. The liberal Warren Court (Chief Justice Earl Warren, 1953–1969), for example, soon gave way to the more conservative Burger Court (Chief Justice Warren Burger, 1969–1986), which, in turn, was succeeded by the even more conservative Rehnquist Court (Chief Justice William Rehnquist, 1986–2005). The legacy of the current court, headed by Chief Justice John Roberts, remains to be decided.

Keep in mind that the use of the labels *liberal* and *conservative* to describe justices may not be fully accurate in every instance. A liberal justice who believes in individual liberty also may be tough on crime, and a conservative justice who opposes abortion also may be an absolutist when it comes to freedom of speech. There are other issues on which a justice's point of view is not easily categorized as either liberal or conservative. History also has demonstrated that justices have changed their philosophy while serving on the Court. There are several areas of disagreement between Supreme Court justices that may help you in understanding why they may take differing approaches to deciding a case.

Federalism. Some justices stress that states should be free to follow their own approach to criminal procedure, and the justices are reluctant to reverse the decisions of state supreme courts. This "states' rights" approach is contrasted with the view of those justices that believe that it is best to have the same system of criminal procedure in the federal courts and in all fifty states.

Precedent. Justices differ in their willingness to deviate from prevailing precedent.

Bright-line rules. Justices may view their decisions as opportunities to establish general rules to guide the police and lower courts. Other justices limit their decisions to the specific facts of the case before them and do not formulate general rules.

Police power. Some justices have greater trust in the police and are willing to expand police powers, while others favor tighter legal controls on the police.

State of mind. A related question is whether to use an objective or a subjective standard in evaluating the conduct of the police and other criminal justice professionals. In evaluating whether a police officer stopped a motorist based on the driver's gender or race, justices favoring police powers rely on an objective standard in evaluating the lawfulness of an arrest. The only issue is whether there was an objective basis for stopping and arresting the motorist. Justices who are skeptical in regard to police powers may rely on a subjective standard and ask whether the police officer intended to enforce the law in a discriminatory fashion.

Interpretation. In interpreting the U.S. Constitution, **originalist** justices are guided by the intent of the framers of the documents. Justices who believe in **contextualism** tend to interpret the Constitution in a broad fashion and argue that the Constitution is a dynamic, "living" document that should be interpreted to meet the current needs of society.

Separation of powers. There are justices who are reluctant to hold unconstitutional the decisions of the elected executive and congressional branches of government. Other justices are more willing to hold that the executive and legislative branches acted in an unconstitutional fashion.

Consensus. Some justices make an effort to create a consensus and to reach a single majority decision, while other justices are more willing to dissent from the other justices on the Court.

Psychology. Justices are only human, and their decisions in some instances may be influenced by their individual experiences and backgrounds.

Justices who favor a judiciary that intervenes to set public policy and to combat social problems are categorized as favoring **judicial activism**. In contrast, justices who believe that the courts should play a limited role and who believe that public policy decisions are to be made by elected officials are viewed as favoring **judicial restraint**.

LAW IN ACTION AND LAW ON THE BOOKS

As you read the cases in the text, keep in mind that although the American criminal justice system affords defendants a long list of rights and protections, there is a difference between *law on the books* and *law in action.* Defendants may choose to plead guilty, waive their constitutional right to challenge an unlawful search, or waive their right to be tried before a jury. Defense attorneys may not vigorously defend their clients. Prosecutors may choose to charge some defendants with criminal offenses while dropping the charges against other defendants charged with the same crime. There also is the unfortunate fact that the police and other criminal justice professionals may abuse their authority and discriminate against minorities, women, or young people or may fail to abide by the letter of the law. Keep in mind that the exercise of discretion is not necessarily a bad thing. A police officer's decision not to arrest a juvenile, or a prosecutor's decision to offer a light sentence to a first-time offender in return for a guilty plea, may be a way of achieving "justice."

CHAPTER SUMMARY

The American system of criminal procedure reflects a faith that fair procedures will result in accurate results. Of course, a system of criminal procedure that places too many legal barriers in the way of the police and prosecutors will frustrate the arrest and conviction of the guilty, while a system that places too few barriers in the way of the police may lead to coerced confessions, unwarranted searches, and false convictions. In the United States, there is an effort to create a system of criminal procedure that strikes a balance between the interests of society in investigating and detecting crime and in convicting criminals on one hand and the interest in protecting the right of individuals to be free from intrusions into their privacy and liberty on the other hand. Criminal procedure also seeks to achieve a range of other objectives, including accuracy, efficiency, public respect, fairness, and equality, all of which together promote the ultimate goal, which is to ensure justice.

A criminal felony in the federal criminal justice system progresses through a number of stages. A case may begin with a police investigation and may not conclude until the individual's claim for postconviction relief is exhausted. A striking feature of the criminal justice process is the number of procedures that exist to protect individuals against unjustified detention, arrest, prosecution, and conviction.

There are various sources that set forth the responsibility of criminal justice officials and the rights of individuals in the criminal justice process. These include the relevant provisions of the U.S. Constitution, judicial decisions, state constitutions, the common law, legislative statutes, rules of criminal procedure, agency regulations, and model codes.

The United States has a federal system of government in which the U.S. Constitution divides powers between the federal government and the fifty state governments. As a result, there are parallel judicial systems. Federal courts address those issues that the U.S. Constitution reserves to the federal government, while state courts address issues that are reserved to the states. The federal judicial system is based on a pyramid. At the lowest level are ninety-four district courts. District courts are the workhorse of the federal system and are the venue for prosecutions of federal crimes. The ninety-four district courts, in turn, are organized into eleven regional circuits. There is also a United States Court of Appeals for the District of Columbia. A thirteenth U.S. court of appeals is the Federal Circuit in Washington, DC. Appeals may be taken from district courts to the court of appeals in each circuit. The U.S. Supreme Court sits at the top of the hierarchy of federal courts and may grant certiorari and hear discretionary appeals from circuit courts. The Supreme Court is called the "court of last resort," because there is no appeal from a decision of the Court. A Supreme Court decision sets precedent and has binding authority on every state and every federal court in the United States with respect to the meaning of the U.S. Constitution and on the meaning of federal laws.

There is significant variation in the structure of state court systems. Prosecutions are first initiated in courts of original jurisdiction. In courts of limited jurisdiction, misdemeanors and specified felonies are prosecuted. In trial courts of general jurisdiction, more serious criminal and civil cases are heard. In some states, courts of general jurisdiction have jurisdiction over

criminal appeals from courts of limited jurisdiction. Appeals from courts of general jurisdiction are taken in most states to intermediate appellate courts. The state supreme courts are the courts of last resort in each state and have the final word on the meaning of local ordinances, state statutes, and the state constitution. A discretionary appeal is available from intermediate courts to the state supreme court.

Courts have different degrees of authority in terms of precedent. As noted, U.S. Supreme Court decisions constitute precedent for all other courts in interpreting the U.S. Constitution and federal laws. Circuit courts of appeals, district courts, and state courts are bound by U.S. Supreme Court precedent. Circuit courts of appeals and state supreme courts establish binding precedents within their territorial jurisdictions. In those instances in which there is no precedent, an appellate court may look to other coequal courts for persuasive authority.

U.S. Supreme Court decisions are the central source for interpreting the federal constitutional provisions addressing criminal procedure. These decisions cover areas ranging from searches and seizures to interrogations and the right to a lawyer at trial. The Supreme Court's approach to criminal procedure historically has undergone significant shifts. These changes in the Supreme Court's approach have reflected transformations in popular attitudes toward crime and criminals, and in most instances they also reflect the appointment of new justices to the Court. Scholars tend to refer to the name of the chief justice as shorthand for describing the shifting philosophy of the Supreme Court. There are several areas of disagreement among U.S. Supreme Court justices that account for the differences in their views. These include issues of federalism, the role of precedent, the scope of governmental power, and philosophies of constitutional interpretation.

As you read the textbook, remain aware that while we primarily are concerned with "law on the books," these procedures are not always followed by "law in action."

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CHAPTER REVIEW QUESTIONS

1. How does criminal procedure affect the enforcement of criminal law?
2. Discuss the balance between security and rights in criminal procedure.
3. What values does the system of criminal procedure seek to achieve?
4. Outline the steps in the criminal justice system.
5. Describe the organization of the federal and state judicial systems.
6. What is the role of precedent in judicial decision making?
7. Is there a difference between law on the books and law in action?

LEGAL TERMINOLOGY

appellant 9
appellee 9
bench trial 10
binding authority 11
brief 9
certiorari 9
collateral attack 9
common law 5
concurrent jurisdiction 6
concurring opinion 9
contextualism 12
courts of general jurisdiction 10
courts of limited jurisdiction 10
courts of original jurisdiction 10
discretion 4
discretionary appeal 10
dissenting opinion 9
en banc 7
Federal Rules of Criminal Procedure 6
first impression 11
Gerstein hearing 4
indictment 4
information 4
intermediate appellate courts 10
judicial activism 13
judicial restraint 13
magistrate 4
majority opinion 9
misdemeanor 7
nolle prosequi 4
original jurisdiction 8
originalist 12
per curiam 9
persuasive authority 11
petitioner 9
plurality opinion 9
precedent 8
respondent 9
rule of four 9
stare decisis 8
trial *de novo* 10

TEST YOUR KNOWLEDGE: ANSWERS

1. True.
2. True.
3. False.
4. False.
5. False.
6. False.
7. False.

2 The Sources of Criminal Procedure

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. There are no provisions of the U.S. Constitution that explicitly address criminal procedure.
2. U.S. Supreme Court interpretations of the provisions of the U.S. Constitution are binding on other federal and state courts.
3. State courts and state constitutions play no role in criminal procedure.
4. The U.S. Congress and state legislatures play a role in establishing the requirements of criminal procedure.
5. The federal rules of criminal procedure and the state rules of criminal procedure, among other provisions, detail the steps involved in the prosecution of criminal offenses.
6. The Fourteenth Amendment was adopted following the Civil War to ensure that newly freed African American slaves were provided with the same rights and liberties as other American citizens.

Did the police officer's order to pump Rochin's stomach for drugs "shock the conscience"?

When asked, "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules, which proved to contain morphine.

INTRODUCTION

The law of criminal procedure provides a map that guides the police in the detection and investigation of crime and the detention of suspects. It also provides directions to defense attorneys, prosecutors, and judges in the prosecution and punishment of offenders and in the appeal of verdicts. The following list gives you some idea of the broad range of topics that are covered by the law of criminal procedure.

- Informants
- Stops and frisks of individuals
- Searches and arrests of individuals
- Searches and seizures of automobiles
- Search warrants and searches of homes
- Right to a criminal defense
- Interrogations
- Lineups
- Pretrial proceedings
- Trials
- Appeals

As the first order of business in this chapter, we will discuss the primary sources of the law of criminal procedure listed below (see also Table 2.1).

- U.S. Constitution
- U.S. Supreme Court
- State constitutions and court decisions

- Federal and state statutes
- Rules of criminal procedure
- A model code of pretrial procedure

The primary source of criminal procedure is the U.S. Constitution. The framers of the Constitution experienced the tyranny of British colonial rule and were reluctant to give too much power to the newly established federal government. The colonists under British rule were subjected to warrantless searches, detentions without trial, the quartering of soldiers in homes, and criminal prosecutions for criticizing the government. The framers responded to these repressive policies by creating a **constitutional political system**. The U.S. Constitution is the supreme law of the land. It lists the structure and powers of the president (executive), Congress (legislature), and judges (judiciary) and allocates responsibilities between federal and state governments. The **Bill of Rights**, or the first ten amendments to the Constitution, was added to protect individual rights and liberties. The Constitution is intentionally difficult to amend. This prevents a government from coming into power and changing the rules of the game by passing a law that, for instance, states that you do not have a right to an attorney or right to a jury trial in a prosecution for a serious criminal offense. The American colonists' concern with individual rights is indicated by the fact that the Constitution was accepted by several state legislatures only on the condition that a Bill of Rights would be incorporated into the document.

The last half of the twentieth century witnessed the nationalization or "constitutionalization" of the law of criminal procedure. The U.S. Supreme Court has held that most of the provisions of the Bill of Rights of the U.S. Constitution are incorporated into the Fourteenth Amendment applicable to the states. This has meant that both federal and state governments are required to provide the same basic rights to criminal defendants. The result is that defendants generally enjoy the same protections in both federal and state criminal justice systems.

In this chapter, following a discussion of the sources of criminal procedure, we will examine the nationalization of the Bill of Rights and the incorporation of rights into the Due Process Clause of the Fourteenth Amendment. We then examine equal protection of the law. The chapter concludes with a discussion of the impact of Supreme Court decisions.

THE SOURCES OF CRIMINAL PROCEDURE

As we have seen, the law of criminal procedure details the steps that the government is required to follow in investigating, detecting, prosecuting, and punishing crime and in criminal appeals. This is distinguished from criminal law, which defines the content of the rules whose violation results in penal responsibility. Some commentators compare this to a sporting event. Criminal law defines the points you receive for a goal. Criminal procedure comprises the rules that tell us how we move the ball up the court or field. As a first step, we will examine the fundamental sources of criminal procedure listed below.

TABLE 2.1

Where to Find the Law of Criminal Procedure

U.S. Constitution. This is the "supreme law of the land" and the primary source of criminal procedure.
U.S. Supreme Court. The Court applies the provisions of the U.S. Constitution to cases that are before the Court. These decisions are binding on courts throughout the land and explain what procedures are required to satisfy the Constitution.

TEST YOUR KNOWLEDGE: TRUE/FALSE

7. Judges today, unlike in the past, now agree that the Fourteenth Amendment incorporates all the provisions of the Bill of Rights to the U.S. Constitution and extends these rights to all American citizens.

Check your answers on page 47.

U.S. Courts of Appeals and District Courts. These courts decide cases within their own geographical region. They are required to follow the rulings of the U.S. Supreme Court. In those instances in which the Supreme Court has not ruled, the decision of each federal court of appeals is binding within its jurisdiction. Federal courts of appeals may look to one another's judgments in arriving at a decision.

State constitutions. Each state has a constitution that contains a list of rights that parallel those provided in the Bill of Rights to the U.S. Constitution.

State courts. The decisions of a state supreme court are binding precedent for all other courts within the state. State courts interpret the provisions of their constitutions. State courts must interpret their constitutions to provide the same protections as the U.S. Supreme Court has held are required under the U.S. Constitution. They are free to recognize greater protections than are required by the U.S. Constitution.

Federal statutes. These are laws passed by Congress that address criminal procedure, such as funding for the analysis of DNA evidence in federal and state court.

State statutes. These are laws passed by state legislatures that address criminal procedure, such as whether cameras are permitted in the courtroom. Towns and cities also may pass local ordinances or rules of procedure in local courts that address criminal procedure.

Federal Rules of Criminal Procedure. These are comprehensive rules adopted by federal judges and approved by Congress that detail the required steps in federal criminal procedure.

State rules of criminal procedure. These are the rules that set forth the required criminal procedures in the states. In some states, these rules are enacted by the legislature and in other states, by the judiciary.

Model Code of Pre-Arraignment Procedure. The American Law Institute, a private group of lawyers and professors, formulated a set of suggested rules regarding pretrial interactions between the police and citizens. Judges occasionally rely on the Model Code in their decisions. There are other documents that courts look to at times, such as the U.S. Justice Department's manual regulating the conduct of prosecutors, ethical guidelines established by bar associations for the conduct of lawyers, and internal police regulations regarding the conduct of law enforcement officers.

THE U.S. CONSTITUTION

The Constitution and the Bill of Rights, which was included in the document at the insistence of the legislatures of New York, Virginia, and other states, each include provisions regarding criminal procedure.

The original Constitution of 1788 includes four provisions that address criminal procedure.

1. ***Habeas corpus.*** Article I, Section 9 limits the ability of Congress to suspend the "Privilege of the Writ of Habeas Corpus." This guarantees individuals the right to go before a court and require the government to explain why they are incarcerated.
2. ***Ex post facto laws.*** Article I, Section 9 also prohibits Congress from adopting bills of attainder (legislative acts punishing a specific individual without a trial) and ex post facto laws (criminalizing an act that was legal when committed).
3. ***Jury trials.*** Article III, Section 2 provides that all crimes shall be tried before a jury and that such trials shall be held in the state where the crime has been committed.
4. ***Treason.*** Article III, Section 4 states that treason consists of levying war against the United States. A conviction requires the testimony of two witnesses to the same overt act or a confession in open court.

The first ten amendments comprising the Bill of Rights were added to the Constitution in 1791. The first eight amendments to the Constitution include fifteen provisions addressing criminal procedure. As we shall see, most of the provisions that originally applied only to the federal

TABLE 2.2
Criminal Procedure Provisions in the Bill of Rights

Amendment	Protections/Rights	From the Constitution
Fourth Amendment	Unreasonable searches and seizures Warrants	"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
Fifth Amendment	Indictment by grand jury Prohibition against double jeopardy Right against self-incrimination Due process of law	"No person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
Sixth Amendment	Speedy and public trial Impartial jury Informed charge Confrontation with witnesses Obtaining witnesses Assistance of a lawyer	"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."
Eighth Amendment	Excessive bail Excessive fines Cruel and unusual punishment	"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

government have been interpreted as applying to state governments as well. The U.S. Supreme Court is the final authority on the meaning of the provisions of the Constitution and the Bill of Rights (see Table 2.2).

THE U.S. SUPREME COURT

Article VI of the U.S. Constitution, the **Supremacy Clause**, specifically states that the Constitution and the laws passed by Congress are the supreme law of the land and trump any state laws or court decisions that address the same issue. Article VI reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The U.S. Constitution is the supreme law of the land, and federal and state laws must conform to the constitutional standard. Alexander Hamilton in the *Federalist Papers* observed that the Constitution is the "standard . . . for the laws" and that where there is a conflict, the laws "ought to give place to the constitution." The constitutional requirements, however, are not always clear from the text of the document. The Sixth Amendment's provision for "assistance in all criminal prosecutions," for instance, does not tell us whether the federal government and the states must appoint lawyers to represent the indigent and poor during police lineups and does not tell us whether a lawyer must be provided free of charge to defendants undertaking an appeal following a conviction.

In 1803, in *Marbury v. Madison,* the U.S. Supreme Court claimed the authority of **judicial review**, the right to define the meaning of the Constitution and to throw out federal, state, and local laws as unconstitutional that do not conform to the Constitution. *Marbury* is a complicated case to

disentangle, and at this point, you merely should appreciate that the lasting significance of this famous case is Justice John Marshall's proclamation that "an act that is repugnant to the Constitution is void" and that "[i]t is emphatically the province and duty of the judicial department to say what the law is" (*Marbury v. Madison,* 5 U.S. [1 Cranch] 137 [1803]).

In two later cases, *Martin v. Hunter's Lessee* and *Cohens v. Virginia,* the Supreme Court explicitly asserted the authority to review whether state laws and court decisions are consistent with the Constitution (*Martin v. Hunter's Lessee,* 14 U.S. [1 Wheat.] 304 [1816]); *Cohens v. Virginia,* 19 U.S. [6 Wheat.] 264 [1821]). In 1958, the Supreme Court affirmed this authority in the famous civil rights case of *Cooper v. Aaron.* In *Cooper*, the Supreme Court ordered Arkansas to desegregate the Little Rock school system and reminded local officials that the Constitution is the supreme law of the land and that *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. . . . Every state legislator and executive and judicial officer is solemnly committed by oath . . . to support this Constitution" (*Cooper v. Aaron,* 358 U.S. 1, 18 [1958]).

As the chief interpreter of the meaning of the Constitution, the Supreme Court's judgments bind all state and federal judges, the president, Congress, state officials, and every official in the criminal justice system. Justice Robert Jackson observed that "we are not final because we are infallible, but we are infallible . . . because we are final" (*Brown v. Allen,* 344 U.S. 443, 540 [1953]). The Supreme Court cannot review every state and federal criminal case that raises a constitutional question. The Court takes a limited number of cases each term and tends to address those issues in which there is a disagreement among federal appellate courts over the constitutionality of a specific practice or where an issue is particularly important. This results in the vast number of criminal procedure cases being decided by lower federal courts and by state courts. In many instances, these courts merely follow Supreme Court precedent. In other cases, we may find that there is no controlling Supreme Court judgment on an issue and that in order to determine the law, we must look to various federal circuit court decisions and state supreme court judgments. In this instance, each court establishes the law for its own jurisdiction until the Supreme Court rules on the issue.

On several occasions, the Supreme Court has relied on what it terms its **supervisory authority** over the administration of justice in the federal courts to impose standards that are not required by the U.S. Constitution. This is based on the Supreme Court's authority to maintain "civilized standards of procedure and evidence" in the practice of the federal courts. In *McNabb v. United States*, the Supreme Court held that federal agents had blatantly disregarded the requirements of a congressional statute. The Court invoked its supervisory authority and held that although federal agents had not violated the Constitution, permitting the trial court to consider the resulting confession would make the judiciary "accomplices in willful disobedience of the law" (*McNabb v. United States,* 318 U.S. 332 [1943]).

STATE CONSTITUTIONS AND COURT DECISIONS

Each of the fifty states has a constitution, and virtually all of these constitutions contain a "declaration of rights." In most cases, the provisions are the same as the criminal procedure provisions in the Bill of Rights to the U.S. Constitution. In some instances, state constitutions have provided for additional rights or have clarified the meaning of particular rights. Alaska, Florida, and Illinois, along with other states, recognize the rights of crime victims to confer with prosecutors and to attend trials. In another example, New York makes it explicit that the freedom from unreasonable searches and seizures includes the freedom from the unreasonable interception of telephonic and telegraphic communications.

The interpretation of state constitutions is a matter for state courts. The decisions of state supreme courts are binding on all lower state courts. The rule is that a state provision may not provide a defendant with less protection than the corresponding federal provision. A state, however, may provide a defendant with more protection. In 1977, Supreme Court Justice William Brennan called on state supreme courts to provide defendants with more rights than what he viewed as the increasingly conservative and "law and order"–oriented U.S. Supreme Court. In a 1989 study, Justice Robert Utter of the Washington Supreme Court found 450 published state court opinions that interpreted state constitutions as "going beyond federal constitutional guarantees." Most of these decisions were handed down in Alaska, California, Florida, and Massachusetts. In reaction to this trend, California, Florida, and several other states have amended their constitutions to instruct state court judges that their constitutions' criminal procedure provisions shall be interpreted in "conformity" with the decisions of the U.S. Supreme Court and are not to provide greater protections to individuals.

As you read the text, you will see that in some instances, state courts continue to engage in what has been called the **new judicial federalism**. The important point to keep in mind is that defendants possess the same rights under both the constitutions of the fifty states and the Bill of Rights to the U.S. Constitution. The next section discusses federal and state laws as a source of the law of criminal procedure.

FEDERAL AND STATE STATUTES

State legislatures and the U.S. Congress have added to constitutional provisions by passing laws regarding criminal procedure. In state statutes, you can usually find these laws grouped together under the title of the "code of criminal procedure." Roughly one-third of the states follow the example of North Carolina, Ohio, and Utah and have detailed laws that describe procedures to be followed at virtually every step in the criminal process. Roughly ten states have brief statutory codes of criminal procedure that cover a limited number of topics of special concern. A New York law, for instance, provides that judges presiding over "widely publicized or sensational cases" may limit extrajudicial statements by lawyers, defendants, and witnesses and other individuals involved in a trial. Another provision describes the procedures that a court is required to employ in removing an unruly spectator from the courtroom. A third New York statute prohibits the televising or radio transmission of trials and specifies the permissible location of photographers and cameras outside the courtroom. A Virginia law establishes standards for requesting the DNA analysis of biological material by an individual who has been convicted of a crime. A Michigan statute discusses the procedure for extraditing offenders to other states for trial. The remaining states follow the pattern in Massachusetts and have "codes of criminal procedure" that cover two or three areas in depth as well as topics of special concern. The interpretation of state statutes is the exclusive concern of state courts, while federal courts are charged with the interpretation of federal statutes.

Statutes can be very important for defining a defendant's rights in the criminal justice system and should not be overlooked. Federal statutes, for instance, include provisions on the requirements of speedy trial, witness protection, and postconviction DNA testing. The U.S. Supreme Court may find that a state or federal statute deprives defendants of their constitutional rights and may rule that the statute is unconstitutional. For example, it is doubtful whether the Supreme Court would approve of a law that provided the FBI or state police with the authority to detain individuals indefinitely without probable cause that the individuals had committed a crime. In the next section, we will see that a full description of state and federal criminal procedure typically can be found in the Federal Rules of Criminal Procedure.

RULES OF CRIMINAL PROCEDURE

The Federal Rules of Criminal Procedure detail the steps in the criminal justice process in the federal system from the filing of a complaint through a verdict and sentencing in district court. This includes topics such as the grand jury, motions that must be filed prior to trial, jury instructions and verdicts, and posttrial motions to reconsider sentencing. The Federal Rules are discussed and regularly amended by the Judicial Conference of the United States, which is a regular meeting of federal judges. These federal judges, in turn, send their proposals to the Chief Justice of the U.S. Supreme Court. He or she then transmits the rules to Congress, and the rules take effect unless amended or vetoed.

The Supreme Court has held that these rules have the force of law and that a federal court has no authority to disregard the requirements of the rules in regard to matters such as the time in which a defendant is required to file various motions or the prohibition on televising trials or providing the media with electronic recordings of trials.

State courts generally also have comprehensive rules of procedure that follow the example of the Federal Rules. Roughly one-third of state constitutions provide that the rules of procedure drawn up by judges are more important than (or take precedence over) laws passed by the state legislature.

A MODEL CODE OF PRETRIAL PROCEDURE

In 1923, a group of prestigious academics, judges, and lawyers formed the privately organized and funded American Law Institute (ALI). These individuals shared a concern that the states dramatically varied in their definitions of crimes and legal procedures. The ALI members drafted a series

of model statutes that they hoped would be adopted by state legislatures. The ALI's *Model Code of Pre-Arraignment Procedure* (1975) addresses pretrial police investigations and has been cited by judges grappling with criminal procedure issues. The Supreme Court, for example, referred to the code in a case involving the permissible length of a police investigatory stop of a suspect. An example of the forward-looking nature of the *Model Code* is the document's call for the taping of police interrogations.

In some judicial decisions, you may see that judges refer to administrative procedures developed by government agencies or local police departments or bar associations. One of the most influential manuals is the *United States Attorneys' Manual* of the Department of Justice. The manual sets forth the policy of the Justice Department at every stage of the criminal justice process, including grand juries, the filing of criminal charges, plea bargaining, and sentencing. A violation of these internal guidelines might result in a prosecutor's being subject to some form of administrative discipline, such as loss of pay or suspension. A judge may consult these guidelines in determining whether a prosecutor has violated his or her professional responsibilities and should be disciplined by the court. Courts may look at the ethical rules established by state bar associations to determine whether a criminal verdict should be thrown out based on a defense attorney's ineffective representation at trial. In some instances, judges also may consult internal police regulations to assist in determining whether an officer acted reasonably in carrying out his or her responsibilities. The American Bar Association has adopted a set of *Standards for Criminal Justice*, which suggests reforms that might be made to various criminal justice procedures.

The next section examines the incorporation of the Bill of Rights into the Fourteenth Amendment Due Process Clause and the nationalization of the law of criminal procedure.

THE DEVELOPMENT OF DUE PROCESS

Nationalization

The last half of the twentieth century witnessed the *nationalization*, or what law professors refer to as the **constitutionalization** of criminal procedure. This involved interpreting the Fourteenth Amendment **Due Process Clause** to extend most of the protections of the Bill of Rights to the states. There now is a single standard of criminal procedure that all levels of government must satisfy. You may be prosecuted in Indiana, in Iowa, or in the federal system, and your rights are fundamentally the same. This *constitutionalization* or development of a single standard that applies to the federal government as well as to the states marked a true revolution in the law.

The question of the nationalization of criminal procedure remains a topic of lively debate and disagreement. The development of consistent procedures is intended to ensure uniform and fair treatment for individuals wherever they live and whatever their backgrounds. On the other hand, there is strong argument that the states should be left free to experiment and to develop their own criminal procedures. The procedures that may be appropriate for federal agents investigating fraud, environmental crime, or corporate abuse are far removed from the daily demands confronting a police officer on the beat in a major city or officers in a small department with a tight budget. Supreme Court judges sitting in Washington, DC, with little or no experience in local government or in law enforcement may be ill equipped to be telling the police in Detroit or Los Angeles how to conduct an interrogation or lineup, and the Court's well-intentioned decisions may result in "handcuffing" the police and in frustrating police investigations. Observers of the Supreme Court predict that in the next few years, we are likely to see a renewed debate among the Supreme Court justices over whether each state should be required to follow uniform procedures or whether states should be provided with greater flexibility in their criminal procedures. The Supreme Court, for instance, might hold that the Fifth Amendment does not require states to tape interrogations and that the states may decide for themselves whether to adopt this practice. We now turn our attention to the process of incorporating the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

THE FOURTEENTH AMENDMENT

In 1833, the U.S. Supreme Court in *Barron v. Mayor & City Council of Baltimore* ruled that the Bill of Rights limited the federal government and did not apply to state and local governments. Justice John Marshall wrote that the "constitution was ordained and established by the people of the United States for themselves for their own government, and not for the government of the individual states." He observed that if the framers had intended for the Bill of Rights to apply to the states, "they would

have declared this purpose in plain and intelligible language" (*Barron v. Mayor & City Council of Baltimore,* 32 U.S. [7 Pet.] 243, 247, 250 [1833]).

Professor Erwin Chemerinsky observed that if the Bill of Rights applies only to the federal government, the state and local governments "then are free to infringe even the most precious liberties" and to "violate basic constitutional rights" (Chemerinsky, 2002, p. 472). On the other hand, the *Barron* decision represents the widespread belief in the nineteenth century that the federal government should not intrude into the affairs of state governments and that the citizens of each state should be left free to determine what rights and liberties they wish to preserve and to protect. Criminal justice, in particular, was viewed as a local matter.

This system of states' rights did not fully survive the Civil War. Slavery in the states of the former Confederacy would no longer be tolerated, and former African American slaves were to enjoy the full rights of citizenship. The **Fourteenth Amendment** was added to the Constitution in 1868 in order to guarantee equal treatment and opportunity for African Americans. The Amendment reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first sentence recognized that African Americans are citizens of the United States and of the state in which they reside. The purpose was to reverse the Supreme Court's 1857 decision in *Scott v. Sandford*, which held that African American slaves were not eligible to become U.S. citizens (*Dred Scott v. Sandford*, 60 U.S. [19 How.] 393 [1857]). Several judges argued that the debates in Congress over the Fourteenth Amendment indicated that the amendment's prohibition on a state's passing a law that abridges "the privileges and immunities of citizens of the United States" was shorthand that was intended to extend the protections of the federal Bill of Rights to the states. What good was citizenship unless African Americans were protected against the violation of their rights by both federal and state governments? This theory, however, was rejected by the Supreme Court in the *Slaughter-House Cases.* Justice Samuel Miller held that the Privileges or Immunities Clause was not intended to extend the Bill of Rights to state citizens. Extending the Bill of Rights to the states would establish the Supreme Court as "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights. . . . We are convinced that no such results were intended" (*Slaughter-House Cases,* 83 U.S. [16 Wall.] 36 [1873]). Individuals now looked to the Due Process Clause of the Fourteenth Amendment to secure their rights against state governments.

The twentieth century witnessed continued efforts by defendants to extend the protection of the Bill of Rights to the states. Professor Lawrence Friedman, in his book *Crime and Punishment in American History*, notes that with the dawn of the mid-twentieth century, there was an increasing call for fairer procedures in state courts. Lawyers now argued that the Due Process Clause of the Fourteenth Amendment, which applied to the states, included various provisions of the Bill of Rights to the U.S. Constitution. The Supreme Court employed one of three approaches to this argument.

- ***Fundamental fairness.*** The Supreme Court decides on a case-by-case basis whether rights are fundamental to the concept of ordered liberty and therefore apply to the states.
- ***Total incorporation and total incorporation plus.*** The entire Bill of Rights applies to the states. Total incorporation plus includes additional rights not in the Bill of Rights along with the entire Bill of Rights.
- ***Selective incorporation.*** Particular rights in the Bill of Rights apply to the states. Selective incorporation plus includes additional rights not in the Bill of Rights along with the particular rights in the Bill of Rights.

The Due Process Clause

There are strong arguments that the individuals who drafted the Bill of Rights intended that the Due Process Clause incorporate the Bill of Rights and extend these protections to state governments. Judges favoring the **total incorporation** approach argue that these rights were viewed as

fundamental by the drafters of the U.S. Constitution and clearly were intended to be guaranteed to African American citizens by the congressional sponsors of the Fourteenth Amendment. Judges who favor the **total incorporation plus** approach would include additional rights not in the Bill of Rights.

A second approach contends that the Due Process Clause left states free to conduct criminal trials so long as the procedures are consistent with fundamental fairness (Chapter 8). This leaves states with the flexibility to prosecute individuals without being bound to apply the same procedures as the federal government. There is no indication according to individuals favoring this *freestanding due process* approach that the Fourteenth Amendment incorporates the Bill of Rights. After all, the drafters of the Fourteenth Amendment could have expressly stated that the Amendment incorporates the Bill of Rights if this is what they intended. The Fourteenth Amendment employs broad language like "due process of law" to provide flexibility to state governments and to allow the states to adjust their procedures to meet changing conditions. Proponents of fundamental fairness point out that the Fifth Amendment also contains the language that "[n]o person shall be denied life, liberty, or property without due process of law," and if this language were meant to incorporate the entire Bill of Rights, it would have been unnecessary to include the Bill of Rights in the Constitution. On the other hand, critics of fundamental fairness point out that the drafters of the Fourteenth Amendment could have used the term *fundamental fairness* rather than *due process* if this was their intent.

Other judges favored **selective incorporation**. They argue that only those provisions of the Bill of Rights that are essential to liberty are incorporated into the Fourteenth Amendment. States are otherwise free to structure their criminal procedures. A small number of judges advocated **selective incorporation plus** and contended that there are rights that are not part of the Bill of Rights that also applied to the states. The challenge confronting the selective incorporation approach is to identify what parts of the Bill of Rights are essential.

Keep these points in mind as you read about the Supreme Court's gradual incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

FUNDAMENTAL FAIRNESS

The Supreme Court developed the fundamental fairness test in a series of cases between 1884 and 1908. Lawyers and their clients were continually disappointed over the next forty years by the Supreme Court's reluctance to recognize that the rights protected by the Bill of Rights were protected by the Fourteenth Amendment.

The fundamental fairness test was first established by the U.S. Supreme Court in 1884 in *Hurtado v. California.* Joseph Hurtado had been charged with homicide based on an information (i.e., a document signed by a prosecutor charging an individual with a crime) filed by a prosecutor, and subsequently, he was convicted and sentenced to death. Hurtado claimed that the prosecutor had denied Hurtado's due process rights by disregarding the Fifth Amendment's requirement of indictment (called a "presentment" in England) before a grand jury for a "capital or otherwise infamous crime." The Supreme Court rejected Hurtado's claim and held that the ancient institution of the grand jury was not essential to the preservation of "liberty and justice." States were free to design their own criminal procedures "within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

The Supreme Court stressed that the information filed by the prosecutor in California was subject to review in a hearing conducted by a magistrate. At any rate, whether a defendant is brought to trial as a result of an information filed by a prosecutor or an indictment issued by a grand jury is not fundamental to a fair prosecution because the defendant's guilt ultimately is determined by the evidence presented at a criminal trial. The important point is that although the Supreme Court rejected Hurtado's claim, the Court opened the door for defense lawyers to argue in the future that their clients had been denied a right that was a "fundamental principle of liberty and justice" that was embodied in the Fourteenth Amendment (*Hurtado v. California,* 110 U.S. 516, 535 [1884]).

Twining v. New Jersey is a second leading case in the development of the fundamental fairness test. In *Twining,* the U.S. Supreme Court rejected Twining's claim that his due process rights had been violated by the trial judge's instruction that the jury could consider the defendant's failure to testify at his trial in determining his guilt or innocence. There was little question that this instruction in a federal trial would be considered to be in violation of the Fifth Amendment right against self-incrimination. The Supreme Court, however, held that the right against self-incrimination at trial was not "an immutable principle of justice which is the inalienable possession of every citizen of a free

government." The people of New Jersey were free to change the law in the event that they found the judge's instruction to be fundamentally unfair.

The Supreme Court in *Twining* encouraged lawyers to continue to bring cases claiming that various protections contained within the Bill of Rights were included in the Due Process Clause of the Fourteenth Amendment when it observed that it is "possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." The Court stressed that these rights are protected "not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process" (*Twining v. New Jersey,* 211 U.S. 78, 99, 113 [1908]).

The world was beginning to change. President Woodrow Wilson had led the United States into a European conflict in World War I and had proclaimed in his famous "Fourteen Points" that he aspired to bring liberty, freedom, and the rule of law to all the peoples of the world. In Wilson's speech, he called for the formation of a League of Nations to settle international disputes through negotiation and understanding rather than through war. This American commitment to liberty and justice was in stark contrast to the newly developing European fascist movements in Italy, Germany, and Spain, which illustrated the dangers posed to democracy by mob rule, racism, and intolerance.

The Supreme Court took a small step toward recognizing that the Fourteenth Amendment protected individuals against abuse by state authorities in *Moore v. Dempsey.* In *Moore*, African American farmers meeting to discuss discriminatory practices in Phillips County, Arkansas, were attacked by white residents. One of the attackers was killed during the exchange of gunfire. Seventy-nine African Americans were prosecuted and convicted, and twelve received a death sentence. In the prosecutions, African Americans were excluded from the juries, the judges rushed through the trials, and threatening mobs surrounded the courthouse. The Supreme Court, based on the totality of the circumstances, held that the murder convictions of five of the defendants violated due process. The Court stressed that it was compelled to intervene to correct the trial court's verdict, given that the "whole proceeding" had been a "mask" in which lawyers, judge, and jury had been "swept to the fatal end by an irresistible wave of public opinion" and that the Arkansas appellate courts had failed to correct the "wrongful sentence of death" (*Moore v. Dempsey,* 261 U.S. 86, 91 [1923]).

Moore was followed in 1932 by the famous case of *Powell v. Alabama.* The Supreme Court held in *Powell* that the failure of the trial court to ensure that indigent, illiterate, and youthful African American defendants confronting the death penalty in a hostile community were represented by an "effective" lawyer constituted a violation of due process of law under the Fourteenth Amendment. The judgment stressed that "this is so . . . not because [this right is] enumerated in the first eight Amendments, but because [it is of] such a nature that [it is] included in the 'conception of due process of law'" (*Powell v. Alabama,* 287 U.S. 45, 67–68 [1932]).

In *Powell,* five Caucasian homeless men reported that they had been attacked and thrown off a freight train by a group of African Americans. The sheriff deputized every man who owned a firearm, and as the train pulled into Painted Rock, Alabama, the forty-two cars were searched, and the sheriff seized nine African Americans between thirteen and twenty years of age as well as two Caucasian females. The two women were dressed in men's caps and overalls. One of the women, Ruby Bates, informed a member of the posse that the African American suspects had raped her along with her companion, Victoria Price.

The nine Scottsboro defendants were brought to trial on April 6, 1932, twelve days following their arrest. The courthouse was ringed by armed National Guardsmen to protect the defendants from the angry crowd, which at times numbered several thousand. Judge Alfred E. Hawkins initially appointed the entire local bar to represent the defendants at their arraignment. On the morning of the trial, he named Stephen R. Roddy to represent the defendants. Roddy was a semi-alcoholic Tennessee lawyer who had been sent to observe the trial by the defendants' families. He protested that he was unfamiliar with Alabama law, and Judge Hawkins responded by appointing a local seventy-year-old senile lawyer, Milo Moody, to assist him. Roddy was given roughly thirty minutes to meet with his clients before the opening of the trial. He immediately filed an unsuccessful motion to change the location of the proceedings to ensure his clients a fair trial, which he argued was impossible given the inflammatory newspaper coverage and threatened lynching of his clients. The trial opened on a Monday, and by Thursday, eight of the defendants had been convicted and sentenced to death. The jury divided over whether thirteen-year-old Roy Wright should receive a death sentence or life imprisonment, and Judge Hawkins declared a mistrial in his case. The Alabama Supreme Court affirmed the verdicts.

By the time the case came before the U.S. Supreme Court, the Scottsboro defendants had become the central cause for political progressives and civil rights activists in the United States and in Europe. The Supreme Court focused on the single issue of denial of counsel. Justice Arthur Sutherland, citing *Twining*, held that the defendants had been deprived of legal representation in violation of the Due Process Clause of the Fourteenth Amendment. Sutherland based his judgment on the lack of time provided to the defendants "to retain a lawyer" as well as the trial judge's appointment of a "less than competent attorney."

The Supreme Court avoided criticism that they were assuming the role of a "super legislator" by narrowly limiting the judgment to the specific facts that confronted the Scottsboro defendants. Justice Sutherland stressed that the trial court's failure to provide the defendants with "reasonable time and opportunity to secure counsel was a clear denial of due process" in light of the "ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and . . . the fact that their friends and families were . . . in other states . . . and above all that they stood in deadly peril of their lives." The trial court's obligation to provide a lawyer to defendants confronting capital punishment was not satisfied by an "assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial." This ruling, according to Justice Sutherland, was based on "'certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard'" (*Powell,* 287 U.S. at 70).

Powell was followed by several cases in which the Supreme Court overturned the convictions of young African American defendants whose confessions had been obtained through abusive and coercive interrogations by Southern police officers. The Court condemned these practices as reminiscent of the totalitarian policies of Nazi Germany and as having no place in a democratic society. In *Brown v. Mississippi*, which is discussed in Chapter 8, confessions were extracted from three African American defendants through "physical torture." The Supreme Court held that it "would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions . . . and the use of confessions thus obtained as the basis for conviction and sentence was a clear denial of due process" (*Brown v. Mississippi,* 297 U.S. 278, 285 [1936]).

In summary, although *Hurtado* and *Twining* affirmed the respective defendants' convictions, these cases established that the Due Process Clause of the Fourteenth Amendment protected individuals against practices that are contrary to the "immutable principles of liberty and justice." The Supreme Court held that due process had been violated and overturned convictions when confronted with poor, rural, African American defendants who had been subjected to "sham judicial hearings," who had been denied access to effective counsel in a capital punishment case, or whose confessions had been extracted through physical coercion. Keep the following four points in mind in regard to the fundamental rights approach to the Fourteenth Amendment Due Process Clause.

You can find *Brown v. Mississippi* on the Student Study Site, **edge.sagepub.com/lippmancp4e**.

- ***Fundamental rights.*** The Due Process Clause prohibits state criminal procedures and police practices that violate fundamental rights. Justice Felix Frankfurter observed that the Fourteenth Amendment "neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause . . . has an independent potency" (*Adamson v. California,* 332 U.S. 46, 66 [1952]).
- ***Bill of Rights.*** The Due Process Clause protects rights because they are fundamental, not because they are in the Bill of Rights.
- ***Legal test.*** The Supreme Court has employed various tests to determine whether a right is fundamental. In 1937, in *Palko v. Connecticut*, the Supreme Court held that the right against double jeopardy was not violated by a Connecticut law that authorized the state to retry a defendant in the event of a successful appeal of a criminal conviction. The Court held that rights are fundamental only if they are of the "very essence of the scheme of ordered liberty," if "'a fair and enlightened system of justice would be impossible without them,'" or if they are based on "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (*Palko v. Connecticut,* 302 U.S. 319, 325 [1937]).
- ***Procedures.*** States are free to establish criminal procedures that do not violate fundamental rights protected under the Due Process Clause of the Fourteenth Amendment. The Supreme Court noted that in those instances in which it holds that a state law does not violate due process, the law may be changed through the democratic process.

The first case reprinted in this chapter, *Rochin v. California*, challenged the Supreme Court to determine whether due process prohibited the police from pumping out Rochin's stomach in order to seize capsules of narcotics. It would seem fundamental to the scheme of ordered liberty that the police should be prohibited from forcibly extracting the capsules. In *Rochin*, Justice Frankfurter relied on *Palko v. Connecticut* to establish the famous "shock-the-conscience test" for determining fundamental fairness under the Fourteenth Amendment. Do you agree with Justice Frankfurter that the police violated Rochin's right to due process of law? Were other means of obtaining the evidence available to the police?

Did the police officer's order to pump Rochin's stomach for drugs "shock the conscience" and violate due process of law?

ROCHIN V. CALIFORNIA,

342 U.S. 165 (1952), FRANKFURTER, J.

Issue

The Supreme Court is asked to decide whether the petitioner's conviction has been obtained by methods that offend the due process of law.

Facts

Having "some information that [the petitioner here] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common law wife, brothers, and sisters. Finding the outside door open, the sheriffs entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed, the deputies spied two capsules. When asked, "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules, which proved to contain morphine.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing "a preparation of morphine" in violation of the California Health and Safety Code, 1947, section 11.500. Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers "were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," and "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the . . . hospital." . . . The Supreme Court of California denied without opinion Rochin's petition for a hearing. . . . This Court granted certiorari, because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States.

Reasoning

In our federal system, the administration of criminal justice is predominantly committed to the care of the States. . . . In reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." Due process of law, "itself a historical product," is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice.

However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions

(*Continued*)

(Continued)

of justice of English-speaking peoples even toward those charged with the most heinous offenses." These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," or are "implicit in the concept of ordered liberty."

The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words, being symbols, do not speak without a gloss. On the one hand, the gloss may be the deposit of history, whereby a term gains technical content. Thus, the requirements of the Sixth and Seventh Amendments for trial by jury in the federal courts have a rigid meaning. No changes or chances can alter the content of the verbal symbol of "jury"—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant. On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as resort to a revival of "natural law." To believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case, "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Holding

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement

that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man, the police cannot extract by force what is in his mind but can extract what is in his stomach.

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society. . . .

Concurring, *Black, J.*

Adamson v. California, 332 U.S. 46, 68–123 (1947), sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that "No person . . . shall be compelled in any criminal case to be a witness against himself." I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California's use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. But I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

What the majority hold is that the Due Process Clause empowers this Court to nullify any State law if its application "shocks the conscience," offends "a sense of justice," or runs counter to the "decencies of civilized conduct." The majority emphasize that these statements do not refer to their own consciences or to their senses of justice and decency. For we are told that "we may not draw on our merely personal and private notions"; our judgment must be grounded on "considerations deeply rooted in reason and in the compelling traditions of the legal profession." We are further admonished to measure the validity of state practices, not by our reason, or by the traditions of the legal profession, but by "the community's sense of fair play and decency"; by the "traditions and conscience of our people"; or by "those canons of decency and fairness which express the notions of justice of English-speaking peoples." These canons are made necessary, it is said, because of "interests of society pushing in opposite directions." If the Due Process Clause does vest this Court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an "evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts." . . . I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. Reflection and recent decisions of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.

Questions for Discussion

1. Why does Justice Felix Frankfurter conclude that the police violated Rochin's due process rights?
2. Are you persuaded by Justice Frankfurter's argument that the determination of the content of due process is an "objective" rather than a "subjective" process?
3. What other police practices would "shock the conscience"?
4. Justice Frankfurter compares the police conduct in Rochin to the involuntary confessions in *Brown v. Mississippi.* He writes that the Supreme Court cannot credibly "hold that in order to convict a man, the police cannot extract by force what is in his mind but can extract what is in his stomach." Do you agree with the judge's comparison?
5. Summarize the view of Justice Hugo Black. What is his criticism of the fundamental fairness test?

Cases and Comments

1. The Court Limited the Scope of the Precedent in *Rochin*. In *Irvine v. California*, law enforcement agents entered Irvine's home three times without a warrant to install and then to move a microphone. The content of his conversations was relied on to convict him of illegal gambling. Justice Jackson noted that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared . . . as a restriction on the Federal Government." Justice Jackson nonetheless affirmed Irvine's criminal conviction. He distinguished the trespass to property and the eavesdropping in *Irvine* from *Rochin*, reasoning that in *Irvine*, there was an absence of "coercion, violence or brutality to the person." Justice Frankfurter, in his dissenting opinion, argued that Justice Jackson misinterpreted the significance of *Rochin* by focusing on the physical coercion employed to extract the narcotics and that Irvine's conviction also should be overturned. He explained that the significance of *Rochin* was that the government must respect "certain decencies of civilized conduct" and may not resort to "any form of skullduggery" to obtain a conviction. Due process is concerned with the "mode in which evidence is obtained," and when evidence is "secured by methods which offend elementary standards of justice, the victim of such methods may invoke the protection of the Fourteenth Amendment." Do you find Justice Jackson's or Justice Frankfurter's analysis of *Rochin* more persuasive? See *Irvine v. California,* 347 U.S. 128 (1954).

2. No Due Process Violation. In *County of Sacramento v. Lewis,* a police high-speed pursuit resulted in the death of a passenger on a motorcycle when the motorcycle tipped over and the squad car skidded into the passenger. Justice David Souter wrote that the police officer did not violate substantive due process when he caused death of the passenger through "reckless indifference" or "reckless disregard." "[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation" (*County of Sacramento v. Lewis*, 523 U.S. 833[1998]).

TOTAL INCORPORATION

The fundamental fairness doctrine continued to hold sway in the Supreme Court until the 1960s. Justice Hugo Black was one of the most prominent critics of fundamental fairness. In 1947, Justice Black, in his dissenting opinion in *Adamson v. California*, explained that he had studied the history of the Fourteenth Amendment and that the intent of the drafters of the amendment was to totally incorporate and to protect the principles contained within the Bill of Rights (*Adamson v. California,* 332 U.S. 46 [1947]). Justice Black made the following points in his criticism of the fundamental fairness approach.

- ***Decision making.*** Fundamental fairness does not provide definite standards to determine the rights that are protected by the Fourteenth Amendment Due Process Clause.
- ***Bill of Rights.*** The Bill of Rights includes the rights that the founders struggled to achieve and believed were essential to liberty and freedom. The Fourteenth Amendment is intended to make these rights available to individuals in their relations with state governments.
- ***Textual language.*** The drafters of the Fourteenth Amendment would have used the phrase "rights essential to liberty and justice" if this were their intent.

Justice Black concluded by expressing doubts whether his fellow judges were "wise enough to improve on the Bill of Rights. . . . To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of the written Constitution" (89–90). Justice Black's "total incorporation" approach never succeeded in attracting a majority of the Supreme Court. Justices Frank Murphy, Wiley Rutledge, and William O. Douglas at various times went so far as to endorse a total incorporation-plus approach, which extended the Bill of Rights to the states along with additional rights, such as the right to a clean environment and health

care. As observed by Justice Murphy in his dissent in *Adamson,* "the specific guarantees of the Bill of Rights should be carried over intact into the . . . Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of . . . fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights" (124). The total-incorporation approach is straightforward and involves three simple steps.

- ***Due process.*** Due process is shorthand for the Bill of Rights.
- ***Bill of Rights.*** Identify the rights protected by the Bill of Rights.
- ***Incorporation.*** These rights are incorporated into the Fourteenth Amendment and must be followed by the states to the same extent that the rights are followed by the federal government.

Critics of total incorporation asked Justice Black to explain why the drafters of the Fourteenth Amendment did not explicitly state that their intent was to extend the protections of the Bill of Rights to the states. The total-incorporation approach, although never endorsed by a majority of the U.S. Supreme Court, nevertheless is important for making a strong case for extending most of the rights available to defendants in the federal system to defendants in the fifty state criminal procedure systems.

SELECTIVE INCORPORATION

By 1962, the U.S. Supreme Court included five judges who favored incorporation and who provided the votes that resulted in the Supreme Court's adopting the incorporation doctrine. The majority of judges, rather than embracing total incorporation, endorsed a *selective incorporation* approach, first articulated by Justice William Brennan. Justice Brennan wrote the majority opinion in *Malloy v. Hogan* incorporating the Fifth Amendment right against self-incrimination into the Fourteenth Amendment. Justice Brennan "rejected the notion that the Fourteenth Amendment applies to the States only a watered-down . . . version of the individual guarantees of the Bill of Rights. . . . It would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified" (*Malloy v. Hogan,* 378 U.S. 1, 10 [1964]).

The elements of the selective incorporation approach may be easily summarized.

- ***Fundamental rights.*** The Fourteenth Amendment incorporates those provisions of the Bill of Rights that are "fundamental principles of liberty and justice which lie at the base of all our [American] civil and political institutions." The entire amendment rather than a single portion of the amendment is incorporated into the Fourteenth Amendment ("jot-for-jot and case-for-case").
- ***Application.*** The amendment that is incorporated is applicable to the same extent to both state and federal governments. Justice William O. Douglas characterized this as "coextensive coverage."
- ***Federalism.*** States are free to design their own systems of criminal procedures in those areas that are not incorporated into the Fourteenth Amendment.

The U.S. Supreme Court has incorporated a number of the fundamental rights included in the Bill of Rights into the Fourteenth Amendment Due Process Clause. The rights that are incorporated are listed in Table 2.3. The Court has not incorporated the following four provisions of the Bill of Rights into the Fourteenth Amendment, and therefore, a state is free to adopt a law or include a provision in its constitution that extends these four protections to its citizens.

- ***Third Amendment.*** Prohibition against quartering soldiers without consent of the owner.
- ***Fifth Amendment.*** Right to indictment by a grand jury for capital or infamous crimes.

- ***Seventh Amendment.*** Right to trial in civil law cases.
- ***Eighth Amendment.*** Prohibition against excessive bail and fines.

The next case on the Student Study Site is *Duncan v. Louisiana* (391 U.S. 145, 148–158 [1968]), which incorporated the Sixth Amendment right to a jury trial into the Fourteenth Amendment. Justice Byron "Whizzer" White wrote the majority opinion and relied on the selective incorporation doctrine to hold that trial by jury in criminal cases is "fundamental to the American scheme of justice" and that the Fourteenth Amendment "guarantees a right of jury trial in all criminal cases which . . . would come within the Sixth Amendment guarantee." Justice White noted that by the time the U.S. Constitution had been drafted, the jury trial had been in existence in England for several centuries. The jury was part of the legal system of the American colonies and then was incorporated into the constitutions of the new states and included in the Sixth Amendment. Justice White concluded by noting that the jury continued to be an important feature of federal and state criminal justice systems and provided a check on the abuse of power. He stressed that while a criminal justice process that is "fair and equitable but used no juries is easy to imagine," the jury is "fundamental" to the organization and philosophy of the American criminal justice system. Justice Black, in his concurring opinion, remained steadfast in his advocacy of total incorporation, while Justice Harlan provided a passionate defense of fundamental fairness. *Duncan* provides the opportunity to review your understanding of the relationship between the Fourteenth Amendment Due Process Clause and the Bill of Rights as we turn our attention to the important topic of equal protection under the law.

EQUAL PROTECTION

The U.S. Constitution originally did not provide for the equal protection of the laws. Professor Erwin Chemerinsky observed that this should not be surprising given that African Americans were enslaved and women were subject to discrimination. Slavery, in fact, was formally embedded in the legal system. Article I, Section 2 of the U.S. Constitution provides for the apportionment of the House of Representatives based on the "whole number of free persons" as well as three-fifths of the slaves. This was reinforced by Article IV, Section 2, the "Fugitive Slave Clause," which requires the return of a slave escaping into a state that does not recognize slavery (Chemerinsky, 2002, p. 642).

In 1865, immediately following the Civil War, Congress enacted and the States ratified the Thirteenth Amendment, which prohibits slavery and involuntary servitude. Three years later, as we have seen, Congress approved the Fourteenth Amendment. Section 1 guarantees individuals equal protection of the law in addition to providing that no state shall deprive any person of liberty or property without due process of law. In 1954, the U.S. Supreme Court declared in *Bolling v. Sharpe* that the Fifth Amendment Due Process Clause imposes an identical obligation of equal protection of the law on the federal government and explained that "discrimination may be so unjustifiable as to be violative of due process" (*Bolling v. Sharpe,* 347 U.S. 497 [1954]).

The Equal Protection Clause is of the utmost importance. The sense that we are being treated fairly and equally is essential for maintaining our respect for the law and support for the political system. Yet every day, the police, prosecutors, and judges make decisions treating people differently in regard to arrests, criminal charges, bail, and sentencing. We generally accept these decisions because we have confidence that the judgments are fair and reasonable. Individuals who believe that they have been discriminated against may ask a court to determine whether they have been denied equal treatment under the law.

One area of legal challenge involves the decision of a prosecutor to charge an individual with a criminal offense. Would it violate equal protection for a prosecutor to charge one teenager involved in a drag race with reckless driving while deciding not to bring charges against the other driver? Courts generally follow a **presumption of regularity**. Prosecutors are expected to use "judgment and common sense" in filing criminal charges, and courts will not second-guess a prosecutor's decision. Judges recognize that prosecutors are in the best position to evaluate a defendant's role in a crime, criminal record, willingness to cooperate, and expressions of remorse and other factors (*Wayte v. United States,* 470 U.S. 598, 607–608 [1985]).

Prosecutors' discretion, however, is not unlimited. The Supreme Court noted in *Oyler v. Boles* that the Equal Protection Clause prohibits prosecutors from making decisions to prosecute that are "deliberately based upon an unjustifiable standard such as race, religion, [or] other arbitrary classification" (*Oyler v. Boyles,* 368 U.S. 448, 456 [1962]).