An Introduction to Criminal Procedure

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

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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, 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).

**Precrime.** 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.

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**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.
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 \textit{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 \textit{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...
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 lower court. 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.
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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**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
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- courts of original jurisdiction: 10
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- 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

**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?
TEST YOUR KNOWLEDGE: ANSWERS

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

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