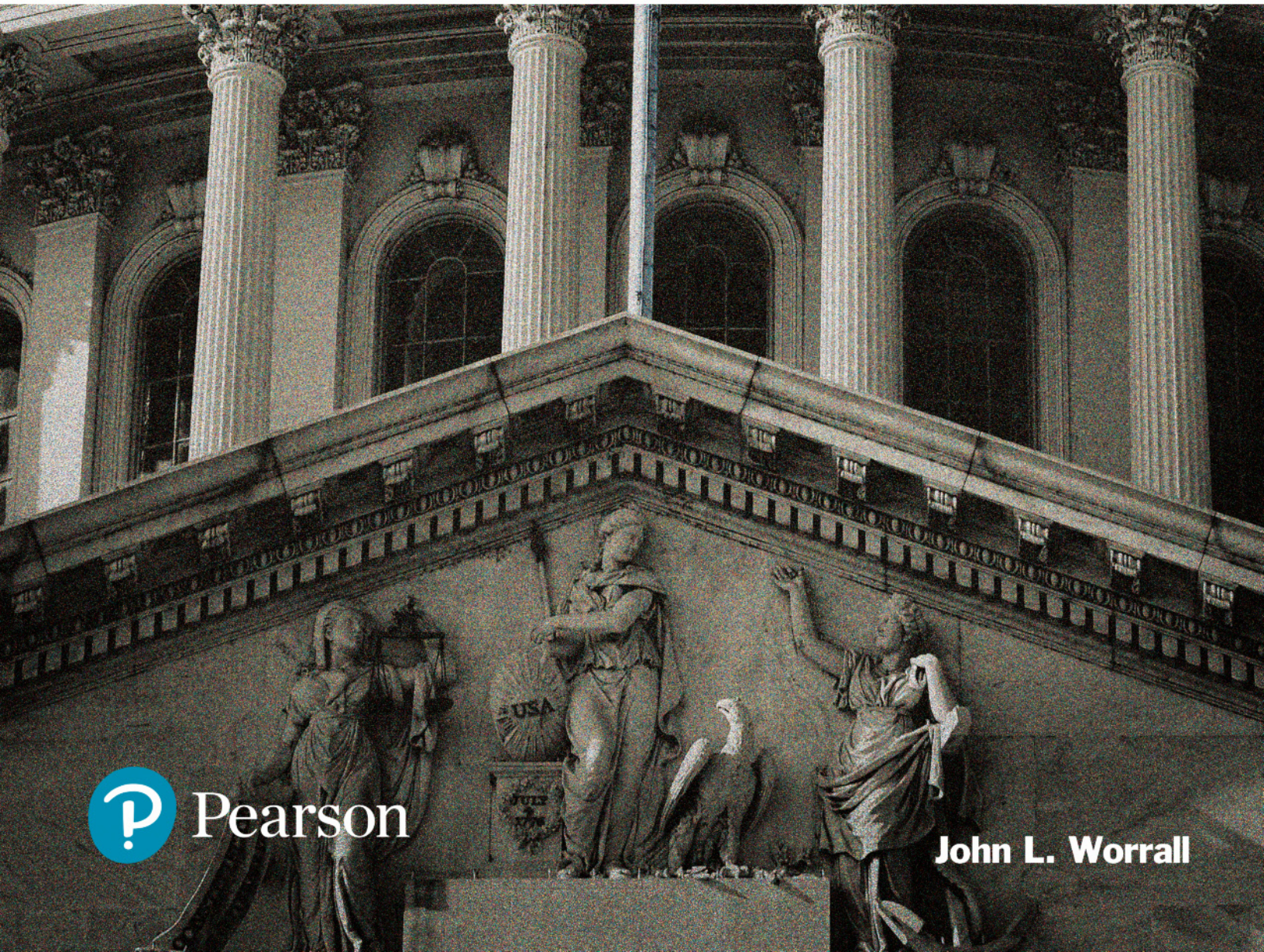




CRIMINAL PROCEDURE

Third Edition



Pearson

John L. Worrall

CRIMINAL PROCEDURE

third edition

John L. Worrall

University of Texas at Dallas



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For Dylan, Jordyn, and Sabrina

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Preface

Introducing the Justice Series

When
best-selling
authors

and instructional designers come together, focused on one goal—improve student performance across the criminal justice (CJ) curriculum—you come away with a groundbreaking new series of print and digital content: the Justice Series.

Several years ago, we embarked on a journey to create affordable texts that engage students without sacrificing academic rigor. We tested this new format with Fagin’s *CJ 2010* and Schmalleger’s *Criminology* and received overwhelming support from students and instructors.

The Justice Series expands this format and philosophy to more core CJ and criminology courses, providing affordable, engaging instructor and student resources across the curriculum. As you flip through the pages, you’ll notice this book doesn’t rely on distracting, overly used photos to add visual appeal. Every piece of art serves a purpose—to help students learn. Our authors and instructional designers worked tirelessly to build engaging info-graphics, flow charts, pull-out statistics, and other visuals that flow with the body of the text, provide context and engagement, and promote recall and understanding.

We organized our content around key learning objectives for each chapter and tied everything together in a new objective-driven end-of-chapter layout. Not only is the content engaging to the student, it’s easy to follow and focuses the student on the key learning objectives.

Although brief, affordable, and visually engaging, the Justice Series is no quick, cheap way to appeal to the lowest common denominator. It’s a series of texts and support tools that are instructionally sound and student approved.

Additional Highlights to the Author’s Approach

- A comprehensive introduction to criminal procedure takes students from the point where individuals first come into contact with the police all the way through to appeal.
- Half of the book is devoted to “traditional” criminal procedure topics, notably search and seizure as well as interrogation and identification procedures. The remainder of the book moves beyond these topics and discusses the pretrial process; the roles of defense attorneys, prosecutors, and grand juries; plea bargaining and guilty pleas; rights of criminal defendants at trial; and appeals and *habeas corpus*.
- Many leading Supreme Court decisions are discussed; however, lengthy excerpts from the actual decisions are

left out of the text in order to avoid distracting from the many important concepts introduced.

- For a “real-world” focus, the book incorporates several actual legal documents and excerpts from official policy manuals of police departments and other CJ agencies around the United States.
- The author avoids unnecessary legalese and takes special steps to thoroughly introduce basic legal concepts and issues, all the while adopting a conversational tone.
- “Think About It” exercises are intended to encourage classroom discussion and reflection. These exercises place readers in the position of a judge who must decide how the issue/scenario should be resolved. Some are based on actual court cases, but several are hypothetical.
- Chapter-opening vignettes and end-of-chapter case studies discuss current events in criminal procedure, including some of the most recent and controversial Supreme Court decisions and their effects on the CJ system.

New to This Edition

In addition to being updated with the latest U.S. Supreme Court decisions, the following chapter-by-chapter changes have been made:

Chapter 1: The chapter-opening story was revised to reflect the most recent changes in drone legislation and includes examples of current drone use in law enforcement. A new end-of-chapter case features the Supreme Court’s 2015 decision in *Grady v. North Carolina* (GPS monitoring of convicted sex offenders), a follow-up to the Court’s 2012 *United States v. Jones* decision regarding police-led GPS tracking of suspects’ vehicles.

Chapter 2: A new chapter-opening story features the Supreme Court’s decision in *Plumhoff v. Rickard*, a high-speed pursuit case in which the families of two slain motorists sued police on the theory they used excessive force. The chapter was also updated with the latest decisions involving remedies for constitutional rights violations.

Chapter 3: The chapter-opening story features the Supreme Court’s decision in *Florida v. Jardines*, a drug dog case. New key terms were added throughout the chapter, and the end-of-chapter story continues with another drug dog case, *Florida v. Harris*.

Chapter 4: Chapter learning outcomes were streamlined. A new end-of-chapter story features the Ninth Circuit’s decision in *United States v. Payton*, a case dealing with search warrants and computers.

Chapter 5: Sections on consent searches and arrests without warrants were reorganized for improved flow. The chapter-ending case features the Supreme Court's 2014 decision in *Heien v. North Carolina*, a case that dealt with a vehicle stop for a malfunctioning brake light that led to a cocaine seizure.

Chapter 6: The chapter-opening story features the latest developments in the *Floyd v. City of New York* stop-and-frisk case. The chapter has been updated with the latest Supreme Court decisions dealing with reasonable suspicion and stop-and-frisk, including the 2015 decision in *Rodriguez v. United States*, a case involving dog sniffs during traffic stops.

Chapter 7: A new opening story features the Supreme Court's 2015 decision in *Los Angeles v. Patel*, a case involving inspections of closely regulated business. At issue in the case was whether police officers could have access to hotel records, including information about their guests.

Chapter 8: A new opening story features recent research on the effects of TASER exposure on *Miranda* waivers. Is it possible that suspects who are "tased," arrested, and advised of their *Miranda* rights could confess more readily than those who are not "tased"? In other words, does TASER exposure lead to cognitive impairment?

The *Miranda* discussion in chapter 8 was also streamlined for this edition of *Criminal Procedure*.

Chapter 9: Content has been updated and learning outcomes have been realigned.

Chapter 10: A new chapter-opening story features the Supreme Court's 2013 decision in *Maryland v. King*, a case dealing with the constitutionality of police DNA swabs during the booking process.

Chapter 11: This chapter has been updated with the latest Supreme Court decisions involving prosecutors, grand juries, and defense attorneys. Concerning the latter, the end-of-chapter case features the Supreme Court's 2015 *per curiam* decision in *Maryland v. Kulbicki*, which dealt with the validity of a scientific technique for comparing bullet fragments.

Chapter 13: The chapter-opening story features the Supreme Court's 2015 decision in *Ohio v. Clark*, a case involving the confrontation clause as it applies to child abuse victims. In that case, a child abuse victim reported his injuries to his preschool teacher. His statements were used against the perpetrator at trial. The question was whether the out-of-court statements violated the Sixth Amendment's confrontation clause.

► **Instructor Supplements**

Instructor's Manual with Test Bank

Includes content outlines for classroom discussion, teaching suggestions, and answers to selected end-of-chapter questions from the text. This also contains a Word document version of the test bank.

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► About the Author



John L. Worrall is professor of criminology at the University of Texas at Dallas (UTD). A Seattle native, both his M.A. (criminal justice) and Ph.D. (political science) are from Washington State University, where he graduated in 1999. From 1999 to 2006, he was a member of the criminal justice faculty at California State University, San Bernardino. He joined UTD in

the fall of 2006. Dr. Worrall has published articles and book chapters on topics ranging from legal issues in policing to crime measurement. He is also the author or coauthor of numerous textbooks, including *Introduction to Criminal Justice* (with Larry J. Siegel, 15th ed., Cengage, 2016) and *Criminal Procedure: From First Contact to Appeal* (5th ed., Pearson, 2015); coeditor of *The Changing Role of the American Prosecutor* (SUNY, 2009); and editor of the journal *Police Quarterly*.

1

Introduction to Criminal Procedure

- 1** Summarize the constitutional basis for criminal procedure.
- 2** Explain the importance of precedent.
- 3** Distinguish between the public order (crime-control) and individual rights (due process) perspectives of criminal justice.
- 4** Outline the structure of the court system, including the responsibilities and jurisdictions of each level.
- 5** Discuss the steps to trace and understand court cases.
- 6** Summarize the criminal process.



Unmanned aerial vehicles (UAVs), more popularly known as drones, have been used by the military for years. They have also been used to assist with patrolling the U.S.–Mexico border. More recently, they have inched into domestic law enforcement use, such as for search-and-rescue operations or performing reconnaissance ahead of raids. Ordinary citizens can readily access drones, too, albeit cheaper and less-sophisticated versions of what government officials typically use.

Use of drones by law enforcement officials raises a number of legal questions. When and where can drones be used? By whom and for what precise purpose? Surveillance? Eavesdropping? Should they be allowed on private property? What if a drone is used to secure evidence for a criminal case? Should the courts admit such evidence? There are no easy answers to these questions. Critics feel that people’s privacy should be protected at all costs. Supporters point to how difficult a job the police must perform; drones may assist in crime prevention and crime control.

With rare exceptions, police do not have carte blanche to use drones as they see fit. First, the Federal Aviation Administration has enacted a number of rules restricting drone use, including for civilians.¹ States, too, can impose their own restrictions on drone use,² as can the cities in which drones are authorized. At one extreme, San Jose, California, permitted police to use drones in only two situations: assisting bomb squads in dealing with explosive devices and in live shooter or hostage situations.³ At another extreme (and as of this writing), North Dakota law allows police to equip drones with less-lethal weapons, including Tasers.⁴



Montgomery Martin/Alamy Stock Photo

High courts have yet to answer questions about the constitutionality of drone use, but that will likely change in the not-too-distant future. But even if legislatures and courts place strict limitations on drone use in domestic law enforcement, civilian use remains an issue. Citizens are not bound by the same constitutional restrictions the government is. That coupled with the increased accessibility to the technology (many drones are homemade) means it is not difficult to imagine a situation in which drones armed with high-definition cameras fly across neighborhoods engaging in all manner of surveillance.

DISCUSS What limits should be placed on law enforcement and civilian drone activities?

American **criminal procedure** consists of a vast set of rules and guidelines that describe how suspected and accused criminals are to be handled and processed by the justice system. Criminal procedure begins when the police first contact a person and ends well after his or her conviction. It continues on through charging, trial, and to the appellate stage. Along the way, the constitutional rights of the accused must be honored and preserved.

Two important themes run throughout criminal procedure. First, there is a concern with the constitutional rights of accused persons, as interpreted by the courts. People enjoy a number of important rights in the United States, but the bulk of criminal procedure consists of *constitutional procedure* or what the U.S. Constitution says—usually through the interpretation of the U.S. Supreme Court (i.e., the Court)—with regard to the treatment of criminal suspects.

Second, criminal procedure contains an important historical dimension, one that defers regularly to how sensitive legal issues have been approached in the past. The role of *precedent*, or past decisions by the courts, cannot be overemphasized. At the same time, though, the world continues to evolve, and it is

sometimes necessary to part ways with the past and decide on novel legal issues.

▶ **The Constitutional Basis for Criminal Procedure**

The Preamble to the U.S. Constitution states,

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Of particular relevance to criminal procedure are the terms *justice* and *liberty*. The Constitution helps ensure justice and liberty through both setting forth the various roles of government and protecting the rights of people within the nation’s borders. Throughout the years, the courts have devoted a great

amount of energy to interpreting the Constitution and to specifying what rights are important and when they apply.

The Constitution is not the only source of rights; there are others worthy of consideration. In addition, some rights are more important than others, at least as far as criminal procedure is concerned. Finally, the two-tiered system of government in the United States creates a unique relationship between the federal and state levels. Criminal procedure cannot be understood without attention to the interplay between federal and states' rights.

Sources of Rights

LEARNING
OUTCOMES
1

Summarize the constitutional basis for criminal procedure.

In addition to the Constitution, important sources of rights include court decisions, statutes, and state constitutions. Most of the court

decisions discussed in this section and throughout the text are U.S. Supreme Court decisions.

Whenever the Supreme Court interprets the Constitution, it effectively makes an announcement concerning people's rights. For example, the Fourth Amendment states that unreasonable searches and seizures are impermissible. The term *unreasonable* is not self-explanatory, so the Court has taken steps to define it. One definition of *unreasonable* appears in *Wilson v. Layne* (526 U.S. 603 [1999]), in which the Court held that it is unreasonable for the police to bring reporters along when serving a warrant unless the reporters are there to serve a legitimate law enforcement objective.

Although the Constitution and the court decisions stemming from it reign supreme in criminal procedure, statutes also play an important role. Obviously, the Constitution and the courts cannot be expected to protect all of the interests that people represent. Statutes attempt to compensate for that shortcoming by establishing that certain rights exist. An example is Title VII of the 1964 Civil Rights Act. Among other things, it prohibits discrimination in employment. Another statute of relevance in criminal procedure is 42 U.S.C. Section 1983. As discussed further in the next chapter, it allows private citizens to sue local law enforcement officials for violations of federally protected rights.

In addition, each state has its own constitution, which can be considered an important source of rights. The supremacy clause of Article VI to the U.S. Constitution makes *it* the supreme law of the land and binds all states and the federal government to it. However, nothing in the U.S. Constitution precludes individual states from adopting stricter interpretations of the federal provisions. In general, if a state constitution gives *less* protection than the federal Constitution, such a limitation is unconstitutional. But a stricter interpretation of the federal Constitution is perfectly reasonable. For example, the Supreme Court has interpreted the Fifth Amendment in such a way that it requires police to advise a suspect of his or her so-called *Miranda* rights when the suspect is subjected to custodial interrogation—an action that does not necessarily rise to the level of an arrest. A *state*, however, could require that *Miranda* rights be read whenever a person is arrested, regardless of whether he or she is interrogated.

Finally, although they are not a source of rights per se, the **Federal Rules of Criminal Procedure** are worth considering.⁵ Excerpts from the Federal Rules are reprinted throughout this book because they sometimes clarify important rulings handed down by the U.S. Supreme Court. Additionally, the Federal Rules set forth the criminal procedure guidelines by which federal criminal justice practitioners are required to abide.

Rights of Relevance in Criminal Procedure

Of the many rights specified in the U.S. Constitution, the rights stemming from five amendments are of special importance in criminal procedure. They are the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments (see Figure 1–1 for details). The first four of these are found in the Bill of Rights. The Bill of Rights consists of the first ten amendments. Beyond the Bill of Rights, the Fourteenth Amendment is of special relevance in criminal procedure. Sometimes the First Amendment, which protects assembly and speech, and the Second Amendment, which protects the right to bear arms, are relevant in criminal procedure, but only rarely.

- The **Fourth Amendment** is perhaps the most well-known source of rights in criminal procedure. In fact, it is considered so important that several books on criminal procedure devote the overwhelming majority of their chapters to it. Several rights can be distinguished by reading the text of the Fourth Amendment. It refers to the right of people to be free from unreasonable searches and seizures, and it provides that specific requirements are to guide the warrant process. That is, a warrant must be issued by a magistrate or judge, supported by probable cause, and sufficiently specific as to what is to be searched and/or seized. Because of the complexity of the Fourth Amendment, this book devotes an entire chapter to its interpretation (see Part 2).
- The second constitutional amendment of special relevance to criminal procedure is the **Fifth Amendment**. This book also examines the Fifth Amendment in detail, focusing in particular on the role of the grand jury, the statement that no person shall be “twice put in jeopardy of life or limb” (known as the *double-jeopardy* clause), the statement that no one can be compelled “to be a witness against himself” (also known as the *self-incrimination* clause), and—perhaps most important of all—the requirement that an individual cannot be deprived of life, liberty, or property without due process of law.
- The **Sixth Amendment** is also of great importance in criminal procedure. Of relevance to criminal procedure is the Sixth Amendment's language concerning speedy and public trials, impartial juries, confrontation, and compulsory process. The Sixth Amendment also suggests that in addition to being public, trials should be open, not closed, proceedings. The Supreme Court has interpreted the Sixth Amendment as providing the right of the accused to be present at his or her trial and to be able to put on a defense.

Fourth Amendment	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	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 offense 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	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 witnesses 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 shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
Fourteenth Amendment (relevant portions)	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.

FIGURE 1-1 Constitutional Amendments of Relevance in Criminal Procedure.
 Source: Preamble: The United States Constitution.

- The **Eighth Amendment** is relevant in criminal procedure but to a limited extent. The Eighth Amendment’s language on bail and the nature of cruel and unusual punishment are relevant in criminal procedure.
- The **Fourteenth Amendment** has an important home in criminal procedure. It is a fairly long amendment, however, and only a small portion is relevant to the handling and treatment of criminal suspects. The due process language of the Fourteenth Amendment mirrors that of the Fifth. Nonetheless, because the Fifth Amendment is part of the Bill of Rights, it is only binding on the federal government. The Fourteenth Amendment, by contrast, has been used by the Supreme Court to *incorporate*, or make applicable to the states, several of the rights provided for in the Bill of Rights. (The following subsection introduces the so-called incorporation controversy.) The Fourteenth Amendment’s due process clause has been interpreted to consist of two types of due process: (1) **substantive due process** and (2) **procedural due process**. The essence of substantive due process is protection from arbitrary and unreasonable action on the part of state officials.

By contrast, a procedural due process violation is one in which a violation of a significant life, liberty, or property interest occurs (e.g., *Geddes v. Northwest Missouri State College*, 49 F.3d 426 [8th Cir. 1995]). Procedural due process is akin to procedural fairness.

Incorporation

The Bill of Rights, consisting of the first ten amendments to the U.S. Constitution, places limitations on the powers of the federal government. It does *not* limit the power of the states, however. In other words, the first ten amendments place no limitations on state and local governments and their agencies. Government power at the state and local levels is clearly limited by state constitutions.

Even though the Bill of Rights does not limit state and local governments, the Supreme Court has found a way to do so through the Fourteenth Amendment. In particular, the Court has used the Fourteenth Amendment’s due process clause, which holds that no state shall “deprive any person of life, liberty, or property, without due process of law,” to make certain

Think About It...

The First Amendment and Criminal Procedure The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Given what you have read so far, is the First Amendment relevant to criminal procedure?



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protections specified in the Bill of Rights applicable to the states. This is known as **incorporation**.

The extent to which the Fourteenth Amendment should regulate state and local government power has been the subject

of some disagreement—hence, the incorporation controversy. The basic question posed over the years has been “To what degree should the Fourteenth Amendment’s due process clause incorporate the various provisions of the Bill of Rights so as to restrict state and local law enforcement in the same way federal law enforcement is restricted by the Bill of Rights?” In response to this question, there are several leading views on incorporation. They are depicted in Figure 1–2.

The incorporation debate is significant because of three concerns. First, because most contact between citizens and the police occurs at the state and local levels, it is critical to determine the role of the federal Constitution at the state level. Comparatively few people have contact with federal law enforcement, so the Bill of Rights actually regulates a limited number of police/citizen contacts. Second, incorporation, according to some, threatens *federalism*. Under the doctrine of federalism, states have the authority to develop their own rules and laws of criminal procedure, but if the Fourteenth Amendment incorporates the Bill of Rights, this authority can be compromised. Third, the incorporation debate raises important concerns about the separation of powers. Namely, the Supreme Court has decided which rights should be incorporated—a decision that may better be reserved for Congress.

Where does incorporation stand today? The Supreme Court has consistently held that some protections listed in the Bill of Rights are more applicable to the states than others. The Fourth

Total Incorporation

The *total incorporation* perspective holds that the Fourteenth Amendment’s due process clause incorporates the entire Bill of Rights. In other words, all protections specified in the Bill of Rights should be binding on the states. The primary proponent of this view was Supreme Court Justice Hugo Black (e.g., *Adamson v. California*, 332 U.S. 46 [1947]; *Rochin v. California*, 342 U.S. 165 [1952]).

Selective Incorporation

The second leading view on incorporation is that of *selective incorporation*, or the *fundamental rights* perspective. It favors incorporation of certain protections enumerated in the Bill of Rights, not all of them. Further, this perspective deems certain rights as being more critical, or fundamental, than others. The Supreme Court’s decision in *Snyder v. Massachusetts* (291 U.S. 97 [1934]) advocates this perspective, arguing that the due process clause prohibits state encroachment on those “principle[s] of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental.”

Total Incorporation Plus

The third view on incorporation can be termed *total incorporation plus*. This view holds that the Fourteenth Amendment’s due process clause incorporates the whole Bill of Rights as well as additional rights *not* specified in the Constitution, such as the “right to privacy.” This view can be found in such Supreme Court cases as *Adamson v. California* and *Poe v. Ullman* (367 U.S. 497 [1961]).

Finally, some people believe that the topic of incorporation deserves case-by-case consideration. That is, no rights should be incorporated across the board. Rather, the facts and circumstances of each individual case should be weighed in order to determine if any protections listed in the Bill of Rights should apply at the state or local level.

FIGURE 1–2 Leading Views on Incorporation.

Right

First Amendment freedom of religion, speech, and assembly and the right to petition for redress of grievances

Fourth Amendment prohibition of unreasonable searches and seizures

Fifth Amendment protection against compelled self-incrimination

Fifth Amendment protection from double jeopardy

Sixth Amendment right to counsel

Sixth Amendment right to a speedy trial

Sixth Amendment right to a public trial

Sixth Amendment right to confrontation

Sixth Amendment right to an impartial jury

Sixth Amendment right to compulsory process

Eighth Amendment prohibition of cruel and unusual punishment

Deciding Case

Fiske v. Kansas, 274 U.S. 380 (1927)

Wolf v. Colorado, 338 U.S. 25 (1949)

Malloy v. Hogan, 378 U.S. 1 (1964)

Benton v. Maryland, 395 U.S. 784 (1969)

Gideon v. Wainwright, 372 U.S. 335 (1963)

Klopfert v. North Carolina, 386 U.S. 213 (1967)

In re Oliver, 333 U.S. 257 (1948)

Pointer v. Texas, 380 U.S. 400 (1965)

Duncan v. Louisiana, 391 U.S. 145 (1968)

Washington v. Texas, 388 U.S. 14 (1967)

Robinson v. California, 370 U.S. 660 (1962)

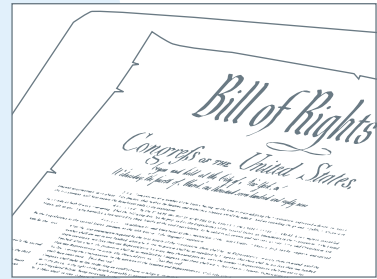


FIGURE 1-3 Rights Incorporated to the States.

Amendment, in its view, lists several *fundamental rights*. By contrast, the Fifth Amendment's grand jury clause has not been deemed fundamental and is not binding on the states (*Hurtado v. California*, 110 U.S. 516 [1884]).

Figure 1-3 lists the rights that have been deemed fundamental by the Supreme Court and, as a result, incorporated to the states.⁶ The Supreme Court cases responsible for these incorporation decisions are listed as well.

Although not all of the Bill of Rights is binding on the states, it bears mentioning that the Supreme Court has repeatedly emphasized that Americans have a fundamental right to privacy, even though the Constitution makes no mention of privacy. It is commonly said that people do not enjoy an *expectation of privacy* in public places. It would seem, then, that certain rights not listed in the Constitution have also been identified as well as incorporated.

► Precedent and Its Importance

To many students of criminal procedure, legal research is a less-than-desirable pursuit. Even so, it is essential in everyday practice because of the importance of precedent. A **precedent** is a rule of case law (i.e., a decision by a court) that is binding on all lower courts and the court that issued it. A past decision may not be available in each case, but when one is, the courts will defer to it. This is the doctrine of *stare decisis*.

Stare Decisis

Stare decisis is a Latin term that means to abide by or to adhere to decided cases. Most courts adhere to the principle of *stare decisis*. That is, when a court has handed down a decision on a specific set of facts or legal questions, future court decisions that involve similar facts or questions will defer to the previous decision. In short, *stare decisis* is simply the practice of adhering to a previous decision or precedent.

Why does *stare decisis* occupy such an important position in the U.S. court system? The answer is that it promotes consistency. It is well known that accused criminals enjoy the right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 [1963]), but what if from one year to the next the Supreme Court vacillated on whether this right were constitutionally guaranteed? The criminal process, not to mention the rights of the accused, would be unpredictable and vary from one point to the next.

It is important to note that the practice of deferring to precedent is not always possible or desirable. First, *stare decisis* is usually only practiced by courts in a single jurisdiction. Suppose, for example, that a federal circuit appeals court handed down a decision. All the district courts within that circuit would then abide by the appeals court decision. Courts outside that circuit would *not* be bound to adhere to the decision (although some courts often do as a matter of professional courtesy). Perhaps more important, if a case coming before a court is unique and does not resemble one decided in the past, the court may *distinguish* it.

Distinguishing Cases

LEARNING
OUTCOMES
2

Explain the
importance of
precedent.

When a previous decision does not apply to the current facts, a court will **distinguish** the case, saying, in effect, that this case is different and cannot be decided by looking to past rulings. Another way of understanding what it means to distinguish a case is to think of the present set of facts as unique and never before considered by an appellate court.

Because only a handful of cases make it to the appellate level, and even fewer still arrive at the Supreme Court, there are an untold number of cases waiting to be distinguished. This is a critical point. The case law in place currently addresses only a minute quantity of possible constitutional questions. Countless contacts occur between the police and citizens, and several of them may give rise to important constitutional questions. Yet they may never see the inside of a courtroom. So, although this book may appear heavy on case law, a thorough understanding of criminal procedure would require a review of the nearly infinite possible factual circumstances that could arise in the criminal process.

An example of a case that was distinguished is *Terry v. Ohio* (392 U.S. 1 [1968]). In that case, the Supreme Court held that police officers can stop and frisk suspects with reasonable suspicion, not probable cause (the latter standard appearing in the text of the Fourth Amendment). The Court felt that a stop-and-frisk is different from a search or a seizure and, as such, should be governed by a different set of standards. Had the Supreme Court *not* decided *Terry*, or any case like it, stop-and-frisk encounters would probably still be considered seizures and therefore subject to the Fourth Amendment's requirement for probable cause. *Terry* will be considered in more detail later, as will many other distinguished cases.

In nearly every class on criminal procedure, students ask, "What if . . . ?" The "what if" question reflects a concern over possible factual circumstances not already addressed in published court decisions. In order for a "what if" question to be answered, a court decision must result, otherwise the best approach to answering such a question is to look to the past and find a decision that closely resembles the hypothetical scenario posed by the question. In this vein, every case discussed throughout this text should be thought of as a distinguished case. Every decision was based on a different set of factual circumstances and was deemed by the reviewing court as worthy of being distinguished. Were it not for distinguished cases, criminal procedure case law could be adequately covered in a matter of minutes, even seconds.

Theory Versus Reality

Criminal procedure consists mostly of rules and guidelines that have been handed down by the courts to dictate how the criminal process should play out. In some circumstances, however, court decisions may not have a great deal of influence. That is, some court decisions are made in the theoretical world, which is somewhat disconnected from the day-to-day operations of

law enforcement within the real world. Understandably, there can be differences, even tensions, between the worlds of theory and reality.

Americans are taught that the courts—and the Supreme Court, in particular—are charged with interpreting the Constitution and the laws of the United States. They are further taught that law enforcement should accept such interpretations uncritically and without much reflection. Although these understandings are mostly true, theory and reality can still differ. Some Supreme Court decisions have little influence in the real world, and in some cases may even be flatly ignored. There are four reasons for this:

- First, the Supreme Court sometimes makes decisions on excruciatingly detailed matters that have almost no applicability to most law enforcement officers, most of the time. A good example is the Supreme Court's decision in *Atwater v. City of Lago Vista* (533 U.S. 924 [2001]). The Court decided that the Fourth Amendment does not prohibit the police from arresting people for seatbelt violations. To the parties involved in the actual case, this decision may have been significant. But in most jurisdictions, how many police officers are going to arrest people for seatbelt violations? The case probably has little relevance to most police officers because they usually have more important matters to address.
- Second, the Supreme Court frequently hands down decisions that would seem to have dramatic effects on the nature of law enforcement, but actually involve issues that are already being addressed by many police agencies. For example, the Supreme Court's decision in *Tennessee v. Garner* (471 U.S. 1 [1985]) made it a violation of the Fourth Amendment for the police to use deadly force to apprehend an unarmed and nondangerous fleeing felon. However, prior to *Garner*, many police agencies had already adopted restrictive deadly force policies—policies that, in many instances, were more restrictive than the ruling handed down in *Garner*. Police agency policy, therefore, can differ from, and even be more restrictive than, decisions reached by the Supreme Court.
- The third reason for the gap between theory and reality is that the courts sometimes hand down decisions that can be effectively circumvented or ignored by the police. Clearly, it is not in the best interest of law enforcement to ignore the courts, and probably quite rare that the police do so, but it does occur. For example, in *Kyllo v. United States* (533 U.S. 27 [2001]), the Supreme Court held that a search occurs when the police scan a private residence with an infrared thermal imager without first obtaining a warrant. The consequence of conducting such a scan without a warrant is that any evidence subsequently obtained will not be admissible in court. However, in reality, what is to prevent the police from scanning someone's house if there is no intent to obtain evidence?
- Finally, what the courts say and the police do can differ simply as a consequence of some aspects of the U.S. legal system. It is well known, for example, that a police officer cannot stop a motorist without some level of justification.

On how many occasions, though, are motorists stopped without justification? That is, how many people are pulled over every day simply because a police officer is suspicious of them? This cannot be established for certain, but it does happen. It *can* happen because the legal system cannot do much to prevent it. Someone who is wrongfully stopped can file a complaint, but research shows that many such complaints are resolved in favor of the police. A lawsuit can be filed, but such suits are rarely successful. And if nothing is discovered that leads to arresting the motorist, then it is doubtful that the illegal stop will draw attention in court.

► **Competing Concerns in Criminal Procedure**

Criminal procedure is an exciting topic because of the inherent tension it creates between two competing sets of priorities. On the one hand, there is a serious interest in the United States in controlling crime, with some Americans advocating doing whatever it takes to keep criminals off the streets. On the other hand, because of their country's democratic system of government, Americans value people's rights and become angry when those rights are compromised or threatened. These two competing sets of values have been described by Herbert Packer as the *crime-control* and *due process* perspectives.⁷

The values each opposing perspective subscribes to are probably familiar to many readers because the due process/crime-control debate invariably pops up all throughout criminal justice. Almost without exception, whenever there is disagreement as to how best to approach the crime problem—be it through court decisions or legislative measures—the due process/crime-control distinction rears its head. A delicate balance has to be achieved between the two perspectives.

The due process perspective closely resembles a liberal political orientation. Liberals often favor protection of people's rights and liberties to a higher degree than their conservative counterparts. By contrast, the crime-control perspective is the one most frequently subscribed to by conservative law-and-order types.

Of course, in reality, there can be a great deal of overlap between the two orientations. Liberals occasionally favor conservative crime-control policies, and conservatives can be concerned with protecting the rights of American citizens. That is to say, although the two groups frequently stand in stark contrast to each other, they do sometimes meet in the middle. Regardless, the values espoused by each group—be it an interest in crime control, an interest in civil rights, or an interest in both—are here to stay. Given that, it is useful to consider each perspective in more detail, focusing special attention on the implications for criminal procedure.

Due Process

Packer's **due process perspective** is, first and foremost, concerned with people's rights and liberties. It also gives significant weight to human freedom. Due process advocates believe

that the government's primary job is not to control crime but rather to maximize human freedom, which includes protecting citizens from undue government influence. Proponents of due process favor minimizing the potential for mistakes, as explained by Packer:

People are notoriously poor observers of disturbing events. . . . [C]onfessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not).⁸

Due process advocates also believe that each suspect is innocent until proven guilty, just as Americans are taught. In addition, they place greater emphasis on *legal guilt* (whether a person is guilty according to the law) rather than *factual guilt* (whether a person actually committed the crime with which he or she is charged).

Underlying the due process/crime-control perspectives are four ideals: (1) The criminal process looks, or should look, something like an obstacle course; (2) quality is better than quantity; (3) formality is preferred over informality; and (4) a great deal of faith is put in the courts.

The Obstacle Course

The "obstacle course" idea is rooted in a metaphor, of course. A criminal process that resembles an obstacle course is one that is complex and needs to be navigated by skilled legal professionals. Further, it is one that is somewhat difficult to operate in a predictable fashion. It is not a process that prides itself on speed and efficiency—values of great importance in the crime-control perspective. In fact, the opposite could be said. The obstacle-course metaphor also stresses that each case must pass through several complicated twists and turns before a verdict can be rendered.

Quality over Quantity

Another way to distinguish between due process and crime control is in terms of quantity and quality. The due process view favors quality—that is, reaching a fair and accurate decision at every stage of the criminal process. It stresses that each case should be handled on an individual basis and that special attention should be paid to the facts and circumstances surrounding the event. In addition, the concern with quality is one that minimizes the potential for error. For example, due process advocates are in favor of allowing several death penalty appeals because the possibility of executing the wrong person should be avoided at all costs.

Insistence on Formality

Due process advocates do not favor informal processes. Because of the potential for human error and bias, they favor a full-blown adversarial criminal process. They also believe that early intervention by judges and other presumptively objective parties (besides, say, the police) is in the best interest of people accused of breaking the law.

Think About It...

Due Process or Crime Control The Supreme Court's decision in *Miranda v. Arizona* (discussed later in Chapter 8, "Interrogation and Confessions") requires that police advise suspects of their Fifth Amendment right to be free from compelled self-incrimination. Is the Court's decision in this case due process oriented or crime-control oriented? Why?



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Faith in the Courts

Another value inherent in the due process perspective is intense faith in the courts as opposed to law enforcement. Due process advocates correctly point out that the job of a judge is to interpret the U.S. Constitution. This, they argue, helps provide protection to people charged with crimes. Faith in the courts also corresponds with the previously mentioned insistence on formality. When guilt or innocence is determined in court, an air of fairness and objectivity must be maintained.

Crime Control

LEARNING OUTCOMES
3 Distinguish between the public order (crime-control) and individual rights (due process) perspectives of criminal justice.

In contrast to the due process perspective, the **crime-control perspective** emphasizes the importance of controlling crime, perhaps to the detriment of civil liberties. From a cost/benefit perspective,

crime-control advocates believe that the benefit of controlling crime to society at large outweighs the cost of infringing on some individuals' due process protections. Another way to distinguish between the due process and crime-control perspectives is to consider the distinction between *means* and *ends*: Crime control is more concerned with the *ends*—with wiping out crime, or at a minimum, with mitigating its harmful effects. By contrast, due process is concerned with the *means*—with the methods by which people are treated by criminal justice officials. The result—either crime or the absence of it—is not of great concern to due process advocates.

The Assembly Line

The metaphor of an "assembly line" suggests that the criminal process should be automatic, predictable, and uniform. In other words, every criminal should be treated the same, with minimal variations in terms of charges and sentences. The assembly-line metaphor further suggests that the criminal process should be quick and efficient. The goal of the crime-control perspective is to move criminals through the justice process as swiftly as possible. A full-blown adversarial criminal process, replete with

hearings and other pauses in the interest of the accused, is anathema to the crime-control view.

Quantity over Quality

As just mentioned, the due process model stresses quality over quantity. The crime-control model, by contrast, favors quantity over quality, a view that is consistent with the assembly-line metaphor. The goal is to move as many offenders as possible through the criminal justice system with as little delay as possible. If mistakes are made along the way and someone is wrongfully charged or convicted, so be it. That is, the *overall* goal of ensuring that as many criminals are dealt with as possible is superior to protecting any individual's constitutional rights.

Insistence on Informality

Whereas the due process perspective favors the formality of the criminal process, with particular emphasis on the courts, the crime-control perspective favors informality. The courts are to be avoided; instead, justice should be meted out beyond the walls of a courtroom. Plea bargaining, for instance, is favored because of its swift, behind-the-scenes nature (not to mention that it eliminates the need to go to trial). An insistence on informality suggests further that the law enforcement establishment should be more involved in making determinations of guilt, not the courts.

Faith in the Police

Finally, whereas the due process perspective places a great deal of faith in the courts, the crime-control perspective puts a high degree of trust in the police. All Americans are taught that each suspect is innocent until proven guilty in a court of law. Clearly, the courts are charged with making this determination. However, crime-control advocates favor so-called street justice, giving the police vast discretion in deciding how to deal with people suspected of being involved in criminal activity. A fitting quote describing the crime-control perspective is, therefore, "All criminals are guilty until proven innocent." In other words, all suspects should be considered guilty; if the courts determine otherwise, then so be it.