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Criminal Procedure

Constitution and Society

Marvin Zalman
Wayne State University

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CHAPTER 1

The Meaning of Criminal Procedure

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues.

—Justice Stanley Matthews, *Hurtado v. California,* 110 U.S. 516, 530–31 (1884)

CHAPTER OUTLINE

KEY TERMS

adequate and independent state grounds
affirm
brief
Burger Court
case law
certiorari, writ of
checks and balances
common law
constitutionalism
court of general jurisdiction
court of limited jurisdiction
Crime Control Model
dictum
due process approach
Due Process Model
ex post facto law
federalism
fundamental rights test
habeas corpus, writ of
hierarchy of constitutional rights
holding
human rights
incorporation doctrine
incorporation plus
judicial craftsmanship
judicial restraint
judicial review
jurisdiction
law
legal reasoning
liberty
opinion
order
overrule
police state
precedent
private law
procedural law
public law
Rehnquist Court
remand
remedial law
reverse
rule application
rule making
Rule of Law
selective incorporation
"shocks the conscience" test
stare decisis
substantive law
Supremacy Clause
total incorporation
Warren Court

ORDER AND LIBERTY

Criminal Procedure and the Constitution

A group smashes in the door of a home at 4:00 A.M. They brandish automatic weapons, scream at residents, subdue them with threats and restraints, trash the house, and leave with some household goods and a resident in tow. This could be a violent gang home invasion and kidnapping. Or it could be a lawful search and seizure and arrest by police. The physical action is similar but the motivation is vastly different. What separates the illegality of the gang break-in from lawful police action is not just the motives of the two groups but the methods by which state officers act. Any job-related action by a government officer, whether an FBI agent or local police officer, whether a prosecutor or judge, whether a code enforcement officer or public school teacher, which forces a person to stop or invades an area of personal privacy, whether a backpack, car, or house, involves the Constitution. More specifically, it involves constitutional rules designed by the Framers to limit what state officers can do to individuals in the name of public safety. If the intrusions of state officers are not justified and authorized by law, their actions are illegal, and they undermine the constitutional foundations of American government.

The Constitution was written in 1787, ratified in 1788, and established the second government for the United States of America that went into effect in 1789. Two years later, ten amendments were added to the Constitution, known collectively as the Bill of Rights (some limit the Bill of Rights to the first eight amendments). Central to the study of criminal procedure are the Fourth, Fifth, Sixth, and Eighth Amendments, and the Fourteenth Amendment, ratified shortly after the Civil War in 1868. Equally important are decisions of the U.S. Supreme Court interpreting the constitutional text. For the most part, the study of constitutional criminal procedure is the study of the Supreme Court's **opinions** that interpret the Constitution.

The Preamble to the Constitution lists, in the broadest generalities, the functions of a constitution and a government. The first five apply to any government. The last announces the ideology on which American government is founded. The first function is to establish a government of the United States—in this case one that was "more perfect" than the government under the Articles of Confederation (1781–1789), and the specifics of which are included in the body of the Constitution. It is a "union" or a federation of states, but also a separate government in its own right. The second and third functions—to "establish Justice" and "ensure domestic Tranquility"—are central purposes of the criminal justice system, although justice and tranquility are also achieved by civil courts, and by civil as well a punitive laws. The fourth function, providing national defense, is vital to any nation, and the fifth, "promoting the general Welfare," is a shorthand phrase for the array of ever-changing issues about which a government must legislate and deal with. The last purpose of the Constitution makes it clear that the central purpose of American government is the liberty of its citizens.

Order, Liberty, and the Two Models of Criminal Justice

In paleolithic and ancient societies group solidarity was unquestioned and modern notions of individualism were unknown. Group norms were often imposed in brutal ways, softened a bit by the development of ethically oriented religions and philosophies around the world during the "axial age" in about the first millennium B.C.E.[1] Liberty was not highly prized, except among a small group of nobles. Another great shift in human history, the emergence of the political concept of self-rule, began in the seventeenth century and is still under way today. Going by various labels—including democracy, republicanism, liberalism, and constitutionalism—the American variant "stood for the primacy of the individual."[2] Modern government and political theory includes the "loyal opposition," the idea that dissent can be valuable, and an understanding that unlimited state power, even when exercised for beneficent ends, is extremely dangerous to individual freedom. Individual liberty has unleashed enormous intellectual, spiritual, and productive powers, although not without costs.[3] The United States was the first state founded explicitly on Enlightenment-era ideals of individual liberty and balanced government. This background is relevant to criminal procedure, the branch of American constitutional law concerned with the state's power to maintain an orderly society and the rights of citizens and residents to live in freedom from undue government interference with their liberty. Unlike in earlier periods, American government under the Constitution must "secure the Blessings of Liberty" while simultaneously "insur[ing] domestic Tranquility."

The primary purpose of criminal procedure is therefore to maintain the proper *balance* between **order** and **liberty,** which are continuously in tension. Social order is maintained by the criminal justice apparatus—police, prosecution, courts, and corrections—employing two million people and authorized to use awesome powers against individuals and organizations. These include the power to arrest and detain people; to break into homes and offices; to search purses, backpacks, and computer files; to use electronic means to listen in on conversations and obtain electronic communications; and to put people through a bewildering and expensive court process. If the process results in a conviction, the state is authorized to execute, imprison, or fine the defendant, and to control the lives of offenders placed on probation and parole in ways not consistent with individual liberty.

A system of such enormous power is necessary to deal with high levels of crime.[4] Violent crime takes the lives and destroys the safety of tens of thousands of people annually, while property and white-collar crimes deprive millions more of their wealth and sense of security. Without effective crime control, the lives of many more would be at risk, undermining the normal functioning of society. A society without order does not enjoy liberty—it endures license. The obverse of license is the repressive "order" of dictatorships or authoritarian governments. While nothing like the brutal control over individuals that marked Saddam Hussein's Baathist dictatorship in Iraq, or the stifling repression of dissenters in contemporary China is close to American criminal justice, unfortunately, abuses do occur.[5] Every society, including advanced democracies, must continuously curb the dangers of corruption, abuse of power, and excessive use of force that inevitably arise when criminal justice powers are placed in the hands of human beings.

A classic exposition of the order–liberty continuum in the context of constitutional criminal procedure is Herbert Packer's "two models of the criminal process"[6] Rather than using the political theory terms of liberty and order, Packer examined the competing values in our constitutional order through models. A model, like a map, is an *abstraction* of reality that allows us to better understand the practices and rules of criminal procedure. Packer calls these the **Due Process Model** and the **Crime Control Model.** Both models reflect *necessary* and desired constitutional values in our society, and so co-exist in continuous tension.

These models tend to reflect the ideological predilections held by Supreme Court justices along with most people in society. Packer starts by noting that both conservatives and liberals share common values about the justice system. Shared values include the **Rule of Law:** conservatives and liberals agree that a person can only be arrested and prosecuted for violating a law that is "on the books." No one wants police to be able to stop people at will. Included under the Rule of Law is the constitutional prohibition against **ex post facto laws;** neither the states nor the federal government may criminalize people for behavior that was legal when committed (U.S. Const. art. I.§, § 9 ¶ 3, and § 10 ¶ 1). Such powers are dictatorial, and dangerous to liberty. Another shared belief is the idea and reality that police and prosecutors have a *duty to enforce* the criminal law and cannot ignore violations of law. Liberals want effective law enforcement as much as conservatives. A third shared understanding, "is the assumption that there are *limits to the powers of government* to investigate and apprehend persons suspected of committing crimes." Conservatives do not want the government's justice system "running amok" any more than liberals. Finally, there is a shared belief "that the alleged criminal is not merely an object to be acted upon, but an independent entity" who deserves his or her day in court and may demand a *trial* and other *procedural safeguards*. This last assumption of the adversary system is central to the Due Process Model and is de-emphasized but not entirely eliminated by the Crime Control Model. Within these broad areas of agreement, liberal adherents to the Due Process Model and conservative supporters of the Crime Control Model tend to see the world of criminal justice differently.

The Crime Control Model emphasizes that "the *repression of criminal conduct* is by far the most important function to be performed by the criminal process" because public safety is essential to personal freedom. To be effective, the criminal justice system must *efficiently* process those who have been lawfully apprehended. There is a premium on speed and finality. Speed "depends on informality and uniformity" (for example, plea bargaining); "*finality* depends on minimizing the occasional challenge" (for example, limiting the right to appeal). The administrative and routine functioning of criminal justice is stressed, almost viewing the system as a *conveyor belt*. Supporters of the Crime Control Model hold a presumption of guilt—an assumption that police and prosecutors are *accurate* in arresting and prosecuting suspects. Because they are confident that the investigative process identifies the right suspects, the pretrial stages, trials, and appeals can be relatively perfunctory; any restrictions on the police investigative stages are to be resisted.

"If the Crime Control Model resembles an assembly line," Packer says, "the Due Process Model looks very much like an obstacle course." Supporters of this model do not assume that police fact-finding is accurate; they assume that the criminal justice system is prone to error. They therefore insist "on *formal, adjudicative, adversary* fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him." Even after a full trial, the fear of an erroneous conviction generates a desire for many avenues of appeal. "The demand for finality is thus very low in the Due Process Model," Packer says. This model demands the "prevention and *elimination of mistakes* to the extent possible; the Crime Control Model accepts the probability of mistakes up to the level at which they interfere with the goal of repressing crime." For the Due Process Model, the "aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty." The Due Process Model is highly suspicious of those who wield power and is ideologically driven by the "primacy of the individual and the complementary concept of limitation on official power."

The Due Process Model emphasizes *legal guilt*, whereas the Crime Control Model stresses *factual guilt*. The legal guilt concept pervades the formal legal and trial process—no matter how "factually" guilty a person is, conviction and punishment are not allowed unless all legal requirements are met: a court with **jurisdiction;** a prosecution within the time set by the statute of limitations; and an offender who is lawfully responsible (for example, not insane). The "quixotic" *presumption of innocence* plays a special role. The presumption of innocence is *not* the opposite of the presumption of guilt, but is a *normative* principle that insists that the defendant be treated *as if* he or she were innocent, no matter how apparent the factual guilt. To this end, the prosecutor must prove a case beyond a reasonable doubt, and the jury verdict must be unanimous. The *equality of treatment* of all suspects is an important Due Process Model attribute. Finally, it includes the strong belief that serious procedural errors invalidate convictions. This last point is the one over which many of the most bitter disputes in constitutional criminal procedure have arisen.

The Dangers of Injustice

Every case reaching the Supreme Court involves not only issues of law and state power but also questions of justice and injustice. This does not mean that every defendant has a good case; it is unwise to romanticize defendants. As Justice Felix Frankfurter said, "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[7] Nevertheless, several famous defendants, such as the Scottsboro boys, Earl Clarence Gideon, and Dr. Sam Sheppard, were innocent of the crimes for which they were convicted.[8] It is important to keep in mind that rights are fundamental and must be available to everyone, not just reserved for "actually innocent" defendants, since they cannot always be detected in advance.

Every chapter in this book details abuses of power and errors in the justice system. Many of the "Law in Society" sections focus on the negative—on negligence, abuses, and even crimes committed by criminal justice officials. It goes without saying that most police officers, prosecutors, defense attorneys, and judges act competently and professionally and often perform their work courageously and selflessly. Nevertheless, the burden of constitutional criminal procedure is to unflinchingly confront the negligent and malignant aspects of criminal justice.

Because the text focuses on police practices, it uncovers numerous police-generated abuses that undermine defendants' constitutional rights. Police perjury, for example, can cloak widespread Fourth Amendment violations. Police end-run games around *Miranda* rules can, in effect, overrule the Supreme Court's decisions. Overzealous police officers can unintentionally push defendants into giving false confessions. Errors or falsehoods in search warrant affidavits undermine personal privacy and security. Sloppy police work exacerbates problems of mistaken eyewitness identification, leading to the conviction of innocent people. The "blue wall of silence" makes it more difficult to ensure professionalism and lawful behavior in criminal justice practice.

Other actors must behave properly to ensure that the criminal justice system lives up to its constitutional ideals. Prosecutorial misconduct occurs with regularity and can negate the very rationale of the adversary system. The same effect is produced by inadequate, poorly prepared, and overworked defense lawyers. The history of American justice is replete with trials that were mockeries, with judges unable or unwilling to conduct the proceedings in a manner that guarantees fairness.[9] Judges must remain vigilant to ensure evenhanded trials.

A lesson of the long struggle to ensure the Rule of Law and a civilized justice system is the need to treat suspects and defendants fairly. An unfair or incompetent system leads to the conviction of the innocent. The conviction of "actually innocent" people has been a concern of the common law since the middle ages, as reflected in the maxim, "Better ten guilty go free than one innocent convicted." The maxim is supported by the high level of evidence needed to convict: proof beyond a reasonable doubt. The large number of wrongful convictions revealed since DNA testing became feasible in the early 1990s makes clear the inadequacies of criminal procedure law to prevent injustice.

The Innocence Project has confirmed 243 DNA exonerations as of October 2009.[10] An independent study counted 340 DNA and non-DNA exonerations between 1988 and 2003, and it is plausible that *thousands* are wrongly convicted each year.[11] The causes for wrongful convictions include mistaken eyewitness identification and poor lineup procedures, police "tunnel vision" on the first suspect, interrogation methods that elicit false confessions, pressure for convictions in high-profile cases, jailhouse snitches who lie to get favorable treatment, overzealous prosecutors, incompetent or dishonest forensic investigators, "junk science" (e.g., hair evidence), incompetent defense lawyers, and legal and constitutional rules that act as roadblocks to the truth.[12]

The world of criminal justice is just beginning to grapple with the complex of problems that produces wrongful convictions. Late in 2004 Congress passed the Innocence Protection Act, which increased compensation for wrongly convicted federal prisoners and provided funds for post-conviction DNA testing.[13] Although growing concerns about wrongful conviction involve the entire criminal justice system, they include some special concerns of criminal procedure. This text pays special attention to wrongful conviction in the chapters on the right to counsel (Chapter 6), interrogations and confessions (Chapter 7), identification and lineups (Chapter 8), the pretrial process (Chapter 10), and the trial process (Chapter 11).

Criminal Justice and Alternate Justice Systems

Criminal procedure law is one way to control the formal, adult, felony criminal justice "system." Other justice systems co-exist with the criminal justice system to maintain, ideally, a healthy and functioning civilization, which is the ultimate goal of criminal justice.

THE SOCIAL SYSTEM All formal or quasi-formal justice systems are parts of our larger, complex, modern society, with its various work, educational, recreational, social, and private routines. Society provides the matrix of ideas of proper action, of right and wrong, and of justice, that are normative foundations of formal justice systems. This "law and society" subject is not formally addressed in this text, although the links between criminal procedure and social norms are occasionally mentioned. Social norms and ideologies are in part produced by national cultures. The culture of a nation-state—centered on a single "nation" with a long history, distinct language, core religion, and sense of "ethnicity"—produces a distinct national culture with deeply etched norms. The United States, however, is an *immigrant society* rather than a nation-state, with norms and values that are more difficult to pin down, especially as immigrants re-interpret the "American dream" in the context of their experiences. Nevertheless there is a distinctively American outlook, with its own bounded set of paradoxes, sometimes called "American exceptionalism." One result is that the Constitution, a legal document, has played a larger role in American culture than is the case in nation-states.[14]

THE CIVIL LAW SYSTEM All the criminal justice systems listed in this section, which seem large when considered in isolation, are small change compared to the informal and formal civil justice system. The majority of lawyers will never step foot in a criminal court, and spend entire careers advising, negotiating, and litigating about divorces, businesses, nonprofit organizations, taxes, employment, injuries, schools, land ownership and use, wills and estates, and on and on. Alongside lawyers and courts, arbitrators, mediators, case-evaluators, and a host of other dispute resolvers exist, within and between organizations and in communities, to deal with the disputational side of human beings. The civil law and dispute resolution systems work at the largest and smallest levels, from the largest corporations, economy-wide labor-management issues, and social conflicts with national scope, down to struggles within families and between neighbors. The civil justice system probably does more to maintain a just and functioning society for most people than the criminal justice system, however necessary it is.

THE CRIMINAL JUSTICE SYSTEM The criminal justice system includes government agencies as well as private individuals such as jurors, bail bond agents, and private defense lawyers. The major agencies—police, prosecution, and corrections—are parts of the *executive* branch of government. The *judicial* branch of government, which adjudicates civil and criminal cases, ensures fair procedures. *Legislatures* also play a central role by enacting criminal law, prescribing sentencing guidelines and structures, and setting budgets for the primary agencies of criminal justice. Knowledge of criminal justice practices (e.g., police discretion) allows a better appreciation of criminal procedure.

Formal criminal procedure law covers six stages of practice by police, prosecutors, defense attorneys, trial judges, and appellate courts. These are (1) police investigation, interrogation, search, and arrest; (2) the pretrial process, including the decision to grant bail, grand jury operations, preliminary examination of the charges, and pretrial motions; (3) formal charging by the prosecutor; (4) adjudication—the determination of guilt or innocence by a jury or a bench trial or by the plea negotiation process; (5) sentencing—imposing punishment on the convicted, a judicial decision in which probation officers, prosecutors, defense attorneys, and sometimes victims play roles; and (6) appellate review by higher courts.[15] This book concentrates on the first stage of the criminal process—police activities that touch on individuals' rights and liberties—and also includes information on the pretrial process, charging, and adjudication. Sentencing and correctional law, including prisoners' rights, are distinct areas of law that are not covered in this text. The last stage of the criminal process, appellate review, is where most of the constitutional rights of suspects are formed. This text does not discuss highly technical appellate issues but emphasizes the substance of Supreme Court cases that shape constitutional criminal procedure.

Based on knowledge of human history and human nature, the Framers' fears about government tyranny were at their highest when they put the enormous punitive powers of the state into the hands of those people who operate the justice system. Consequently, they erected many rules of law to limit the power of criminal justice officials, and to make them permanent, embedded them in the Constitution. James Madison, the prime drafter of the Bill of Rights, announced to Congress that judges would be the special guardians of those rights.

THE MISDEMEANOR AND TRAFFIC JUSTICE SYSTEMS The formal rules of law reviewed in this text apply to misdemeanors as well as felonies, but the focus is on felony-level crimes. At a few points the text mentions the applicability of constitutional protections to misdemeanants. In reality the quasi-criminal traffic justice system operates more like an administrative system, albeit one operated by police officers, prosecutors, and courts. And in actual practice, misdemeanors are often handled in informal ways that approach "assembly-line justice" by courts, ways that often fall below what that is required by law. This does not mean that spending a weekend or six months in jail is a trivial matter.[16] This text, nevertheless, cannot explore this important subject in depth.

THE JUVENILE LAW AND JUSTICE SYSTEMS For more than a century, American states have treated minors, a large proportion of people who get into trouble, through a separate legal system. The insights that led to the creation of the first juvenile court in the United States in 1899 are if anything confirmed by the most up-to-date neurological research that shows that teens are still in states of physiological development that require that children and teens be handled by an alternate justice system. This large and important subject is discussed in available textbooks and is taught as a separate course in most criminal justice programs. It is only touched on in various places in this text.[17]

THE SHADOW CRIMINAL JUSTICE SYSTEM In June 2009 the Supreme Court ruled that a strip search of a middle-school girl was unconstitutional (*Safford Unified School District v. Redding*, 2009). The intersection of criminal law and civil institutions like schools comes under the Fourth Amendment through the "special needs beyond the need for normal law enforcement" doctrine. Although this doctrine occupies a small corner of constitutional criminal procedure, legal sociologist Jonathan Simon has described how resort to police and criminal justice mechanisms, *governing thorough crime*, has crept into a host of institutions, even including the family, to deal with unruly behavior that was once handled informally.[18] Americans now take it in stride that thousands of police are present even in middle-class and quite "safe" public high schools,[19] suggesting an unhealthy social trend of the over-criminalization of American culture and society.

THE IMMIGRATION JUSTICE SYSTEM According to a government official, in 2008 at least "304,000 immigrant criminals [were] behind bars nationwide" awaiting deportation, up from 167,000 in 2007.[20] They are held in "a rapidly growing conglomeration of county jails, federal centers and privately run prisons across the country where problems of detainee mistreatment have been persistent and widespread." After a two-and-a-halfyear delay, a federal court in June 2009 ordered the Obama administration to grant or deny a legal "petition asking for detention rules."[21] Among the problems in recent American immigration detention has been the lack of medical care that has led to a number of unnecessary deaths.[22] Homeland Security secretary Janet Napolitano has ordered a comprehensive review of detention practices.[23]

At the same time, "the nation's immigration courts [are] seriously overburdened." The government hired only four new immigration judges to assist the 234 active immigration judges between 2006 and 2009. A study based on government statistics "found that the shortage of judges had contributed to a 19 percent increase in the backlog of cases since 2006 and a 23 percent increase in the time it takes to resolve them." An immigration judge described it as "a system at its breaking point." The crisis in the immigration courts was brought on by the Bush administration hiring thousands of new immigration agents and stepping up raids in factories and communities. "Many thousands of immigrants have been affected by the delays because the authorities have started to hold many more of them in detention while the immigrants challenge deportation orders or seek political asylum through the courts." There were 186,342 immigration court cases pending at the end of the 2008 fiscal year.[24]

A July 2009 legal clinic report, based on data obtained through Freedom of Information Act lawsuits, confirmed a pattern of unconstitutional home raids by Immigration and Customs Enforcement (ICE) agents, conducted between 2006 and 2009, that had been noted in numerous news accounts and in vocal concerns raised by lawmakers and local law enforcement chiefs.[25] The report identified four kinds of illegal action by ICE agents: (1) illegally entering homes without legal authority, (2) illegally seizing "non-target individuals" during home raid operations; (3) illegally searching homes without legal authority; and (4) illegally seizing individuals based solely on racial or ethnic appearance or on limited English proficiency. These mostly predawn raids were authorized only by administrative and not judicial warrants; as a result, agents were supposed to obtain consent from occupants before entering but frequently just broke in. An odd feature of the raids is that only one-third of the persons arrested were "targeted" as dangerous or suspected of terrorism, while two-thirds were non-dangerous people held on immigration status violations. What could account for this sharp rise in seemingly out-of-control behavior in "home raids [displaying] a lack of law enforcement professionalism and a kind of cowboy mentality that . . . contribute[d] to the apparent lack of attention to the governing constitutional norms"? The most persuasive reason seems to be that in 2006, ICE made dramatic changes in its enforcement strategy "that collectively set the stage for the Bush Administration's widely publicized campaign of immigration home raids." Teams of seven agents, who preciously had annual arrest quotas of 125 illegal aliens, 75 percent of whom were "dangerous," had their quotas increased to 1,000 per year. "Overnight, [the teams] were expected to become eight times more efficient. Simultaneously, the new 2006 quota system eliminated the requirement that 75 percent of the arrests needed to be "criminal aliens." As a result, these teams, after breaking into homes, illegally questioned residents and illegally targeted persons on racial characteristics. The report found that suppression motions and civil lawsuits had almost no effect on this widespread pattern of unconstitutional behavior. The Obama administration had eliminated some of the worst aspects of these rules in early 2009. To prevent violations, the Cardozo Immigration Justice clinic recommended such reforms, among others, as obtaining judicial warrants for home raids, obtaining high-level clearance, limiting them to obtaining dangerous aliens who cannot be found in public, and videotaping raids.

The immigration justice system has grown into a substantial sub-justice system, with rules and procedures that threaten constitutional values while undermining effective local law enforcement based on trust with and gaining information from the local community.

THE TERRORISM JUSTICE SYSTEM One of the most persistent and worrisome of pubic topics debated since the terror attack of September 11, 2001, has been the treatment of detainees extracted from the Iraq and Afghanistan wars, and how the fear of foreign terrorism may be distorting police priorities and the civil rights of ordinary American citizens. A discussion of the topic is found in the Law in Society section of this chapter.

The alternate juvenile, misdemeanant, immigration, and terrorism justice systems offer fewer procedural and constitutional protections to individuals than are provided by the felony criminal justice system, which is formally controlled by the full panoply of rights under the Due Process Clause and the Bill of Rights. As governments seek to control costs and tend to be sure of themselves, the danger to individuals' liberties is that a kind of "blowback" will lead police and prosecutors to adopt the methods of these alternate justice systems in ways that will permanently cripple civil rights in the felony criminal justice system.

LEGAL FOUNDATIONS

Constitutional criminal procedure involves a good deal of specialized knowledge about the structure, operations, and relationships of courts in the context of American federal government, a fairly sophisticated understanding of how law is classified and created, and an appreciation of special constitutional rules and developments that make the cases understandable. Further, a grasp of criminal procedure's legal foundation only makes sense in relation to information provided in other sections of this chapter. None of this is particularly simple, but as the information provided in this chapter reappears continuously in subsequent chapters, it must be readily at hand.

Law

Collectively, **law** is a body of written rules issued by legitimate government authorities, designed to guide and control individuals and institutions. There are different forms and sources of law; the most important are (1) statutes or legislation and (2) rules created by appellate courts, called **case law** or **common law** (explained in following paragraphs). Other forms of law include executive orders of the president or state governors, administrative agency regulations, ordinances passed by local units of government, and court rules detailing court procedures. Government officials can enforce case law and statutes.

These sources exist in a hierarchical order: a statute, issuing from the legislature (elected by the sovereign people) can modify or eliminate court-made law (created by appointed judges, or elected judges who are not directly accountable to the electorate). Constitutional case law is the major exception to this rule. The Constitution of the United States and the state constitutions are special kinds of statutes. The U.S. Constitution was ratified not by an ordinary session of Congress, but by special ratifying conventions in the states, and so it represents the will of the people as a whole. Because of this, under the authoritative ruling of *Marbury v. Madison* (1803) and under unbroken government practice and tradition, the Supreme Court has come to have the final word on the interpretation of the Constitution, with the power to overrule laws passed by Congress or state legislatures, provisions of state constitutions, and actions by executive officers including the president of the United States, when they are found to conflict with the meaning of the Constitution.

The only direct way for the federal and state governments to override a constitutional interpretation issued by the Supreme Court (constitutional case law) is by formally amending the Constitution by procedures specified in Article V, which requires a proposed amendment passed by two-thirds of the House of Representatives and two-thirds of the Senate (or by a convention called by two-thirds of the state legislatures) and ratified by three-fourths of the state legislatures. The Constitution has been amended only twenty-seven times in two and a quarter centuries, and only a few of those amendments directly overturned Supreme Court cases. A clear example of the Supreme Court's constitutional power is *Dickerson v. U.S.* (2000) (discussed in Chapter 7), which held that a 1968 Act of Congress passed to overrule *Miranda v. Arizona* (1966) was unconstitutional: "We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves" The Supreme Court has enormous power to determine the meaning and content of constitutional law and thus to impose rules of conduct on police, prosecutors, judges, and other officials. In a real sense, the Constitution means what the Supreme Court says it means. Law, then, is not only the words of the rules, but the power that the rules give to courts and government officials to enforce the rules.

CLASSIFICATIONS OF LAW Law is classified first by its *applicability*. **Private law** concerns disputes between private individuals, groups, and corporations, while **public law** involves government power and arises from disputes between government departments or between private people or groups and government agencies. Law is also classified by its specific *subject matter*. Private law covers such subjects as contracts, property, torts (the law of injuries), commercial law, copyright, sports law, civil procedure, and the like. Public law includes constitutional law, administrative law, tax law, substantive criminal law, and criminal procedure.

Law is classified by its three *functions*. **Substantive law** establishes and defines rights, powers, and obligations. Major areas of substantive private law, for example, establish contractual obligations, property rights, and the freedom from intentional or negligent harm. Substantive criminal law defines crimes such as homicide and theft and defenses such as insanity. **Procedural law** prescribes methods of enforcing substantive rights that are breached and includes rules of jurisdiction, the serving of legal process (e.g., a summons), and rules that guide the conduct of a trial. Rules of criminal procedure include court rules, state and federal statutes, and rules of constitutional law. **Remedial law** determines the actual benefits or "remedies" obtained by a successful party to a lawsuit. Civil remedies include (1) *legal* remedies or money damages to compensate loss and may include punitive damages and (2) *equitable* remedies (i.e., injunctions or specific performance to rectify a violation of rights). Criminal law "remedies" are the lawful punishments that may be inflicted on convicted criminals.[26] Chapter 2 focuses on remedies for constitutional violations and the Fourth Amendment exclusionary rule.

The label "criminal *procedure*" can be misleading because although this branch of law includes genuinely procedural rules it is important for its substantive law. Constitutional criminal procedure is better classified as a branch of civil liberties law. It regulates the relationship between the individual and the state during trials (U.S. Const. amends. V and VI), protects against unlawful arrest and search and seizure (U.S. Const. amend. IV), does not allow compelled confessions (U.S. Const. amends. V and XIV), and provides many other protections against unlawful government conduct when a person's life, liberty or property is at stake.

The Court System

In the American constitutional framework, courts of law constitute a separate branch of government. They exist not only to decide legal disputes but also to provide **checks and balances** against the risk that the "political branches" of government (the executive and legislative branches) will violate the rights of individuals for improper political or corrupt purposes.

COURT STRUCTURE Courts are *hierarchical*—ranked by authority into appellate and trial courts. Every state and the federal government have supreme courts and trial courts; the federal government and most states also have intermediate courts of appeal. The basic function of trial courts is **rule application**—deciding individual cases in accord with the law. Trial courts decide issues of fact and resolve issues of law that apply to a case. They also encourage pleas in criminal cases. Many states have different levels of trial courts. Lower-tier **courts of limited jurisdiction** (often called *district* or *municipal courts*) decide misdemeanors and oversee the pretrial stages of felony cases. Felony cases are decided in **courts of general jurisdiction** (called *superior courts* in most states, but also known as *circuit* or *district courts*). Trial judges can oversee juries, which decide issues of fact under rules of law and evidence specified by the judge. Juries, incidentally, are not part of the judicial branch but are "the people." If a jury trial is waived, a judge sits as the trier of facts and law in a *bench* or *waiver* trial.

Appellate courts are "above" (or "superior to") trial courts in the court hierarchy. The basic function of appellate courts is **rule making**—that is, making law (legal precedents) by a process of legal interpretation. Every state and the United States has a supreme court, which are the final arbiters of issues of law that may be appealed by losing parties in civil lawsuits or criminal cases. Most states and the United States also have established intermediate courts of appeal, which became necessary as the volume of legal appeals grew too large to be handled by supreme courts. Issues of fact are typically not appealable. This text focuses on constitutional rule making by the U.S. Supreme Court.

APPELLATE COURT PROCESS A basic understanding of the appellate process is important because almost every case in this text is a Supreme Court decision. Every state gives convicted defendants a statutory right to appeal their convictions to intermediate appellate courts, although defendants who plead guilty may have limited rights. Formally, there is no right to appeal in the federal Constitution. Appeals to state supreme courts, or appeals beyond the first appeal are discretionary and require permission from the appellate court to proceed.

Appeals as of right or discretionary appeals have to be initiated by the party, by a filing that asserts that specific legal rights were violated during the trial. Claimed violations of law, the most typical basis for appeals, are decided by appellate courts de novo—that is, the appellate court is not bound by the lower court decision. Issues of fact, which are less commonly appealed, may be reversed only for "clear error." This is because juries or trial judges who actually saw witnesses testify are in a better position than appellate judges to decide what happened. Appeals based on actors' discretion are decided on the "abuse of discretion" standard.[27]

Unlike trials, in which witnesses are sworn in and testify, appellate courts decide cases based only on legal arguments presented by the lawyers. The arguments are presented in formal written essays called **briefs** and may also be presented in relatively short oral arguments before the court.

> The appeal begins when the party losing the case in the trial court, the "appellant," files a notice of appeal, usually a month or two after the trial court decision. Then within a few months the appellant files the trial court record in the appellate court. The record, often bulky, consists of the papers filed in the trial court along with a transcript of the trial testimony. Next the appellant and the opposing party, the "appellee," file briefs that argue for their respective positions. The briefs are usually followed by short oral presentations to the judge. Finally, the judges decide the case and issue a written opinion.[28]

Appeals to the U.S. Supreme Court are discretionary; the Supreme Court hears only those cases that it wishes to decide based on policy reasons that do not have to be announced. The appellate process in the Supreme Court is taken under a writ with a Latin title that originated in English procedure: a **writ of certiorari.** Appellants in Supreme Court cases are known as *petitioners*, and appellees are called *respondents*.

Appellate courts issue specific decisions in an appeal, in reference to the decision in the last court from which an appeal was taken. For example, before a case reaches the U.S. Supreme Court, there may have been a trial verdict, an appeal in the state court of appeals, a decision of the state supreme court, a decision by a federal district court on a federal **writ of habeas corpus**, followed by a decision by a federal court of appeals. In such a case, the Supreme Court will **affirm** or **reverse** the decision of the federal court of appeals—the court just "below" the Supreme Court. If the appeal involves several legal issues, the Supreme Court may affirm in part and reverse in part. The Supreme Court usually does not apply its decision directly to the parties. Instead, it usually **remands** the case, sending it back to the lower court to handle the details of applying its decision. An appellate court can **overrule** its own prior **precedent** when it finds that its prior decision was incorrect, was unsound, or has become obsolete, and can replace it with a different ruling.

Although the Supreme Court's decision (e.g., "Judgment below affirmed") is exceedingly terse, the important part of the case is the Court's opinion, which is usually a lengthy essay written for the benefit of lawyers and judges in a formal style, which purports to explain the reasons behind the Court's decision. We study these opinions to understand the Court's reasoning.

Federalism

A police officer makes a lawful arrest. Under which law does the officer operate? In a unitary nation like France or England, the arrest is made under the nation's laws. The United States, however, is a federated nation (as are Canada, Germany, and Mexico) with a national government and state governments. An officer making a lawful arrest in Augusta, Maine, must therefore comply with both Maine law and applicable U.S. law.

This complicated arrangement is the result of **federalism**—the legal and power relationship between the national government and the state governments. Federalism is a very important topic in American criminal procedure because up until the mid-twentieth century, state and local criminal justice officials were guided exclusively by state law. In the twentieth century, the Supreme Court began to apply the Bill of Rights to state officials, and this movement created modern constitutional criminal procedure. The story of how this happened and its effects are detailed later in this chapter in the section on the **incorporation doctrine**. This section provides information necessary for understanding "incorporation."

The Constitution's Framers understood that some level of friction (as well as cooperation) would exist between the national and state governments and between the states. They provided rules in the Constitution to create a nation in which the limited sovereignty of the states would be respected but in which the federal government would have certain exclusive powers. Foreign affairs and the war-making power are examples of exclusive federal authority.[29] The Constitution also established numerous rules to ensure a unified nation rather than competing states. These include a federally controlled postal system and federal oversight of interstate and foreign commerce in Article I. Article IV includes rules to make a federal nation work smoothly: the prohibition of a state's giving favorable treatment to its own citizens over the residents of other states ("privileges and immunities"), the requirement that states appropriately apply the laws or court judgments of another state ("full faith and credit"), the extradition of felons, federal control over territories, and the like.[30] Finally, the Constitution requires federal and state governments to adhere to a political philosophy of liberal republicanism. The Preamble to the Constitution emphasizes that the purpose of American government is to "secure the Blessings of Liberty to ourselves and our Posterity." The national government guarantees to every state a "republican form of government"—in Abraham Lincoln's words, a "government of the people, by the people, for the people."[31] State and federal governments are prohibited from passing ex post facto laws or bills of attainder, which undermine political liberty; nor may they create "titles of Nobility" that would create a class of Americans other than citizens.[32]

To understand how federalism works in the criminal procedure context, we must consider the topics of jurisdiction, the Supremacy Clause, the special role of the U.S. Supreme Court, ***stare decisis***, and adequate and independent state grounds. Each state is a limited sovereign within the national framework. Each has a constitution that establishes a "republican form of government." The structures of state governments are quite similar, including a chief executive or governor, a legislature, and a state court system with a supreme court and trial courts. With some small variations, the legal systems of each state are comparable and parallel to the federal legal system. Each state legislature makes laws for the benefit of its people, and each has its own bill of rights to guarantee the rights of its citizens and residents.

American federalism recognizes areas of exclusive federal control, areas of exclusive state action, and many areas of concurrent jurisdiction where the federal and state governments can work together. For example, in the last forty years Congress has passed federal criminal laws that overlap substantially with state criminal laws, allowing either federal or state law enforcement agencies to investigate and either federal or state courts to try cases under their respective laws.[33]

JURISDICTION Jurisdiction, or lawful power, is both the lawful authority of a government to exercise its powers in its territory and the authority of a court to decide cases brought before it. The jurisdiction of the U.S. government is granted by, *and limited by*, the Constitution. The jurisdiction of federal courts, including the Supreme Court, is granted in Article III of the Constitution, which explicitly grants to Congress the power to expand or contract the jurisdiction of federal courts. States are recognized in the Constitution as subordinate sovereignties, not as administrative arms or subdivisions of the national government. Thus, in *Printz v. U.S.* (1997), the Supreme Court held that Congress could not require local sheriffs to enforce the background check portions of the Brady Handgun Violence Prevention Act and the portion of the Brady Bill requiring such action was held to be unconstitutional. States do, however come under the Constitution's jurisdiction in specific ways.[34] Every government officer, state and federal, swears to uphold the U.S. Constitution.[35] As a formal matter, the federal government, which was established by the Constitution, is a government of limited powers. In the legislative realm, state legislatures have *plenary*, or general, powers to pass laws for the good of their residents, whereas the U.S. Congress can only pass laws on topics listed in Article I, section 8 of the Constitution.

Courts can decide cases only if they have lawful jurisdiction to do so. State courts derive their jurisdiction from state constitutions and statutes. Federal court jurisdiction is conferred by Article III of the Constitution and by congressional statutes. The Constitution and Congress grant jurisdiction to the Supreme Court and other federal courts only over *federal* questions—issues that arise under the U.S. Constitution, federal statutes, or treaties made between the United States and a foreign nation. As a result, the Supreme Court can review almost all decisions of lower federal courts.[36] On the other hand, the Supreme Court has *no jurisdiction over matters of state law*. Cases based exclusively on provisions of state constitutions, state legislation, or rules of state common law can be decided only by state courts. The U.S. Supreme Court can review a case from the highest tribunal of a state only if it concerns a federal question.

In constitutional criminal procedure, a federal question arises in a state court when a criminal defendant claims that an action taken by a local or state officer or court violated a right protected by the Fourteenth Amendment or elements of the Bill of Rights that have been applied to the states. Under the Fourteenth Amendment, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." (The discussion of the incorporation doctrine in a later section will explain how the interpretation of this provision allowed federal courts to impose the Bill of Rights on local and state officers and courts in criminal appeals.) Therefore, federal issues can arise out of state criminal justice and be appealed to federal courts and the U.S. Supreme Court. This can occur in collateral criminal appeals under federal habeas corpus, or in federal civil rights suits against municipalities or local or state officers claiming violations of their federal constitutional rights. The civil rights law (42 U.S.C. § 1983) was passed in 1871 under the authority of the Fourteenth Amendment (discussed in Chapter 2).

THE SUPREMACY CLAUSE State judges can decide issues under the U.S. Constitution in state trials when defendants claim that their federal constitutional rights have been infringed by state officers. When a state court interprets the U.S. Constitution, its ruling can be appealed to a federal court. It is logical that the final determination of the meaning of the Constitution be vested in the Supreme Court. This understanding is confirmed by the **Supremacy Clause** of the Constitution.

Article III of the U.S. Constitution (the "judicial article"), which confers jurisdiction on the Supreme Court, does not directly give that Court the jurisdiction to hear federal questions that arise in state courts. Nevertheless, this power was asserted by the Supreme Court in the early Republic and is inherent in the Supremacy Clause (Article VI, paragraph 2).[37] The clause says that where there is a direct conflict between a state and federal law (i.e., where a state law blocks the application of a valid federal law, or where compliance with both a federal and a state law is impossible), the federal law and the interpretation of the federal courts control. The Supremacy Clause ensures that the United States will be a united nation; otherwise, if every state could decide the meaning of the U.S. Constitution in its own way, constitutional law would not be uniform.

The Supremacy Clause

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

Source: U.S. Constitution, Article VI, paragraph 2.

The Special Role of the Supreme Court

The Supreme Court and its work lies at the heart of criminal procedure. Two things about the Court and its work should be kept in mind. First, the Court is, in a special way, a political institution, and second, the Court is a special guardian of civil liberties in our system of government.

In what ways is the Court political and in what ways is it not? The Supreme Court, as an appellate court, hears cases brought to it by litigants and ostensibly decides by analyzing legal principles and always reviews prior precedent. Although it sometimes makes sweeping rulings, for the most part its cases build doctrines one small issue at a time. Procedurally, it does not act like a legislature; it is not pressured or educated by lobbyists, and there is no committee structure to investigate specialized topics. Yet, despite public ignorance and politicians' hypocrisy, the Supreme Court is indeed political in special ways. Another way to say this is that the Supreme Court *makes* law and policy. This is so because most important social and domestic issues in the United States are enacted into law and can often be litigated on constitutional grounds. This gives the Court—with its power of **judicial review** to overrule unconstitutional acts, or statutory interpretation to decide on the meaning of a law—a form of "negative" power by preventing government action. Related to this, by the time a case reaches the Court, easy decisions have been resolved and the Court is usually confronted with decisions than can reasonably be decided in different ways. This is made easier in constitutional adjudication because many of the Constitution's provisions are broad principles that allow for interpretive "play in the joints" rather than narrow rules with only one obvious meaning. As a result, in most important decisions, the ideology, life experience, and judicial philosophy of the justice become the most important factor that propels a judge to decide, more or less, in consistent patterns. This is why in criminal procedure some justices *tend* to vote in favor of the prosecution (Crime Control Model), others in favor of the defense (Due Process Model), and others, "moderates," tend to be less predictable.

There are elements of the Supreme Court's judicial *process* that makes it somewhat political. Although the Court is not subjected to lobbying, its cases are often of great importance to interest groups, and such groups can submit amicus curiae briefs that bring the ideas and knowledge of various interest groups to bear. On the positive side, these briefs are available to the public so that anyone can see the formal ideas that are presented to the Court prior to a decision. In this way, the Court's process allows a broader public to participate.

As a Court, the high tribunal cannot decide to take up an issue; it has to wait for a case to come before it for decision. However, the Court has a sophisticated audience of lawyers who understand various signals and will steer cases to the Court or try to avoid bringing cases to favor their positions. This helps the Court to make the policies that a majority wishes to make.

We are used to thinking of constitutional interpretation as "belonging" to the courts. Nevertheless, the president and Congress often justify their actions by citing the Constitution. The courts, however, have final say about the meaning of the Constitution. A state supreme court is the final authority on the meaning of a state constitution, and the U.S. Supreme Court has the last say on the meaning of the U.S. Constitution, giving it great power in shaping criminal procedure. This principle was reaffirmed recently in the titanic struggle to constrain the Bush administration's unprecedented assertion of unlimited power to detain persons under Article II commander-in-chief power. In four landmark cases culminating in *Boumediene v. Bush* (2008) the Court ruled that neither Congress nor the president could strip it of its constitutional powers to consider habeas corpus petitions, barring a proper congressional suspension of the writ (see Law in Society section, this chapter).

From the beginning of the Republic, the Framers believed that courts play an essential role in protecting individual liberty. James Madison's 1789 speech to the House of Representatives proposing the Bill of Rights said that by placing rights "into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[38]

ADEQUATE AND INDEPENDENT STATE GROUNDS Prior to the incorporation of the Bill of Rights in the 1960s (discussed later in this chapter), federal criminal procedure rules tended to favor defendants more than state rules. One goal of incorporation was to apply the Constitution equally to state and federal law enforcement and courts. After 1972, the U.S. Supreme Court began to water down individual rights and rule more favorably toward the prosecution. This resulted in a reaction by a minority of state courts, regarding specific criminal procedure issues, granting *more* rights to defendants under their own state constitutions.

This is consistent with the federal structure of the United States. Justice Brennan, who championed defendants' rights, noted that "no State is precluded by [U.S. Supreme Court] decision[s] from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution" (*Michigan v. Mosley*, 1975, Brennan, J. dissenting). This basic element of American federalism was confirmed by the Court: each state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution" (*Prune Yard Shopping Center v. Robins*,1980).

There is, therefore, a "federal constitutional floor" established by Supreme Court interpretations of the Due Process Clause and Bill of Rights provisions. A state must afford suspects and defendants at least this level of basic rights. Because states are quasi-sovereign, state law operates independently of federal jurisdiction if no federal issue arises. Thus, a state court deciding that the *state* constitution entitles defendants to greater rights than guaranteed by the federal constitution creates the "state constitutional ceiling."

A state supreme court might interpret its constitution differently from the U. S. Supreme Court's interpretation of a Bill of Rights provision for a number of reasons. The wording of a state's constitution might grant greater or different individual freedoms or might put them in positive rather than negative form. A state's constitutional history might show that its Framers intended to award greater liberties. Early state legislation might have more broadly defined the meaning of rights later written into a state bill of rights. Local traditions might lead to heightened definitions of state rights, or distinctive local popular attitudes might lead a state supreme court to interpret a state constitutional provision as more favorable to liberty.[39]

The Supreme Court ruled in *Michigan v. Long* (1983) that when a state court discusses state *and* federal law in its opinion, it will not disturb the state court ruling only if it is based on **adequate and independent state grounds.** A state court could guarantee that its ruling would be honored if its opinion included a "plain statement" that the federal cases are discussed only for the purpose of guidance and not as the basis of the state court's decision. To some commentators, *Long* created a wedge that allows prosecutors an opportunity to have a conservative U.S. Supreme Court overturn more liberal state court opinions and "reflects the Supreme Court's animosity to expansion of individual rights."[40] In *Arizona v. Evans* (1995), Justice Ginsburg, joined by Justice Stevens, forcefully attacked the *Long* doctrine because experience had shown that the "plain statement" rule was not working and that it "interferes prematurely with state-court endeavors to explore different solutions to new problems facing modern society."

THE CONTEXT OF CRIMINAL PROCEDURE

Criminal procedure is not a "closed system" of Supreme Court cases and statutes cut off from the larger society. Criminal procedure law links criminal justice practice to a host of social, cultural, political and legal contexts that are felt by the justices who decide cases. A brief introduction to some of the more salient contexts provides a glimpse of the richness and complexity of criminal procedure. As a branch of constitutional law, the study of criminal procedure requires a basic understanding of American history, values, and society, including an appreciation of race relations—subjects that influence all Americans but that come to bear with intensity when justices make decisions that will shape American life. Further, knowledge of English and American constitutional history, political theory, and human rights enhances our understanding of criminal procedure. This section briefly reviews these contextual areas, and commends their further study.

POLITICAL THEORY Law is not a self-referential "closed system" of rules. To be fully understood and to be legitimate, law must rest on fundamental beliefs held by the people. For example, criminal laws against murder, rape, robbery, and arson are uncontested because of the powerful underlying value that we place on life, personal autonomy, and the safe enjoyment of the home. On the other hand, laws criminalizing the recreational use of marijuana are controversial because they pit the fears of negative health effects and flouting the law against beliefs in personal autonomy in acts that do not directly harm others.

Similarly, criminal procedure law—and the rights it ensures—draws full meaning and importance from its underlying political theories and values. Individual *liberty* is the central American political philosophy.[41] It was deemed an "unalienable right" in the Declaration of Independence (1776). The Preamble to the Constitution (1789) declares that a basic purpose of government is to "secure the Blessings of Liberty to ourselves and our Posterity." To operate effectively, however, law enforcement officers must deprive people of liberty. The Framers' study of history taught them that rulers had used the state's monopoly of force to unjustly deprive people of liberty, thus leading to tyranny. Because "policing is a metaphor for state power [and] the capacity to use force is the defining characteristic of the police,"[42] the criminal justice system both protects and threatens the basis of American political life.

Criminal procedure law is designed to ensure that individual liberty will not be violated without good cause. Most important, the exercise of power by executive branch officers that interfere with liberty is subject to review by the judicial branch. Searches of persons and places, including electronic eavesdropping, must be authorized by judicial warrants. Persons arrested without a warrant must be brought before a magistrate within forty-eight hours or less to ensure that the police had probable cause for arrest. Illegal detention may be questioned by a court under a writ of habeas corpus. People who are charged with crimes are presumed to be innocent and are, for the most part, entitled to bail.

The Fourth Amendment also protects the value of *personal privacy*. The Supreme Court was strongly criticized in 1928 when it held that wiretapping is not a search and does not violate Fourth Amendment rights (*Olmstead v. United States*, 1928).[43] Such an obvious invasion of privacy did not sit well with the American people. In 1968, Congress passed a law bringing electronic eavesdropping within the Fourth Amendment, supporting reasonable law enforcement use of eavesdropping, but requiring judicial warrants to limit and control it.[44] Where Supreme Court rulings have undermined privacy, Congress has in some cases passed laws to ensure the privacy of personal records, bank records, and the like. Some of these protections were weakened by the USA PATRIOT Act.[45] A troubling example is the "sneak and peek" warrant that allows officers to enter homes surreptitiously to look around without notifying the homeowner for a lengthy period. Such warrants have become routine since 2001, not to investigate suspected terrorists, but for ordinary crimes.[46] This is an example of rights against government intrusion withering away in times of hysteria over public safety.

Equality is another hard-won political value in American life that is supported by criminal procedure rules.[47] Before the landmark case of *Gideon v. Wainwright* (1963), poor defendants often went to trial or pled guilty without having a lawyer. Today, depending on the circumstances, the state may also have to pay for an expert witness (*Ake v. Oklahoma*, 1985). These decisions reflect the value of equal treatment before the law, which demands that both rich and poor have a fair trial. This guaranteed right is often undermined, however, by the limited resources provided for indigent defense, which has reached a crisis level (see Law in Society section, Chapter 6). This crisis is a powerful reminder that rights must exist in practice, and not just on paper, to be effective, and that fundamental rights are always subject to attack or erosion. The fact that the right to counsel rests on the fundamental principle of equality is why the lack of material support for indigent counsel is such a troubling issue and arouses efforts to correct the injustice.

Political philosophies such as liberty, privacy, and equality, dearly held in the United States and other Western democracies, rest on two essential legal and political institutions: **constitutionalism** and the Rule of Law. Broadly speaking, a nation's constitution is its rules and stable arrangements for the exercise of government power. Constitutionalism is essentially the ideal that government balances the interests of all its members and is not "captured" by and used for the benefit of one faction. It has roots in Roman ideals of a state's political structure:[48] "For more than two thousand years there has been a remarkably wide and stable consensus that government ought to be carried on within publicly known and enforceable restraints."[49] The modern concept of constitutionalism includes two ideas: limited government and the Rule of Law—"that governments exist only to serve specified ends and properly function only according to specified rules."[50] Constitutionalism implies balanced government and is antithetical to absolutism or tyranny.

The Rule of Law is neither a rule nor a law, but instead a concept of political and legal theory that holds that the government and its officers are not above the law and that the government conducts its business in accord with established legal norms and procedures. In enforcing the law, the government may not exceed its legal authority. The Rule of Law stands in contrast to arbitrary rule and applies to all branches of government. The president, for example, may be subjected to a civil lawsuit while in office (*United States v. Nixon*, 1974; *Clinton v. Jones*, 1997). Legislation is declared void by courts if found to be unconstitutional, and Supreme Court justices' constitutional rulings can be reversed only by constitutional amendment or by a later Court that interprets the Constitution differently.[51]

Constitutional criminal procedure advances constitutionalism and the Rule of Law primarily when the courts prevent governmental abuses of power. Every trial conducted under due process is an example of the need for the government to accede to the judicial branch in enforcing the law; today, the government routinely operates under the law. Civil lawsuits against police officers also manifest the Rule of Law. In our democracy, abuses by law enforcement can also be checked by legislative action and by chief executives. A good example was an executive order by President George W. Bush banning racial profiling in federal law enforcement, with certain exceptions for terrorism investigations.[52] The constitutional ban on ex post facto laws is a classic example of the Rule of Law because conviction under a retroactive law is conviction under no law at all. The same is true when the Supreme Court banned vague criminal laws (*Papachristou v. City of Jacksonville*, 1972).[53]

The courts, as guardians of constitutional liberties, play a central role in maintaining the Rule of Law and constitutionalism. But the courts cannot maintain freedom if the people are not willing to fight for their rights. To a significant degree, the Rule of Law lies in "supporting institutions, procedures, and values."[54] Traditions of liberty, real political competition between the party in power and the "loyal opposition," a spirit of tolerance, the existence of interest groups who will fight vigorously in the political realm to enforce their rights, the absence of an oligarchy (an extremely lopsided distribution of wealth), a measure of political and economic stability, a vigorous political press, a literate and aware citizenry—all play a role in maintaining the Rule of Law. In this kind of society, courts can more effectively ensure that the Rule of Law continues.

HISTORY In several places, this text refers to English and American legal, constitutional, and political history. Legal history is more than an aid to understanding constitutional law—it is an integral part of the reasoning process used by constitutional lawyers to argue cases and by judges to justify their opinions. For example, in *Printz v. United States* (1997), the Supreme Court declared unconstitutional the requirement in the federal Brady Handgun Violence Prevention Act that required local law enforcement officers to participate in background checks of prospective handgun purchasers. Justice Antonin Scalia noted that the decision turned in large part on the Court's reading of legal history: "Because there is no constitutional text speaking to this precise question, the answer to the [sheriff's] challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."

The historical references in the text are not included for ornamentation but to provide information essential to understanding the Court's decision. A few definitions and basic points are included here to clarify the text. References in the text to "the common law" can be confusing because the term is used as a synonym for *case law* or *judge-made law* and is also used to describe the long period in English history, from the twelfth century to the eighteenth century, when the bulk of English law was developed by the courts rather than by statutes of Parliament. The term also refers to the body of law developed in this period.

Many of the great rights essential to American freedom and enshrined in the Constitution were products of the English common law period. The concept of *due process* has its roots in the provision of the Magna Carta (1215) that no free man would be deprived of life, property, or liberty but according to the law of the land. The mode of *trial by jury* emerged at that time and was the hallmark of the common law justice system. The *writ of habeas corpus*, which is protected by the Constitution, emerged in the fifteenth century. The *privilege against self-incrimination* became a standard of individual rights during the seventeenth century, a period of civil war that led to the victory of Parliament and the development of the constitutional monarchy. The use of *judicial warrants* to justify entry into homes to search for stolen goods is an English practice that became solidified into a constitutional principle at the time of the American Revolution. The colonists praised these "British liberties," and when the original thirteen colonies declared their independence, each adopted the common law of England as their model.

Additional protections that make a jury trial fair were rooted in common law developments: the right to subpoena witnesses, the right to be notified of charges, the rule against double jeopardy, the right to be confronted with accusing witnesses, the right to an impartial and local jury, and the right to have trials open to the public. The independence of the courts is critical to individual liberty. The Constitution gives federal judges life tenure and does not allow their pay to be cut specifically to ensure that judges would not be subservient to the legislative or executive branches. This concept was first developed by English statute in 1702, after the autocratic monarchy had been replaced with a balanced, constitutional system of government. Only the right to counsel in criminal cases came to be seen as essential to fair trials in America before being universally adopted in England.[55]

The creation of the Constitution in 1789 and the Bill of Rights in 1791 reflected the dominant concern of the governing class in the early Republic for the survival of the United States as a nation. The premise of those who framed, ratified, and implemented these foundational documents was that only a united nation with a strong government would survive against external rivals and internal jealousies. A strong government was created, but it was restrained by deliberately fashioned checks and balances and constitutional guarantees of liberty. These ensure that elected officials would not misuse their power. It is not an accident that the Constitution protects a free political culture by placing limits on the state's criminal justice apparatus.

The Civil War (1861–1865) was as much a constitutional as a national crisis. In the Reconstruction period following the war, the Constitution was reframed, in Lincoln's words, to shape a "new nation" that was not only "conceived in Liberty" but also "dedicated to the proposition that all men are created equal."[56] The three "Reconstruction Amendments" did this by abolishing slavery, establishing national citizenship, and guaranteeing the vote to former slaves in the Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) amendments, respectively. Section 1 of the Fourteenth Amendment is discussed frequently in the text and is a foundation of modern criminal procedure. Under it, "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." This overruled the Supreme Court's decision in the *Dred Scott* case (1857) that barred persons of African ancestry from obtaining U.S. citizenship. The next sentence extended three rights to citizens as against the states: the "privileges or immunities of citizens," due process, and "the equal protection of the laws." Over the next century, the Fourteenth Amendment's Due Process Clause became the vehicle used by the Supreme Court to ensure that basic liberties were extended to state residents or citizens. Note the terms of the clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law." If a state deprives a citizen or resident of "due process," that person has recourse to the federal courts for protection. The process by which this occurred is fleshed out later in this chapter.

RACE AND CRIMINAL PROCEDURE Racism and other forms of prejudice have infected American law enforcement, judging, and corrections from slavery through the Jim Crow and civil rights eras to the present time, when racial profiling is a hot-button item even after the election of the first African-American president.[57] Although studying the effects of racism is important in every criminal justice subject, there is an organic link between race and criminal procedure that is summed up in the title of an article by Professor Michael Klarman: *The Racial Origins of Modern Criminal Procedure*.[58] The next section of this text explores how the Bill of Rights, originally applicable only to the federal government, was extended by the Supreme Court to cover the states. This was made possible by protecting the basic civil and political rights of then newly freed blacks in the "Civil War Amendments" to the Constitution. Most important was the Fourteenth Amendment (1868), which prevented *states* from depriving citizens of life, liberty or property without the due process of law.[59] The promise of equality faded and died in the late nineteenth century with the rise of "Jim Crow" segregation, economic oppression, and the political exclusion of African Americans.[60] This oppression was enforced by brutal policing and indifferent courts in the South, including lynching and Ku Klux Klan terrorism.

The foundation of modern criminal procedure, paving the way to incorporation, was established by several landmark cases. Common to each was that they concerned African-American defendants subject to the worst abuses of southern justice in the period between the world wars: *Moore v. Dempsey* (1923) regarding mob-justice, *Powell v. Alabama* (1932) and inadequate legal defense in capital cases, *Norris v. Alabama* (1935) concerning the exclusions of blacks from southern juries, and *Brown v. Mississippi* (1936) exposing the torture of African Americans to obtain confessions.[61] Professor Klarman explains why the Court issued advanced civil rights rulings in criminal justice while in other rulings upholding segregation and the disenfranchisement of blacks. Prior to 1914 the defendants in these cases would likely have been lynched. By the early 1920s the National Association for the Advancement of Colored People (NAACP) had engaged in a vigorous lobbying campaign for a federal statute to outlaw lynching. Although the law never passed, the campaign raised the consciousness of the nation. In fact, the House of Representatives passed anti-lynching legislation, only to have it blocked by a southern and western plurality in the Senate. These cases became cause célèbres as interest groups provided the funding to mount effective cases. Also, the defendants in these cases were clearly or likely innocent. Most important, the South was out of step with the rest of the nation on criminal justice, operating on a different criminal justice paradigm. "For the southern courts, the simple fact that these defendants enjoyed the formalities of a criminal trial, rather than being lynched, represented a significant advance over what likely would have transpired in the pre-World War I era."[62] The immediate effect of these decisions on actual practices of criminal justice in the South was negligible, but Professor Klarman argues that they had a significant effect in mobilizing the efforts and raising the morale of African Americans that was to pay dividends in the civil rights era.[63] It is also clear, when looking at the doctrinal development of constitutional criminal procedure law, that these cases laid a foundation for incorporation and the expansion of federal court oversight of criminal justice through its criminal procedure rulings.

Violent opposition to the civil rights movement in the 1950s and 1960s made it clear to the Supreme Court that the racial equality required by the Constitution and epitomized by *Brown v. Board of Education* (1954) was threatened by a "lawless" criminal justice system.[64] This understanding links three of the great themes, or "agenda items," of the Warren Court. In a lecture, retired Supreme Court justice Arthur J. Goldberg outlined these themes:

> To me, the major accomplishments of the Court during the fifteen years in which Earl Warren was Chief Justice were a translation of our society's proclaimed belief in racial equality into some measure of legal reality, the beginning of a profound change in the mechanics of our political democracy and the revolution in criminal justice, both state and federal.[65]

Even if the cases themselves often avoided explicit mention of the fact that the defendant was African American (as in *Terry v. Ohio*, 1968), the concern that racism may generate unfair verdicts was a factor in many rulings of the 1960s (*Mapp v. Ohio*, 1961; *Miranda v. Arizona*, 1966; *Duncan v. Louisiana*, 1968). It is perhaps no simple coincidence that the Supreme Court since 1972 has neither eradicated nor extended defendants' rights, coinciding with an era of fitful progress in the economic and social equality of minorities in a changing America, and the end of using criminal justice to overtly enforce racial suppression while the remnants of discrimination linger on.[66]

JUDICIAL IDEOLOGY AND EXPERIENCES Law is a human and a political product. Supreme Court decisions, in particular, are not the mechanical application of preexisting legal rules to fact patterns, but depend in a large measure on the justices' ideological orientations, life experiences, and judicial philosophies. This is controversial to many Americans. In 2009, Supreme Court nominee Sonia Sotomayor had to "assure senators that she believes a judge's job 'is not to make law' but 'to apply the law,'"[67] after being attacked by Republican senators for past statements hinting at the reality that law reflects a judge's values. Given the political theater that Supreme

Court nomination hearings have become, she retreated to making "motherhood and apple pie" statements that none could publicly disagree with. Harvard Law Professor Alan Dershowitz reflected the common knowledge of all legal scholars and social scientists who study the Supreme Court: "Senators pretend to be outraged that a judge might be influenced by her background; and a nominee pretends she misspoke. Every practicing lawyer knows that these external factors matter—and matter a great deal."[68]

The reason is, first, that every Supreme Court decision concerns important issues of legal or constitutional policy. Second, most cases that reach the Supreme Court rarely can plausibly be decided in different ways, each of which is reasonable. Third, in constitutional adjudication, the rules are often broad generalities, such as "due process," that reflect aspirations rather than unambiguous rules like the Article II requirement that the president must be thirty-five years old (U.S. Const. Art II, sec. 1, ¶ 5). Fourth, justices, like all people, have predilections, such as having a "conservative" (Crime Control Model—favoring the prosecution) or a "liberal" (Due Process Model—favoring the defense) orientation to criminal procedure issues. Decisions that reflect these views simply seem "natural" or "right" to the justice.

Justices tend to vote in more or less predictable ways, not according to some party line, but in response to the facts and issues in a case and to existing precedent. Yet, there is an apparent tendency for justices to decide cases in ways that fit their considered judicial viewpoints. Some justices are more predictably liberal or conservative than others, while others are "moderates" who might decide cases less predictably in favor of the prosecution or the defense. The Appendix to this text includes a table, "Summary Information about Selected Supreme Court Justices," that lists the positions of individual justices.

Justices are not perfectly predictable. Their typical patterns of decision may shift in light of views held about a particular legal rule or of prior experiences. Or, views about *stare decisis* or about judicial activism or restraint may generate unexpected decisions. Conservative justices who opposed the incorporation of the Bill of Rights to the states in the 1960s accused the liberal justices of violating judicial restraint and "making law." Today, many conservative decisions are quite "activist." The influence of justices in getting other justices to join their opinions can depend on the depth of their legal analysis, their willingness to modify majority opinions to accommodate the views of other justices, and on the quality of their writing, which is called **judicial craftsmanship.** Well-crafted opinions have the greatest potential to shape the body of law and to leave a lasting legal legacy.

POLITICS Connected to the fact that law is a human product is the reality that constitutional law cannot be entirely separated from politics—the contest for goods and values in the public sphere. The justices are not legislators and do not respond to lobbyists, although they tend to vote in ways consistent with the broad perspectives of the presidents who nominated them. The most direct political input into the Court comes not after a justice is appointed but before, in the appointment process, when presidents and senators prefer to appoint and vote for justices who reflect their political and ideological perspectives.

Crime and criminal justice became major national political issues in the 1960s. In 1968 the Republican presidential candidate, Richard Nixon, politicized constitutional criminal procedure by attacking the Supreme Court. He claimed that its 1966 *Miranda* ruling was responsible for increasing crime rates and led to rioting in inner cities and antiwar demonstrations by college students. Nixon accused the Supreme Court of having "gone too far in weakening the peace forces as against the criminal forces in this country."[69]

As president, Nixon appointed justices who were expected to take a "hard line" on criminal justice issues. From 1969 to 2006, Republican presidents have appointed thirteen Supreme Court justices, and Democratic presidents only two. These appointees have generally favored the Crime Control Model, demonstrating the link between political considerations and the general trend of how justices vote on cases.

Subsequent chapters focusing on the development of search and seizure law, the right to counsel, confessions, and lineups display a general trend of *shifts* in criminal procedure doctrines from a "conservative," pro-prosecution phase before the 1950s and 1960s, to a "liberal" phase under the **Warren Court** (1953–1969), then back to a more conservative phase under the **Burger Court** (1969–1986), the **Rehnquist Court** (1986–2005) and the Roberts Court (2005–present). Although characterizing an era, a Court, or a justice as "conservative" or "liberal" over-generalizes and misses important nuances, the historic pattern of conservative-to-liberal-to-conservative helps the reader understand the otherwise bewildering twists and turns in constitutional criminal procedure that result from the Court's general political-ideological orientation.

HUMAN RIGHTS Although this text focuses on U.S. law, it is worth noting that most of the constitutional liberties found in the Bill of Rights are **human rights** under international law and enshrined in the UN Universal Declaration of Human Rights (UDHR) (1948).[70] The UDHR was deemed necessary after the Nuremberg War Crimes Trials publicized Nazi crimes against humanity committed during World War II.[71] Rights are claims created by law and enforced by courts. Human rights are a special class of rights held by a person simply by virtue of being human. They are moral rights of the highest order, grounded in human equality and moral dignity. They should be made legally binding in national, regional, or international law. They include the rights to a speedy and public trial, to subpoena and examine witnesses, and to a lawyer. Due process rights such as notice of charges, the presumption of innocence, and the right to be present at one's trial are counted as human rights. An independent and impartial judge is a human right and is made effective by the lifetime tenure provision of Article III of the U.S. Constitution.

The UDHR lists criminal procedure rights that are essential to a civilized society. Article 5 states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," which is borrowed from the Eighth Amendment prohibition on cruel and unusual punishment. Article 9 states that "no one shall be subjected to arbitrary arrest, detention or exile," a right that is in essence part of the Fourth Amendment. One right not included as a human right is trial by jury, which is unique to the common law system and is not typically used in other civilized nations.[72]

It is gratifying to know that many American constitutional rights are recognized as human rights by the world community. In much of the world human rights are embedded in international charters, and enforced by regional and international courts of justice.[73] These rights appeal to a sense of justice that transcends local cultures. They are central to other rights because democratic politics and human dignity cannot exist when governments use their police to crush all political opposition. A criminal justice system that adheres to human rights principles of criminal procedure ensures a democratic form of government bound by restraint and decency, which, in turn, helps ensure its legitimacy.[74] The danger that some of this was lost in the "global war on terror (GWOT)" is discussed in the Law in Society Section in this chapter.

LAW AND SOCIETY The primary focus of this text is on legal content and analysis, but placing criminal procedure issues in a law and society context improves understanding of the legal rules and their effects on practice. Law in Society sections at the end of each chapter highlight social forces that changed legal doctrines (e.g., domestic violence concerns), social science findings (e.g., exclusionary rule research), or the fairness of criminal justice practices (e.g., racial profiling, prosecutorial misconduct, and police perjury). The sections that highlight abuses do not mean that abuses are the norm and are not meant to condemn the entire criminal justice system. The great majority of police officers, prosecutors, defense attorneys, and judges act professionally, competently, and within the law. Complacency, however, is never wise when considering liberties, and systemic abuses must be studied if they are to be corrected. Lon Fuller's classic study of the Rule of Law notes that the greatest way in which law fails is by a lack of congruence between the law as written and the law as practiced.[75] It is too much to expect perfection; but too great a gap between professed constitutional liberties and actual practice breeds cynicism and demoralization and may bring about the collapse of our system, as Justice Louis Brandeis warned in his 1928 dissent in *Olmstead v. United States:* "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously." (See the biographical sketch of Justice Brandeis for the quotation.)

INCORPORATING THE BILL OF RIGHTS

The underlying rule is that the Bill of Rights in the U.S. Constitution protects people's rights only against acts of the federal government, *not* against acts of state or local governments. State citizens and residents can look to their state constitutions for protection of their rights. The U.S. Supreme Court, however, modified this rule in a series of cases under the selective incorporation doctrine. As a result most, but not all, of the Bill of Rights applies not only against the federal government but against state legislatures, courts, and executive branch officers, including local police officers. (References to "state" officials in this text include state and local officers, as distinguished from federal officers.) The story of incorporation stretches from the founding to the present day, when citizens question whether the Supreme Court's 2008 declaration that people have a personal right to possess firearms in the District of Columbia will be extended to the states. Incorporation is not a dry, technical issue. The story of incorporation is the story of the slow and difficult growth (and recession) of liberty, and the growth of America as a unified society, exposing its fault lines.

The term *incorporation* indicates that the mechanism by which specific Bill of Rights provisions (e.g., the Sixth Amendment right to a public trial) are applied to state officers is through the Due Process Clause of the Fourteenth Amendment. To use an awkward metaphor, it is as if the Due Process Clause, which applies directly to the states, were a "container" into which Bill of Rights provisions are poured.

At the outset of the Republic, under the Constitution's federal government structure, the Bill of Rights was held to *not* apply to the states. When the Fourteenth Amendment was ratified in 1868, some proponents in Congress believed that establishing the "dual citizenship" of Americans (as state and U.S. citizens) meant that the Bill of Rights would automatically protect citizens against unconstitutional actions by local and state officials. This, however, did not occur and indeed was resisted by the Supreme Court for a century. When most of the criminal procedure provisions of the Bill of Rights were finally incorporated in the 1960s by the liberal Warren Court, its decisions generated an intense political debate. This debate, part of a larger contest over the meaning of the Constitution in such areas as abortion, affirmative action, flag burning and free speech, voting rights, property rights, and the like, polarized constitutional law to a greater extent than had been the case since the days of the struggle over the constitutionality of President Franklin D. Roosevelt's New Deal legislation in the 1930s. After 1972, the composition of the Court became far more conservative. Although the Burger, Rehnquist, and Roberts courts did not dismantle incorporation, they did whittle down the extent to which provisions of the Bill of Rights protect individuals in a host of rulings. These cases are the main subject of this text.

This section explores the process by which the Supreme Court resisted incorporation. The major reason for resistance was the tug of *federalism*—the belief that the federal courts should not interfere in state matters. When incorporation occurred in the 1960s, it indicated that the nation had become more unified about the rights of its citizens, a result that was set in motion by the Civil War and its legal and constitutional outcome. It is worth noting that "substantive" criminal procedure rights became more meaningful because of the incorporation process.[76]

Before the Civil War

Before the Civil War, the Supreme Court held that the Bill of Rights applied only to the federal government and not to the states, despite the fact that the Constitution itself does apply to the states. Article I, section 10, for example, prohibits the states from many actions. Nevertheless, in Chief Justice John Marshall's last constitutional opinion, *Barron v. Baltimore* (1833), the Supreme Court held that the Bill of Rights did not apply to the states. Barron's waterfront land was taken by Baltimore for public use. He felt Maryland did not pay him enough money and sued in federal court, arguing that the state violated his right to just compensation under the Fifth Amendment. The Supreme Court rejected his claim, saying that Barron simply had no case in the federal courts under the Bill of Rights, primarily because the Framers had intended the Bill of Rights to restrict only the federal government, not state or local governments:

> The Constitution was ordained and established by the people of the United States for themselves, for their government, and not for the Government of the individual States. Each State established a Constitution for itself, and, in that Constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. (*Barron v. Baltimore*, 1833)

Although not all Americans accepted the *Barron* ruling, it was the law of the land, and there was no way to change it without amending the Constitution.[77]

The Growth of Federal Judicial Power

At the founding of the nation, most observers, including some justices, felt that the Supreme Court would play a small role in the nation's governance. Under the Court's third chief justice, John Marshall, the Court became a powerful political institution. Because the Court *is* a powerful institution, its modern rulings on criminal procedure, on topics such as the right to counsel, confessions, and search and seizure, help to shape our national policy on fundamental rights.

The Court's authority rests on three major powers that, while not explicitly conferred in the text of the Constitution, are implicit in constitutional history and were confirmed in authoritative decisions authored by Chief Justice Marshall. The first is the power of judicial review—the power to declare acts of Congress unconstitutional when they conflict with the Court's interpretation of the Constitution. This power was asserted in *Marbury v. Madison* (1803):

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. . . .
>
> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . (*Marbury v. Madison*, 1803)

Marbury continues to be controversial, but there is no questioning the judicial review power of the U.S. Supreme Court.[78]

The Court's second great power is its ability to declare a *state* ruling, statute, or constitutional provision void because it conflicts with the U.S. Constitution. This is axiomatic under the Supremacy Clause (U.S. Const. art. VI, cl. 2). The Court's power, however, was directly challenged by the Supreme Court of Virginia at a time when the large states were very powerful and the reach of the federal government's authority was not entirely spelled out. In *Fletcher v. Peck* (1810), the Court ruled a state law unconstitutional because it conflicted with the Contract Clause (U.S. Const. art. I, § 10), which prohibits a state from "impairing the Obligation of Contracts." *Fletcher*'s constitutional significance lay in Marshall's opinion, which

> declared categorically that the states could not be viewed as a single, unconnected sovereign power, on whom no other restrictions are imposed than those found in its own constitution. On the contrary, it is a member of the Union, and "that Union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass."[79]

The third great power of the Supreme Court is to take jurisdiction over any state case that interprets federal law, including the Constitution, whether in a civil or in a criminal case. This gives the Supreme Court *final say* over the meaning of the Constitution. The Virginia Supreme Court again tried to shield its rulings over the application of federal laws in Virginia from federal Supreme Court review. In *Martin v. Hunter's Lessee* (1816) and *Cohens v. Virginia* (1821), the U.S. Supreme Court held that the Virginia Supreme Court could not hold federal civil and criminal statutes unconstitutional.

Together, these cases helped establish the United States as a "real country" and not a loose federation of fully sovereign states. They confirmed the Supreme Court's authority as the final arbiter of cases arising under the Constitution. They made state governments and state courts responsible under the Constitution to uphold national law. Under Chief Justice Marshall, the Court became a legitimate wielder of power because "the Justices were able to elevate their decisions above the plane of partisan politics, to transform political issues into legal ones, and thereby to increase the political power of the Court."[80] This power, established in the early Republic, allowed the Court to play a central role in the fight to apply the Bill of Rights to the states a century and a half later.

Dred Scott and the Fourteenth Amendment

The infamous *Dred Scott* case, *Scott v. Sandford* (1857), ruled that the "Missouri Compromise" of 1820, which drew an East–West line between free states to the north and slave states to the south, was unconstitutional. In the course of its ruling, it also held that whether or not a state granted freedom and even state citizenship to Americans of African descent, such persons could not be U.S. citizens. This case inflamed political passions and probably hastened the Civil War. The ruling, part of the nation's constitutional law, could not be eradicated by simple legislation. The Thirteenth Amendment (1866), abolishing slavery after the Union victory in the Civil War, did not entirely clarify the civil status of ex-slaves; they were "free," but were they citizens invested with political as well as social and economic rights? The first sentence of the Fourteenth Amendment (1868) was designed to overrule *Scott v. Sandford:* "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."

Having established *national citizenship* in all state citizens, the Fourteenth Amendment went on to confer three rights that national citizens could assert against the states: "the privileges or immunities of citizens of the United States," due process of law, and the "equal protection of the laws." These were vague and open-ended provisions. Did the Framers intend the amendment to "incorporate" the Bill of Rights into the privileges of national citizenship and overrule *Barron v. Baltimore* (1833), as the first sentence of the amendment had overturned *Dred Scott* (1857)? Statements by the amendment's leading proponents, Representative John A. Bingham and Senator Jacob M. Howard, made in the House and Senate during the debate concerning the Fourteenth Amendment, supported this intent. Nevertheless, for a century this interpretation was refused.[81] An early sign in the opposite direction, however, was found in the *Slaughterhouse Cases* (1873). That case declared that a common employment, such as butchering, is *not* a privilege and immunity of federal citizenship and thus is beyond the protection of federal courts against a monopoly that prevented some butchers from operating in certain places. As a result, the Supreme Court permanently made the Privileges or Immunities Clause a dead letter.[82] Could the Bill of Rights be applied to the states through the Due Process Clause?

The Anti-incorporation Cases, 1884–1908

The *Slaughterhouse Cases* aborted the idea that the Privileges or Immunities Clause would be used to inaugurate **total incorporation** of the Bill of Rights. In a series of criminal appeals brought before the Supreme Court from state convictions, lawyers argued that specific provisions of the Bill of Rights of the U.S. Constitution should be held to apply to the states under the Due Process Clause of the Fourteenth Amendment. The Supreme Court consistently refused to adopt this position in each of these cases from 1884 to 1908, with one exception.

In these cases, Justice John M. Harlan was the lone voice whose dissents consistently argued for the application of the Bill of Rights to the states. He contributed to the debate by ending the focus on the Framers' original intent and asserting the idea that due process was a *fundamental* right whose lineage went back to Magna Carta (1215). He argued that a state could not pretend to have a civilized system of government under constitutional requirements if it were allowed to violate the fundamental due process rights of its citizens.

In *Hurtado v. California* (1884), the first of these cases, a defendant convicted of murder argued that the use of a prosecutor's information instead of a grand jury's decision to indict him, as required in federal prosecutions under the Fifth Amendment, was unconstitutional. The majority held that using the information to formally charge the defendant did not violate his Fourteenth Amendment due process rights. Justice Harlan's dissenting opinion reviewed centuries of common law history to argue that common law institutions, including the grand jury, were essential to the political rights cherished by Americans. The majority opinion agreed with this concept as a general matter but concluded that the grand jury was not a fundamental guarantee of liberty and therefore not a component of due process. Note the language used by the majority:

> In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted *within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . .* (*Hurtado v. California* [1884], emphasis added)

This phrasing in effect adopted what came to be called the **fundamental rights test,** which became the ultimate criterion of incorporation and gained clarity as it was applied in specific cases. It meant, in theory, that the Supreme Court would not uphold every state criminal procedure rule. Laws or government practices that are blatantly arbitrary or discriminatory would violate due process, even though established by the democratic process, for they would constitute the "despotism of the many, of the majority."[83] To the *Hurtado* majority, an information issued by an elected prosecutor was not unfair and did not undermine "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." In short, the grand jury is not a "fundamental" right. This is still the law.

Following *Hurtado,* the Court refused to incorporate a variety of other rights, finding that none of them were fundamental rights essential to the civil and political liberty of Americans. One case held that a state eight-person felony jury did not violate due process although federal felony juries had to be composed of twelve, the traditional common law number, under Article III and the Sixth Amendment (*Maxwell v. Dow*, 1900). The last major nonincorporation case of this era, *Twining v. New Jersey* (1908), held that the Fifth Amendment privilege against self-incrimination was not incorporated into the Fourteenth Amendment. The state trial judge informed members of the jury that when deciding guilt or innocence they could take into consideration a defendant's refusal to testify on his own behalf. In federal courts, such an instruction from a judge violated a defendant's Fifth Amendment absolute right to remain silent at trial. Although jurors are likely to wonder why the defendant did not take the stand, they are instructed that the defendant has an absolute right to not testify under the Fifth Amendment. But if the judge adds that they can still take the defendant's silence into account, the jury will be prone to take such statement as a green light to presume that the defendant has something to hide and is guilty.

The only case in this era that effected an incorporation was *Chicago, Burlington and Quincy Railroad Company v. Chicago* (1897). The Court ruled that compensation paid by the state of Illinois for land taken from a railroad company for street improvements was inadequate and a violation of federal due process standards under the Fourteenth Amendment. This case did not mention or overrule *Barron v. Baltimore* (1833). Holding that the Due Process Clause required the states to grant just compensation, the Court appeared to "incorporate" the Fifth Amendment's Just Compensation Clause. A double standard clearly applied. Property rights were deemed so fundamental to the American polity that state violations of the Just Compensation Clause violated the constitutional rights of property owners. Liberty rights, however, were not offended by state rules of criminal procedure that afforded state criminal defendants fewer protections than did federal rules under the Bill of Rights.

Federalism was an underlying reason for the reluctance to apply the Bill of Rights to the states. The Court made clear it was protecting states' rights, warning that incorporation "diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union" (*Twining v. New Jersey*, 1908). The Court also feared that the federal judiciary, few in number and hampered by the jurisdictional limits of the time, did not have the capacity to enforce civil rights on recalcitrant states. In the final analysis, it was just too big a change in the federal–state relationship at the time for the majority of Supreme Court justices to accept.

Nevertheless, the fundamental rights language and reasoning of the cases denying incorporation, initiated by Justice Harlan, opened the door to "selective" incorporation in the 1960s. If a later Supreme Court viewed a provision of the Bill of Rights as fundamental, the state would be obligated to abide by such an interpretation of the Due Process Clause.

The next two steps in the incorporation story helped pave the way, although neither step directly involved incorporation. These steps were the adoption of the "due process approach" and the incorporation of First Amendment rights.

Adopting the Due Process Approach

In this text, the **due process approach** is defined as a ruling by the U.S. Supreme Court that an action of a state criminal justice officer violates the Due Process Clause of the Fourteenth Amendment without violating a specific provision of the Bill of Rights. This is so even if there is a parallel between the action held unconstitutional under due process and a specific Bill of Rights provision.

In 1923, the Supreme Court held, for the first time in a criminal appeal from a state, that state court procedures violated a defendant's Fourteenth Amendment due process rights. Five African Americans were sentenced to death after a murder trial that, although perfect in form, was dominated by a bloodthirsty Arkansas lynch mob just outside the courthouse, screaming for death (*Moore v. Dempsey*, 1923).[84] A similar case had come before the Court in 1915, the notorious *Leo Frank* case in which an Atlanta mob's anti-Semitic chants and threats of lynching (later carried out) could be heard by the jury.[85] The Supreme Court in *Frank v. Mangum* (1915) held that a state prisoner could not use a federal writ of habeas corpus to challenge "mere errors" in his trial. Justice Oliver Wendell Holmes Jr. strenuously dissented in *Frank*, arguing, "Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted." Despite the hideous injustices surrounding Leo Frank's trial, the majority of the Court could see no violation of due process.

In the next eight years, four members of the Court retired and were replaced, setting the stage for a different decision.[86] Justice Holmes, now writing for the Court's majority, held that federal habeas corpus applied:

> It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights. (*Moore v. Dempsey*, p. 91)

The effect of *Moore v. Dempsey* was that a federal district judge could upset the verdict of a local jury, which had been upheld by a state supreme court, if the federal judge found that the conviction violated the defendant's Fourteenth Amendment right to not be deprived of life, liberty, or property without due process of law. This was a revolutionary change in theory and in judicial attitude, even if it fit the text and logic of the Fourteenth Amendment. *Moore v. Dempsey* breached the wall of federal judicial noninterference in state criminal justice. In the next fifteen years, the Court would slowly begin to use this newfound authority to correct gross injustices in a handful of significant cases, typically featuring appalling examples of racism.

The first was *Powell v. Alabama* (1932), the notorious "Scottsboro Case." The Court held that due process was violated because the defendants were not allowed time to prepare a defense and, under the circumstances, were not afforded adequate legal counsel. The Scottsboro defendants were retried, found guilty, and on further appeal, the Supreme Court held that their trial was unfair because African Americans were systematically excluded from Alabama grand juries (*Norris v. Alabama*, 1935). In 1936, the Court ruled that a confession obtained by torture violated due process (*Brown v. Mississippi*, 1936). This trickle of cases became a stream in the 1940s and a river by the 1950s. The Court had, by that time, given state criminal justice a place on its annual dockets. Without the increased attention to criminal cases on the Court's growing civil rights agenda, it is unlikely that the Court would have eventually incorporated the criminal provisions of the Bill of Rights.

Incorporating First Amendment Civil Liberties

Before the Court again considered incorporating criminal procedure provisions in the Bill of Rights, a momentous shift occurred in American constitutional liberties. By the 1930s, the Supreme Court, for the first time, struck down state laws that violated First Amendment rights by reading them into the Fourteenth Amendment, despite the amendment's text, which began, "Congress shall make no law . . ." The free speech cases arose out of (1) state "criminal syndicalism" prosecutions for advocating violence against the government, designed to suppress left-wing political parties, and (2) World War I–era laws making it criminal to advocate resistance to the military draft.

In dictum in *Gitlow v. New York* (1925), Justice Edward T. Sanford assumed that "freedom of speech and of the press. . . are among the fundamental personal rights and liberties, protected by the Due Process Clause of the Fourteenth Amendment from impairment by the States." In *Fiske v. Kansas* (1927), the Court overturned the conviction of a person who simply carried a radical labor manifesto on his person, stating that the Kansas Criminal Syndicalism Law infringed on due process but without mentioning First Amendment free speech. Finally, *Stromberg v. California* (1931) overturned a California law making it a crime to display a red flag as an emblem of opposition to organized government. Chief Justice Charles Evans Hughes's opinion ruled that First Amendment free speech was "embraced by" Fourteenth Amendment liberty; the state law therefore violated the First and the Fourteenth amendments. *Near v. Minnesota* (1931) followed, in which the Court struck down a state law that allowed a judge, acting without a jury, to stop publication of a newspaper article deemed "malicious, scandalous, and defamatory." *Near* prohibited censorship and "prior restraint" of publications and explicitly stated that the freedom of press is included in Fourteenth Amendment due process and that prior restraint strikes at the core of the First Amendment. And in January 1937, a unanimous Court ruled in *DeJonge v. Oregon* that making it a crime to participate in a peaceful political rally violated the First Amendment right of peaceful assembly via the Due Process Clause. Together, these cases clearly "incorporated" First Amendment rights.

In the First Amendment cases, the Court applied the *fundamental rights* test that the Court had developed during the nonincorporation era. On the next occasions when the Court faced challenges to state criminal prosecutions under the Fifth or Sixth Amendment, the constitutional landscape was vastly different, because the Court had incorporated several provisions of the First Amendment. Did the incorporation of First Amendment rights (with the free exercise of religion to soon follow) mean that the Court would be obliged to incorporate rights into the criminal procedure amendments as well?

Resistance to Incorporation and Growing Support, 1937–1960

The great weight of anti-incorporation precedents in criminal cases still had a hold on the Court. In 1937, an important eight-to-one decision by Justice Benjamin Cardozo in *Palko v. Connecticut* held that the Double Jeopardy Clause of the Fifth Amendment was not a fundamental right and therefore was not incorporated into Fourteenth Amendment due process. The defendant had been convicted once for the murder of a police officer during a robbery and sentenced to life imprisonment. Under existing state law, the prosecution appealed on the ground of trial errors. On retrial, Palko was again found guilty and sentenced to *death*. He argued to the Supreme Court that a retrial after an appeal by the prosecutor violated the double jeopardy guarantee. Also, because the first jury had implicitly acquitted him of first-degree murder, he argued that the retrial on that charge was double jeopardy.[87] The Court held that the Fifth Amendment double jeopardy guarantee did not apply against the states, despite the fact that a federal prosecution would violate double jeopardy on the facts of this case.

Why were First Amendment rights incorporated but not Fifth Amendment rights? Justice Cardozo drew a distinction between *fundamental* rights and *formal* rights. Freedoms of speech and press were "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and thus included in due process liberty, he wrote. Criminal procedure rights were merely "formal" and not a part of due process liberty. To be fundamental, a right had to be essential to justice and to the American system of political liberty. The First Amendment cases blocked the operation of state laws out of the "belief that neither liberty nor justice would exist if [these rights] were sacrificed. . . . This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom" (*Palko v. Connecticut*, 1937).

First Amendment rights are fundamental, then, because political freedom rests on the free exchange of political ideas and the ability of citizens to address the government in protest. On the other hand, to Cardozo the criminal procedure provisions in the Bill of Rights were not "of the very essence of a scheme of ordered liberty." He indicated that many democracies had criminal procedure rules that did not afford procedures such as trial by jury, and that Palko's case was not the same as the state trying him many times to get a conviction. The *Palko* doctrine held sway for a quarter of a century before the Court began to incorporate most of the criminal procedure rights in the Bill of Rights into the Fourteenth Amendment Due Process Clause.

Justice Hugo Black's dissenting opinion in *Adamson v. California* (1947), however, marked a turning point that eventually led to incorporation. The case dealt with the same issue as *Twining v. New Jersey* (1908)—whether a judge's comment on a defendant's failure to testify violated his Fifth Amendment rights as incorporated by the Due Process Clause. Again the Court held that it did not. A defendant in Adamson's position, with a prior criminal record, faced a dilemma: If he testified, the prosecutor could bring out the existence of prior convictions to impeach his testimony. If he did not testify, the prosecutor could not introduce his prior convictions. If Adamson had been tried in federal court, the judge would not have been allowed to comment. Applying the Bill of Rights to the states would make the administration of justice in the United States more uniform and would afford greater constitutional protection to individuals.

The majority opinion essentially rested upon precedent. Justice Felix Frankfurter wrote a strong concurring opinion. He was a political liberal but also a judicial conservative and a supporter of **judicial restraint;** his concurrence made him the champion of the Court's anti-incorporation faction. He challenged Justice Black's "total incorporation" idea by stressing that the Court could employ the due process approach to overturn atrocious state action. Justice Black's opinion, based on solid research, powerfully supported the position that the original intent of the Framers of the Fourteenth Amendment was to incorporate the Bill of Rights. This argument placed incorporation of the Bill of Rights on the "constitutional agenda," as three other liberal justices—William O. Douglas, Frank Murphy, and Wiley Rutledge—agreed that the Bill of Rights should be incorporated. With four votes in favor, the chance that incorporation would become the law of the land was in reach of realization.

Justice Black, as much a "constitutional fundamentalist" as a liberal, argued for "total incorporation" in his *Adamson* dissent. There are at least two problems with a Supreme Court decision in one case to apply all of the twenty-six provisions of the Bill of Rights to the states via the Fourteenth Amendment. The first is that no case can come before the Court raising such an issue. A defendant's case gets to the Court by arguing that a *specific* right has been violated. Second, a case that incorporates a provision of the Bill of Rights involves an intense study of the history and jurisprudence of the right and of its impact on criminal justice practice. To do this for each of the twenty-six rights embedded in the first eight amendments is simply beyond the Court's capacity in a single case and would violate norms of the judicial process.

Instead, the incorporation process proposed in these cases, and that indeed occurred in the 1960s, was **selective incorporation,** the decision in a single case that a *specific* right in the Bill of Rights is included in the concept of Fourteenth Amendment due process "liberty" because the particular right is fundamental to the system of "ordered liberty." Any infringement by a state undermines "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Twining v. New Jersey*, 1908).

The next incorporation case demonstrated the cleavages between Justice Black and his more liberal colleagues. Sheriff's deputies in *Wolf v. Colorado* (1949) entered a doctor's office without a warrant and seized patient files. In a federal prosecution, such a blatant violation of the Fourth Amendment would have invoked the exclusionary rule, established in 1914 in *Weeks v. United States*, to exclude the use of these records at trial. The issue was whether the exclusionary rule applied to the states. (This issue is covered in greater depth in Chapter 2.)

The majority in *Wolf* held, under the *Palko* standard, that it did not. In an adroit majority opinion, Justice Frankfurter held that the substance of the Fourth Amendment is a fundamental right and therefore incorporated into the Due Process Clause. However, the exclusionary rule was characterized as a remedy, and the Court declined to incorporate it. Justice Black, the champion of incorporation, concurred. As a "constitutional fundamentalist," he was stymied by the fact that the text of the Fourth Amendment does not include the exclusionary rule, and therefore it could not be applied to the states as a constitutional rule. He believed, however, that the exclusionary rule was appropriately applied to the federal courts under the Supreme Court's supervisory authority. Justices Murphy, Rutledge, and Douglas dissented; they believed that exclusion was the only real "remedy" because the police virtually never lost civil suits brought against them in state courts: A right without a remedy is not a true right.

A further division between Justice Black and the rest of the Court was seen in his growing and partial opposition to the due process approach. Justices who opposed incorporation took the position that the due process approach, initiated with *Moore v. Dempsey* (1923) and that had been used more frequently in cases examining confessions taken by local police officers, was sufficient to protect the rights of Americans against the excesses of state and local criminal justice officers. The three liberal justices who followed Justice Black's incorporation lead (Douglas, Murphy, and Rutledge) nevertheless went beyond total incorporation to espouse **incorporation plus**—that is, incorporation of the Bill of Rights *plus* the due process approach where appropriate. Justice Black opposed the due process approach because he saw the use of discretionary power by the justices as a harbinger of *judicial tyranny* and a violation of the limited constitutional powers of judges to decide cases. His position was designed not only to limit state and local government, but also to limit the discretion of federal judges. Justice Murphy, in a separate dissenting opinion in *Adamson*, stated, "Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."

The Court next applied the due process approach in a case that created the **"shocks the conscience" test.** In *Rochin v. California* (1952), police broke into the home of a suspected drug seller, invaded his bedroom, scuffled with him after seeing him swallow pills, and dragged him off to a hospital where he was forced to swallow an emetic to vomit up evidence. Justice Frankfurter, writing for the Court, threw out the evidence by relying on a subjective Fourteenth Amendment due process standard: "[T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is action that shocks the conscience." These police activities "are methods too close to the rack and the screw to permit of constitutional differentiation." The phrase *shocks the conscience* created a label for the Court's due process rule in search and seizure cases: the *shocks the conscience* test. Justice Black concurred but argued instead that such acts compelled a defendant to be a witness against himself, suggesting that the Fifth Amendment prohibition against self-incrimination, which should be incorporated, applied to tangible as well as to testimonial evidence.

The *Rochin* test was criticized as too vague. What shocked the conscience of appellate judges was too capricious a standard to give guidance to police officers or trial judges. It gave the Court sweeping power to inject its likes and dislikes into the Constitution. This criticism was borne out by *Irvine v. California* (1954). Some justices were clearly shocked by FBI electronic eavesdropping of the bedroom of a married suspect for over a month. Justice Frankfurter characterized it as "repulsive." Still, the majority upheld the introduction of the wiretap evidence, did not incorporate the Fourth Amendment exclusionary rule, and limited *Rochin* to acts of physical violence.

The Court signaled its growing concern with civil liberties in search and seizure by overturning the "silver platter" doctrine in *Elkins v. United States* (1960). State police officers obtained evidence of crime by means of an illegal search and seizure of the defendant's home. The evidence was suppressed by a state court. Afterward, the state officers left the evidence (illegal telephone wiretapping equipment) in the safe-deposit box of a local bank, where federal agents obtained it and used the evidence as the basis of a federal prosecution. The Supreme Court held that the federal exclusionary rule applied even though the federal officers did not directly engage in the illegal search and seizure. This practice undermined state efforts to exclude illegally seized evidence by encouraging federal officers "tacitly to encourage state officers in the disregard of constitutionally protected freedom." Justice Potter Stewart's majority opinion was quite favorable to the exclusionary rule, signaling the coming era of incorporation.

The Due Process Revolution, 1961–1969

By 1962, the Supreme Court's membership had changed to include five pro-incorporation liberals: Justices Black and Douglas (Roosevelt appointees), Chief Justice Earl Warren and Justice William Brennan (Eisenhower appointees), and Justice Arthur Goldberg, appointed in 1962 by President John F. Kennedy. But even before this shift, the Court opened the floodgate of incorporation cases with *Mapp v. Ohio* (1961) (reviewed in the next chapter), which held that the Fourth Amendment exclusionary rule applied to eliminate illegally seized evidence from state as well as federal trials.

After *Mapp*, virtually every year during the 1960s brought the incorporation of an additional Bill of Rights provision into Fourteenth Amendment due process. (See Table 1–1.) The Eighth Amendment Cruel and Unusual Punishment Clause was applied to the states in 1962. A state law criminalized narcotics addiction, but the Court viewed addiction as a disease and held in *Robinson v. California* (1962) that the conviction and punishment of a person for a status such as a disease were constitutionally forbidden cruel and unusual punishment. *Robinson* opened the door for the Supreme Court to consider state death penalty cases in *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976). In 1962, however, *Robinson* did not attract much popular attention.

The next incorporation case, *Gideon v. Wainwright* (1963), was widely publicized and quite popular. It incorporated the right to counsel in an opinion authored by Justice Black, who

TABLE 1–1 Rights Enumerated in Amendments I–VIII of the Bill of Rights

Rights Enumerated	Selective Incorporation	
	Date	**Case**
Amendment I		
Freedom of speech	1925	*Gitlow v. New York*
	1927	*Fiske v. Kansas*
	1931	*Stromberg v. California*
Freedom of press	1931	*Near v. Minnesota*
Freedom to peaceably assemble	1937	*DeJong v. Oregon*
Free exercise of religion	1940	*Cantwell v. Connecticut*
Establishment of religion	1947	*Everson v. Board of Education*
Amendment II		
Militia/right to bear arms	Open	[*Dist. Colum. v. Heller*, 2008]
Amendment III		
No quartering soldiers	NI	
Amendment IV		
No unreasonable search and seizure	1949	*Wolf v. Colorado* (basic right)
Exclusionary rule	1961	*Mapp v. Ohio* (exclusionary rule)
Amendment V		
Grand jury	NI	[*Hurtado v. California*, 1884]
No double jeopardy	1969	*Benton v. Maryland*
Due process	NA	(14 Amdt. DPC applies)
No self-incrimination	1964	*Malloy v. Hogan*
Just compensation for taking private property	1897	*Chicago, Burlington & Quincy Railroad Co. v. Chicago*
Amendment VI		
Speedy trial	1967	*Klopfer v. North Carolina*
Public trial	1948	*In re Oliver*
Impartial jury	1966	*Parker v. Gladden*
Jury trial	1968	*Duncan v. Louisiana*
Vicinage and venue	NI	[implied in due process]
Notice	NI	[implied in due process]
Confrontation	1965	*Pointer v. Texas*
Compulsory process	1967	*Washington v. Texas*
Counsel	1963	*Gideon v. Wainwright*
Amendment VII		
Jury trial in civil case	NI	[*Walker v. Sauvinet*, 1875]
Amendment VIII		
No excessive bail	[implied]	[*Schilb v. Kuebel*, 1971]
No excessive fine	NI	
No cruel or unusual punishment	1962	*Robinson v. California*

NI, not incorporated.

had argued for its incorporation in a dissent twenty-one years earlier. Over half the states provided counsel for indigent defendants by 1963. The decision appealed to the American sense of fair play: Once a defendant is haled into court, he should have the same basic "equipment" to fight his fight as does the prosecutor. Congress acted to ensure that counsel would be available for indigents in federal cases, and many local bar associations and courts willingly developed systems to provide counsel. There were no dissents in *Gideon*, although some justices argued that the decision should be based on the due process approach rather than incorporation.

The right against self-incrimination, the point of contention in *Twining v. New Jersey* (1908) and *Adamson v. California* (1947), was incorporated and *Twining* was overruled in 1964 in *Malloy v. Hogan* and *Murphy v. Waterfront Commission of New York Harbor. Malloy* was a five-to-four decision bringing the Fifth Amendment right against self-incrimination into the Fourteenth Amendment by allowing a witness to refuse to answer questions before a state investigatory body under the Fifth Amendment. *Murphy* unanimously held that a state witness was protected from self-incrimination in federal courts and a federal witness was protected from self-incrimination in state courts. The specific issue in *Adamson* (1947)—whether a judge could comment on a defendant's failure to testify in a state trial—was in effect overruled in *Griffin v. California* (1965).

Other cases incorporating Bill of Rights provisions came in quick succession: *Pointer v. Texas* (1965)—Sixth Amendment Confrontation Clause; *Parker v. Gladden* (1966)—Sixth Amendment right to an impartial jury; *Washington v. Texas* (1967)—Sixth Amendment right to subpoena witnesses under the Compulsory Process Clause; *Klopfer v. North Carolina* (1967)—Sixth Amendment right to a speedy trial; and *Benton v. Maryland* (1969)—Fifth Amendment protection against double jeopardy, overruling *Palko v. Connecticut* (1937).

The Court incorporated the Sixth Amendment right to trial by jury in *Duncan v. Louisiana* (1968). Was a jury trial required for a crime carrying a maximum penalty of two years' imprisonment? To answer this, Justice Byron White analyzed the trend of the incorporation cases and concluded that the standard of what constituted a fundamental right, worthy of incorporation into the Due Process Clause and made applicable against the state, had shifted considerably since the 1937 *Palko* case:

> Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. . . . The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but *actual systems bearing virtually every characteristic of the common-law system* that has been developing contemporaneously in England and this country. The question thus is whether given *this kind of system* a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. (*Duncan v. Louisiana*, 1968, emphasis added)

By the late 1960s, it appeared that the effect of incorporation rulings was to make state rules of constitutional criminal procedure identical to the federal rules. However, several important decisions made it clear that this was not always the case. The basic reason is that the Court did not hold that the Bill of Rights applied *directly* to the states.[88] To this extent, *Barron v. Baltimore* (1833) still had a residual effect. Incorporation meant that a state procedure that came within the general scope of a Bill of Rights provision but did not afford rights that had been granted to federal defendants under the specific provision was held to violate the Due Process Clause of the Fourteenth Amendment. The ruling then applied the interpretation that had been applied to federal defendants. But the intermediate step of incorporation—going *through* the Fourteenth Amendment—gave the Court some "wiggle room" in a few cases decided after 1970 to hold that the precise impact of the federal rule would not apply to the states.

The Sixth Amendment, for example, guarantees federal defendants a jury trial in all crimes. The Court, nevertheless, upheld state laws that eliminated jury trials for crimes punishable by six months or less of imprisonment, calling them "petty crimes." In *Baldwin v. New York* (1970), the Court drew the line of "petty crimes" at six months and struck down a New York law that allowed the crowded New York court system to deprive defendants of a jury trial for crimes carrying penalties of up to one year of imprisonment. In a case decided the same day, *Williams v. Florida* (1970), federal and state standards for rights diverged for the first time. The Supreme Court held that the common law twelve-person jury was not constitutionally mandated by the Sixth Amendment, upholding a state felony conviction by a six-person jury.

Justice Harlan, who opposed the incorporation doctrine, noted that flexibility could have been introduced into constitutional criminal procedure by adhering to the due process case-by-case approach of *Palko*, *Adamson*, and *Rochin*. Now, he argued, rights guaranteed to federal defendants were being diluted in order to impose Bill of Rights protections on the states. The Court was softening the clear meaning and requirements of the Bill of Rights in federal cases.

The Court continued this trend in jury cases. State felony convictions based on less than unanimous jury verdicts were upheld in *Johnson v. Louisiana* (1972) and *Apodaca v. Oregon* (1972), creating the risk that plurality juries would be far less deliberative than unanimous juries. The Court may have felt that it went far enough with these jury cases, and in *Ballew v. Georgia* (1978), it held that a five-person jury violated the constitutional guarantee of a jury.

At present, a few rights in the First through Eighth Amendments have not been incorporated into the Fourteenth Amendment. These include indictment by grand jury, no excessive bail, jury trial in civil cases, the quartering of soldiers, and the right to bear arms as part of a militia. Reflecting on the rights excluded as a result of the selective incorporation approach, a leading commentator suggests that "perhaps it is just as well that they remain unincorporated."[89] In recent years a huge pro-gun lobbying campaign and reconsideration by scholars led the Supreme Court to rule (5–4), in *District of Columbia v. Heller* (2008), that the Second Amendment guarantees a personal right to own guns for personal protection in the home, subject to reasonable regulation. *Heller* will probably be followed by other federal cases seeking to clarify its specific decision. But *Heller* applied only to federal jurisdictions. A footnote in Justice Scalia's majority opinion pointed out that *Heller* did not incorporate the Second Amendment. Nineteenth-century precedents relied on as the basis to not incorporate the right to possess firearms, "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases" (*District of Columbia v. Heller*, 2008). This suggests two things. First, it provides the pro-gun majority on the Court an avenue to incorporate the Second Amendment by asserting that it is a fundamental right. Given the majority's general language in *Heller*, it is reasonable to predict that the Court will incorporate the Second Amendment. As of August 2009, at least two Circuit Courts of Appeal have scrupulously followed precedent and refused to apply to Second Amendment to state regulations, reasoning that "the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions."[90] A panel of the Ninth Circuit found that firearms possession is a fundamental right and incorporated, but the entire circuit court set the decision for rehearing en banc, casting doubt on its effect.[91] Judge Easterbrook's clear opinion in the Seventh Circuit held that under Supreme Court precedent only the Supreme Court has the prerogative to overrule its own precedents. It has told lower courts that they do not have the license to go their own ways and anticipate what the Supreme Court might decide under a new case. To do so "undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision."[92]

Second, the tenor of the case shows how deeply the general idea of incorporation has penetrated the constitutional culture. Even a conservative Supreme Court that restricts the extent of rights has jettisoned the reasoning of conservative justices in the 1960s who opposed incorporation on federalism grounds.

The due process revolution therefore *nationalized* criminal justice by opening the door to federal court intervention of local and state agencies and courts, making criminal procedure somewhat more uniform. The due process revolution was in sync with the Warren Court's other major agenda items: eradicating legal racial segregation, providing "one person, one vote," and protecting First Amendment rights. Together, all of these advances were designed to ensure the equal participation of all citizens in the political life of the nation. The due process revolution and the other parts of the Court's agenda generated enormous antagonism toward the Supreme Court and its liberal chief justice, Earl Warren, on the part of conservative politicians and many in law enforcement. Since 1970, the Supreme Court, with a more conservative membership under Chief Justices Warren Burger and William Rehnquist, and now Chief Justice John Roberts, has limited the expansion of pro-defendant criminal procedure rights but has not overruled incorporation. Most Americans, while having mixed views of defendants' rights, nevertheless have come to accept the nationalization of the Bill of Rights.

The Counterrevolution

With historic regularity, revolutions produce counterrevolutions. The Warren Court had severe political critics, and a reaction to its rulings began in the early 1970s. Between 1969 and 1996, twelve new justices were appointed to the Court, four by President Richard M. Nixon, one by President Gerald R. Ford, three by President Ronald Reagan, two by President George H. W. Bush, and two by President Bill Clinton. The appointment of ten new justices by conservative Republicans and two by a "new," or middle-of-the-road, Democrat definitely swung the ideological makeup of the Court to the right. This section provides an overview of the shift from liberal to more-or-less conservative rulings in the period since the due process revolution. This overview is a prelude to most of the cases analyzed in this text.

THE COUNTERREVOLUTION THAT WASN'T: THE BURGER COURT (1969–1986) President Nixon's appointment of four justices led many to believe that the selective incorporation of the Bill of Rights would be overturned.[93] These fears were abetted by Chief Justice Burger's attack on the *Miranda* doctrine and the *Mapp* exclusionary rule in his early cases.[94] The Burger Court did not, however, execute a reactionary return to the preincorporation era. Instead, it held the line against the expansion of rights. "In place of the expected counterrevolution, the Burger Court waged a prolonged and rather bloody campaign of guerilla warfare. It typically left the facade of Warren Court decisions standing while it attacked these decisions from the sides and underneath."[95] For example, the *Miranda* rule stands after more than thirty years of conservative criticism, but a "public safety" exception allows prewarning questions (*New York v. Quarles*, 1984), and a defendant may subsequently be questioned after having exercised *Miranda* rights by requesting the right to remain silent (*Michigan v. Mosley*, 1975). And although the *Mapp v. Ohio* (1961) exclusionary rule was not overruled, an exception was created that allowed the introduction of evidence based on a defective search warrant if the officer relied on it in "good faith" (*United States v. Leon*, 1984).

The Burger Court was not uniformly pro-prosecution and did extend defendants' rights on several occasions. For example, it established a warrant requirement for entry of a house to make a felony arrest (*Payton v. New York*, 1980), and it declared random automobile stops to check driver licenses to be a Fourth Amendment violation (*Delaware v. Prouse*, 1979).

One measure of the success of a Supreme Court's "agenda" over the period of a chief justice's tenure is whether the Court provides a coherent conceptual foundation for its decisions. In general, scholars have found the Burger Court to be lacking a coherent set of guiding principles by which decisions can be measured. Professor Charles Whitebread, examining the lack of doctrinal consistency, has suggested five ways in which the Burger Court approached criminal procedure cases that account for its generally conservative rulings, while not going to the point of rolling back the Warren Court's Bill of Rights incorporation revolution.

First, the Court emphasized the Crime Control Model of the criminal process and was "eager to accommodate what it perceived as legitimate needs of effective law enforcement" rather than taking an evenhanded approach.[96] Second, the Court established a **hierarchy of constitutional rights**. The Sixth Amendment rights concerned with the integrity of the trial and the truth-finding process are protected more strictly than are Fifth Amendment self-incrimination issues, which in turn are given more protection than Fourth Amendment rights concerning search and seizure. Third, this hierarchy is connected with a concern for the factual guilt or innocence of the party whose case is before the Supreme Court. Whitebread believes that this concern distorted the Supreme Court's overriding duty to develop sound and principled general rules for the guidance of the entire court system.

A fourth aspect of the Court's approach was a "jurisprudential preference for case-by-case analysis rather than announcing its decisions in criminal cases in rules."[97] Whitebread sees this as the most dangerous characteristic of the Court's approach. This attribute fails to give lower courts and police clear-cut rules by which to guide their actions. Whitebread correctly predicted a spate of future cases generated by a need to determine how the narrow distinctions established by the Court are to be applied in specific instances. Fifth, the Court fostered the "new federalism" that partially closed the door to federal courts for state defendants, thus transferring significant power over criminal procedure to the state courts. For example, the Court applied a cost-benefit analysis in *Stone v. Powell* (1976) and ruled that Fourth Amendment claims, once raised and decided in state courts, could not be heard again on federal habeas corpus when the state provided a full and fair hearing. The narrowing of federal habeas corpus jurisdiction reversed a hallmark of the Warren Court: opening the door of the federal courts to state defendants in *Fay v. Noia* (1963). The reimposition of procedural barriers indicated an attitude of wishing to return to an era when federal protection of constitutional rights was minimal.

THE COUNTERREVOLUTION THAT WAS: THE REHNQUIST AND ROBERTS COURTS (1986–PRESENT) It now seems clear that with a few exceptions, the Supreme Court from the mid-1980s to the present has taken a far more conservative stance than the Burger Court. Mary Weddington and W. Richard Janikowski write about the "counter-revolution that is."[98] The counterrevolution can be seen in search and seizure decisions. Although a few Rehnquist Court rulings have upheld traditional Fourth Amendment rights, these have had little practical effect on law enforcement. For example, the Court ruled that the common law "knock and announce" procedure is required by the Fourth Amendment. This ruling has little practical effect, for the "Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests" (*Wilson v. Arkansas*, 1995). On the other hand, rulings that acknowledge drug courier profiles as a basis to stop individuals (*United States v. Sokolow*, 1989), that authorize "bus sweeps" for drugs (*Florida v. Bostick*, 1991), that allow searches based on anonymous telephone tips (*Alabama v. White*, 1990), that uphold the "protective sweep" of homes during an arrest (*Maryland v. Buie*, 1990), that permit "plain feel" pat-downs (*Minnesota v. Dickerson*, 1993), that license electronic eavesdropping without minimization procedures (*United States v. Ojeda Rios*, 1990), that sanction arrests in violation of international law (*United States v. Alvarez-Machain*, 1992), that treat a police chase as not being a "search and seizure" (*California v. Hodari D.*, 1991), and that favor full searches of containers in automobiles without warrants (*California v. Acevedo*, 1991) have all substantially unshackled police from serious Fourth Amendment limitations. Many see this diminution of rights as giving political support to an uncontrolled war on drugs and as condoning modern racism.

As for the highly controversial law of confessions, John Decker writes, "The Burger and Rehnquist Courts have more recently reflected a degree of apparent discomfort with the principles of *Miranda*, for the great majority of the opinions interpreting *Miranda* decided since the Warren Court period have not vigorously followed its lead."[99] For example, the use of undercover agents in a jail setting is allowed. While *Miranda* on its face prohibits custodial interrogation without Fifth Amendment warnings, the Court held that because a jailed suspect who speaks to an officer posing as a fellow inmate is not compelled, no warnings need be given (*Illinois v. Perkins*, 1990). The Court has also supported an aggressive campaign by federal prosecutors to disallow effective opposing defense attorneys (*Wheat v. United States*, 1988), claiming there would be a conflict of interest, and has allowed money paid to defense attorneys by drug defendants to be forfeited (*United States v. Monsanto*, 1989; *Caplin & Drysdale v. United States*, 1989).

More telling than specific conservative rulings is the Rehnquist Court's tampering with underlying doctrines. In *Arizona v. Fulminante* (1991), a majority overturned a long-standing precedent and ruled that a coerced confession could be deemed "harmless error." Thus if police coerce a confession and a court, in error, allows such a constitutionally invalid confession to be heard by a jury, a conviction based on the coerced confession can be upheld. The Court was explicit in directing that the central purpose of a trial is to decide questions of guilt or innocence; the introduction of unconstitutional evidence is of lesser importance. Perhaps the most dramatic example of the Rehnquist Court as an activist-conservative Court, interested more in achieving the "right" result than in upholding basic principles, is *Payne v. Tennessee* (1991), which allowed victim impact statements at death penalty hearings. What has shocked commentators is that *Payne* overruled two precedents that were only four years old and that Chief Justice Rehnquist openly stated that precedent is not important where earlier cases were decided by close votes (*Booth v. Maryland*, 1987; *South Carolina v. Gathers*, 1989). He believed "that *stare decisis* 'is not an inexorable command' but instead a 'principle of policy.'. . . *Stare decisis* principles are at their weakest point in 'constitutional cases, ' he said, because correction through legislative initiative is virtually impossible."[100] He went on to say that precedent is more important in property and contract rights than in procedural and evidentiary cases. Justice Thurgood Marshall, dissenting, noted that under the majority's theory, the Court's rulings cannot be considered "impersonal reasoned judgements" and that "[p]ower, not reason, is the new currency of this Court's decisionmaking." This was a polite way of saying that the majority opinion was lawless.

The Rehnquist Court has extended the work of the Burger Court in closing the door to federal and collateral appeals. *Brecht v. Abrahamson* (1993) made it more difficult for defendants to challenge errors on habeas corpus review of constitutional error than on direct appeal. Justice Rehnquist "explained that the beyond-reasonable-doubt standard had become too costly for the government."[101] These decisions display a Court that has become hostile to the claims of defendants. What is curious, and even brilliant, is that the Court has shifted virtually every rule and underlying doctrine in favor of the state while at the same time maintaining the facade of the essential right. Thus the *Mapp* exclusionary rule exists and the *Miranda* warnings are still required, but these general rules are shot through with exceptions.

These trends continue into the Roberts' Court era. A characteristic has been the reduction of the application of the Fourth Amendment exclusionary rule, meaning that defendants cannot seek that remedy to challenge illegal police searches and seizures. In *Hudson v. Michigan* (2006) the Court ruled that even though violations of the knock-and-announce rule are constitutional violations, the rule is designed to protect life and limb and not restrict the seizure of evidence, so the exclusionary rule does not apply. And in *Herring v. United States* (2009) the exclusionary rule was held not applicable to illegal search and seizures when police rely on erroneous information about nonexistent outstanding arrest warrants in police computers. Some commentators believe that such rulings pave the way to the Court overruling the exclusionary rule.[102]

LAW IN SOCIETY

Terrorism, Justice, and Liberty

The Constitution's role in criminal justice, effectuated through criminal procedure law, is, in the most general terms, to maintain a balance between order and liberty. The twentieth century tragically produced too many examples of nations with total order and almost no liberty. Nazi Germany (1933–1945) and Stalinist Russia (1922–1953) were the largest and best documented examples, but numerous state tyrannies with torture apparatuses have existed since the middle of the last century in countries like Greece (1967–1974), Argentina (1974–1986), Zaire (now the Democratic Republic of the Congo) under Mobuto Sese Seko (1971–1997), and others. These countries lacked functioning democracies and are aptly labeled **police states**. Fewer examples of total anarchy exist, but in Lebanon from 1975 to 1987, parts of West Africa (Liberia and Sierra Leone, late 1980s to about 2003), Somalia in East Africa for the last twenty years, and central Africa where wars have sporadically erupted between Congo, Rwanda, and Burundi, warlords have flourished, children were drafted into rag-tag armies, millions have died violently, and outrages like mass rape and chopping off peoples' limbs have been common. The lack of order is as hideous in its own way as life in a police state.

The United States has experienced riots, examples of sustained lawlessness (e.g., Kansas shortly before the Civil War; western territories in the late nineteenth century), and a major Civil War (1861–1865), but has been free from the kind of anarchy resulting from a collapse of official order that makes meaningful personal liberty impossible. Instead, the threats to liberty in America have more often resulted from excessive government power. The worst experience, of course, was the existence of constitutionally authorized slavery, followed by a century of Jim Crow repression, which was sustained by totalitarian regimes over chattel slaves to 1865, and highly repressive authoritarian regimes thereafter. It says something about the ideals of liberty that America overcame the enormous pressure of economic advantage, deep-seated prejudice, and inertia to begin to move beyond this dark heritage. This section explores a different source of threats to liberty, connected to the state's criminal justice apparatus, which in the past has in fact submerged personal liberty and today has the potential to bring large numbers of citizens and residents under excessive and unconstitutional government control.

Justice and Liberty in Times of National Crisis

From the first decade of our nation's existence to the present, foreign wars have excited partisan passions, unleashing very real attacks on civil liberties. In times of war the national emergency concentrates necessary extra power in the hands of the government. In almost every American conflict, war was accompanied by war hysteria, very rarely justified, which led to the misuse of the government's concentrated power to imprison innocent and even loyal citizens. In most cases, the cessation of foreign hostilities has eliminated the assault on liberty, but the twentieth-century "national-security state" and a seemingly endless global war on terror (GWOT) has left us with structures that carry the risk of permanently curtailed civil liberties.

In the 1790s undeclared naval wars by Britain and France were carried out against the fledgling United States in the Atlantic Ocean. The pro-English, Federalist-controlled Congress passed the Alien and Sedition Laws, fanned by political paranoia and aimed at mythical fears that pro-French political rivals in the new Republican Party, led by Thomas Jefferson, would overthrow the government. These laws, clear First Amendment violations, made it a crime to disparage the government. A number of political prosecutions, convictions, and imprisonments resulted. The worst of these laws were repealed when the crisis ebbed, but they left a residue—the paranoid use of criminal justice in times of crisis.[103]

Perhaps the most justified use of extra-legal imprisonments during a war was carried out when President Abraham Lincoln suspended the writ of habeas corpus in thousands of cases during the Civil War. Congress validated his exercise of the Suspension Clause. Many detainees were indeed southern sympathizers and collaborators. Although historians have granted the necessity and even the restraint of these acts, the Supreme Court repudiated this unilateral presidential power after the war ended by ruling that detained citizens could not be tried and convicted by military tribunals while civilian courts were functioning (*Ex Parte Milligan*, 1866).[104]

World War I spawned patriotic enthusiasm and a revival of paranoid fears, combined with virulent ethnic hatreds and class antagonisms that had been brewing for decades. In 1917 Congress passed an Espionage Act (also known as the Sedition Act) that, among other things, criminalized willfully obstructing military recruitment. The Supreme Court upheld the convictions of Socialists who peacefully printed and distributed pamphlets arguing against the war (*Schenck v. U.S.*, 1919), and the imprisonment of Eugene Debs, longtime head of the Socialist Party who ran for president from federal prison in 1920 and won almost a million write-in votes. These prosecutions clearly stifled free speech. In reaction, the American Civil Liberties Union (ACLU) was formed, and in a series of landmark cases, the Supreme Court strengthened First Amendment freedoms, limiting the ability of government to stifle unpopular political expression, and incorporated First Amendment provisions.[105] In the turmoil following World War I, a fear of Bolsheviks, a deadly Wall Street bombing, and assassination threats led to the "Palmer raids" in which thousands of people around the country, mostly leftist or pro-labor, were rounded up without warrants or probable cause by federal authorities for interrogation and deportation. The raids were organized by J. Edgar Hoover, who was then a special assistant to Attorney General A. Mitchell Palmer.[106] While this hysteria faded in the prosperity of the 1920s, it showed once again that American society was inherently prone to paranoid overreaction in times of national crisis. Worse was to come.

It is widely known that more than a hundred thousand Japanese Americans were interned in concentration camps for the duration of World War II in a tragic overreaction to the Japanese attack on Pearl Harbor. This horrible injustice, which has been acknowledged by the U.S. government in later years with reparations, was spurred by a combination of war fears that spies lurked among the Japanese-American population, venomous racism, and openly acknowledged greed as the interned citizens and residents were forced to sell their lands and goods at fire-sale prices.[107] Even the Supreme Court could not withstand the pressures of the moment and upheld the internment in a shameful ruling (*Korematsu v. United States*, 1944). Also during World War II, President Franklin D. Roosevelt authorized wiretapping and eavesdropping for the protection of national security, a necessary expansion of power that led to later abuses that were curbed by the Foreign Intelligence Surveillance Act (FISA).[108]

The Supreme Court finally curtailed excessive presidential wartime power in *Youngstown Sheet & Tube v. Sawyer* (1952). President Harry S. Truman nationalized the steel industry by an executive order during the Korean War in order to break a strike that threatened war production. The Supreme Court swiftly ruled that this was an unconstitutional extension of the president's war powers. Justice Jackson's authoritative concurring opinion in *Youngstown Sheet & Tube* has been important in assessing claimed presidential powers in the GWOT. Presidential power under Article II of the Constitution varies in strength; it is most powerful when the president acts with a congressional authorization, weakest when the president acts against a congressional declaration, and uncertain when the Congress is silent on an issue. Because Congress refused to authorize the seizure, it was declared unconstitutional.[109] The Supreme Court evaded deciding whether the war in Vietnam (1963–1975), which was not directly voted on by Congress, was constitutional. It issued mixed rulings regarding civil liberties issues arising out of that war, upholding the publication of the "Pentagon Papers" under the First Amendment (*New York Times Co. v. United States*, 1971), but refusing to declare that military files on thousands of civilians, including Congress persons, activist political organizations, and U.S. Army surveillance of peaceful political activity were a First Amendment violations (*Laird v. Tatum*, 1972). The protests against the Vietnam War in the 1960s and early 1970s produced repressive political crimes and political trials (such as the Anti-Riot Act of 1968 and the infamous Chicago 7 trial of antiwar activists). This carried over into the wiretapping abuses of the Nixon administration and led to the president's resignation under threat of impeachment.[110] While the post-1960s era generated a permanent national consensus that reduced earlier racial antagonisms, spawned a gender equality movement (also necessitated by economic pressures), and supported personal liberties, it also confirmed a deep ideological national divide, with a portion of the nation attributing the military defeats of Korea and Vietnam to perverse liberals unwilling to wage just war to the bitter end, and ready for mobilization in the next national war crisis.

The longest and most severe threat to civil liberty was the rise of the "national security state" for at least half of the twentieth century in an effort to thwart the real threats of fascism, Nazism, and expansionist Soviet communism under Stalin. Fascism and the Axis Powers were defeated both by military victories in World War II and by postwar assistance that painstakingly built democratic regimes in Japan, Germany, and Italy. The long struggle to contain communist global expansion warped American politics and justice in the 1950s with political trials, loyalty oaths, and communist witch hunts (which missed the real Soviet spies). Artists were blacklisted, people lost jobs without really knowing why, local police departments formed "red squads" for snooping on citizens, CIA operatives spied on Americans within the country, and the FBI wiretapped Martin Luther King Jr. and other civil rights leaders—all of which led to a climate of political fear in which the FBI equated a belief in racial equality or other liberal opinions with support for communism.[111]

After these emergency periods passed, repressive laws were typically repealed or declared unconstitutional, and curbs were even placed on excessive law enforcement behavior. Nevertheless, a huge and permanent national security apparatus was created, which may be necessary in a dangerous world, but with the ready capacity to snoop on every house, telephone and computer in America, and the ability, if mobilized, to monitor, harrass, and detain thousands of citizens, as is now being done to illegal and many legal immigrants. All that would be needed to unleash such terrible and unconstitutional powers would be a government that believed that such action was necessary backed up by a plurality of public opinion. In fact, the United states came very close to such a pass in the first decade of the twenty-first century.

The Global War on Terror and the Threat to Liberty

Almost a decade after the September 11, 2001, terrorist attacks on the United States by radical jihadists that took almost three thousand lives, analysts perceive that the so-called "global war on terror" (GWOT) was used as an excuse to draw the United States into a military quagmire in Iraq. The U.S. is slowly drawing down its role in Iraq while the Obama administration is increasing America's war effort in Afghanistan, from whence the militant Islamist terrorists originated. For a number of years the GWOT fueled support for the Bush administration's Iraq policy, but over time the costs of the Iraq war and its negligible connection to terrorism soured the American electorate, which voted for a cautious policy of withdrawal from Iraq and military containment in Afghanistan in the elections of 2006 and 2008.

Perhaps the most incendiary aspect of the Bush administration's GWOT, which may continue in a less virulent form in the Obama administration, was the way in which it violated international law and treaties in the treatment of captured fighters and detainees, including the authorization of torture at the highest levels of government, and has unlawfully spied on Americans. This large and varied topic is relevant to criminal justice because the penetration of homeland security concerns and mechanisms into local law enforcement poses direct threats to liberty; the attractiveness of "effective" extra-constitutional measures has begun to degrade legal protections to "the Blessings of Liberty."

The rationale for extra-legal measures in the GWOT begins with the war metaphor for the anti-terror campaign, as opposed to viewing terrorism as partly a criminal justice issue. The war metaphor, oddly enough, makes it difficult to think of and act on more effective counterterrorism strategies.[112] In our polity, the *criminal model* includes the full panoply of constitutional rights and protections, and limitations on government power, in comparison to alternate systems of justice detailed previously in this chapter. The *war model*, in contrast, allows the government to act with far fewer legal constraints because its goal is not deterrence and punishment but prevention.[113] Under this "new 'paradigm of prevention' . . . prosecutors [have used] every tool at their disposal to investigate, observe and detain potential terrorists before they strike."[114] In times of war, civil liberties are curtailed. The press is more circumspect; military censorship is necessary; certain areas are off limits; freedom of movement is curtailed; and intelligence agencies are given a freer hand to probe civilian secrets. This had happened in the United States by 2006, as a guest scholar at a prestigious think tank labeled Bush administration efforts as "an *extralegal* terrorism war" that was conducted without "making proper legal provisions for . . . practices" such as domestic spying, indefinite detentions, and "conducting tough interrogations"[115]

If, as *The 9/11 Commission Report*[116] makes clear, the jihadist enemies of modern, secular states in the global economy are grounded in extremist views of Islam and in social and economic malaise, it would seem that classic counterinsurgency tactics that rely heavily on police techniques of monitoring, infiltration, interdiction, and prosecution, along with the judicious use of the military and material support for civilians not involved in terrorism, is the way to successfully counter terrorism.[117] It is, after all, patient, meticulous police work in Britain and elsewhere that identified and thwarted the 2006 plot by a small group of criminal terrorists to destroy airliners with explosives disguised as carry-on liquids.[118] The understanding that law enforcement is a key to fighting terrorism is reflected in the Anti-Terrorism Advisory Councils. These councils, involving federal, state, and local governments and the private sector, were set up by the Justice Department to coordinate antiterrorism training and action.[119] The bulk of their activity focuses on police and prosecution.

Detainees: The Court's Finest Hour

The Supreme Court during World War II did not muster the will to support constitutional liberty in the face of a massive war effort, deep prejudice, and executive action. The GWOT's threat to liberty arose in detainee cases. This time the Court was able to muster a majority that balanced the genuine needs of the government against excessive threats to liberty and the writ of habeas corpus posed by the government's acts.

The Afghanistan war brought a large number of detainees within American control. Some were Taliban fighters captured on the battlefield and some were al Qaeda members. Others turned over locals to U.S. forces that included al Qaeda members, but also entirely innocent civilians who were kidnapped for profit.[120] Few were dressed in standard military uniforms or organized into military units of a regular state's army. These detainees were clearly not classic prisoners of war under the Geneva Conventions, to which the United States is a signatory. The State Department's legal advisor noted that the "restraints and sanctions" of the Geneva Conventions still "apply to both lawful and unlawful belligerents."[121]

Secret Justice Department legal memoranda to the contrary advised President Bush that as commander-in-chief of the armed forces, he had *unilateral* authority to detain *anyone* thought to be a terrorist, whether arrested in the territorial United States or captured on a foreign battlefield. Such persons could be secretly detained *indefinitely* without recourse to legal process. The Geneva Conventions were deemed "obsolete."[122] These lawyers "contended . . . that the president wasn't bound by laws prohibiting torture and that government agents who might torture prisoners at his direction couldn't be prosecuted by the Justice Department."[123] They also argued that pain-inflicting methods of interrogation did not constitute torture. This argument "elaborated the Bush administration's view that the president has virtually unlimited power to wage war as he sees fit, and neither Congress, the courts nor international law can interfere." The *Wall Street Journal* called this "an exceptional argument."[124] These arguments clearly violated international and American law.

Acting on this advice, "President Bush signed a secret order granting new powers to the CIA and authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness."[125] This led to acts of torture committed by U.S. personnel and the attempt to confine detainees *indefinitely* without any review of their status under the laws of war that had been codified in the Uniform Code of Military Justice (UCMJ).[126] Detainees were held in military bases in Afghanistan and other countries and some were transferred to a newly constructed prison at the Guantanamo Bay naval base which was under complete U.S. control.

Defense lawyers working for corporate law firms and civil liberties groups, with great difficulty, began to represent individual detainees. The claim of inherent power to detain persons indefinitely under a "unitary executive" set up an historic legal confrontation between the executive and judicial branches. The result thus far has been four landmark Supreme Court decisions that have fundamentally reasserted the Rule of Law and constitutional balance in the American governmental system even in a time of war and terrorism.

The most recent and most important case, ***Boumediene v. Bush*** (2008), has summarized the monumental constitutional struggle. Shortly after the 9/11 attacks Congress authorized President Bush to use "all necessary and appropriate force" against those who perpetrated the attacks. In ***Hamdi v. Rumsfeld*** (2004) the Supreme Court held that this authorization gave the president authority to detain combatants. Because Hamdi was an American citizen he was transferred from Guantanamo to the continental United States. Hamdi claimed he was not a combatant. The Circuit Court ruled that Hamdi had no right to challenge the authority of the president, under his Article II powers as commander-in-chief of the armed forces, to indefinitely detain an alleged combatant for the duration of the GWOT. The Supreme Court reversed, and eight of the justices ruled, on varying grounds, that Hamdi could not be held indefinitely without some kind of due process hearing. Yaser Hamdi, incidentally, was released from custody in October 2004 and transferred to Saudi Arabia.[127]

The Bush administration has also claimed that detainees held at Guantanamo have no right to petition courts under habeas corpus, because Guantanamo is under the *de jure* sovereignty of Cuba. The Supreme Court has twice rejected this argument. In ***Rasul v. Bush*** (2004) it held (6–3) that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured during hostilities abroad and incarcerated at Guantanamo Bay, because "the writ of habeas corpus has served as a means of reviewing the legality of Executive detention" and because the writ "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." The Court in *Boumediene* added, in dealing directly with the constitutional right to habeas and not just with the habeas law enacted by Congress, "that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory." After examining the prior case law minutely, the Court concluded that the government's argument would make it "possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this."

While appeals from detainees were pending, Congress passed the Detainee Treatment Act of 2005 (DTA), which stripped statutory habeas corpus jurisdiction from federal courts over Guantanamo cases and gave the Court of Appeals for the District of Columbia Circuit "exclusive" jurisdiction to review detainee status decisions. The Supreme Court in ***Hamdan v. Rumsfeld*** (2006) held that (1) military commissions set up by the Bush administration to try detainees were illegal because they were not established by Congress and did not comply with the Uniform Code of Military Justice of the Geneva Conventions, and (2) the DTA did not apply to pending cases like Hamdan's. The military commissions allowed hearsay obtained by coercion and verdicts by a two-thirds vote. (Hamdan, incidentally, was finally tried and convicted by a military tribunal, for supporting terrorism as a low-level driver for Osama bin Laden, sentenced to five and a half years, given credit for five years of time served, and was sent back to Yemen and released after completing his sentence.[128])

After *Hamdan*, Congress established military commissions in an act that again stripped the Courts of hearing habeas corpus appeals. In *Boumediene v. Bush* (2009) the Supreme Court (5–4) held that the act of Congress was not an adequate substitute for a habeas corpus petition. More significantly, it firmly held that the *constitutional* habeas provision, known as the Suspension Clause (U.S. Const. art. I., §9, cl.2), "has full effect at Guantanamo Bay." And even more important was the basis of Justice Kennedy's majority opinion. *Boumediene* intimately linked the writ of habeas corpus to the very structure of the Constitution's separation of powers: "This design serves not only to make Government accountable but also to secure individual liberty." Because "the Framers considered the writ a vital instrument for the protection of individual liberty," it follows that the "separation-of-powers doctrine, and the history that influenced its design, . . . must inform the reach and purpose of the Suspension Clause." Thus, unless Congress declares the kind of emergency (that existed during the Civil War) that suspends habeas corpus, Congress cannot water -down the effective powers of a habeas court and cannot "switch the Constitution on or off at will."

Blowback

What is the likelihood that GWOT techniques will seriously erode the liberties of Americans? It is possible to create exaggerated fears. For example, the worst case of the routine, prolonged and truly hideous use of torture on scores of suspects to obtain confessions (several were innocent and sentenced to death), occurred for almost two decades in Chicago's Area 2 precinct in the 1970s and 1980s. The leader of the effort was the precinct's commander, Jon Burge. Burge apparently learned torture techniques in 1969 while serving as an MP in the Ninth Military Police Company of the Ninth Infantry Division in a U.S. facility in the Dong Tam Delta of Vietnam, which held over 1,500 Viet Cong POWs. Despite this sickening case, it seems that no other Vietnam veterans brought torture home to domestic law enforcement. It therefore seems an overreaction for one commentator to warn that when "troops do pull out of Iraq, tens of thousands of them will take up jobs in domestic law enforcement" and will enforce a religious profiling in an America "where warrantless searches are the norm, where racial or religious profiling is part of protocol, and where secret detentions are accepted."[129]

Without hyper-exaggerated fears, there is still much to worry about. Chapter 3 explains how a rarely used pre-9/11 technique of delaying notice of search warrants (called "sneak and peek") has expanded in ordinary law enforcement following its inclusion in the USA PATRIOT Act. A creepy example of this practice was recalled by Brandon Mayfield, a lawyer and American Muslim who was wrongly targeted as a terrorist. Mayfield, his wife, and children would come back to their modest home and find obvious signs that someone was repeatedly entering: window blinds adjusted higher than anyone could reach, oversized footprints in the living room's plush white carpet, a locked deadbolt that the Mayfields never used, and digital clocks and the VCR blinking as if someone had tripped the breaker.[130]

Another concern is the expanded use of the military in domestic law enforcement. Some scholars and libertarian commentators have worried about the excessive use of para-military SWAT teams to enforce the law.[131] In this light, it has been unnerving to learn that Vice President Dick Cheney and other top administration officials, consisting of the same lawyers who said that acts resembling torture were legal when authorized by the president, "argued that a president had the power to use the military on domestic soil to sweep up the terrorism suspects, who came to be known as the Lackawanna Six, and declare them enemy combatants." This use of the military appears to violate the Posse Comitatus Act of 1878.[132]

The largest concern is with the potential for domestic spying. In the 1960s Congress authorized law enforcement electronic eavesdropping under very strict warrant procedures.[133] In 1978 Congress closed a loophole and brought national security eavesdropping under a special warrant procedure, with a Foreign Intelligence Surveillance Court (FISC) consisting of specially selected federal district judges. Between 1979 and 2001 there were 14,036 applications for FISA surveillances or searches, and all but one of these requests were granted.[134] It seems that the eavesdropping was not being misused for partisan political advantage by the various administrations, nor to trample on First Amendment rights. After 9/11, 2001, the Bush administration authorized the National Security Agency (NSA) to monitor thousands of telephone calls and international e-mails where one party was not in the United States and the other was, without FISA warrants. The government claimed that the process was too cumbersome, although the FISA law allowed warrantless surveillance during emergencies, with after-the-fact warrants. The NSA was engaged in "data mining," which picked up a huge number of messages from locations maintained by private telecommunications companies, screened them via supercomputers for those with tell-tale words, and had FBI agents follow up with investigations.[135] An expert called this a classic fishing expedition.[136] "President Bush characterized the eavesdropping program as a 'vital tool' against terrorism; Vice President Dick Cheney said it has saved 'thousands of lives.'"[137] The bitter irony is that the FBI has complained that virtually all of the "steady stream of telephone numbers, e-mail addresses and names" sent to the FBI by the NSA just after the 9/11 attacks, which grew to a flood and required "hundreds of agents to check out thousands of tips a month," led to dead ends or to innocent Americans.[138] Indeed, a report on this matter authorized by Congress and released in mid-2009, "produced by the inspectors general of five federal agencies, found that other intelligence tools used in assessing security threats posed by terrorists provided more timely and detailed information" than warrantless eavesdropping.[139] There are signs that the NSA has continued warrantless domestic surveillance, and it is unclear whether the Obama administration has been sufficiently effective in curbing abuses, although it "said it had taken comprehensive steps to bring the security agency into compliance with the law."[140]

The latest concern for personal liberty stemming form the GWOT is the development of Seventy-two fusion centers as part of an Information Sharing Environment (ISE) in the United States.[141] These have been in the works for four years and are strongly supported by Homeland

Security Secretary Janet Napolitano. The impetus behind fusion centers is to build a total, interlocking database designed to identify potential terrorists. The sources of data are truly staggering. Most fusions centers subscribe to private information-broker services that keep billions of records about millions of Americans, including unlisted cellphone numbers, insurance claims, driver's license photographs, credit reports, car-rental databases, real estate records, currency transactions, corporate charters, utility records, personal locations, associates, relatives, firearms licenses, and a Federal Trade Commission database with information about hundreds of thousands of identity-theft reports. Maryland authorities rely on a little-known data broker called Entersect, which claims it maintains 12 billion records on about 98 percent of Americans. This private data is combined with a host of government files, including criminal justice information and traffic tickets. Some fusion centers claim access to top-secret CIA data. If even one fusion center has access to CIA data, it will be accessible by others.

To these massive data sets, police in dozens of cities enter information on "terror tip sheets" in a Suspicious Activity Reporting (SAR) initiative. Patrol officers enter activities that seem "out of place," such as someone buying police or firefighter uniforms, taking pictures of a power plant, or espousing extremist views. By 2014 the plan is for fusion centers to have in place a standardized system of codes for suspicious behaviors to be used by the 800,000 officers in the 18,000 state, local, and tribal law enforcement agencies.

The centers use law enforcement analysts and sophisticated computer systems to compile, or fuse, disparate tips and clues and pass along the refined information to other agencies. The approach is justified on the claim that terrorists typically have their targets under surveillance before an attack, conducting dry runs of their operations to note guard schedules, to gauge how emergency personnel react to false alarms or abandoned packages and to seek out security weaknesses. In essence, the operations of the fusion centers will involve channeling all the data collected into the computer system of a centralized security agency and the application of data mining to the reports and databases to identify suspicious individuals.

What is also impressive, or of concern depending on one's perspective, is the level of cooperation between local law enforcement, federal law enforcement, intelligence agencies, homeland security, and the military. At present the fusion centers are organized by the states and differ in size and focus. Sizeable federal grants have supported their development.

Needless to say, fusion centers have raised civil liberties concerns. One is that the SAR system may open the door to racial and religious profiling. In September 2007, a twenty-four-year-old Muslim-American journalism student at Syracuse University was stopped by a Veterans Affairs (VA) police officer in New York for taking photographs of flags in front of a VA building as part of a class assignment. The student was taken into an office for questioning, and the images were deleted from her camera before she was released.

Related to this, the SAR reporting authority is so overbroad as to give law enforcement officers justification to harass practically anyone they choose, and to collect personal information and to pass it along to the intelligence community as suspicious.

Another problem is that the SAR system may be illegal. After the scandals raised by "Red Squads" during the cold war, the federal government adopted a prevision of the code of Federal Regulations that bars law enforcement agencies from compiling dossiers on people not involved in wrongdoing. Even if names of "suspects" are not included, the data-mining capabilities of the Information Sharing Environment (ISE) are so powerful that with a few items, innocent individuals can be picked out.

There is also a concern that involving local police in a mission to seek out terrorists will lead to First Amendment violations of privacy and protected activities. The North Central Texas Fusion System bulletin stated that it is "imperative for law enforcement officers to report" the activities of lobbying groups, Muslim civil rights organizations, and anti-war protest groups in their areas. Maryland State Police used undercover officers to spy on non-violent peace activists and anti-death-penalty activists for fourteen months. Some of the reactions of police are absurd. A fifty-four-year-old female artist and fine arts professor at the University of Washington was stopped by Washington State Police for taking photographs of electrical power lines as part of an art project. She was searched, handcuffed, and placed in the back of a police car for almost half an hour before being released.

Another concern is that fusion centers have grown without much oversight and may not be accountable to the public through the legislature. Jim Dempsey, vice president for public policy at the Center for Democracy and Technology, a nonpartisan watchdog group in the District of

Columbia, said that “Congress and the state legislatures need to get a handle over what is going on at all these fusion centers.”

If the goal is to identify terrorists, there is a threat to their effectiveness if poor intelligence, in the words of Mike German, a former FBI special agent and ACLU counsel, pollutes the information bloodstream of the fusion centers.

It is worth noting that the national model for fusion centers requires them to have and submit a privacy policy, guided by a federal matrix, to the Departments of Justice and Homeland Security for approval. ACLU lawyers have met with police and federal officials to try to work out tougher safeguards on vetting information that goes into the reports, police training, and privacy and civil liberties protections. A grand lesson of constitutional government is that the state is typically more effective when it is transparent and acts in ways that do not threaten civil liberties. The cooperation between civil liberties lawyers and those responsible for fusion centers suggests that, despite current problems and the awesome power in a central national data base, this lesson is in play in contemporary criminal justice and national security circles.

Summary

Criminal procedure is a branch of constitutional law that pits public safety against the guarantee of liberty. This tension is resolved by the U.S. Supreme Court, which balances the need for public order against the need for liberty. The poles of the tension between order and liberty are also represented by the Crime Control Model, which stresses finality, and the Due Process Model, which stresses the overriding need to avoid miscarriages of justice. These orientations influence the direction of the Court’s decisions. A major concern of criminal procedure is that innocent people can be found guilty of crimes. Criminal procedure erects many legal protections for people charged with felonies, but alternate justice systems, with different and less protective legal regimes also exist within society. These include the civil, misdemeanor, juvenile, immigration, and terrorism justice systems.

The legal foundation of criminal procedure includes understanding the definition, classification, and functions of legal rules. Functions include substantive law, which creates rights and obligations; procedural law, which directs officers, lawyers, and judges about how to carry out their functions; and remedial law, which determines what benefits or remedies can be won by parties who prevail in lawsuits. Criminal procedure is procedural law in guiding the conduct of criminal justice personnel, but simultaneously substantive because it creates constitutional rights of suspects and defendants.

The legal foundation includes the jurisdiction and hierarchy of courts. Appellate courts resolve issues of law; they do not retry the facts of a case. The U.S. Supreme Court decides only federal issues, but when it does, its rulings under the Constitution are superior to federal legislation and to state law (including state constitutions). State high courts can decide criminal procedure issues exclusively under their own state constitutions. When they base decisions on adequate and independent state grounds, state supreme courts can grant parties a greater level of individual rights than that granted by the U.S. Supreme Court under the federal Constitution.

Knowledge of the context of criminal procedure provides a better understanding of the subject than can be gleaned only by reading Supreme Court decisions. The context includes such topics as political theory (e.g., liberty, equality), constitutional history, politics, judicial ideology and experiences, and human rights. Knowledge of the relationship between race and the development of constitutional rights is especially important.

The incorporation doctrine is the idea that the Bill of Rights applies as a limitation against state law and state and local officers. Before the Civil War, the Supreme Court ruled that the Bill of Rights applied only to the federal government. Under the Due Process Clause of the Fourteenth Amendment, a state cannot infringe upon the rights of a person, who is both a state and a federal citizen, to due process and equal protection. Congress and the federal courts have the power to enforce the Fourteenth Amendment. During the century after 1868, the argument was made that specific provisions of the Bill of Rights are also guarantees of due process. The Court accepted this concept in the 1960s, and in that decade incorporated most of the criminal procedure rights in the Bill of Rights, thus requiring that states abide by those rights. The federal courts, in addition to finding that a state law or practice violated a right inherent in the Bill of Rights, may also find that a state practice violated Fourteenth Amendment due process if such a practice is fundamentally unfair, as determined by examining all of the facts and circumstances of the case.

Since the due process revolution of the 1960s, the Supreme Court has become quite conservative in its criminal procedure rulings. The Burger Court (1969–1986), in accord with the temper of the times that combined political conservatism with individualism, maintained the incorporation of rights but limited the expansion of most rights and created several exceptions. The Rehnquist Court (1986–2005) and the Roberts Court (2005–present) accelerated this trend.

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How to Read and Brief Cases

Reading and understanding Supreme Court opinions is a necessary skill in a constitutional law course. A Supreme Court case is likely to include concurring and dissenting opinions, authored by individual justices, as well as the Court's majority opinion, authored by one justice who speaks for the other justices who join the majority. The opinions are not written in hypertechnical language and so can be understood with a bit of practice. The challenge for beginning students is grasping the formal and polished usage in Supreme Court opinions, sorting out the major components of the opinion. Most important is understanding the decision and the reasoning by which the Court arrived at the decision. In this book, cases presented in the Case and Comments are accompanied by side comments that are like color commentary in a sports broadcast. The comments help readers by defining technical terms, highlighting conflicts between the justices, noting interesting reasoning strategies, and asking questions about values inherent in the case. The **legal reasoning** of Supreme Court opinions is embedded in a system of precedent.

NOTES ON LEGAL PRECEDENT

An appellate decision is precedent—a rule of case law (the holding) that binds lower courts within the court's jurisdiction (e.g., the state for a state supreme court, the circuit for a federal Court of Appeals, or the nation for the U.S. Supreme Court). A lower court decision that does not follow precedent can be *reversed* on appeal. Precedent is also called *authority*. A supreme court will generally follow its own precedent. American law, however, is dynamic, and many Supreme Court cases *overrule* prior precedent. For example, the landmark case of *Gideon v. Wainwright* (1963), which held that an indigent defendant has a right to government-paid counsel in all state felony trials, overruled the prior precedent of *Betts v. Brady* (1942), which had stood for two decades (see Chapter 6). The overruling of prior precedent is infrequent and tends to produce policy discussions in the Court's opinions.

A more subtle process of modifying earlier case decisions is by *distinguishing* earlier precedent. Distinguishing prior precedent requires you to know the difference between a court's **holding** and its decision. A *decision* is the simple rule issued by the Court. It includes, first, whether the decision of the court that follows is affirmed or reversed, indicating which party "won" the case. The decision, or the judgment of the Court, also includes the specific legal rule for which the case stands. The Court's holding is more complex. The holding is the essential legal principle that is derived from a full reading of the Court's opinion, which is based on the facts that are essential to the Court's decision.

The result of every case can be reduced to an abstract statement of a legal principle. Unfortunately, the usage to describe this is not precise. It might be called the "rule" or the "principle" or the "decision" or the "holding" of a case. But for purposes of briefing a case, the *holding* is the principle or *rule* in light of the *facts* of the case.

Law is dynamic. A court that decides a case and writes an opinion does not fix the rule for all time. A later case can widen or narrow the impact of a prior precedent by the way in which it follows or distinguishes the prior case. In *Rochin v. California* (1952), for example, evidence was excluded because it "shocked the conscience" and thus violated due process. Police entered Rochin's home without a warrant and took him to a hospital where he was subjected to "stomach pumping" that forced him to vomit up swallowed illicit drugs. Two years later, in *Irvine v. California* (1954), the Court ruled that evidence of conversations obtained by placing a listening device in the bedroom of a married couple for twenty days did not "shock the conscience." The evidence was admitted. *Irvine* did not follow the *Rochin* decision (i.e., it was not bound by *Rochin*) because it distinguished that case on its facts, even though the *Irvine* majority excoriated the police action: "Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government." Justice Frankfurter, the *author* of the *Rochin* opinion, felt that the police did shock the conscience and that the evidence should be excluded under the Due Process Clause. The majority of the Court, however, disagreed and distinguished the earlier case because there was an element of *violence* in *Rochin* not present in *Irvine*. If the majority of the justices felt that listening in on intimate conversations without a warrant shocked their consciences, they could have expanded the *Rochin* rule to add to the shocks-the-conscience category those intrusions not involving physical coercion but intruding on privacy.

A supreme court might modify an earlier precedent for a number of reasons including the trend of earlier decisions, and novel conditions such as the use of new technologies that intrude on privacy. Another reason is that the Court's composition has changed and the new justices have different policy perspectives. This has clearly been the case in constitutional criminal procedure, as the U.S. Supreme Court's policy orientation shifted from conservative before the 1960s, to liberal in that decade, and back to conservative again in the following years. In any event, the process of constitutional decision making is quite complex, supremely important to the United States, and requires substantial effort to fully comprehend.

THE COMPONENTS OF AN OPINION

The first case and comment in the text, *United States v. Leon*, is found in Chapter 2 on page 80. The first line is the case title. The "*v.*" stands for "versus": The appeal is an adversary contest or fight between two parties seeking victory. The battle is conducted with words and with legal ideas. The United States is the *petitioner*—the party that lost the case in the court from which the case was appealed. Leon is the *respondent*—the party that is responding to the petitioner. In state appellate cases, the terms *appellant* and *appellee* may be used instead.

The citation is in the next line. It tells readers where they can find the original printed source of the excerpted case: volume 468 of the United States Reports (the official reporter published by the U.S. Government Printing Office), beginning at page 897; volume 104 of the Supreme Court Reports (published by the West Group) at page 3405 (published by the West Group, St. Paul); and volume 82, page 677 of the United States Reports, Lawyer's Edition, Second

Series (published by the Lexis Corporation). Next, the name of the justice who wrote the majority opinion appears. This opinion is usually the majority opinion, but on rare occasions where a clear majority cannot be mustered, it is the plurality opinion. Not every opinion is authored. *Per curiam* opinions are issued by the Court without indicating an author. Most *per curiam* opinions are brief, straightforward opinions in relatively minor cases. The name of the justice is followed by the body of the majority opinion, followed by concurring and dissenting opinions, listed in order of the seniority of the justices. The majority opinion ends with a line indicating the decision (e.g., "Reversed and Remanded"), not always printed in this text.

The opinion is the essay written by the justice explaining the decision; it includes the holding and the reasons given by the Court for its decision. The reasoning process of an opinion may be complex or simple, eloquent or plain, convincing or vapid, based on narrow legal precedent or on grand principles. Some opinions of Supreme Court justices are classics of American political rhetoric. A majority opinion is not the author's lone effort but has been agreed to by the justices who "sign on" to it. Often, the opinion's reasoning is a matter of compromise, as each of the justices who votes for it makes suggestions as to the proper legal basis for the decision. A statement in the opinion that is not necessary for the decision or the holding is called **dictum** (or *obiter dictum*). Dicta, which can be several paragraphs in length, do not have weight as precedent.

An appellate case may include more than the court's opinion. In addition, some judges may author *concurring* opinions, in which they join the decision or "judgment" of the court but do so for different reasons. A justice who disagrees with the decision "dissents." A dissenting judge need not explain the dissent in a separate opinion, but it is now typical for dissenting justices of the U.S. Supreme Court to do so. Throughout American constitutional history, many doctrines of constitutional law have been overruled by later courts. When this has happened, the later Court often looks to a dissenting opinion in an earlier case. Thus a dissenting justice writes for the future, in the hope that in a later era his or her dissenting view will be adopted.

BRIEFING A CASE

A Supreme Court opinion includes some or all of the following elements:

- The prior history of the case in the lower courts.
- The facts of the case.
- The legal/constitutional issue or issues that the Court is called on to decide.
- The statute or administrative rule that is relevant to the case.
- Prior precedent.
- The "holding," or legal rule in the case as applied to the case facts.
- The reasoning that is essential to the resolution of the case.
- Other nonessential information, known as *obiter dictum.*
- The decision or judgment (e.g., reversed, affirmed, remanded).

Justices need not write these parts of the opinion in any particular order or fashion, although they are usually presented in the order listed.

Students should make notes (called briefs) of each case to help etch the case in memory and to provide a study aid. It is advised that you read the entire case once without taking notes, though underlining or highlighting may be helpful. After this first reading, write the title, the page number in the text, the year of the decision, the justice who authored the opinion, and enough of the prior history of the case so it is clear how the case got to the Court. This mechanical information is not the essence of the case and should be kept short.

There is no one way to brief a case. Use the method that works best for you. Use abbreviations and short phrases, as long as you will be able to understand them later when studying for a test. Once you have successfully thought through the case and understand the opinion, complete the process by writing out—*in your own words*—the most important parts of the case: the decision, the facts essential for the holding, the legal issue, the essence of the reasoning used to resolve the issues, and the holding. The Supreme Court sometimes explicitly states the issue; at other times, one has to read the entire case carefully to understand the actual issue. Once you have read the case through one time, you will know which party won the case and will have an idea of the issue and how it was resolved.

Stating the legal issue or issues in the case with precision is the key to fully comprehending the Court's reasoning. The Court often announces the issue, but at times it is only a formal issue and not the real issue. In a sense, you have to understand the entire case to accurately ascertain the issue. If you think the Court's statement of the issue is accurate, do not copy it; instead, restate it in your own words.

The Court's reasoning, which it uses to resolve the issue, may include analyses of relevant statutes or prior decisions (precedent) and appeals to history, logic, and social policy. For example, in some criminal procedure cases, the justices will to some degree argue that the convenience of the police in enforcing the law is a factor in the decision. In cases arising from state courts, the Court will often raise the issue of federalism. It can be difficult to determine which parts of the opinion contain essential reasoning and which contain statements that are not essential.

The holding of the case is a concise statement of the decision and the facts on which the decision was based. The holding is different from an abstract rule of law and from the decision. The holding is especially important because the precedent of a case is based on the holding rather than on an abstract statement of the law. The concept of the holding is related to the role of courts, for it prevents appellate courts from usurping the legislative function. A court's primary function is to decide cases, and legal rules are formulated in the context of the case's specific facts. Since only the holding is precedent, courts cannot (or should not) issue broad rules that go beyond the facts of the case. In this way, case law builds incrementally, one case after another, based on unfolding experience. A legal doctrine is ascertained by following a "line" of case holdings on an issue. Learning how to trace the development of case law into doctrines is an important legal skill. Appellate courts often try to clarify a ruling by explicitly stating in a case, "We hold. . ." Look for this when reading cases. The holding is more comprehensive than the decision of a case, but it is important to know who won. Students sometimes get so involved in the reasoning of the Court that they forget the outcome. It is useful to indicate "who won" the case in your brief.

Your brief is a practical thing. It should not be longer than a page or two. When preparing for tests, writing a brief once is a more efficient use of your time than rereading a case multiple times, as long as the brief is the product of your thinking about and understanding the case.

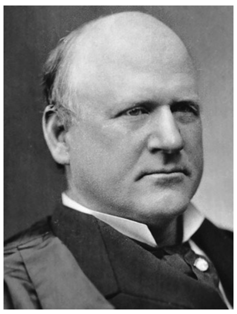
JUSTICES OF THE SUPREME COURT

The Precursor Justices: Harlan I, Holmes, Brandeis, and Cardozo

The "precursor" justices of the U.S. Supreme Court include some of the greatest who have sat on the Court. They occupied seats on the Court from 1877 (Harlan) to 1939 (Brandeis) and for the most part decided cases in areas other than criminal procedure. However, each did make an important contribution to constitutional criminal procedure, especially in framing positions concerning the incorporation of the criminal justice provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

Justice John Marshall Harlan I forcefully advocated the total incorporation of the Bill of Rights into the Fourteenth Amendment, thereby anticipating the revival of this doctrine by Justice Hugo Black and its eventual adoption, albeit in its "selective" form, during the 1960s. Justices Oliver Wendell Holmes Jr. and Louis Brandeis contributed to incorporation indirectly. First, they championed First Amendment freedom of speech as fundamental to American democracy. At first dissenting against the violation of free speech by state laws, they ultimately convinced the other justices that state laws that violate free speech are unconstitutional. This amounted to the incorporation of key provisions of the First Amendment and so "breached the wall" of the nonincorporation position. This foundation for incorporation was blocked by Justice Benjamin Cardozo, who built an intellectually strong argument against incorporation in the *Palko* (1938) case. That is, he defined First Amendment rights as fundamental and therefore as a part of due process. Fourth, Fifth, and Sixth Amendment rights, however, were defined as "formal" and not worthy of incorporation.

A profound principle of federalism, with enormous practical implications, was at play. Incorporation would undoubtedly bring the federal courts into the running of state criminal justice, and from the creation of the Republic criminal justice had been left entirely to the states. On this point, incorporation was also assisted by an important ruling, *Moore v. Dempsey* (1923) championed by Justice Holmes. It held that a fundamentally unfair state trial violated the Due Process Clause of the Fourteenth Amendment, which prohibits any state from depriving a person of life, liberty, or property without due process of law. Thus, well before the incorporation doctrine became a matter of constitutional law in the 1960s, the door to federal court interference into state criminal justice had been opened.



Collection of the Supreme Court of the United States. Photographer: Mathew Brady.

John M. Harlan I

Kentucky, 1833–1911
Republican
Appointed by Rutherford B. Hayes
Years of Service: 1877–1911

Life and Career. Harlan was the son of a prominent Kentucky attorney and of a slaveholding family. An 1850 graduate of Centre College, he studied law in his father's office. After admission to the bar in 1853, he practiced law and was politically active. During the Civil War, he fought on the Union side. In 1864, he was elected attorney general of Kentucky as a Democrat and opposed the Thirteenth Amendment. He later underwent an extreme change of views, becoming a radical Republican and an ardent supporter of African-American civil rights.

Harlan ran unsuccessfully for Kentucky governor in 1871 and 1875. At the 1876 Republican nominating convention, he swung the Kentucky delegation to Rutherford B. Hayes and was rewarded with a nomination to the Supreme Court the following year.

Contribution to Criminal Procedure. Harlan's great contribution to criminal procedure was to champion the incorporation of the Bill of Rights into the Fourteenth Amendment in order to make the federally guaranteed rights apply against state and local officers. He never succeeded in convincing the Court to incorporate any right other than the Just Compensation Clause of the Fifth Amendment, but his efforts paved the way for the due process revolution of the 1960s.

The importance of Harlan's dissents in *Hurtado v. California* (1884), *Twining v. New Jersey* (1908), and other cases concerning the rights of state criminal defendants under the Fifth, Sixth, and Eighth Amendments was not simply that he championed incorporation. As a "great dissenter," his forceful opinions required the majority to formulate reasoned arguments in response to his position that the post–Civil War Reconstruction amendments fundamentally changed the nature of American federalism. To his mind, these rights were essential to citizenship. The majority opinions in these cases were forced to agree that if a state were to violate the fundamental rights of a citizen, this would violate due process. Although the Court at that time did not view the criminal procedure rights as fundamental, a later Supreme Court used the "fundamental rights" formulation to selectively incorporate most of the Bill of Rights.

Signature Opinion. Dissenting opinion in *Hurtado v. California* (1884). Harlan argued that the grand jury provision of the Fifth Amendment was violated by charging a person with a felony by a prosecutor's information rather than a grand jury indictment.

Assessment. In economic matters, Harlan opposed state economic regulations and favored laissez-faire pro-capitalist doctrines; on the other hand, he was a nationalist and so supported federal regulation, such as the Sherman Anti-Trust Act, against great economic concentration. He is best known for his lone dissent in *Plessy v. Furguson* (1896), arguing against the "separate but equal" interpretation of the Equal Protection Clause that upheld the state segregation laws. Harlan, arguing that the very intent of the law was to perpetuate inequality, castigated the majority for joining Louisiana in a charade. He wrote that "there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of the law." The Great Dissenter discerned with more accuracy than his brethren the true nature of the American polity and its ideals.

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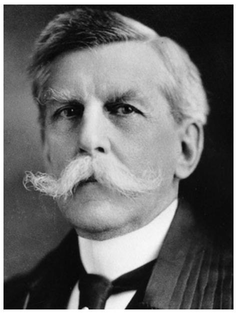

Collection of the Supreme Court of the United States. Photographer: Harris and Ewing.

Oliver Wendell Holmes Jr.

Massachusetts, 1841–1935
Republican
Appointed by Theodore Roosevelt
Years of Service: 1902–1932

Life and Career. Holmes was born in Boston to an established "Boston Brahmin" family, but not one of great wealth. His father was a professor of medicine at Harvard and a famous essayist. Holmes attended Harvard College in 1857. His family was devoted to the Union cause, and Holmes entered military service soon after the Civil War broke out. He was seriously wounded three times during his three years of service. He rose to the rank of captain and mustered out in the summer of 1864. His war experiences led him to see life as a struggle.

His great ambition was to become famous through his philosophical writings, but he entered the law in order to make a living. Nevertheless, while practicing law he pursued legal scholarship, editing the *American Law Review* and studying the old English cases of the common law. This resulted in a series of lectures and a book, *The Common Law* (1881), a seminal work of legal scholarship that did indeed make him famous. The book delved into the tangled web of old cases and demonstrated that there were coherent utilitarian reasons for seemingly irrational rules of law. The magisterial opening phrase of *The Common Law* sounded the theme of the pathbreaking philosophy of legal realism: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."

After a brief appointment to the Harvard law faculty, he accepted an appointment to the Massachusetts Supreme Judicial Court (1883–1902), on which he served with distinction before his appointment to the U.S. Supreme Court.

Contribution to Criminal Procedure. The Supreme Court heard few criminal procedure cases in his era, and so Holmes had little opportunity to write extensively on these issues. He took a conservative stance in an early Eighth Amendment case, viewing the Cruel and Unusual Punishment Clause as static; he advanced modern Fourth Amendment law in the *Weeks* (1914) and *Silverthorne* (1920) cases by voting for and writing in favor of the exclusionary rule. His adherence to the Rule of Law was displayed in his dissent in the *Olmstead* (1928) wiretapping case. Although not as eloquent as Brandeis who also dissented in that case, he stated bluntly that the government should not be above the law, even at some cost to public safety. "We have to choose, and for my part I think it is a less evil that some criminals should escape than that the government should play an ignoble part."

Signature Opinion. *Moore v. Dempsey* (1923). This was a monumentally important case. In *Frank v. Mangum* (1915), Holmes had failed to convince the Court that a sham trial violates due process. When the Court's composition changed, Holmes's views became law. The importance of *Moore* was that the Supreme Court for the first time reversed a state criminal decision as a violation of due process. This opened the door to federal court intrusion into state criminal procedure, making criminal justice more civilized and uniform throughout the nation.

Assessment. Holmes was one of the great Supreme Court justices, perhaps second only to Chief Justice John Marshall (1801–1835). He also stands as one of the greatest shapers of the English and American common law in its eight-hundred-year history.

Holmes's accomplishments on the Supreme Court include (along with Brandeis) the creation of modern First Amendment law enshrining free speech as a foundation of democracy, for free government is not possible unless all ideas are allowed to compete in the "marketplace of ideas."

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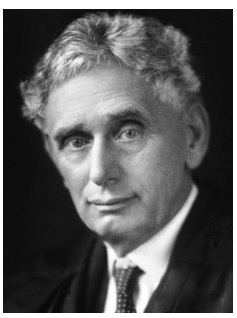

Collection of the Supreme Court of the United States. Photographer: Harris and Ewing.

Louis Dembitz Brandeis

Massachusetts, 1856–1941
Republican
Appointed by Woodrow Wilson
Years of Service: 1916–1939

Life and Career. Brandeis was born in Louisville, Kentucky, to a German Jewish family that sided with the Union during the Civil War. He entered Harvard Law School shortly before his nineteenth birthday, supported himself as a tutor, earned the highest grades, and spent a third year at Harvard as an instructor and graduate student. Attracted by Boston's liberal and intellectual atmosphere, he entered law practice there with his classmate Samuel Warren. They built a thriving practice representing midsize businesses. Brandeis developed a tremendous reputation as a thorough attorney whose success was built on a deep study of the law.

Brandeis became wealthy practicing law, but he gave it up to represent the interests of laborers struggling for economic security and protection of health and safety on the job. As an unpaid mediator and attorney in labor disputes, he became a renowned defender of workers' rights in the early twentieth century. In his victory before the conservative Supreme Court in *Muller v. Oregon* (1908), which upheld a state law limiting the working hours of female laundry employees, Brandeis used an innovative written argument (or "brief") consisting of ninety-six pages of social, economic, and health facts about the damaging effects of long working hours and only ten pages with the usual legal arguments. Since that time, this form of presentation has been known as a "Brandeis brief."

As a leading progressive who opposed monopolies, he drew the animosity of the propertied classes but also became a key advisor to President Woodrow Wilson, who nominated him to the Supreme Court. He was appointed after a long and acrimonious confirmation debate in the Senate based mainly on his "radicalism" but also supported to some degree by anti-Semitism.

Contribution to Criminal Procedure. Brandeis supported the federal exclusionary rule and the extension of federal due process against the states in important cases like *Moore v. Dempsey* (1923), *Powell v. Alabama* (1932)—counsel, and *Brown v. Mississippi* (1936)—confessions.

Signature Opinion. Dissent in *Olmstead v. United States* (1928). Federal agents violated a state criminal law against wiretapping. The issue was whether this was a search and seizure and, if so, whether the illegally seized wiretap evidence should be excluded. Brandeis's dissent is a classic statement of the Rule of Law:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Assessment. The dissents of Brandeis and Holmes in First Amendment cases ultimately persuaded the Court to hold that free speech and free press rights were so fundamental that the states could not abridge them. This incorporation of First Amendment rights helped open the door to the later incorporation of criminal procedure rights. His work in this and many other areas ranks him as one of the greatest justices.

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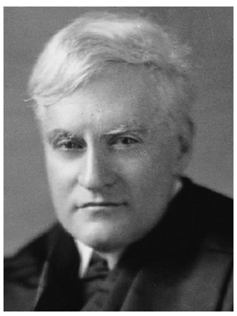

Collection of the Supreme Court of the United States. Photographer: Harris and Ewing.

Benjamin Nathan Cardozo

New York, 1870–1938
Democrat
Appointed by Herbert Hoover
Years of Service: 1932–1938

Life and Career. Cardozo, born into a distinguished New York family of Sephardic Jews who emigrated to America in the mid-eighteenth century, was a brilliant student and a noted lawyer, in practice with his older brother for twenty years. Despite his personality (described as gentle, courteous, lonely, ascetic, and saintly) and his apparent lack of political involvement, his reputation as a practitioner led to a judicial appointment to New York's highest court, the Court of Appeals, on which he served from 1913 to 1932.

Cardozo's outstanding reputation as a person and a judge led to an unparalleled national clamor for his appointment as the most worthy replacement for Justice Holmes. Thus, despite the facts that he was nominally of the wrong political party, that two justices from New York (Harlan Fiske Stone and Charles Evans Hughes) already sat on the Court, and that a Jewish justice (Brandeis) occupied another seat, President Hoover named Cardozo to the Court.

Contribution to Criminal Procedure. Cardozo was a conservative judge in criminal matters and had opposed the exclusionary rule as a judge on the New York Court of Appeals.

Signature Opinion. *Palko v. Connecticut* (1938). The Supreme Court had from 1925 to 1933 incorporated several First Amendment rights; it seemed likely that the Court would next incorporate criminal procedure rights. Palko, found guilty of murder and sentenced to prison, was retried after the prosecutor appealed under state law, was again found guilty, and was sentenced to death. He argued that this second conviction violated the Fifth Amendment Double Jeopardy Clause, which should apply to the states via due process. Cardozo's majority opinion held that the Connecticut law did not violate due process or incorporate the Double Jeopardy Clause. This was achieved by distinguishing between "fundamental" First Amendment rights and "formal" Fifth Amendment rights:

> The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a

proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' …

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . . This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every form of freedom.

The conservative *Palko* rationale retarded the advance of the incorporation doctrine for another quarter century.

Assessment. Cardozo's reputation as a great common law judge is based mainly on his work on the New York Court of Appeals. His opinions were masterpieces of judicial craft that precisely analyzed basic principles of law; his decisions were neither immobilized by precedent nor excessively experimental. His fame was enhanced by his lectures and books (especially *The Nature of the Judicial Function*, 1921), which dissected the work of the appellate judge with such penetrating candor as to add a new chapter to the philosophy of judicial realism. His Supreme Court opinions were marked by total mastery over the subject matter at hand, a graceful and fluid writing style, and a penetrating intelligence. On the Court for only five and a half terms, he mainly supported the New Deal in economic cases and had a mixed record in civil rights cases.

Further Reading

Andrew L. Kaufman, *Cardozo* (Cambridge, Mass.: Harvard University Press, 1998).