

CRIMINAL PROCEDURE

THIRD EDITION



**MATTHEW
LIPPMAN**



Criminal Procedure

Third Edition

Matthew Lippman
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Preface

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

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

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

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

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

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

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

CHAPTER ORGANIZATION

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

Each chapter is introduced by an *opening vignette* drawn from a case in the chapter. This is followed by chapter *Learning Objectives*. At the end of the chapter, students will find a *Chapter Summary*, *Chapter Review Questions*, and *Legal Terminology*. Contemporary developments in the law are illustrated by a feature titled *Criminal Procedure in the News*. Students may want to further explore issues in each chapter by visiting the Student Study Site at edge.sagepub.com/lippman3e, which contains a variety of features, including a summary of the *Leading Cases* discussed in each chapter.

ORGANIZATION OF THE TEXT

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

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

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

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

THIRD EDITION

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

Cases. The U.S. Supreme Court has decided a number of significant cases that are discussed in the book. The cases address important procedural issues including search and seizure, exigent circumstances, consent searches, effective assistance of counsel, plea bargaining, sentencing, and habeas corpus. A number of the cases that are discussed are available on the Student Study Site. Several cases from the second edition have been edited to highlight the important points.

Features. The text includes Learning Objectives and a number of new You Decide and Criminal Procedure in the News features. There are new criminal procedure exercises on the Student Study Site.

Instructor teaching site. A password-protected site, available at edge.sagepub.com/lippmancp3e, features resources that have been designed to help instructors plan and teach their courses. These resources include an extensive test bank, chapter-specific PowerPoint presentations, lecture notes, sample syllabi for semester and quarter courses, class activities, additional You Decide questions with accompanying answers, full-text SAGE journal articles, and links to video and web resources.



Student Study Site. An open-access Student Study Site is available at edge.sagepub.com/lippmancp3e. This site provides access to several study tools including eFlashcards, web quizzes, additional edited cases, full-text SAGE journal articles, video and web resources, author podcasts, answers to the You Decide boxes in the text, and more.

ACKNOWLEDGMENTS

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

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

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The people at SAGE are among the most skilled professionals that an author is likely to encounter. An author is fortunate to publish with SAGE, a publisher that is committed to quality books. Publisher Jerry Westby provided intelligent suggestions and expert direction and, in my opinion, is unmatched in the field. Associate Editor Jessica Miller was invaluable in shaping the third edition. I would also like to thank all the expert professionals at SAGE in production and design who contributed their talents, particularly Senior Project Editor Tracy Buyan, who expertly coordinated the preparation and publication of this lengthy manuscript. The text was immensely improved by the meticulous, intelligent, and insightful copyediting of Melinda Masson. Robert Higgins and Nicole Mangona deserve full credit for their efficient and effective work on the study site.

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

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1

AN INTRODUCTION TO CRIMINAL PROCEDURE

Learning Objectives

1. State the difference between criminal law and criminal procedure.
2. Specify how criminal procedure strikes a balance between the interests in investigating and detecting crime and in convicting criminals on one hand and the interest in protecting the right of individuals to be free from intrusions into their privacy and liberty on the other hand.
3. Appreciate the objectives of criminal procedure.
4. Know the sources of criminal procedure.
5. Define precedent and role of precedent in judicial decision making.
6. Know the differing philosophical perspectives of judges.
7. Understand the difference between law in action and law on the books.

INTRODUCTION

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

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



CRIMINAL LAW AND CRIMINAL PROCEDURE

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

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

BALANCING SECURITY AND RIGHTS

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

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

THE OBJECTIVES OF CRIMINAL PROCEDURE

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

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



THE CRIMINAL JUSTICE PROCESS

A criminal felony in the federal criminal justice system progresses through a number of stages that are outlined below. We will be exploring each phase in depth in the text. Keep in mind that this process is somewhat different in the federal criminal justice system than it is in state systems (see Figure 1.1). The striking feature of the criminal justice process is the number of procedures that exist to protect individuals against an unjustified detention, arrest, prosecution, or conviction. Individuals may be weeded out of the system because there is a lack of evidence that they committed a crime, or because a police officer, prosecutor, or judge or jury exercises his or her **discretion** and decides that there is little social interest in continuing to subject an individual to the criminal justice process. The police may decide not to arrest an individual; a prosecutor may decide not to file a charge, to file a less serious charge, or to enter into a plea bargain; the jury may acquit a defendant; or a judge may determine that the offender merits a lenient sentence.

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

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

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

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

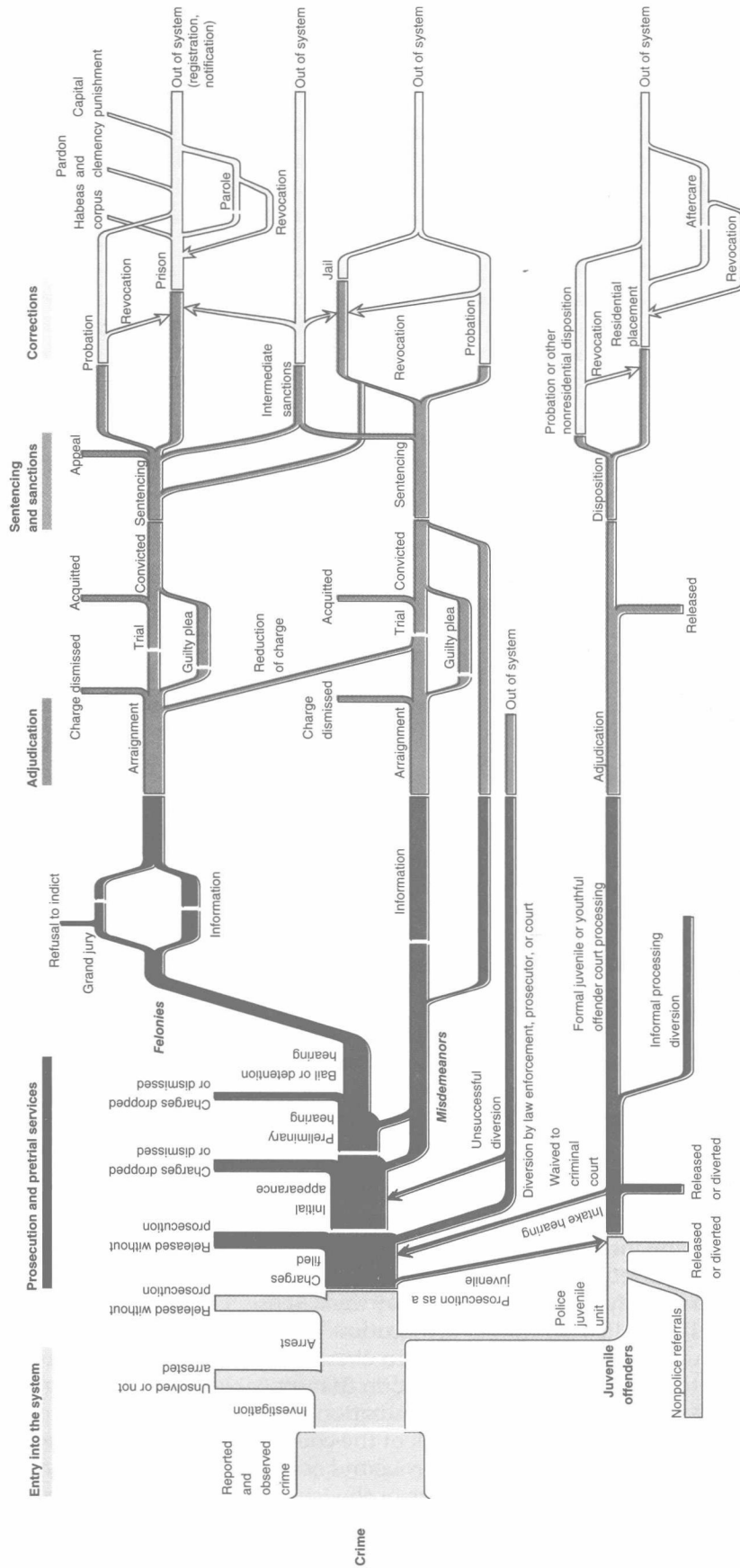
The criminal charge. Prosecutors have the discretion to formally charge suspects with criminal offenses or to decide not to file formal charges and release suspects from custody. Prosecutors who decide to pursue cases file complaints that describe the alleged crimes and the relevant sections of the criminal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

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

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

Figure 1.1 Criminal Justice Flow Chart

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



Source: U.S. Department of Justice.

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



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

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

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

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

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

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

SOURCES OF THE LAW OF CRIMINAL PROCEDURE

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

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

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

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

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

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