

# Criminal Procedure

Matthew Lippman

**2**  
EDITION



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**Matthew Lippman**

*University of Illinois at Chicago*



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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 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 [www.sagepub.com/lippmancp2e](http://www.sagepub.com/lippmancp2e), 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 and is followed by 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.

## SECOND EDITION

I have profited in preparing the second edition from the comments of reviewers and colleagues and from my own experience in teaching from the text. My main goals in the second 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 second 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, interrogations, effective assistance of counsel, hearsay, plea bargaining, and the sentencing of juveniles. A number of these cases are discussed in the book and are available on the Student Study Site. Several cases from the first edition have been edited to highlight the important points.



**New developments.** The text includes new developments in a number of areas, including sentencing and counterterrorism.

**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 [www.sagepub.com/lippmancp2e](http://www.sagepub.com/lippmancp2e), 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, author podcasts, and links to video and web resources.

**Student Study Site.** An open-access Student Study Site is available at [www.sagepub.com/lippmancp2e](http://www.sagepub.com/lippmancp2e). 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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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 70 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. Explain the difference between criminal law and criminal procedure.
2. Understand 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. Understand precedent and the 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 insure 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 insure 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