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## The Sources of Criminal Procedure

### TEST YOUR KNOWLEDGE: TRUE/FALSE

1. There are no provisions of the U.S. Constitution that explicitly address criminal procedure.
2. U.S. Supreme Court interpretations of the provisions of the U.S. Constitution are binding on other federal and state courts.
3. State courts and state constitutions play no role in criminal procedure.
4. The U.S. Congress and state legislatures play a role in establishing the requirements of criminal procedure.
5. The federal rules of criminal procedure and the state rules of criminal procedure, among other provisions, detail the steps involved in the prosecution of criminal offenses.
6. The Fourteenth Amendment was adopted following the Civil War to ensure that newly freed African American slaves were provided with the same rights and liberties as other American citizens.

### Did the police officer's order to pump Rochin's stomach for drugs "shock the conscience"?

When asked, "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules, which proved to contain morphine.

### INTRODUCTION

The law of criminal procedure provides a map that guides the police in the detection and investigation of crime and the detention of suspects. It also provides directions to defense attorneys, prosecutors, and judges in the prosecution and punishment of offenders and in the appeal of verdicts. The following list gives you some idea of the broad range of topics that are covered by the law of criminal procedure.

- Informants
- Stops and frisks of individuals
- Searches and arrests of individuals
- Searches and seizures of automobiles
- Search warrants and searches of homes
- Right to a criminal defense
- Interrogations
- Lineups
- Pretrial proceedings
- Trials
- Appeals

As the first order of business in this chapter, we will discuss the primary sources of the law of criminal procedure listed below (see also Table 2.1).

- U.S. Constitution
- U.S. Supreme Court
- State constitutions and court decisions

- Federal and state statutes
- Rules of criminal procedure
- A model code of pretrial procedure

The primary source of criminal procedure is the U.S. Constitution. The framers of the Constitution experienced the tyranny of British colonial rule and were reluctant to give too much power to the newly established federal government. The colonists under British rule were subjected to warrantless searches, detentions without trial, the quartering of soldiers in homes, and criminal prosecutions for criticizing the government. The framers responded to these repressive policies by creating a **constitutional political system**. The U.S. Constitution is the supreme law of the land. It lists the structure and powers of the president (executive), Congress (legislature), and judges (judiciary) and allocates responsibilities between federal and state governments. The **Bill of Rights**, or the first ten amendments to the Constitution, was added to protect individual rights and liberties. The Constitution is intentionally difficult to amend. This prevents a government from coming into power and changing the rules of the game by passing a law that, for instance, states that you do not have a right to an attorney or right to a jury trial in a prosecution for a serious criminal offense. The American colonists' concern with individual rights is indicated by the fact that the Constitution was accepted by several state legislatures only on the condition that a Bill of Rights would be incorporated into the document.

The last half of the twentieth century witnessed the nationalization or “constitutionalization” of the law of criminal procedure. The U.S. Supreme Court has held that most of the provisions of the Bill of Rights of the U.S. Constitution are incorporated into the Fourteenth Amendment applicable to the states. This has meant that both federal and state governments are required to provide the same basic rights to criminal defendants. The result is that defendants generally enjoy the same protections in both federal and state criminal justice systems.

In this chapter, following a discussion of the sources of criminal procedure, we will examine the nationalization of the Bill of Rights and the incorporation of rights into the Due Process Clause of the Fourteenth Amendment. We then examine equal protection of the law. The chapter concludes with a discussion of the impact of Supreme Court decisions.

## THE SOURCES OF CRIMINAL PROCEDURE

As we have seen, the law of criminal procedure details the steps that the government is required to follow in investigating, detecting, prosecuting, and punishing crime and in criminal appeals. This is distinguished from criminal law, which defines the content of the rules whose violation results in penal responsibility. Some commentators compare this to a sporting event. Criminal law defines the points you receive for a goal. Criminal procedure comprises the rules that tell us how we move the ball up the court or field. As a first step, we will examine the fundamental sources of criminal procedure listed below.

**TABLE 2.1**

### Where to Find the Law of Criminal Procedure

**U.S. Constitution.** This is the “supreme law of the land” and the primary source of criminal procedure.

**U.S. Supreme Court.** The Court applies the provisions of the U.S. Constitution to cases that are before the Court. These decisions are binding on courts throughout the land and explain what procedures are required to satisfy the Constitution.

## TEST YOUR KNOWLEDGE: TRUE/FALSE

- Judges today, unlike in the past, now agree that the Fourteenth Amendment incorporates all the provisions of the Bill of Rights to the U.S. Constitution and extends these rights to all American citizens.

Check your answers on page 47.



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**U.S. Courts of Appeals and District Courts.** These courts decide cases within their own geographical region. They are required to follow the rulings of the U.S. Supreme Court. In those instances in which the Supreme Court has not ruled, the decision of each federal court of appeals is binding within its jurisdiction. Federal courts of appeals may look to one another's judgments in arriving at a decision.

**State constitutions.** Each state has a constitution that contains a list of rights that parallel those provided in the Bill of Rights to the U.S. Constitution.

**State courts.** The decisions of a state supreme court are binding precedent for all other courts within the state. State courts interpret the provisions of their constitutions. State courts must interpret their constitutions to provide the same protections as the U.S. Supreme Court has held are required under the U.S. Constitution. They are free to recognize greater protections than are required by the U.S. Constitution.

**Federal statutes.** These are laws passed by Congress that address criminal procedure, such as funding for the analysis of DNA evidence in federal and state court.

**State statutes.** These are laws passed by state legislatures that address criminal procedure, such as whether cameras are permitted in the courtroom. Towns and cities also may pass local ordinances or rules of procedure in local courts that address criminal procedure.

**Federal Rules of Criminal Procedure.** These are comprehensive rules adopted by federal judges and approved by Congress that detail the required steps in federal criminal procedure.

**State rules of criminal procedure.** These are the rules that set forth the required criminal procedures in the states. In some states, these rules are enacted by the legislature and in other states, by the judiciary.

**Model Code of Pre-Arrest Procedure.** The American Law Institute, a private group of lawyers and professors, formulated a set of suggested rules regarding pretrial interactions between the police and citizens. Judges occasionally rely on the Model Code in their decisions. There are other documents that courts look to at times, such as the U.S. Justice Department's manual regulating the conduct of prosecutors, ethical guidelines established by bar associations for the conduct of lawyers, and internal police regulations regarding the conduct of law enforcement officers.

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## THE U.S. CONSTITUTION

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The Constitution and the Bill of Rights, which was included in the document at the insistence of the legislatures of New York, Virginia, and other states, each include provisions regarding criminal procedure.

The original Constitution of 1788 includes four provisions that address criminal procedure.

1. **Habeas corpus.** Article I, Section 9 limits the ability of Congress to suspend the "Privilege of the Writ of Habeas Corpus." This guarantees individuals the right to go before a court and require the government to explain why they are incarcerated.
2. **Ex post facto laws.** Article I, Section 9 also prohibits Congress from adopting bills of attainder (legislative acts punishing a specific individual without a trial) and ex post facto laws (criminalizing an act that was legal when committed).
3. **Jury trials.** Article III, Section 2 provides that all crimes shall be tried before a jury and that such trials shall be held in the state where the crime has been committed.
4. **Treason.** Article III, Section 4 states that treason consists of levying war against the United States. A conviction requires the testimony of two witnesses to the same overt act or a confession in open court.

The first ten amendments comprising the Bill of Rights were added to the Constitution in 1791. The first eight amendments to the Constitution include fifteen provisions addressing criminal procedure. As we shall see, most of the provisions that originally applied only to the federal

**TABLE 2.2**

Criminal Procedure Provisions in the Bill of Rights

Amendment	Protections/Rights	From the Constitution
<i>Fourth Amendment</i>	Unreasonable searches and seizures Warrants	“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
<i>Fifth Amendment</i>	Indictment by grand jury Prohibition against double jeopardy Right against self-incrimination Due process of law	“No person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”
<i>Sixth Amendment</i>	Speedy and public trial Impartial jury Informed charge Confrontation with witnesses Obtaining witnesses Assistance of a lawyer	“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”
<i>Eighth Amendment</i>	Excessive bail Excessive fines Cruel and unusual punishment	“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

government have been interpreted as applying to state governments as well. The U.S. Supreme Court is the final authority on the meaning of the provisions of the Constitution and the Bill of Rights (see Table 2.2).

## THE U.S. SUPREME COURT

Article VI of the U.S. Constitution, the **Supremacy Clause**, specifically states that the Constitution and the laws passed by Congress are the supreme law of the land and trump any state laws or court decisions that address the same issue. Article VI reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.

The U.S. Constitution is the supreme law of the land, and federal and state laws must conform to the constitutional standard. Alexander Hamilton in the *Federalist Papers* observed that the Constitution is the “standard . . . for the laws” and that where there is a conflict, the laws “ought to give place to the constitution.” The constitutional requirements, however, are not always clear from the text of the document. The Sixth Amendment’s provision for “assistance in all criminal prosecutions,” for instance, does not tell us whether the federal government and the states must appoint lawyers to represent the indigent and poor during police lineups and does not tell us whether a lawyer must be provided free of charge to defendants undertaking an appeal following a conviction.

In 1803, in *Marbury v. Madison*, the U.S. Supreme Court claimed the authority of **judicial review**, the right to define the meaning of the Constitution and to throw out federal, state, and local laws as unconstitutional that do not conform to the Constitution. *Marbury* is a complicated case to

disentangle, and at this point, you merely should appreciate that the lasting significance of this famous case is Justice John Marshall's proclamation that "an act that is repugnant to the Constitution is void" and that "[i]t is emphatically the province and duty of the judicial department to say what the law is" (*Marbury v. Madison*, 5 U.S. [1 Cranch] 137 [1803]).

In two later cases, *Martin v. Hunter's Lessee* and *Cohens v. Virginia*, the Supreme Court explicitly asserted the authority to review whether state laws and court decisions are consistent with the Constitution (*Martin v. Hunter's Lessee*, 14 U.S. [1 Wheat.] 304 [1816]; *Cohens v. Virginia*, 19 U.S. [6 Wheat.] 264 [1821]). In 1958, the Supreme Court affirmed this authority in the famous civil rights case of *Cooper v. Aaron*. In *Cooper*, the Supreme Court ordered Arkansas to desegregate the Little Rock school system and reminded local officials that the Constitution is the supreme law of the land and that *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. . . . Every state legislator and executive and judicial officer is solemnly committed by oath . . . to support this Constitution" (*Cooper v. Aaron*, 358 U.S. 1, 18 [1958]).

As the chief interpreter of the meaning of the Constitution, the Supreme Court's judgments bind all state and federal judges, the president, Congress, state officials, and every official in the criminal justice system. Justice Robert Jackson observed that "we are not final because we are infallible, but we are infallible . . . because we are final" (*Brown v. Allen*, 344 U.S. 443, 540 [1953]). The Supreme Court cannot review every state and federal criminal case that raises a constitutional question. The Court takes a limited number of cases each term and tends to address those issues in which there is a disagreement among federal appellate courts over the constitutionality of a specific practice or where an issue is particularly important. This results in the vast number of criminal procedure cases being decided by lower federal courts and by state courts. In many instances, these courts merely follow Supreme Court precedent. In other cases, we may find that there is no controlling Supreme Court judgment on an issue and that in order to determine the law, we must look to various federal circuit court decisions and state supreme court judgments. In this instance, each court establishes the law for its own jurisdiction until the Supreme Court rules on the issue.

On several occasions, the Supreme Court has relied on what it terms its **supervisory authority** over the administration of justice in the federal courts to impose standards that are not required by the U.S. Constitution. This is based on the Supreme Court's authority to maintain "civilized standards of procedure and evidence" in the practice of the federal courts. In *McNabb v. United States*, the Supreme Court held that federal agents had blatantly disregarded the requirements of a congressional statute. The Court invoked its supervisory authority and held that although federal agents had not violated the Constitution, permitting the trial court to consider the resulting confession would make the judiciary "accomplices in willful disobedience of the law" (*McNabb v. United States*, 318 U.S. 332 [1943]).

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## STATE CONSTITUTIONS AND COURT DECISIONS

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Each of the fifty states has a constitution, and virtually all of these constitutions contain a "declaration of rights." In most cases, the provisions are the same as the criminal procedure provisions in the Bill of Rights to the U.S. Constitution. In some instances, state constitutions have provided for additional rights or have clarified the meaning of particular rights. Alaska, Florida, and Illinois, along with other states, recognize the rights of crime victims to confer with prosecutors and to attend trials. In another example, New York makes it explicit that the freedom from unreasonable searches and seizures includes the freedom from the unreasonable interception of telephonic and telegraphic communications.

The interpretation of state constitutions is a matter for state courts. The decisions of state supreme courts are binding on all lower state courts. The rule is that a state provision may not provide a defendant with less protection than the corresponding federal provision. A state, however, may provide a defendant with more protection. In 1977, Supreme Court Justice William Brennan called on state supreme courts to provide defendants with more rights than what he viewed as the increasingly conservative and "law and order"-oriented U.S. Supreme Court. In a 1989 study, Justice Robert Utter of the Washington Supreme Court found 450 published state court opinions that interpreted state constitutions as "going beyond federal constitutional guarantees." Most of these decisions were handed down in Alaska, California, Florida, and Massachusetts. In reaction to this trend, California, Florida, and several other states have amended their constitutions to instruct state court judges that their constitutions' criminal procedure provisions shall be interpreted in "conformity" with the decisions of the U.S. Supreme Court and are not to provide greater protections to individuals.

As you read the text, you will see that in some instances, state courts continue to engage in what has been called the **new judicial federalism**. The important point to keep in mind is that defendants possess the same rights under both the constitutions of the fifty states and the Bill of Rights to the U.S. Constitution. The next section discusses federal and state laws as a source of the law of criminal procedure.

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## FEDERAL AND STATE STATUTES

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State legislatures and the U.S. Congress have added to constitutional provisions by passing laws regarding criminal procedure. In state statutes, you can usually find these laws grouped together under the title of the “code of criminal procedure.” Roughly one-third of the states follow the example of North Carolina, Ohio, and Utah and have detailed laws that describe procedures to be followed at virtually every step in the criminal process. Roughly ten states have brief statutory codes of criminal procedure that cover a limited number of topics of special concern. A New York law, for instance, provides that judges presiding over “widely publicized or sensational cases” may limit extrajudicial statements by lawyers, defendants, and witnesses and other individuals involved in a trial. Another provision describes the procedures that a court is required to employ in removing an unruly spectator from the courtroom. A third New York statute prohibits the televising or radio transmission of trials and specifies the permissible location of photographers and cameras outside the courtroom. A Virginia law establishes standards for requesting the DNA analysis of biological material by an individual who has been convicted of a crime. A Michigan statute discusses the procedure for extraditing offenders to other states for trial. The remaining states follow the pattern in Massachusetts and have “codes of criminal procedure” that cover two or three areas in depth as well as topics of special concern. The interpretation of state statutes is the exclusive concern of state courts, while federal courts are charged with the interpretation of federal statutes.

Statutes can be very important for defining a defendant’s rights in the criminal justice system and should not be overlooked. Federal statutes, for instance, include provisions on the requirements of speedy trial, witness protection, and postconviction DNA testing. The U.S. Supreme Court may find that a state or federal statute deprives defendants of their constitutional rights and may rule that the statute is unconstitutional. For example, it is doubtful whether the Supreme Court would approve of a law that provided the FBI or state police with the authority to detain individuals indefinitely without probable cause that the individuals had committed a crime. In the next section, we will see that a full description of state and federal criminal procedure typically can be found in the Federal Rules of Criminal Procedure.

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## RULES OF CRIMINAL PROCEDURE

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The Federal Rules of Criminal Procedure detail the steps in the criminal justice process in the federal system from the filing of a complaint through a verdict and sentencing in district court. This includes topics such as the grand jury, motions that must be filed prior to trial, jury instructions and verdicts, and posttrial motions to reconsider sentencing. The Federal Rules are discussed and regularly amended by the Judicial Conference of the United States, which is a regular meeting of federal judges. These federal judges, in turn, send their proposals to the Chief Justice of the U.S. Supreme Court. He or she then transmits the rules to Congress, and the rules take effect unless amended or vetoed.

The Supreme Court has held that these rules have the force of law and that a federal court has no authority to disregard the requirements of the rules in regard to matters such as the time in which a defendant is required to file various motions or the prohibition on televising trials or providing the media with electronic recordings of trials.

State courts generally also have comprehensive rules of procedure that follow the example of the Federal Rules. Roughly one-third of state constitutions provide that the rules of procedure drawn up by judges are more important than (or take precedence over) laws passed by the state legislature.

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## A MODEL CODE OF PRETRIAL PROCEDURE

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In 1923, a group of prestigious academics, judges, and lawyers formed the privately organized and funded American Law Institute (ALI). These individuals shared a concern that the states dramatically varied in their definitions of crimes and legal procedures. The ALI members drafted a series

of model statutes that they hoped would be adopted by state legislatures. The ALI's *Model Code of Pre-Arrest Procedure* (1975) addresses pretrial police investigations and has been cited by judges grappling with criminal procedure issues. The Supreme Court, for example, referred to the code in a case involving the permissible length of a police investigatory stop of a suspect. An example of the forward-looking nature of the *Model Code* is the document's call for the taping of police interrogations.

In some judicial decisions, you may see that judges refer to administrative procedures developed by government agencies or local police departments or bar associations. One of the most influential manuals is the *United States Attorneys' Manual* of the Department of Justice. The manual sets forth the policy of the Justice Department at every stage of the criminal justice process, including grand juries, the filing of criminal charges, plea bargaining, and sentencing. A violation of these internal guidelines might result in a prosecutor's being subject to some form of administrative discipline, such as loss of pay or suspension. A judge may consult these guidelines in determining whether a prosecutor has violated his or her professional responsibilities and should be disciplined by the court. Courts may look at the ethical rules established by state bar associations to determine whether a criminal verdict should be thrown out based on a defense attorney's ineffective representation at trial. In some instances, judges also may consult internal police regulations to assist in determining whether an officer acted reasonably in carrying out his or her responsibilities. The American Bar Association has adopted a set of *Standards for Criminal Justice*, which suggests reforms that might be made to various criminal justice procedures.

The next section examines the incorporation of the Bill of Rights into the Fourteenth Amendment Due Process Clause and the nationalization of the law of criminal procedure.

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## THE DEVELOPMENT OF DUE PROCESS

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### Nationalization

The last half of the twentieth century witnessed the *nationalization*, or what law professors refer to as the **constitutionalization** of criminal procedure. This involved interpreting the Fourteenth Amendment **Due Process Clause** to extend most of the protections of the Bill of Rights to the states. There now is a single standard of criminal procedure that all levels of government must satisfy. You may be prosecuted in Indiana, in Iowa, or in the federal system, and your rights are fundamentally the same. This *constitutionalization* or development of a single standard that applies to the federal government as well as to the states marked a true revolution in the law.

The question of the nationalization of criminal procedure remains a topic of lively debate and disagreement. The development of consistent procedures is intended to ensure uniform and fair treatment for individuals wherever they live and whatever their backgrounds. On the other hand, there is strong argument that the states should be left free to experiment and to develop their own criminal procedures. The procedures that may be appropriate for federal agents investigating fraud, environmental crime, or corporate abuse are far removed from the daily demands confronting a police officer on the beat in a major city or officers in a small department with a tight budget. Supreme Court judges sitting in Washington, DC, with little or no experience in local government or in law enforcement may be ill equipped to be telling the police in Detroit or Los Angeles how to conduct an interrogation or lineup, and the Court's well-intentioned decisions may result in "handcuffing" the police and in frustrating police investigations. Observers of the Supreme Court predict that in the next few years, we are likely to see a renewed debate among the Supreme Court justices over whether each state should be required to follow uniform procedures or whether states should be provided with greater flexibility in their criminal procedures. The Supreme Court, for instance, might hold that the Fifth Amendment does not require states to tape interrogations and that the states may decide for themselves whether to adopt this practice. We now turn our attention to the process of incorporating the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

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## THE FOURTEENTH AMENDMENT

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In 1833, the U.S. Supreme Court in *Barron v. Mayor & City Council of Baltimore* ruled that the Bill of Rights limited the federal government and did not apply to state and local governments. Justice John Marshall wrote that the "constitution was ordained and established by the people of the United States for themselves for their own government, and not for the government of the individual states." He observed that if the framers had intended for the Bill of Rights to apply to the states, "they would

have declared this purpose in plain and intelligible language” (*Barron v. Mayor & City Council of Baltimore*, 32 U.S. [7 Pet.] 243, 247, 250 [1833]).

Professor Erwin Chemerinsky observed that if the Bill of Rights applies only to the federal government, the state and local governments “then are free to infringe even the most precious liberties” and to “violate basic constitutional rights” (Chemerinsky, 2002, p. 472). On the other hand, the *Barron* decision represents the widespread belief in the nineteenth century that the federal government should not intrude into the affairs of state governments and that the citizens of each state should be left free to determine what rights and liberties they wish to preserve and to protect. Criminal justice, in particular, was viewed as a local matter.

This system of states’ rights did not fully survive the Civil War. Slavery in the states of the former Confederacy would no longer be tolerated, and former African American slaves were to enjoy the full rights of citizenship. The **Fourteenth Amendment** was added to the Constitution in 1868 in order to guarantee equal treatment and opportunity for African Americans. The Amendment reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first sentence recognized that African Americans are citizens of the United States and of the state in which they reside. The purpose was to reverse the Supreme Court’s 1857 decision in *Scott v. Sandford*, which held that African American slaves were not eligible to become U.S. citizens (*Dred Scott v. Sandford*, 60 U.S. [19 How.] 393 [1857]). Several judges argued that the debates in Congress over the Fourteenth Amendment indicated that the amendment’s prohibition on a state’s passing a law that abridges “the privileges and immunities of citizens of the United States” was shorthand that was intended to extend the protections of the federal Bill of Rights to the states. What good was citizenship unless African Americans were protected against the violation of their rights by both federal and state governments? This theory, however, was rejected by the Supreme Court in the *Slaughter-House Cases*. Justice Samuel Miller held that the Privileges or Immunities Clause was not intended to extend the Bill of Rights to state citizens. Extending the Bill of Rights to the states would establish the Supreme Court as “a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights. . . . We are convinced that no such results were intended” (*Slaughter-House Cases*, 83 U.S. [16 Wall.] 36 [1873]). Individuals now looked to the Due Process Clause of the Fourteenth Amendment to secure their rights against state governments.

The twentieth century witnessed continued efforts by defendants to extend the protection of the Bill of Rights to the states. Professor Lawrence Friedman, in his book *Crime and Punishment in American History*, notes that with the dawn of the mid-twentieth century, there was an increasing call for fairer procedures in state courts. Lawyers now argued that the Due Process Clause of the Fourteenth Amendment, which applied to the states, included various provisions of the Bill of Rights to the U.S. Constitution. The Supreme Court employed one of three approaches to this argument.

- **Fundamental fairness.** The Supreme Court decides on a case-by-case basis whether rights are fundamental to the concept of ordered liberty and therefore apply to the states.
- **Total incorporation and total incorporation plus.** The entire Bill of Rights applies to the states. Total incorporation plus includes additional rights not in the Bill of Rights along with the entire Bill of Rights.
- **Selective incorporation.** Particular rights in the Bill of Rights apply to the states. Selective incorporation plus includes additional rights not in the Bill of Rights along with the particular rights in the Bill of Rights.

## The Due Process Clause

There are strong arguments that the individuals who drafted the Bill of Rights intended that the Due Process Clause incorporate the Bill of Rights and extend these protections to state governments. Judges favoring the **total incorporation** approach argue that these rights were viewed as

fundamental by the drafters of the U.S. Constitution and clearly were intended to be guaranteed to African American citizens by the congressional sponsors of the Fourteenth Amendment. Judges who favor the **total incorporation plus** approach would include additional rights not in the Bill of Rights.

A second approach contends that the Due Process Clause left states free to conduct criminal trials so long as the procedures are consistent with fundamental fairness (Chapter 8). This leaves states with the flexibility to prosecute individuals without being bound to apply the same procedures as the federal government. There is no indication according to individuals favoring this *freestanding due process* approach that the Fourteenth Amendment incorporates the Bill of Rights. After all, the drafters of the Fourteenth Amendment could have expressly stated that the Amendment incorporates the Bill of Rights if this is what they intended. The Fourteenth Amendment employs broad language like “due process of law” to provide flexibility to state governments and to allow the states to adjust their procedures to meet changing conditions. Proponents of fundamental fairness point out that the Fifth Amendment also contains the language that “[n]o person shall be denied life, liberty, or property without due process of law,” and if this language were meant to incorporate the entire Bill of Rights, it would have been unnecessary to include the Bill of Rights in the Constitution. On the other hand, critics of fundamental fairness point out that the drafters of the Fourteenth Amendment could have used the term *fundamental fairness* rather than *due process* if this was their intent.

Other judges favored **selective incorporation**. They argue that only those provisions of the Bill of Rights that are essential to liberty are incorporated into the Fourteenth Amendment. States are otherwise free to structure their criminal procedures. A small number of judges advocated **selective incorporation plus** and contended that there are rights that are not part of the Bill of Rights that also applied to the states. The challenge confronting the selective incorporation approach is to identify what parts of the Bill of Rights are essential.

Keep these points in mind as you read about the Supreme Court’s gradual incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.

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## FUNDAMENTAL FAIRNESS

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The Supreme Court developed the fundamental fairness test in a series of cases between 1884 and 1908. Lawyers and their clients were continually disappointed over the next forty years by the Supreme Court’s reluctance to recognize that the rights protected by the Bill of Rights were protected by the Fourteenth Amendment.

The fundamental fairness test was first established by the U.S. Supreme Court in 1884 in *Hurtado v. California*. Joseph Hurtado had been charged with homicide based on an information (i.e., a document signed by a prosecutor charging an individual with a crime) filed by a prosecutor, and subsequently, he was convicted and sentenced to death. Hurtado claimed that the prosecutor had denied Hurtado’s due process rights by disregarding the Fifth Amendment’s requirement of indictment (called a “presentment” in England) before a grand jury for a “capital or otherwise infamous crime.” The Supreme Court rejected Hurtado’s claim and held that the ancient institution of the grand jury was not essential to the preservation of “liberty and justice.” States were free to design their own criminal procedures “within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.”

The Supreme Court stressed that the information filed by the prosecutor in California was subject to review in a hearing conducted by a magistrate. At any rate, whether a defendant is brought to trial as a result of an information filed by a prosecutor or an indictment issued by a grand jury is not fundamental to a fair prosecution because the defendant’s guilt ultimately is determined by the evidence presented at a criminal trial. The important point is that although the Supreme Court rejected Hurtado’s claim, the Court opened the door for defense lawyers to argue in the future that their clients had been denied a right that was a “fundamental principle of liberty and justice” that was embodied in the Fourteenth Amendment (*Hurtado v. California*, 110 U.S. 516, 535 [1884]).

*Twining v. New Jersey* is a second leading case in the development of the fundamental fairness test. In *Twining*, the U.S. Supreme Court rejected Twining’s claim that his due process rights had been violated by the trial judge’s instruction that the jury could consider the defendant’s failure to testify at his trial in determining his guilt or innocence. There was little question that this instruction in a federal trial would be considered to be in violation of the Fifth Amendment right against self-incrimination. The Supreme Court, however, held that the right against self-incrimination at trial was not “an immutable principle of justice which is the inalienable possession of every citizen of a free

government.” The people of New Jersey were free to change the law in the event that they found the judge’s instruction to be fundamentally unfair.

The Supreme Court in *Twining* encouraged lawyers to continue to bring cases claiming that various protections contained within the Bill of Rights were included in the Due Process Clause of the Fourteenth Amendment when it observed that it is “possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.” The Court stressed that these rights are protected “not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process” (*Twining v. New Jersey*, 211 U.S. 78, 99, 113 [1908]).

The world was beginning to change. President Woodrow Wilson had led the United States into a European conflict in World War I and had proclaimed in his famous “Fourteen Points” that he aspired to bring liberty, freedom, and the rule of law to all the peoples of the world. In Wilson’s speech, he called for the formation of a League of Nations to settle international disputes through negotiation and understanding rather than through war. This American commitment to liberty and justice was in stark contrast to the newly developing European fascist movements in Italy, Germany, and Spain, which illustrated the dangers posed to democracy by mob rule, racism, and intolerance.

The Supreme Court took a small step toward recognizing that the Fourteenth Amendment protected individuals against abuse by state authorities in *Moore v. Dempsey*. In *Moore*, African American farmers meeting to discuss discriminatory practices in Phillips County, Arkansas, were attacked by white residents. One of the attackers was killed during the exchange of gunfire. Seventy-nine African Americans were prosecuted and convicted, and twelve received a death sentence. In the prosecutions, African Americans were excluded from the juries, the judges rushed through the trials, and threatening mobs surrounded the courthouse. The Supreme Court, based on the totality of the circumstances, held that the murder convictions of five of the defendants violated due process. The Court stressed that it was compelled to intervene to correct the trial court’s verdict, given that the “whole proceeding” had been a “mask” in which lawyers, judge, and jury had been “swept to the fatal end by an irresistible wave of public opinion” and that the Arkansas appellate courts had failed to correct the “wrongful sentence of death” (*Moore v. Dempsey*, 261 U.S. 86, 91 [1923]).

*Moore* was followed in 1932 by the famous case of *Powell v. Alabama*. The Supreme Court held in *Powell* that the failure of the trial court to ensure that indigent, illiterate, and youthful African American defendants confronting the death penalty in a hostile community were represented by an “effective” lawyer constituted a violation of due process of law under the Fourteenth Amendment. The judgment stressed that “this is so . . . not because [this right is] enumerated in the first eight Amendments, but because [it is of] such a nature that [it is] included in the ‘conception of due process of law’” (*Powell v. Alabama*, 287 U.S. 45, 67–68 [1932]).

In *Powell*, five Caucasian homeless men reported that they had been attacked and thrown off a freight train by a group of African Americans. The sheriff deputized every man who owned a firearm, and as the train pulled into Painted Rock, Alabama, the forty-two cars were searched, and the sheriff seized nine African Americans between thirteen and twenty years of age as well as two Caucasian females. The two women were dressed in men’s caps and overalls. One of the women, Ruby Bates, informed a member of the posse that the African American suspects had raped her along with her companion, Victoria Price.

The nine Scottsboro defendants were brought to trial on April 6, 1932, twelve days following their arrest. The courthouse was ringed by armed National Guardsmen to protect the defendants from the angry crowd, which at times numbered several thousand. Judge Alfred E. Hawkins initially appointed the entire local bar to represent the defendants at their arraignment. On the morning of the trial, he named Stephen R. Roddy to represent the defendants. Roddy was a semi-alcoholic Tennessee lawyer who had been sent to observe the trial by the defendants’ families. He protested that he was unfamiliar with Alabama law, and Judge Hawkins responded by appointing a local seventy-year-old senile lawyer, Milo Moody, to assist him. Roddy was given roughly thirty minutes to meet with his clients before the opening of the trial. He immediately filed an unsuccessful motion to change the location of the proceedings to ensure his clients a fair trial, which he argued was impossible given the inflammatory newspaper coverage and threatened lynching of his clients. The trial opened on a Monday, and by Thursday, eight of the defendants had been convicted and sentenced to death. The jury divided over whether thirteen-year-old Roy Wright should receive a death sentence or life imprisonment, and Judge Hawkins declared a mistrial in his case. The Alabama Supreme Court affirmed the verdicts.

By the time the case came before the U.S. Supreme Court, the Scottsboro defendants had become the central cause for political progressives and civil rights activists in the United States and in Europe. The Supreme Court focused on the single issue of denial of counsel. Justice Arthur Sutherland, citing *Twining*, held that the defendants had been deprived of legal representation in violation of the Due Process Clause of the Fourteenth Amendment. Sutherland based his judgment on the lack of time provided to the defendants “to retain a lawyer” as well as the trial judge’s appointment of a “less than competent attorney.”

The Supreme Court avoided criticism that they were assuming the role of a “super legislator” by narrowly limiting the judgment to the specific facts that confronted the Scottsboro defendants. Justice Sutherland stressed that the trial court’s failure to provide the defendants with “reasonable time and opportunity to secure counsel was a clear denial of due process” in light of the “ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and . . . the fact that their friends and families were . . . in other states . . . and above all that they stood in deadly peril of their lives.” The trial court’s obligation to provide a lawyer to defendants confronting capital punishment was not satisfied by an “assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial.” This ruling, according to Justice Sutherland, was based on “certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard” (*Powell*, 287 U.S. at 70).

*Powell* was followed by several cases in which the Supreme Court overturned the convictions of young African American defendants whose confessions had been obtained through abusive and coercive interrogations by Southern police officers. The Court condemned these practices as reminiscent of the totalitarian policies of Nazi Germany and as having no place in a democratic society. In *Brown v. Mississippi*, which is discussed in Chapter 8, confessions were extracted from three African American defendants through “physical torture.” The Supreme Court held that it “would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions . . . and the use of confessions thus obtained as the basis for conviction and sentence was a clear denial of due process” (*Brown v. Mississippi*, 297 U.S. 278, 285 [1936]).

In summary, although *Hurtado* and *Twining* affirmed the respective defendants’ convictions, these cases established that the Due Process Clause of the Fourteenth Amendment protected individuals against practices that are contrary to the “immutable principles of liberty and justice.” The Supreme Court held that due process had been violated and overturned convictions when confronted with poor, rural, African American defendants who had been subjected to “sham judicial hearings,” who had been denied access to effective counsel in a capital punishment case, or whose confessions had been extracted through physical coercion. Keep the following four points in mind in regard to the fundamental rights approach to the Fourteenth Amendment Due Process Clause.

- **Fundamental rights.** The Due Process Clause prohibits state criminal procedures and police practices that violate fundamental rights. Justice Felix Frankfurter observed that the Fourteenth Amendment “neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause . . . has an independent potency” (*Adamson v. California*, 332 U.S. 46, 66 [1952]).
- **Bill of Rights.** The Due Process Clause protects rights because they are fundamental, not because they are in the Bill of Rights.
- **Legal test.** The Supreme Court has employed various tests to determine whether a right is fundamental. In 1937, in *Palko v. Connecticut*, the Supreme Court held that the right against double jeopardy was not violated by a Connecticut law that authorized the state to retry a defendant in the event of a successful appeal of a criminal conviction. The Court held that rights are fundamental only if they are of the “very essence of the scheme of ordered liberty,” if “a fair and enlightened system of justice would be impossible without them,” or if they are based on “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (*Palko v. Connecticut*, 302 U.S. 319, 325 [1937]).
- **Procedures.** States are free to establish criminal procedures that do not violate fundamental rights protected under the Due Process Clause of the Fourteenth Amendment. The Supreme Court noted that in those instances in which it holds that a state law does not violate due process, the law may be changed through the democratic process.

You can find *Brown v. Mississippi* on the Student Study Site, [edge.sagepub.com/lippmancp4e](http://edge.sagepub.com/lippmancp4e).

The first case reprinted in this chapter, *Rochin v. California*, challenged the Supreme Court to determine whether due process prohibited the police from pumping out Rochin's stomach in order to seize capsules of narcotics. It would seem fundamental to the scheme of ordered liberty that the police should be prohibited from forcibly extracting the capsules. In *Rochin*, Justice Frankfurter relied on *Palko v. Connecticut* to establish the famous "shock-the-conscience test" for determining fundamental fairness under the Fourteenth Amendment. Do you agree with Justice Frankfurter that the police violated Rochin's right to due process of law? Were other means of obtaining the evidence available to the police?

## Did the police officer's order to pump Rochin's stomach for drugs "shock the conscience" and violate due process of law?

### **ROCHIN V. CALIFORNIA,**

342 U.S. 165 (1952), FRANKFURTER, J.

#### **Issue**

The Supreme Court is asked to decide whether the petitioner's conviction has been obtained by methods that offend the due process of law.

#### **Facts**

Having "some information that [the petitioner here] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common law wife, brothers, and sisters. Finding the outside door open, the sheriffs entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed, the deputies spied two capsules. When asked, "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules, which proved to contain morphine.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing "a preparation of morphine" in violation of the California Health and Safety Code, 1947, section 11.500. Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers "were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," and "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the . . . hospital." . . . The Supreme Court of California denied without opinion Rochin's petition for a hearing. . . . This Court granted certiorari, because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States.

#### **Reasoning**

In our federal system, the administration of criminal justice is predominantly committed to the care of the States. . . . In reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." Due process of law, "itself a historical product," is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice.

However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions

(Continued)

(Continued)

of justice of English-speaking peoples even toward those charged with the most heinous offenses.” These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” or are “implicit in the concept of ordered liberty.”

The Court’s function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words, being symbols, do not speak without a gloss. On the one hand, the gloss may be the deposit of history, whereby a term gains technical content. Thus, the requirements of the Sixth and Seventh Amendments for trial by jury in the federal courts have a rigid meaning. No changes or chances can alter the content of the verbal symbol of “jury”—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant. On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as resort to a revival of “natural law.” To believe that this judicial exercise of judgment could be avoided by freezing “due process of law” at some fixed stage of time or thought

is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one’s own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case, “due process of law” requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

### Holding

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement

that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend “a sense of justice.” It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man, the police cannot extract by force what is in his mind but can extract what is in his stomach.

To attempt in this case to distinguish what lawyers call “real evidence” from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community’s sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society. . . .

### Concurring, Black, J.

*Adamson v. California*, 332 U.S. 46, 68-123 (1947), sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment’s command that “No person . . . shall be compelled in any criminal case to be a witness against himself.” I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California’s use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they

hold as I do in this case, I regret my inability to accept their interpretation without protest. But I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

What the majority hold is that the Due Process Clause empowers this Court to nullify any State law if its application “shocks the conscience,” offends “a sense of justice,” or runs counter to the “decencies of civilized conduct.” The majority emphasize that these statements do not refer to their own consciences or to their senses of justice and decency. For we are told that “we may not draw on our merely personal and private notions”; our judgment must be grounded on “considerations deeply rooted in reason and in the compelling traditions of the legal profession.” We are further admonished to measure the validity of state practices, not by our reason, or by the traditions of the legal profession, but by “the community’s sense of fair play and decency”; by the “traditions and conscience of our people”; or by “those canons of decency and fairness which express the notions of justice of English-speaking peoples.” These canons are made necessary, it is said, because of “interests of society pushing in opposite directions.” If the Due Process Clause does vest this Court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover “canons” of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an “evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts.” . . . I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. Reflection and recent decisions of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.

### Questions for Discussion

1. Why does Justice Felix Frankfurter conclude that the police violated Rochin’s due process rights?
2. Are you persuaded by Justice Frankfurter’s argument that the determination of the content of due process is an “objective” rather than a “subjective” process?
3. What other police practices would “shock the conscience”?
4. Justice Frankfurter compares the police conduct in Rochin to the involuntary confessions in *Brown v. Mississippi*. He writes that the Supreme Court cannot credibly “hold that in order to convict a man, the police cannot extract by force what is in his mind but can extract what is in his stomach.” Do you agree with the judge’s comparison?
5. Summarize the view of Justice Hugo Black. What is his criticism of the fundamental fairness test?

## Cases and Comments

### 1. The Court Limited the Scope of the Precedent in *Rochin*.

In *Irvine v. California*, law enforcement agents entered Irvine's home three times without a warrant to install and then to move a microphone. The content of his conversations was relied on to convict him of illegal gambling. Justice Jackson noted that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared . . . as a restriction on the Federal Government." Justice Jackson nonetheless affirmed Irvine's criminal conviction. He distinguished the trespass to property and the eavesdropping in *Irvine* from *Rochin*, reasoning that in *Irvine*, there was an absence of "coercion, violence or brutality to the person." Justice Frankfurter, in his dissenting opinion, argued that Justice Jackson misinterpreted the significance of *Rochin* by focusing on the physical coercion employed to extract the narcotics and that Irvine's conviction also should be overturned. He explained that the significance of *Rochin* was that the government must respect "certain decencies of civilized conduct" and may not resort to "any form of skullduggery" to obtain a

conviction. Due process is concerned with the "mode in which evidence is obtained," and when evidence is "secured by methods which offend elementary standards of justice, the victim of such methods may invoke the protection of the Fourteenth Amendment." Do you find Justice Jackson's or Justice Frankfurter's analysis of *Rochin* more persuasive? See *Irvine v. California*, 347 U.S. 128 (1954).

**2. No Due Process Violation.** In *County of Sacramento v. Lewis*, a police high-speed pursuit resulted in the death of a passenger on a motorcycle when the motorcycle tipped over and the squad car skidded into the passenger. Justice David Souter wrote that the police officer did not violate substantive due process when he caused death of the passenger through "reckless indifference" or "reckless disregard." "[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation" (*County of Sacramento v. Lewis*, 523 U.S. 833[1998]).

## TOTAL INCORPORATION

The fundamental fairness doctrine continued to hold sway in the Supreme Court until the 1960s. Justice Hugo Black was one of the most prominent critics of fundamental fairness. In 1947, Justice Black, in his dissenting opinion in *Adamson v. California*, explained that he had studied the history of the Fourteenth Amendment and that the intent of the drafters of the amendment was to totally incorporate and to protect the principles contained within the Bill of Rights (*Adamson v. California*, 332 U.S. 46 [1947]). Justice Black made the following points in his criticism of the fundamental fairness approach.

- **Decision making.** Fundamental fairness does not provide definite standards to determine the rights that are protected by the Fourteenth Amendment Due Process Clause.
- **Bill of Rights.** The Bill of Rights includes the rights that the founders struggled to achieve and believed were essential to liberty and freedom. The Fourteenth Amendment is intended to make these rights available to individuals in their relations with state governments.
- **Textual language.** The drafters of the Fourteenth Amendment would have used the phrase "rights essential to liberty and justice" if this were their intent.

Justice Black concluded by expressing doubts whether his fellow judges were "wise enough to improve on the Bill of Rights. . . . To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of the written Constitution" (89–90). Justice Black's "total incorporation" approach never succeeded in attracting a majority of the Supreme Court. Justices Frank Murphy, Wiley Rutledge, and William O. Douglas at various times went so far as to endorse a total incorporation-plus approach, which extended the Bill of Rights to the states along with additional rights, such as the right to a clean environment and health

care. As observed by Justice Murphy in his dissent in *Adamson*, “the specific guarantees of the Bill of Rights should be carried over intact into the . . . Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of . . . 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” (124). The total-incorporation approach is straightforward and involves three simple steps.

- **Due process.** Due process is shorthand for the Bill of Rights.
- **Bill of Rights.** Identify the rights protected by the Bill of Rights.
- **Incorporation.** These rights are incorporated into the Fourteenth Amendment and must be followed by the states to the same extent that the rights are followed by the federal government.

Critics of total incorporation asked Justice Black to explain why the drafters of the Fourteenth Amendment did not explicitly state that their intent was to extend the protections of the Bill of Rights to the states. The total-incorporation approach, although never endorsed by a majority of the U.S. Supreme Court, nevertheless is important for making a strong case for extending most of the rights available to defendants in the federal system to defendants in the fifty state criminal procedure systems.

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## SELECTIVE INCORPORATION

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By 1962, the U.S. Supreme Court included five judges who favored incorporation and who provided the votes that resulted in the Supreme Court’s adopting the incorporation doctrine. The majority of judges, rather than embracing total incorporation, endorsed a *selective incorporation* approach, first articulated by Justice William Brennan. Justice Brennan wrote the majority opinion in *Malloy v. Hogan* incorporating the Fifth Amendment right against self-incrimination into the Fourteenth Amendment. Justice Brennan “rejected the notion that the Fourteenth Amendment applies to the States only a watered-down . . . version of the individual guarantees of the Bill of Rights. . . . It would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused’s silence in either a federal or state proceeding is justified” (*Malloy v. Hogan*, 378 U.S. 1, 10 [1964]).

The elements of the selective incorporation approach may be easily summarized.

- **Fundamental rights.** The Fourteenth Amendment incorporates those provisions of the Bill of Rights that are “fundamental principles of liberty and justice which lie at the base of all our [American] civil and political institutions.” The entire amendment rather than a single portion of the amendment is incorporated into the Fourteenth Amendment (“jot-for-jot and case-for-case”).
- **Application.** The amendment that is incorporated is applicable to the same extent to both state and federal governments. Justice William O. Douglas characterized this as “coextensive coverage.”
- **Federalism.** States are free to design their own systems of criminal procedures in those areas that are not incorporated into the Fourteenth Amendment.

The U.S. Supreme Court has incorporated a number of the fundamental rights included in the Bill of Rights into the Fourteenth Amendment Due Process Clause. The rights that are incorporated are listed in Table 2.3. The Court has not incorporated the following four provisions of the Bill of Rights into the Fourteenth Amendment, and therefore, a state is free to adopt a law or include a provision in its constitution that extends these four protections to its citizens.

- **Third Amendment.** Prohibition against quartering soldiers without consent of the owner.
- **Fifth Amendment.** Right to indictment by a grand jury for capital or infamous crimes.

- **Seventh Amendment.** Right to trial in civil law cases.
- **Eighth Amendment.** Prohibition against excessive bail and fines.

The next case on the Student Study Site is *Duncan v. Louisiana* (391 U.S. 145, 148–158 [1968]), which incorporated the Sixth Amendment right to a jury trial into the Fourteenth Amendment. Justice Byron “Whizzer” White wrote the majority opinion and relied on the selective incorporation doctrine to hold that trial by jury in criminal cases is “fundamental to the American scheme of justice” and that the Fourteenth Amendment “guarantees a right of jury trial in all criminal cases which . . . would come within the Sixth Amendment guarantee.” Justice White noted that by the time the U.S. Constitution had been drafted, the jury trial had been in existence in England for several centuries. The jury was part of the legal system of the American colonies and then was incorporated into the constitutions of the new states and included in the Sixth Amendment. Justice White concluded by noting that the jury continued to be an important feature of federal and state criminal justice systems and provided a check on the abuse of power. He stressed that while a criminal justice process that is “fair and equitable but used no juries is easy to imagine,” the jury is “fundamental” to the organization and philosophy of the American criminal justice system. Justice Black, in his concurring opinion, remained steadfast in his advocacy of total incorporation, while Justice Harlan provided a passionate defense of fundamental fairness. *Duncan* provides the opportunity to review your understanding of the relationship between the Fourteenth Amendment Due Process Clause and the Bill of Rights as we turn our attention to the important topic of equal protection under the law.

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## EQUAL PROTECTION

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The U.S. Constitution originally did not provide for the equal protection of the laws. Professor Erwin Chemerinsky observed that this should not be surprising given that African Americans were enslaved and women were subject to discrimination. Slavery, in fact, was formally embedded in the legal system. Article I, Section 2 of the U.S. Constitution provides for the apportionment of the House of Representatives based on the “whole number of free persons” as well as three-fifths of the slaves. This was reinforced by Article IV, Section 2, the “Fugitive Slave Clause,” which requires the return of a slave escaping into a state that does not recognize slavery (Chemerinsky, 2002, p. 642).

In 1865, immediately following the Civil War, Congress enacted and the States ratified the Thirteenth Amendment, which prohibits slavery and involuntary servitude. Three years later, as we have seen, Congress approved the Fourteenth Amendment. Section 1 guarantees individuals equal protection of the law in addition to providing that no state shall deprive any person of liberty or property without due process of law. In 1954, the U.S. Supreme Court declared in *Bolling v. Sharpe* that the Fifth Amendment Due Process Clause imposes an identical obligation of equal protection of the law on the federal government and explained that “discrimination may be so unjustifiable as to be violative of due process” (*Bolling v. Sharpe*, 347 U.S. 497 [1954]).

The Equal Protection Clause is of the utmost importance. The sense that we are being treated fairly and equally is essential for maintaining our respect for the law and support for the political system. Yet every day, the police, prosecutors, and judges make decisions treating people differently in regard to arrests, criminal charges, bail, and sentencing. We generally accept these decisions because we have confidence that the judgments are fair and reasonable. Individuals who believe that they have been discriminated against may ask a court to determine whether they have been denied equal treatment under the law.

One area of legal challenge involves the decision of a prosecutor to charge an individual with a criminal offense. Would it violate equal protection for a prosecutor to charge one teenager involved in a drag race with reckless driving while deciding not to bring charges against the other driver? Courts generally follow a **presumption of regularity**. Prosecutors are expected to use “judgment and common sense” in filing criminal charges, and courts will not second-guess a prosecutor’s decision. Judges recognize that prosecutors are in the best position to evaluate a defendant’s role in a crime, criminal record, willingness to cooperate, and expressions of remorse and other factors (*Wayte v. United States*, 470 U.S. 598, 607–608 [1985]).

Prosecutors’ discretion, however, is not unlimited. The Supreme Court noted in *Oyler v. Boles* that the Equal Protection Clause prohibits prosecutors from making decisions to prosecute that are “deliberately based upon an unjustifiable standard such as race, religion, [or] other arbitrary classification” (*Oyler v. Boles*, 368 U.S. 448, 456 [1962]).

**TABLE 2.3**

Bill of Rights Provisions Related to Criminal Procedure Incorporated into the Fourteenth Amendment

Amendment	Case	Protection/Right
First Amendment	<i>Fiske v. Kansas</i> , 274 U.S. 380 (1927)	freedom of speech
Second Amendment	<i>McDonald v. Chicago</i> , 561 U.S. 3025 (2010)	right to bear arms
Fourth Amendment	<i>Wolf v. Colorado</i> , 338 U.S. 25 (1949)	unreasonable searches and seizures
	<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	exclusionary rule
Fifth Amendment	<i>Malloy v. Hogan</i> , 378 U.S. 1 (1964)	compelled self-incrimination
	<i>Benton v. Maryland</i> , 395 U.S. 784 (1969)	double jeopardy
Sixth Amendment	<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	right to counsel
	<i>Klopfer v. North Carolina</i> , 386 U.S. 213 (1967)	speedy trial
	<i>In re Oliver</i> , 333 U.S. 257 (1948)	public trial
	<i>Pointer v. Texas</i> , 380 U.S. 400 (1965)	right to confront witnesses
	<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	impartial jury
	<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	right to compulsory process for obtaining favorable witnesses at trial
Eighth Amendment	<i>Robinson v. California</i> , 370 U.S. 660 (1962)	cruel and unusual punishment

In *Yick Wo v. Hopkins*, the U.S. Supreme Court held that focusing prosecutions on the Chinese community for violations of a San Francisco ordinance regulating laundries violated the Fourteenth Amendment. The Court noted that the ordinance was being applied “with a mind so unequal and oppressive as to amount to a practical denial by the state of . . . equal protection of the law. . . . Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is . . . within the prohibition of the constitution” (*Yick Wo v. Hopkins*, 118 U.S. 356 [1886]).

A defendant’s claim of discriminatory or **selective prosecution** and request that a court dismiss a prosecution on the grounds of equal protection of the law must overcome the presumption of regularity by presenting clear and convincing evidence of a discriminatory impact and discriminatory intent.

- **Discriminatory impact.** Equal enforcement of a law focuses on whether individuals of a group or groups and nonmembers of these groups have violated the same law but have not been prosecuted to the same extent.
- **Discriminatory intent.** The prosecutor intentionally or purposefully singles out and targets members of the group for prosecution.

Courts will subject classifications based on race, religion, ethnicity, or national origin or the exercise of First Amendment rights to *strict scrutiny*. These categories in almost every instance are irrelevant to the enforcement of the criminal law. For example, a prosecutor would have a difficult time explaining why he or she brought most prosecutions for speeding against members of a particular religious group who recently moved into the community. On the other hand, it may make sense to direct prosecutions against young drivers who statistics indicate pose a significant threat to safety or who commit more driving violations than other drivers. The following are three frequently noted examples of successful claims of selective prosecution.

- **Census questions.** Four individuals were prosecuted in Hawaii for failing to complete their census forms. The individuals were members of a census resistance movement and openly protested the census on the grounds that it constituted an invasion of privacy (*United States v. Steele*, 461 F.2d 1148 [9th Cir. 1972]).
- **Housing codes.** A landlord convicted of violating a housing law was allowed to show that she was singled out for prosecution because she had disclosed corruption in the Department of Buildings in New York (*People v. Walker*, 200 N.E.2d 779 [N.Y. 1964]).
- **Sunday sales.** The defendant was permitted to argue that he was the only store owner prosecuted for selling items that were prohibited from being sold on Sunday. He alleged that he was singled out because he had a discount drugstore that threatened the economic livelihood of other storeowners in the area (*People v. Utica Daw's Drug Company*, 225 N.Y.S.2d 128 [1962]).

The next case in the text is *United States v. Armstrong*. The respondents were indicted on charges of conspiring to possess with intent to distribute and conspiring to distribute more than fifty grams of cocaine base (crack) and using firearms in connection with drug trafficking. The defendants filed a motion for discovery (a legal action asking for the court to order the opposing side, in this instance the U.S. Attorney, to turn over information). This motion was based on the claim that the defendants were being subjected to “selective prosecution” in violation of equal protection of the law because they are African Americans. The respondents primarily relied on an affidavit by a “paralegal specialist” employed by the Federal Public Defender Services who stated that in his experience, every individual against whom similar charges had been filed during 1991 was African American. The affidavit was supported by other documents, including a “study” of crack-cocaine cases processed by the Federal Public Defender during 1991 that indicated that all of the defendants charged with conspiracy to possess or to distribute crack cocaine were African Americans. The respondents anticipated that the U.S. Attorney’s files would reveal a pattern of prosecuting African Americans for charges relating to crack cocaine while dropping or plea-bargaining the same charges against Caucasians.

The U.S. Supreme Court held that a defendant seeking discovery in a selective-prosecution claim based on race must demonstrate that the prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose. The claimant is required to present “some evidence” (a “credible showing”) that “similarly situated individuals of a different race were not prosecuted.” As you read *Armstrong*, consider whether the claimants presented “some evidence tending to show the existence of the essential elements of a selective-prosecution claim.” A second question is whether Justice John Paul Stevens, in his dissenting opinion, is correct in arguing that the respondent’s discovery request should be granted based on the “severity of the imposed penalties and the troubling racial patterns of enforcement” that raise a question concerning the “fairness of charging practices for crack offenses” (*United States v. Armstrong*, 517 U.S. 456 [1996]).

## Criminal Procedure in The News

The American people consider the handgun to be the quintessential self-defense weapon. There are various reasons that a citizen may prefer a handgun for home defense. Handguns are easily accessible in an emergency, do not require a great deal of physical strength to use, and cannot easily be wrestled away by an attacker. In the past several decades, various cities and suburbs have placed restrictions on the right of Americans to possess handguns, even for self-defense. There is a risk that individuals may act impulsively and settle arguments through the use of a firearm or that the gun may fall into the “wrong hands.”

Gun rights advocates long have argued that limitations on the right to possess arms violate the Second Amendment to the U.S. Constitution, which reads that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

The meaning of the Second Amendment has been the topic of considerable debate. Courts historically focused on the first clause of the amendment that recognizes the importance of a “well regulated Militia” and held that the Amendment protects the right of individuals to possess arms in conjunction with service in an organized government militia.

In 1939, in *United States v. Miller*, the U.S. Supreme Court upheld the constitutionality of a federal law prohibiting the interstate shipment of sawed-off shotguns, reasoning that the Second Amendment protections are limited to gun ownership that has “some reasonable relationship to the preservation or efficiency of a well regulated militia” (*United States v. Miller*, 307 U.S. 174 [1939]).

The decision in *Miller* reflected the traditional view that the framers of the Constitution feared that the federal government would abolish state and local militias and create a national standing army that could pose a danger to freedom. The Second Amendment, according to this interpretation, was intended to protect the states by prohibiting the national government from interfering with state militias, and it did not address the individual right to possess weapons or enshrine the common law right of self-defense.

Gun rights activists contended that the Second Amendment recognition of the “right of the people to keep and bear Arms” is not limited to members of the militia. They argued that the Amendment also protects individuals’ right to possess firearms “unconnected” with service in a militia. The Founding Fathers, according to gun rights activists, viewed gun ownership as essential to the preservation of individual liberty. A state or federal government could abolish the state national guard and leave citizens unarmed and vulnerable. According to gun rights activists, the framers had concluded that the best way to safeguard and to protect the people was to guarantee individuals’ right to bear arms in the Second Amendment.

In *District of Columbia v. Heller*, the U.S. Supreme Court reversed existing precedent and adopted the view of gun rights activists. The Court majority held that the Second Amendment protects the right of individuals to possess firearms for self-defense in the home (*District of Columbia v. Heller*, 544 U.S. 570 [2008]).

Dick Heller, a special police officer, was authorized to carry a handgun while on duty at the federal courthouse in the District of Columbia (DC). He applied for a registration certificate from the DC government for a handgun that he wanted to keep at home for self-defense. A DC ordinance prohibited the possession of handguns and declared that it was a crime to carry an unregistered firearm. A separate portion of the District Code authorized the DC Chief of Police to issue licenses for one-year periods. Lawfully registered handguns were required to be kept “unloaded and disassembled or bound by a trigger lock or similar device” when not “located” in a place of business or used for lawful recreational activities.

Justice Antonin Scalia, writing for a five-judge majority, held the DC ordinance unconstitutional because the regulation interfered with the ability of law-abiding citizens to use a firearm for self-defense in the home, the “core lawful purpose” of the right to bear arms. “Undoubtedly some think that the Second Amendment is outmoded in a society where our

standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.”

The Supreme Court decision cautioned that while DC could not constitutionally prohibit the possession of handguns in the home for self-defense, the right to bear arms is not unlimited—just as the First Amendment right to freedom of speech is not unlimited. The judgment did not limit the ability of DC to prohibit possession of firearms by felons and the mentally challenged or to enact laws forbidding the carrying of firearms in “sensitive places” such as schools and government buildings, regulating the commercial sale of arms, restricting the possession of dangerous and unusual weapons, or requiring the safe storage of weapons.

*Heller*, although important for defining the meaning of the Second Amendment and establishing the individual right to possess a firearm in the home for self-defense, applied only to the District of Columbia and to other federal jurisdictions. *Heller* did not establish that the right to possess firearms was a fundamental right protected by the Fourteenth Amendment that applied to state governments. As a result, state governments remained free to restrict or even to prohibit individual ownership of firearms.

Two years later, in *McDonald v. Chicago*, the Supreme Court was presented with the question whether the Second Amendment was incorporated into the Fourteenth Amendment of the U.S. Constitution and applied to both the federal and state governments (*McDonald v. Chicago*, 561 U.S. 3025 [2010]).

Otis McDonald likely was surprised to find himself the lead plaintiff in a landmark U.S. Supreme Court case. McDonald, a seventy-six-year-old grandfather and father of eight, was the son of poor Southern sharecroppers. He served in the military and made his way to Chicago, where he was hired as a janitor at the University of Chicago. By the time McDonald retired after thirty years of service, he had worked his way up to the position of an operating engineer. McDonald, an African American, had raised his kids on the leafy and safe streets of the Morgan Park area of Chicago. In recent years, the neighborhood had been overrun by gangbangers and drug dealers. His house had been burglarized three times, and his garage had been broken into three times. The well-kept yards increasingly were littered with trash and bottles. McDonald was prohibited by Chicago’s restrictive gun laws from possessing a handgun to protect himself. He complained that while he was left vulnerable, the criminals had all the guns. Adam Orlov, a police officer, was another plaintiff. He explained that he was tired of telling women living alone that it was unlawful to possess a handgun to protect themselves.

A companion case challenged the gun control law in the liberal suburb of Oak Park, Illinois. Oak Park banned handguns

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in 1983 after a local attorney was shot to death with a handgun that an assailant had smuggled into a courtroom. A citizens' committee gathered six thousand signatures in support of a prohibition on handguns, and the village board enacted the ban into law. Opponents of the ban asked for a popular referendum on whether to maintain the prohibition, and the public voted to keep the ban on handguns by a vote of 8,031 to 6,368.

In 2010, in *McDonald v. Chicago*, McDonald and Orlov and other residents of Chicago, Illinois, and of the Chicago suburb of Oak Park, Illinois, challenged local ordinances that were almost identical to the law that the Court struck down as unconstitutional in the federal enclave of Washington, DC. Chicago residents, according to the petitioners McDonald and Orlov, confronted one of the highest violent crime rates in the country. During the weekend preceding the Supreme Court decision, fifty individuals were shot in Chicago, some fatally.

The Second Amendment was one of the few amendments in the Bill of Rights that had not been incorporated into the Fourteenth Amendment and made applicable to the states. The result was that even after *Heller*, the right to possess firearms was not considered a fundamental right incorporated into the Fourteenth Amendment. State and local governments were limited only by the provisions of their own state constitutions in their ability to restrict or even to prohibit individual ownership of firearms.

The Fourteenth Amendment prohibits a state from denying an individual life, liberty, or property without due process of law. The question in *McDonald* was whether the right to keep and to bear arms was a liberty interest protected under the Due Process Clause of the Fourteenth Amendment. The incorporation of the Second Amendment into the Due Process Clause of the Fourteenth Amendment would mean that the Supreme Court would be final arbiter as to whether a state and local gun ordinance was constitutional under the Due Process Clause. Justice Samuel Alito, writing for a 5-4 majority, argued that self-defense is a "basic right, recognized by many legal systems from ancient times to the present day." He concluded that the Second Amendment right to possess firearms in the home for the purpose of self-defense is incorporated into the Fourteenth Amendment and is applicable to the states. The right to keep and bear arms for purposes of self-defense is "among the fundamental rights necessary to our system of ordered liberty," which is "deeply rooted in this Nation's history and tradition." The handgun is the preferred means of self-defense favored by Americans to protect their homes and their families.

Justice Alito noted that the right to bear arms was recognized in the 1689 English Bill of Rights, which explicitly protected a right to keep arms for self-defense, and that by 1765, the famous legal scholar William Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen." The right to bear arms

was incorporated into the Second Amendment of the U.S. Bill of Rights. Congress, in drafting the Fourteenth Amendment, was expressly concerned that former African American slaves have access to weapons to protect themselves against the discriminatory governments of the Southern states.

The incorporation of the Second Amendment into the Fourteenth Amendment clearly established that the right to bear arms for the purpose of self-defense is a fundamental right that may not be infringed by state governments.

Justice Stevens, in dissent, recognized that although most state constitutions historically recognized the right to bear arms, localities and states traditionally had differed in their approach to regulating firearms. He wrote that urban areas generally were much stricter than rural areas in their approach to firearms, and the Supreme Court should not dictate to state and local elected officials the rules and regulations governing firearms.

In 2016, the U.S. Supreme Court in *Caetano v. Massachusetts* held that the Second Amendment protects Tasers and held that the Second Amendment is not limited to weapons in existence at the time the Second Amendment was drafted and is not restricted to "weapons of war" (*Caetano v. Massachusetts*, 517 U.S. \_\_\_, 136 S. Ct. 1027 [2016]).

The precise meaning of the decisions in *Heller* and *McDonald* will not be clear until various state gun control laws are reviewed by the courts. There have been more than one thousand state and federal court decisions addressing the Second Amendment since the decision in *Heller*. State and federal courts in accordance with *Heller* have upheld laws prohibiting the possession of firearms by juveniles, undocumented individuals, and by "dangerous persons," including individuals convicted of felonies and of domestic violence, and by individuals who have been committed to mental institutions. Laws also have been held constitutional that prohibit individuals from possessing firearms in "sensitive places" such as schools and government buildings, and courts have affirmed the right of private institutions such as churches and businesses to prohibit the possession of firearms on their property. In addition, laws have been affirmed that prohibit the possession of machine guns, assault weapons, and large-capacity ammunition magazines. Other state and local statutes require that individuals in homes with children take precautions to prevent juveniles from gaining access to weapons. Several states impose taxes on the commercial sale of firearms and ammunition or require brief waiting periods for the purchase of a firearm. Some states require that an applicant for a handgun permit demonstrate competence in handling firearms on the grounds that a person who is not well trained in the use of firearms is a menace to himself and others.

New York has one of the most restrictive laws and limits possession of firearms outside the home to individuals with

a “proper cause.” A “proper cause” includes individuals in specific professions and individuals in designated locations such as a bank guard as well as individuals desiring a firearm for target practice or hunting or self-defense. Individuals who want a weapon for self-defense are required to demonstrate a “special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” In other words, only individuals with a real and approved reason to possess handguns may bring a firearm into the “public sphere.” The Second Circuit Court of Appeals upheld the New York statute and held that “in light of the state’s considerable authority . . . to regulate firearm possession in public, requiring a showing that there is an objective threat to a person’s safety—a ‘special need for self-protection’—before granting a carry license is entirely consistent with the right to bear arms” (*Kachalsky v. County of Westchester*, 701 F.3d 81 [2d Cir. 2012]).

In 2013, in *Moore v. Madigan*, the Seventh Circuit Court of Appeals held unconstitutional an Illinois flat ban on carrying a loaded firearm within accessible reach outside the home. The only exceptions to this prohibition under Illinois law were police officers and other security personnel, hunters, and members of target shooting clubs. The Seventh Circuit Court of Appeals held that although both *Heller* and *McDonald* reasoned that “‘the need for defense of self, family, and property is most acute’ in the home,” this does not mean “‘it is not acute outside the home.’” The court pointed out that *Heller* recognized a broader Second Amendment right than the right to have a gun in one’s home when the decision noted that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” The Seventh Circuit concluded that confrontations

are not limited to the home and that the Illinois law therefore is in violation of individuals’ Second Amendment rights (*Moore v. Madigan*, 702 F.3d 933 [7th Cir. 2013]). In July 2013, the Illinois legislature passed a statute permitting individuals to obtain a license to carry a loaded or unloaded concealed weapon on their person or within a vehicle (430 ILCS 66).

In 2017, the United States Court of Appeals for the District of Columbia held a District of Columbia Code provision unconstitutional that required applicants for a concealed-carry permit for handguns to demonstrate a “good reason to fear injury to their person or property” or to demonstrate “any other proper reason for carrying a pistol” such as transporting cash or valuables as part of their job. Judge Thomas Griffith in his majority decision held that the requirements of the District of Columbia statute by the “law’s very design” made it impossible for most residents to exercise their Second Amendment rights. “In this way, the District’s regulation completely prohibits most residents from exercising the constitutional right to bear arms. . . . The good reason [requirement] is necessarily a total ban on exercise of [the Second Amendment] for most D.C. residents” (*Wrenn v. District of Columbia*, 864 F.3d 656 (D.C.Cir. 2017)).

The Supreme Court thus far has declined to rule on the constitutionality of “good reason” concealed-carry laws. What is your view as to whether the requirement that individuals demonstrate a “good reason” for the concealed carry of firearms is a violation of the Second Amendment?

A number of states, including Texas in May 2015, authorize students and faculty to carry concealed arms on campus. Do you favor these types of laws?

You can find *McDonald v. Chicago* on the Student Study Site, [edge.sagepub.com/lippmanpc4e](http://edge.sagepub.com/lippmanpc4e)

## Did the respondents present some evidence of the discriminatory enforcement of drug laws?

**UNITED STATES V. ARMSTRONG,**  
517 U.S. 456 (1996), REHNQUIST, C.J.

### Issue

In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that

the Government declined to prosecute similarly situated suspects of other races.

### Facts

In April 1992, respondents were indicted in the United States District Court for the Central District of California on charges  
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of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same, in violation of 21 U.S.C. §§ 841 and 846 (1988 ed. and Supp. IV), and federal firearms offenses. For three months prior to the indictment, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics Division of the Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants. On seven separate occasions during this period, the informants had bought a total of 124.3 grams of crack from respondents and witnessed respondents carrying firearms during the sales. The agents searched the hotel room in which the sales were transacted, arrested respondents Armstrong and Hampton in the room, and found more crack and a loaded gun. The agents later arrested the other respondents as part of the ring.

In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black. In support of their motion, they offered only an affidavit by a “Paralegal Specialist,” employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the affidavit was that, in every one of the twenty-four § 841 or § 846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a “study” listing the twenty-four defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.

The district court granted the motion. It ordered the Government (1) to provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.

The Government moved for reconsideration of the district court’s discovery order. With this motion, it submitted affidavits and other evidence to explain why it had chosen to prosecute respondents and why respondents’ study did not support the inference that the Government was singling out blacks for cocaine prosecution. The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, because there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten-year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; . . . there were multiple federal firearms violations intertwined with the narcotics

trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; . . . and several of the defendants had criminal histories including narcotics and firearms violations.

The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that “large-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack.” In response, one of respondents’ attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are “an equal number of Caucasian users and dealers to minority users and dealers.” Respondents also submitted an affidavit from a criminal defense attorney alleging that in his experience, many non-blacks are prosecuted in state court for crack offenses, and a newspaper article reporting that federal “crack criminals . . . are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black.” The district court denied the motion for reconsideration. When the Government indicated it would not comply with the court’s discovery order, the court dismissed the case. . . . The court of appeals voted to hear the case en banc, and the en banc panel affirmed the district court’s order of dismissal, holding that “a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated.” We granted certiorari to determine the appropriate standard for discovery for a selective-prosecution claim.

### Reasoning

A selective-prosecution claim asks a court to exercise judicial power over a “special province” of the Executive. The Attorney General and United States Attorneys retain “broad discretion” to enforce the Nation’s criminal laws. They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to “take Care that the Laws be faithfully executed.” See U.S. Constitution, Article II, Section 3. As a result, “the presumption of regularity supports” their prosecutorial decisions, and “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” In the ordinary case, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”

A prosecutor’s discretion is “subject to constitutional constraints.” One of these constraints, imposed by the equal protection component of the Due Process Clause

of the Fifth Amendment, is that the decision whether to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” A defendant may demonstrate that the administration of a criminal law is “directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive” that the system of prosecution amounts to “a practical denial” of equal protection of the law.

In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present “clear evidence to the contrary.” We explained in *Wayte v. United States* why courts are “properly hesitant to examine the decision whether to prosecute.” Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. “Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.” It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. “Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”

The requirements for a selective-prosecution claim draw on “ordinary equal protection standards.” The claimant must demonstrate that the federal prosecutorial policy “had a discriminatory effect and that it was motivated by a discriminatory purpose.” To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. . . . The similarly situated requirement does not make a selective-prosecution claim impossible to prove. In *Yick Wo*, an ordinance adopted by San Francisco prohibited the operation of laundries in wooden buildings. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings “under similar conditions.”

Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant’s claim. Discovery thus imposes many of the costs present when the Government must respond to a prima

facie case of selective prosecution. It will divert prosecutors’ resources and may disclose the Government’s prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

The courts of appeals “require some evidence tending to show the existence of the essential elements of the defense,” discriminatory effect and discriminatory intent. In this case, we consider what evidence constitutes “some evidence tending to show the existence” of the discriminatory effect element. . . . The vast majority of the courts of appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law. As the three-judge panel explained, “‘selective prosecution’ implies that a selection has taken place.”

The court of appeals reached its decision that a defendant may establish a colorable claim for a discriminatory effect without evidence that the Government failed to prosecute others who are similarly situated to the defendant. The court of appeals reached this decision in part because it started “with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group.” It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90 percent of the persons sentenced in 1994 for crack cocaine trafficking were black; 93.4 percent of convicted LSD dealers were white; and 91 percent of those convicted for pornography or prostitution were white. Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers but were not prosecuted in federal court. We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government’s interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution.

### Holding

In the case before us, respondents’ “study” did not constitute “some evidence tending to show the existence of

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the essential elements of a selective-prosecution claim.” The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged but were not so prosecuted. . . . The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents’ affidavits, which recounted one attorney’s conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the court of appeals is therefore reversed. . . .

### **Dissenting, *Stevens, J.***

The United States Attorney for the Central District of California is a member and an officer of the bar of that district court. As such, she has a duty to the judges of that Court to maintain the standards of the profession in the performance of her official functions. If a district judge has reason to suspect that she, or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the judge to determine whether there is a factual basis for such a concern. . . .

The district judge’s order should be evaluated in light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti-Drug Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called “crack” cocaine. Those provisions treat 1 gram of crack as the equivalent of 100 grams of powder cocaine. The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence of 10 years in prison that applies to the distribution of 5,000 grams of powder cocaine. The Sentencing Guidelines extend this ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine. These penalties result in sentences for crack offenders that average three to eight times longer than sentences for comparable powder offenders.

Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. For a variety of reasons, often including the absence of mandatory minimums, the existence of parole, and lower baseline penalties, terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system. The difference is especially marked in the case of crack offenses. The majority of States draw no distinction between types of cocaine in their penalty schemes; of those that do, none has established as stark a differential as the

Federal Government. For example, if respondent Hampton is found guilty, his federal sentence might be as long as a mandatory life term. Had he been tried in state court, his sentence could have been as short as 12 years, less work time credits of half that amount.

Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65 percent of the persons who have used crack are white, in 1993, they represented only 4 percent of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. During the first 18 months of full guideline implementation, the sentencing disparity between black and white defendants grew from pre-guideline levels: Blacks on average received sentences over 40 percent longer than whites. Those figures represent a major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing. The Sentencing Commission acknowledges that the heightened crack penalties are a “primary cause of the growing disparity between sentences for Black and White federal defendants.”

The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses. Evidence tending to prove that black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that district. In my view, the district judge, who has sat on both the federal and the state benches in Los Angeles, acted well within her discretion to call for the development of facts that would demonstrate what standards, if any, governed the choice of forum where similarly situated offenders are prosecuted.

Respondents submitted a study showing that of all cases involving crack offenses that were closed by the Federal Public Defender’s Office in 1991, twenty-four out of twenty-four involved black defendants. To supplement this evidence, they submitted affidavits from two of the attorneys in the defense team. The first reported a statement from an intake coordinator at a local drug treatment center that in his experience, an equal number of crack users and dealers were Caucasian as belonged to minorities. The second was from David R. Reed, counsel for respondent Armstrong. Reed was both an active court-appointed attorney in the Central District of California and one of the directors of the leading association of criminal defense lawyers who practice before the Los Angeles County courts. Reed stated that he did not recall “ever handling a [crack] cocaine case involving non-black defendants” in federal court, nor had he even heard of one. He further stated that “there are many crack cocaine

sales cases prosecuted in state court that do involve racial groups other than blacks.”

The majority discounts the probative value of the affidavits, claiming that they recounted “hearsay” and reported “personal conclusions based on anecdotal evidence.” But the Reed affidavit plainly contained more than mere hearsay; Reed offered information based on his own extensive experience in both federal and state courts. Given the breadth of his background, he was well qualified to compare the practices of federal and state prosecutors. . . . The criticism that the affidavits were based on “anecdotal evidence” is also unpersuasive. I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery in cases like this one. Certainly, evidence based on a drug counselor’s personal observations or on an attorney’s practice in two sets of courts, state and federal, can “tend to show the existence” of a selective prosecution.

The presumption that some whites are prosecuted in state court is not “contradicted” by the statistics the majority cites, which show only that high percentages of blacks are convicted of certain federal crimes, while high percentages of whites are convicted of other federal crimes. Those figures are entirely consistent with the allegation of selective prosecution. The relevant comparison, rather, would be with the percentages of blacks and whites who commit

those crimes. But, as discussed above, in the case of crack, far greater numbers of whites are believed guilty of using the substance. The district judge, therefore, was entitled to find the evidence before her significant and to require some explanation from the Government.

The Government . . . submitted a list of more than 3,500 defendants who had been charged with federal narcotics violations over the past three years. It also offered the names of 11 nonblack defendants whom it had prosecuted for crack offenses. All 11, however, were members of other racial or ethnic minorities. . . . As another court has said, “Statistics are not of course, the whole answer, but nothing is as emphatic as zero. . . .”

In sum, I agree with the Sentencing Commission that “while the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent, because of the 100-to-1 quantity ratio and federal mandatory minimum penalties, discretionary decisions in cocaine cases often have dramatic effects.” . . . In this case, the evidence was sufficiently disturbing to persuade the district judge to order discovery that might help explain the conspicuous racial pattern of cases before her court. I cannot accept the majority’s conclusion that the district judge either exceeded her power or abused her discretion when she did so. I therefore respectfully dissent.

### Questions for Discussion

1. What is the holding of the case?
2. Did the respondents demonstrate “some evidence” of a discriminatory impact and of a discriminatory intent? What additional evidence would the respondents have to present to meet the “some evidence” standard? List the type of data that the respondents anticipate
3. Summarize Justice Stevens’s argument. Do you agree with him that the facts are “sufficiently disturbing to require that the government explain its charging practices for crack offenses”?
4. What is the best argument in support of the respondents’ claim? What is the best argument for the government in arguing that the respondents have failed to make a credible case of racial discrimination in charging practices?

## Cases and Comments

**Equal Protection and the Death Penalty.** In *United States v. Bass*, defendant John Bass was charged with the intentional firearm killing of two individuals. The U.S. Attorney filed a notice to seek the death penalty. Bass requested discovery regarding the federal government’s capital

punishment charging policies. The Sixth Circuit Court of Appeals affirmed the discovery order of the District Court of the Eastern District of Michigan.

In support of his request for discovery, Bass presented data regarding “white” and “black” prisoners contained

(Continued)

(Continued)

in *The Federal Death Penalty System: A Statistical Survey* (1988–2000). The Sixth Circuit found that the evidence constituted “some evidence” of a discriminatory impact.

Bass highlighted the following statistics. Caucasians comprise a majority of all federal prisoners and are only one-fifth of those charged with death-eligible offenses. The United States charges African Americans with a death-eligible offense more than twice as often as it charges Caucasians. In addition, fourteen of the seventeen defendants charged with death-eligible crimes in the Eastern District of Michigan are African American, and three are Hispanic. Among death-eligible defendants, the United States enters into plea bargains with Caucasians almost twice as often as it does with African Americans. (The United States entered into a plea bargain with 48 percent of the Caucasian defendants against whom it sought the death penalty, compared with 25 percent of similarly situated African American defendants. The federal government entered into plea agreements with 28 percent of Latino and 25 percent of other nonwhite defendants.) In the “few non-death-eligible offense categories” in which African Americans constituted a higher percentage of total offenders sentenced than Caucasians, “none reflected a statistical disparity comparable to the disparity reflected by the survey for death-eligible charges.”

Bass also noted that both U.S. Attorney General Janet Reno and Deputy Attorney General Eric Holder commented after reviewing the federal study that they were concerned that African Americans and Latinos were overrepresented in “those cases presented for consideration of the death penalty, and those cases where the defendant is actually sentenced to death.” Deputy Attorney General Holder indicated that further study was required to determine whether race was involved in the decision to seek the death penalty.

The Sixth Circuit Court of Appeals determined that the plea-bargaining statistic identifies a “pool of similarly situated defendants—those whose crimes share sufficient aggravating factors that the United States chose to pursue the death penalty against each of them.” The appellate

court found it significant that the U.S. government enters into plea bargains with one in two Caucasians in this category of offenders, while it enters into plea bargains with one in four African Americans. The court of appeals held that based on this evidence, the district court “did not abuse its discretion in finding that the statistical disparities are, at the least, some evidence tending to show the death penalty protocol’s discriminatory effect warranting discovery.”

As for discriminatory intent, the appellate court pointed out that the racial disparities identified by Bass in death penalty charging do not occur in any non-death-eligible federal offenses. “Therefore, they suggest that a defendant’s race does play a role during the death penalty protocol.” The court also noted that the U.S. Department of Justice had concluded that the statistics indicate sufficient evidence of discrimination to justify further exploration. The circuit court of appeals accordingly ruled that Bass had presented “some evidence” of a discriminatory intent.

The U.S. Supreme Court in a per curiam decision ruled that the defendant failed to make a “credible showing” that “similarly situated individuals of a different race were not prosecuted.” The Sixth Circuit had concluded that Bass met this standard based on nationwide statistics that U.S. prosecutors plea-bargain more frequently with Caucasians charged with death penalty offenses than with African Americans. “Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing . . . raw statistics regarding overall charges say nothing about charges brought against similarly situated defendants.” The statistics in regard to plea bargains “are even less relevant, since respondent was offered a plea bargain but declined it.” The Court concluded that under *Armstrong*, because Bass “failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery.” What type of evidence would have satisfied the Supreme Court’s standard? Do you agree with the Supreme Court’s decision? See *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001), 536 U.S. 862 (2002).

## THE IMPACT OF SUPREME COURT DECISIONS

The U.S. Supreme Court for a number of years largely ignored the issue of **retroactivity of judicial decisions** or the impact of a decision announcing a “new rule” on other cases. *New rule* is defined as a procedural requirement that the Court heretofore had not required. An example would be the Supreme Court’s holding in *Gideon v. Wainwright* that the Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment and that states are required to provide legal representation to indigents charged with a felony. Gideon had been denied counsel at his trial, and the Supreme Court accordingly reversed his conviction. The question is whether individuals who were convicted prior to the decision in *Gideon* should be provided with a new trial.

As the Supreme Court became actively involved in criminal procedure decisions, judges became concerned that a decision announcing a new rule on interrogations, lineups, searches and seizures, or other areas would permit every person in federal or state “custody” (in prison or on probation or parole) whose conviction was obtained under the “old rule” to file a writ of habeas corpus challenging his or her conviction. Many of these individuals had been convicted years ago, and a retrial was not always practical: Witnesses likely would prove difficult to locate, memories may have faded, and records likely would have disappeared. The criminal justice system also could not absorb an avalanche of new trials and appeals.

This is a philosophical as well as a practical question. A Supreme Court ruling might be viewed as a statement of the law as it always existed, in which case individuals in custody should be authorized to rely on the new rule in challenging their convictions. The problem is that this would “open wide the courthouse door” to a cascade of appeals. The Supreme Court in a series of cases wisely decided that courts should follow the “rule that existed at the time of the final decision” and that the new rule would not be available on a habeas corpus review.

The Supreme Court recognized at the same time that it would be unfair to benefit the individual before the Court whose case had resulted in the new ruling while denying this same benefit to individuals whose cases raised the same issue and were currently at trial or on appeal.

In brief, the Supreme Court applies the new rule to cases that are “pending” and denies the new rule to cases that are “final.” The rule of retroactivity is summarized below:

- **Trial.** The new rule applies to cases that have not yet been brought to trial and to trials that are currently being conducted.
- **Appeals.** The new rule applies to cases that are on direct appeal or about to be appealed.
- **Habeas corpus.** The new rule is not available to individuals in cases in which the judgments have become “final” before the new judgment is issued. These are the individuals who have exhausted their appeals as a matter of right and now must rely on habeas corpus review of the constitutionality of their conviction.

The Supreme Court reserves the right to make a judgment fully retroactive in a small handful of what are considered “watershed” judgments.

Another impact of a Supreme Court decision is that a host of questions inevitably arises in lower courts that require the Supreme Court to explain its opinion. In 1966, in *Miranda v. Arizona*, the Supreme Court held that prior to interrogating a suspect who is in custody, the police are required to provide the suspect with the three-part *Miranda* warning. Over the past three decades, the Supreme Court has issued decisions in more than thirty-five cases interpreting the requirements of *Miranda* that address questions such as the definition of *custody*, how the rights are to be read, and the standard for waiving and invoking the *Miranda* rights.

A Supreme Court judgment is intended to impact the enforcement of the criminal law. The fact is that the Court cannot “wave a magic wand” after it issues a decision and immediately change the behavior of thousands of police officers, prosecutors, and judges.

As a result, decisions often are not fully implemented, even after a number of years. A second aspect of the impact of a Supreme Court decision is that the judgment may have “unanticipated consequences.” The Supreme Court believed that informing suspects of their rights would encourage individuals to assert their Fifth Amendment right against self-incrimination. Professor Gerald N. Rosenberg, in his study of the impact of Supreme Court decisions, found that the *Miranda* rights have had virtually no impact on the frequency of confessions. Professor Rosenberg recounts several factors that have limited the impact of *Miranda* and of the decisions explaining the *Miranda* judgment (Rosenberg, 1991, pp. 324–329).

- A number of police officers continue to resist *Miranda* and give the warnings in a way that discourages individuals from asserting their rights.
- The police are not always able to keep track of the new Supreme Court decisions that are issued regarding interrogations.
- Some suspects feel a “social or moral obligation” to speak or may believe that the prosecutor may reduce their charges if they are cooperative.

- Defendants do not always understand the *Miranda* rights and, for instance, do not comprehend why they should remain silent.
- Suspects may have a great deal of incorrect information. They may believe that only written confessions are admissible in evidence at the trial and that they are free to talk to the police without their statement being used against them at trial.

We have now completed our discussion of the sources of criminal procedure, the incorporation debate, and equal protection. The remainder of the chapter briefly discusses two perspectives that you may find useful in thinking about the material in the text. The first perspective is to appreciate that Supreme Court criminal procedure decisions generally attempt to balance the investigation and punishment of crime with the protection of the rights of suspects. The second perspective to keep in mind is that criminal procedure matters: *How* we achieve results is as important as *what* results we achieve.

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## TWO MODELS OF CRIMINAL PROCEDURE

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We want a system of criminal procedure to provide relatively quick and accurate verdicts through fair procedures that treat individuals with respect and without discrimination.

- **Efficiency.** There should be a brief period of time between arrest, indictment, trial, and conviction. The verdict should be relatively quickly affirmed or overturned on appeal.
- **Accuracy.** The criminal process should reach accurate results and not lead to the conviction of the innocent.
- **Fairness.** Suspects should be protected against abuse, corruption, mistreatment, and human error.
- **Equality.** Individuals should be treated the same regardless of race, religion, ethnicity, or income.

These goals often fit uneasily with one another. The speedy and efficient prosecution of cases may be in conflict with detailed procedures and lengthy appellate reviews of verdicts. The tension between the various goals of criminal procedure is nicely illustrated by the work of Herbert Packer (1968).

Packer constructed two “models of criminal procedures” or theoretical approaches to criminal procedure. These models illustrate the difference between a criminal justice system that is based on “crime control” and a criminal justice system that is based on “due process.” Clearly, no system completely fits either of these two models. The *Crime Control Model* is based on the premise that the repression of crime is one of the most important functions of government. The emphasis is on the rapid arrest, screening, charging, and acquittal or conviction and sentencing of the guilty and limiting the appeals process in order to remove antisocial individuals from society.

The police under the Crime Control Model are able to conduct investigations without being slowed by complicated technical requirements for interrogations and searches or by the right of defendants to ask for the assistance of lawyers. The criminal justice system is an assembly line in which the goal is for suspects to have their cases dismissed or to plead guilty and for police and prosecutors to move on to the next case rather than to spend time establishing guilt or innocence at trial or responding to appeals. In summary, the Crime Control Model has several characteristics:

- **Purpose.** The prevention and punishment of crime is the single most important function of the criminal justice system.
- **Informal procedures.** There is stress on speed and efficiency, and the police and other criminal justice professionals should not be weighed down by technical procedures.
- **Determination of guilt.** Emphasis is placed on the ability of the police and prosecutors to separate the guilty from the innocent rather than look to the courts to determine guilt or innocence.

The Crime Control Model can be contrasted with the *Due Process Model*. While recognizing the importance of preventing and punishing crime, the Due Process Model stresses the importance of protecting suspects against the power of police, prosecutors, and judges. Detailed procedures are viewed as the best protection against human error, mistreatment, corruption, and false convictions. Speed and efficiency are sacrificed in order to protect individual “rights,” to provide equal treatment, and, most important, to ensure reliable results. The Due Process Model is an obstacle course; the Crime Control Model is an assembly line.

The Due Process Model relies on trial and appellate courts to determine guilt and innocence. Trials and multilevel appeals safeguard against witnesses with faulty memories, inaccurate identifications at lineups, coerced or false confessions, and inaccurate laboratory reports. The credo is that it is “better that nine guilty people go free than a single innocent individual is convicted.” The Due Process Model is summarized here:

- **Purpose.** There is a concern with the prevention and punishment of crime that is accompanied by an equal concern with detailed procedures that protect individual rights in the criminal justice process.
- **Formal procedures.** The police and other criminal justice personnel are required to follow detailed procedures that sacrifice speed in the interest of protecting individual rights and ensuring reliable results.
- **Determination of guilt.** Guilt or innocence is determined at a formal trial, and verdicts are subject to lengthy appeals. The judicial process is a check against human error, corruption, and falsehoods that may lead to inaccurate results.

The American system of criminal justice does not fully embrace either the Crime Control or the Due Process Model. The U.S. Supreme Court is constantly attempting to balance the need to efficiently prevent and to punish crime with the constitutional commitment to protecting the rights of the individual. Keep the Court’s search for balance in mind as you read the text, and ask yourself whether in a given instance the Supreme Court is tilting too far toward crime control or too far toward due process. The last section of the chapter stresses the important role that criminal procedure plays in maintaining respect and support for the law.

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## WHY CRIMINAL PROCEDURE MATTERS

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Most of us would agree that the goal of detaining, convicting, and punishing the guilty should be the primary function of the criminal justice system. It may be less apparent why we are concerned with *how* we arrive at a conviction or punishment. Psychologist Tom Tyler has pioneered research on *procedural justice* and has found that confidence in the criminal justice system is based primarily on whether people believe that “just procedures” are being employed rather than on the outcome of the case. Tyler identifies four factors that are crucial in determining whether people perceive that fair procedures are being employed (Tyler, 2006).

- **Voice.** Both sides are able to tell their side of the story.
- **Neutrality.** Decisions are based on rules that are applied in the same fashion in each case and are not the result of personal opinions or prejudice. Confidence is increased when officials explain their decisions to the public.
- **Respect.** Individuals are treated with respect and politeness.
- **Trust.** Criminal justice professionals are honest and dedicated to doing a good job.

The lesson of Tyler’s work is that no matter our race, religion, ethnicity, income, or age, we will support and respect the criminal justice system regardless of the outcome so long as we believe that the process is fair. Social scientists use the word *legitimate* to summarize feelings of respect and support for an institution. We will continue to view criminal justice as legitimate so long as we have trials in which individuals are able to voice their views, decisions are determined by objective rules that are

applied in a uniform fashion by dedicated professionals, and the criminal justice system continues to treat people with respect and concern. An important point to keep in mind is that fair procedures are likely to result in correct outcomes. As you read the remainder of the text, keep in mind that *how* we reach a result may be as important as *what* result is achieved by the criminal justice system.

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## CHAPTER SUMMARY

The founders of the United States adopted a written constitution in which the powers of the various branches of the federal government and the rights and liberties of individuals were explicitly articulated. The document is difficult to amend, and it is extremely complicated for any government to come to power and to change the rules of the game by assuming dictatorial powers or by severely limiting the individual liberties and freedoms contained in the Bill of Rights.

The U.S. Constitution and the Bill of Rights are the primary sources of criminal procedure. These provisions, in turn, are interpreted by the U.S. Supreme Court. The Court's decisions interpreting the Constitution are binding on lower federal courts and on state courts. State constitutions have provisions that protect rights that parallel the provisions of the Bill of Rights. State courts are required to interpret these provisions to provide at least the same protections as are contained in the Bill of Rights. Other sources of criminal procedure include federal and state statutes, federal and state rules of criminal procedure, the American Law Institute's *Model Code of Pre-Arrest Procedure*, and the judgments of state and federal courts.

The last half of the twentieth century has witnessed the nationalization of criminal procedure. This involves the extension of the protections of the Bill of Rights in the U.S. Constitution to the states. Today, we have a fairly uniform system in which the rights of individuals in the criminal justice system generally are the same whether they are in the federal system or are located in one of the fifty states. This has been accomplished by interpreting the Fourteenth Amendment Due Process Clause to incorporate all but four of the provisions of the Bill of Rights. Judges have relied on one of three approaches in interpreting the Fourteenth Amendment.

- **Fundamental fairness.** The Due Process Clause permits states to structure their criminal justice systems however they choose so long as the procedures are consistent with those rights and liberties that are fundamental to a system of ordered liberty.

- **Selective incorporation.** Those portions of the Bill of Rights are incorporated into the Fourteenth Amendment that are considered to be fundamental principles of liberty and justice that provide a foundation for our American civil and political institutions.
- **Total incorporation.** The Bill of Rights contains those liberties and freedoms that the framers viewed as essential to democracy, and the entire Bill of Rights is incorporated into the Fourteenth Amendment.

A few judges, at times, have endorsed a selective-plus or total incorporation-plus approach.

Equal protection of the law, which is guaranteed by both the Fifth and the Fourteenth Amendments, is a particularly important right. It is a fundamental principle that all people should be treated equally, regardless of race, religion, or ethnicity. An individual challenging his or her criminal prosecution on equal protection grounds must overcome the presumption of regularity and establish a discriminatory impact and intent.

Supreme Court decisions establishing a "new rule" apply retroactively to future cases as well as to cases presently at trial and to cases on appeal. A new rule does not apply to cases in which all appeals have been exhausted and which are on habeas corpus review. A Supreme Court judgment also may raise a number of questions that must be addressed by the Court in other decisions. The fact that the Supreme Court issues a judgment does not automatically mean that these rights will be fully implemented.

As you read the remainder of the text, keep Herbert Packer's two models of criminal procedure in mind and analyze how the Supreme Court balances the Crime Control with the Due Process Model. Finally, do not lose sight of the fact that as Tom Tyler documents in his studies of procedural justice, *how* we reach a result may be as important as *what* result is achieved by the criminal justice system.

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## CHAPTER REVIEW QUESTIONS

1. Describe the reasons for creating a constitutional political system in the United States. What provisions regarding criminal procedure are included in the body of the Constitution? Give some examples of the rights contained in the Bill of Rights.
2. Discuss the importance of the U.S. Constitution and the Supreme Court as sources of criminal procedure. Describe the role of state courts and state constitutions as a source of criminal procedure.
3. What is meant by nationalization or "constitutionalization" of criminal procedure?
4. Explain the difference between various approaches to determining the "fundamental rights" that the Fourteenth Amendment extends to the states: fundamental fairness, total incorporation, and selective incorporation.

5. What provisions of the Bill of Rights are incorporated into the Fourteenth Amendment? What provisions of the Bill of Rights are not incorporated into the Fourteenth Amendment?
6. Discuss equal protection, the presumption of regularity, and prosecutorial discretion in charging criminal defendants with a criminal offense.
7. What is the rule regarding the retroactivity of Supreme Court judgments?
8. Distinguish between the Crime Control Model and the Due Process Model of criminal procedure. Why is “procedural justice” important?

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### TEST YOUR KNOWLEDGE: ANSWERS

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



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