

**UNDERSTANDING
CRIMINAL
PROCEDURE
Third Edition**

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Chapter 1

INTRODUCTION TO CRIMINAL PROCEDURE

§ 1.01 The Relationship of “Criminal Law” to “Criminal Procedure”

At one level, the relationship of criminal procedure to criminal law is straightforward. Criminal procedural law (“criminal procedure,” for short) is composed of the rules that regulate the inquiry into whether a violation of a criminal law (“substantive” criminal law, to distinguish it from “procedural” criminal law) has occurred, and whether the person accused of the crime committed it.

Logically, substance is anterior to procedure.¹ The substantive criminal code defines the conduct that society wishes to deter and to punish. Procedural law functions as the means by which society implements its substantive goals. For example, assume the criminal law makes it a crime to possess cocaine. Criminal procedure sets the rules for discovering violations of this criminal statute—*e.g.*, police may not entrap suspects, subject them to unreasonable searches and seizures, or coerce confessions. If the police violate these or other procedural rules, various procedural consequences may arise, such as exclusion of evidence at trial or dismissal of the charge.

Unfortunately, the relationship of procedure to substance is more complicated than the simple description in the preceding paragraph suggests. First, procedural rules can frustrate the implementation of a community’s substantive goals. For example, if the rules unduly hinder the police and prosecutors in their pursuit of law violators, some persons who deserve to be punished are apt to avoid criminal sanction, and the deterrent value of the criminal law is likely to be undermined. On the other hand, if the rules are lax, the police may mistreat suspects, and prosecutors may be able to introduce unreliable evidence against the accused, enhancing the likelihood of unjust convictions and punishment.

Second, the existence of some procedural rules may motivate lawmakers not to enact proposed criminal statutes. For example, suppose that a legislature is debating whether to prohibit consensual homosexual conduct by adults in private places, *i.e.*, their homes. Further assume that the lawmakers determine that the only realistic way to seriously combat such conduct is for police officers to entrap suspects in the investigation of this offense. If procedural rules provide that entrapment (however defined) is illegal, lawmakers might hesitate to prohibit the conduct in the first place, even though they wish to deter or condemn it.²

¹ Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 3 (1964).

² See *id.* at 4.

Third, some legal doctrines involve a mixture of procedure and substance. Consider the constitutional rule that the government must prove beyond a reasonable doubt “every fact necessary to constitute the crime . . . charged.”³ This is a procedural rule, but it cannot properly be enforced unless the term “crime,” a substantive criminal law concept, is defined. For example, does the “crime” of murder include as an ingredient the “absence of a legitimate claim of self-defense”—that is, is “murder” a killing that occurs in the absence of self-defense—or is self-defense an affirmative defense to the “crime” of murder? In short, the answer to the procedural question—who has the burden of proof regarding the matter of self-defense?—depends on the definition of murder, a substantive criminal law concept.

§ 1.02 Sources of Procedural Law

[A] Formal Sources

Various layers of laws and regulations govern the conduct of the participants in the criminal justice system. First, starting at the highest level, various provisions of the United States Constitution, in particular those found in amendments 4, 5, 6, 8, and 14 thereto, restrict the power of law enforcement officers in their relations to persons suspected of criminal activity, and also govern the way in which pre-trial and criminal trials and appeals are conducted. The United States Supreme Court and lower federal and state courts frequently are called upon to interpret the federal constitutional provisions. As a result of substantial constitutional litigation, the study of some aspects of criminal procedure—in particular, police practices—is principally a study of constitutional law.

Second, at the state level, state constitutions are an increasingly important source of procedural law. In the past few decades, as the United States Supreme Court and lower federal courts have become less sympathetic to the *federal* constitutional claims of individual petitioners, a body of *state* constitutional jurisprudence has developed, in which some state courts, interpreting their own constitutions, have granted relief to their residents that would be unavailable under the federal Constitution.⁴ This trend is

³ In re Winship, 397 U.S. 358, 364 (1970).

⁴ See Barry Latzer, *The Hidden Conservatism of the State Court “Revolution,”* 74 *Judicature* 190 (1991) (providing a list, by state, of the number of cases in which each state’s highest court has rejected or adopted United States Supreme Court’s criminal procedure decisions, from the late 1960s through 1989); Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 *Mich. L. Rev.* 189, 217 (1988) (reporting that, in their research, state courts in at least 450 cases recognized rights not available under the federal constitution). This treatise provides non-exhaustive citations to state constitutional law decisions.

Not all state courts have the authority to interpret their constitution differently than the United States Constitution. *E.g.*, Calif. Const. art. I, § 24 (in which the state constitution was amended by the initiative process to provide that in criminal cases various enumerated constitutional rights of the defendant “shall be construed by the courts of this state in a manner consistent with the Constitution of the United States”); Fla. Const. art. I, § 12 (in which the state charter was amended by initiative to provide that it “shall be construed in conformity

significant because a state supreme court is the final arbiter of the meaning of its own constitution.⁵

Third, legislatures have enacted statutes and courts have adopted written rules of criminal procedure governing many aspects of the state and federal criminal justice systems. For example, at the federal level, Congress has enacted laws governing such matters as electronic surveillance of private conversations,⁶ pretrial detention of dangerous persons,⁷ and the qualifications for jury service.⁸ Also, Congress has granted authority to the Supreme Court to promulgate written rules to govern proceedings in the federal courts, which the Court has done in the form of the Federal Rules of Criminal Procedure. In turn, Federal Rule 57 authorizes District Courts (trial courts) to make rules governing local practice.

Fourth, some law enforcement agencies promulgate written regulations that their employees are required to follow. For example, police departments frequently have rules governing, among other matters, the use of deadly force to effectuate arrests, the techniques to be followed in conducting lineups, and the procedures to be used in inspecting the contents of automobiles taken into police custody. Although these regulations do not have the force of law, their violation may result in internal sanctions.

Fifth, on occasion the Supreme Court invokes its so-called “supervisory authority” over the administration of criminal justice in the federal courts

with the 4th amendment to the United States Constitution, as interpreted by the United States Supreme Court”).

It should be noted that a state court may interpret its own constitutional charter *less* protectively than its federal constitutional counterpoint, but if it does so, then the state court “must go on to decide the claim under federal law, assuming it has been raised.” Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 179 (1984). If a state court interprets the state law *more* protectively to the individual, however, it need not turn to federal law—the state petitioner wins her claim.

⁵ The importance of state constitutional law cannot easily be overstated, in terms of its potential impact on litigation in the early decades of the twenty-first century. For thoughtful discussion of so-called “judicial federalism” generally, or of its application in criminal cases, see generally Barry Latzer, *State Constitutional Criminal Law* (1995); Barry Latzer, *State Constitutions and Criminal Justice* (1991); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141 (1985); Catherine Greene Burnett & Neil Colman McCabe, *A Compass in the Swamp: A Guide to Tactics in State Constitutional Law Challenges*, 25 Tex. Tech. L. Rev. 75 (1993); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 Utah L. Rev. 751 (1993); George E. Dix, *Judicial Independence in Defining Criminal Defendants’ Texas Constitutional Rights*, 68 Tex. L. Rev. 1369 (1990); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992); Paul Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, 20 Ariz. St. L.J. 151 (1988); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 Tex. L. Rev. 1081 (1985); Special Project, *State Constitutions and Criminal Procedure: A Primer for the 21st Century*, 67 Ore. L. Rev. 689 (1988).

⁶ 18 U.S.C. §§ 2510–2521 (1997).

⁷ 18 U.S.C. §§ 3141–3150 (1997).

⁸ 28 U.S.C. § 1865 (1997).

to announce rules that apply throughout the federal judicial system. Similarly, some federal circuit courts have developed rules that apply to the district courts within their jurisdiction. Federal supervisory authority rules do not apply in the state courts and are subject to revision by Congress.⁹

[B] Informal Sources: A Taste of Reality

Although criminal procedural rules are primarily promulgated “from on high”—by the United States Supreme Court, state supreme courts, and federal and state legislatures—the law that is enforced daily on the streets often looks considerably different. As Professor Anthony Amsterdam once observed about United States Supreme Court case law: “[o]nce uttered, these pronouncements will be interpreted by arrays of lower appellate courts, trial judges, magistrates, commissioners and police officials. *Their* interpretation . . . , for all practical purposes, will become the word of god.”¹⁰ Put more bluntly, the law at the end of a billy club or police firearm may look very different than the law handed down by nine Justices of the United States Supreme Court or by a legislative body.¹¹

This dichotomy between formal and informal law is inevitable. The United States Supreme Court, and each state’s highest court, lack daily supervisory control over the actions of the police. Judicial authority is limited to litigated cases, and most of what occurs on the street between police officers and the citizenry is legally invisible. Even if a police officer breaches a constitutional or statutory rule, the victim of the breach may not bring the matter to the attention of a judicial body. Even if she does, state supreme courts and the United States Supreme Court can only hear a tiny fraction of the cases affecting criminal suspects.

§ 1.03 Stages of a Criminal Prosecution

[A] In General

Analytically and in law school curricula, “criminal procedure” is often divided into two parts, the investigatory and the adjudicatory stages. In the investigatory phase, the primary actors in the “drama” are police officers and those whom they suspect of criminal activity. This is the “cops and (alleged) robbers” stage of the process.

The adjudicatory phase begins when the government commits itself to bringing a suspect to trial for her alleged criminal conduct. In this stage,

⁹ The concept of “supervisory authority” is discussed more fully at § 4.04, *infra*.

¹⁰ Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785, 786 (1970).

¹¹ Gregory Howard Williams, *Police Discretion: The Institutional Dilemma—Who Is In Charge?*, 68 Iowa L. Rev. 431, 437 (1983) (“There is little assurance that policy established by the Supreme Court will be implemented by patrol officers”).

the focus of attention turns to the legal profession—the prosecutors, defense lawyers, and judges—who participate in the adversarial judicial system. This is the “bail-to-maybe-jail” phase of the process.

In studying criminal procedure, it is important to understand the procedural context in which the legal rules apply. What follows, therefore, is a brief overview of the stages of a typical criminal prosecution. Because adjudicatory procedures differ by state and depend on whether the defendant is charged with a felony or a misdemeanor, primary emphasis is on *felony* prosecutions in the *federal* system.

[B] Investigatory Stage

A criminal investigation commonly begins when a police officer, on the basis of her own observations and/or those of an informant, comes to believe that criminal activity may be afoot or has already occurred. Because there are no formal stages of a criminal investigation, most Criminal Procedure courses survey the constitutional law pertaining to the most common police investigative practices.

Police officers usually search and seize persons and property during the investigatory stage. Searches and seizures occur in an almost infinite variety of ways: for example, by stopping (“seizing”) a suspect on the street and frisking her (“searching”) for weapons or evidence; by entering a house in order to look for a suspect or evidence of a crime; by opening containers found in an automobile stopped on the highway; and by wiretapping in order to monitor the conversations of suspects.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. At one time, most especially in the late 1950s through the early-to-mid 1970s, this proscription was interpreted to mean that, except in limited circumstances, police officers were not allowed to search or seize property without a search warrant, supported by probable cause, issued by a judge (or “magistrate”). This warrant requirement (or, at least, warrant presumption) came to be honored primarily in the breach, and is of limited value today in determining the lawfulness of police conduct. Not only do police officers today rarely seek a warrant, but many searches and seizures can be conducted on less than probable cause.¹²

The police also interrogate suspects and witnesses during criminal investigations. Some interrogations occur in a police-dominated atmosphere, such as in a police station. In other circumstances, questioning occurs in a less coercive environment, such as in a person’s home, automobile, or on the street, sometimes in the presence of family or friends. An interrogation may trigger various constitutional questions, including: (1) is the suspect entitled to be represented by counsel during the questioning?; and (2) was any ensuing confession obtained voluntarily? In particular, the Fifth Amendment privilege against compulsory self-incrimination, the due process clauses of the Fifth and Fourteenth Amendments, and the Sixth

¹² See generally chapters 18–19, *infra*.

Amendment guarantee of assistance of counsel during criminal prosecutions, are potentially implicated during police interrogations.¹³

The police also conduct lineups, show witnesses photographs of potential suspects, take handwriting and voice exemplars, and conduct other identification procedures. The police may conduct many of these activities without prior judicial approval, and without intervention by defense counsel. Nonetheless, in some cases the Sixth Amendment right-to-counsel provision applies and, in all cases, the procedures must be conducted in a constitutionally reliable manner.¹⁴

Assuming that a criminal investigation results in a police determination that there is probable cause to believe that the suspect committed a crime, she may be arrested. When a routine arrest occurs in a private home, the police must ordinarily be armed with a warrant to take the suspect into custody. Arrests in public places usually can be made without an arrest warrant.¹⁵

Upon arrest, the suspect is usually searched and taken to the police station or to a jail, where she is “booked” (*i.e.*, her name is logged in an arrest book or on a computer), photographed, fingerprinted, and more fully searched. Typically, any personal belongings found in her possession at the station or jail are inventoried and placed in custody for safekeeping.

[C] Adjudicatory Stage

[1] Issuance of a Complaint

After a suspect is arrested and booked, a complaint is prepared by the police or a prosecutor and is filed with the court. A “complaint” is “a written statement of the essential facts constituting the offense charged.”¹⁶ It serves as the official charging document until either an “information” or an “indictment,” each of which is discussed below,¹⁷ is issued.

[2] Probable Cause (*Gerstein*) Hearing

The police may not constitutionally arrest a person unless they have probable cause to believe that a crime has occurred and that the suspect committed it. In order to implement the Fourth Amendment bar on unreasonable seizures of persons, the Supreme Court has held that, whenever practicable, a probable cause determination should be made by a neutral and detached magistrate, rather than by a police officer.¹⁸

¹³ See generally chapters 22–25, *infra*.

¹⁴ See generally chapter 27, *infra*.

¹⁵ See generally chapter 10, *infra*.

¹⁶ Fed. R. Crim. P. 3.

¹⁷ See §§ 1.03[C][4]–[5], *infra*.

¹⁸ See *Johnson v. United States*, 333 U.S. 10 (1948).

If the police apply for an arrest warrant, the requisite judicial oversight occurs. However, when the police arrest a suspect without an arrest warrant—the vast majority of cases—a prior judicial determination of probable cause is lacking. Therefore, the Supreme Court ruled in *Gerstein v. Pugh*¹⁹ that, following a *warrantless* arrest, the Fourth Amendment requires that a prompt judicial determination of probable cause be made as a precondition to any extended restraint of the arrestee’s liberty.

Because a so-called “*Gerstein* hearing” serves as a post-arrest equivalent of a pre-arrest warrant-application hearing,²⁰ the proceeding may be conducted in the same manner as a warrant hearing—in the defendant’s absence, and the probable cause determination may be based on hearsay testimony. If the arrestee is permitted to be present during the hearing, she is not constitutionally entitled to representation by counsel or to the full panoply of adversarial safeguards available at trial. In many jurisdictions, the probable cause hearing is conducted in the suspect’s presence at her first appearance before a judicial officer, a proceeding which is discussed immediately below.²¹

[3] First Appearance Before the Magistrate

An arrested person must be taken “without unnecessary delay,”²² usually within 24 hours except on weekends, before a judicial officer, for a hearing variously called the “initial arraignment,” “arraignment on a warrant,” “arraignment on a complaint,” or, simply the “first” or “initial” “appearance.”

At the hearing, the arrestee receives formal notice of the charges against her, her constitutional rights in the impending prosecution are explained to her, and a date is set for a preliminary hearing. If the suspect is indigent and not presently represented by counsel, a lawyer is appointed for her at this time. If the suspect was arrested without a warrant, a probable cause determination (a *Gerstein* hearing) is usually made at the first appearance. Finally, and perhaps most significantly, the magistrate determines at this time whether the arrestee should be set free on her own recognizance, released on bail, or detained pending further proceedings.²³

¹⁹ 420 U.S. 103 (1975).

²⁰ See § 11.02, *infra*.

²¹ How promptly must the *Gerstein* hearing be held? In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court stated that the Constitution “permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system.” Therefore, if a state wishes to combine the probable cause hearing with other pretrial proceedings, such as the first appearance before the magistrate, it may do so as long as the hearing occurs, as a general matter, within 48 hours from the time of arrest. However, a delay “for delay’s sake,” out of ill-will toward the suspect, or in order to secure evidence that will justify the arrest, is constitutionally unreasonable, even if it falls within the presumptive 48-hour period.

²² Fed. R. Crim. P. 5(a).

²³ See generally chapter 30, *infra*.

[4] Preliminary Hearing

In most jurisdictions, a preliminary hearing (or “preliminary examination”) is held within two weeks after the arrestee’s initial appearance before the magistrate, unless the defendant waives the hearing.²⁴ The primary purpose of a preliminary hearing is to determine whether there is probable cause to believe that a criminal offense has occurred and that the arrestee committed it.²⁵

A preliminary hearing is adversarial in nature, and runs somewhat like a trial. Because it is considered a critical stage of the prosecution, the defendant is constitutionally entitled to representation by counsel.²⁶ At the hearing, the prosecutor and the defendant may call witnesses on their behalf and cross-examine adverse witnesses. However, many jurisdictions permit the introduction of hearsay and of evidence obtained in an unconstitutional manner, although such evidence usually is inadmissible at trial.²⁷

The significance of the preliminary hearing in the criminal process depends on whether the state is an “indictment jurisdiction” (*i.e.*, a state in which the defendant ordinarily cannot be brought to trial unless she is indicted by a grand jury) or an “information jurisdiction” (*i.e.*, a state in which an indictment by a grand jury is not required). In *information* jurisdictions, once the magistrate determines that there is sufficient evidence to “bind over” the defendant for trial, the prosecutor files an “information” with the trial court. The “information” is a document stating the charges against the defendant and the essential facts relating to them. The information replaces the complaint as the formal charging document.

In the alternative, if the magistrate in an information jurisdiction does *not* find sufficient evidence to bind over the defendant, the complaint is dismissed and the defendant is discharged. If the prosecutor wishes to proceed with the dismissed case, various options are available: (1) she may file a new complaint, in which case the prosecution begins anew;²⁸ (2) in some states, she may appeal the magistrate’s dismissal to the trial court; and/or (3) in some circumstances, she is permitted to seek an indictment from a grand jury.

In indictment jurisdictions, by contrast, the preliminary hearing functions as little more than an adversarial *Gerstein*-type hearing.²⁹ Indeed, the magistrate’s probable cause determination may be superseded by the actions of the grand jury, *i.e.*, if the grand jury does not indict the defendant, she must be released, even if the preliminary hearing magistrate previously

²⁴ In the federal system, the hearing must be held no later than 10 days following the initial appearance, if the arrestee is in custody, or within 20 days if she is not. Fed. R. Crim. P. 5(c).

²⁵ Fed. R. Crim. P. 5.1(a).

²⁶ *Coleman v. Alabama*, 399 U.S. 1 (1970).

²⁷ Fed. R. Crim. P. 5.1(a).

²⁸ This is not a violation of the double jeopardy clause of the United States Constitution. See § 32.01[A][2], *infra*.

²⁹ See § 1.03[C][2], *supra*.

determined that there was probable cause to believe that the arrestee committed an offense. In the federal system, which is an indictment jurisdiction, the preliminary examination is not held if the defendant is indicted before the date set for the preliminary hearing.³⁰

[5] Grand Jury Proceeding

In indictment jurisdictions, a person may not be brought to trial for a serious offense unless she is indicted by a grand jury or waives her right to a grand jury hearing. The purpose of a grand jury is to stand “between the accuser and the accused . . . [in order] to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.”³¹ Because of the grand jury’s historical role as the guardian of the rights of the innocent, the Fifth Amendment to the United States Constitution provides that in federal prosecutions, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a[n] . . . indictment of a Grand Jury . . .” The constitutional term “infamous crime” encompasses all felony prosecutions.

Today, for various reasons, a grand jury proceeding may not in fact shield an innocent person as well as a preliminary hearing. First, the putative defendant, *i.e.*, the person targeted for indictment, is not permitted to be present during the grand jury proceedings, except if and when she is called as a witness. Only the grand jurors, the prosecutor, the witness, and a transcriber of the proceedings, is present in the jury room during the hearing.

Second, witnesses, including the putative defendant, do not have a constitutional right to have counsel present while they testify before the grand jury.³² Third, because no judge is present during the proceedings, rules of evidence do not apply. An indictment is not invalid even if it is based solely on inadmissible hearsay evidence³³ or unconstitutionally obtained information.³⁴ Fourth, the prosecutor is not required to disclose to the grand jurors evidence in her custody that might exculpate the putative defendant.³⁵

Upon conclusion of the prosecutor’s presentation of her case, the grand jurors deliberate privately. If a majority of them determine that sufficient evidence was introduced by the prosecutor,³⁶ the jury (through the

³⁰ Fed. R. Crim. P. 5(c).

³¹ Wood v. Georgia, 370 U.S. 375, 390 (1962).

³² In re Groban, 352 U.S. 330 (1957) (dictum); United States v. Mandujano, 425 U.S. 564 (1976) (dictum) (plurality opinion).

³³ Costello v. United States, 350 U.S. 359 (1956).

³⁴ See United States v. Calandra, 414 U.S. 338 (1974).

³⁵ United States v. Williams, 504 U.S. 36 (1992).

³⁶ Most jurisdictions, including the federal courts (see United States v. Calandra, 414 U.S. at 343), apply a probable cause standard, similar to that employed in preliminary hearings. Some states use a higher, “directed verdict,” standard, *i.e.*, whether there is evidence which, if unexplained, would warrant a conviction at trial.

prosecutor) issues an “indictment,” a document that states the charges and the relevant facts relating to them. If the jury does not vote to indict the defendant (a “no-bill”), the complaint issued against the defendant is dismissed and she is discharged.

[6] Arraignment

If an indictment or information is filed, the defendant is arraigned in open court. At the arraignment, at which time defense counsel is permitted to be present, the accused is provided with a copy of the indictment or information, after which she enters a plea to the offenses charged in it. She may plead “not guilty,” “guilty,” “*nolo contendere*,”³⁷ or (in some states) “not guilty by reason of insanity.”

[7] Pretrial Motions

After arraignment, the defendant may make various pretrial motions. Among the defenses, objections, and requests that often are raised prior to trial are: (1) that the indictment or information is defective, in that it fails to allege an essential element of the crime charged, or that it fails to give the defendant sufficient notice of the facts relating to the charge against her;³⁸ (2) that the venue of the prosecution is improper or inconvenient;³⁹ (3) that the indictment or information joins offenses or parties in an improper or prejudicial manner;⁴⁰ (4) that evidence in the possession of one of the parties should be disclosed to the opposing party;⁴¹ (5) that evidence should be suppressed because it was obtained in an unconstitutional manner; and (6) that the prosecution is constitutionally barred, such as by the double jeopardy and/or speedy trial clauses of the Constitution.⁴²

In some circumstances, if a defendant’s pretrial motions are successful, the judge will dismiss the charges on her own or on the prosecutor’s motion.⁴³ For example, if the prosecution is barred by the double jeopardy clause, dismissal is obligatory. Or, if the judge grants the defendant’s motion to suppress key evidence, the prosecutor might determine that continuation of the proceedings would be futile and, therefore, request dismissal of the charges.

³⁷ Literally, the plea means “I will not contest it [the charge].” For most purposes in a criminal proceeding, the plea is treated the same as a guilty plea.

³⁸ See, e.g., Fed. R. Crim. P. 12(b)(2).

³⁹ See, e.g., Fed. R. Crim. P. 18, 21(a).

⁴⁰ See, e.g., Fed. R. Crim. P. 8, 14.

⁴¹ See, e.g., Fed. R. Crim. P. 16.

⁴² U.S. Const. amend. V (“ . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial. . . .”).

⁴³ See, e.g., Fed. R. Crim. P. 48.

[8] Trial

[a] Right to Trial by Jury

If a defendant does not plead guilty and the charges are not dismissed, a trial is held. The Sixth Amendment entitles a defendant to trial by jury in the prosecution of any serious, *i.e.*, non-petty, offense. Although the boundaries of the term “non-petty” have not been fully laid out, the right to a jury trial applies, at a minimum, to any offense for which the maximum potential punishment is incarceration in excess of six months.⁴⁴

Trial juries usually consist of twelve persons.⁴⁵ However, a jury as small as six in number is constitutionally permitted.⁴⁶ In most jurisdictions, the jury verdict to acquit or to convict must be unanimous.⁴⁷ However, state laws permitting non-unanimous verdicts have been upheld as constitutional.⁴⁸

[b] Composition of the Jury

The Sixth Amendment guarantees a defendant trial “by an impartial jury.” An individual juror is not impartial if her state of mind as to any individual involved in the trial, or as to the issues involved in the case, would substantially impair her performance as a juror in accordance with the law and the court’s instructions.⁴⁹

Moreover, although the accused is not entitled to a jury that mirrors the community as a whole, she is entitled to one drawn from a pool of persons constituting a fair cross-section of the community. This right is violated if large, distinctive groups of persons, such as women or members of a racial group, are systematically excluded from the jury pool.⁵⁰

[c] Selection of Jurors

In order to discover possible bias, the trial judge and (in some jurisdictions) the attorneys examine the prospective jurors (“venirepersons”) regarding their attitudes and beliefs relating to the case (*i.e.*, conduct a “*voir dire*”). If either side believes that a venireperson is partial, that side may

⁴⁴ *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989). A defendant who is prosecuted in a single proceeding for multiple petty offenses does not have a Sixth Amendment right to a jury trial, even if the aggregate prison terms authorized for the offenses exceeds six months. *Lewis v. United States*, 518 U.S. 322 (1996).

⁴⁵ *See, e.g.*, Fed. R. Crim. P. 23(b).

⁴⁶ *Williams v. Florida*, 399 U.S. 78 (1970) (jury of six is allowed); *Ballew v. Georgia*, 435 U.S. 223 (1978) (jury of five is not allowed).

⁴⁷ *See, e.g.*, Fed. R. Crim. P. 31(a).

⁴⁸ *Johnson v. Louisiana*, 406 U.S. 356 (1972) (upholding a 9-3 guilty verdict because the vote constituted a “substantial majority” of the jurors); *but see Burch v. Louisiana*, 441 U.S. 130 (1979) (striking down a statute permitting 5-1 guilty verdicts by six-person juries).

⁴⁹ *See Adams v. Texas*, 448 U.S. 38 (1980).

⁵⁰ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

challenge the juror “for cause.” If the judge grants the challenge, the prospective juror is excused.

The law also recognizes “peremptory” challenges, *i.e.*, challenges not based on cause. The primary purpose of a peremptory challenge is to allow a party to exclude a person from the jury if it believes, as a matter of intuition or as the result of the *voir dire*, that the individual is biased, but whose partiality has not been proved to the satisfaction of the judge. Both the defense and prosecution are entitled to exercise a specified number of peremptories.⁵¹

Peremptory challenges may not be exercised in an unfettered manner. Under the equal protection clause of the Fourteenth Amendment, neither the prosecution,⁵² nor the defense,⁵³ may exercise challenges to remove persons from the venire *solely* on the basis of the prospective juror’s race or gender,⁵⁴ *i.e.*, on the assumption or intuitive judgment that the person will be biased in the case solely because of the defendant’s and juror’s shared (or different) race or sex.

[d] Other Constitutional Trial Rights

The defendant is constitutionally entitled to employ counsel at trial. An indigent is entitled to the appointment of counsel in all felony prosecutions, as well as at any misdemeanor trial in which she will be incarcerated if convicted.⁵⁵ The defendant may also call witnesses on her own behalf, and confront and cross-examine the witnesses who testify against her.⁵⁶ The defendant is not required to testify in her own behalf, and she “must pay no court-imposed price for the exercise of [her Fifth Amendment] constitutional privilege not to testify.”⁵⁷

[9] Appeal

If the defendant is acquitted by the jury or by the judge in a bench trial, the government is barred by the double jeopardy clause to appeal the acquittal.⁵⁸

⁵¹ *E.g.*, Fed. R. Crim. P. 24(b) (in non-capital felony trials, the government is entitled to 6, and the defense to 10, peremptory challenges; in capital trials, each side is entitled to 20 peremptories).

⁵² *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁵³ *Georgia v. McCollum*, 505 U.S. 42 (1992).

⁵⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986) (race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender).

⁵⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanor cases). *See generally* chapter 29, *infra*.

⁵⁶ U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall the enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor. . .”).

⁵⁷ *Carter v. Kentucky*, 450 U.S. 288, 301 (1981); *see also Griffin v. California*, 380 U.S. 609 (1965).

⁵⁸ *See* § 32.03[A][1], *infra*.

If the defendant is convicted, she has no constitutional right to appeal her conviction.⁵⁹ However, all jurisdictions statutorily permit a convicted defendant (now the “appellant”) to appeal. In state court systems, she may appeal to an appellate court below the state supreme court or, if there is none, directly to the state supreme court. In the federal courts, a defendant may appeal her conviction to the United States Court of Appeals for the circuit with jurisdiction over the case.

If the appellant is unsuccessful in her statutory appeal of right, she may be entitled to discretionary appeals to a higher court. For example, in a state in which an appeal of right is brought to an intermediate appellate court, the state supreme court is permitted, but usually is not required except in capital cases, to hear the appellant’s second appeal. She may also petition the United States Supreme Court to consider her case. If her appeal is ultimately successful, she ordinarily may be reprosecuted.⁶⁰

[10] Collateral Attack of a Conviction: Habeas Corpus⁶¹

After a defendant’s appeals are exhausted—*i.e.*, once her conviction is final—she may file a petition for a writ of habeas corpus in a federal district court, if she believes that her continued incarceration is in violation of the United States Constitution or of a federal law.⁶² A post-conviction habeas corpus proceeding is not part of the criminal appeal process itself. It is a civil action designed to overturn a presumptively valid criminal judgment. As such, it is considered a collateral attack on a criminal conviction, as distinguished from a direct criminal appeal. The purpose of a habeas petition is to convince the district (trial) court that it should compel the warden of the jail or prison holding the petitioner to bring her before the court so that it can determine whether she is being held in custody against the law.

Federal habeas corpus jurisprudence involves exceedingly intricate rules, and recent legislation has made it more difficult than in the past for petitioners to obtain a hearing on the merits of their federal claims.

⁵⁹ See *McKane v. Durston*, 153 U.S. 684 (1894) (dictum); *Jones v. Barnes*, 463 U.S. 745 (1983) (dictum).

⁶⁰ See § 32.05[A], *infra*.

⁶¹ See generally Graham Hughes, *The Decline of Habeas Corpus* (Occasional Papers from the Center for Research in Crime and Justice, N.Y.U. School of Law, No. VIII, 1990); Joseph L. Hoffmann, *The Supreme Court’s New Vision of Federal Habeas Corpus for State Prisoners*, 1989 Sup. Ct. Rev. 165; Kathleen Patchel, *The New Habeas*, 42 *Hastings L.J.* 939 (1991); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 *Geo. Wash. L. Rev.* 362 (1991); Robert Weisberg, *A Great Writ While It Lasted*, 81 *J. Crim. L. & Criminology* 9 (1990); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *Buffalo L. Rev.* 381 (1996); Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 *Harv. L. Rev.* 1578 (1998).

⁶² 28 U.S.C. §§ 2241–2244, 2253–2255, 2261–2266 (1997). Some states have their own habeas corpus procedures, which must be exhausted before a convicted person seeks *federal* habeas relief.

However, if the proper allegations are made, the district court may grant the petition and conduct an evidentiary hearing into the federal claim.

Because a habeas corpus petition constitutes a collateral attack on a judgment that is already final, and because federal courts are hesitant to intrude on state proceedings, the standards that a petitioner must satisfy to obtain ultimate relief in habeas are often stricter than those that apply on direct appeals. However, if the district court determines that the petitioner is being held in custody in violation of federal law or the Constitution, it may vacate the conviction. The ruling of the district court—whether to grant or deny the petition—is subject to appeal by the losing party.

§ 1.04 Studying Constitutional Law Cases

The study of many aspects of criminal procedure, particularly the law relating to police practices, is largely the study of constitutional law, especially the decisions of the United States Supreme Court. Consequently, the following suggestions are offered to students inexperienced in analysis of constitutional cases.

[A] Read Concurring and Dissenting Opinions

To the extent that your casebook permits, pay attention to concurring and dissenting opinions, if any, in the assigned cases. Various reasons support this recommendation. First, the ideas expressed in the concurring or dissenting opinions of today sometimes become the majority views of tomorrow.

Second, sometimes a concurring or dissenting opinion explains the views of the majority better than the latter's own opinion, calls attention to unresolved issues, or suggests where the logic of the majority opinion may lead. Indeed, on occasion a concurring opinion takes on a life of its own, and is cited or applied in subsequent opinions in preference to the majority opinion.⁶³

Third, as discussed in subsection [C], it is often necessary to analyze these opinions in order to determine the long-term significance of a constitutional holding.

[B] Learn Case Names

Pay attention to the names of Supreme Court cases. Unlike cases applying common law doctrine, which often are fungible, a United States Supreme Court constitutional decision represents the final official⁶⁴ word on the issue in question.⁶⁵ These opinions have the “power to shake the

⁶³ *E.g.*, Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 487 (1967). See generally § 7.03[C], *infra*.

⁶⁴ *But see* § 1.02[B], *supra*, for a “taste of reality.”

⁶⁵ Of course, the Supreme Court can overrule itself, or the Constitution can be amended to override an unpopular decision.

assembled faithful with awful tremors of exultation and loathing.”⁶⁶ Consequently, lawyers tend to talk about constitutional issues in a shorthand (*e.g.*, “Was the suspect *Mirandized*⁶⁷ ?”). It is helpful to understand and speak this language.

[C] Count Votes

If the casebook permits, take note of the vote breakdown in important cases. For various reasons, vote counting can prove insightful, and sometimes is essential. First, the long-term importance of a decision may depend on the size of the majority. A 5-4 decision is not equivalent to a 9-0 ruling. A unanimous opinion often carries greater moral suasion with the public and within the legal community than one decided by the slimmest of margins. Moreover, a 5-4 precedent is a prime target for overruling (or, at least, narrowing) when a Justice in the majority leaves the Court.

Second, vote counting is essential in ascertaining the precedential value of some cases. For example, suppose that *D* appeals her conviction on two independent grounds: (1) that police officers conducted an unconstitutional search of her house (issue A); and (2) that the officers coerced a confession from her (issue B). Assume that if either of these claims is successful *D*'s conviction must be overturned.

Assume the following scenario: four judges agree with *D* on issue A, but express no opinion regarding issue B. One judge concurs in the judgment; she rules against *D* on issue A, but in *D*'s favor on issue B. Four dissenters reject both of *D*'s claims. Thus, *D* gets what she wants: she wins her appeal, as five judges believe that she is entitled to a new trial, albeit for different reasons.

However, a good lawyer with a client who wishes to raise issue A on similar facts would observe that her chances of success with the same court are not good: four members of the court are likely to favor her client's claim regarding issue A, while five (the dissenters and the concurring judge) will probably oppose her. Likewise, another attorney, but one who seeks to raise issue B, can expect that at least four judges will oppose, and only one will favor, her client. The case would depend on the views of the four court members who expressed no opinion on issue B.

⁶⁶ Amsterdam, Note 10, *supra*, at 786.

⁶⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

[D] Learn the Views of Individual Justices⁶⁸

Suppose that a lawyer is considering the wisdom of appealing a criminal conviction in a case in which the law is fuzzy, *i.e.*, there is no rule or precedent on point. In order to determine whether to recommend an appeal and, if so, what arguments are most apt to be persuasive, the attorney needs to “get into the head” of the judges on the court that will hear the case. One aspect of this is to identify each judge’s judicial and legal philosophy, as well as her overall belief-system.⁶⁹

It is usually too simplistic (although not always⁷⁰) to treat a judge as a “liberal” or a “conservative” (or as an “activist” or a “non-activist”), whatever these terms may mean to the user. Some judges are “liberal,” for example, in matters relating to freedom of speech but are “conservative” on question of criminal justice. Even in the latter area, a particular judge might believe that the police should not generally be required to obtain warrants before they conduct searches (a pro-police position), but that they should usually be required to have probable cause before they conduct the searches (a pro-defense position).

In the field of Criminal Procedure, where the focus is primarily on the Supreme Court, lawyers and law students need to pay attention to the voting patterns of individual members of the Supreme Court. Over time, an observer can develop a sense of a Justice’s philosophy and can more accurately predict her vote on specific issues.

⁶⁸ For discussion of the jurisprudence of various currently sitting Justices, *see generally* Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O’Connor*, 52 U. Chi. L. Rev. 389 (1985); M. David Gelfand & Keith Werham, *Federalism and Separation of Powers on a “Conservative” Court: Currents and Cross-Currents from Justices O’Connor and Scalia*, 64 Tul. L. Rev. 1443 (1990); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 Yale L.J. 1297 (1990); Christopher E. Smith, *Justice Antonin Scalia and Criminal Justice Cases*, 81 Ky. L.J. 187 (1992); Christopher E. Smith, *Supreme Court Surprise: Justice Anthony Kennedy’s Move Toward Moderation*, 45 Okla. L. Rev. 459 (1992). For one analysis of a recently retired Justice, see Kit Kinports, *Justice Blackmun’s Mark on Criminal Law and Procedure*, 26 Hastings Const. L.Q. 219 (1998).

⁶⁹ The focus here is on the appellate court level, but lawyers must especially be sensitive to the belief-system of trial judges, where the vast majority of cases are ultimately resolved. In regard to the backgrounds and voting patterns of President Bill Clinton’s appointments to the federal court of appeals, *see* Rorie L. Spill & Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 *Judicature* 256 (2001) and Susan B. Haire, Martha Anne Humphries, & Donald R. Songer, *The Voting Behavior of Clinton’s Court of Appeals Appointees*, 84 *Judicature* 274 (2001).

⁷⁰ As an example, Justice William Douglas took the “civil libertarian” position in 90 percent of the cases in which he cast a vote between 1953 and 1975. In contrast, Justice William Rehnquist took a civil libertarian position in only 19.6% of the cases decided between 1972, when he joined the Court, and 1985. Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 *Judicature* 103, 105–06 (1989).

[E] Be Sensitive to Supreme Court History⁷¹

Just as individual Justices have specific philosophical perspectives, the Supreme Court as a body—or, more correctly, a majority of it—possesses, at any given time, an institutional philosophy or attitude regarding constitutional adjudication or, in the case of criminal procedure, criminal law jurisprudence. Moreover, certain small-group dynamics develop among the sitting Justices, which affect interpersonal relations, and ultimately, shape the work product. It is worthwhile, therefore, to be sensitive to the place of a Supreme Court opinion in the larger historical constitutional and institutional picture.

Lawyers tend to talk in general terms about the philosophical views of the “Warren Court,” the “Burger Court,” and the “Rehnquist Court,” the shorthand titles for the Supreme Court, and the opinions decided by it, under the three most recent Chief Justices, Earl Warren (1953-1969), Warren Burger (1969-1986), and William Rehnquist (1986-Present).

As the footnote at the beginning of this subsection may suggest, countless book and articles have been written about the philosophies of the Warren, Burger, and Rehnquist Courts. As a generalization, the Warren Court was an activist Court that used its judicial power to develop rules favorable to individuals *vis a vis* the government. In the context of criminal procedure,

⁷¹ For discussion of the so-called Warren Court, see generally Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. Ill. L.F. 518; A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L. Rev. 249 (1968); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 Tulsa L.J. 1 (1995).

Regarding the Burger Court and a comparison of it to the Warren Court, see generally *The Burger Years* (H. Schwartz ed. 1987); Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 Harv. L. Rev. 1436 (1987); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 Geo. L.J. 185 (1983); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319 (1977); Stephen A. Saltzburg, *The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Geo. L.J. 151 (1980); Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 Wash. U. L.Q. 11 (1988); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 Colum. L. Rev. 436 (1980); Robert Weisberg, *Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. Crim. L. & Criminology 832 (1985).

Regarding the Rehnquist Court, see generally Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* (2000); Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 Ind. L.J. 273 (1987); Brian K. Landsberg, *Race and the Rehnquist Court*, 66 Tul. L. Rev. 1267 (1992); Robert H. Smith, *Uncoupling the “Centrist Bloc”—An Empirical Analysis of the Thesis of a Dominant, Moderate Bloc on the United States Supreme Court*, 62 Tenn. L. Rev. 1 (1994); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466 (1996).

For a political history of the appointments to the Supreme Court, see Henry J. Abraham, *Justices and Presidents* (1974). For a perspective on various twentieth century Justices, see *The Supreme Court and Its Justices* (Jesse Choper, ed. 1987). For a valuable statistical analysis of each Supreme Court term, including figures on voting alignments, see the annual study of the Supreme Court term, published in the first issue of each volume of the *Harvard Law Review*.

the Warren Court was responsible for most of the constitutional decisions that expanded the rights of persons accused of crime. Indeed, the “criminal justice revolution”—as it has often been called—was largely led by the Warren Court (or, more accurately, a majority of its members).⁷²

In contrast, the current-day Rehnquist Court (and, somewhat less so, the Burger Court) has favored the “crime control” model of criminal procedure,⁷³ in that it has granted legislatures and prosecutorial agencies considerable discretion in defining, investigating, and prosecuting crime. The Rehnquist Court has usually placed greater emphasis than did the Warren Court on the matter of obtaining (or, at least, its critics would claim, more rhetoric of obtaining) a factually reliable outcome at trial, and less emphasis than the earlier Court on the methods employed by the government to obtain the evidence used to convict defendants.

Some criminal procedure casebooks include a chart showing the dates on which individual Justices joined the Court. If your book has such a chart, look at it often to see where specific cases fit in. If your book does not have such a chart, the following brief review may be helpful.

In theory, the Warren Court began in 1953 when President Dwight Eisenhower appointed Earl Warren as Chief Justice. However, the civil libertarian thrust of the Court did not develop immediately, but rather took effect gradually as new appointments were made. Already on the Court in 1953, and sympathetic to the Chief Justice’s views as they developed, was William Douglas, who was appointed in 1939 by President Franklin D. Roosevelt. After the Chief Justice was appointed, William Brennan (1956) and Potter Stewart (1958) joined the Court. Brennan was a major participant in the Warren Court decisions, and Stewart sometimes provided a crucial fifth vote.

The Warren Court reached its civil libertarian peak in the mid-1960s, after Presidents John F. Kennedy and Lyndon B. Johnson replaced outgoing members of the Court with: Arthur Goldberg (1962, by J.F.K.), who was himself replaced by Abe Fortas (1965, by L.B.J.); Byron White (1962, by J.F.K.); and Thurgood Marshall (1967, by L.B.J.). Of the replacements, only Justice White was often critical of Warren Court values.

The shift away from the Warren Court philosophy was as gradual as its ascendancy. It began in 1969 with the election of Richard Nixon, who campaigned for office in part on the promise to nominate “law and order” justices.⁷⁴ President Nixon almost immediately filled two Court vacancies: Warren Burger (1969) and Harry Blackmun (1970), who replaced Chief Justice Warren and Justice Fortas respectively. He subsequently appointed two more Justices: William Rehnquist (1972) and Lewis Powell (1972), who replaced centrist Justices John Harlan and Hugo Black, respectively.

⁷² For a summary of the “revolution” (or, failed revolution, according to the author) see Craig M. Bradley, *The Failure of the Criminal Procedure Revolution* 6–36 (1993).

⁷³ See § 2.02[B], *infra*.

⁷⁴ Liva Baker, *Miranda: Crime, Law and Politics* 221–324 (1983).

President Gerald Ford appointed John Stevens (1975) to replace Justice Douglas. In the context of criminal procedure, each of these changes in personnel resulted in a high court somewhat more disposed to crime control outcomes. (However, over time, Stevens has become the Court's most consistent advocate of the displaced Warren Court values.)

It was not until the 1980s that the shift away from Warren Court values became clearly evident. During this decade, Sandra Day O'Connor (1981), Antonin Scalia (1985), and Anthony Kennedy (1988) were appointed by President Ronald Reagan, replacing Justice Stewart, Chief Justice Burger,⁷⁵ and Justice Powell, respectively. With the appointment of Justice Kennedy, the balance of power definitively tipped in favor of the crime control model of criminal justice, and the Court increasingly cut back on the holdings of the Warren Court era.

The 1990s saw the departure of the remaining members of the Warren Court. Justices Brennan (1990) and Marshall (1991), strong believers in Warren Court values, retired. President George Bush replaced them with David Souter and Clarence Thomas, respectively. In 1993, the last member of the Warren Court, Byron White, retired. President William Clinton appointed Ruth Bader Ginsburg as his replacement. The year 1994 saw the first departure of a Burger Court Justice, Harry Blackmun, with Stephen Breyer taking his place on the Court. The criminal justice opinions of Justices Souter, Ginsburg, and Breyer have frequently run counter to the now prevailing pro-government position of the Rehnquist Court;⁷⁶ in contrast, Justice Thomas is a consistent advocate for crime control values.

⁷⁵ Technically, Chief Justice Burger was replaced by Justice Rehnquist, who was elevated to Chief Justice. Justice Scalia filled Justice Rehnquist's old spot.

⁷⁶ See generally Karen O'Connor & Barbara Palmer, *The Clinton Clones: Ginsburg, Breyer, and the Clinton Legacy*, 84 *Judicature* 262 (2001).