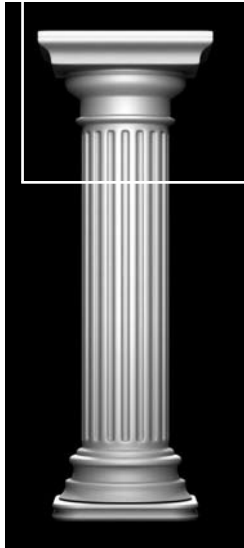


Tenth Edition

CRIMINAL PROCEDURE

Joel Samaha

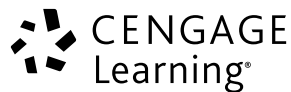


Tenth Edition

Criminal Procedure

Joel Samaha

Horace T. Morse Distinguished Teaching Professor,
University of Minnesota



Australia • Brazil • Mexico • Singapore • United Kingdom • United States

Criminal Procedure, Tenth Edition

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C*riminal Procedure 10* is about the central promise of U.S. criminal justice: to balance the power of government to protect the safety and security of *all* persons against those who want to do them harm, while at the same time protecting their right to come and go as they please without government interference, *and* guaranteeing to all persons that the government will enforce the law equally: on the street, at the police station, in the courts, and in punishing wrongdoers. This promise is also its central problem—how close to social reality is the promise of *equal* rights and justice. This promise and this problem have fascinated my students for close to a half century. It stimulates them to think, and to discuss the issue in class and with their friends and family outside of class.

I'm not surprised. The balance between government power and individual rights and equal justice has fascinated me since I had the great good fortune to study criminal procedure at Northwestern University Law School decades ago under the sparkling Claude R. Sowle and the legendary Fred E. Inbau. Professor Sowle, a brilliant advocate and a distinguished teacher, emphasized the philosophical underpinnings of the law of criminal procedure. Professor Inbau, a famous interrogator and a highly respected student of the law of interrogation, spoke from the 1930s right up to his death in the late 1990s with the authority of one who has actually applied abstract principles to everyday police practices.

In 1971, I taught criminal procedure for the first time. I've done so ever since. My current students are a richly varied group of people: liberal arts students right out of high school; police officers and veterans; city dwellers from the Twin Cities (Minneapolis/St. Paul); students from small towns and farms; immigrants and U.S. citizens; Blacks, Whites, Hispanics, Asians, Africans and Native Americans; "straight" and LGBTQ students. That many of these students are now police officers and administrators; corrections officers and administrators; criminal defense attorneys, prosecutors, and judges; legislators; and criminal justice scholars testifies to their enduring interest in the law and social reality of criminal procedure and to their commitment to the application of formal law to informal real-life decision making.

Criminal Procedure 10, like its predecessors, reflects my conviction that the best way to learn the law of criminal procedure is both to understand general principles and to critically examine the application of these principles to real problems. By "critically," I don't mean "negatively"; *Criminal Procedure* doesn't trash the system. Rather, it interrogates the principles that govern the balance between government power and individual life, liberty, privacy, and property. It tests the weight of strong, honest feelings about this balance in the bright light of reason, logic, and facts. *Criminal Procedure* proceeds on the assumptions that the general principles governing the balance between government power and individual rights have real meaning only in the context of a specific reality, and that reality makes sense only when seen in the light of general principles fitted to specific facts in particular circumstances.

Text and Cases

Criminal Procedure 10 is a text-case book, meaning that it contains both text and excerpts of actual court opinions that apply the general principles discussed in the text to concrete cases. The text and case excerpts complement each other. The text enriches the understanding of the cases, while the cases enhance the understanding of

the constitutional principles in the text. The cases aren't just examples, illustrations, or attention grabbers; they explain, clarify, elaborate, and apply the general principles and constitutional provisions to real-life situations. Moreover, the cases are excellent tools for developing students' critical thinking skills and applying them to everyday life.

The cases and the text are independent enough of each other that they can each stand alone. (Design differences clearly mark one from the other.) This separation of text from cases allows instructors who favor the case analysis approach to emphasize cases over text, leaving the text for students to read if they need to in order to understand the cases. Instructors who favor the text approach can focus on the text, allowing students to read the cases as enrichment or as examples of the principles, constitutional provisions, and rules discussed in the text.

The case excerpts are edited for nonlawyers. They supply students with a full statement of the facts of the case, key portions of the reasoning of the court, and the court's decision. Excerpts also contain portions of the dissenting opinions and, when appropriate, parts of the concurring opinions.

The question that opens each case focuses students on the main principle of the case. The case history gives a brief procedural history of the case. And the questions at the end of the case excerpts test whether students know the facts of the case, understand the law of the case, and comprehend the application of the law to the facts of the case. The questions also supply the basis for developing critical thinking skills, not to mention provoking class discussions on the legal, ethical, and policy issues raised by the case.

Key Changes to the Tenth Edition

New cases and many re-edited existing cases appear in *Criminal Procedure 10*. I added, replaced, and re-edited cases for three reasons. First, I wanted to reflect new developments in the law since the last edition. Second, I included cases I've found since the last edition that explain the law better and apply the law to the facts in clearer and more interesting ways for students. Third, experiences through actual use in the classroom led me to re-edit some cases and sometimes cut excerpts from previous editions.

Empirical Research

Criminal Procedure 10 continues the practice of recent editions to include more of the growing, rich social science research that explains and evaluates criminal procedures.

Criminal Procedure in Times Of Crisis

Chapter 15 reflects a major shift. In the immediate aftermath of the 9/11 attacks, the terrorism story primarily revolved around the issue of what to do with enemy combatants drawn from the ranks of Al-Qaeda who fought in Afghanistan and Iraq and were being detained at Guantanamo prison. That story has not ended. But increasingly, the story now is how to prevent another attack—namely counterterrorism and counterintelligence. That's a big and complicated story and it represents a crucial expansion of *Criminal Procedure 9's* Chapter 15. In the new chapter, we focus on recalibrating the balance between the critical need for information to conduct counterterrorism and counterintelligence, and the First, Fourth, and Fifth Amendment rights you learn about in Chapters 2 through 7 (searches and seizures). And, of course, we'll update the immigration sections to reflect the U.S. Supreme Court's opinion in *Arizona v. U.S.* (2012), upholding key sections of the Arizona immigration law, a law emulated by a growing number of other states.

New Real-World Emphasis

There are two new boxes incorporated into this new edition. First, at least one **CRIMINAL PROCEDURE IN ACTION** in each chapter adds a *practical application* of the law. A point of law introduces the box, such as “Fifteen minutes is not ‘too long’ to detain a stopped person.” Second, each chapter also includes at least one **YOU DECIDE** feature that begins with a question to develop your critical thinking skills, such as “Are domestic drones Fourth Amendment searches?”

Chapter-by-Chapter Revisions

Chapter 1

New

- Chapter title
- Opener
- Section, “Welcome to *Criminal Procedure* 10!”
- Section, “*U.S. v. Apple*”
- Table, “InternetLiveStats.com, Midnight to 9 am, March 16, 2016”
- Exhibits
 - Cook’s Letter to Apple Customers
 - Federal Court System
- Case, *U.S. v. Apple* (2016)

Revised

- Sections “The Text-Case Method” and “Empirical Evidence” moved to Chapter 2

Chapter 2

New

- Case, *U.S. v. Armstrong* (1996)
- You Decide (YD), “*U.S. v. Thorpe* (2006)”
- Criminal Procedure in Action (CPIA), “The right to observe and record police performing their public duties”

Chapter 3

New

- Opener
- Sections
 - The “Private Search Doctrine”
 - Searches in the Digital Age
- Cases
 - *U.S. v. Lichtenberger* (2015)
 - *U.S. v. Ganas* (2014)

- Exhibits
 - Private Search
 - Courts Recognize Computer Hard Drive Part of Daily Digital Life

Revised

- Section, “The Reasonable Expectation of Privacy Doctrine”

Chapter 4

New

- Opener, *Navarette v. California* (2014)
- Case, *Navarette v. California* (2014)
- Exhibits
 - Stop to Seizure (NYPD, 2004–2012)
 - Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity
- YD, “Should the ‘End Racial Profiling Act of 2011’ become the law?”

Expanded/Rewritten Sections

- Stop-and-Frisk Law after *Terry v. Ohio*
- Frisks and the Fourth Amendment

Chapter 5

New

- Opener, *Estate of Ronald Armstrong v. Village of Pinehurst* (2016)
- Cases
 - *Draper v. U.S.* (1959)
 - *Estate of Ronald Armstrong v. Village of Pinehurst* (2016)
- Section, “Tasers”
- YD, “Was the Custodial Arrest Reasonable?”

Revised

- Section, “Hearsay”

Chapter 6

New

- Opener, *U.S. v. Rodney* (1992)
- Cases
 - *FBI—Six Search Warrants for Smart Devices*
 - *Wilson v. Arkansas* (1995)
 - *Young v. City of Radcliff* (2008)
 - *Knowles v. Iowa* (1998)
- Sections
 - Search Warrants in the Digital Age

- Consent Searches
- Empirical Research and Consent Searches
- The Scope of Consent
- Third-Party Consent Searches
- Exhibits
 - Reflections on Law and Technology
 - Circumstances That May Form Part of Voluntary Consent
 - “Unequivocal” Withdrawal of Consent
- CPIA
 - Knock and Talk Violates Fourth Amendment Warrant Requirement
 - Consent Given While Handcuffed, After Promises and Threats, Was Voluntary?
- YD, “Should Searches Incident to Pretext Arrests Be Banned?”

Revised

- Sections
 - *Wilson* Exceptions to the Knock-and-Announce Rule
 - Occupants’ Failure to Respond to Officers’ Announcement
 - “Knock and Talk”
 - Searches Incident to Misdemeanor Offenses
 - Searches Incident to Pretext Arrests
 - Vehicle Searches

Chapter 7

New

- Opener, *Norris v. Premier Integrity Solutions, Inc.* (2011)
- Section, “Searching People Not Charged with Any Crime”
- Case, *Norris v. Premier Integrity Solutions, Inc.* (2011)

Revised

- Section, “Custody-Related Searches”

Chapter 8

New

- Opener
- Exhibit, “Cases in Which Courts Found a Knowing Waiver”

Chapter 9

New

- Exhibit, “*Iipse dixit* statute forensic proof process”

Revised

- Sections
 - Social Science and Mistaken Eyewitness Identification
 - Empirical Assessments of Lineups

Chapter 10

New

- Opener
- Exhibit, “SCOTUS Opinions Expanding Good-Faith Exception”

Chapter 11

Revised

- Sections
 - Civil Actions
 - Lawsuits Against the U.S. Government
 - The “Special-Relationship” Exception to the “No-Duty-to-Protect” Rule
 - The “State-Created-Danger” Exception to the “No-Duty-to-Protect” Rule

Chapter 12

Revised

- Sections
 - Bail and Pretrial Detention
 - The Right to Counsel

Chapter 13

Revised

- Sections
 - The 12-Member Jury Requirement
 - The “Unanimous Verdict” Requirement
 - Conviction by Guilty Plea

Chapter 14

New

- Exhibits
 - Odds of Receiving Departures by Race, Ethnicity, Sex, and Age
 - U.S. Sentencing Guidelines, 18 U.S.C. § 3553

Revised

- Section, “Trial Rights at Sentencing”

Chapter 15

New

- Introduction
- Case, *U.S. v. M. Farah and Others* (2016)

- Sections
 - Criminal Procedure in the Digital Age
 - Homegrown Terrorist Suspects and ISIS

Revised

- Sections
 - Illegal Immigrants and the Constitution
 - Detention During Deportation Hearings
 - Counterterrorism, Counterintelligence, and the FBI
- Table, “Sneak-and-Peek Search Warrants and Extensions (2014)”

Supplements

Resources for Instructors

MindTap Criminal Justice

MindTap from Cengage Learning represents a new approach to a highly personalized, online learning platform. A fully online learning solution, MindTap combines all of a student’s learning tools—readings, multimedia, activities, and assessments—into a singular Learning Path that guides the student through the curriculum. Instructors personalize the experience by customizing the presentation of these learning tools for their students, allowing instructors to seamlessly introduce their own content into the Learning Path via “apps” that integrate into the MindTap platform. Additionally, MindTap provides interoperability with major Learning Management Systems (LMS) via support for open industry standards and fosters partnerships with third-party educational application providers to provide a highly collaborative, engaging, and personalized learning experience.

Online Instructor’s Resource Manual

The instructor’s manual includes learning objectives, key terms, a detailed chapter outline, a chapter summary, discussion topics, student activities, and media tools. The learning objectives are correlated with the discussion topics, student activities, and media tools.

Online Test Bank

Each chapter’s test bank contains questions in multiple-choice, true/false, completion, and essay formats, with a full answer key. The test bank is coded to the learning objectives that appear in the main text and includes the page numbers in the main text where the answers can be found. Finally, each question in the test bank has been carefully reviewed by experienced criminal justice instructors for quality, accuracy, and content coverage so instructors can be sure they are working with an assessment and grading resource of the highest caliber.

Cengage Learning Testing Powered by Cognero

This assessment software is a flexible, online system that allows you to import, edit, and manipulate test bank content from the *Criminal Procedure* test bank or elsewhere, including your own favorite test questions; create multiple test versions in an instant; and deliver tests from your LMS, your classroom, or wherever you want.

PowerPoint® Lectures

Helping you make your lectures more engaging while effectively reaching your visually oriented students, these handy Microsoft PowerPoint® slides outline the chapters of the main text in a classroom-ready presentation. The PowerPoint® slides are updated to reflect the content and organization of the new edition of the text and feature some additional examples and real-world cases for application and discussion.

Acknowledgments

Criminal Procedure 10 didn't get here by my efforts alone; I had a lot of help. I'm grateful for all those who have provided feedback over the years.

Thanks to the people at Cengage. One more time, my editor, Carolyn Henderson Meier, supported what I wanted to change in this edition and cajoled me to make changes I didn't want to make, while through it all putting up with my exasperating "mercurial temperament." *Criminal Procedure 10* is so much better because of her. Thanks also to Julia White, content developer; Christy Frame, senior content project manager; and Helen Bruno, senior designer.

Then there's Derek Volk, who has thrice blessed me. First, he was my student in all three courses I teach at the University of Minnesota—Introduction to Criminal Justice, Criminal Law, and Criminal Procedure. Second, he was my TA in Criminal Procedure and in Intro to CJ once. (Students respected and loved him in both courses.) Third, he was my indispensable assistant in preparing *Criminal Procedure 9* and *10* for publication. The revised **Learning Objectives** and **Chapter Summaries** are utterly and invaluable his. His strong performance as a student (he was near the top of the class in Criminal Procedure) and twice as a TA Criminal Procedure uniquely qualified him to assist me. Countless times throughout the manuscript, I encountered comments such as "I think students might understand this better if you worded it this way" or "I think this should be a *key term*; otherwise students might miss its significance" or "I'm glad you changed this; I think it'll be easier for students to understand now." I accepted *all* of Derek's suggestions. The result: For the first time, a student who used the book and dealt with students' problems when he was a TA actively participated in preparing an edition of *Criminal Procedure*. Don't take this to mean we "dumbed it down" and "spoon-fed" students. We just made a serious effort to write difficult matter in clear, straightforward prose.

Thanks to my son Luke, Meadowbrook Software, LLC, who designed the "Police-Citizen Contacts" graphic in Chapter 4. My own efforts to depict the concept that greater police intrusions and deprivations in their street encounters require greater objective basis to back them up were feeble. We struggled and argued over the details. (Pitting my mercurial temperament against his stubbornness wasn't always a pretty picture. We even tested our efforts on our friends, with his backing him up and mine backing me.) In the end, the adversarial process produced a result that is both a pretty and effective tool to portray the concept we were trying to depict.

What would I do without Steve and Doug? Doug takes me there and gets me here and everywhere, day in and day out, days that now have stretched into decades. And my dear friend Steve, whom I've known from the days when he watched over my kids; over the decades when he kept the Irish Wolfhounds; to now, when he manages to keep our OSH cat, the very Senior Poodle, me, and a lot more around here in order. And

they do it all while putting up with what my adored mentor at Cambridge, the late Sir Geoffrey Elton, called “Joel’s mercurial temperament.” Only those who really know me can understand how I can try the patience of Job!

I dedicate the book to my students, who say that I’ve challenged them, but who for 50 years have challenged me to explain and defend what *I* say and what *I* write. They, more than anyone or anything else, have made me a better teacher and continue to inspire me to be the best teacher and write the best book I can. But, should I ever think I’ve done well enough, I’ve got what my long-departed German mother said when I brought my report card home with grades of 100 in all but one of my subjects. It was a 99. She asked, “What’s this 99?” I asked, “What about the 100s?” Her answer lives with me still: “The 100s will take care of themselves. Get to work on that 99!”

Students, friends, families, and associates like these are behind whatever success *Criminal Procedure 10* enjoys. As for its faults, I own them all. Are you listening, Mom?

Joel Samaha
Minneapolis
September 1, 2016

About the Author

Professor Joel Samaha teaches Criminal Law, Criminal Procedure, and Introduction to Criminal Justice at the University of Minnesota. He is both a lawyer and a historian whose primary interest is crime control in a constitutional democracy. He received his BA, JD, and PhD from Northwestern University. Professor Samaha also studied under the late Sir Geoffrey Elton at Clare Cambridge University, England. He was named the College of Liberal Arts Distinguished Teacher in 1974. In 2007 he was awarded the title of University of Minnesota Morse Alumni Distinguished Teaching Professor and inducted into the Academy of Distinguished Teachers.

Professor Samaha was admitted to the Illinois State Bar Association in 1962 and practiced law briefly in Chicago. He taught at UCLA before going to the University of Minnesota in 1971. At the University of Minnesota, he served as Chair of the Department of Criminal Justice Studies from 1974 to 1978. He now teaches and writes full time. He has taught both television and radio courses in criminal justice and has co-taught a National Endowment for the Humanities seminar in legal and constitutional history.

In addition to *Law and Order in Historical Perspective* (1974), an analysis of law enforcement in pre-industrial Essex County, England, Professor Samaha has transcribed and written a scholarly introduction to a set of local criminal justice records from the borough of Colchester during the reign of Elizabeth I. He has also written several articles on the history of criminal justice, published in the *Historical Journal*, *The American Journal of Legal History*, *Minnesota Law Review*, *William Mitchell Law Review*, and *Journal of Social History*. He has also written two other textbooks, *Criminal Law*, now in its twelfth edition, and *Criminal Justice*, now in its seventh edition.



1

Preview of Criminal Procedure in the Age of the Digital Revolution

Learning Objectives

- 1 Understand the read-about–talk-about–write-about approach to “interrogating” criminal procedure in the Digital Age.
- 2 Know, understand, and appreciate the five ideals of criminal procedure in the Digital Age.
- 3 Appreciate the balancing ideal as it is applied to the real world of criminal procedure.

U.S. v. Apple (2016)

CASE COVERED

“

In a crime analytics bureau, a police officer logs in to see what alerts have been posted by social media software designed to spot potential threats within the billions of daily online tweets, likes, and posts. On the street, a police officer uses his body-worn camera to scan a crowd; the feed is sent in real time back to the department where facial recognition and movement analysis software alerts the patrol officer as to whether furtive movements or people on watch lists have been identified. Other people are dismissed as not posing an immediate threat but are logged on watch lists for future reference. No police department has all of this technological ability today, but some will one day soon. There is no question that this version of big data policing is on the cusp of wider adoption, and it raises key questions about discretion and accountability.

—Professor Elizabeth Joh (2016)

Most people today live their lives on smartphones, and, in this regard at least, criminals are no different. While in the past criminals may have kept evidence of their crimes in file cabinets, closets, and safes, today that evidence is more often found on smartphones. Photos and videos of child sexual assault; text messages between sex traffickers and their customers; even a video of a murder victim being shot to death—these are just a few of the pieces of evidence found on smartphones and used to prosecute people committing horrific crimes.

—Cyrus Vance, Jr., Manhattan County Attorney (2016)

Welcome to *Criminal Procedure* 10!

Criminal Procedure Snapshots,
2014–2016

Criminal Procedure Ideals in the Real
World

U.S. v. Apple

The Case Enters the Criminal Process
The Order



Smartphones, led by iPhone, have become an essential part of our lives. People use them to store an incredible amount of personal information, from our private conversations to our photos, our music, our notes, our calendars and contacts, our financial information and health data, even where we have been and where we are going. All that information needs to be protected from hackers and criminals who want to access it, steal it, and use it without our knowledge or permission.

—Tim Cook, Apple, Inc. (2016)

Welcome to *Criminal Procedure* 10!

LO 1 I hope you'll enjoy reading this edition as much as I've enjoyed revising it—for the 10th time. But, I hope you'll do more than just *read* it. I hope that, like most of my students, you'll "interrogate" it. It's what I call the *think about* and *read about* and *talk about* and *write about* approach to criminal procedure. I'm pleased that when last week I polled my class on the prompt "I talk about our class to my friends/family/others," 51% answered "a lot" and 37% responded "sometimes." To get us started on the read-about-think-about-talk-about approach, consider the following sample of criminal procedure snapshots from December 2014 to March 2016. We'll explore them more in the chapters to come, but I've previewed them here to introduce you to my version of the active learning approach to teaching criminal procedure in the Digital Age. As you consider the snapshots, think about (and hopefully talk to your classmates, friends, and family about) where and how they fit into the criminal procedure regime we'll engage in the book. Look at the Table of Contents and the index to identify in which chapter(s) the item should appear. (Tables of contents and indexes are invaluable resources that students often overlook. In my opinion, you can tell the quality of a book by its table of contents and indexes.)

Criminal Procedure Snapshots, 2014–2016

1. *Ferguson, MO police shooting, August 9, 2014.* Darren Wilson, a police officer, in Ferguson, Missouri, a St. Louis suburb, shot dead Michael Brown, an unarmed teenager. Officer Wilson is White; Michael Brown was Black. Protests roiled the area for weeks. Shortly before Officer Wilson shot him, Brown had stolen two packs of cigarillos from a convenience store and shoved the store clerk who tried to stop Brown on Brown's way out of the store. On November 24, when a grand jury decided not to indict Mr. Wilson, protestors took to the streets again. In March 2015, the U.S. Justice Department called on Ferguson to overhaul its criminal justice system, declaring that the city's actions had violated the Constitution.
2. *Paris, France ISIS attack, November 13, 2015.* Six ISIS (Islamic State of Iraq and Syria) suicide bombers armed with assault weapons carried off a well-coordinated attack on Paris entertainment sites on a weekend evening when they were full of people enjoying themselves. The sites included Stade de France, the French national stadium during a France versus Germany soccer

match; several popular bars, coffee shops, and restaurants; and Bataclan Concert Hall where Eagles of Death Metal band performed. The result—130 dead and hundreds more wounded.

3. *Malheur National Wildlife Refuge occupation near Burns, Oregon, February 1, 2016.* Local residents of Burns, Oregon, furious about antigovernment militias' January 2 armed occupation of the wildlife refuge, faced off against antigovernment protesters who supported the occupation. In a surprisingly vocal counter protest, local residents yelled "Go home! Go home!" at the occupation supporters across the sidewalk—many of whom were visibly armed and carried American flags. The supporters, most of them from out of state, shouted back that freedom for all Americans was under threat no matter where you lived and that patriotism was on their side. "Where are your flags?" they shouted. "Where are your flags?" The occupation ended on February 11, 2016, after the FBI negotiated a peaceful surrender by the occupiers. "No one was injured, and no shots were fired," said an FBI statement. A grand jury indicted 16 people.
4. *Risk of death or serious injury from a terrorist attack, November 23, 2015.* In the United States, an individual's likelihood of being hurt or killed by a terrorist (whether an Islamist radical or some other variety) is negligible. Consider, for instance, that since the attacks of September 11, 2001, Americans have been no more likely to die at the hands of terrorists than being crushed to death by unstable televisions and furniture. Daniel Kahneman, professor emeritus at Princeton University, has observed that "even in countries that have been targets of intensive terror campaigns, such as Israel, the weekly number of casualties almost never [comes] close to the number of traffic deaths."

Because the likelihood that you or those you love will be directly affected by any of this in your lifetime is exceedingly small, perhaps the best way to counter terrorists is to do just as the French pianist who played "Imagine" in public outside the Bataclan did after the attack, or as did the widower whose wife died in the attack, and whose open letter to the terrorists included this: "I will insult you with my happiness." We can refuse to give them the fear they so desperately want from us (Shaver 2015).

5. *Picture of the Digital Age.* See Table 1.1 and Figure 1.1.

TABLE 1.1 "InternetLiveStats.com" Midnight to 9 am, March 16, 2016

Items	Number
Emails	86.8 billion
Facebook active users	1.6 billion
Google searches	1.8 billion
Instagrams	32 million
Internet users	3.3 billion
Internet Websites hacked	24,199
Smartphones sold	2.4 million
Tweets	241 million
Twitter active users	342 million
YouTube videos viewed	4 billion

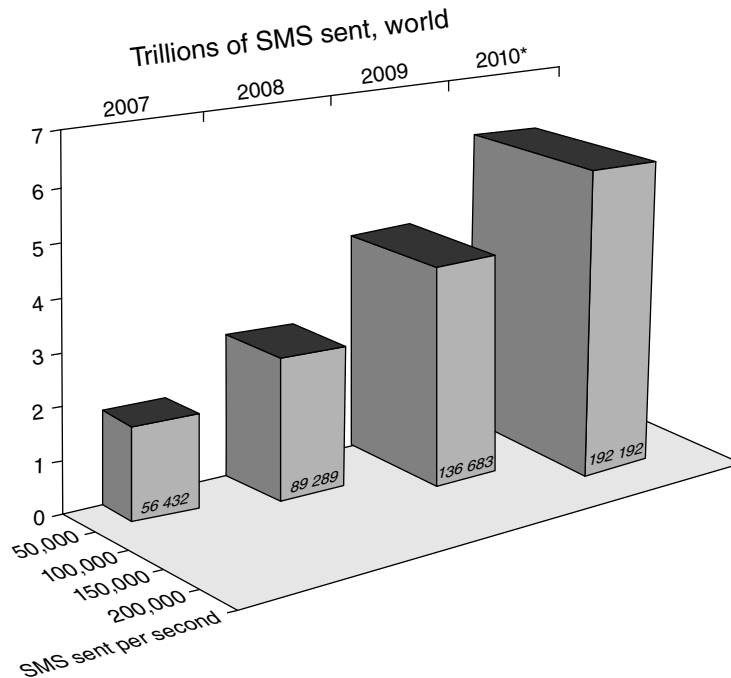


FIGURE 1.1 SMS Triples in Three Years

Note: *Estimate

Source: ITU World Telecommunication/ICT Indicators database

6. *Apple, Inc. A Letter to Our Customers, February 16, 2016.* Smartphones, led by iPhone, have become an essential part of our lives. People use them to store an incredible amount of personal information, from our private conversations to our photos, our music, our notes, our calendars and contacts, our financial information and health data, even where we have been and where we are going. All that information needs to be protected from hackers and criminals who want to access it, steal it, and use it without our knowledge or permission.

Customers expect Apple and other technology companies to do everything in our power to protect their personal information, and at Apple we are deeply committed to safeguarding their data. Compromising the security of our personal information can ultimately put our personal safety at risk. That is why encryption has become so important to all of us. For many years, we have used encryption to protect our customers' personal data because we believe it's the only way to keep their information safe. We have even put that data out of our own reach, because we believe the contents of your iPhone are none of our business.

Criminal Procedure Ideals in the Real World

LO 2 Each snapshot in the list in this chapter's introduction highlights how one or more U.S. criminal procedure ideals play out in the real world of the Digital Age. Here are five ideals we'll explore in depth in the chapters to come.

1. **Balancing.** Balancing refers to securing public safety for the whole community, while protecting the liberty and privacy of every individual in the

community. At the heart of our criminal procedure regime is the ideal of balancing two *conflicting* values, both of which we believe are essential to the quality of our lives. On one side of the balance is community security. Who can doubt the value of living in a community where we're safe (or at least where we *feel* safe)? Our lives are safe from murder; our bodies are safe from sexual and nonsexual assaults, and robbery; our homes are safe from burglars, arsonists, and trespassers; our secrets are safe from exposure; and our "stuff" is safe from thieves and vandals.

On the other side of the balance is individual autonomy. **Autonomy** refers to individuals' freedom to control their own lives without government interference. They can come and go as they please; develop their body and mind as they wish to do; believe whatever or whomever they want to believe; worship any god they like; associate with anybody they choose to be with; and do whatever else they wish to do in the privacy of their own homes (assuming that they're competent adults and what they want to do doesn't include committing crimes that violate the community's or other persons' safety against their will). In other words, they can't tip the balance between community security and individual autonomy in their favor whenever and however they want.

2. **Proportionality.** Proportionality refers to using no more state power and resources than are needed to prevent, investigate, prosecute, sentence, and review official actions taken to provide for the ideals of public safety and individual autonomy.
3. **Equal justice.** The equal justice ideal in criminal procedure refers to the impartial treatment of innocent *and* guilty individuals by:
 - a. *Law enforcement officers'* actions to prevent and investigate crime (Chapters 3–9).
 - b. *Prosecutors'* actions to manage the state's case in court proceedings before, during, and after conviction (Chapters 10–14).
 - c. *Judges'* actions to review law enforcement decisions when they're officially challenged (Chapters 3–10) and to supervise court proceedings before, during, and after conviction (Chapters 11–14).
4. **Accuracy.** The ideal of accuracy in criminal procedure is perhaps best stated as *avoiding* two "errors of justice" in determining innocence and guilt, namely
 - a. "Harassing and sanctioning *innocent* people."
 - b. "Failure to sanction culpable *offenders*" (Forst 2004, 2, italics added).
5. **Evidence-based decision making.** Evidence-based decision making relies on two kinds of evidence.
 - a. **Legal evidence.** Facts and circumstances (objective basis) required to back up government actions in criminal procedures.
 - b. **Empirical evidence** is composed of two types:
 - i. **Basic research** describes the frequency, initiation, location, and distribution of criminal procedures (e.g., how often do SWAT raids uncover drugs in the houses they dynamically enter) (Chapter 6).
 - ii. **Policy research** evaluates practices and policies (e.g., are police officers safer, or less safe, if they order passengers of lawfully stopped cars to get out of the car?) (Chapter 4).

U.S. v. Apple

LO 3 *Criminal Procedure 10*, like all previous editions, is a **text-case book**. We'll explore in detail the "case" part of the book in Chapter 2. Here, we'll preview *U.S. v. Apple, Inc.* (2016). This will give you the chance to see the balancing ideal as it's *beginning* to play out in the courts. It pits the FBI against Apple. Fred Kaplan described it as "a fight to the finish over lofty principles and national values, involving not just this company and this bureau but all of Silicon Valley and the entire realm of U.S. intelligence gathering" (2016).

At least, this is how Apple and the FBI are presenting the case. On one side, Apple, Google, Facebook, and other Silicon Valley companies and their supporters contend that the future of "encryption and privacy rides on the outcome" (Kaplan 2016; Exhibit 1.1).

Exhibit 1.1 Cook's letter to Apple customers

February 16, 2016

A Message to Our Customers

The United States government has demanded that Apple take an unprecedented step which threatens the security of our customers. We oppose this order, which has implications far beyond the legal case at hand.

This moment calls for public discussion, and we want our customers and people around the country to understand what is at stake.

The Need for Encryption

Smartphones, led by iPhone, have become an essential part of our lives. People use them to store an incredible amount of personal information, from our private conversations to our photos, our music, our notes, our calendars and contacts, our financial information and health data, even where we have been and where we are going.

All that information needs to be protected from hackers and criminals who want to access it, steal it, and use it without our knowledge or permission. Customers expect Apple and other technology companies to do everything in our power to protect their personal information, and at Apple we are deeply committed to safeguarding their data.

Compromising the security of our personal information can ultimately put our personal safety at risk. That is why encryption has become so important to all of us.

For many years, we have used encryption to protect our customers' personal data because we believe it's the only way to keep their information safe. We have even put that data out of our own reach, because we believe the contents of your iPhone are none of our business.

The San Bernardino Case

We were shocked and outraged by the deadly act of terrorism in San Bernardino last December. We mourn the loss of life and want justice for all those whose lives were affected. The FBI asked us for help in the days following the attack, and we have

worked hard to support the government's efforts to solve this horrible crime. We have no sympathy for terrorists.

When the FBI has requested data that's in our possession, we have provided it. Apple complies with valid subpoenas and search warrants, as we have in the San Bernardino case. We have also made Apple engineers available to advise the FBI, and we've offered our best ideas on a number of investigative options at their disposal.

On the other side, the FBI, National Security Agency (NSA), and local law prosecutors like Manhattan County Attorney Cyrus Vance, Jr. maintain that if Apple wins, we can forget about capturing and bringing justice to terrorists, murderers, rapists, gangsters, and drug lords (see *Criminal Procedure in Action*, "Apple iOS 8 Is a 'Gift from God'").



Criminal Procedure in Action

Apple iOS 8 Is a "Gift from God"

We risk losing crucial evidence in serious cases if the contents of passcode-protected smartphones remain immune to a warrant. The enormity of the loss is fully appreciated by wrongdoers who use smartphones. The following telephone call, made earlier this year, from a prison inmate to a friend, shows that the inmate hoped that his phone had the new, impregnable Apple operating system. (Phone calls made by inmates are recorded by the Department of Corrections, and inmates are repeatedly advised that their calls are recorded.)

Inmate: I need you to open up your iPhone and go to your operating system. If it's on operating system 8, a iOS8, they can't get into my phone. Because when we switched to T-Mobile they gave us brand new phones, right?

Friend: Yeah.

Inmate: And I think they had to do operating systems . . . what month we switched to T-Mobile?

Friend: Um . . . February I think. We didn't even have these phones for not even long.

Inmate: Good. What happen is in September 17, 2014, they opened up . . . It's all in the papers . . . The DA Cyrus Vance who's

prosecuting me is beefing with Apple because they put these phones that can't be [un]encrypted. If our phones is running on the iOS8 software, they can't open my phone. That might be another gift from God. We might have accidentally gotten the new phones and . . .

Friend: Yeah . . .

Later conversations between this inmate and his friend similarly focused on this topic. After the friend told the inmate that she had checked and believed that the iPhone was using the iOS 8 operating system, the inmate was relieved:

"That means God might be in my favor. I don't think they can open it." Later, speaking to another person, the inmate expressed the hope that his phone could not be unlocked because "I mean, you know how much shit is on that phone." The inmate then spoke with this friend again, had her confirm that the inmate's iPhone used the iOS 8 operating system, and also had her call Apple to make sure that the iOS 8 operating system was secure. The friend confirmed that Apple said that it was, and then assured him, "You should be good, as long as they can't open that phone."

CONTINUED