AMERICAN CRIMINAL PROCEDURE

CASES AND COMMENTARY

Sixth Edition

Stephen A. Saltzburg
Daniel J. Capra

American Casebook Series®

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Preface

This Sixth Edition plays to what we feel were the strengths of the first five editions. While the predominant focus is on Supreme Court jurisprudence, we have tried wherever possible to give the reader a sense of what the lower courts are doing with the interesting and exciting issues that abound in criminal procedure. The lower courts are where the day-to-day law is made, and where many of the most interesting fact situations arise. Since our topic is "American" Criminal Procedure, we have made an effort to include cases from all the circuits and state courts throughout the book. As with prior editions, extensive commentary and interesting fact situations are included to assist in doctrinal development. We have also added extensive academic commentary on some of the cutting issues in criminal procedure. Finally, the book covers all problems of criminal investigation and adjudication. It is not limited to constitutional issues. Yet despite the breadth of the book, we have made a special effort to keep it to a manageable and readable length.

The format of the book is the same as the prior editions, although much of the material has been reorganized and updated. Citations to Supreme Court opinions are limited to United States Reports, unless the case is so recent that the U.S. cite is not available. Certiorari denied citations are omitted on the ground that they unnecessarily clutter a book that is primarily for classroom use. Citations included in cases are often omitted without so specifying. Lettered footnotes are from the original materials. Numbered footnotes are ours. Omissions from the text of original material are indicated by asterisks and brackets. We have added more than 1000 headnotes in an effort to make the book as user friendly as possible.

This Edition gives special treatment to some of the more active areas of criminal procedure in the past four years. Racially-based stops and encounters are discussed in Chapter Two. The case law on peremptory challenges has burgeoned, and is thoroughly discussed in the material on *Batson* and its progeny in Chapter Ten. Important questions concerning the right to retained counsel and to counsel's role are also explored in Chapter Ten. The fundamental changes wrought by the Sentencing Guidelines, which take up much of the lower courts' time and effort and which have resulted in a shift of power from courts to prosecutors, are explored in Chapters Nine and Eleven. Finally, Chapter Thirteen gives extensive treatment to recent Congressional efforts to limit habeas corpus review.

Because every criminal procedure teacher likes to cover different material, we have tried to divide the book into numerous subdivisions to enable teachers to pick and choose the subjects they most want to cover. We think that an advanced criminal procedure course is a useful and popular addition to the curriculum. If an advanced course is contemplated, Chapters Nine through Thirteen could be reserved for that course. An alternative approach is to include Chapter Nine in the basic course and move Chapters Eight and Five into the advanced course. A third approach is to cover parts of all, or almost all, chapters in the basic course,

and to finish them in the advanced course. We believe and hope that the material lends itself to several different divisions that all work well in class and make either a single course or a tandem interesting for all students.

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Introduction

Criminal procedure is one of the courses in law school that generates classroom excitement that continues from the first to the last day of class. Whether it is the opportunity to compare the Warren and the Burger Courts and to predict the likely course of the Rehnquist Court, the fact that criminal procedure as a subject of study has developed only relatively recently so that one is almost always on the cutting edge of the law, a fascination with the battle between government and individual and the true adversary clash that often results, the fact that the Bill of Rights holds an important place in the hearts and minds of future lawyers, or all of these things to some extent, people like to talk and argue about criminal procedure, and they mind studying it less than they mind studying many other things.

As excited as students of criminal procedure are, too often they leave their courses feeling somewhat frustrated. They have learned a lot of recent law and they know what the latest decisions of the Supreme Court are, but they do not feel comfortable in their understanding of the criminal justice system (to the extent that it is accurate to call the way criminal cases are handled a system) as a whole, or in their knowledge of the doctrinal roots of the numerous concepts that they have examined. This book is an effort to remove some of that frustration, to clarify the way in which the parts of the criminal justice system relate to one another, and to explain how we arrived where we now find ourselves.

To accomplish this task, the book utilizes far more original text and scholarly commentary than is typically found in casebooks on the subject. The text attempts to develop the history of the rules discussed, to point out how judicial treatment of various concepts has changed over time, and to indicate the vices and the virtues of various approaches, past and present. An effort is made to provide students with citations to law journals, books and cases not presented in this book so that those who are interested can examine topics more fully on their own with easy access to the relevant literature.

When a subject is examined, an effort is made to point out inadequacies in judicial opinions or legislative reactions to judicial opinions. Sometimes our own views are stated, either explicitly or implicitly, in an effort to stimulate thinking about new approaches to familiar problems. Where appropriate, students are asked to think about the concepts they have learned in connection with problems that encourage them to develop their own ideas about how best to handle hard cases and close questions.

An effort has been made to reproduce only those Supreme Court cases that are most important. Less important cases are discussed in the textual material. Some of the cases that are offered are not yesterday's Supreme Court decisions, but those of a more distant Court, because the important opinions may be those that were seminal.

The emphasis on the development of concepts over time indicates a bias that should be confessed here: We believe that the judiciary, especially the Supreme Court, and legislatures, to the extent that they become involved in establishing procedures for criminal cases, attempt to articulate and apply doctrines that will

hold their own over time. In other words, we believe that they struggle "to get it right" eventually, if not always at the first crack.

This is not to suggest that right answers are clear or easy to ascertain. In many instances, reasonable minds will differ on the proper solution to questions, and often reasonable minds will find proper solutions to be elusive. We suggest only that approaches that are plainly defective are almost always abandoned or changed, and that it seems that courts and legislatures do attempt to refine the procedures that govern criminal investigations and prosecutions as a result of experience.

Like most criminal procedure books, this one places much emphasis on constitutional rules. This hardly can be avoided, since the Constitution as now interpreted does set minimum standards for many parts of the criminal justice system. But, an attempt is made to indicate when nonconstitutional rules may be more important or more useful than constitutional ones.

To sum up, this book combines elements of traditional casebooks with textual material that might more typically be found in a treatise or hornbook, and it intersperses problems in many chapters. Overall, the idea is to identify clearly the problems of criminal procedure, to offer various ideas about how to handle the problems, and to describe the work that still needs to be done if criminal cases are to be processed fairly.

Some comments on the particular chapters of the book may help to explain how we have approached various topics.

Chapter One begins with a development of the criminal justice system. The importance of constitutional rules is discussed, and the incorporation and retroactivity doctrines are examined, since they arise again and again in the cases that are discussed in the following chapters.

Chapter Two examines all aspects of Fourth Amendment law. It begins with a careful examination of the Amendment's language and an exploration of the relationship between the warrant clause and the reasonableness clause. The concepts of probable cause, valid warrants, arrest, stop and frisk, and scrutiny by a detached magistrate are all covered at length. Eavesdropping and wiretapping are looked at afterwards. The chapter reserves an examination of the exclusionary rule until the end and attempts thereby to promote an understanding of what the rule is and what its true costs are. This is the longest chapter of the book, covering the many facets of search and seizure law.

Chapter Three covers self-incrimination and confessions. More than usual attention is paid to traditional Fifth Amendment law and how it relates to the law of confessions. Much space is devoted to laying the historical foundation for present law. Only then are *Miranda, Massiah, Brewer, Henry* and other major cases discussed.

Identification evidence is scrutinized in Chapter Four. The major Supreme Court cases take up most of the chapter, but an attempt is made to point out the shortcomings in the Court's work and to suggest how identification procedures might be improved and how fairer trials might result.

Chapter Five is about the right to counsel. Since the right to counsel may be important in connection with confessions and identifications, as well as later in the process, it might seem strange for this chapter to follow the two previous ones. But we believe that the order works and that it is helpful to treat the counsel cases

in one place—at the point at which counsel is likely to be involved for the remainder of the process. The doctrines of ineffective assistance and self-representation are not treated here, but are reserved for Chapter Ten.

Chapter Six looks at the decision whether or not to charge a suspect. The roles of the police, the prosecutor and the grand jury are examined, and an effort is made to show how interdependent they are. The current controversy over the utility of the grand jury as a screening device and the dangers of the grand jury serving as an arm of the executive are described and discussed. Preliminary hearings and their relationship to grand juries and charging decisions generally are considered in some detail.

Chapter Seven covers bail and pretrial release. Both constitutional and nonconstitutional rules, especially the 1984 Federal Bail Reform Act, are analyzed. The purposes of bail and the controversy over preventive detention are discussed. Some emphasis is placed on the traditional role of the bondsman and the need for bail reform.

Chapter Eight presents criminal discovery. After a general overview, attention is paid to what the defendant can get from the prosecutor and what the prosecutor can get from the defendant without violating the Constitution. Proposals for liberalizing discovery are considered.

Chapter Nine is devoted to guilty pleas and plea bargaining. An extensive excerpt from a comprehensive study of plea bargaining in the United States begins the chapter. It is followed by a scholarly debate about the merits of plea bargaining, and then by a discussion of the requirements of a valid plea and an analysis of the finality of a plea.

Trial and trial-related rights are treated in Chapter Ten. Among the topics covered are speedy trial, joinder of defendants and charges, burdens of persuasion, jury trial, fair-trial—free press conflicts, and effective representation and self-representation. This is the second longest chapter in the book. It addresses in the context of criminal trials many issues that are considered in the context of civil trials in the typical course in Civil Procedure.

Sentencing is the exclusive concern of Chapter Eleven. Basic options in sentencing are described, as are the roles of judge and jury. The determinate versus indeterminate sentencing controversy is explored, and the Federal Sentencing Guidelines are carefully examined. Also, the procedures that are generally employed in sentencing, and the applicable constitutional rules are set forth.

Chapter Twelve covers all aspects of double jeopardy. Most attention is paid to recent decisions of the Supreme Court that clarify (or further confuse, depending on how the decisions are read) a subject that has been puzzling criminal procedure students for years. Collateral estoppel and vindictive prosecutorial conduct also are discussed.

Finally, Chapter Thirteen focuses on post-trial motions, appeals, and collateral attacks on convictions. An effort is made to examine all important post-sentencing challenges that can be made to a conviction. The section on collateral attack endeavors to explain the development of habeas corpus by the Supreme Court and Congress and the high points of the debate over how much post-conviction attack is desirable in a criminal justice system.

It should be obvious that we have tried to cover all of the significant parts of the criminal justice system and to do so in a reasonable number of pages. To ac-

complish this, we have worked hard to make the textual portions of the book as informative as possible. This Edition cannot yet be called a short book, but criminal procedure is not a subject that is easily confined to a few pages. To make the length somewhat more tolerable, we have endeavored to use headnotes as well as several different typesizes, not only for purposes of emphasis, but also to break the monotony of the printed page. To make the book easier to read, we also delete most internal citations in material that we quote from other sources. Thus, most internal cites in the Supreme Court opinions found throughout the book are missing. Footnotes in quoted material generally are deleted also. When we leave internal citations and original footnotes in the quoted material, we do so in the belief that they make a contribution to the overall coverage of the materials. Footnotes that are taken from the original source all have small letters to identify them—i.e., a, b, c, etc. Our own footnotes are identified by number—i.e., 1, 2, 3, etc. We hope that these choices enhance the "readability" of the book, and that by choosing to delete unnecessary baggage in quoted material, we have been able to pay more attention to the important and interesting questions that make criminal procedure a joy to study.

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