

MODERN CRIMINAL PROCEDURE

CASES-COMMENTS-QUESTIONS

Tenth Edition

Yale Kamisar
Wayne R. LaFare
Jerold H. Israel
Nancy J. King

American Casebook Series®



MODERN CRIMINAL PROCEDURE

CASES, COMMENTS AND QUESTIONS

Tenth Edition

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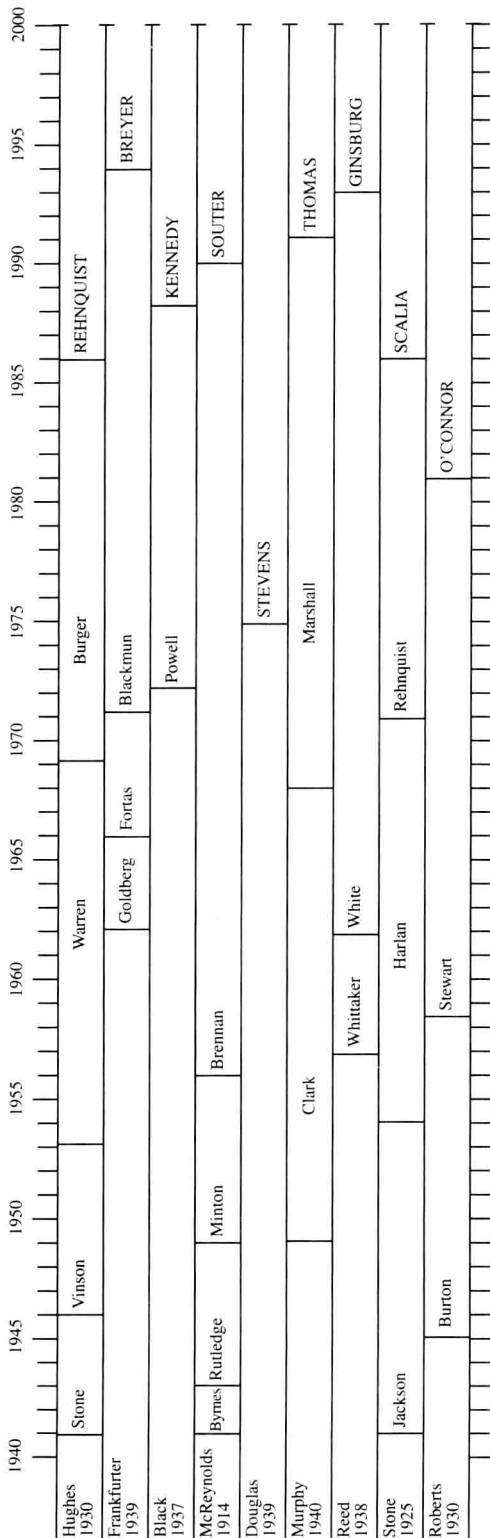
To the memory of

Joseph D. Grano

*the criminal procedure professor
who educated us all.*

*

UNITED STATES SUPREME COURT SINCE 1940



The publishers wish to acknowledge that the above chart was developed from a suggestion by Dean Joe E. Covington of the University of Missouri Law School.

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Preface to the Tenth Edition

Several eventful Supreme Court Terms, numerous legislative changes and lower court rulings, and much significant law review commentary has occurred since the cut-off date for the ninth edition. Because of the need to integrate all of this new material, strenuous efforts were made to compress some of the older material. This produced a volume almost 30 pages shorter than the ninth edition, but this is still (and we have “probable cause” to believe always will be) a big book.

This is so because we have taken pains to set forth the views of *all* the Justices in the leading cases; because we believe that often the student should see the subsequently overruled or distinguished opinion “in the original” rather than rely on the overruling and distinguishing case’s version of the earlier opinion; because we have retained older cases which contribute significantly to an understanding of new trends and developments; because we have covered significant non-constitutional issues, as well as traditional constitutional matters; because, in treating non-constitutional issues, we have looked to state law (with its frequent variations) as well as federal law; and because, at many places, we have sought to enrich the case materials with authors’ Notes and Questions or extracts from illuminating and stimulating books, reports, articles, model codes and proposed standards.

The size of this book—the result of striving both for breadth of coverage and depth of treatment—indicates clearly enough that our purpose is not to provide a volume to be taught from cover to cover in a single one semester course on the subject. Rather it is to present materials that afford a teacher maximum freedom to shape his or her own course—in light of a particular teacher’s own sense of priorities and interests and other related courses available at that teacher’s school. In many schools, two criminal procedure courses are offered—one on the “investigatory process” and the other on the “adversary process.” These materials divide quite naturally for such courses, with Chapters 1-11 covering the investigatory process and 12-29 (possibly supplemented by Chapter 1) covering the adversary process. In other schools, a single course is given surveying various aspects of the process. Here, the opening sections of the chapters on such subjects as prosecutorial discretion, grand jury review, preliminary hearings, and discovery can be used for an abbreviated coverage of those subjects. Finally, for a single course that focuses on constitutional limitations as they run throughout the process, the relevant materials can readily be pulled together from different chapters. For self-incrimination, for example, the subject can be thoroughly covered by combining materials from Chapter 2, § 2 (e.g., *Schmerber*); Chapter 8 (e.g., *Miranda*); Chapter 10, §§ 2 & 3 (e.g., *Boyd*, *Fisher*, *Hubbell*, and *Doe II*); Chapter 11, §§ 3 & 4 (e.g., *Harris* and *Elstad*); Chapter 21, § 3 (e.g., *Williams*) and Chapter 25, § 4 (e.g., *Griffin v. California*). Our extensive index includes headings that should help one in pulling together the various materials that relate to any particular right or privilege. The index also has proven especially helpful to students (along with the cross-references in the Notes and Questions) in increasing their understanding of the interrelationship of various aspects of the process.

In the main, we have followed a chronological approach in ordering the materials which appear in this book. Following the introductory materials, which include an overview of the criminal justice system and a general consideration of due process, the system is examined from arrest and search to post-conviction review. We have occasionally departed from the chronological scheme when it seemed appropriate to do so. For example, the initial chapter on the right to counsel (Ch. 3) is included in the introductory part of the book as background for the confessions and lineups materials. This chapter is also included in the introductory part on the assumption that a student should get some understanding of how and when an attorney becomes involved in a criminal case before examining the procedural issues that will confront the attorney. Wiretapping and other surveillance activities are discussed after search and seizure on the ground that the student must first grasp the basic Fourth Amendment doctrines that have developed in the latter area, while the entrapment material is presented following the surveillance chapter because of the relationship between entrapment and other uses of secret agents.

This volume includes significant developments up to January 1, 2002. Important developments thereafter will appear in annual supplements, which will also contain relevant federal court rules and statutory materials. The supplement accompanying this book and published simultaneously with it will contain all notable cases handed down by the Supreme Court during the 2001-2002 Term. It will also include the Federal Rules of Criminal Procedure and various statutes.

Case citations in the text and the footnotes of judicial opinions and in the writings of commentators have been omitted without so specifying. Numbered footnotes are from the original materials; lettered footnotes are ours.¹ Omissions from the text of the original are indicated by asterisks and brackets.

One or more of the authors has been fortunate enough to participate actively in four major criminal procedure projects: The American Bar Association's project on *Standards for Criminal Justice*; The American Law Institute's *Model Code of Pre-Arrestment Procedure*; The National Conference of Commissioners on Uniform State Laws' *Uniform Rules of Criminal Procedure*; and the ongoing revision of the *Federal Rules of Criminal Procedure*. We are indebted to the members of the various committees with whom we have worked for providing us with many leads and insights. We are also indebted to the many users of this book who have offered helpful suggestions on content as to this edition and previous editions. That list, like the list of our student research assistants over the years, has now grown far too long to mention each person individually.

1. Standard abbreviations are used throughout. On occasion, a book or article is used so frequently in a chapter as to call for a shorter citation form. Here we have given the full citation to the book or article in the first footnote of the chapter and indicated there the shorter citation form. For our own books, we simply have used the shorter citation form throughout the book. These are:

LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (3d ed. 1996), available on

Westlaw under the database SEARCHSZR and cited as SEARCHSZR §__.

LaFave, Israel, and King, *Criminal Procedure Treatise* (2d ed. 1999), available on Westlaw under the database CRIMPROC and cited as CRIMPROC §__.

Articles collected in Kamisar, *Police Interrogation and Confessions: Essays in Law and Policy* (1980) are usually cited as Kamisar essays.

We are especially appreciative of the able secretarial assistance provided on this tenth edition, too often under great stress, by Rosemary Getty, Carol Haley, Mary Lebert, Carolyn Lloyd, Janis Stewart, and Cindy Zimmerman.

YALE KAMISAR
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June, 2002

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