

MODERN CRIMINAL PROCEDURE

Livingston Hall
Yale Kamisar
Wayne R. LaFare
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American Casebook Series



MODERN CRIMINAL PROCEDURE

CASES, COMMENTS AND QUESTIONS

THIRD EDITION

By

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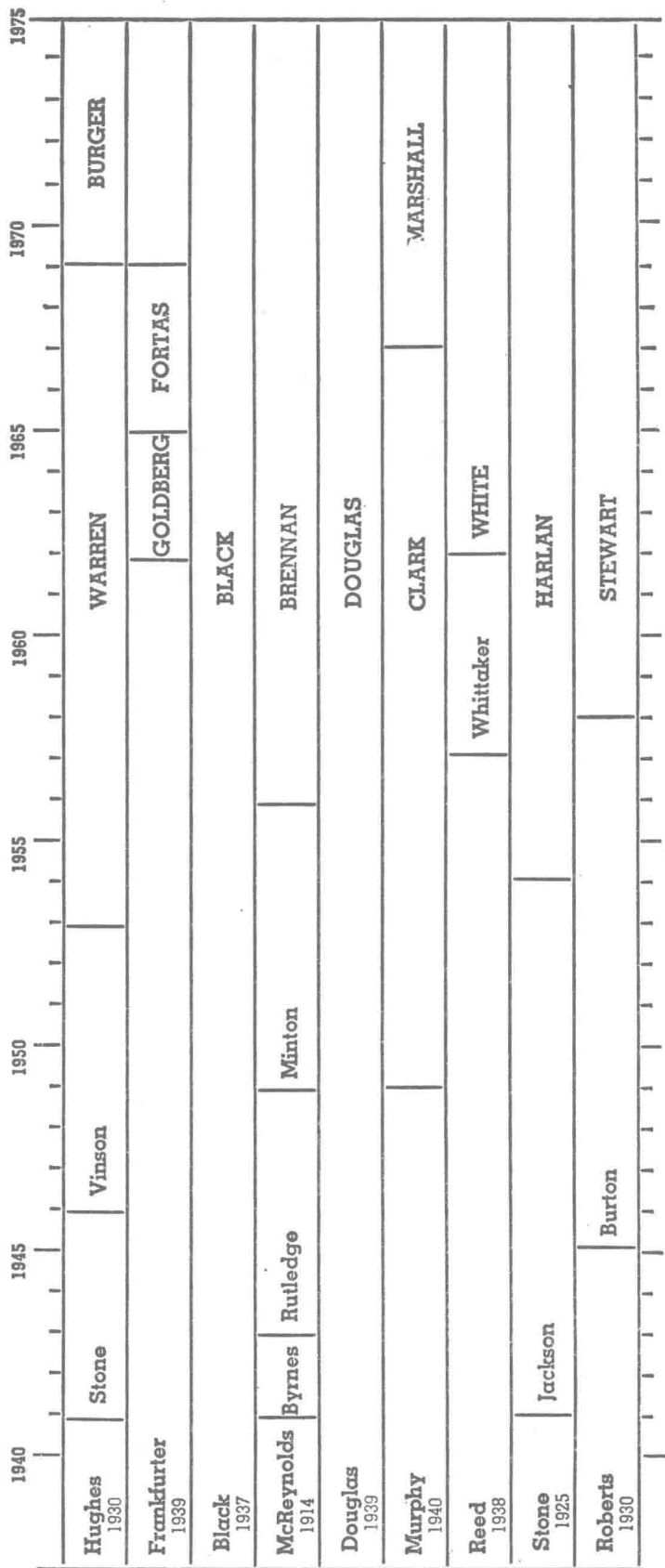
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The publishers wish to acknowledge that the above chart was developed from a suggestion by Dean Joe E. Covington of the University of Missouri Law School.

PREFACE

TO THE THIRD EDITION

Although only three years have passed since the publication of the second edition of *Modern Criminal Procedure*, the continuing rapid changes in the criminal procedure field, the wealth of literature, model codes and proposed standards stimulated by these developments, the growing attention to this area in law school courses and seminars, and the demands of users of earlier editions of this book for wider coverage of the field, have led us to produce a much more comprehensive treatment of the general subject. Largely because of the addition of twelve new chapters, this book is over 500 pages longer than the second edition.

Many of the new chapters deal primarily with procedures which are non-constitutional in their thrust—e. g., the decision to prosecute; the grand jury; the preliminary hearing; the scope of the prosecution: joinder and severance of counts and parties; post trial motions and appeals. The materials on arrest, search and seizure; wiretapping and electronic eavesdropping; line-ups and other identification procedures; plea bargaining; notice, discovery and disclosure; and post-conviction review, especially, have undergone extensive revision and expansion. All existing chapters have been completely updated and enriched with Notes and Questions raising issues of current significance. (The questions posed after the cases are deliberately of varying difficulty. As to many, of course, there are no "correct" answers. The ideas or theories advanced or implied in the Notes and Questions are not necessarily shared by any of the authors, but may only present viewpoints worthy of discussion.)

As in the previous editions, in addition to the Notes and Questions, we have sought to enrich the case materials with major extracts from illuminating and stimulating books, reports, articles and speeches. Because of the current concern over the need for legislative attention to problems in the administration of criminal justice, we have frequently included proposals growing out of such recent law reform efforts as the American Bar Association's Minimum Standards for Criminal Justice and the American Law Institute's Model Code of Pre-Arrestment Procedure.

Inasmuch as a separate course on criminal procedure is a relatively new development in the law school curriculum and at various points its content may overlap with matters covered in constitutional law, evidence, federal courts, and the basic course on substantive criminal law, we have had to make some difficult decisions on subject matter to be included in this casebook. Generally, we have been guided by our expectation of what the student is likely to confront in other courses at most law schools. We have, for example, not dealt with problems of evidence and tactics which occur during trial, on the assumption that these matters will be treated in courses on evidence and trial practice. Similarly, we have not explored the structure of the sentencing and correctional systems because they are usually considered in connection with the study of the substantive criminal law. (However, insofar as right to counsel, jury participation, discovery, and increased sentence on retrial do relate to the peno-correctional process, they are treated herein. Although these procedural matters are scattered throughout the

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casebook, Ch. 3, § 7; Ch. 21, § 8; Ch. 22, § 6; Ch. 25, § 2, the instructor who desires to do so may, of course, treat them as a unit.)

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 course on criminal procedure. It is, rather, to present the instructor with a set of materials that afford him maximum freedom to mould his own course—in light of his own sense of priorities and interests and other related courses being offered at his particular school. For example, two of the authors plan to teach a criminal procedure course dealing almost exclusively with police practices and discretionary enforcement (including prosecutor's discretion and negotiated pleas), while a third contemplates placing primary emphasis on the more formal aspects of the process—from bail to post-conviction review. As to the priority to be assigned particular chapters in the event only one course on criminal procedure is to be offered, there is a wide range of views among the authors (bearing a remarkable resemblance to the chapters for which each was assigned primary responsibility). One author feels that Chapter 4, Some General Reflections on the Police, the Courts and the Criminal Process, and Chapter 29, The Administration of Criminal Justice in the Wake of Civil Disorders, are "musts" in any course, no matter how short, on criminal procedure, but even in a "long course" would omit entirely Part V: Trial Motions, Appeals, Post-Convictions Remedies. On the other hand, a second author would give close, intensive attention to Chapter 27, Habeas Corpus and Related Post-Conviction Remedies, omit entirely Chapter 29, and pass rapidly over Chapter 4.

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 chapter on right to counsel is included in the introductory part of the book on the premise that it is "the most pervasive right" of an accused and on the assumption that it is beneficial to the student to understand how and when an attorney becomes involved in a criminal case before examining the procedural issues which will confront the attorney. Wiretapping and other surveillance activities are discussed after search and seizure on the ground that the student must first understand the basic Fourth Amendment doctrines which have developed in the latter area, while the entrapment material is presented following the surveillance chapter because of the growing relationship between entrapment and other uses of secret agents. Inasmuch as the grand jury is sometimes used as an investigative tool rather than as a check upon the prosecutor, it is treated before the materials on preliminary hearing. The final part of the book contains chapters on juvenile delinquency and civil disorders, which afford a basis for review of the major topics of criminal procedure in two special contexts: on the one hand, where there is greater emphasis upon the "rehabilitative ideal"; and, on the other, where the criminal justice system is operating under enormous stress.

For the most part, it has not been possible to utilize decisions rendered after March 1969, but the publishers have been most cooperative in permitting the

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addition of cases handed down by the United States Supreme Court while the book was in the process of printing. As a result, we have managed to include all the significant criminal procedure decisions of the 1968-69 Term of the Supreme Court except three handed down the last day of the Term. These are: *Chimel v. California*, holding that a warrantless search incident to arrest may not extend beyond the area which the arrestee might reach to obtain a weapon or to destroy evidence; *Benton v. Maryland*, applying the Double Jeopardy clause to the states; and *North Carolina v. Pearce*, holding that a more severe sentence may not be imposed after conviction for the same offense upon retrial unless valid reasons for doing so appear in the record.

In our efforts to make maximum use of the most recent writings on criminal procedure, we have been greatly aided by various persons who, as the book was being prepared, permitted us to read, profit by, and select extracts from manuscripts or galleys of then unpublished works:

Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U.Chi.L. Rev. 50 (1968);

William A. Dobrovir, Draft Chapter for Report of the Task Force on Law and Law Enforcement, National Commission on the Causes and Prevention of Violence (June 1969) (thanks to the cooperation of James S. Campbell, General Counsel to the Violence Commission);

Kenneth W. Graham & Leon Letwin, *A Study of the Preliminary Hearing in Los Angeles* (1969);

Norval Morris & Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (to be published in 1970);

Dallin H. Oaks, *The Criminal Justice Act in the Federal District Courts* (1969) (prepared at the request of the Committee to Implement the Criminal Justice Act, Judicial Conference of the United States; and the U. S. Department of Justice);

A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L.Rev. 249 (1968);

Herman Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 Mich.L.Rev. 455 (1969);

Charles Alan Wright, *Federal Practice and Procedure (Criminal)* (1969);

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Note, *The Supreme Court, 1967 Term*, 82 Harv.L.Rev. 63 (1968).

Footnotes of the courts and commentators have been omitted without so specifying; numbered footnotes are from the original materials; lettered footnotes are ours. The following abbreviations have been used:

Drafts of the various committees of the American
Bar Association Project on Minimum Standards
for Criminal Justice A.B.A. Standards

PREFACE

Various task force reports of The President's Commission on Law Enforcement and Adminis- tration of Justice	Task Force Reports
Amsterdam, Segal & Miller, <i>Trial Manual for the Defense of Criminal cases</i> (1967)	Amsterdam, Trial Manual
Wright, Federal Practice and Procedure (Crimi- nal) (1969)	Wright, Federal Practice

We should like to acknowledge the permission granted by the publishers of the books and articles produced herein. We are indebted to Dean Francis A. Allen, and Professors W. Kenneth Graham, Lawrence Herman, Michael S. Josephson, and Herman Schwartz for their valuable suggestions and insights. One of the authors is indebted to the Social Science Research Council for financial support in connection with a general study of Police-prosecution discretion which contributed immeasurably to this book. Our grateful thanks go also to the student research assistants who contributed so much to this book: Edward J. Dauber of the Harvard Law School; William A. Schroeder and Charles J. Schufreider of the University of Illinois College of Law; and Miss Louise Lander and Messrs. Spencer Denison, Arnold Nemirow, Robert Sammis, Peter W. Tague and William Weiner of the University of Michigan Law School. Finally, we are most appreciative of the able secretarial assistance provided, not infrequently under great stress, by Miss Bernadine A. Brooks, Mrs. Joyce Elliott, Miss Helgard Rodman and Mrs. Carole Russell.

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July, 1969

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