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MODERN CRIMINAL PROCEDURE

CASES, COMMENTS & QUESTIONS

Thirteenth Edition



Yale Kamisar, Wayne R. LaFare
Jerold H. Israel, Nancy J. King
Orin S. Kerr & Eve Brensike Primus

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CASES, COMMENTS AND QUESTIONS

Thirteenth Edition

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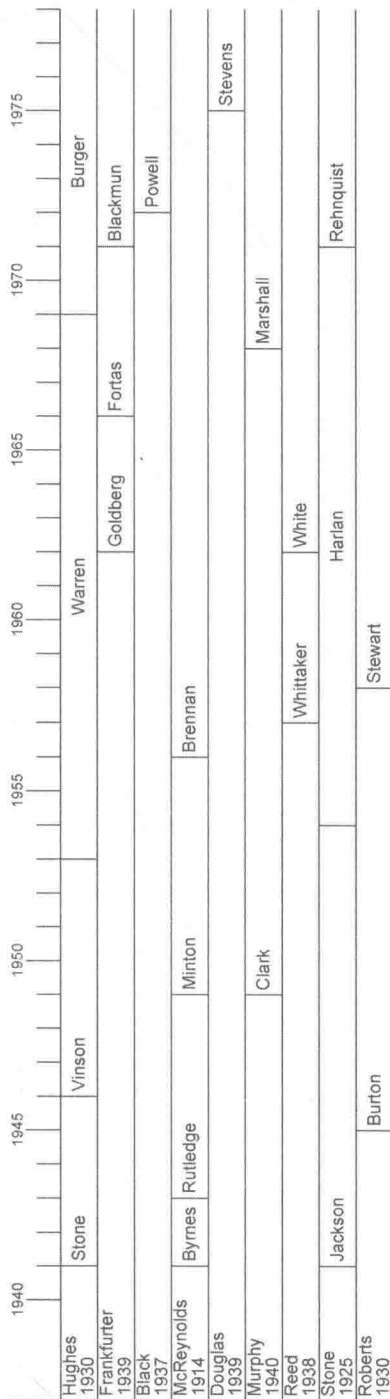
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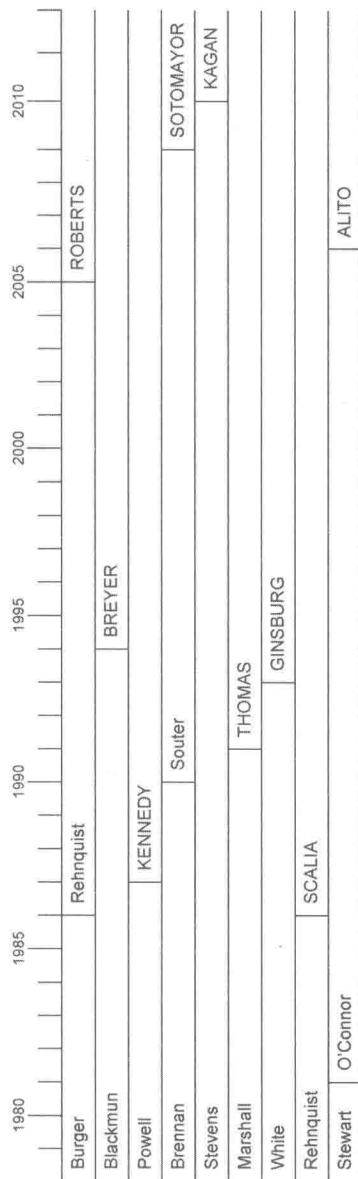
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1978-PRESENT



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 THIRTEENTH EDITION

Several eventful Supreme Court Terms, numerous legislative changes and lower court rulings, and much significant academic commentary has occurred since the publication of the twelfth edition. Because of the need to integrate all of this new material, strenuous efforts were made to tighten the editing in the older cases and in the Notes and Questions. As a result, we are pleased to report that this edition of *Modern Criminal Procedure* is actually slightly smaller than the previous edition.

However, this is still a big book and for various reasons: We have taken pains to set forth the views of *all* the Justices in the leading cases; 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; we have retained older cases which contribute significantly to an understanding of new trends and developments; we have covered significant non-constitutional issues, as well as traditional constitutional matters; 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 material with editors’ 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 one semester course. 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, the primary course offering in criminal procedure is a two-semester combination of courses. Very often the first course focuses on the investigatory portion of the process and the second course focuses on the post-investigation portion of the process. These materials divide quite naturally for such courses; Part One contains material that can be covered in either of the two courses (or be divided between the courses); Part Two deals with investigations; and Parts Three–Five treat the post-investigation portion of the process. This division is followed in two “spin-offs” from *Modern*, *Basic Criminal Procedure* and *Advanced Criminal Procedure*, with *Basic* containing Parts One and Two, and *Advanced* containing Parts One, Three, Four, and Five. *Modern* offers the advantage of being a single volume that can be used in both courses, and the potential for adding to each course some related materials dealing with the other portion of the process.

Some schools offer a single introductory course in criminal procedure, and the coverage tends to vary from one instructor to another. Our materials can readily be adapted, through selective assignments, to present courses that have quite different objectives in exploring the criminal justice process. These include: (1) a course that focuses on the seminal constitutional rulings dealing with each of the different constitutional guarantees; (2) a course that focuses on selected aspects of the investigation and post-investigation portions of the process (e.g., police searches and interrogations, the prosecutor's charging decisions, and plea negotiations); (3) a course that provides a brief overview of each step in the process (using, for example, the first sections in the various chapters which provide such overviews), combined with an in-depth analysis of a few selected topics; and (4) a course that focuses on differing regulatory objectives and difference in regulation by legislation, court rule, and constitutional decisionmaking, looking to the treatment of certain basic concepts (e.g., "privacy" and "waiver") as they are reflected in the law governing different aspects of the process. One consequence of providing instructors with materials that can be shaped for use in such a variety of single-course offerings is a volume that includes many more pages than will be assigned for such a course. We appreciate the awkwardness of dealing with such a hefty course-book, but hope the user willingly tolerates that awkwardness, as we do, in the interest of furthering flexibility in the choice of materials.

In the main, we have followed a chronological approach in arranging the materials which appear in this book. The Part One materials include an overview of the criminal justice system, a general consideration of due process, and two chapters on counsel ("the right to counsel" and "the performance of counsel"). The system is then examined from arrest and search to post-conviction review in Parts Two to Five.

In the chapters on investigation, 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. So too, general issues relating to the exclusionary rules that implement the various standards governing investigation are considered in Chapter 12, following all of the basic chapters on investigation. One exception is made here, however. We believe the *Miranda* "poisoned fruit" cases, *Patane* and *Seibert*, shed so much light on the significance of *Dickerson*, the case that reaffirmed *Miranda*'s constitutional status (or perhaps one should say shed so much light on the lack of significance of *Dickerson*) that we decided to place *Patane* and *Seibert* in the confessions chapter, a few pages after *Dickerson*.

Our index is unusually detailed. It is designed to allow the reader to do all of the following: (1) find the page location for some bit of information that you recall reading at some uncertain location in a previous chapter; (2) find under a single heading all discussions of a particular concept or right that bears upon multiple stages in the process (e.g., "waiver" or "self-incrimination"); (3) find under a single heading the discussion of all practices that raise a particular legal issue (e.g., all investigative practices that present the question

of what areas and interests fall within the protection of the Fourth Amendment); and (4) find under a single heading the discussions of the various issues likely to arise in dealing with a particular step in the process (e.g., the setting of the bail, or preliminary hearing review of the charge). The second function supplements the numerous cross-references in the Notes and Questions in identifying the interrelationship of various aspects of the process, and the third and fourth functions provide useful checklists in reviewing the subject matter. Indeed, many students have found these index functions quite helpful in preparing for the course examination.

In general, we have included significant developments up to January 31, 2012. This has permitted inclusion of such major rulings from the Supreme Court's 2011–12 Term as *United States v. Jones* and *Perry v. New Hampshire*. Important developments thereafter will appear in annual supplements, which will also contain relevant federal court rules and statutory materials. The first annual supplement, which will be published about two months after this book appears, will contain all the remaining notable cases handed down by the Supreme Court during the 2011–12 Term. It will also include the Federal Rules of Criminal Procedure and various statutes. In addition, it will contain various extracts from the new criminal procedure literature.

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 *Standards for Criminal Justice*; The American Law Institute's *Model Code of Pre-Arrest 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.

We are especially appreciative of the outstanding secretarial assistance provided on the thirteenth edition, too often under great stress, by Selah

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:

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Woody, Karen Kays, Dorothy Kryskowski, and Mary Lebert. We are also indebted to Aurora Maoz for her valuable research assistance.

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P.S. An additional note from Yale Kamisar, Wayne LaFave, Jerold Israel, Nancy King and Orin Kerr. We are delighted that Eve Brensike Primus has agreed to join us in this venture. We greatly appreciate the important contributions she has made to the new edition.

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