

AMERICAN
CRIMINAL PROCEDURE
INVESTIGATIVE
CASES AND COMMENTARY

Ninth Edition

STEPHEN A. SALTZBURG
DANIEL J. CAPRA

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AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE CASES AND COMMENTARY

[from AMERICAN CRIMINAL PROCEDURE:
CASES AND COMMENTARY,
NINTH EDITION]

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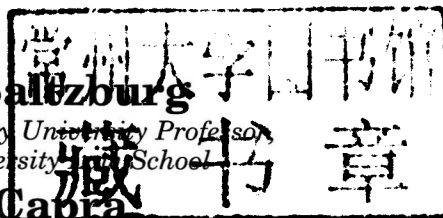
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610 Opperman Drive
St. Paul, MN 55123
1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-19971-3

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*To the women we love,
Susan Lee and Anne Capra*

PREFACE

This book is a complete, unchanged reprint of Chapters 1–6 of Saltzburg & Capra, *American Criminal Procedure* (9th ed. 2010).

This Ninth Edition plays to what we feel were the strengths of the first eight 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, including important developments after the terrorist attack on 9/11/2001. Racially-based stops and encounters are discussed in Chapter Two. Detention of suspected terrorists as “material witnesses” and “enemy combatants” is discussed throughout the Book. Important questions concerning the right to retained counsel and to counsel’s role are also explored in Chapter Ten. The fundamental changes wrought in sentencing under the Supreme Court’s *Apprendi* line of cases, are explored in Chapters Ten and Eleven.

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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March 2010

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, Burger and Rehnquist Courts or to predict the likely course of the Roberts Court, criminal procedure as a subject of study is almost always on the cutting edge of the law. It involves the battle between government and individual and the true adversary clash that often results. 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.

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