

ACING LAW SCHOOL SERIES®

*A Checklist Approach to
Solving Procedural Problems*

Acing Criminal Procedure

Leslie W. Abramson

Second Edition

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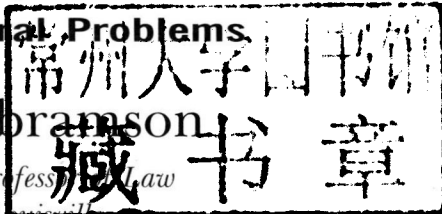
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Solving Procedural Problems**

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For Lisa, Sam, Shel and Will

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Introduction

Most students spend a good deal of time developing an outline for each course—a lengthy (sometimes well over 100 pages) and exhaustive document that purports to compile the universe of information presented in a course into an organized, accessible format that would simplify studying and provide a useful source for information during the exam (provided the exam is open-book).

Unfortunately, personal outlines often do no more than provide anything more than a restatement of various principles of law or doctrine organized by topic. It remains for you to take those doctrines and apply them to the fact patterns presented on exams. That process of applying legal principles to facts is a large part of what exams and lawyering are all about; knowing the relevant law is only half (oftentimes less than half) of the battle. So why are you and your fellow students devoting all of this time and energy into developing these miniature volumes on the course material and not putting more energy into developing a tool that could help guide your legal analysis of problems presented on exams?

In addition to an outline, another document that some students occasionally develop as an examination aid: the checklist. There is not a single definition for a checklist or a consistent approach to drafting one. But a checklist is meant to present in a sparse and simplified way the basics about a topic that you want to

be sure to remember to discuss or evaluate in the course of your examination answer. Some checklists are simply elements or rules under larger topical headings. Others are more involved in linking various concepts together in a logical pattern that facilitated the analysis of legal problems. Regardless of the format, most checklists do not make much of a contribution beyond being a condensed form of the lengthier outline prepared for the course.

Properly conceived and crafted, checklists can fulfill the role of providing a tool that truly aids you in your effort to analyze legal problems in your courses. There is a general structure to legal analysis that involves identifying the issue, articulating the applicable legal rules and principles, applying those principles to a given set of facts, and then arriving at and stating a conclusion. A checklist is the document that organizes a collection of rules, identifying all of the relevant questions and issues that you must consider in order to completely analyze a question.

The purpose of this book is to present you with a comprehensive set of checklists pertaining to each of the topics typically covered in a criminal procedure course. The checklists are meant to provide you with a tool that facilitates their analysis of procedural problems. Each chapter focuses on a different topic, first presenting a brief review of the subject followed by the checklist for the subject. After the checklist is presented, problems are analyzed to illustrate how the checklists can be used to resolve such problems. Each chapter concludes with a section entitled “Points to Remember” to recapitulate key points that you need to remember when answering exam questions. A concluding chapter provides some final thoughts on preparing for and taking exams generally. At the end of the book there is an Appendix that presents condensed “mini-checklists” for each topic. You may find these useful during the time crunch of an exam when you need quick access to the full range of major concepts that are pertinent to an issue.

You should use this book to assist yourself in developing your own analytical process for resolving the questions you will face on your examinations. The steps outlined in the checklists presented

here can provide you with a map for how you should proceed when evaluating any given legal issue. Funneling your analysis through the checklist will also improve the chances that your answer will fully display a reasoned analysis while also arriving at a sound conclusion. But these checklists can only be used effectively if you have a thorough understanding of the substantive material.

This book does not attempt to explain constitutional criminal procedure doctrines in any great detail; rather, it merely seeks to organize doctrine into a dynamic tool that you can use to apply legal principles to fact patterns you will face on exams. You should use these checklists in conjunction with substantive course material to prepare for your exams. Use of these checklists should enhance your ability to write reasoned and sound responses to examination questions. Further, these checklists should be helpful in putting the course material in perspective and providing a clearer picture of how the concepts you are learning should be integrated into a legal analysis. Finally, you should make sure to modify these checklists according to the areas of emphasis and coverage of your professor.

CHAPTER 1

Incorporation & Retroactivity

A. INCORPORATION

The constitutional rights included in the first ten amendments to the United States Constitution—the “Bill of Rights”—do not apply to the States; they apply automatically only to the federal government. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

Prior to the adoption of the Fourteenth Amendment, the Bill of Rights was not applied to the States. Since then, the Court has been willing to apply the individual rights in the Bill of Rights to the States, using constitutional analysis and interpretation, discussed below.

1. Fundamental Rights Approach

For the first half of the 20th century, the Supreme Court decided the applicability to the States of the Bill of Rights on a right-by-right (not amendment-by-amendment) basis, using a standard of whether the asserted right violated in a particular case involved a “fundamental right.” If the Court found that the right was fundamental, the right applied to the States through the authority of the Fourteenth Amendment Due Process Clause.

The test used by the Court to decide whether a right was fundamental was whether the right was “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Critics found the test overly subjective and unstructured. In *Rochin v. California*, 342 U.S. 165 (1952), the Court held that a person had a fundamental right not to have his stomach pumped forcibly, because such conduct “shocks the conscience.” On the other hand, warrantless eavesdropping on bedroom conversations was permitted in *Irvine v. California*, 347 U.S. 128 (1954). The majority found that this police conduct was not as or more shocking than in *Rochin*, while the dissenters either disagreed or proposed that this whole fundamental rights approach be replaced. The dissenters’ position ultimately prevailed.

2. Total Incorporation

Some Justices in the past have advocated a simple incorporation and application of *all* parts of the Bill of Rights to the States through the Fourteenth Amendment Due Process Clause. *See, e.g., Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting). However, a majority of the Court rejected total incorporation for two reasons: it was an improper interpretation of the legislative history of the Fourteenth Amendment, and it failed to allow experimentation by the States about what and how liberties should be protected. *See, e.g., Adamson v. California*, 332 U.S. at 67 (Frankfurter, J., concurring).

A “total incorporation plus” approach also failed; it would incorporate not only all of the rights in the Bill of Rights, but also other rights deemed by the Court to be fundamental.

3. Selective Incorporation

Selective incorporation is a hybrid between earlier analytical methods. The Fourteenth Amendment Due Process includes rights which are essential to “ordered liberty,” and the protections in the Bill of Rights are the only fundamental protections. Advocates of selective incorporation believe that the fundamental rights approach is too subjective and unstructured.

Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) is the leading selective incorporation decision, applying the Sixth Amendment right to a jury trial through the Fourteenth Amendment Due Process Clause to the States.

To determine whether a protection from the Bill of Rights applies to the States under the selective incorporation approach, a court looks at the entirety of the right (not just as it applies to a particular set of facts, as with the fundamental rights approach) and whether the provision is fundamental to Anglo-American jurisprudence.

Using the selective incorporation approach, the Supreme Court has applied almost every right in the Bill of Rights to the States through the Fourteenth Amendment. Although it may be regarded as fundamental, the Eighth Amendment prohibition on excessive bail does not apply to the States. As recently as the 1990s, the Court noted that the Fifth Amendment requirement for a grand jury indictment in felony cases is inapplicable to the States. *Albright v. Oliver*, 510 U.S. 266 (1994).

4. Scope of Selective Incorporation

When the Supreme Court selectively incorporates a right from the Bill of Rights to the States, a majority of the Court believes that the right as well as the case law relating to that right apply to the States as though the right is being applied in a trial in a federal court. *Duncan v. Louisiana*, 391 U.S. at 149.

Not every Justice has agreed with this principle. In *Duncan*, for example, Justice Harlan, in dissent, argued against the selective incorporation approach entirely, but he also argued that, even if a right were to be incorporated in this fashion, it should not be incorporated so as to include necessarily “the sometimes trivial accompanying *baggage* of judicial interpretation in federal contexts.” In other words, some Justices argued that, even after a right was selectively incorporated, it could apply differently to the States than it does to the federal government.

Justice Harlan’s view has from time to time influenced the Court’s interpretation of the scope of some constitutional rights. For example, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), the Court examined whether States could constitutionally convict accused individuals with less-than-unanimous, criminal trial juries. The Court had to look at the

Sixth Amendment jury-trial right which had been selectively incorporated to the States in *Duncan*. Justice Powell concluded that the Sixth Amendment criminal jury trial right required verdict unanimity in the federal courts, but not in the State courts. Because Justice Powell's opinion also provided the fifth and the deciding vote, the Supreme Court judgment was that federal criminal juries must be unanimous, but that State criminal juries need not be.

B. RETROACTIVITY—THE SCOPE OF APPLICATION OF A CASE THAT GENERATES A NEW RULE OF LAW

1. Case-by-case Analysis

Traditionally, the prevailing litigant in a case establishing a new constitutional rule is entitled personally to the benefit of that new rule. Application of the decision to the prevailing litigant is justified as satisfying the case or controversy requirement as well as for inducing challenges to improve the law.

The issue of retroactivity asks about the application of the new rule to others whose cases involve the same issue. What rule applies to them, the old or the new one? In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court held that “the Constitution neither prohibits nor requires retrospective effect.” *Id.* at 629. Instead, it decided to “weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” *Id.*

Applying a case-by-case, balancing approach, *Linkletter* concluded that *Mapp v. Ohio*, 367 U.S. 643 (1961), the landmark decision overruling prior Supreme Court precedent and applying the exclusionary rule to the States, did not apply retroactively, i.e., it did not apply to any cases that had been finally decided prior to the date when *Mapp* was decided.

Subsequently, in *Stovall v. Denno*, 388 U.S. 293, 297 (1967), the Court organized the retroactivity analysis: what mattered was “(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive