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CRIMINAL PROCEDURE
**Investigation and
Right to Counsel**

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**CRIMINAL PROCEDURE:
INVESTIGATION AND RIGHT TO COUNSEL**

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To my wife, Julie O'Donnell Allen — R.J.A.

In memory of my mother,
Joanne Matuszak Hoffmann — J.H.

In memory of my grandfather,
Harold Yates DeVenny — D.L.

To Louis Pollak,
mentor and friend — W.S.

Preface

Criminal Procedure: Investigation and Right to Counsel contains the first seven chapters of *Comprehensive Criminal Procedure*, Second Edition, 2005. Many modern American law schools provide two mainstream criminal procedure courses. One course focuses primarily on right to counsel, Fourth Amendment, self-incrimination, and related areas, while the second course focuses primarily on post-arrest, trial, and appellate issues. *Comprehensive Criminal Procedure* provides a set of materials suitable for any criminal procedure course beyond those that focus primarily on state law issues. This book, *Criminal Procedure: Investigation and Right to Counsel*, by contrast, covers all but only the subject matter of the traditional constitutional criminal procedure book. We offer it in this format because of the convenience of a smaller and less expensive set of materials for those offering and taking such a course.

As this book is based on the new second edition of *Comprehensive Criminal Procedure*, a few words, first, about its revision, and, second, about our overall objectives for both books. While we believe that these materials preserve the best parts of their predecessor, we have added material focused on recent developments throughout the book, and have been especially attentive to the effects of the “War on Terror” for criminal procedure doctrine. Post-9/11 developments are taken up in various chapters, and are treated comprehensively in a new and expanded version of Chapter 7 that deals with complex crimes and crimes involving threats to national security. Many other chapters have been thoroughly rewritten, with many new sections, re-edited and reorganized cases, and substitutions of new cases and materials for outdated ones. Of the subject matter of this book, this is especially true of Chapter 5 (“The Fourth Amendment”), which has been almost completely revised, and now includes entirely new discussions on the meaning of both “search” and “seizure,” exigent circumstances, searches incident to arrest, the relationship between police discretion and racial profiling, and “special needs,” among other topics. Much the same can also be said for Chapter 6 (“The Fifth Amendment”), and, as mentioned, Chapter 7 (“Investigating Complex Crimes”).

The book opens with a wide-ranging set of readings about the criminal justice system, combining hard data with expert commentary. The nature of due process adjudication is then introduced, because so much of this field either has been constitutionalized or operates within the shadow of the Constitution. The first major substantive area examined in detail is the right to counsel in Chapter 3. We begin with the right to counsel because it is the linchpin of criminal procedure, obviously so with respect to its constitutional aspects but even more critically so with respect to its statutory and common law aspects. Without adequate counsel, a suspect or defendant is, with rare exceptions, lost. The most elaborate procedural

protections courts can devise are of little value to one who neither knows what those protections are nor how they can be used to best advantage.

Following the right to counsel is a chapter chronicling the history of *Boyd v. United States*. We think it fair to say that the Supreme Court of the United States has been reacting to the *Boyd* case for the last century, and that the present law of search and seizure and the right to be free from compelled self-incrimination cannot be understood without a grounding in *Boyd* and its aftermath. This is followed by in-depth examinations of, first, one of the “hottest” areas of criminal procedure today, the Fourth Amendment, followed by a thorough treatment of the Fifth Amendment’s self-incrimination clause. The Fifth Amendment materials cover the entire range of relevant issues rather than just the *Miranda* doctrines. There is, in our judgment, often an unfortunate equation between the right to be free from compelled self-incrimination and the prophylactic rules constructed in *Miranda* that actually constitute an exception to the normal requirements of the Fifth Amendment. We carefully sort out these issues in Chapter 6. This book finishes with a study of the problems posed by complex crimes in the completely rewritten Chapter 7.

Criminal procedure is one of the most fascinating and important fields of legal study. More than any other area of law, criminal procedure determines the relationship between government and citizen, and thus defines the legal system’s stance toward the demands of autonomy, privacy, and dignity. It often does so through adversarial legal processes. Thus, the study of criminal procedure leads naturally to fundamental problems of reasoning, decision making, and political and social theory, in addition to standard law school questions about the meaning of a constitutional or statutory provision, or the implications of a precedent. The subject demands, and we have tried to bring, intellectual rigor to these materials; we do not shy away from addressing intractable problems. Moreover, much of the present law reflects its past, and thus we have tried to give a picture not only of the law today but also of its history.

In addition to the careful attention given to the historical roots of modern law, we develop four other subthemes while pursuing the overarching theme to this book—that the criminal process significantly forms the boundary between the government and the citizen. First, we draw attention to the real-world implications of alternative regulatory regimes. All too common in this field is the notion that if there is a problem, the courts should remedy it. Often courts are unable to remedy problems, and sometimes their solutions are worse than the initial problems. Second, the subject matter is criminal procedure, but procedure interacts in complex, profound ways with substance. In appraising any procedural matter, especially one involving a judicial determination of a procedural right, the power of legislatures to indirectly eliminate the right through changes in substantive criminal law (or directly through statutory changes to the procedure in question) must be analyzed. Third, much of the modern law of criminal procedure is a direct consequence of the effort to eliminate racial discrimination in the United States, and can be understood only in that context. Last, the implications of limited resources must constantly be kept in mind. All too often neglected is that criminal procedure is instrumental to the construction of a civilized society, and a dollar spent here is a dollar that cannot be spent somewhere else. One can have more expensive criminal procedure or one can have more hospitals, roads, or welfare programs. One cannot, however, have it all.

We have endeavored to keep editing of cases at a minimum, opting at times for textual description over a series of edited excerpts. Editing is unavoidable, however. In all cases and materials reproduced here, we have kept the original footnoting sequence. Wherever our own footnotes might be confused with those of the primary material, our own footnotes are identified by the legend “—Eds.” This book contains Supreme Court and lower court cases and legislative materials current through July 2004.

Ronald J. Allen
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