

MODERN CRIMINAL PROCEDURE

CASES—COMMENTS—QUESTIONS

Twelfth Edition

Yale Kamisar
Wayne R. LaFare
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Nancy J. King
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MODERN CRIMINAL PROCEDURE

CASES, COMMENTS AND QUESTIONS

Twelfth Edition

By

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610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-18987-5



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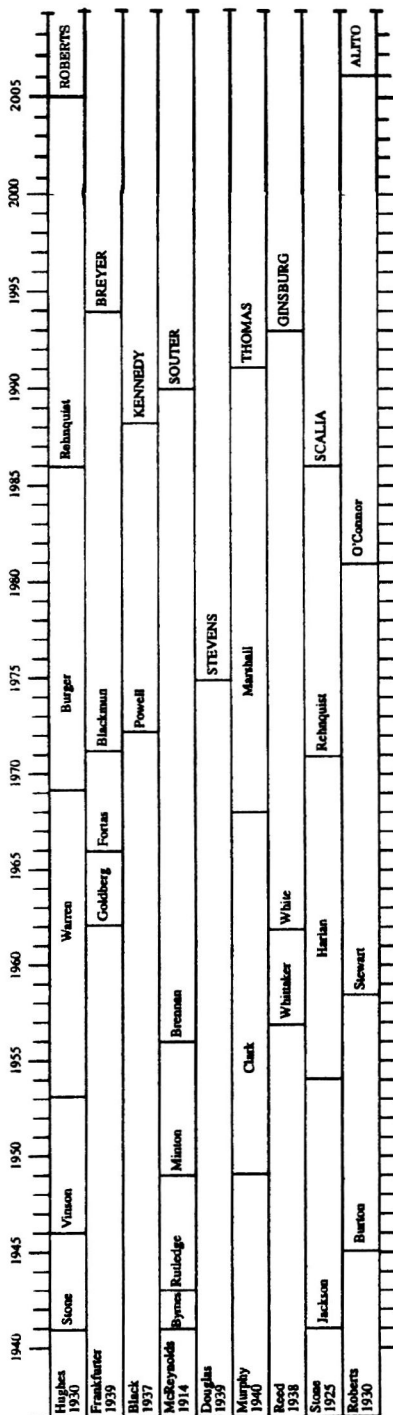
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*

Preface to the Twelfth Edition

Several eventful Supreme Court Terms, numerous legislative changes and lower court rulings, and much significant academic commentary has occurred since the cut-off date for the eleventh 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, this edition of *Modern Criminal Procedure* is some fifty pages 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 single one semester course on the subject. 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 two criminal procedure courses are offered—one on the “investigatory process” and the other on the “adversary process.” These materials divide quite naturally for such courses, with Chapters 1-12 covering the investigatory process and Chapters 1-5 and 13-29 covering the adversary process.

In other schools, a single course is given surveying various aspects of the process. Here, the opening sections of the chapters on such subjects as prosecutorial discretion, grand jury review, preliminary hearings, and discovery can be used for an abbreviated coverage of those subjects. Finally, for a single course that focuses on constitutional limitations as they run throughout the process, the relevant materials can readily be pulled together from different chapters. For self-incrimination, for example, the subject can be thoroughly covered by combining materials from Ch. 2, § 2 (e.g., *Schmerber*); Ch. 9 (e.g., *Miranda*, *Chavez v. Martinez*, *Patane*); Ch. 11 (e.g., *Boyd*, *Fisher*, *Hubbell*); Ch. 11, § 6 (fifth amendment history and values); Ch. 12, § 3 (e.g., *Harris and Hass*); Ch. 21, § 3 (e.g., *Williams*) and Ch. 25, § 2 (e.g., *Griffin v. California*), and Ch. 27, § 3 (e.g., *Mitchell*).

Our extensive index includes headings that should help one in pulling together the various materials that relate to any particular right or privilege. The index also has proven especially helpful to students (along with the cross-references in the Notes and Questions) in increasing their understanding of the interrelationship of various aspects of the process.

In the main, we have followed a chronological approach in arranging the materials which appear in this book. Following the introductory materials which 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 role of counsel”), the system is examined from arrest and search to post-conviction review. 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.

Because the introductory material about the criminal process, constitutional interpretation, the right to counsel and the role of counsel is important for any criminal procedure course, the first five chapters, including the two counsel chapters, will appear in the introductory material in *both* ***Basic Criminal Procedure*** (a spin-off of *Modern*), a volume designed for a course on the investigation process and in ***Advanced Criminal Procedure*** (another spin-off of *Modern*), a volume designed for a course on the adjudication process.

Chapters 7 and 8 have been completely reorganized and cover significant new material. Chapter 7 now considers the law of undercover investigations, including both Fourth Amendment issues and entrapment law. The new Chapter 8, titled ‘Network Surveillance,’ covers evidence collection from communications networks such as the telephone, the Internet, and the postal networks. It addresses both constitutional regulations and the statutes that regulate network crime investigations.

The long extracts from Fred Inbau and Yale Kamisar’s articles which introduced the chapter on police interrogation and confessions (Ch. 9) in previous editions have been deleted in favor of new introductory segments on the “third degree” (and its close relationship to current torture techniques) and police professionalism and the rise of the interrogation manual. These segments draw heavily from Richard Leo’s new book, *Police Interrogation and American Justice* (2008). The confessions chapter also contains new segments on the Central Park Jogger case and false confessions generally and on the legitimacy and plausibility of *Miranda*.

Special attention should be paid to the last section of Ch. 11 (grand jury investigation): Fifth Amendment history and values. This section is designed to facilitate exploration of the general policies underlying the privilege against compelled self-incrimination. There is much to be said for taking up this material with the confessions chapter.

A final point about the organization of these materials. Although we have a separate chapter on the scope of the exclusionary rules (Ch. 12), which includes a section on the “fruit of the poisonous tree,” 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 *Dick-*

erson) that we decided to place *Patane* and *Seibert* in the confessions chapter, a few pages after *Dickerson*.

This casebook includes significant developments up to January 31, 2008. 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 notable cases handed down by the Supreme Court during the 2007-09 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 able secretarial assistance provided on the twelfth edition, too often under great stress, by Perla Bleisch, Marita Bush, Joyce Kenney, Mary Lebert and Carol Robison.

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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:

La Fave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed., 2004), available

on Westlaw under the database SEARCHSZR and cited as SEARCHSZR § ____.

LaFave, Israel, King, and Kerr, *Criminal Procedure Treatise* (3d ed. 2007), available on Westlaw under the database CRIMPROC and cited as CRIMPROC § ____.

Articles collected in Kamisar, *Police Interrogation and Confessions: Essays in Law and Policy* (1980) are usually cited as Kamisar Essays.

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

April, 2008

Acknowledgments

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