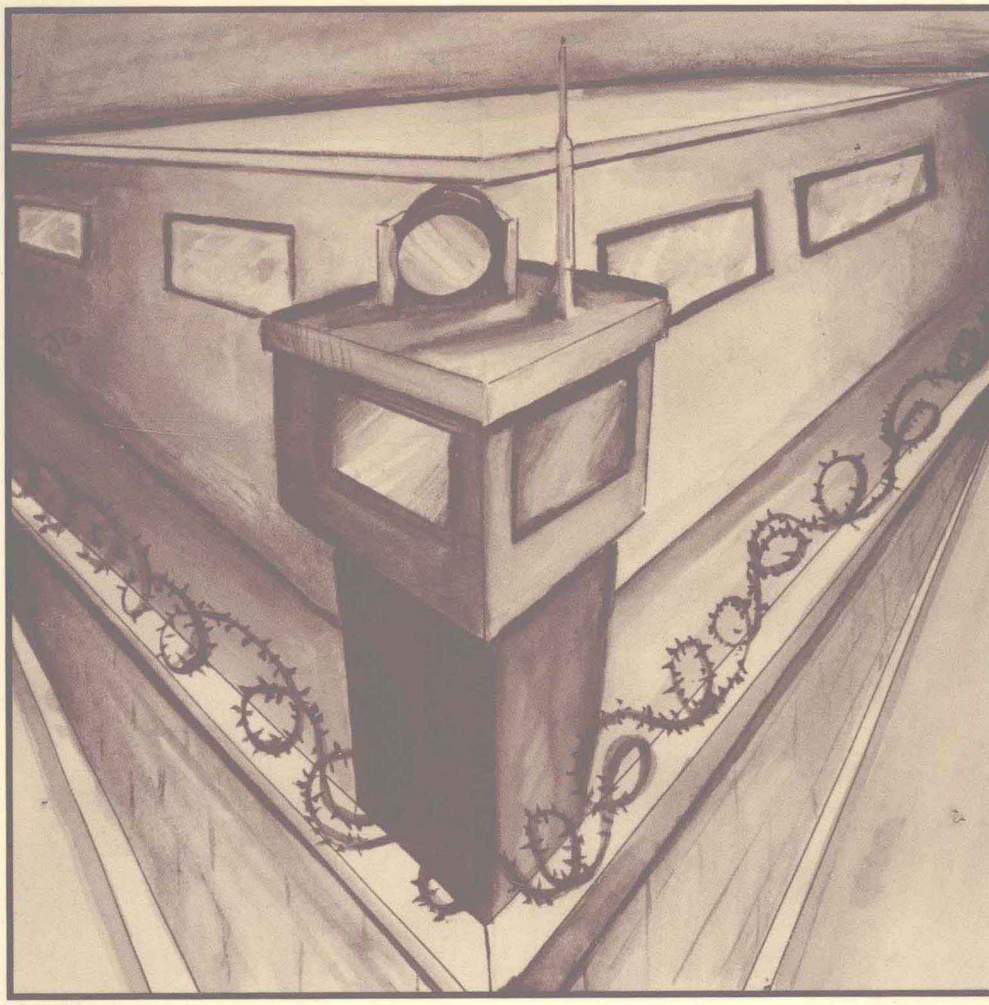
EXAMPLES & EXPLANATIONS

Criminal Procedure

Second Edition

Robert M. Bloom
Mark S. Brodin



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This book is dedicated to Tina, Martha, and David Bloom, and to the memory of my parents, Henry and Martha Bloom.

—R.M.B.

This book is dedicated to Andrea, Rachel, and Laura Brodin, as well as to my parents, Shirley and Hy Brodin.

—M.S.B.

The authors dedicate this Second Edition to the memory of our dear friend and colleague, Brian P. Lutch.

—R.M.B.
—M.S.B.

Preface

No area of the law evokes more passionate debate about the balance between the prerogatives of government and the liberty of the individual than constitutional criminal procedure. The social and political history of the United States in the past four decades has in significant part been written in the opinions of the Supreme Court, adjusting and readjusting this balance. As the Court under Chief Justice Warren gave definition to the 1960s with landmark "civil liberties" decisions like *Mapp v. Ohio* and *Miranda*, so the Rehnquist Court has reflected the transformation of the political landscape in its decisions of the 1980s and 1990s, lifting many constraints on the police in their "War on Crime and Drugs." With the curtailment of civil liberties protections by the United States Supreme Court, state courts in recent years have turned to their own constitutions to reassert safeguards against the excesses of law enforcement.

Although there is undeniably an ideological dimension to the cases in this area, there is also a wealth of legal doctrine that must be mastered by student and practitioner. It is the purpose of this book to facilitate this mastery while at the same time keeping the reader focused on the overarching policy issues raised in the cases.

The format of this book is a combination of text, examples, and explanations. Each chapter begins with an accessible summary of the controlling law. That is followed by a set of examples of increasing difficulty, which explore the basic concepts and then challenge the reader to apply them to hypothetical situations (frequently derived from reported cases) in the ever-present gray areas. The explanations both permit the student to check her own work and also provide additional insights not developed in the text. In addition, figures are provided to graphically demonstrate the various legal standards and concepts.

The book's organization is designed to assist the student in the critical task of problem solving. This is accomplished by breaking down the constitutional analysis of police conduct into component issues. The "search and seizure" chapters of the book, for example, are organized so as to first pose the threshold issue of applicability and then

deal with the discrete questions of justification and the warrant requirement. Similarly the chapters on "interrogation and confessions" follow sequentially the questions that must be resolved to determine the admissibility of a statement obtained by the police.

The goal of this book is to convey the richness of the evolving case law while at the same time helping to demystify this highly complex domain of law. We aim, in short, to simulate the Socratic classroom at its best.

Mark Brodin
Robert Bloom

December 1995

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Mark Brodin wishes to gratefully acknowledge three mentors who kindled his interest in and shaped his thoughts about criminal law: Joseph L. Tauro, Moe Tandler, and the late Reuben Goodman.

Bob Bloom wishes to recognize two colleagues and mentors, Dean Richard G. Huber and the late Professor James Houghteling, who have been supportive throughout his career.

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Overview of Constitutional Criminal Procedure

Consider the following situation: One afternoon two city police officers, while patrolling in a marked cruiser, observe a car pull up to a street corner. A man emerges from the car and begins talking with an individual whom the officers recognize as Michael Chestnut, identified last week by an informant as the main narcotics dealer in that neighborhood. The first man hands Chestnut a large leather pouch and promptly departs. Chestnut, observing the police cruiser, begins running in the opposite direction. The officers follow Chestnut and overtake him. They inform him that he is under arrest, handcuff him, and take the pouch, which they open to find several plastic bags filled with a white powder. Chestnut is brought to the station house and booked for unlawful possession of narcotics. He is then taken into an interrogation room where he is questioned by a detective, and he makes several incriminating statements. The substance seized from Chestnut is sent to the police lab and is determined to be cocaine. Chestnut is charged with narcotic offenses in violation of state law.

Before the 1960s Chestnut's encounter with the police would represent the first step in a criminal justice process that in many states focused exclusively on the question of Chestnut's guilt or innocence. The way in which the police conducted the arrest, search, and interrogation of Chestnut would not be pertinent to the proceedings, unless made so by local law. Given the circumstances set forth above,

either a guilty plea or verdict of guilt after trial would be the likely conclusion of the process.

The criminal justice system in the United States underwent a transformation in the 1960s, a "revolution from above" initiated by the United States Supreme Court. By the end of a decade of groundbreaking precedent, the question of an accused's guilt or innocence came to share the judicial spotlight with questions concerning the legality of the police conduct. Was the arrest of Chestnut and the seizure of his possessions lawful? Was the interrogation properly conducted? These questions were to be answered not under local law, but according to the United States Constitution as interpreted by the Supreme Court. The answers would determine whether the prosecutor could use the evidence seized and statements obtained against Chestnut at trial, or whether they would be kept from the jury by operation of the exclusionary rule. As some commentators have put it, criminal procedure had been federalized and constitutionalized.

How did this transformation come about?

The Constitution adopted in 1787 divided sovereign power between the states on the one hand and the newly formed federal government on the other. Each had the power to prosecute offenders of its criminal laws in its own courts. Those prosecuted in the federal system were beneficiaries of the considerable procedural protections established by the Bill of Rights (the original ten amendments to the Constitution), most notably the rights to be free from unreasonable search and seizure and from compelled self-incrimination. Those prosecuted in state court (which group has always constituted the majority of criminal defendants), however, were afforded only those protections created by state constitution or other local law, which usually were significantly less protective than their federal counterparts.

The seeds of change were sown with the adoption after the Civil War of the Fourteenth Amendment, which provides that the states may not "deprive any person of life, liberty, or property without due process of law." This limit on state power raised the possibility that defendants in state prosecutions might be able to claim the same procedural protections afforded federal defendants. The "incorporation" of such rights against the states, however, was a long time coming. At first the Supreme Court applied the due process clause to state trials by employing an amorphous standard of "fundamental fairness," which did not encompass all the specific protections of the Bill of Rights. In the few cases in which the clause was successfully invoked to reverse state criminal convictions, such as *Rochin v. California*, 342

U.S. 165 (1952)[1] the Court refused to define the mandate of due process more precisely than requiring that state law enforcement officers not engage in conduct that "offends a traditional sense of justice" or "shocks the conscience."

Throughout the first half of the present century state criminal defendants were without the constitutional protections provided in the Bill of Rights, which were available to those facing federal charges. The difference in treatment was magnified when, in 1914, the federal courts adopted an exclusionary remedy requiring suppression of evidence obtained in violation of the Fourth Amendment. See *Weeks v. United States*, 232 U.S. 383 (1914). A search that would be deemed illegal under federal standards and consequently result in suppression of the evidence (and perhaps the dismissal of charges) in federal court might nonetheless be considered lawful in a state prosecution under the less stringent due process measure, opening the way to the introduction of the evidence (and possible conviction). Even after the Court imposed the same federal constitutional standards on searches conducted by state (and local) police in 1949, the exclusionary remedy was not mandated in state prosecutions.[2] As a result, dramatically inconsistent results could follow depending upon which court system the accused happened to be prosecuted in.

In the early 1960s the Court, under the leadership of Chief Justice Earl Warren, set out on a new path of uniform application of both constitutional standards and remedies in which specific provisions of the Bill of Rights were "incorporated" through the due process clause and applied to the conduct of state and local law enforcement officers. In the seminal case of *Mapp v. Ohio*, 367 U.S. 643 (1961),[3] the Court

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1. Los Angeles deputy sheriffs had entered Rochin's home without a warrant to search for narcotics. When they forced open the door to his bedroom and discovered him, he shoved two capsules into his mouth. The deputies seized Rochin and attempted to recover the capsules, but he swallowed them. They then brought him to a doctor who pumped his stomach with a chemical solution, and he vomited the capsules. The Court ruled that the prosecution could not use the capsules as evidence at trial. See §11.2.

2. See *Wolf v. Colorado*, 338 U.S. 25 (1949). It should be noted that by 1961, several of the states had adopted the exclusionary rule through their own legislature or courts.

3. Cleveland police officers had forced their way into Mrs. Mapp's house without a warrant to seek information regarding a person wanted in connection with a recent bombing. They handcuffed Mapp after a struggle and then engaged in an intensive search in which they seized allegedly obscene materials. The Court ruled that the prosecution could not use the materials as evidence at trial.