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## PREFACE

The American criminal justice system is huge, complex, and varied. Federal, state, and local governments together spend over \$200 billion each year on policing, prosecution, trial, and punishment. About 1.9 million persons are incarcerated in federal and state prisons, and in state and local jails, in the United States at any one time. Another 3.9 million are on probation or parole.

There are more than 15,000 separate police agencies in the United States, with around 700,000 sworn officers. There are even more “private police” and security agents than sworn officers. In an average year, these officers and agents make about 10 million arrests.

Criminal cases are prosecuted by more than 2,400 prosecutors’ offices, employing about 35,000 attorneys and 50,000 additional staff. They obtain about 1 million felony convictions every year, and many more misdemeanor convictions. Thousands of attorneys work as public defenders or as defense counsel in private practice. Thousands of judges hear criminal cases in trial and appellate courts. Lawyers often find their first jobs in the criminal justice system. Some stay for life.

Criminal procedure is the body of law—drawn from many sources—that governs this collection of systems. The law of criminal procedure attempts to direct the actions of police officers, prosecutors, defense attorneys, judges, and other government officials. The law prescribes the way the government may interact with residents, suspects, defendants, convicted offenders, and victims.

The federal government, every state government, and many local governments operate criminal justice systems. Although the federal system is one of the largest systems standing alone, the state and local systems collectively are much larger. Virtually all misdemeanors are processed in state courts, along with almost 95 percent of all felony convictions. Criminal justice in the United States is overwhelmingly a state and local function.

There is no single criminal procedure: Each system follows its own set of rules, controlled to different degrees by outside authorities. Procedural rules come from many sources, including constitutions, legislatures, courts, and executive branch agencies. Because the issues of criminal procedure are common and accessible—unlike, say, antitrust or international law—a wealth of less formal constraints, including community views and the media, also shape procedure. We have titled this casebook “Criminal Procedures” to reflect these multiple layers and sources of law.

### **The Approach in This Casebook**

A criminal procedure casebook must impose some order on the morass of cases, rules, and practices that characterize criminal justice systems. One accepted way to make this material accessible for newcomers is to focus on the role of one important institution, the United States Supreme Court, and on one important source of law, the United States Constitution.

Since the days of the Warren Court, starting in 1953, the Supreme Court has influenced criminal justice systems in profound ways. It made the Bill of Rights in the federal Constitution a shaping force for every criminal justice system. The Warren Court made the

story of criminal procedure, told from the point of view of the Supreme Court, compelling. The main topics of controversy were police practices: stops, searches, and interrogations. Other decisions of the Court created a basic framework for providing defendants with counsel and for conducting criminal trials. For years, the focus on the Supreme Court's constitutional rulings guided students through the questions that most concerned judges and lawyers.

But the story of this one institution has offered less explanatory power over time. Traditional issues on the Court's constitutional criminal procedure docket now occupy less of the attention of judges, attorneys, defendants, victims, and others concerned with criminal justice. Most criminal defendants do not go to trial. Many have no complaints about illegal searches or coerced confessions. These defendants and their lawyers care about pretrial detention, the charges filed, the plea agreements they can reach with the prosecutor, and their sentences.

The central questions have shifted in light of changes in the workload, politics, funding, and structure of criminal justice institutions. For example, the question of *whether* indigent defendants will get counsel has become a question of *what* counsel they will get. New crime-fighting strategies—such as community policing and curfews—advances in technology, and changes in the political and social order raise new questions and place old questions in a new light. For judges, sentencing questions in particular have attained higher priority: Determining the proper sentence in some systems now requires more time from court personnel than resolution of guilt or innocence.

The U.S. Supreme Court leaves important dimensions of most procedural issues unresolved and thus leaves other institutions free to innovate; they have done so. The issues of current importance in criminal procedure are being shaped in multiple institutions, including state courts, legislatures, and executive branch agencies.

This book adopts a panoramic view of criminal procedure, emphasizing the interaction among, and variety within, criminal justice systems. In our opinion, students in an upper-level course such as criminal procedure can and should move well beyond the skills of case synthesis and develop the ability to appreciate the role of multiple institutions. Our materials emphasize the following themes and objectives:

- *Procedural variety.* In each area we present competing rules from the federal and state systems. We also occasionally examine procedures from earlier times or from non-U.S. systems. Reviewing different possible procedural rules encourages critical analysis and helps identify the assumptions and judgments made in the design of each criminal system.
- *Materials from multiple institutions.* In addition to leading U.S. Supreme Court cases, we make extensive use of state high court cases, statutes, rules of procedure, and police and prosecutorial policies, and we encourage readers to consider the interactions among multiple institutions. Examining the efforts of different institutions to achieve similar goals highlights the reality of procedural innovation and reform.
- *Street-level federalism.* Federal law, typically in the form of constitutional decisions by the U.S. Supreme Court, still plays an important role in guiding the investigation and prosecution of high-volume street crimes. The impact of abstract constitutional doctrine on daily police actions in the real world raises important theoretical questions about federal-state relations and interactions among governmental institutions.
- *Political context.* Materials trace the political environment surrounding different institutions and issues. We explore the impact on procedural rules of public concerns such as drug trafficking, domestic abuse, race and wealth disparities, and treatment of crime victims. Funding decisions with regard to criminal justice systems offer a window into the

political setting. We devote the most attention to the issues arising in the largest number of cases, and to those issues now shaping criminal justice.

- *Impact of procedures.* We consider the effects that different procedures have on law enforcers, lawyers, courts, communities, defendants, and victims. We emphasize primary materials but include social science studies as well, especially when they have been the basis for procedural reform. This experimental perspective keeps in mind the managerial needs of criminal justice: Any legal rule must apply to multitudes of defendants in overcrowded systems.

By studying the various ways in which state and local systems have answered crucial procedural questions, students become aware of a broader range of policy alternatives. They form a more complete picture of the interactive workings of the criminal justice system. Our goal in emphasizing the variety within criminal procedure is to produce lawyers who know both the current law and the way to shape better law down the road.

### **Conceptual Anchors**

Our emphasis on variety does not mean that we will survey the practices of all 50 states on each issue; this casebook is not a treatise. Rather, the materials highlight the majority and minority views on each topic, as well as the federal view. The major positions on a topic are usually summarized in the first note following the principal materials. Truly distinctive answers to problems are mentioned occasionally as a point of comparison with the leading approach and to illuminate alternatives, but we always highlight the uniqueness of the position.

The book addresses a wide range of U.S. Supreme Court precedents, including the recognized core of essential cases and many of the most recent important decisions. State supreme court decisions summarizing and critiquing a U.S. Supreme Court decision, or a line of cases, represent effective teaching tools since the state cases tend to highlight the competing doctrinal positions. State supreme court opinions by and large show less interest in the positions of individual justices than do U.S. Supreme Court decisions and devote less attention to questions about consistency with past decisions. State supreme court opinions often provide provocative settings that show how principles operate in practice. They tend to present succinctly the textual and institutional arguments favoring a procedural requirement, the values furthered by the rules, and their likely effects on police, suspects, and communities.

Studying a variety of possible answers to important procedural questions has an unexpected effect: through criticism and contrast, students finish with a firmer grasp of federal constitutional criminal procedure than they would obtain through study of federal law alone. We believe students emerge from this book better able to represent clients and to pass bar examinations. Short “problems” throughout the book also enable readers to apply and integrate basic concepts.

The state cases appearing in this book take every conceivable position with respect to Supreme Court precedent, ranging from total agreement to complete rejection, and encompassing subtle variations in interpretation and emphasis. For a large number of state cases that focus on state constitutional or statutory questions, the position of the U.S. Supreme Court is simply irrelevant. The case selection does not favor decisions merely because they reject the U.S. Supreme Court view—the “new federalism” approach. These materials are not a battle cry for state court independence; they simply reflect the vibrancy of state supreme courts and state law.

### **The Seventh Edition**

The seventh edition of this book responds to changes in the field, incorporating emerging themes and major issues. Such themes and issues—the turning points in the law—result

at least as often from dramatic events outside the courtroom as from blockbuster judicial decisions. Such dramatic “drivers” of change in criminal procedure over the years since the first edition of this book appeared include increasing attention to issues of race. Public and institutional debate about so-called DWB (driving while black) stops on American highways raise these questions in a setting that many students find familiar. Highly publicized wrongful convictions have reframed legal debates about eyewitness identification procedures and about enforcement of prosecutor discovery obligations. Changing public attitudes about criminal enforcement of marijuana laws have prompted some fascinating prosecutor office policies on declinations in those cases. And a growing awareness of the heavy use of prison in the United States, captured under the label “mass incarceration,” calls for a rethinking of many procedural rules.

The seventh edition also explores police–community relations and the use of force by police that fuel protests after each new and tragic incident that plays out on YouTube. Such cases provoke national debate over the use of force, police rules and practices, the transfer of military equipment and practices to local police, the dramatic increase in the use of body-worn cameras by police, and the pervasive impact of cell phones to record police–citizen interactions. The increasing use of technology to investigate crime has also prompted the Supreme Court to adapt constitutional doctrine to address concerns about pervasive surveillance. We now weave questions throughout the book about the effects of new technology on criminal procedure doctrines and practices.

We have made changes in every chapter. Our attention to developments in the states provides a large pool of new cases, statutes, and rules, keeping the discussion anchored to current reality in criminal justice. For example, many of the cases in this book were decided after 2010. Recent federal developments also find their place in these pages. Significant U.S. Supreme Court cases added to this edition include *Caniglia v. Strom*, *Torres v. Madrid, Lange v. California*, *Kansas v. Glover*, *Mitchell v. Wisconsin*, *Vega v. Tekoh*, *Shinn v. Ramirez*, *United States v. Cooley*, *Gamble v. United States*, *Denezpi v. United States*, *Flowers v. Mississippi*, *Ramos v. Louisiana*, *Edwards v. Vannoy*, *Hemphill v. New York*, and *Kahler v. Kansas*.

The overall goal of these changes has been to produce a book that remains fresh and engaging while retaining those materials that work especially well in the classroom.

### **Procedure, Politics, and Reform**

Students who appreciate the handful of basic political struggles that time and again shape procedural debates will be better able to direct changes in the system and to influence decisions in close cases. The struggles center on questions such as these: What are the purposes of the criminal justice system? In particular, what is the relevance of criminal law and procedure to the social goals of crime control and prevention? How does the theory and practice of federalism inform criminal justice theory and practice? Can we trust the police? How vital is the adversary system and the role of defense counsel to the success of that system? Are we comfortable with the broad discretion exercised on a daily basis by police and prosecutors? How important is it to treat suspects similarly? Should we explicitly consider the costs of procedures?

The priorities inherent in this textbook suggest a return to the study of criminal procedure as a genuine procedure course, not a course in constitutional adjudication. The constitutional component remains an indispensable part of the course but is not the sum total of criminal procedure.

The return to a fuller conception of criminal procedure offers enormous opportunities to those who study the system and to those who will soon participate in its operation and evolution. When many institutions shape a legal system, there are many opportunities for change. We hope each student will leave this course ready to create procedures more sound than those that exist today.

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