PREFACE

In 2002, I published a small casebook primarily with decisions from France, Germany, Italy, Spain, Russia, the United Kingdom, and the European Court of Human Rights with Carolina Academic Press. I compared European law with U.S. law in the commentary, and provided a citation to "relevant U.S. case law" at the ends of the chapters. A second edition was published in 2008.[1] I intended this book for use in courses on comparative criminal procedure in the United States and abroad and also as a supplement for those teaching the basic U.S. criminal procedure courses. This book was translated into Chinese and published in 2018 in Beijing by the Beijing University of Political Science and Law Press.

Because of the importance of U.S. law in the development of criminal procedure law in Europe and other parts of the world, I decided to do a greatly expanded version of the book published by Carolina Academic Press that would include U.S. case law and case law from some other countries I did not include in the first book.

In my teaching abroad, both before and after I retired from teaching at Saint Louis University School of Law, in countries as different as France, Italy, Portugal, Switzerland, Hungary, Turkey, Russia, Japan, China, and Singapore, I realized that students abroad know a lot more about U.S. criminal procedure law than U.S. students know about criminal procedure law in other countries. In my discussions with Aspen Publishing, we came to the conclusion that U.S. criminal procedure could, and perhaps should, be taught from a comparative perspective, so that U.S. students can see our system in its historical and doctrinal context and can better analyze its strengths and its weaknesses.

This comparative book will encourage students to be critical about the U.S. approach to criminal procedure and the approaches taken by the U.S. Supreme Court in its case law. I have always told my students that only from a comparative perspective can one understand one's own system.[2] Unfortunately, most students learn about our system in a relative vacuum and believe what is at times a fairy-tale version of U.S. criminal procedure that often comes out in high court decisions.[3] When I spent much of the 1990s working with the American Bar Association's Central and Eastern European Law Initiative (CEELI) in Russia and other post-Soviet republics, I was often embarrassed by how little knowledge U.S. judges, prosecutors, and even defense lawyers, who were invited to "teach" the Russians and others about jury trial and other aspects of U.S. law, knew about the law of other countries.

Although this book will not be able to include as many of the decisions of the U.S. Supreme Court as would a traditional U.S. casebook on the topics it covers, it will include the seminal cases and perhaps a relatively recent U.S. decision that summarizes the previous case law, and then refer

1. Stephen C. Thaman, Comparative Criminal Procedure: A Casebook Approach (2d ed. 2008).

2. *See* Stephen C. Thaman, *A Comparative Approach to Teaching Criminal Procedure and Its Application to the Post-Investigative Stage*, 56 J. of Legal Education 459 (2006).

3. This is not unusual. I am sure in law schools around the world, similarly uncritical "fairy-tale" versions of systems, whether in Germany, the United Kingdom, France, or China are presented to students by teachers, and incorporated into the jurisprudence of the high courts.

to other complementary or distinguishing decisions or law in a section called "U.S. Law Notes." Students should still end up well-prepared for the bar examination, and the inclusion of comparative material will enable them, hopefully, to write more persuasively in the essay portions of the exam.[4]

Some U.S. criminal procedure casebooks use a comparative approach *within* the United States by using decisions of state courts to explain the relevant doctrine. I have done the same in this book. When I was a public defender in California, from 1976 through 1987, we virtually only cited California law, because the U.S. Supreme Court had begun its dismantling of the progressive jurisprudence of the Warren Court during the 1960s. California, at that time, interpreted its state constitution in many areas to give criminal defendants stronger protections than were then being afforded by the increasingly more conservative majority of the Court. California abandoned its independent state constitution, however, by virtue of a prosecutor-driven referenda in the 1980s, so the state is now compelled to heed the doctrine promulgated by the current conservative Supreme Court majority.

Other states have, however, maintained their independence, and their jurisprudence is in many areas much more coherent and due-process-oriented than are the opinions of the U.S. Supreme Court and are thus better tools, in my opinion, for teaching U.S. doctrine. Of course, the contrasts among the states with regard to various aspects of criminal procedure doctrine are not as great as one sees between U.S. approaches and those, especially, on the European continent.

The comparative book is divided into two parts: (1) investigative criminal procedure and (2) adjudicative criminal procedure. Each of these parts will more or less follow the typical U.S. distinctions between a pretrial (investigative) and a "bail to jail" (adjudicative) text: The pretrial part deals with search and seizure, interrogations, exclusionary rules, and the historical steps taken by the U.S. Supreme Court to "incorporate" the protections of the federal Bill of Rights, primarily of the Fourth, Fifth, and Sixth Amendments into the general guarantee of due process, finally made binding on the states with the enactment of the Fourteenth Amendment after the Civil War, while the "bail to jail" part deals with bail and pretrial detention, the right to a speedy trial, charging by grand jury or preliminary investigation, trial by jury, plea bargaining, double jeopardy, and postconviction remedies. One major difference in my adjudicative text, however, is that it includes the right to confrontation, which only applies in criminal procedure and thus, in my opinion, belongs in the criminal procedure course and not in a separate course on evidence. It is also an area in which the United States greatly differs from nearly all civil law countries in Europe and Latin America, as well as from the current practice in the United Kingdom. I discuss the right to counsel in the investigative part of the text, as it applies at the pretrial stage of proceedings, such as with the *Miranda* rules, and again in the adjudicative part of the text, as it applies at the trial level and on appeal.

A brief summary of the chapters of the comparative text follows.

THE INVESTIGATIVE CRIMINAL PROCEDURE CHAPTERS

Chapter 1: The Historical and Comparative Foundations of Crime Prevention and Criminal Procedure

This chapter introduces students to the history of criminal procedure and to historical examples of archetypical criminal cases; flagrant cases; "who-done-it?" cases, which require proof through circumstantial evidence; and inquisitorial investigations, often aimed at crime

4. At any rate, most students do take bar preparation courses that will refresh them in the third year as to any aspects of the U.S. system they might not have had in their textbooks, or have forgotten. Professors should encourage them to take these refresher courses.

prevention, which lead to state penetration into the privacy and, at times, the human dignity of suspects and other citizens. This should get students to think about the differences between "preventive" police procedure, which is given much more leeway by codes and court decisions, and "repressive" criminal procedure, which responds to crimes that have already been committed, as well as between "proactive" and "reactive" criminal investigations. It also introduces the students to enemy criminal procedure, a historical reality whereby nearly all systems have had at least two systems of criminal procedure, one for the "good guys," and one for the outsiders, "others," "enemies of the people," minorities, and so on. It also includes an introduction to George Packer's two models of criminal procedure, the "crime control" and the "due process" models, and Mirjan Damaška's differentiation of systems into the "hierarchical" and the "co-ordinate."

Chapter 2: The Preliminary Investigation: Models, Division of Tasks, and Powers

This chapter deals with the preliminary investigation in general and the roles of police, public prosecutor, investigating magistrate, grand jury (in the United States), and victim or aggrieved party in investigating crimes and deciding if criminal charges will be brought. It also shows the differences between U.S. and European law in relation to the right to counsel during the investigative phase.

Chapter 3: Arrest and Temporary Detention: Limitations and Deprivations of Liberty in the Investigation and Prevention of Crime

This chapter addresses the powers of the police to limit the freedom of citizens during the investigation of crime, from temporary detentions to full-blown arrests, along with the power to search associated with these measures. It also covers preventive detentions permitted in the interests of national security or the fight against organized crime.

Chapter 4: Theories of the Right to Privacy and Conventional Search Law

This chapter discusses the different theories of privacy and human dignity that inform the rules relating to searches, interceptions of confidential communications, or other investigative measures that affect personal privacy. It then discusses the regulation of overt searches of persons, places, and personal property. In this context, it covers the requirements of probable cause, prior judicial authorization, the specificity of warrants, and the recognized exceptions of exigent circumstances, consent, and preventive police action.

Chapter 5: Privacy and the Use of Secret Investigative Techniques in Investigating Crime and Threats to National Security

This chapter discusses the regulation of secret investigative techniques, such as wiretaps, bugging, interceptions of electronic communications, accessing of stored digital information, long-term electronic tracking, and data mining in both conventional criminal investigations and in preventive, national security contexts. It shows how the national security exception, especially, has made inroads on the requirements of probable cause, judicial authorization, and specificity.

Chapter 6: The Right to Silence and the Privilege Against Self-Incrimination

This chapter addresses the limits placed on criminal investigators by the privilege against self-incrimination in gathering evidence in general, but, more particularly, in seeking to induce

testimonial evidence from the mouths of criminal suspects. It deals with the prohibition of torture or inhuman and degrading treatment and other tactics that undermine the voluntariness of confessions, as well as how the famous *Miranda* rights, in relation to advising suspects of the right to silence and counsel, are applied in the United States and abroad.

Chapter 7: The Use of Undercover Agents and Informants and Their Impact on the Right to Privacy, the Privilege Against Self-Incrimination, and Due Process

This chapter covers the police use of undercover agents and informers to collect information and to provoke the commission of crimes, what is called entrapment in the United States. It includes material that relates to Chapter 6, as it deals with use of undercover agents to secretly interrogate suspects, and Chapter 5, as it deals with use of undercover agents to enter private spaces and record conversations. It basically covers organized police use of deception, if not worse tactics, to make a case against a suspect.

Chapter 8: The Admissibility of Illegally Gathered Evidence: Exclusionary Rules and Evidentiary Use Prohibitions

This chapter is dedicated to exclusionary rules—more precisely, to the various models used for deciding when evidence gathered in violation of the Constitution or the law may be used in criminal prosecutions. It concentrates on the violations of the right to privacy and the privilege against self-incrimination and the extent to which evidence derived from an illegal search, wiretap, interrogation, and so on, the so-called fruits of the poisonous tree, may be used at trial.

Chapter 9: The Regulation of Eyewitness Identification

This chapter deals with the regulation of identifications pretrial and during the trial. Faulty eyewitness identifications are the main cause of the conviction of the innocent. This chapter highlights the flawed regulation of pretrial confrontations between witness and suspect in the form of show-ups, photographic identification procedures, and lineups or "identification parades," and the attempts to introduce more scientific methods for minimizing the possibility of error in these important procedures.

THE ADJUDICATIVE CRIMINAL PROCEDURE CHAPTERS

Chapter 10: Pretrial Detention, Other Coercive Measures, and the Right to a Speedy Trial

This chapter discusses the imposition of coercive measures against criminal defendants during the pretrial and trial stages in the form of pretrial detention, house arrest, bail, and other lesser conditions for release. The chapter also covers the right to a speedy trial, which is especially important when the defendant is incarcerated during the proceedings.

Chapter 11: Preparation for Trial: Review of the Charging Decision, Discovery, and the Postcharge Ability of Counsel to Prepare a Defense

This chapter discusses the postcharge right to counsel both in theory and in practice in the United States and abroad and the extent to which counsel is able to be effective in the preparation of the case for trial and at trial itself. It discusses pretrial review of the charges by grand

juries and preliminary hearings in the United States and in preliminary hearings abroad, and also what we call "discovery" in the United States — that is, the extent to which the government must preserve and reveal the results of its investigations and the evidence it intends to use at trial, especially evidence that may be helpful to the defense. It also discusses rules that require the defense to disclose evidence it might have gathered, or any defenses it may rely on.

Chapter 12: The Taking of Evidence at Trial: Orality, Immediacy, and the Right to Confrontation

This chapter discusses how the secret inquisitorial written model of criminal procedure and the common law model of adversarial, oral, and public trial have developed, concentrating on the mode of production of evidence, examination of witnesses, the right of the defendant to confront and cross-examine witnesses, and the admissibility of written or other hearsay evidence. It deals with the use of anonymous witnesses, testimony through audiovisual links, and special rules for the testimony of child victims and witnesses.

Chapter 13: Presumption of Innocence, Burden of Proof, and Guaranteeing the Independence and Impartiality of the Trial Court and the Jury

This chapter discusses how the presumption of innocence is protected during the full-blown trial in jury, mixed, and professional courts, with emphasis on the passive or active role of the judge, jury, or lay assessors and the procedural pressures placed on the defendant to testify. It also concentrates on how the independence of the trial court can be ensured, with special emphasis on how to guarantee an independent and impartial jury that represents a true cross-section of the community.

Chapter 14: The Roles of Lay and Professional Judges in Evaluating the Evidence, Deciding Facts, Guilt, and Punishment, and How the Rationality of Their Decisions Are Justified

This chapter discusses the roles of professional and lay judges in evaluating the evidence and deciding the facts, guilt, and sentence after a full-blown trial. This includes the history of the common law jury to gain its independence from the bench, and how the bench and legislators continue in their attempts to limit the independence of the jury. It also shows how the various court systems try to guarantee the rationality of the court's judgment. It compares the general, unreasoned verdicts returned typically by common law juries with the special verdicts returned by European juries and some mixed courts, as well as the otherwise reasoned judgments required by most civil law systems. It deals with instructions to the jury, canons of judgment reasons, and the extent of appeal of factual findings made by the first instance court.

Chapter 15: The Finality of Criminal Judgments: Appeal, Cassation, the Reopening of Final Judgments, and the Effect of Double Jeopardy

This chapter deals with review of the factual and legal correctness of criminal judgments through appeal, cassation, and the reopening of final judgments, and the effects different perceptions of double jeopardy (or *ne bis in idem*, as it is called in civil law countries) have, especially on the finality of acquittals. It emphasizes how the higher courts deal with the sufficiency of evidence to prove guilt, and their approaches to correcting possible miscarriages of justice.

Chapter 16: How Much Evidence Suffices to Overcome the Presumption of Innocence and Prove Guilt Beyond a Reasonable Doubt: A Closer Look at the Difficult Cases That Are Prone to Miscarriages of Justice

This chapter concentrates on just how much evidence is required in the various systems to rebut the presumption of innocence and find guilt beyond a reasonable doubt. It explores the kinds of cases that give rise to wrongful convictions and how the evidence law or canons of judgment reasons serve to prevent, or, at times, even facilitate, the conviction of the innocent. It will look at some famous cases in both the United States and abroad as vehicles for exploring these issues.

Chapter 17: Plea and Sentence Bargaining and the Avoidance of the Full Criminal Trial

This chapter addresses procedures that are aimed at avoiding the full trial with all of its guarantees, and, in essence, allow punishment based only on a strong suspicion or "probable cause" of guilt. It explores those procedures based on the defendant admitting guilt, such as U.S. plea bargaining and German "agreements," and others that are more like pleas of *nolo contendere* or victim-offender mediation. Important here is the degree to which the judiciary is marginalized in some systems, with the prosecutor assuming inherently judicial roles in determining charge and punishment. Special emphasis will be placed on the coercive nature of U.S. plea bargaining and how it has converted U.S. criminal justice into a perfunctory administrative procedure with virtually no guarantees as to the truth of its resulting judgments.

Chapter 18: Possible Pathways to Reform

This concluding chapter begins by focusing on the famous Amanda Knox and Raffaele Sollecito case in Italy, where police and prosecutors violate nearly every guarantee provided by criminal procedure and nearly come away with a final judgment of guilt. As comparison, it also briefly discusses the hysteria around alleged child abuse in day care centers and other such establishments in the United States and elsewhere, which led to the prosecution and conviction of dozens of innocent persons.

Then the chapter suggests possible ways to avoid miscarriages of justice based on coercive plea bargaining, or insufficient or manufactured evidence, and how to streamline procedure so as to increase the number of trials with "all the guarantees" and to simplify the U.S. jury trial system so that the citizenry can again play an important role in the administration of criminal justice.

With few exceptions, each chapter begins with U.S. law and then provides comparative cases, statutes, and commentary. Each major section includes discussions, which pose difficult questions raised by the material and that attempt to flush out the key issues and the different approaches thereto. Each chapter also concludes with suggestions for further English-language reading. I use the following abbreviations: Constitution (Const.), Codes of Criminal Procedure (CCP), and Criminal Codes (CC).[5]

5. The official cites for the various codes will be found in the Appendix. English translations of all national constitutions may be found at https://www.constituteproject.org/constitutions?lang=en&status=in_force&status=is_draft.

VERSIONS OF THIS CASEBOOK

There are three versions of this casebook: *Criminal Procedure: A Comparative Approach* (which includes all chapters); *Investigative Criminal Procedure: A Comparative Approach* (which contains chapters 1-9); and *Adjudicative Criminal Procedure: A Comparative Approach* (which contains chapters 1 and 10-18). The introductory Chapter 1 of the larger text will appear in both the investigative and adjudicative texts, for the introductory materials touch on aspects covered in both. The pagination of the investigative and adjudicative books is identical to the pagination in the comparative text.

THE ONLINE APPENDIX AND ITS SUGGESTED USE

Because of space considerations, much of the material I have translated into English cannot be included in the text.[6] The book emphasizes U.S. law and includes what I believe are seminal cases from abroad that are useful to contrast with U.S. law and enable students to see the strengths and weaknesses of both U.S. and foreign approaches to the various subjects.

For U.S. professors who would like to use one or both of the texts, but place more emphasis on the comparative law substance of the book, or for teachers here and abroad who are teaching a general Comparative Criminal Procedure course and would like to use more non-U.S. law in doing so, I include, chapter by chapter, beginning with Chapter 2, important non-U.S. cases and statutory law, which I have translated, that can supplement the materials included in the bound books. In a sense, this Comparative Law Appendix can, when integrated into this U.S.-based comparative casebook, constitute an expanded casebook for courses in advanced or comparative criminal procedure.

A NOTE ON THE CASE LAW AND ITS TRANSLATION

I have tried to find English terms for the procedural realities in the countries whose codes and case law provide the bulk of the comparative material in this book. I hope this will reduce, to the greatest extent possible, confusion among English readers. I also want to warn those readers who may have access to the codes and high court opinions that I have translated that my translations are not necessarily word-for-word, but attempt to explain in English in clear terms what the legislators and appellate judges are trying to say. Most of the words I use come from American English.

Judges, in my opinion, do not always use the clearest modes of expression in their opinions or exegeses of doctrine, and it is at times difficult for me to divine precisely why they express themselves in the way they do. Sometimes I just omit a sentence or paragraph that is too elliptically written for me to understand or is clearly redundant or repetitive. I have tried my best not to change the gist of what the opinions actually say. Some judges may be frustrated writers. Many appear to be writing for fellow legally educated jurists, instead of the broader public. This is one reason why systems have incorporated lay judges, in the form of jurors or lay assessors, into the criminal justice decision-making process, so as to try to compel judges to speak in commonly understandable language.[7] I have also abridged many important U.S. decisions, due to space considerations, by summarizing the facts and eliminating the frequent string citations and recapitulations of prior case law that lead up to the important holdings in the case.

6. Unless otherwise noted, I have translated all of the French, German, Italian, Portuguese, Spanish, Russian, and Latin American cases into English.

7. This was one of the reasons given for introducing jury trial in several Argentine provinces. *See* Sidonie Porterie & Aldana Romano, El Poder del Jurado, Descubriendo el Juicio Por Jurados en la Provincia de Buenos Aires 26 (2018).