
PREFACE

This casebook brings a sustained emphasis on race to the traditional content of criminal procedure. To be clear, the book is not intended as a wholesale revision of the standard criminal procedure fare: It amply covers all the familiar subject matter areas, as the Table of Contents should make clear. But it integrates into these and other materials, wherever possible, the roles that racial prejudice and racial disparities have played and continue to play in our criminal justice system. For example, in a chapter on jury trials, the book has a focus on *Batson v. Kentucky* and its progeny that is more extensive than counterpart books. For another example, in connection with *Terry v. Ohio*, the book looks deeply into the role that race—mostly implicitly—played not only in the Court’s written decision but also in the trial court and appellate advocacy that produced that decision, including the direct and cross-examinations of Detective McFadden in the suppression hearing. The book also includes four race-orientated chapters not found in other criminal procedure casebooks: The Roots of Modern Constitutional Criminal Procedure (Chapter II), Race and Juries (Chapter XV), The Department of Justice and the Prosecution of Civil Rights Crimes (Chapter X), and Discriminatory Enforcement (Chapter XII).

An argument could be made that the DOJ prosecution chapter and another atypical chapter, Addressing Police Misconduct (Chapter VI), focusing on § 1983 and other civil remedies, aren’t really “criminal procedure” topics. Fair enough. They are included for other reasons: the DOJ chapter because it permits an important historical and contemporary look into race and federal criminal enforcement, and the police misconduct chapter because, among other reasons, of the subject’s increasing invocation by the Court as an alternative to the exclusionary rule.

These five unconventional chapters are not a package deal. They do not depend on each other or on any other chapters. A professor could fruitfully use some or all of these chapters, in whole or in part. Because the book aspires to something novel it does so modestly, aiming to permit maximum flexibility.

A secondary overarching goal of the book is to emphasize the role and power of prosecutors in the contemporary criminal justice system. As many scholars and judges have recognized, in our contemporary landscape of minimum mandatory sentences and unfettered plea bargaining, prosecutors not only exercise their historical function of making charging decisions but also, in the exercise of that power, significantly impact and even effectively determine the length of sentences. Chapter IX, The Prosecution Function, focuses on the powers, responsibilities, and obligations of prosecutors in this system. In keeping with this emphasis, and recognizing the reality that due to the prevalence of the notorious “trial penalty” in the modern plea-bargaining and sentencing regimes most criminal justice happens outside of a trial setting, the book also devotes more attention than most books to the grand jury (Chapter VII), pleas and plea bargaining (Chapter XI), and incarceration (Chapter XVI).

The book also focuses, more generally, on lawyering. Should the prosecutor have presented that piece of exculpatory information to the grand jury even if she wasn’t required to under *Williams v. United States*? How could the cross-examination of the bank teller-cooperator in *Giglio v. United States* be improved? This emphasis comes from a conviction that encouraging

students to think about what the lawyers did or did not do in the cases only enhances their understanding of the cases' doctrinal significance. Advocacy is not the enemy of the doctrine. Ideally, such a focus may even encourage a few students to pursue a career that includes time spent as a responsible and ethical prosecutor and/or a creative and aggressive defense attorney.

The book's pedagogical approach is conventional. It consists primarily of cases followed by a numbered Notes and Questions section. There are many Notes and Questions for each case, in keeping with the book's themes to encourage thinking and discussion not only about the case's doctrinal situation but also about racial implications where applicable, the decisions made or forgone by the lawyers in the case, and also (again where applicable) the historical context of the case. The expectation is that professors will assign to students only the Notes and Questions that they anticipate to be most fruitful based on their own interests and emphases.

The book also contains approximately 80 photographs, mostly of defendants, lawyers, or images establishing relevant historical, cultural, or geographical context.

The cases have been edited for space and relevance. Almost all case citations within cases have been removed except where the citation was of contextual relevance. Unlike these omissions, the removal of more substantial matter—e.g., sections, paragraphs, or sentences in cases—are noted by ellipses (. . .).

There are three versions of this casebook: a hardcover volume (which includes everything) and two paperback volumes, one for use in courses focusing on the investigative phase of criminal procedure and the other for use in courses focusing on the adjudicative phase. Both of the paperback volumes include the entirety of Chapter I, Introductory Principles, and Chapter II, Roots of Modern Constitutional Criminal Procedure. The chapter numbering and pagination of both paperback volumes remains identical to the pagination in the hardcover volume. In other words, the investigative volume includes Chapters I through VII of the hardcover volume, while the adjudicative volume begins with Chapters I and II of the main volume and then picks up with Chapter VIII of the main volume.

Mr. Rehnquist thanks his coauthor Tracey Maclin for believing in and joining this venture, and for the insight, expertise, and credibility he has brought to bear on it; Aspen Publishing, especially Joe Terry, who gave a non-academic lawyer the opportunity to take a shot at this book, as well as editors Anton Yakovlev and Kathy Langone for their excellent assistance throughout and Corinne Pulicay for her photograph procurement; the many reviewers who gave helpful comments and suggestions on early drafts, especially David Sklansky, William Ortman, Dan Medwed, and Barry Friedman; and to his former law firm Goodwin Procter LLP, and his good friends there, who provided both institutional and personal support for this effort, especially his former Goodwin assistant Shannen Flanagan. Lastly, and above all, he thanks his family—his wife Anna; children Andy, Dana, Peter, Grace, and Thomas; and daughters-in-law Leah, MK, Molly, and Erica—for their continuous and loyal support.