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(Almost) Everything You Wanted to Know About Criminal Procedure

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(ALMOST) EVERYTHING YOU WANTED TO KNOW ABOUT CRIMINAL PROCEDURE

*Charles F.C. Ruff**

CRIMINAL PROCEDURE. 3 volumes (with pocket parts). By *Wayne R. LaFave* and *Jerold H. Israel*. St. Paul, Minn.: West Publishing Co. 1984. \$211.

Professors and students, defense counsel and prosecutors, judges and clerks — all have been waiting for someone to produce the “Corbin” or “Prosser” of criminal procedure. Virtually every other field of the law has its definitive work or works. Major areas of criminal procedure have been the subjects of learned treatment in law reviews, and endless numbers of casebooks have been prepared for classroom use. Prospective consumers assumed that the law was developing too rapidly, particularly in the critical area of search and seizure, to justify the investment of time and money in the preparation of a full-blown treatise. Yet equally volatile subjects generated everything from one-volume texts to looseleaf services to multivolume tomes.

If taxes and securities and employment discrimination merited their own treatises, why not criminal procedure? Again, the untutored have assumed that the market would not support the product — that sales would be limited to law school libraries, some large firms, a few criminal practitioners successful enough to afford more than a manual for solving routine day-to-day problems, and a smattering of other lawyers interested enough in the general subject to invest in a good working reference. Without exploring the vagaries of the publishing business, one can only guess what it was that finally convinced West Publishing to leap into the breach. Whatever their motive, the result is an important work — not Corbin or Prosser, but valuable nonetheless.

Users of treatises seldom spend much time reading prefaces and introductions; they leap directly to the substance, caring little about why the authors have done what they have done or what theoretical goals they have tried to achieve. Nor have these authors provided any temptation for the reader to linger over their opening pages, which consist of a brief preface and the usual tributes to those who assisted in

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the research and typing. The reviewer, searching for guidance as he attempts to test the authors' purpose against their performance, is given only the following:

We have sought in these three volumes to analyze the law governing all of the major steps in the criminal justice process, starting with investigation and ending with post-appeal collateral attacks. . . . We have also sought to go beyond describing "the law" as it currently stands, exploring as well its historical roots and underlying policies. [P. III.]¹

With this limited explanation, it is difficult to judge whether Professors LaFave and Israel have succeeded either in achieving their own goals or in meeting the expectations of their readers. One who has dabbled in academia, spent most of his career as a prosecutor, and recently come to the private practice of law, can appreciate this work for what it offers — clear and concise analysis and an eminently usable resource for student, teacher and practitioner. At the same time, from whatever perspective one views it, one is left with an odd sensation that, in trying to be all things to all readers, this treatise is not quite right for any.

On the one hand, no one will spend his spare hours reading LaFave and Israel either for new insights into the jurisprudence of criminal procedure or for that special argument that will mean victory in the courtroom. On the other hand, although it will not regularly be cited in briefs or in judicial opinions, lawyers and law clerks will have it close by when the moment comes to begin their research.

I do not intend to damn with faint praise. Our firm library had a copy of LaFave and Israel on the shelves within days of its availability, and I can conceive of no well-stocked law school, law firm, court or government library that will long be without it. Yet one cannot help but wonder if that is what the authors hoped for. Did they envision their work on a professor's desk, well-thumbed and spine broken from repeated use? Did they see the trial lawyer dashing into the library for one last look before going into the courtroom? Did they expect their book to engender lively debate with challenging analysis and novel approaches to old problems? It is hard to tell.

Recognizing the enormity of the task before them and the prospect that the legal ground would be shifting constantly beneath their feet, the authors have sought out a compromise: almost every conceivable issue is at least briefly touched upon; the critical areas are explored in some depth; and the reader is given a foundation for additional research. Like all compromises, however, this one will leave some read-

1. The authors describe a division of responsibility which seems to have left Professor LaFave with the bulk of the substantive material and Professor Israel with the general introductory chapters (Chs. 1, 2), the grand jury (Chs. 8, 15), right to counsel (Ch. 11), discovery (Ch. 19), and appeal and collateral attack (Chs. 26, 27). P. IV.

ers dissatisfied, the extent of that dissatisfaction depending on their expectations.

Volume 1 of the treatise consists of ten chapters covering the core fourth, fifth and sixth amendment issues — search and seizure, interrogation and identification. Volume 2 covers the pretrial process, including appointment of counsel, release, the decision to prosecute, and such lesser topics as venue, joinder and speedy trial, as well as discovery, guilty pleas, and the right to fair trial. Volume 3 covers briefly the trial process itself, double jeopardy and sentencing; the remainder of the volume is taken up with appeals and collateral review, and an extensive appendix of rules and statutes.

The reader who comes to these volumes looking for a description of the law as it is (or at least as it was in July 1983, the cutoff date for Supreme Court opinions), will find a reliable and clearly written analysis of virtually every aspect of the criminal process. The coverage of no area is so thorough that the researcher can rely on it as exhaustive, but signposts to the open issues are well marked, and the reader will, at worst, find the text and citations a handy starting-place for further inquiry.

If, however, one comes looking for the jurisprudence of criminal procedure, one will find that, with a few notable exceptions, there simply is not much room for theory in the midst of the densely packed descriptive material. One exception is the extraordinarily well-written discussion of the constitutional theories underlying the Supreme Court's criminal procedure decisions (pp. 55-129). Professor Israel has provided in some seventy pages a lucid history of the development of selective incorporation and related doctrines — a history which could well substitute for the opening sections of casebooks that track the same process through severely edited cases and textual footnotes or serve as a guide for the student who is trying to bring some order to a semester's wanderings in the byways of the typical criminal procedure course.

If there was any area of criminal procedure that presented the authors with a risk of rapid obsolescence, it was the exclusionary rule, and they have, in fact, found themselves with a text written when the Supreme Court had granted *certiorari* in the "good faith" cases² but published after those decisions had been announced. As the text now stands, the authors have in some five pages (vol. 1, pp. 136-41) set out and rejected the various arguments against the rule, ranging from the more emotional claims of those who would free the police from its "handcuffs" to the proposals of the Chief Justice in *Bivens v. Six Unknown Named Agents*.³ The notion of a "good faith" exception pro-

2. *United States v. Leon*, 104 S. Ct. 3405 (1984); *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984).

3. 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

posed by Justice White in dissent in *Stone v. Powell*⁴ is given equally, if more moderately, short shrift, and the Court's refusal to adopt such an exception in *Taylor v. Alabama*⁵ and *United States v. Johnson*,⁶ followed by its avoidance of the issue in *Illinois v. Gates*,⁷ is seen as signalling the death of the "good faith" campaign.

The authors make only passing reference to the Fifth Circuit's adoption of a "good faith" exception in *United States v. Williams*,⁸ certainly a case worth more detailed discussion if one were attempting to predict the outcome of the Supreme Court's debate. The grants of *certiorari* in *Massachusetts v. Sheppard*⁹ and *United States v. Leon*¹⁰ are flagged in a brief footnote (vol. 1, p. 140 n.58), and the suggestion that a warrant-based exception be adopted is left with only the comment that, "[d]oubtless some would oppose [it]" (vol. 1, p. 141).

Whether or not it would have been possible in July, 1983, to predict the results in these cases, a somewhat more elaborate discussion would at least have mitigated the impact of the early publication date. As it is, a substantial portion of the exclusionary rule chapter has become irrelevant and will remain so until the publication of the first pocket-part.¹¹ The reader with little or no expertise in the field runs the risk of being misled, while the experienced reader will simply bypass this section of the treatise until it catches up with the state of the law.

The body of the chapter on "Arrest, Search and Seizure" (vol. 1, pp. 130-359) provides a clear and concise overview of the fourth amendment that will be useful for the student or the lawyer newly come to the area. For the prosecutors in the audience it must be noted that, when the authors move from the descriptive to the analytical, their commentary has a certain defense orientation. Even for defense counsel, however, their criticism tends to focus on the merits of Supreme Court decisions now well ensconced rather than on current issues still being litigated in the lower federal and state courts. This problem, one supposes, is unavoidable in a treatise that seeks to cover so much ground in such limited space.

An odd organizational decision has placed the introductory discussion of the exclusionary rule (vol. 1, pp. 130-62) at the beginning of the section on "Detection and Investigation of Crime," and the discussion of standing, fruits and the exceptions to the rule some 600 pages away.

4. 428 U.S. 465, 536 (1976) (White, J., dissenting).

5. 457 U.S. 687 (1982).

6. 457 U.S. 537 (1982).

7. 462 U.S. 213 (1983).

8. 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

9. 104 S.Ct. 3424 (1984).

10. 104 S.Ct. 3405 (1984).

11. Since the writing of this review, the 1985 pocket parts have become available. — Ed.

In between come presentations on wiretapping, interrogation, identification, the grand jury and, strangely, entrapment. This arrangement is unlikely to prove troublesome to those who know what they are looking for and can simply turn to the appropriate subsection, but again the neophyte may wonder why it is not possible to present a more integrated analysis of the subject.

In addition to its odd placement, the discussion of entrapment is more extensive than is justified by the importance of the purely legal issues and yet inadequate in its coverage of the current controversy. The public debate over the entrapment defense in recent years has made it one of the most controversial issues in the law of criminal procedure — perhaps second only to the exclusionary rule. The authors devote a considerable amount of space to the origins of the defense in *Sorrells v. United States*¹² and *Sherman v. United States*,¹³ and to the “debate” over the “subjective” and “objective” theories. They treat that debate, however, as though it had considerably more real-world significance and continuing vitality in the courts than the typical practitioner would perceive.

The discussion of the “Abscam” cases in this context is brief but telling (vol. 1, pp. 428-29). In addressing the question of whether law enforcement officers should be required to have some “reasonable suspicion” that an individual is engaged in criminal activity before offering him inducement to do so, the authors recognize the adverse implications of *United States v. Russell*.¹⁴ They point to Abscam, however, as a source of “renewed interest in this issue” (vol. 1, p. 428) because “there a convicted swindler and other middlemen who were themselves under investigation decided which politicians would be offered bribes” (vol. 1, p. 428). This highly simplistic description of the Abscam scenario then leads to brief citations to Representative Edwards, the prime congressional critic of the operation (vol. 1, p. 428 n.18), and to an article in *The Nation* that proposes the use of a warrant procedure.¹⁵ Only in a footnote is it mentioned that all attacks on the Abscam convictions were rejected by the courts of appeals (vol. 1, p. 428 n.19), and no mention is made of the one dispassionate congressional study of the operation.¹⁶

In the real world the entrapment defense has meaning only in the extraordinary cases — the DeLorean prosecution, for example — and even in those the defense has meaning less as a legal issue than as a

12. 287 U.S. 435 (1932).

13. 356 U.S. 369 (1958).

14. 411 U.S. 423 (1973).

15. V. 1, p. 429 n.20 (citing Chevigny, *A Rejoinder*, THE NATION, Feb. 23, 1980, at 205).

16. SENATE SELECT COMMITTEE TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE, FINAL REPORT, S. REP. NO. 682, 97th Cong., 2d Sess. (1982).

vehicle for attacking the government's tactics and evoking some sympathy for an otherwise unsympathetic defendant. In routine drug cases, where entrapment has most often been raised and where the bulk of the unfavorable case law has developed, the defense virtually never succeeds. Yet the unsophisticated reader may well be left with the idea that the entrapment doctrine provides some meaningful control over police conduct. It might have been more useful for the authors to have analyzed the facts of the Abscam cases and the juries' and courts' responses to those facts in an effort to explain just why the defense, whatever academic appeal it may have, offers little solace to defendant or defense lawyer. Instead, they have provided the reader with citations to the critics without offering anything in the way of detached assessment — an approach that smacks more of advocacy than scholarship.

If the authors' messages on the exclusionary rule and entrapment are clear, they seem in other parts of the treatise to have gone out of their way to avoid reaching any conclusions. For example, in their introduction to the chapter on the grand jury's screening function (vol. 2, pp. 282-85), they present the arguments for and against continued reliance on the indictment process in what is little more than a compilation of the ideas of other commentators and offer no assessment of their relative merits. Similarly, on the issue of plea bargaining, their summary of the many vices and limited but important benefits of that process gives the reader nothing that has not been said many times before (vol. 2, pp. 554-70).

All of which is not to say that the effort has not been worthwhile. These volumes represent the only comprehensive work in the field. They are lucid and thorough. West's decision to publish and the authors' decision to write are more than justified by the product. Professors LaFave and Israel can be expected to offer in other forums the insightful analysis of important issues that has characterized their other work, and while we await that day, we can be content that they have, for now, provided us with a first-rate reference that fills a space on our shelves too long left empty.