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Book Review

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RECENT BOOKS

BOOK REVIEWS

CRIMINAL PROCEDURE. By *Abraham S. Goldstein* and *Leonard Orland.* Boston: Little, Brown. 1974. Pp. lix, 1263. $22.50.

CASES AND COMMENTS ON CRIMINAL PROCEDURE. By *Fred E. Inbau, James R. Thompson, James B. Haddad, James B. Zagel* and *Gary L. Starkman.* Mineola, N.Y.: Foundation Press. 1974. Pp. xxvii, 1500. $20.

MODERN CRIMINAL PROCEDURE. 4th Ed. By *Yale Kamisar, Wayne R. LaFave* and *Jerold H. Israel.* St. Paul: West. 1974. Pp. xcv, 1572. $20.

THE PROCESS OF CRIMINAL JUSTICE: INVESTIGATION. By *H. Richard Uviller.* St. Paul: West. 1974. Pp. xxii, 744. Paperback ed., $7.50.

CRIMINAL PROCESS. 2d Ed. By *Lloyd L. Weinreb.* Mineola, N.Y.: Foundation Press. 1974. Pp. xlvii, 1211. $19.

These five casebooks strikingly illustrate the emergence of criminal procedure as an important body of law that must be given its own place in the contemporary law school curriculum. It is no longer sufficient to include it as a terminal adjunct to the traditional course in substantive criminal law, which has itself expanded so far beyond traditional, common-law boundaries that its separation from procedure is highly desirable. The size of these procedure books lends weight to this conclusion; with the exception of Uviller's book, which, as its title indicates, is limited to the legal aspects of police investigation, each runs well over a thousand pages.

All of the books reflect, of course, the great and controversial explosion of law in virtually every area relating to the criminal process. Beginning about fifteen years ago, this singular phenomenon brought a swift end to the long period of indifference to and neglect of procedural reform. It produced a flood of decisional law, articles, and commentaries, whose magnitude tests the selection and editorial skills of casebook authors. On the whole, the editors of the books reviewed here have met this challenge with competence and discretion.

In one respect, their task has been simplified. The requirement that state criminal procedure by and large conform to the Bill of Rights has destroyed the highly variegated pattern of state and local law that for so long characterized criminal procedure in this country. The lack of uniformity among our many jurisdictions had previously made it all but impossible to organize a meaningful collection of teaching materials in this area. Moreover, the prevalent, pre-*Mapp*[1]

1. Mapp v. Ohio, 367 U.S. 643 (1961).

common-law rule of judicial indifference to the source of evidence resulted in a paucity of case law, and statutory law amounted to little more than brief restatements of the fourth volume of Blackstone's *Commentaries*.[2] Information with respect to local conditions revealed scandalous defects in the criminal justice system, defects that were the inevitable results of ill-defined or nonexistent procedural safeguards. However deplorable certain aspects of today's criminal justice system may appear, at least we are in the course of developing a coherent and comprehensible body of procedural law.

While the books under review all provide copious sources from which the continuing evolution of modern criminal procedure may be understood, they touch but lightly upon its history. The dominant role of the United States Supreme Court in this almost completely judicial revision of the law becomes obvious from the cases, but the voices of past dissent and controversy seem stilled and distant.

I.

Goldstein and Orland's *Criminal Procedure* conveys an air of unreality at the start. In the introduction, a brief historical note followed by an outline of the development of scholarly interest in the processes of criminal justice, acknowledges the conflict and debate generated by efforts to elevate criminal procedure to constitutional standards. There is no intimation, however, of the depth and bitterness of that conflict, of the denigration and denunciation of the Supreme Court that accompanied it, or of the political pressures that threatened the Court's judicial integrity. Charges of "handcuffing" the police and being "soft" on crime, coupled with demands for the impeachment of the Chief Justice, had a personal impact upon the members of the Court to which they responded with great patience and courage.

This historical gap does not detract from the over-all excellence of the casebook, however. I mention it only to remind instructors and students that the materials the book contains have their roots in the great social, moral, and political divisions of our times.

The authors have generally avoided following the operational sequence of the criminal process in favor of examining the system as a set of interconnected functions based upon underlying fundamental assumptions. Thus, the book opens with text and case materials explicating the tension created by the divided goals of the criminal justice system, and then proceeds to the first "fundamental assump-

2. 4 BLACKSTONE, COMMENTARIES *289-93. The California Penal Code follows the Blackstone pattern. *See, e.g.*, CAL. PENAL CODE §§ 815 (arrest with warrant, based on 4 BLACKSTONE, *supra*, § 324, at *290), 836 (arrest without warrant, based on 4 BLACKSTONE, *supra*, § 328, at *292), 838 (arrest upon the order of a magistrate, based on 4 BLACKSTONE, *supra*, § 328, at *292) (West 1970).

tion," the right to counsel and its development from *Betts v. Brady*[3] to the present.[4]

Succeeding chapters deal with the function of judge and jury, the acceptance of guilty pleas, and plea bargaining. The structure of the latter section emphasizes the fact that negotiation looking toward a plea of guilt is no longer constitutionally suspect, but accepted as an integral part of the administration of justice. To maintain balance, however, the authors present the emphatic argument for the abolition of plea bargaining advanced by the National Advisory Commission on Criminal Justice. Also included are the American Bar Association's standards for plea bargaining, although pertinent state decisional and statutory law is not mentioned.[5] While this omission is understandable—issues of constitutional dimension are involved, and the problem of source selection is difficult—some bow toward state efforts to solve the problems presented by the recent legitimation of plea bargaining would have been useful in rounding out the subject. In all fairness to the authors, it should be noted that the casebook as a whole makes generous use of state materials; hence this omission is a very minor flaw.

The second of the book's four parts opens with the law of arrest, and then follows the sequential pattern of criminal procedure through the preliminary hearing, the grand jury, bail, and prosecutorial discretion. The authors include text materials and cases relating to California's highly structured preliminary hearing procedure, which is usually characterized by the formalities of a nisi prius court.[6] This century-old procedure[7] not only serves to preserve the testimony of witnesses, but also provides a valuable means for discovery that contrasts with the peculiar reluctance of other jurisdictions, particularly the federal courts, to permit any kind of pretrial disclosure.[8] There is an excellent chapter on the grand jury, again including reference to the California practice, which requires

3. 316 U.S. 455 (1942).

4. The overruling of *Betts* by Gideon v. Wainwright, 372 U.S. 335 (1963), is given adequate treatment in all of the books reviewed, but only *Modern Criminal Procedure* by Kamisar, LaFave, and Israel provides footnote reference to Anthony Lewis' delightful history of the case. *See* A. LEWIS, GIDEON'S TRUMPET (1964).

5. For example, the California Supreme Court, influenced by the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE RELATING TO PLEAS OF GUILTY (1967), not only gave its approval to the plea bargaining process but explicitly provided procedures that must be followed by court and counsel. *See* People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

6. *See* CAL. PENAL CODE §§ 858-83 (West 1970).

7. The legislative history of this procedure, beginning in 1851, can be found in CAL. PENAL CODE §§ 858-83 (Deering 1909).

8. For a critical view of the federal practice, see Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962).

that a copy of the transcript of the grand jury hearing be delivered to the accused.[9]

The third part of the casebook treats the general subject of criminal investigation. Beginning with the defense of entrapment, it proceeds through the exclusionary rule to interrogation, immunity, and search and seizure, concluding with privacy of communications. The contents are comprehensive and well-organized.

The fourth and concluding part is concerned with trial and conviction, starting with indictment and problems in pleading. The authors rely exclusively on federal cases and materials in those areas; with one exception the same is true of the treatment of jurisdiction and speedy trial. Discovery procedures then receive fairly extensive coverage, ranging from the pre-trial practice to the grudging limitations of the Jencks Act.[10]

The last chapters address the problems of trial and disposition of the convicted offender. They commence with a thoroughgoing treatment of double jeopardy, including a generous amount of statutory material. The familiar topics of judicial disqualification and free press and fair trial follow. The book concludes with a relatively brief treatment of sentencing, parole, and prison discipline. All in all, it is an excellent casebook: exhaustive and well-organized, with an interesting selection of materials.

II.

Cases and Comments on Criminal Procedure by Inbau, Thompson, Haddad, Zagel, and Starkman, like other multi-authored works of this kind, may appear to have been compiled by a committee, with all of the faults such a characterization implies. Such an assumption, however, would be a mistake—this, too, is an excellent casebook. It is organized on the conventional, sequential criminal procedure model, and utilizes a generous selection of state decisional law to supplement the fundamental restructuring of criminal procedure found in the decisions of the Supreme Court.

In their preface, the authors claim to have taken an approach different from the one followed in the predecessor volume.[11] The difference, they explain, is a change in emphasis from police procedures to matters of courtroom concern, which are said to be more truly procedural and more "stable" than judicial efforts to control police conduct by such devices as exclusionary rules. The control of police conduct, they believe, should be left to the executive and legislative

9. CAL. PENAL CODE § 938.1 (West 1970).

10. 18 U.S.C. § 3500 (1970).

11. F. INBAU, J. THOMPSON & C. SOWLE, 2 CASES AND COMMENTS ON CRIMINAL JUSTICE, CRIMINAL LAW ADMINISTRATION (1968).

branches of government. Nevertheless, about a third of the book's contents is devoted to law enforcement practices and procedures. While this is some decrease in emphasis, it involves no diminution of Professor Inbau's long and vigorous opposition to the exclusionary rules. Substantial portions of the chapters on searches and interrogation examine the exclusionary rule controversy, including the various alternative methods that have been proposed for dealing with illegal law enforcement practices. Whatever one's opinion on the attempts of the judiciary to devise sanctions for the control of police practices, this unusually thoroughgoing exploration of the subject is, in my judgment, one of the distinctive values of this casebook.

The first chapter deals briefly with the law of arrest by comparing the statutory law of five states, a useful approach. The power of private persons to make arrests is included. The next topic, search and seizure, receives lengthy and comprehensive treatment (with the exception of automobile searches, which are accorded just five pages of case digests and text). Various evidence-gathering practices are arranged in a well-ordered series, concluding with interrogation. Here the authors devote more than a hundred pages to explication and analysis of *Miranda v. Arizona*,[12] the case in which Inbau and Reid, *Criminal Interrogation and Confessions* (1962), was used to illustrate the dangers of modern police interrogation. If Professor Inbau was abashed by the Court's treatment of the interrogation methods he has long espoused, it does not appear in the casebook. On the contrary, this chapter opens with an expression of hope that *Miranda* will be overruled and concludes with substantial excerpts from the post-*Miranda* edition of *Criminal Interrogation and Confessions* (1967). Unrepentant and unreformed, Professor Inbau adheres firmly to the proposition that "[o]f necessity, criminal interrogators must deal with criminal offenders (or suspects) on a somewhat lower moral plane than that upon which ethical, law-abiding citizens are expected to conduct their everyday affairs" (p. 458).

It may thus be a source of surprise to some that the book has a chapter on ethics. It appears in part three of the casebook, which deals with trial proceedings in such depth that it embraces not only matters of procedure, but also of practice and evidence. (Part two deals in comprehensive fashion with grand jury and preliminary hearing procedures, including chapters on bail, pre-trial discovery, plea bargaining, and related procedures.) The materials on post-trial procedures, with which the casebook concludes, are much more limited but cover all that is necessary to provide an adequate introduction to sentencing and appellate procedures.

This is an interesting, well-organized collection of teaching materials. While the book derives an individuality of its own from the

12. 384 U.S. 436 (1966).

controversial views of its principal author, this characteristic does not detract from its merits.

III.

The Kamisar, LaFave, and Israel casebook, *Modern Criminal Procedure*, first appeared almost ten years ago. Its first authors, Professors Hall and Kamisar, developed a format to which the succeeding volumes have adhered without significant variation, but with ever-increasing amplification. This latter feature, as demonstrated by the new fourth edition, is frankly acknowledged by the authors, who describe their work in the preface as "a big book" (p. xiii), best adapted for use in three different (but overlapping) courses.[13] Almost thirty pages are required for the table of cases; almost nineteen for the table of articles, books, and reports. The authors attribute the intimidating size of their volume in part to the fact that its leading cases include not only the majority opinions, but also the views of all the concurring and dissenting justices. While their goals are commendable, the result approaches the encyclopedic, and may well deter instructors from adopting what is without question a casebook of the highest excellence.

Arranged around the fully reported main cases are combinations of notes, questions, case digests, texts, and extracts from a wide variety of pertinent books, articles, statutes, and materials as unusual as a transcript of the oral arguments made to the Supreme Court in *Miranda*. After an overview of the criminal justice system, the book inquires into the due process concept, the theory of the fourteenth amendment's incorporation of the Bill of Rights, and the emergence of current constitutional principles of criminal procedure. This last development is examined in detail by focusing on the cases that have developed and expanded the right to counsel from *Betts v. Brady*[14] to the present. In sharp contrast to this exalted level, the following chapter presents extracts from a variety of articles on police behavior, portraying the unhappy lot of the policeman and shedding useful light on the great gulf between him and what Amsterdam calls a distant and oracular Supreme Court.[15] This is, I think, an excellent introduction to the conventional materials on arrest and search and seizure that follow.

Apart from the cursory treatment of automobile searches and seizures, these materials provide broad coverage of the field, including a discussion of the problems arising out of the present phenomenon

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13. Under the title *Basic Criminal Procedure*, the first 12 chapters are separately available in paperback. A 1975 supplement to both volumes has just been released.

14. 316 U.S. 455 (1942).

15. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785 (1970).

of airport searches to prevent air piracy. The remainder of this portion of the casebook covers wiretapping, entrapment, police interrogation (in which Professor Inbau's article on the subject[16] is the starting point), pre-trial identification, bail, and allied subjects. Special consideration is given to the administration of the exclusionary rules, preventive detention, and the exercise of prosecutorial discretion.

Continuing with the grand jury and preliminary hearing processes, the book proceeds sequentially through jurisdiction, plea bargaining, discovery, jury selection, and other related topics, to double jeopardy. The once unique[17] character of California's grand jury procedure is mentioned, albeit briefly (p. 886). In that state, longstanding practice requires that a shorthand record of grand jury testimony be made, and a transcript of it delivered to the defendant before trial.[18] More recently, power was conferred upon the superior court to dismiss an indictment for lack of probable cause, thus making an indictment no less vulnerable to legal attack than an information.[19] The effect of these procedures, of course, is to minimize disclosure problems and to require that indictments be supported by the adequate or competent standard rejected by the Supreme Court in *Costello v. United States.*[20] Neither appears to have had any adverse effect on the administration of criminal justice in California.

The last part of the casebook allots about one hundred pages to the appellate process and post-conviction remedies. Understandably, the emphasis here is upon the blossoming of federal habeas corpus and its use as a means of subjecting state procedures to federal review. The jurisdictional rivalries thus engendered and the persistent incompatibilities between the two systems present a challenge to contemporary reformers of criminal law and procedure, and mark an appropriate place to conclude this book.

Modern Criminal Procedure reflects excellent scholarship; it contains a careful and commendably imaginative selection of materials, and is most comprehensive. The latter virtue is its only drawback; for an instructor working within a curriculum relatively free of the usual constraints, it is of the highest rank.

IV.

Uviller's *The Process of Criminal Justice: Investigation* is much different from the other books here reviewed. First, it is the first part

16. Inbau, *Police Interrogation—A Practical Necessity,* 52 J. CRIM. L.C. & P.S. 16 (1961).

17. That the California procedure is no longer strictly "unique" is demonstrated by the authors in their note on "Inspection of grand jury transcripts" (pp. 909-12).

18. CAL. PENAL CODE §§ 938-38.1 (West 1970).

19. CAL. PENAL CODE § 995 (West 1970).

20. 350 U.S. 359 (1956).

of a larger volume on the subject of criminal procedure.[21] As its title indicates, it is limited in scope, concerned solely with legal problems involved in the acquisition of evidence. Second, it is a *casebook*, assembled in faithful compliance with the earliest models of its kind —free of author's footnotes, uncluttered by any but the briefest text, unindexed, and only slightly burdened by statutory materials. Finally, its appearance can only be described as "paste and scissors": Almost all of its contents are photocopies of cases as they are printed in the *Supreme Court Reporter* and other volumes of the National Reporter System.

In short, this book is simply not comparable to the four others, and should not be considered, at least in its present form, as adequate for a course in criminal procedure. It might possess some utility for a brief course in search and seizure or a survey of legal restraints on police practices, but even for this limited purpose it lacks the range and depth of the other books and does not come close to the variety of materials and differences of approach that contemporary legal education requires.

V.

The last of the casebooks in this group is the second edition of Weinreb's *Criminal Process*. As the title suggests, its contents are arranged to portray criminal procedure as the basic structure of the larger process that is broadly described as the criminal justice system. To achieve this result, the author supplements the statutory and decisional materials at appropriate points with samples of administrative as well as legal forms, and with pertinent extracts from the Federal Rules of Criminal Procedure.[22] Federal law is relied upon almost exclusively. This is a conscious choice by the author, based upon the ever-increasing similarity between state and federal law and upon the assumption that generous use of District of Columbia cases, rules, and practices will reflect the problems and practices of the states. The author believes that this disregard of the interrelationships between the states, and between the states and the federal government, is justified by the overriding importance of focusing upon constitutional problems.

The structure of the book is one of its most striking features. In general, each chapter opens with a principal case, usually an opinion of the United States Supreme Court. Concurring and dissenting opinions are frequently omitted, but footnotes briefly indicate their thrust and significance. Following each principal case, a series of numbered paragraphs carries digests of cases selected to demonstrate the efforts

21. A second volume, *The Processes of Criminal Justice: Adjudication*, was published in February 1975.

22. The proposed amendments to the Federal Rules of Criminal Procedure are reproduced in an appendix.

of courts and law enforcement personnel to conform to the rules in the infinite variety of situations that characterize the criminal justice system. State decisional law is often used to illustrate the wide range of contrasting results. The numbered paragraphs also contain text and questions, which are useful for discussion both in and out of the classroom.

The eighteen chapters of the casebook are divided into two parts: investigation and prosecution. The first part—about one third of the total—provides excellent coverage of the subject matter. It is helpfully supplemented by reproduced forms, beginning with a police department incident report and ranging through complaint, warrant, summons, and other forms in the sequence of the process, ending with a fingerprint record form.

The title of the second part—prosecution—is misleading. The section begins with preliminary hearing, and proceeds in the usual sequence through sentence and judgment to the book's conclusion, dealing with appeal, double jeopardy, and collateral attack. Forms are reproduced throughout this part, as in the first, wherever appropriate to the subject matter. Among these is a lengthy pre-sentence report, a useful example of the extensive assistance that a first-rate probation office can provide for a judge confronted with the awesome task of determining the disposition of a serious offender.[23] A comprehensive bibliography is keyed to the subject matter of each chapter.

Weinreb's casebook must be ranked with the best. Its unique organization is well-designed for classroom use, and encourages students who become intrigued by the author's questions to engage in supplemental research and study.

Except for the Uviller book—which suffers from its narrow scope—these new casebooks afford a welcome range of selection. Their over-all quality is high, and their varying approaches enlarge the opportunity for instructors in criminal procedure to find a text compatible with their individual teaching styles and techniques.

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23. The defendant's record, which is hopelessly negative, compels a prison sentence recommendation that is expressed in classical bureaucratic jargon: "If treatment is to have any potential, corrective measures would certainly have to be employed over a substantial duration in a controlled environmental situation."