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Criminal Law and Procedure: An Overview

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TO GRANT, PEYTON, EMMY, AND JAMES
—RONALD BACIGAL

TO MY CHILDREN: JOHN, STEPHEN, AND CLAIRE TATE
—MARY KELLY TATE
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THE GOAL OF THIS BOOK is to provide an introduction to both the practice and
the theory of criminal law. Thus, it may be used in a number of diverse educational
programs such as undergraduate criminal law classes, associate-degree criminal justice
programs, or paralegal courses. Depending on the needs of the students, sections of the book
addressing either theory or practice can be emphasized, ignored, or given cursory coverage.
For example, in a course emphasizing theoretical aspects of the criminal justice system, the
contractual relationship between counsel and client (Chapter 8) can be deleted in favor of
focusing on the coverage of the fundamental conflict between individual privacy and the
government’s use of electronic surveillance (Chapter 11). In contrast, a course stressing the
pragmatic aspects of criminal practice might cover the contractual nature of the attorney–
client relationship, while omitting coverage of electronic surveillance, which is used in only
a small number of actual cases. The first half of the book covers substantive criminal law,
while the second half discusses both the constitutional dimensions of criminal procedure and
practical aspects of the criminal justice process.

Because this text covers both substantive criminal law and criminal procedure, it is suitable
for a single course designed to provide an overview of the entire criminal justice system, or it
can be used in separate courses focusing on either substantive or procedural law. If this book is
used in separate courses covering substantive and procedural law, the text can be augmented
with materials or lecture references to the laws of a specific jurisdiction. Chapters 1 through 7
define criminal responsibility and address the major felonies recognized in most if not all
jurisdictions. Although these chapters provide a textual foundation for a course on substantive
criminal law, they can be tailored to a particular jurisdiction by supplementing the text with
statutory and case law from a specific locality. For example, Chapter 6 acquaints students with
the elements of common law burglary, but students preparing for careers as paralegals will
need to become familiar with specific forms of statutory burglary in their own states.

In a course limited to the procedural aspects of criminal law, Chapters 8 through 16 con-
tain enough material to support a semester-long course. Because a great deal of criminal
procedure is of constitutional dimension, these chapters have universal application.
There remains, however, ample opportunity to supplement constitutional procedure with the rules
of a particular locality. For example, Chapter 14 notes that each jurisdiction has rules govern-
ing the timing and content of motions for pretrial discovery.

Whatever the nature of the course in which this book is used, the text material consti-
tutes a narrative account of the law. Abundant case summaries are interwoven with the
text to bring the “real world” into the classroom. The use of these case excerpts can be
varied to suit individual tastes. The cases enhance the textual discussion of law, but for
the most part, any case may be eliminated without depriving the student of exposure to
the relevant law.
NEW TO THE FOURTH EDITION

- New Learning Objectives focus readers’ attention on key concepts within each chapter and reinforce the most important concepts and law practices to direct students’ review and study.

- New Practice Exercises and Discussion Questions help readers apply concepts in a hands-on environment and encourage critical thinking about key legal issues. Two new Essay Assignments in every chapter provide opportunities to frame detailed arguments and demonstrate comprehension.

- New Sidebar features add current perspective on key legal concepts by highlighting and clarifying significant chapter topics.

- Fresh emphasis on Case excerpts helps readers fully understand legal changes and rulings. The authors have thoroughly updated the text with new excerpts and explanations to ensure students gain a full understanding of criminal law practices today.

- Updated Exhibits clarify key points. Recognized for a clear, reader-focused presentation, this edition continues to clarify even the most difficult legal concepts and rulings with useful illustrations, sample forms, and meaningful exhibits.

- Updated Companion Websites for instructors and students provide instructional resources and the latest rulings. These companion websites are more helpful than ever with an online instructor’s manual, Powerpoint® slides, computerized test bank, study resources and Web links, and more. You’ll also find the latest relevant Supreme Court decisions to keep your course as current as possible.

CHAPTER FORMAT

- Chapter outlines open each chapter to focus attention on the main elements students will encounter.

- Learning Objectives identify key concepts for each chapter and reinforce important law practices.

- Key terms are set in boldface type and defined in the margin where they first appear within the chapter.

- Exhibits, such as jury instructions, sample documents, and forms, illustrate how theories discussed in the chapter appear in the “real world.”

- Case excerpts help readers apply legal concepts to real-world situations.

- Sidebars highlighting and clarifying significant chapter topics add current perspective on key legal concepts.

- A chapter summary provides a brief review of the main points covered.

- Concept summary charts at the end of many chapters depict and contrast the key points covered.

- Discussion questions and practice exercises are designed to stimulate deliberation and practical application of the chapter material.

- Essay assignments provide opportunities to frame detailed arguments and demonstrate comprehension.

- At the end of each chapter is a list of helpful websites that are germane to chapter materials.
SUPPORT MATERIAL

This book is accompanied by a support package that will assist students in learning and aid instructors in teaching. The following supplements accompany this text:

- An instructor’s manual and test bank is available online and includes suggestions on classroom coverage, descriptions of hypothetical situations to stimulate classroom discussion, suggested “answers” or approaches to the discussion questions, and a brief summary of the facts and holding of each case cited within the chapter. A comprehensive test bank provides objective test questions and answers. To access this resource, please visit www.cengagebrain.com, and search on this book’s ISBN (located on the back cover and the copyright page).

- A student companion website contains chapter outlines, Web links, exhibit downloads, and quizzes to help you study. To access this resource, please visit www.cengagebrain.com, and search on this book’s ISBN (located on the back cover and the copyright page).

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INTRODUCTION

OUTLINE

OVERVIEW OF A CRIMINAL CASE
Prearrest Investigation
Arrest
Booking Process
First Appearance before a Judicial Officer
Preliminary Hearing
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Arraignment and Plea
Pretrial Motions
Trial
Sentencing
Appeal and Habeas Corpus

CRIMINAL JUSTICE PROFESSIONALS
Law Enforcement Agencies
Prosecutorial Agencies
Defense Bar
Courts
Coroners
Magistrates
Court Clerks
Probation Officers
Paralegals

SUMMARY
Criminal law is an intricate and fascinating subject. The American Bar Association maintains that criminal law is the proper concern of all lawyers, and it also is of primary concern to the general public. Any skeptics may view a typical night of television programs and compare the number of "cop" shows with the number of shows that focus on contract law or property law.

People have an understandable curiosity and fascination with a branch of law that deals with thieves, rapists, robbers, and murderers—the seamy side of life. At the other end of the spectrum, however, criminal law, primarily constitutional procedure, addresses our highest aspirations: the right to privacy, liberty, freedom, and the need to limit government power over "we the people." Prosecutors often see themselves as protecting the community from dangerous lawbreakers, while defense counsel frequently characterize themselves as "Liberty's Last Champion," the motto of the National Association of Criminal Defense Lawyers.

These diametrically opposed views of criminal law have produced a criminal justice system that is like no other in the world. The United States leads the Western world in the number of persons incarcerated and condemned to death. At the same time, this country outrips all nations in the constitutional and procedural protections given to those accused of crime. Similar paradoxes are manifested in the substantive law that defines criminal conduct. For example, the U.S. Supreme Court has elevated freedom of speech to unprecedented heights and guards against legislative attempts to criminalize the exercise of free speech (e.g., burning the American flag). The same court, however, has deferred to state legislatures that promulgate what some perceive to be puritanical laws against private sexual conduct (e.g., premarital or same-gender sex). You may judge for yourself whether these contradictions are part of the strength or weakness of the American criminal justice system.

The first part of this book addresses substantive criminal law, which declares what conduct is criminal. Chapters 1 through 4 discuss general principles of criminality that apply to most if not all crimes. Chapters 5, 6, and 7 address the definition of specific offenses like murder or larceny. The second part of the book (Chapters 8 through 16) addresses the procedures through which the substantive law is enforced. However, considering the complexity of criminal procedure, an overview of the criminal justice process and the steps that carry an individual case from start to finish is a helpful place to start.

**OVERVIEW OF A CRIMINAL CASE**

The procedural stages in a criminal case are not the same in all states. This overview presents a "typical felony case" in a "typical" jurisdiction.

**Prearrest Investigation**

When an alleged crime is reported or discovered, the police must investigate to determine whether a crime was committed, and if so, by whom. The principal participants in this "cops and robbers" stage are the police and those whom they suspect of criminal activity. The courts, prosecutors, and defense counsel normally address the investigatory process in retrospect when determining whether the police acted in accordance with constitutional or statutory provisions governing police investigative practices. Chapters 9, 10, and 11 address the most frequently litigated prearrest investigative procedures: temporary detentions, search and seizure, and electronic surveillance.

**Arrest**

An arrest generally occurs when the police investigation uncovers facts sufficient to constitute probable cause to arrest—in other words, a reasonable belief that the suspect committed a crime. Although a judicial officer, normally a magistrate, may determine the adequacy of the facts constituting probable cause and issue an arrest warrant, most arrests are made by police officers acting without a judicially issued warrant.
An arrest, of course, does not mean the end of police investigation of the crime. Incident to arrest, the police officer usually will search the suspect’s person and remove any weapons, contraband, or evidence relating to the crime. Following arrest, police investigation may continue in the form of interrogating the suspect, conducting further searches for additional evidence, or placing the suspect in a lineup or other identification procedure.

Booking Process
In a typical arrest, the arrestee is transported to the police station and subjected to what is known as a booking process. The process, which is primarily clerical, consists of (1) completing the arrest report and preparing the arrestee’s permanent police record, (2) fingerprinting and photographing the arrestee, and (3) entering on the police “blotter” the name of the arrestee, the personal effects found in that person’s possession, and the date, time, and place of arrest.

First Appearance before a Judicial Officer
A person held in police custody has a right to a judicial hearing on the grounds for detaining the person. If the suspect was arrested without an arrest warrant, a judicial officer (perhaps a lower court judge, often a magistrate) must determine whether the police had probable cause to arrest the accused. If probable cause is lacking, the suspect must be released from custody. If the arrest was lawful, the judicial officer must determine whether to hold the arrestee in pretrial custody or to set bail—in which case the accused will be released pending trial. Bail may consist of posting cash or a secured bond with the court, or the accused may be released into the custody of another or released on “personal recognizance,” which is an unsecured promise to appear for trial.

Preliminary Hearing
Many jurisdictions have eliminated the preliminary hearing stage and allow the prosecutor to go forward with the case by filing an “information” stating the charges, or by taking the case directly to a grand jury, which may indict the accused for specific crimes. A preliminary hearing is a judicial proceeding to determine whether there are reasonable grounds to require the accused to stand trial. The prime distinction between a preliminary hearing and a first appearance is that the preliminary hearing is an adversary proceeding in which the accused is allowed to introduce evidence, whereas a first appearance is normally an ex parte proceeding in which the judge or magistrate hears only the evidence that constituted probable cause to arrest the accused.

If the preliminary hearing judge determines that reasonable grounds to try the accused have not been shown, the accused must be released from custody. This release, however, is not an acquittal; a grand jury may subsequently indict the accused for the crime and force the accused to stand trial on the indictment.

Grand Jury Indictment/Information
Many jurisdictions require that all felony charges be submitted to a grand jury composed of citizens selected to review the evidence and determine whether the evidence is sufficient to justify a trial on the charge sought by the prosecution. A grand jury has significant power to investigate crime, primarily by subpoenaing witnesses and documentary evidence relevant to the charge. Generally, only the prosecution’s evidence is presented to the grand jury; the accused is not heard, nor is defense counsel permitted to be present or offer any evidence.

Some jurisdictions have eliminated grand juries or permit, at least in some cases, prosecutors to bypass existing grand juries and present the charged crimes in the form of an information. An information is a written accusation of a crime, unilaterally prepared by the prosecutor.
Arraignment and Plea
Arraignment consists of bringing the accused before the court, informing that person of the charges, and asking the accused to enter a plea to the charges. In some jurisdictions, arraignment may take place weeks in advance of the actual trial, while other jurisdictions postpone arraignment until the trial is scheduled to begin.

In most jurisdictions, the accused may enter a plea of guilty, not guilty, or nolo contendere. A plea of nolo contendere has the same effect as a plea of guilty, except that the admission of guilt cannot be used as evidence in any other action. For example, former Vice President Spiro Agnew pled nolo contendere to bribery charges, but the plea was not admissible in subsequent civil litigation concerning whether taxes were due on the unreported bribes.

In the majority of cases, the defendant’s guilt and the applicable range of sentences are determined by a plea agreement struck between the prosecutor and defense counsel. In most plea agreements, the defendant agrees to plead guilty to a charge in exchange for the prosecutor’s promise to drop other charges or to recommend a reduced sentence.

Pretrial Motions
Pretrial motions are requests that the trial court take some action, such as dismissing a defective indictment, ruling on the admissibility of illegally obtained evidence, or ordering the parties to disclose certain information. In essence, these matters can or must be disposed of prior to the trial on the merits of the case. All jurisdictions have rules governing the time period within which pretrial motions must be filed with the trial court.

Trial
The American criminal justice system is an adversarial process that assigns each participant in the trial a defined role. The judge is not an advocate for either side, but is concerned with enforcing procedural rules. The prosecutor's primary task is to marshal the evidence against the defendant. The defendant has no obligation to present any evidence or play any part in the trial, because a defendant may rely on the presumption of innocence and remain passive during the trial. The defense attorney is an advocate for the accused, with the primary responsibility of winning the case without violating the law. The jury (or the judge alone in a bench trial) hears the evidence from both sides and must decide whether the defendant committed the charged offense.

Sentencing
Some states permit the jury to set the punishment, but most jurisdictions entrust sentencing to the trial judge. By statute, certain convictions require a mandatory sentence, in which case the judge has no discretion. In most cases, the judge exercises some discretion and may impose any sentence within statutory limitations, or the judge may determine the appropriate sentence according to sentencing guidelines enacted by the legislature. As part of the sentencing determination, the judge also may be empowered to suspend a portion of the sentence and place the defendant on probation. Parole and time off for "good behavior" are awarded by correctional authorities and are not part of the initial sentencing process.

Appeal and Habeas Corpus
A convicted defendant may appeal a conviction to an appellate court, which will review the trial proceedings and either reverse or affirm the trial court decision. If the conviction is "reversed and remanded," then the defendant's conviction is set aside, although the defendant may be required to stand trial again. A second trial may be precluded, however, if the appellate court reverses the conviction because of insufficient evidence to justify the conviction.

The excerpts of cases in this book are the written opinions of appellate courts, announcing and often explaining their decisions. Most opinions are signed by one judge; and, when
joined by a majority of the judges, this opinion constitutes the judgment of the court. Judges who agree with the decision but wish to address other considerations may write separate concurring opinions. Judges who disagree with the court's decision may write dissenting opinions.

If the attempt to obtain a reversal of the conviction on appeal fails, the defendant may file a collateral attack on the conviction, the most common form of collateral attack being a habeas corpus petition. A habeas corpus petition is a collateral attack because it is not a continuation of the criminal process, but a civil suit brought to challenge the legality of the restraint under which a person is held. (*Habeas corpus* is a Latin term meaning "you have the body.") Because the action is a civil suit, the petitioner (the confined person) has the burden to prove that the confinement is illegal.

**CRIMINAL JUSTICE PROFESSIONALS**

Like any organization, the operation of our criminal justice system is dependent on the people who administer the system. Because of the popularity of movies and television shows about criminal justice, most people are familiar with the roles played by police officers, prosecutors, defense attorneys, and judges. Less publicized, but no less important, is the vital role played by coroners, magistrates, court clerks, probation officers, and paralegals.

**Law Enforcement Agencies**

Law enforcement agencies are charged with enforcing criminal laws that range from traffic offenses to serious felonies. At the national level, the Federal Bureau of Investigation (FBI) is the largest agency empowered to deal with violations of federal criminal laws. In addition to the FBI, other federal agencies investigate specific types of violations of federal law: for example, the Drug Enforcement Administration; the Bureau of Alcohol, Tobacco, and Firearms; the Customs Service; the Secret Service; and the Immigration and Naturalization Service.

At the state level, the state police are charged with prevention and investigation of all crimes covered by state law. At the local level, police departments or sheriff's offices exercise broad powers as the chief law enforcement officers of their communities. Their responsibilities include enforcing state law as well as local ordinances.

**Prosecutorial Agencies**

Prosecutorial agencies review the information gathered by law enforcement agencies and decide whether to proceed with formal charges. At the national level, the U.S. Department of Justice and U.S. Attorney's offices, distributed geographically throughout the country, initiate a prosecution for a federal offense. At the state level, the state attorney general's office may initiate certain prosecutions, but such offices normally limit their function to handling appeals of convictions. Most state prosecutions are initiated by district attorneys geographically distributed throughout the state.

**Defense Bar**

Criminal defendants may hire attorneys to represent them in all criminal prosecutions, no matter how minor the offense. Indigents, who cannot afford to hire counsel, may have defense counsel appointed at public expense whenever the indigent faces possible imprisonment. Many states have established a public defender's office to represent indigents. As a supplement to, or in place of, a public defender's office, many states utilize a court-appointed list of attorneys who have volunteered or been recruited to represent indigents.
Courts
In the federal system, the principal trial court is the U.S. District Court, which presides over the prosecution of serious federal crimes. Trials of federal misdemeanors are often handled by federal magistrates, who are appointed by federal district judges. The U.S. Circuit Courts of Appeal hear appeals from convictions in the District Court. Thirteen judicial circuits cover the United States and its possessions. The U.S. Supreme Court reviews the decisions of the lower federal courts and many decisions of the state courts.

The structure of state court systems varies considerably, but every state has one or more levels of trial courts and at least one appellate court. A common arrangement of a state court system includes a lower court—often called police court, magistrate court, or a court not of record—which tries minor or petty offenses; a higher trial court, often called a court of record, which tries more serious offenses; and an appellate court, which reviews the decisions of the lower courts.

Coroners
A coroner's inquest is peculiar to homicide cases, and its function is to determine the cause of death. Although this determination is merely advisory and can be either accepted or ignored by the prosecutor, the inquest may uncover evidence useful to both the prosecution and the defense. Many jurisdictions have replaced the coroner system (which sometimes required a finding by the coroner's jury made up of six laypersons) with a medical examiner system staffed by forensic pathologists.

Magistrates
In some jurisdictions, magistrates are judges who preside over lower courts (often called magistrate or police court) in which traffic violations and minor misdemeanors are tried. In other jurisdictions, magistrates have no trial jurisdiction. As their primary function, they determine whether there is probable cause to issue search or arrest warrants. They also determine the conditions of any pretrial release of an arrested suspect.

Court Clerks
Court clerks, who may be elected or appointed in a given jurisdiction, handle the vast amount of paperwork involved in bringing a case to trial. For example, the clerk's office may be responsible for issuing subpoenas for witnesses or documents; filing the formal charge upon which the accused will stand trial; summoning the jurors and administering requests to be excused from jury duty; scheduling the court's docket and use of multiple courtrooms; and receiving pretrial motions requesting the court to take some form of action.

Probation Officers
Convicted defendants are sometimes granted a suspended sentence and may avoid incarceration as long as they demonstrate good behavior and comply with the terms of the court's granting of probation. Probation officers supervise the conduct of the individual on probation by monitoring whether the individual is gainfully employed, has made restitution to any victim of the crime, and is avoiding further breaches of the law. Prior to conviction, probation officers may be ordered to investigate the background of the defendant and prepare a presentence report recommending an appropriate sentence.

Paralegals
Like court clerks, paralegals may be responsible for organizing the vast amount of paperwork often generated by a criminal case: for example, obtaining and filing police reports, coroner's finding, transcripts of a preliminary hearing, grand jury indictments, and requests for and responses to pretrial discovery motions. What may be unique to criminal justice paralegals is their involvement in the factual investigation and legal research surrounding the case.
As part of their tasks related to factual investigation, paralegals may be asked to interview victims, witnesses, and police officers; draft preliminary charges when assisting a prosecutor; draft motions to dismiss the complaint when assisting defense counsel; draft subpoenas and locate witnesses; and prepare trial notebooks that organize the presentation of evidence, particularly any documents or exhibits to be used at trial.

Criminal justice paralegals are also responsible for many legal tasks requiring them to research the substantive law governing the charged offense, draft pretrial motions or responses to such motions, draft legal memoranda and briefs on contested points of law, prepare pre-sentence reports or responses to such reports, and draft post-trial motions.

**SUMMARY**

Although the specific tasks of criminal justice professionals vary, a fundamental knowledge of the substantive criminal law and the essence of criminal procedure is crucial to the performance of a criminal justice professional. In simplified form, the foundation for this specialized knowledge of the criminal justice system is the subject matter of this book.