Criminal Procedure

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Constitutional Constraints Upon Investigation and Proof

Eighth Edition

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Welsh S. White
1940–2005

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Dedication

J.J.T.

To Nancy, Vivian, Michelle, Henry, and, of course, Welsh

W.S.W.

To Linda, Kathy, and Ryan

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Preface

The eighth edition of Criminal Procedure: Constitutional Constraints Upon Investigation and Proof marks the third time I have revised the casebook without the invaluable collaboration of my partner and friend, Welsh White. I hope I have been guided by his spirit and abiding wisdom. Ours was a remarkably respectful, conflict-free relationship. We rarely disagreed and, on the rare occasions when we did not see matters identically, we found constructive ways to resolve disagreements. As in the previous two editions, I have tried hard to be faithful to the vision and goals that first prompted the two of us to develop a new casebook three decades ago.

From the outset, this book has been intended for use in an introductory Criminal Procedure course that focuses entirely on issues raised by pretrial law enforcement investigatory practices. The principal topics covered are searches and seizures, entrapment, confessions, identification procedures, and the courtroom rules that command the suppression of evidence. The eighth edition adheres to the same overall structure and addresses the same subjects. Many of the changes made are predictable, due to new developments in the law of constitutional criminal procedure. Other modifications are the result of some new thoughts about how to present the essential subjects most economically and efficiently.

This revision incorporates only three new main cases. Two of them, *Riley v. California* (searches of cell phones incident to arrests) and *Maryland v. King* (taking and testing DNA samples from arrestees for purposes of "identification") were decided since the publication of the last edition. One new main opinion, *Kentucky v. King* (application of the "exigent circumstances" exception to police-created exigencies), was decided before the last edition. Reflection upon advice from a colleague who has adopted the casebook persuaded me that *King* is a better vehicle for teaching the "exigent circumstances" exception than *Vale v. Louisiana*, an opinion that has been in the text since the first edition. New decisions that are captured in notes include: *Florida v. Jardines; Grady v. North Carolina; Florida v. Harris; Missouri v. McNeely; Fernandez v. California; Navarette v. California; Heien v. North Carolina; Rodriguez v. United States; and Bailey v. United States.*

Because there are limits on how much the text can grow, I have had to make some difficult decisions about how to trim the material to make room for the additions

described in the previous paragraph. *Vale v. Louisiana*, which has been supplanted as a main case by *Kentucky v. King*, is now a note. In addition, *New York v. Belton* and *Dunaway v. New York* have been reduced to note status. I have eliminated entirely former Chapter 9 — a brief treatment of the right to the assistance of counsel at trial that has always served as a predicate for the two ensuing chapters that discuss important pretrial extensions of the trial counsel guarantee. In lieu of that foundational chapter, I have written a substantial introductory note that appears at the beginning of Chapter 10. That note summarizes the most important lessons taught by the deleted chapter. I believe that the new note provides an ample, and much more economical, predicate for understanding the two pretrial right to counsel doctrines that are the subjects of Chapters 9 and 10 (formerly Chapters 10 and 11). I realize that some may disagree with my editorial decisions, particularly the omission of Chapter 9. Instructors who wish to assign and teach any of the material that no longer appears in the text are welcome to reproduce the versions that appear in the seventh edition.

Because many subjects addressed by this casebook have not been the focus of any (or any significant) decisions in the past four years, many chapters have changed little, if at all, in this edition. I do not believe in change for the sake of change. I have added a few supplemental notes and done some minor reorganization here and there in the hope of bringing additional clarity to certain issues and doctrines.

This casebook has always sought to strike an appropriate balance — to furnish enough material for students to gain a clear understanding of the basic topics, but not to overwhelm and confuse them with excessive, unnecessary, or distracting details. The cases presented are limited to those decided by the United States Supreme Court. The primary aim remains the same — to facilitate students' appreciation of the richness and complexity of the issues pertaining to each topic. Moreover, while it endeavors to be relatively comprehensive, the eighth edition makes no attempt to address every significant question or to present every Supreme Court decision relating to the topics that are covered.

From the start, the aim of this text has not been merely to explain the currently governing constitutional doctrine. Instructors will still find not only the most recent answers to the questions but also some of the prior approaches that have been supplanted or refined. Seminal decisions remain because students are enriched by insights into the historical roots and the evolution of the constitutional doctrines. Moreover, these decisions enable students to reach their own conclusions about the appropriate resolutions of important issues.

Welsh and I always preferred to allow the Supreme Court to speak for itself as much as possible. Although most of the opinions have been edited substantially,[1] core analytical elements of the majority opinions have been retained. Moreover, the

1. Substantive deletions have been indicated by ellipses. Although citations to cases and other sources have frequently been deleted, there are no indications of those deletions.

text presents the conclusions and the basic reasoning of significant concurrences and dissents.

There are two noteworthy features that have always distinguished this text from competing criminal procedure casebooks. First, the textual material at the beginnings of chapters and between main opinions has been, and still is, limited — although there has again been some growth of the introductory and interstitial text for purposes of economy and clarification. One belief that Welsh and I shared — a tenet that once again guided my choices — is that detailed scholarly or analytical discussions are better left to treatises, hornbooks, and law review articles. The preference has always been to include *focused* questions and *brief* comments that encourage students to do their own thinking. I once again made my best effort to restrict the Notes and Questions to the most germane issues related to the main opinions. Updated bibliographies of pertinent articles appear at the ends of chapters and/or subsections. Students interested in pursuing more extensive discussions of the subjects dealt with in this text might wish to consult the scholarly pieces listed in these bibliographies.

The second distinctive feature of the text is the inclusion of "problems" at the end of every lengthy section. The problems, all of which are based on actual federal and state cases, can serve several functions. By highlighting specific facets of the doctrine, some of the problems focus attention upon and reinforce important principles and limitations announced in the Court's decisions. Other problems highlight unresolved or debatable issues generated by those decisions — issues that are the focus of disputes in the lower courts. The problems furnish vehicles for testing and fleshing out students' awareness and understanding of doctrinal nuances. They afford opportunities to apply governing principles to different fact patterns, thereby refining and exercising exam-taking skills. While a large majority of the problems in the prior edition have been retained, I have made an effort to "refresh" most of the problem collections with new situations that raise interesting, challenging, sometimes novel or cutting-edge, issues.

From the start, the primary objective of this casebook has been to provide a pragmatic and flexible instructional tool that is adaptable for a variety of pedagogical approaches. Welsh and I believed that the inclusion of the most significant decisions, the preservation of the critical elements of the Justices' reasoning, and the incorporation of problem situations would prove useful to a wide range of criminal procedure professors. Instructors who prefer the more traditional, Socratic approach will have the necessary opinion material. Those who emphasize a problem-oriented methodology should find a sufficient number of problems to enable exploration and development of the students' understanding. Teachers who blend the case and problem approaches should also find the book suitable for their needs. Any of the classroom approaches facilitated by the text should enable professors and students to gain a comprehensive understanding of the relevant doctrine and to explore the vital policy considerations and value choices that underlie our Constitution and its interpretation.

I wish to express my sincere appreciation and gratitude to two conscientious and talented research assistants, Caleb Copley and Grant Taylor, who worked very hard on this revision, and to my longtime, dedicated administrative assistant, Jackie Hand. Indeed, I would be remiss not to express my gratitude to all research and administrative assistants who have contributed their labors to prior editions of the casebook. This eighth edition stands on the shoulders of its seven predecessors.

James J. Tomkovicz
October, 2016

JUSTICES OF THE UNITED STATES SUPREME COURT[1]

	(1)[2]	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
	Warren (1953)[3]	Black (1937)	Frankfurter (1939)	Douglas (1939)	Clark (1949)	Harlan (1955)	Brennan (1956)	Whittaker (1957)	Stewart (1958)
1960			Goldberg (1962–65)[4]					White (1962–93)	
			Fortas (1965–69)		Marshall (1967–91)				
	Burger (1969–86)								
1970			Blackmun (1970–94)						
		Powell (1972–87)				Rehnquist (1972–86)			
				Stevens (1975–2010)					
1980									O'Connor (1981–2006)
	Rehnquist (1986–2005)					Scalia (1986–2016)			
		Kennedy (1988–present)							
1990							Souter (1990–2009)		
					Thomas (1991–present)				
			Breyer (1994–present)					Ginsburg (1993–present)	
2000									
	Roberts (2005–present)								Alito (2006–present)
2010							Sotomayor (2009–present)		
				Kagan (2010–present)					

[1] Starting with membership as of 1958
[2] Chief Justice
[3] Year of Appointment
[4] Years on Court

Introduction

This brief Introduction is intended to familiarize students with two foundational subjects: the typical processes of and participants in the American criminal justice system and the constitutional source of restraints upon state law enforcement officers. The excerpt in Part A describes the operation of the criminal justice system. Part B contains a brief history and summary of the regulation of state conduct by Bill of Rights guarantees incorporated through the Due Process Clause.

[A] An Overview of the Criminal Justice System

National Advisory Commission on Criminal Justice Standards and Goals: Courts 11–15 (1973)*

Arrest

The first formal contact of an accused with the criminal justice system is likely to be an arrest by a police officer. In most cases, the arrest will be made upon the police officer's own evaluation that there is sufficient basis for believing that a crime had been committed by the accused. However, the arrest may be made pursuant to a warrant: in this case, the police officer or some other person will have submitted the evidence against the accused to a judicial officer, who determines whether the evidence is sufficient to justify an arrest. In some situations, the accused may have no formal contact with the law until he or she had been indicted by a grand jury. Following such an indictment, a court order may be issued authorizing police officers to take the accused into custody. But these are exceptional situations. Ordinarily, the arrest is made without any court order and the court's contact with the accused comes only after the arrest.

Even if there has been no court involvement in the initial decision to arrest the defendant, courts may have been involved in the case at an earlier stage. The requirement of the Fourth Amendment to the U.S. Constitution that all searches be reasonable has been interpreted to mean that a warrant be obtained from a judicial officer before all searches unless there are specific reasons for not obtaining a war-

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rant. Thus investigations that precede arrest sometimes involve searches made pursuant to a search warrant issued by a court. The court role in criminal investigation is broadening in other areas, and procedures are being developed whereby suspects may be compelled to submit to photographing, fingerprinting, and similar processes by court order. The potential for court involvement in the criminal justice system, then, extends to early parts of the police investigatory stage.

Initial Judicial Appearance

In all jurisdictions, a police officer or other person making an arrest must bring the arrested person before a judge within a short period of time. It is at this initial appearance that most accused have their first contact with the courts. This initial appearance is usually before a lower court — a justice of the peace or a magistrate. Thus in prosecutions for serious cases the initial appearance (and some further processes) occur in courts that do not have jurisdiction to determine the guilt or innocence of the accused. Often by the time of the initial appearance, the prosecution will have prepared a formal document called a complaint, which charges the defendant with a specific crime.

At the initial appearance, several things may occur. First, the defendant will be informed of the charges against him, usually by means of complaint. Second, the defendant will be informed of his or her rights, including the constitutional privilege against self-incrimination. Third, if the case is one in which the accused will be provided with an attorney at state expense, the mechanical process of assigning the attorney at least may begin at this stage. Fourth, unless the defendant is convicted of an offense at this point, arrangement may be made concerning the release of the defendant before further proceedings. This may take the traditional form of setting bail, that is, establishment of an amount of security the defendant himself or a professional bondsman whom the defendant may hire must deposit with the court (or assume the obligation to pay) to assure that the defendant does appear for later proceedings. Pretrial release, in some jurisdictions, also may take the form of being released on one's own recognizance, that is, released simply upon the defendant's promise to appear at a later time. Other forms of encouraging a released defendant's later appearance sometimes are used.

In addition to these matters collateral to the issue of guilt, it is at the initial appearance that judicial inquiry into the merits of the case begins. If the charge is one the lower court has authority to try, the defendant may be asked how he or she pleads. If the defendant pleads guilty, the defendant may be convicted at this point. If the defendant pleads not guilty, a trial date may be set and trial held later in this court.

However, if the charge is more serious, the court must give the defendant the opportunity for a judicial evaluation to determine whether there is enough evidence to justify putting the defendant on trial in the higher court. In this type of case, the judge at the initial appearance ordinarily will ask the defendant whether he or she wants a preliminary hearing. If the defendant does, the matter generally is continued, or postponed to give both the prosecution and the defense time to prepare their cases.

The matter will be taken up again later in the lower court at the preliminary hearing. At this proceeding, the prosecutor introduces evidence to try to prove the defendant's guilt. The prosecutor need not convince the court of the defendant's guilt beyond a reasonable doubt, but need only establish that there is enough evidence from which an average person (juror) could conclude that the defendant was guilty of the crime charged. If this evidence is produced, the court may find that the prosecution has established probable cause to believe the defendant guilty.

At this preliminary hearing the defendant may cross-examine witnesses produced by the prosecution and present evidence himself. If the court finds at the end of the preliminary hearing that probable cause does not exist, it dismisses the complaint. This does not ordinarily prevent the prosecution from bringing another charge, however. If the court finds that probable cause does exist, it orders that the defendant be bound over to the next step in the prosecution. As a practical matter, the preliminary hearing also serves the function of giving the defendant and his attorney a look at the case the prosecution will produce at trial. It gives a defense attorney the opportunity to cross-examine witnesses the attorney later will have to confront. This informal previewing function may be more valuable to defendants than the theoretical function of the preliminary hearing.

Filing of Formal Criminal Charge

Generally, it is following the decision of the lower court to bind over a defendant that the formal criminal charge is made in the court that would try the case if it goes to formal trial. If no grand jury action is to be taken, this is a simple step consisting of the prosecutor's filing a document called an information. However, in many jurisdictions the involvement of the grand jury makes the process more complex. There, the decision at the preliminary hearing simply is to bind the defendant over for consideration by the grand jury. In these areas, the prosecutor then must go before the grand jury and again present the evidence. Only if the grand jury determines that there is probable cause does it act. Its action — consisting of issuing a document called an indictment — constitutes the formal charging of the defendant. If it does not find probable cause, it takes no action and the prosecution is dismissed.

In some jurisdictions, it is not necessary to have both a grand jury inquiry and a preliminary hearing. In most federal jurisdictions, for example, if a defendant has been indicted by a grand jury the defendant no longer has a right to a preliminary hearing, on the theory that the defendant is entitled to only one determination as to whether probable cause exists.

Although the defendant is entitled to participate in the preliminary hearing, the defendant has no right to take part in a grand jury inquiry. Traditionally, he has not been able to ascertain what went on in front of the grand jury, although increasingly the law has given him the right, after the fact, to know.

Following the formal charge — whether it has been by indictment or information — any of a variety of matters that require resolution may arise. The defendant's competency to stand trial may be in issue. This requires the court to resolve the

question of whether the defendant is too mentally ill or otherwise impaired to participate meaningfully in his trial. If he is sufficiently impaired, trial must be postponed until the defendant regains competency.

The defendant also may challenge the validity of the indictment or information or the means by which they were issued. For example, the defendant may assert that those acts with which he or she is charged do not constitute a crime under the laws of jurisdiction. Or, if the defendant was indicted by a grand jury, the defendant may assert that the grand jury was selected in a manner not consistent with state or federal law and, therefore, that the indictment is invalid.

A defendant also may — and in some jurisdictions must — raise, before trial, challenges to the admissibility of certain evidence, especially evidence seized by police officers in a search or statements obtained from the defendant by interrogation. In view of the rapid growth of legal doctrine governing the admissibility of statements of defendants and evidence obtained by police search and seizure, resolution of the issues raised by defendants' challenges to the admissibility of such evidence may be more complex and time-consuming than anything involved in determining guilt or innocence.

The criminal law also is increasingly abandoning the traditional approach that neither side is entitled to know what evidence the other side is going to produce until the other side actually presents it at trial. In the main, this has taken the form of granting defendants greater access to such things as physical evidence (e.g., fingerprints) that will be used against them. Access to witness[es'] statements sometimes is required, and some jurisdictions are compelling the defendant to grant limited disclosure to the prosecution.

Arraignment

In view of the potential complexity of pretrial matters, much of the significant activity in a criminal prosecution already may have occurred at the time the defendant makes his or her first formal appearance before the court that is to try him or her. This first appearance — the arraignment — is the point at which the defendant is asked to plead to the charge. The defendant need not plead, in which case a plea of not guilty automatically is entered for the defendant. If the defendant pleads guilty, the law requires that certain precautions be taken to assure that this plea is made validly. Generally, the trial judge accepting the plea first must inquire of the defendant whether the defendant understands the charge against him or her and the penalties that may be imposed. The judge also must be assured that there is some reasonable basis in the facts of the case for the plea. This may involve requiring the prosecution to present some of its evidence to assure the court that there is evidence tending to establish guilt.

Trial

Unless the defendant enters a guilty plea, the full adversary process is put into motion. The prosecution now must establish to a jury or a judge the guilt of the de-

fendant beyond a reasonable doubt. If the defendant elects to have the case tried by a jury, much effort is expended on the selection of a jury. Prospective jurors are questioned to ascertain whether they might be biased and what their views on numerous matters might be. Both sides have the right to have a potential juror rejected on the ground that the juror may be biased. In addition, both have the right to reject a limited number of potential jurors without having to state any reason. When the jury has been selected and convened, both sides may make opening statements explaining what they intend to prove or disprove.

The prosecution presents its evidence first, and the defendant has the option of making no case and relying upon the prosecution's inability to establish guilt beyond a reasonable doubt. The defendant also has the option of presenting evidence tending to disprove the prosecution's case or tending to prove additional facts constituting a defense under applicable law. Throughout, however, the burden remains upon the prosecution. Procedurally, this is effectuated by defense motions to dismiss, which often are made after the prosecution's case has been presented and after all of the evidence is in. These motions in effect assert that the prosecution's case is so weak that no reasonable jury could conclude beyond a reasonable doubt that the defendant was guilty. If the judge grants the motion, the judge is, in effect, determining that no jury could reasonably return a verdict of guilty. This not only results in a dismissal of the prosecution but also prevents the prosecution from bringing another charge for the same crime.

After the evidence is in and defense motions are disposed of, the jury is instructed on the applicable law. Often both defense and prosecution lawyers submit instructions which they ask the court to read to the jury, and the court chooses from those and others it composes itself. It is in the formulation of these instructions that many issues regarding the definition of the applicable law arise and must be resolved. After — or sometimes before — the instructions are read, both sides present formal arguments to the jury. The jury then retires for its deliberations.

Generally, the jury may return only one of two verdicts: guilty or not guilty. A verdict of not guilty may be misleading; it may mean not that the jury believed that the defendant was not guilty but rather that the jury determined that the prosecution had not established guilt by the criterion — beyond a reasonable doubt — the law imposes. If the insanity defense has been raised, the jury may be told it should specify if insanity is the reason for acquittal; otherwise, there is no need for explanation. If a guilty verdict is returned, the court formally enters a judgment of conviction unless there is a legally sufficient reason for not doing so.

The defendant may attack the conviction, usually by making a motion to set aside the verdict and order a new trial. In the attack, the defendant may argue that evidence was improperly admitted during the trial, that the evidence was so weak that no reasonable jury could have found that it established guilt beyond a reasonable doubt, or that there is newly discovered evidence which, had it been available at the time of trial, would have changed the result. If the court grants a motion raising one

of these arguments, the effect generally is not to acquit the defendant but merely to require the holding of a new trial.

Sentencing

Sentencing then follows. (If the court has accepted a plea of guilty, this step follows acceptance of the plea.) In an increasing number of jurisdictions, an investigation called the presentence report is conducted by professional probation officers. This involves investigation of the offense, the offender and the offender's background, and any other matters of potential value to the sentencing judge. Following submission of the report to the court, the defendant is given the opportunity to comment upon the appropriateness of sentencing. In some jurisdictions, this has developed into a more extensive court hearing on sentencing issues, with the defendant given the opportunity to present evidence as well as argument for leniency. Sentencing itself generally is the responsibility of the judge, although in some jurisdictions juries retain that authority.

Appeal

Following the conclusion of the proceeding in the trial court, the matter shifts to the appellate courts. In some jurisdictions, a defendant who is convicted of a minor offense in a lower court has the right to a new trial (trial de novo) in a higher court. However, in most situations — and in all cases involving serious offenses — the right to appeal is limited to the right to have an appellate court examine the record of the trial proceedings for error. If error is found, the appellate court either may take definitive action — such as ordering that the prosecution be dismissed — or it may set aside the conviction and remand the case for a new trial. The latter gives the prosecution the opportunity to obtain a valid conviction. Generally, a time limit is placed upon the period during which an appeal may be taken.

Collateral Attack

Even if no appeal is taken or the conviction is upheld, the court's participation in the criminal justice process is not necessarily ended. To some extent, a convicted defendant who has either exhausted all appeal rights or declined to exercise them within the appropriate time limits can seek further relief by means of collateral attack upon the conviction. This method involves a procedure collateral to the standard process of conviction and appeal.

Traditionally, this relief was sought by applying for a writ of habeas corpus on the ground that the conviction under which the applicant was held was invalid. Many jurisdictions have found this vehicle too cumbersome for modern problems and have developed special procedure for collateral attacks. Despite variations in terminology and procedural technicalities, however, opportunities remain for an accused convicted in federal court to seek such collateral relief from his conviction in federal courts and for those convicted in state courts to seek similar relief in state and, to a somewhat more limited extent, in federal courts.

The matter has become an increasingly significant point of the state-federal friction as issues of federal constitutional law have become more important parts of

criminal litigation. Defendants convicted in state courts apparently have thought that federal courts offered a more sympathetic forum for assertions that federal constitutional rights were violated during a state criminal prosecution. State judges and prosecutors have indicated resentment of the actions of federal courts in reversing state convictions for reasons state courts either considered of no legal merit or refused to consider for what they felt were valid reasons.

In any case, because the collateral attack upon a conviction remains available until (and even after) the defendant has gone through the correctional process, the courts' role in the criminal justice process extends from the earliest points of criminal investigation to the final portions of the correctional process.

[B] Due Process and Incorporation of the Bill of Rights

There can be no question that the Fourth, Fifth, and Sixth Amendment guarantees treated in this casebook were intended to govern the actions of federal law enforcement officers. With respect to state law enforcement officers, an important preliminary question is whether the guarantees of the Bill of Rights regulate state action. Early on, in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833), the United States Supreme Court answered that question, holding that the Bill of Rights governs only the federal government and not the states. That holding endures today. Nevertheless, due to the Fourteenth Amendment Due Process Clause, a provision specifically designed to control state action, today the states are generally not free to do that which the Bill of Rights proscribes.

For many years, the members of the Supreme Court debated the extent to which the liberties reflected in various Bill of Rights provisions are a part of the "due process of law" that the Fourteenth Amendment prohibits states from denying. Initially, the prevailing view was that the Due Process Clause required only those rights and procedures that were "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 2d 288 (1937); *see also Adamson v. California*, 332 U.S. 46, 677 S. Ct. 1672, 91 L. Ed. 2d 1903 (1947). This "ordered liberty" approach to interpretation of the Fourteenth Amendment yielded a number of holdings that permitted states to afford fewer rights and liberties than provided for in the Bill of Rights.

Over the years, however, a different approach to the issue evolved. In *Duncan v. Louisiana*, 391 U.S 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), the Court, in an opinion by Justice White, endorsed and explained that approach. The Court explained that a provision of the Bill of Rights is applicable to the states as an integral part of due process if it is "essential to an Anglo-American regime of ordered liberty" or "fundamental to the American scheme of justice." Moreover, in determining whether a particular provision qualifies, the Court will not consider the provision in the abstract, but, rather, will evaluate it against the backdrop of the common-law system of criminal procedure that has developed "contemporaneously in England and in this country." Thus, in deciding that the right to jury trial is applicable to the states, the *Duncan* Court emphasized the historical role of the jury in England and

in this country, noting that for centuries the jury had served as a buffer between the individual and the government.

That approach to deciding whether the substance of a particular Bill of Rights entitlement applies to the states has been called "selective incorporation."[1] While the approach has been "selective" in demanding individual evaluation of each provision, over time it has resulted in the effective "incorporation" of most of the Bill of Rights guarantees.[2] Moreover, the Court has generally refused to dilute those guarantees, but, instead, has found that the content of the Due Process Clause is identical to the content of specific Bill of Rights provisions.

For purposes of the subjects in this casebook, students need to appreciate two basic matters. First, the actual constitutional source of the controls on *state* law enforcement is the Fourteenth Amendment Due Process Clause. Second, the Fourth, Fifth, and Sixth Amendment regulations on law enforcement activity considered in this book have been fully and exactly "incorporated" and applied to the states through that Due Process Clause.

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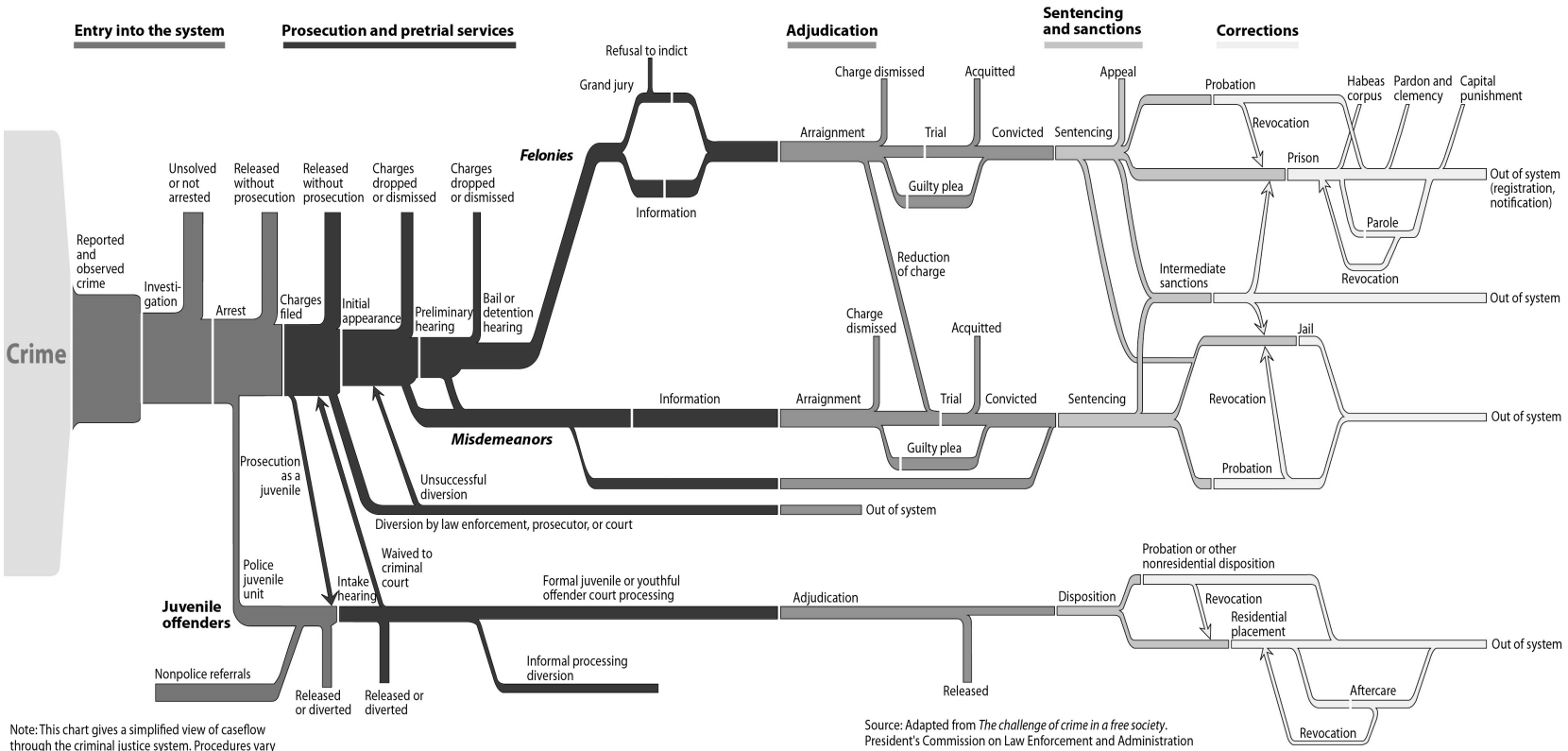
1. For a discussion of the approach, see Israel, *Selective Incorporation Revisited*, 71 Geo. L.J. 253 (1982).

2. For a summary of the historical development of the Supreme Court's different approaches to deciding whether a provision of the Bill of Rights is a part of the due process of law guaranteed against the states by the Fourteenth Amendment, *see McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 759-765, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (holding that the Second Amendment right to bear arms is applicable against the states because it is "among those fundamental rights necessary to our system of ordered liberty"). According to the Court, the only provisions of the Bill of Rights pertaining to the criminal process that have not been "fully incorporated" by the Due Process Clause are "the Sixth Amendment right to a unanimous jury verdict," "the Fifth Amendment[] grand jury indictment requirement," and "the Eighth Amendment[] prohibition on excessive fines." *See McDonald*, 561 U.S. at 765 n. 13. The Justices have never addressed whether the excessive fines ban governs states. *Id*. The holding in *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884), that states need not adhere to the grand jury requirement long predates the era of selective incorporation. *Id*. The only modern ruling that due process of law does not require the states to provide a safeguard contained in the Bill of Rights is the decision that 12-person juries need not render unanimous verdicts in state courts. *See Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); *see also Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972). With the exception of this single detail, the Sixth Amendment right to trial by jury in criminal prosecutions is binding on the states by virtue of the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

What is the sequence of events in the criminal justice system?



Note: This chart gives a simplified view of caseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.

Source: Adapted from *The challenge of crime in a free society*. President's Commission on Law Enforcement and Administration of Justice, 1967. This revision, a result of the Symposium on the 30th Anniversary of the President's Commission, was prepared by the Bureau of Justice Statistics in 1997.