

Criminal Procedure: The Post-Investigative Process

Criminal Procedure: The Post-Investigative Process

FIFTH EDITION

Neil P. Cohen

(LATE) W.P. TOMS PROFESSOR OF LAW AND DISTINGUISHED PROFESSOR OF LAW
THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW

Stanley E. Adelman

VISITING PROFESSOR OF LAW (RETIRED)
UNIVERSITY OF NEW MEXICO SCHOOL OF LAW
UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW

Leslie W. Abramson

FROST BROWN TODD PROFESSOR OF LAW
UNIVERSITY OF LOUISVILLE LOUIS D. BRANDEIS SCHOOL OF LAW

Michael O'Hear

PROFESSOR OF LAW
MARQUETTE UNIVERSITY LAW SCHOOL

Wayne A. Logan

GARY & SALLYN PAJIC PROFESSOR OF LAW
FLORIDA STATE UNIVERSITY COLLEGE OF LAW



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To Leroy and Mindy

S.E.A.

To Sam, Shel, and Will

L.W.A.

To Jennifer, Lauren, Daniel, and Owen

M.O.

To Meg, Anna, and Charlotte

W.A.L.

To the memory of Neil, our enduring guiding light

S.E.A., L.W.A., M.O., W.A.L.

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Preface to the Fifth Edition

Historically, the course that most law schools call “Criminal Procedure” focused on vital Fourth, Fifth, and Sixth Amendment issues, but paid scant attention to the subject matter of this book – the equally vital aspects, both practical and theoretical, of the criminal adjudication process.

Happily, in recent years, law schools have added a separate course on criminal adjudication, and placed it on a co-equal footing with the traditional “Crim. Pro.” course. In recognition of the importance of requiring demonstrated competence in this area of law practice, bar examiners around the nation have also begun testing for knowledge of the criminal adjudication process. It is no exaggeration (and no disrespect to the traditional Criminal Procedure course) to call this book, and the course it is intended for, “the real criminal procedure.”

This Fifth Edition continues the previous editions’ focus on both the theoretical and practical aspects of the “bail to jail” aspects of American criminal procedure. We have deliberately chosen to give special emphasis to many practice-related issues, such as motion practice, the form and content of indictments and other pleadings, the impact of various parts of the system on the guilty plea process, and ethical dilemmas facing lawyers (both prosecution and defense) and judges in criminal cases. Ability to navigate through these real-life (and frequently occurring) practice issues is every bit as essential as the formal mastery criminal law and rules of criminal procedure to providing students with the necessary knowledge and skills to serve as competent and ethical practitioners, be they prosecution or defense lawyers.

Criminal adjudication is one of the most rapid developing areas of the law, accounting for approximately twenty percent of the U.S. Supreme Court’s decisions in recent years. Keeping current is of vital importance to students, practitioners, and of course, to us. Each year, shortly after the close of the Supreme Court’s term, we prepare a cumulative annual supplement incorporating important new decisions from SCOTUS and lower federal and state courts, as well as recent scholarship that we find helpful and illuminating. Carolina Academic Press publishes our annual supplements on its website (at no additional cost) prior to each fall semester, in time to assure that students and teachers will have available the most up-to-date set of materials in this area of the law.

We have discontinued the practice from earlier editions and supplements of reproducing verbatim the full text of the Federal Rules of Criminal Procedure,

which are easily available from other sources on line. Their omission, except where we have deemed including the exact text to be crucial, has helped us to reduce the length of this book so that teachers, with perhaps a few judicious omissions, can cover its wide-ranging content in one semester of study.

Substantively, the Fifth Edition continues our detailed focus on the most important recent trends, upheavals, and hotly debated issues in adjudicatory criminal procedure, including:

- The fairness (or not) and the effectiveness (or not) of the grand jury as both “a sword and a shield”;
- Prosecutors’ duty to disclose materially exculpatory evidence, and remedies for *Brady* violations;
- Defense counsel’s obligations under *Frye* and *Lafler* to provide competent advice and effective assistance to clients in the plea-bargaining process;
- Application of the *Apprendi-Booker* line of cases to sentencing decisions;
- The steady decrease in the availability and use of the death penalty nationwide; and
- The near-total disappearance of habeas corpus as an effective post-conviction remedy. As we observe in Chapter 17, the Supreme Court has reached a solid consensus in recent years, that habeas lies only to correct blatant misapplications of the Court’s constitutional precedents and not as an easily available second round of appeals. That battle is now over.

Just before we were to begin work on this new edition, we lost our original lead author, Professor Neil Philip Cohen, W.P. Toms Distinguished Service Professor of Law at the University of Tennessee College of Law, to an untimely passing. We have missed Neil’s warmth, his guidance, his quick wit, his sharp intellect, and his commitment to excellence, but we hope that this book will continue to live up to his high standards. As a camp counselor in his late teens, Neil was known to his campers as “Captain Neil.” He spent a lifetime inspiring campers, students, scholars, and teaching colleagues throughout the United States. His loss to us, and to the legal academy, is inestimable. We dedicate this and all future editions and supplements of this book to the honor and the memory of our own Captain Neil.

To our teaching colleagues who have taught from earlier editions of this book and to attorneys who have kept it on their bookshelves as a practice reference, welcome back. We hope you find this edition to be worthy of the earlier editions begun by Professor Cohen and our other original co-author, the late Professor Don Hall of Vanderbilt University Law School. We have tried to maintain their clarity of analysis, structure, and just plain good writing, and adapt these strengths to evolving doctrinal law in the electronic era of legal scholarship and law practice. To our new readers, welcome to our world! To both our newer and more “experienced” readers,

we look forward to receiving your thoughts, comments, suggestions, and yes, your criticisms.

Stanley E. Adelman
Leslie W. Abramson
Michael O'Hear
Wayne A. Logan
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