Chapter 1

INTRODUCTION: THE STUDY OF CRIMINAL PROCEDURE

1.01 The Warren Court, Incorporation, and the Federalization of Criminal Procedure

As late as 1960, the study of criminal procedure was a fledgling discipline. Few law schools offered courses on the subject.[1] The relevant decisions of the United States Supreme Court focused on confessions and certain narrow problems connected with the conduct of trial. The task of monitoring the criminal process was in large part left up to the states, which varied widely in their approach.

The last several decades have witnessed an enormous increase in the amount of litigation concerning the procedural rights of the criminally accused. This upsurge has been the direct result of Supreme Court decisions in the early and mid-1960's that fashioned a wide variety of rules designed to provide those enmeshed in the criminal justice system with protection from overreaching by the state. In 1961, for example, the Court decided *Mapp v. Ohio*,[2] which held that any evidence seized in violation of the defendant's Fourth Amendment rights must be excluded from state as well as federal prosecutions. Two years later, the Court established a right to counsel for the indigent accused in all state felony prosecutions.[3] And in 1966, it enunciated the now well-known *Miranda* warnings as a constitutional prerequisite to the admissibility of any statement produced during custodial police interrogation.[4] Numerous other decisions reinforced Fourth, Fifth and Sixth Amendment guarantees having to do with searches, self-incrimination, double jeopardy, and the rights to counsel, confrontation, and speedy public jury trial.[5]

At least part of this judicial awakening was triggered by the Supreme Court's growing appreciation of the position occupied by the "underprivileged" of society—minority groups, the poor and the young. In decisions such as *Brown v. Board of Education*,[6] the Warren Court, so called after the appointment of Earl Warren as Chief Justice in 1953, attempted to break down some of the social barriers that operated to exclude these groups from mainstream society. It is no coincidence that the Court's rising interest in the procedural rights of the criminally accused—a group which is disproportionately composed of the minorities, the poor and the young—followed hard on its important civil rights decisions.

The Warren Court's activism focused primarily on the pretrial stages of the criminal process. Legal scholars had for some years been suggesting that the trial itself played a

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1 See Abraham Goldstein, *Reflections on Two Models: Inquisitorial Themes in Criminal Procedure*, 26 Stan.L.Rev. 1009 (1974).

2 367 U.S. 643, 81 S.Ct. 1684 (1961).

3 *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963).

4 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

5 See infra, this section.

6 347 U.S. 483, 74 S.Ct. 686 (1954).

relatively minor role in the criminal justice system.[7] The majority of cases never reach open court; they are settled through the plea bargaining process. Moreover, even if the accused pleads not guilty, the integrity of the resulting trial can still be tainted by police misconduct—an illegal search, a coerced confession or an inappropriately suggestive lineup. The Warren Court, sensitive to these concerns, shifted its attention to those stages of the criminal process where the exercise of police and prosecutorial discretion is most evident. *Mapp* and *Miranda* illustrate its attitude toward police investigation; the Court also sought to regulate other key elements of the pretrial process, from the preliminary hearing[8] and pretrial identification procedures[9] to plea taking itself.[10]

In order to ensure a uniform system of justice nationwide, the Warren Court made avid use of the "incorporation" concept. The Bill of Rights as ratified limited only the actions of the federal government. But the Fourteenth Amendment, ratified in 1868, provided that "no state" shall deprive citizens of life, liberty or property "without due process of law". This language was eventually interpreted to mean that provisions in the Bill of Rights that were a fundamental, intrinsic aspect of "due process" were "incorporated" into the Fourteenth Amendment and thus also applied to the states.[11] Pre-Warren Court decisions were reluctant to declare rights to be "fundamental," with nineteenth and early twentieth century cases refusing to find that due process encompassed the Fifth Amendment's provision for indictment by grand jury to the states,[12] the Eighth Amendment's cruel and unusual punishment prohibition,[13] the Fifth Amendment's privilege against self-incrimination,[14] and certain aspects of the double jeopardy clause.[15] But, during the Warren Court's tenure, the Court's focus shifted from an inquiry into whether a given right was "necessarily fundamental to fairness in every criminal system that might be imagined" to whether it was "fundamental in the context of the criminal processes maintained by the American states."[16] Guided by this principle, virtually every Bill of Rights guarantee pertaining to the criminal process other than the grand jury right was found to be inherent in due process of law and was thus imposed on the states through incorporation into the Fourteenth Amendment.[17] The following list

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[7] See, e.g., Abraham Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960).

[8] *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999 (1970) (right to counsel at preliminary hearing).

[9] *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967) (right to counsel at lineups); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967) (prohibiting unnecessarily suggestive identification procedures).

[10] *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166 (1969); *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (requiring intelligent and voluntary pleas).

[11] See generally, *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937) (describing circumstances under which a Bill of Rights guarantee is "selectively incorporated" by the Fourteenth Amendment's prohibition on state laws that violate due process).

[12] *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111 (1884) (holding that an indictment by a grand jury is not necessary to due process of law under the Fourteenth Amendment).

[13] *O'Neil v. Vermont*, 144 U.S. 323, 12 S.Ct. 693 (1892). See also, *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1 (1951) (explaining the meaning of the Eighth Amendment's bar against "excessive bail" without according it full constitutional status under the Fourteenth Amendment).

[14] *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14 (1908). See also, *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672 (1947).

[15] *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937).

[16] See *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968).

[17] Although *Schilb v. Kuebel*, 404 U.S. 357, 92 S.Ct. 479 (1971) intimated as much, the Eighth Amendment's excessive bail clause was not officially incorporated by the Court until *McDonald v. City of Chicago*, 561 U.S. 752, 130 S.Ct. 3020, 3034 n.12 (2010). Neither the Warren Court nor any subsequent Supreme Court decision has addressed the status of the Eighth Amendment excessive fines clause nor the Sixth Amendment guarantee that crimes be tried in the district where they occur, but these clauses are likely

outlines by amendment the relevant Warren Court decisions (and one much more recent decision) applying federal constitutional principles to the states:

(1) Fourth Amendment: the exclusionary remedy—*Mapp v. Ohio* (1961);[18] the full scope of the Fourth Amendment—*Ker v. California*[19] (1963);

(2) Fifth Amendment: the privilege against self-incrimination—*Malloy v. Hogan*[20] (1964); the ban against double jeopardy—*Benton v. Maryland*[21] (1969);

(3) Sixth Amendment: the right to speedy trial—*Klopfer v. North Carolina*[22] (1967); the right to jury trial—*Duncan v. Louisiana*[23] (1968); the right to appointed counsel—*Gideon v. Wainwright*[24] (1963); the right to confront and cross-examine witnesses—*Pointer v. Texas*[25] (1965); the right to compulsory process for obtaining witnesses—*Washington v. Texas*[26] (1967);

(4) Eighth Amendment: the ban against cruel and unusual punishment—*Robinson v. California*[27] (1962); the prohibition on excessive fines—*Timbs v. Indiana*.[28]

It is probable that many state courts resented this sudden upheaval in criminal procedure. In any event, the Warren Court felt that state court judges could not be counted upon to support enthusiastically its departures from tradition. Accordingly, in conjunction with its expansion of substantive constitutional causes of action, the Court opened wide the door to the federal court system through a series of cases redefining the scope of the writ of habeas corpus.[29] The increased availability of the writ, which under common law was designed to challenge the legality of detention by the government, handed to state prisoners a new method of attacking state judicial decisions on federal constitutional matters.

1.02 The Post-Warren Court: Four Themes

The Warren era, then, saw a dramatic expansion of the state defendant's federally protected constitutional rights and an equally dramatic widening of access to the federal courts as a means of vindicating those rights. With President Nixon's four appointments (Chief Justice Burger in 1969, Blackmun in 1970, Powell and Rehnquist in 1972), the Court's orientation in both of these areas began to shift noticeably, a shift which continued after Justice Rehnquist took over the Chief Justice position in 1987 and also appears to be a feature of the Court under Chief Justice Roberts, appointed in 2005. In

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to be declared fundamental as well. Cf. *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 109 S.Ct. 2909 (1989) (O'Connor, J., concurring in part and dissenting in part).

18 The Fourth Amendment was actually applied to the states in *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359 (1949), but *Mapp* was needed to give *Wolf* teeth. See § 2.02.

19 374 U.S. 23, 83 S.Ct. 1623 (1963).

20 378 U.S. 1, 84 S.Ct. 1489 (1964).

21 395 U.S. 784, 89 S.Ct. 2056 (1969).

22 386 U.S. 213, 87 S.Ct. 988 (1967).

23 391 U.S. 145, 88 S.Ct. 1444 (1968).

24 372 U.S. 335, 83 S.Ct. 792 (1963).

25 380 U.S. 400, 85 S.Ct. 1065 (1965).

26 388 U.S. 14, 87 S.Ct. 1920 (1967).

27 370 U.S. 660, 82 S.Ct. 1417 (1962).

28 ___ U.S. ___, 139 S.Ct. 682 (2019).

29 *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397 (1953), discussed in § 33.02(a); *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963), discussed in § 33.03(b).

analyzing the criminal procedure decisions of the post-Warren Court four themes seem to emerge as central.

The first theme is the "post-Warren Court's"[30] belief that the ultimate mission of the criminal justice system is to convict the guilty and let the innocent go free. The Warren Court tried to encourage respect for individual rights in the aggregate. In so doing, it often required the release of a factually guilty defendant in order to ensure an appropriate process. While some decisions of the post-Warren Court have produced the same result, it is clear that since the early 1970's the Court has been far more impressed than its predecessor with the importance of the defendant's guilt. Its decisions suggest that the rights enumerated in the Constitution are not all entitled to the same degree of judicial protection, but instead should be valued according to their impact on the adequacy of the guilt determining process.

In evolving this hierarchy among the provisions of the Bill of Rights, the Court has placed the Fourth Amendment's ban on unreasonable searches and seizures at the bottom. Suppose an individual is found in possession of a gram of cocaine. Whether the search that produced the cocaine is unlawful is irrelevant to the issue of the defendant's guilt. Yet if this evidence is excluded because the search *is* illegal then conviction for possession of the drug may be all but impossible. For this reason, application of the exclusionary rule to Fourth Amendment violations has received less than enthusiastic support from the post-Warren Court.

The most prominent illustrations of the lowly position the Amendment occupies in the hierarchy of rights are the Court's rulings that one who is not aware of his prerogatives under the Fourth Amendment can still "voluntarily" waive them[31] and that others can waive those prerogatives for him;[32] such is not the case with other rights.[33] The Court has also singled out Fourth Amendment claims by holding that they are not justiciable in federal habeas proceedings if they were fairly adjudicated by the state courts;[34] to date it has not extended this holding to other guarantees found in the Bill of Rights.

The right not to incriminate oneself, which derives from the Fifth Amendment, is more closely bound up with the truth-finding mission at trial. If a confession is extracted by methods that would make anyone say anything, the confession cannot be considered reliable. But while the post-Warren Court is not at all reticent about barring the courtroom use of statements produced in this manner,[35] it appears to be extremely hostile toward the *Miranda* rule, which can operate to exclude statements which are not directly "coerced." Thus, for example, the Court has permitted the use of a confession obtained in violation of *Miranda* for impeachment purposes, if the confession is shown

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[30] The use of the terms "Warren Court" and "post-Warren Court" is not meant to imply that the same justices always voted as a bloc on the decisions discussed nor is it meant to suggest that those forming the majority of these decisions hold identical views. The terms are merely shorthand labels designed to symbolize the dichotomy between the Supreme Court's decisions in the past several decades.

[31] *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973).

[32] See *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793 (1990) (anyone with apparent authority of the defendant's property may consent to its search).

[33] See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) (Fifth Amendment waiver must be voluntary and intelligent); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938) (waiver of all fundamental rights must be knowing and intelligent).

[34] *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976).

[35] See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 (1978).

to have been uncoerced.[36] It has also held that evidence obtained in violation of *Miranda* is still admissible in the prosecution's case-in-chief if the questioning was necessitated by an objective threat to the safety of the public or the arresting officer.[37] Even bad faith violations of *Miranda* do not require exclusion of fruits of the violation in many circumstances.[38] The Court also has had little problem finding that defendants cajoled into confessing nonetheless "voluntarily" waived their rights.[39]

A similar tension is evidenced in the Court's decisions regarding the Fifth Amendment's ban on trying an individual twice for the same offense—the double jeopardy clause. More recent Court decisions have shifted the emphasis away from the Warren Court's concern over the deleterious impact of two separate proceedings on the defendant's well-being toward whether the reason for aborting the first trial is bottomed on a decision that the defendant is not guilty.[40] If no acquittal occurs at the first proceeding, the post-Warren majority sees little sense in barring a second trial.

On the other hand, the current Court has been relatively zealous in scrutinizing such Sixth Amendment rights as the right to counsel at trial and the right to public jury trial, because these guarantees are viewed as essential to an accurate determination of guilt. The Court has staunchly supported the right to trial counsel as the key to ensuring a balance of power between the state and the accused, at least when confinement results,[41] and has bolstered the right to counsel on appeal.[42] Several decisions have also emphasized that the criminal trial is to be held in open court barring exceptional circumstances,[43] and interpreted the right to confront one's accusers expansively.[44] Less forcefully, the Court has maintained the jury's historic function as a buffer between the state and the criminal defendant.[45] It has also insisted that counsel be effective during the adjudication process,[46] and that prosecutors disclose exculpatory information prior to trial,[47] albeit in each case with the significant caveat, consistent with the factual guilt

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[36] *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643 (1971).

[37] *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626 (1984).

[38] See *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601 (2004); *Wisconsin v. Knapp*, 542 U.S. 952, 124 S.Ct. 2932 (2004).

[39] See, e.g., *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755 (1979) (waiver despite confusion about admissibility of oral statements); *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350 (1994) (waiver despite equivocal request for counsel); *Berghuis v. Thompkins*, 559 U.S. 98, 130 S.Ct. 1213 (2010) (waiver because no explicit statement asserting right to silent).

[40] *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978)); *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187 (1978).

[41] See *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972) (right to counsel in misdemeanor cases).

[42] *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985) (failure to meet filing deadline for appeal is ineffective assistance).

[43] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814 (1980); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819 (1984).

[44] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

[45] See generally Chapter 27. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) (peremptory challenges may not be used to exclude jurors solely on the basis of race); *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029 (1978) (five member jury unconstitutional); *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623 (1979) (nonunanimous vote by six member jury unconstitutional); *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975) (cross-representative jury pool required). But see, *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970) (six member jury constitutional); *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620 (1972) (9–3 verdict constitutional).

[46] *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003) (capital sentencing); *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010) (plea bargaining).

[47] *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995).

theme, that relief be granted only if the violation likely affected the outcome.[48] The focus on the trial as the central battleground between the accused and the government represents a substantial departure from the Warren Court's emphasis.

A second noticeable trait exhibited by the Court since 1970 is its devotion to "totality of the circumstances" analysis as distinct from a rule-oriented approach to criminal procedure. The Warren Court appeared to prefer the adoption of specific rules to guide law enforcement officers, as well as the courts which evaluate their behavior.[49] The post-Warren Court, on the other hand, has, with a few exceptions,[50] opted for a case-by-case approach which makes the precedential value of any one decision suspect.[51] Depending upon one's perspective, this tendency can be praised because it gives police and courts more flexibility in evaluating the propriety of particular acts and omissions, or criticized because it encourages standardless police conduct and judicial review. In practical terms, the end result of totality of the circumstances analysis has been a relaxation of constitutional restrictions on law enforcement.[52]

A third related theme running through the Court's decisions since the early 1970's is its greater faith in the integrity of the police and other officials who administer the criminal justice system. Whereas the Warren Court saw a need for strict judicial scrutiny of the law enforcement process, the post-Warren Court tends to give government officials wider latitude. Thus, it has frequently been willing to assume that police will act in good faith,[53] and has likewise assumed that magistrates,[54] prosecutors,[55] parole officers,[56] and

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[48] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) (Sixth Amendment violated only if attorney inadequacy deprived defendant of fair trial); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985) (impeachment evidence must be likely to affect the outcome of trial to be "material").

[49] See e.g., *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) (requiring specific warnings before custodial interrogation); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969) (adopting "armspan" rule for scope of search incident).

[50] See *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467 (1973) (permitting search incident to arrest for all crimes); *Maryland v. Shatzer*, 559 U.S. 98, 130 S.Ct. 1213 (2010) (bar on re-initiation of interrogation lasts two weeks).

[51] See *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983) (definition of probable cause); *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568 (1985) (rejecting a time limitation on stops); *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556 (1980) (Fourth Amendment standing analysis); *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977) (admissibility of lineup identifications); Chapter 13 (development of "special needs" balancing test); § 16.03 (emasculation of *Miranda* rule).

[52] See cases cited in previous note.

[53] See e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536 (2001) (police will not abuse authority to conduct custodial arrests for traffic offenses); *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984) (police will not knowingly violate Constitution merely because they think sought-after evidence will be discovered in any event); *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380 (1984) (police will not illegally enter premises to secure evidence pending arrival of a warrant); *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626 (1984) (police will not take advantage of public safety exception to *Miranda* to obtain incriminating statements).

[54] *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984) (magistrates will not rubber stamp warrant requests).

[55] *Connick v. Thompson*, 563 U.S. 51, 131 S.Ct. 1350 (2011) (multiple violations of duty to disclose exculpatory evidence do not demonstrate a predictable "pattern" of unconstitutional violations because prosecutors will generally abide by ethical obligations); *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524 (1985) (minimizing need for judicial supervision of charging process); *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568 (1973) (prosecutor can be counted upon to treat defendant fairly at photo identification in absence of defendant's counsel); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985) (prosecutor can be trusted to disclose to defense counsel information which might be exculpatory).

[56] *Pennsylvania v. Scott*, 524 U.S. 357, 118 S.Ct. 2014 (1998) (it's "unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality").

clerical personnel[57] can be trusted to protect the rights of criminal defendants. It has also granted state correctional officials broad authority in supervising those confined in jail or prison.[58]

The fourth theme underlying many modern Court decisions is a corollary of the third; the Court believes that state judges can be entrusted to enforce federal constitutional rights, with the caveat that when those rights impinge directly upon the question of guilt there should be no obstacle to seeking collateral relief in federal court.[59] Thus, it has prohibited federal habeas courts from announcing "new rules"—that is, rules that are not "dictated" by precedent—unless the habeas claim is one that questions the jurisdictional basis or the accuracy of the state court conviction.[60] And, as noted earlier, when the claim involves the Fourth Amendment, the Court has held that even well-accepted law cannot be applied by habeas courts when the petitioner has received a full and fair opportunity to raise the claim in state court.[61] The Court has also substantially narrowed the Warren Court's decisions governing the ability of those who fail to assert their constitutional claims in state court to assert them for the first time in federal court.[62] Finally, it has repeatedly emphasized and diligently applied the statutory requirement that state court determinations of legal and factual issues relating to federal constitutional claims be accorded a "presumption of correctness."[63] As a result of this "New Federalism," state court decisions are much less likely to be reviewed by the federal courts than in the Warren Court era.

As the substantive and procedural avenues of relief under the federal constitution have been narrowed by the post-Warren Court, two interesting counter-developments have occurred. First, some state courts have found Supreme Court precedent inapplicable in their jurisdictions by interpreting *state* constitutional provisions to provide more protection for criminal defendants.[64] At the same time, some federal courts, also apparently unsympathetic to the higher court's goals, resorted to their "supervisory" authority over the federal system as a means of redressing what they perceived as inappropriate, albeit "constitutional," actions in federal court. For instance, in *United States v. Payner*,[65] a federal district court suppressed evidence despite the defendant's inability to challenge its admission under the Court's standing cases, on the ground that the government had "affirmatively counsel[led] its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties." In *United*

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57 *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185 (1995).

58 *Block v. Rutherford*, 468 U.S. 576, 104 S.Ct. 3227 (1984); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979), discussed in § 20.04.

59 *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639 (1986).

60 *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

61 Congress may have altered this rule, however. See § 33.02(b).

62 See generally, § 33.03(c) & (d).

63 *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000) (an incorrect state court ruling is not unreasonable unless it is *clearly* opposite to a *holding* of the United States Supreme Court); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844 (1985) (applying presumption of correctness with respect to facts); *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843 (1983) (same).

64 For example, between 1970 and 1986, over 150 state court decisions repudiated Supreme Court criminal procedure rulings on independent state grounds. Ronald Collins & Peter Galie, *The Methodology of State Court Decisions*, Nat'l L.J., Sept. 29, 1986, at S-9. See generally, Chapter 34.

65 434 F.Supp. 113 (N.D.Ohio 1977).

States v. Hasting,[66] the Seventh Circuit admitted that a Fifth Amendment error committed by the prosecutor during closing argument was "harmless" under the Court's harmless error doctrine, but nonetheless reversed the conviction in an attempt to penalize the prosecutor's office for committing the error in case after case.

The Supreme Court has responded to both developments. In reaction to the rebellion at the state court level, it held, in *Michigan v. Long*,[67] that a state court decision relying on state constitutional provisions may nonetheless be subject to federal review unless the decision clearly indicates that it is based *solely* on state law. *Long* has meant that some ambiguously reasoned state court rulings have been considered and overturned by the Supreme Court. But it has not stifled state court activism; its "plain statement" requirement is easily met, thus permitting a competent state court to insulate from federal review any decisions that meet the federal minimum and are truly based on independent state grounds.[68] The Court has been more successful in curtailing the activism of lower federal courts. For example, in *Hasting*, it reinstated the conviction and held that local disciplinary action, not reversal, is the correct sanction for repeated prosecutorial error that is deemed harmless.[69] In *Payner*, it disapproved the district court's use of its supervisory power to accomplish something (i.e., suppression) the defendant had no constitutional authority to request.[70] Thus, the current Court appears committed not only to restricting defendants' rights, but also to ensuring, to the limits of its authority, that state and federal courts do not evade those restrictions.[71]

The foregoing is not meant to imply that the post-Warren Court's philosophy has in all respects been diametrically opposed to that of the Warren Court; many Supreme Court decisions since 1970 have reaffirmed the new law announced in the 1960's.[72] The point is that the post-Warren Court is more cautious in asserting the interests of the individual over those of the state in its monitoring of the criminal justice system.

1.03 The Crime Control and Due Process Models of Criminal Procedure

The difference in emphasis between the Warren and post-Warren Courts suggests the diverging approaches that can be taken toward the central problem encountered in the study of criminal procedure: how best to protect the rights and interests of the criminally accused without at the same time unduly inhibiting law enforcement. It is interesting to view the dichotomy between the two Courts against the backdrop of

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66 660 F.2d 301 (7th Cir. 1981).

67 463 U.S. 1032, 103 S.Ct. 3469 (1983).

68 See § 34.02(c) for examples of state court decisions repudiating Supreme Court standards.

69 461 U.S. 499, 103 S.Ct. 1974 (1983).

70 447 U.S. 727, 100 S.Ct. 2439 (1980).

71 See also *Virginia v. Moore*, 553 U.S. 164, 128 S.Ct. 1598 (2008) (arrest invalid under state law does not necessarily invalidate ensuing search because state statutes do not define reasonableness under the Fourth Amendment); *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940 (1982) (federal courts hearing state habeas claims "may intervene only to correct wrongs of constitutional dimension," even when failing to intervene would permit prosecutorial misbehavior to "reign unchecked.").

72 See *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326 (2000) (reaffirming *Miranda*). Compare *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643 (1985) with *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394 (1969) (stationhouse detention for fingerprinting on less than probable cause unconstitutional); *Moore v. Illinois*, 434 U.S. 220, 98 S.Ct. 458 (1977) with *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967) (right to counsel at lineups conducted after initial appearance or indictment).

Herbert Packer's study of the criminal process in his book *The Limits of the Criminal Sanction*.[73]

Packer posited two opposing trends in the administration of criminal justice, the Crime Control Model and the Due Process Model. He was careful to point out that neither model necessarily represents the "ideal." Rather each model offers advantages of its own and compromise between the two may often offer the best resolution, depending upon the issue at stake.

The Crime Control Model places a premium on efficiency and quick adjudication. The goal is to convey the guilty as rapidly as possible toward a conviction at trial or, better yet, a guilty plea, while ferreting out those who are unlikely to be offenders. Inherent in this model is what Packer called the "presumption of guilt"—that the person who enters the system is probably *factually* guilty. To ensure that these guilty parties are brought to justice, any limitations placed on law enforcement officials should be motivated solely out of a desire to promote the reliability of the outcome; purely "technical" controls on police behavior are unnecessary and inimical to this model of the criminal process.

The Due Process Model likewise stresses reliability in the accumulation and presentation of evidence but, given the "gross deprivation of liberty" resulting from conviction, mandates a higher degree of accuracy than the Crime Control Model. It assumes that, as Packer described it:

> People are notoriously poor observers of disturbing events . . . confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not).[74]

Thus, those administering the criminal process should be as certain as possible that the information used to convict an individual is accurate.

Beyond this heightened emphasis on reliability is a more global concern that the integrity of the criminal justice system, and therefore the integrity of society as a whole, be preserved. Thus, advocates of the Due Process Model are more willing to hinder the efficiency of the system through prophylactic rules designed to remind law enforcement officials of their duty toward the criminally accused. They are less concerned with letting off the factually guilty if, due to a failure on the part of the state to follow these rules, *legal* guilt has not been established.

Packer hypothesized that the means of implementing these two models are decidedly different:

> Because the Crime Control Model is basically an affirmative model, emphasizing at every turn the existence and exercise of official power, its validating authority is ultimately legislative. . . . Because the Due Process Model is basically a negative model, asserting limits on the nature of official

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[73] Herbert L. Packer, The Limits of the Criminal Sanction, ch. 8.

[74] Id. at 163.

> power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, the law of the Constitution.[75]

This hypothesis is especially interesting given the post-Warren Court's arguably greater deference to the legislative process.[76]

In any event, it should be evident that each of Packer's models has its appealing aspects. Choosing between the two, or arriving at some middle ground, is not an easy task, regardless of whether the judiciary or the legislature makes the ultimate decision.

Dispassionate discussion about the "rights" of criminal defendants is further hindered by the emotionally-charged nature of the subject. Opinions as to what to do with the "criminal element" can vary with the type of crime, the possible outcomes, and the experiences of the opinion-giver himself. One might prefer the full panoply of constitutional safeguards in cases involving minor crimes such as gambling or vagrancy, but tend to opt for the less technical "crime control" approach where a crime of violence is concerned.[77] Conversely, one could reasonably favor greater protections for those individuals most likely to receive the most significant sanctions and be willing to permit relaxed procedures when the consequences of mistake are not significant.[78] Regardless of the crime involved, the person who has been "busted" understandably may take a different view of the process than the student who has just been robbed of his prize record collection. There is no easy way to control for the impact of such personal biases, whether the debate takes place in the classroom, the legislature or the Supreme Court. But it is essential to be aware of the fact that they play a crucial role in the evolution of public policy.

The student of criminal procedure should also be aware of the relatively hidden world of discretion in the criminal process. The police, the prosecutor and the courts all have varying degrees of power to "push" a case or to drop it altogether, depending upon what stage the case has reached. Their decisions can have as much significance for the accused as any opinion delivered by the Supreme Court. A police officer may decide not to report a first offender, a prosecutor may refuse to accept a plea, a judge may divert a case out of the criminal system at a preliminary hearing. Existing statutory and case law may exert little or no influence over such decisions. Yet they are a part of the everyday workings of our criminal justice system.

1.04 The Stages of the Criminal Process

This book cannot hope to convey all of the nuances underlying the everyday operations of the criminal process, especially given the wide variations from state to

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[75] Id. at 173.

[76] Compare *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) (establishing detailed protections during interrogation) with *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673 (1983) (legislative intent determinative as to whether two offenses are the "same offense" for purposes of deciding whether multiple punishment is permissible under double jeopardy clause) and Chief Justice Burger's dissent in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971) (arguing that legislative sanctions should replace the Fourth Amendment exclusionary rule).

[77] See Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 Judicature 214 (1978) (arguing that the rule should at least be eliminated with respect to serious crimes).

[78] This apparently was the premise of the juvenile court movement in its early years, when procedural protections afforded juveniles were minimal given the belief that the consequences of a delinquency adjudication were principally "therapeutic." See Monrad Paulsen & Charles Whitebread, Juvenile Law and Procedure, ch. 1 (1974).

state. Nonetheless, the following outline of what could be called the "Ordinary Model" of the process may prove useful to the student as a preface to the rest of this book.

A typical case normally begins either with a complaint by a private citizen, or when police directly observe what looks like criminal activity. In the former instance, police usually have time to investigate the complaint through questioning of witnesses and examination of physical evidence. If they decide they have enough evidence to establish "probable cause"[79] that a particular individual committed the crime, they will often approach a magistrate and swear out an arrest warrant on the suspected culprit (as well as, perhaps, a search warrant authorizing search of his home). When police observe crime, on the other hand, there is normally no time to secure a warrant. In such cases, if the police have probable cause to believe the individual has committed or is committing a crime, they may arrest him without a warrant; if they do not have probable cause, they may still be able to question him and, if probable cause then develops, arrest him.

During arrest the police may conduct a search of the individual and begin to question him concerning the alleged offense. Soon after arrest, the arrestee is taken to the stationhouse for "booking," which usually involves being fingerprinted and photographed. At this point, when minor charges are involved, the police may release the arrestee on "stationhouse bail." For serious charges, the person usually remains in custody and a more formal interrogation may take place; additionally, the arrestee may be required to participate in a lineup or submit to scientific tests (such as blood tests) if they were not administered in the field, and further searches may also occur.

Fairly soon after arrest and booking (usually within 48 hours) comes the initial appearance in front of a judicial officer (sometimes called an "arraignment on the warrant"). Here the arrestee is informed of the charge (usually written up by the police or prosecutor in the form of a "complaint"), and of his rights to counsel and to remain silent. In many states, if the charges are minor, the magistrate may proceed to try the case at this time as well. In felony cases, if there is no arrest warrant, the magistrate must determine, either at the initial appearance or at a proceeding soon thereafter, whether there is probable cause to detain the individual.[80] If probable cause is found, or there is an arrest warrant, a decision is then made as to whether the arrestee can be released on personal recognizance, subjected to bail conditions, or detained preventively.[81]

In the meantime, the prosecutor formalizes the charges against the arrestee, now more appropriately called the defendant. In some states, the prosecutor need merely file an "information" describing the charges. In other states and the federal system, he must go to a grand jury to obtain an "indictment" stating the charges. In the former jurisdictions, he is usually required to make out a prima facie case on the charges in the information during a preliminary hearing in front of a magistrate. In the latter jurisdictions, he may have to go through the preliminary hearing before he can get to the grand jury.

The Constitution allows the defendant to *demand* counsel only at certain isolated "stages" of the pretrial process such as interrogation or a lineup identification.[82] But in

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[79] This term, explicated in §§ 3.03 & 5.03, is found in the Fourth Amendment.

[80] The Supreme Court so held in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975).

[81] See § 20.03.

[82] See § 31.03.

practice counsel is often appointed as early as the initial appearance. Once appointed, counsel can make several different types of pretrial motions, seeking dismissal of the case, change of venue, suppression of illegally obtained evidence, discovery of evidence, or the implementation of a statutory "speedy trial" right. Many of these motions cannot be made after trial or judgment. Defense counsel may also enter into negotiations with the prosecutor with a view to having his client plead guilty in exchange for a reduction in charges or a lenient sentence recommendation.

Sometime before trial, the defendant is brought before the court that will try him. With misdemeanants, as already noted, this is often the initial appearance. With more serious charges, a separate stage, called the "arraignment on the information" (or indictment) occurs, at which the court informs the defendant of his charges and asks him how he pleads. There are three basic pleas: not guilty, guilty and nolo contendere. If either of the latter two pleas are entered, the court conducts a hearing to ensure the plea is voluntarily and intelligently entered and to discover the terms of any plea agreement that has been reached between the defendant and the prosecution. Roughly 90 percent of all cases that are not dismissed previously by the police or the prosecutor are adjudicated via plea.

If the defendant pleads not guilty, the case is set for trial. In most cases, the defendant is entitled to a jury, which consists of twelve people in federal court and varies from six to twelve in state courts. In jury cases, voir dire of the jury panel is conducted, during which counsel for both sides, using peremptory and "for cause" challenges,[83] attempt to obtain a jury to their liking. Most states also require that notice of an alibi or insanity defense be made prior to or at this time.

At trial, the prosecution bears the burden of proving each element of the crime beyond a reasonable doubt.[84] After the presentation of evidence, with the defendant's case following the state's case, a verdict is reached and sentence imposed. In jury trials, the judge normally imposes sentence after a separate hearing, although some states permit sentencing by the trial jury.

An appeal may be automatic or discretionary, depending upon the level of the original trial court and the type of crime (misdemeanor or felony) involved. For instance, many states provide for automatic appeal from courts "not of record" to a higher court at which a record of the proceedings is kept (and at which the charges will usually be adjudicated *de novo*), but make further appeal to the state supreme court or intermediate appellate court discretionary with that court. An appeal must usually be taken within a specified time limit. If the defendant does appeal, the bail question may again arise. After sentence and appeal, the defendant may also "collaterally" attack the verdict through a writ of habeas corpus or coram nobis.

A major variation on the Ordinary Model described above occurs when the grand jury indictment *precedes* arrest. In these cases, typically involving political corruption or organized crime, the grand jury functions not as a check on charge selection but as an investigatory body. When arrest is predicated on an indictment, there is normally no need for a preliminary hearing other than an initial appearance to set bail, advise the

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[83] Each side receives a limited number of peremptory challenges permitting automatic removal of prospective jurors and an unlimited number of for cause challenges requiring the challenging party to prove potential prejudice toward it. See § 27.04(a).

[84] *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970).

defendant of his rights and appoint counsel, if necessary. No probable cause determination is necessary since the grand jury has already found it exists.

1.05 A Brief Outline of the Book

This book is devoted to examining the legal doctrines which govern the operation of the system described above. The first half of the book (Parts A through D) discusses the constraints the Constitution places on law enforcement officials in their effort to investigate crime. Specifically, it looks at the legal rules governing search and seizure (Part A), state compulsion of self-incriminating information (Part B), identification procedures (Part C), and police attempts to lure—or perhaps "entrap"—individuals into committing crime (Part D). The second half of the book (Parts E through H) examines the adversary system, including the formal stages of the pretrial process (Part E), trial and appeals (Part F), the role of defense counsel during these stages (Part G), and federal habeas review of state court decisions (Part H). In addition to the habeas issue, the last Part covers a second subject having to do with the relationship between the federal and state criminal justice systems—the tendency of state courts, discussed above, to ignore Supreme Court pronouncements and rely on their own constitutions to enforce stricter controls on law enforcement officials.

BIBLIOGRAPHY

Allen, Francis. The Judicial Quest for Penal Justice: The Warren Court and Criminal Cases. 1975 Ill.L.F. 518.

Amar, Akhil. The Constitution and Criminal Procedure: First Principles (1997).

Arenella, Peter. Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies. 72 Geo.L.J. 185 (1984).

Bradley, Craig. Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun? 62 Ind.L.J. 273 (1987).

Chemerinsky, Erwin. The Roberts Court and Criminal Procedure at Age Five. 43 Texas Tech Law Review 13 (2010).

Clayton, Cornell W. and J. Mitchell Pickerell. The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Jurisprudence. 94 Geo.L.J. 1385 (2006).

Damaska, Mirjan. Evidentiary Barriers to Conviction and Two Models of Criminal Procedure. 121 U. Pa.L.Rev. 506 (1972).

Feeley, Malcolm M. Two Models of the Criminal Justice System: An Organizational Perspective. 7 Law and Society Review 407 (1973).

Gizzi, Michael C. and R. Craig Curtis. The Fourth Amendment in Flux: The Roberts Court, Crime Control, and Digital Privacy (2016).

Israel, Jerold H. Criminal Procedure, the Burger Court and the Legacy of the Warren Court. 75 Mich.L.Rev. 1320 (1977).

Kamisar, Yale. The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?) and Police Investigatory Practices. In: The Burger Court: The Counter-Revolution That Wasn't (V. Blasi ed. 1983).

Packer, Herbert. The Limits of the Criminal Sanction, Chap. 8. Stanford: Stanford University Press, 1968.

Saltzburg, Stephen A. Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 Geo.L.J. 151 (1980).

Schulhofer, Stephen J. The Constitution and the Police: Individual Rights and Law Enforcement. 66 Wash. U.L.Q. 11 (1988).

Smith, Stephen F. The Rehnquist Court and Criminal Procedure. 73 Colorado L.Rev. 1337 (2002).

Stuntz, William J. The Uneasy Relationship Between Criminal Procedure and Criminal Justice. 107 Yale L.J. 1 (1997).

Symposium. The Fourteenth Amendment and the Bill of Rights. 18 J. Contemp. Legal Issues 469 (2009).

Whitebread, Charles. The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court. 24 Washburn L.J. 41 (1985).