BUILDING A BETTER CASEBOOK

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Editing a casebook is neither easy nor exciting. It can be tedious, time consuming and rarely as fulfilling as developing one's "brilliant" idea into a law review article. So why do it? The answer has to be to fill a need. If there are books on the market that accomplish what you would like to accomplish as well (or nearly as well) as you could do it, prudence would dictate staying away from the market. As one who, despite giving this advice, has edited casebooks in several different subject areas,[1] it seems appropriate to explain the thinking that inspired one of them: *Criminal Procedure: Cases, Materials, and Questions*.[2]

In creating the predecessor volume to this work, I spoke with representatives of Anderson Publishing Company, an aggressive, innovative, and relatively new to the law school market[3] publishing company.[4] After some negotiation, we agreed that a two-volume work - one on police practices, and one on adjudication - was preferable to one volume.[5] Because I had not taught the adjudication portion of the course for several years, I sought a co-author to primarily work on the adjudication book. Arthur LaFrance of Lewis and Clark Law School graciously agreed to be the primary editor of the adjudication book.[6]

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[1] *See, e.g.*, ARNOLD LOEWY, CRIMINAL LAW: CASES AND MATERIALS (1991); ARNOLD LOEWY & ARTHUR LAFRANCE, CRIMINAL PROCEDURE: ARREST AND INVESTIGATION (1996); ARNOLD LOEWY, CRIMINAL PROCEDURE: CASES, MATERIALS, QUESTIONS (2002); ARNOLD LOEWY, RELIGION AND THE CONSTITUTION: CASES AND MATERIALS (1999); ARNOLD LOEWY, THE FIRST AMENDMENT: CASES AND MATERIALS (1999).

[2] ARNOLD LOEWY, CRIMINAL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (2002).

[3] Although new to the law school market, Anderson has been publishing legal reference books for 115 years. *See* http://www.lexisnexis.com/anderson (last visited Oct. 2, 2003).

[4] Now a subsidiary of Lexis Nexis.

[5] A decision that we later concluded was unwise because of the expense of two volumes and the number of courses that cover both.

[6] *See* ARTHUR LAFRANCE & ARNOLD LOEWY, CRIMINAL PROCEDURE: TRIAL AND

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My primary focus was on police investigation and, on that score, I identified three needs that were not served by the casebooks on the market. First, unsurprisingly, everybody else had the material in the wrong order. I say unsurprisingly because the order is so idiosyncratic that it would be surprising if there weren't substantial disagreement about the order of a casebook. In some ways, however, this is the least important reason to edit a casebook. I say that because one who otherwise likes a book, but disapproves of the order, is always free to simply teach the book in the order she prefers.[7] Consequently, if order of presentation is the only source of dissatisfaction with the casebooks on the market, one should not add to the glut with another contribution.

The other two ingredients missing in most casebooks were precise focus, including constant communication with students, and a size designed to fit the parameters of a three-hour law school course. These, of course, are not things that can be fixed simply by varying the order of the materials.

I. PRECISE FOCUS

Because Criminal Procedure is primarily a Constitutional Law course emanating from decisions of the Supreme Court, it is especially important for the student to focus on the case being studied. Towards that end, I seek to tunnel the student's vision onto that particular case. Consequently, I have eliminated most tangential notes that (1) teach the students collateral concepts, but (2) distract the student's attention from the precise issues of the principle case.

Second, I try not to over-edit a case. Because I believe in the importance of a student's understanding all of the Court's reasoning, it seems counter-productive to edit out a significant portion of it. For the most part, I try to include the more significant dissents and concurrences. Of course, as every editor knows, compromises are inevitable. Nevertheless, my starting point is to include as much of the opinion as I can, consistent with a reasonable-sized casebook.

Third, where space permits, I aim to present a line of cases, rather than to start at the end. For example, in teaching probable cause, I do

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SENTENCING (1994).

[7] Notwithstanding, I do intend to at least try to persuade the reader that my order is the best possible way to teach the material. *See infra* Part III.

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not just teach *Illinois v. Gates.*[8] Rather, I take two classes to teach the concept. On the first day, I cover *Brinegar v. United States,*[9] *Draper v. United States,*[10] and *Spinelli v. United States.*[11] These cases nicely contrast with one another and help set the stage for the second day when I get to *Gates*. In addition to *Gates*, I cover, for comparison, the subsequent case of *Massachusetts v. Upton,*[12] and conclude with its follow-up state counterpart, *Commonwealth v. Upton,*[13] wherein the Supreme Judicial Court of Massachusetts rejected *Gates* and announced that Massachusetts would continue to adhere to pre-*Gates* law. I believe that this gives the students a much better understanding of the probable cause concept, and provides them with the incidental benefit of understanding the full role of states in our Federal system.

Fourth, for the most part, I do not include law review articles in the body of the book. This is not because I view these articles as unimportant. To the contrary, they can be extremely helpful collateral reading for a student seeking to master the material.[14] However, a brief paragraph, or two excerpts, from law review articles in large quantities can distract the student from the focus of the case in the same manner as collateral notes. Thus, with a few exceptions, I have not reproduced law review articles.[15]

Fifth, and perhaps most important, I follow each case with a series of focused questions. In this way, I can grab the students' attention in regard to what really matters about the case. For example, after *Mapp v. Ohio,*[16] I include the following questions:

1. Is there any logic to not *automatically* applying the exclusionary remedy if there has been a violation? Does it make sense to say

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[8] 462 U.S. 213 (1983).

[9] 338 U.S. 160 (1949).

[10] 358 U.S. 307 (1959).

[11] 393 U.S. 410 (1969).

[12] 466 U.S. 727 (1984).

[13] 394 Mass. 363 (1985).

[14] For that reason, I include a glossary of law review articles in the back of the book to direct the student's attention to them.

[15] I did include an outstanding article on *Nix v. Williams.* Phillip E. Johnson, *The Return of the 'Christian Burial Speech' Case*, 32 EMORY L. J. 394 (1983). Another is my article: Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent,* 81 MICH. L. REV. 1229 (1983), which I use to introduce the question of what constitutes a search.

[16] 367 U.S. 643 (1961).

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that the police violated your rights in obtaining evidence, but they can use it anyway?

2. Which of the following factors influenced the Court's decision? A. The exclusionary rule creates a disincentive for the police to conduct unconstitutional searches; B. The exclusionary rule deters unconstitutional searches; C. The exclusionary rule is an inherent right of the victim of an unconstitutional search or seizure; or D. Considerations of judicial integrity compel the exclusionary rule?
3. Which of the factors in question 2 do you find most persuasive?
4. How, if at all, are factors A and B in question 2 different? To the extent that they are different, which one ought to be deemed most significant?
5. Under the exclusionary rule, is it fair to say that "the criminal goes free because the constable has blundered?" Explain.
6. Does the benefit of the exclusionary rule necessarily redound solely to the benefit of criminals? If so, is that a good reason for abandoning it?
7. In an ideal system of jurisprudence, would we have an exclusionary rule? Explain.
8. As you read *United States v. Calandra,*[17] consider whether it would change any of your answers to the preceding questions?

These questions form the basis for about a thirty to thirty-five minute discussion of *Mapp.*[18] For me, the first question hits home. When I first learned about the exclusionary rule,[19] I remembered being shocked that a violation of the Constitution didn't automatically mean exclusion. It was only years later that I learned to understand that the violation of a substantive right (freedom from unreasonable search and seizure) did not automatically carry with it a procedural remedy. This is a good opportunity to teach the difference between a substantive violation (Fourth Amendment) and procedural violation (Fifth Amendment). In my materials, the students have already been

[17] 414 U.S. 338 (1974).

[18] For a discussion of calibration of the material to the time available, *See infra Part II.*

[19] This was in college while *Wolf v. Colorado*, 338 U.S. 25 (1949), was still the law of the land.

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introduced to that concept in *United States v. Verdugo- Urquidez,*[20] but *Mapp* is a good chance to drive the point home.[21]

Questions 2 through 4 obviously constitute the core of the case. One can find language supporting any of the four rationales at different places in the *Mapp* opinion.[22] Although *Calandra* ultimately settled on the deterrence rationale,[23] the Court's interpretation was hardly a necessary reading of *Mapp*. In my view, the disincentive rationale is most attractive. It differs from deterrence in that it is immaterial whether or not empiric evidence suggests factual deterrence. The point is that the law ought not provide an incentive to violate the Constitution. So understood, the disincentive rationale is kind of a cross between deterrence and judicial integrity.

Question 5 is designed to explode the popular Cardozo myth that "[t]he criminal . . . goe[s] free because the constable has blundered."[23] In most cases, *i.e.* all of those in which the officer should not have searched in the first place, the criminal and the Government are in exactly the same place that they would have been had there been no violation–without the evidence. Of course, in those cases in which the search would have been valid with a warrant, the criminal may, but not necessarily will, go free because of the constable's blunder. But, it is important for the student to understand that such is not true in all or even most of the cases.

Question 6 is designed to make the students look at indirect as well as direct benefits. Of course, by definition only one against whom criminal evidence is found can *directly* benefit from the exclusionary rule. However, to the extent that police conduct searches for the purpose of obtaining evidence, untold numbers of innocent people will

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[20] 494 U.S. 259 (1990).

[21] *See generally* Arnold H. Loewy, *Distinguishing Unconstitutionally-Obtained Evidence from Unconstitutionally-Used Evidence*, 87 MICH. L. REV. 907 (1989).

[22] *See* 367 U.S. 643 (1961). A) "[The Exclusionary Rule works] by removing the incentive to disregard it." *Id.* at 656 (quoting Elkins v. United States, 364 U.S. at 217.) B) "The purpose of the exclusionary rule it to deter." *Id.* C) Fourth and Fifth Amendment right to privacy is an "indefeasible right" *id.* at 647 and "[the] use of seized evidence involve[s] a denial of [that] constitutional right" *id.* at 648, making the protection of the Fourth and Fifth Amendments "an empty promise." *Id.* at 660. D) "[The Court's] decisions, founded on reason and truth, gives...to the courts that judicial integrity so necessary in the true administration of justice." *Id.*

[23] 414 U.S. 338 (1974).

[23] Of course, originating in the case of *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

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not be searched by policemen, who would otherwise search them, because the policeman knows that any evidence he finds will be inadmissible. Thus, the exclusionary rule is likely to redound to the benefit of the innocent.[24]

Obviously, one with unlimited time could spend an entire class on question 7. Because real world criminal procedure classes don't have unlimited time, a typical class will need to limit discussion to about five minutes. Still there are a number of points to be made. Do too many criminals go free? If so, does the fault lie with the exclusionary rule or the underlying Fourth Amendment rule? Does strict adherence to the exclusionary rule lead to a restrictive reading of the Fourth Amendment?[25] And, are there alternatives that would work better?

The last question follows a pattern of the casebook that always introduces students to the next case. This is actually part of a larger pattern to communicate with students as much as possible. To the extent that the casebook talks to and directs students, it hopefully will seem more like something with which to interact as opposed to something that just has to be read.

II. MAKING THE CASEBOOK FIT THE COURSE

Ideally, a casebook should be calibrated to a course in two ways. First, the material should be designed to be completed in the number of hours available for most courses.[26] And second, the material for each class should be designed to be taught in a fifty-minute class. Few, if any

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[24] *See* Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966) (NY Police Chief Michael Murphy noted that after *Mapp*, his officers seemed to take the Fourth Amendment more seriously). (Quoted in Yale Kamisar, *Remembering the Old World of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J. L. REFORM 537559 (1990)). *Cf.* Justice Brennan's discussion of Chief Murphy's statements in *U.S. v. Leon*, 468 U.S. 897 954 (1984). *See also* LOEWY, *supra* note 15 at 1266.

[25] *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999).

[26] Of course one could make the choice to provide significantly more material than one can reasonably cover in a course, leaving the individual professors the choice of inclusion and exclusion. Indeed, I opted for that approach in my First Amendment casebook. *See* ARNOLD LOEWY, THE FIRST AMENDMENT: CASES AND MATERIALS (1999). Because I believe that there is a certain core material in Criminal Procedure Investigation, I opted against that approach for this course.

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casebooks appeared to do that. Thus, in preparing my book, I sought to provide a three-hour (forty-two class coursebook) rather than a series of cases and notes presented with no relationship to the time available to teach them.

To do this, it was first necessary to determine the most essential material to be taught. Thereafter, I focused on the length of time necessary to discuss each case. For the most part, each class averages three to five cases per day. This in turn averages about fifteen minutes per case. Obviously, the time varies. *Miranda v. Arizona*[27] gets an entire class to itself. Whereas other classes cover as many as six cases.[28] What remains constant is the attention to timing.

III. KEEPING THINGS IN ORDER

It is not uncommon for casebooks to start with the exclusionary rule and follow with what is a search.[29] In my mind, these questions belong at the end of the study of the Fourth Amendment. Before a student considers what a search is, she ought to know what that means. That is, she ought to know that calling something a search means that the police (perhaps) must have a warrant and (again perhaps) must have probable cause. Similarly, before considering the exclusionary rule, the student should know just what kind of evidence is being excluded.

In my mind, one of the most overlooked exclusionary rule arguments is that the underlying Fourth Amendment rule, rather than the exclusionary rule, kept the evidence out. Obviously, if the student has not studied the underlying Fourth Amendment rules, this concept will be unlikely to occur to her.

I prefer to begin with probable cause (what I call the substantive heart of the Fourth Amendment), move to the need for a warrant (which I consider the procedural heart of the Fourth Amendment), and then turn to the various exceptions: e.g. arrest, automobile, and temporary

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[27] 384 U.S. 436 (1966).

[28] For example the class on the need for a warrant includes *Vale v. Louisiana*, 399 U.S. 30 (1970), *Chambers v. Maroney*, 399 U.S. 42 (1970), *Chadwick v. United States*, 433 U.S. 1 (1977), a portion of *Coolidge v. New Hampshire*, 40 U.S. 443 (1971), *Shadwick v. Tampa*, 407 U.S. 345 (1972), and *Connally v. Georgia*, 429 U.S. 245 (1977).

[29] *See, e.g.*, KAMISAR, LA FAVE, ISRAEL, & KING, MODERN CRIMINAL PROCEDURE (10th ed. 2002).

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detentions. Only then do I turn to what constitutes a seizure,[30] what constitutes a search, and the exclusionary rule.

IV. PREPARING A SECOND EDITION

When it came time for a second edition, Anderson Publishing and I agreed that a one volume book would be more practical than the earlier two volume set.[31] Unfortunately, Arthur LaFrance was unavailable for the new edition. So I chose to prepare the new edition alone. Although I kept the investigation section substantially intact, I chose not to try to duplicate the entire adjudication book because the length would be too much for a single volume. Consequently, I produced a book that can be used for either a three-hour course in investigation or a four-hour course in combined criminal procedure.

One of the great questions for me was how to deal with the burgeoning material of the six years between editions. For example, a large number of automobile cases, necessitating the addition of two additional classes, had emerged during this interim. So how do I eliminate the classes necessary to keep the material teachable in a three-hour course? One thing was to look over the development of cases and decide where I needed to keep the development cases and where I could summarize with an additional note.

In the probable cause cases, I chose to keep the developmental cases described earlier in this essay.[32] However, I did find it necessary to reduce some developmental automobile cases to a note. For example, in the first automobile section of the original book, I referenced back to *Chambers v. Maroney*[33] and set out *Coolidge v. New Hampshire*,[34] *Cardwell v. Lewis*,[35] and *Carney v. California*.[36] In the new edition, I merely set out *Carney*, describing *Coolidge* in a note.[37] I then reduced

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[30] Which I separate from what constitutes a search.

[31] This decision was primarily predicated on the cost of the two-volume set for courses that included both investigation and adjudication in the same course.

[32] *See supra* Part I.

[33] 399 U.S. 42 (1970) (reproduced in an early section on the importance of warrants.)

[34] 403 U.S. 443 (1971).

[35] 417 U.S. 583 (1974).

[36] 471 U.S. 386 (1985).

[37] I didn't find it necessary to describe *Cardwell*.

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two of the leading container-in-a-car cases (*Arkansas v. Sanders*[38] and *Ross v. United States*[39]) to an introductory note, and set out *California v. Acevedo*[40] and the recently decided *Wyoming v. Houghton.*[41] Thus, I was able to cover *Carney, Acevedo,* and *Houghton* in a single class, thereby reducing two classes into one, while adding a new case to the mix.

Obviously, these kinds of choices were necessary throughout. But by making them, I actually reduced the investigation material from forty-two classes to forty-one classes.[42]

V. PROBLEM SOLVING

A final question in casebook preparation is how much, if any, time to spend on problems. Books run the gamut from nothing but problems to never using a problem. I have found that judicious use of problems works best. I basically use two types of problems. One is to construct a hypothetical, usually from an old exam. The other is to present an actual case as a problem.

Use of actual cases works very well in terms of efficiency. In order to keep classes down to size, some cases can be presented as problems thereby obviating the need to spend much time critiquing the Court's reasoning. For example, after *Terry v. Ohio*[43] and *Sibron v. New York,*[44] I present *Minnesota v. Dickerson,*[45] which is an excellent vehicle for a great number of things. Most obviously, it reinforces the limited scope of *Terry* searches. But of equal importance, the case gives the professor an opportunity to show how attitudes have changed regarding the interrelationship of drug dealers and violence during the quarter century between the two cases.

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[38] 442 U.S. 753 (1979).

[39] 456 U.S. 798 (1982).

[40] 500 U.S. 565 (1991).

[41] 526 U.S. 295 (1999).

[42] Although that was partially accomplished by moving *Riverside v. McLaughlin,* 500 U.S. 44 (1991), and *United States v. Salerno,* 481 U.S. 739 (1987), to the adjudication section. At least in my mind it was so moved. Officially the book is an integrated whole. Investigation is not divided from adjudication.

[43] 392 U.S. 1 (1968).

[44] 392 U.S. 40 (1968).

[45] 508 U.S. 366 (1993).

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In editing the second edition, I found that occasionally converting a case that was fully set out in the earlier edition to a problem in the later edition allowed me to set out a newer case in its entirety. For example, in the section on standing to challenge an unlawful search, I reduced *United States v. Payner*[46] to a problem to create room for *Minnesota v. Carter*.[47]

Perhaps my best use of a problem was *Miller v. Fenton*,[48] a Third Circuit case that, by a 2-1 vote, upheld a confession as voluntary. I have reprinted the entire videotaped dialogue, which presents an entire fifty-eight-minute dialogue[49] between a suspect and a police officer, resulting in a confession. Obviously, the result is nowhere near as important as the process by which the students can analyze the factors that support voluntariness *vel non*. This has always been one of the students' favorite problems.

VI. CONCLUSION

Editing a casebook can be rewarding. If nothing else, teaching from your own book can improve the classroom dynamic. It is, however, not a project that should be undertaken unless you have something different to put on the market. For me, the constant interaction with students through introductory communication and focused questions has made the project worthwhile. Having a set of materials that can actually be completed in the allotted hours is also a source of great satisfaction. For those of you who believe that you have something new to add, I encourage you to go build a better casebook.

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[46] 447 U.S. 727 (1980).

[47] 525 U.S. 83 (1998). Similarly, in the section contrasting *Miranda* and *Massiah* I reduced *Moran v. Burbine*, 457 U.S. 412 (1986), to a problem and set out the more recent case of *Texas v. Cobb*, 532 U.S. 162 (2001).

[48] 796 F. 2d 598 (3rd. Cir. 1986).

[49] Right down to the coughs.

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