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CRIMINAL PROCEDURES
Cases, Statutes, and
Executive Materials

*Second
Edition*

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CRIMINAL PROCEDURES

**Cases, Statutes, and
Executive Materials**

Second Edition

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Preface

The American criminal justice system is huge, complex, and varied. Federal, state and local governments together spend around \$150 billion each year on policing, prosecution, trial, and punishment. They employ over 2 million persons in criminal justice activities. In an average year, they make more than 15 million arrests and obtain about 1 million felony convictions. More than 1.4 million people serve time each year in U.S. prisons, another 600,000 are held in jail on any given day, and another 4.6 million are on probation or parole.

Criminal cases are prosecuted by more than 2,400 prosecutors' offices, which employ about 29,000 attorneys and about 50,000 additional staff. Thousands of attorneys work as public defenders or as defense counsel in private practice. Thousands of judges hear cases in trial and appellate courts. Lawyers often find their first jobs in the criminal justice system. Some stay for life.

Criminal procedure is the body of law governing this collection of systems. The law of criminal procedure directs — or at least attempts to direct — the actions of police officers, prosecutors, defense attorneys, judges, and other government officials. Criminal procedure limits the way the government may interact with citizens, suspects, defendants, convicted offenders, and victims.

The federal government, every state government, and many local governments operate criminal justice systems. All spend time, effort, and money each year running and reshaping their systems. There is no one criminal procedure: Each system follows its own set of rules, controlled to different degrees by outside authorities. Procedural rules come from many sources, including constitutions, legislatures, courts, and executive branch agencies. Because the issues of criminal procedure are common and accessible — unlike, say, antitrust law — a wealth of less formal constraints, including community views and the media, also shape procedure. We have titled this casebook "Criminal Procedures" to reflect these multiple layers and sources of law.

The Approach in This Casebook

A criminal procedure casebook must impose some order on the morass of cases, rules, and practices that describe criminal justice systems. One accepted way to make this material accessible for newcomers is to focus on the role of one important institution, the United States Supreme Court, and on one important source of law, the United States Constitution.

Since the days of the Warren Court, starting in 1953, the Supreme Court has influenced criminal justice systems in profound ways. It made the Bill of Rights in the federal Constitution a shaping force for every criminal justice system. The Warren Court made the story of criminal procedure, told from the point of view of the Supreme Court, compelling. The main topics of controversy were police practices: stops, searches, and interrogations. Other decisions of the Court created a basic framework for providing defendants with counsel and for conducting criminal trials. For years, the focus on the Supreme Court's constitutional rulings guided students through the questions that most concerned judges and lawyers.

But the story of this one institution has shown less explanatory power as time passes. The traditional issues on the Court's constitutional criminal procedure docket now occupy less of the attention of judges, attorneys, defendants, victims, and others concerned about criminal justice. Most criminal defendants do not go to trial. Many have no complaints about illegal searches or coerced confessions. These defendants and their lawyers care about pretrial detention, the charges filed, the plea agreements they can reach with the prosecutor, and their sentences.

The central questions have shifted in light of changes in the workload, politics, funding, and structure of criminal justice institutions. For example, the question of *whether* indigent defendants will get counsel has become a question of *what* counsel they will get. New crime-fighting strategies — such as community policing and curfews — and changes in technology raise new questions and place old questions in a new light. For judges, sentencing questions in particular have attained a higher priority: Determining the proper sentence in some systems now requires more time for court personnel than resolution of guilt or innocence.

The U.S. Supreme Court leaves important dimensions of most procedural issues unresolved and thus leaves other institutions free to innovate. They have done so. The issues of current importance in criminal procedure are being shaped in multiple institutions, including state courts, legislatures, and executive branch agencies.

This book adopts a panoramic view of criminal procedure, emphasizing the interaction among, and variety within, criminal justice systems. In our opinion, students in an upper-level course such as criminal procedure can and should move beyond the skills of case synthesis and beyond an ability to appreciate the role of only one institution. Our materials emphasize the following themes and objectives.

- *Procedural variety.* In each area we present competing rules from the federal and state systems. We also occasionally examine procedures from earlier times or from non-U.S. systems. Review of different possible procedural rules encourages critical analysis and helps identify the assumptions held and judgments made in designing each criminal system.
- *Materials from multiple institutions.* In addition to leading U.S. Supreme Court cases, we make extensive use of state high court cases, statutes, rules of procedure, and police and prosecutorial policies, and encourage readers to consider the interactions among multiple institutions. Examining the efforts of

different institutions to achieve similar goals highlights the reality of procedural innovation and reform.

- *Real-world perspective.* We focus on procedures and issues of current importance to defendants, lawyers, courts, legislators, and the public. We devote the most attention to the issues arising in the largest number of cases.
- *Street-level federalism.* Federal law, typically in the form of constitutional decisions by the U.S. Supreme Court, still plays an important role guiding the investigation and prosecution of high-volume street crimes. The interactions of police with citizens and suspects are the workaday setting for issues of criminal justice. The impact of abstract constitutional doctrine on these daily interactions raises important theoretical questions about federal-state relations and interactions among jurisdictions and governmental institutions.
- *Political context.* Materials trace the political environment surrounding different institutions and issues. We explore the impact that public concerns, such as drug trafficking, domestic abuse, and treatment of crime victims, have on procedural rules.
- *Impact of procedures.* We consider the impact that different procedures have on law enforcers, lawyers, courts, communities, defendants, and victims. We emphasize primary materials but include social science studies as well, especially when they have been the basis for procedural reform. This perspective keeps in mind the managerial needs of criminal justice: Any legal rule must apply to multitudes of defendants in overcrowded systems.

By studying the various ways in which state and local systems have answered crucial procedural questions, students become aware of a fuller range of policy alternatives. They form a more complete picture of the complex and interactive workings of the criminal justice system. Our goal in emphasizing the variety within criminal procedure is to train lawyers who know both the current law and how to shape better law down the road.

Conceptual Anchors

Our emphasis on variation does not lead us to survey all 50 states on each issue; this casebook is not a treatise. Rather, the materials highlight the majority and minority views on each topic, as well as the federal view. The major positions on each topic are usually summarized in the first note following the principal materials. Truly distinctive answers to problems are mentioned occasionally as a point of comparison to the leading approach, but the uniqueness of the position is always highlighted.

The book addresses a wide range of U.S. Supreme Court precedents, including the recognized core of essential cases and many of the most recent important Supreme Court decisions. Some U.S. Supreme Court cases are discussed in other sources. State supreme court decisions summarizing and critiquing a U.S. Supreme Court decision, or a line of cases, prove effective teaching tools since the state cases tend to highlight the competing doctrinal positions. State supreme court opinions by and large show less interest in the positions of individual justices than do U.S. Supreme Court decisions and pay less attention to questions about consistency with past decisions. State supreme court opinions often provide provocative factual

settings that show how principles operate in practice. They tend to present succinctly the textual and institutional arguments favoring a procedural requirement, the values furthered by the rules, and their likely effects on police, suspects, and communities. State courts vary by jurisdiction and issue in the extent to which they respect, reject, or sidestep federal constitutional doctrine.

Studying a variety of possible answers to important procedural questions has an unexpected effect: Through criticism and contrast it provides students with a firmer grasp of the federal approach, including current federal constitutional criminal procedure, than does presentation of federal law alone. Students become better equipped to understand what is truly important about the current norms. Short “problems” throughout the book also enable readers to apply and integrate basic concepts.

The state cases appearing in this book take every conceivable position with respect to Supreme Court precedent, ranging from total agreement, to complete rejection, to subtle variations in interpretation and emphasis. For a large number of state cases that focus on state constitutional or statutory questions, the position of the U.S. Supreme Court is simply irrelevant. The case selection does not lean toward decisions merely because they reject the U.S. Supreme Court view — the “new federalism” approach. These materials are not a battle cry for state court independence; they simply reflect the vibrancy of state supreme courts and state law.

The Second Edition

The second edition of this book responds to changes in the field, incorporating emerging themes and major issues. Such themes and issues — the turning points in the law — emerge at least as often from dramatic events outside the courtroom as from blockbuster judicial decisions. Such dramatic and unexpected “drivers” of change in criminal procedure over the five years since the first edition of this book appeared include increasing attention to issues of race, especially the so-called DWB (“driving while black”) stops on American highways, the Rampart scandal in Los Angeles, and the “innocence” projects that have revealed strings of wrongful convictions. This edition records the first legal echoes within domestic criminal procedure of the attacks on September 11, 2001, and the emerging war on terrorism.

We have made changes in every chapter. Some of those changes reflect actual changes in doctrine, while others reflect the advice of teachers and students about cases and materials that worked well in the classroom, and other cases and materials that might be improved. Recent significant U.S. Supreme Court cases appearing in this edition include *Chicago v. Morales*, *Illinois v. Wardlow*, *Indianapolis v. Edmond*, *Bond v. United States*, *Atwater v. City of Lago Vista*, *Kyllo v. United States*, *Alabama v. Shelton*, *United States v. Ruiz*, *Apprendi v. New Jersey*, and *Smith v. Robbins*. Some of these cases, such as *Morales*, wrestle with significant new questions. Others, such as *Shelton*, emphasize the interplay among key actors in the criminal justice system. A few older Supreme Court cases were added, such as *Brinegar v. United States*, because those cases take on new importance in light of post–September 11 events.

The new edition also includes some changes in topics covered. The chapter on forfeiture was removed from the print volume; few teachers said they had time in

their “adjudication” or “survey” courses to teach these materials. An updated version of that chapter is available for teachers who want to use it. The chapters on sentencing and race in sentencing have both been shortened and combined into a single chapter, with the emphatic focus on race still in place. The habeas corpus chapter has been added to this print volume.

The overall goal of these changes is a book that remains fresh and engaging. We note that the product of these changes is a significantly shorter book.

Criminal Procedure Courses

This book covers the full spectrum of procedure, from casual police-citizen interactions to appeals. Part One examines police activities, including stops, investigations, searches, arrests, interrogations, and identifications. This is the heart of the basic criminal procedure course, often labeled the police practices course. It is typically taught in either three or four classroom hours.

Most law schools now offer a second procedure course — often called the bail-to-jail course — which focuses on the regulation of prosecutors, defense counsel, and courts before and during trial. Part Two examines procedural issues before trial, including the provision of defense counsel, and Part Three explores adjudication of guilt through both the most common method (plea bargains) and the most prominent (trials). Sometimes survey or advanced courses include an introduction to the new law of sentencing and the procedures governing appeals and collateral review of convictions. Part Four provides a relatively quick introduction to sentencing and post-conviction review.

The materials throughout this volume address interrelated themes; criminal procedure is a relatively coherent field. It is not necessary, however, to study the materials on police practices before those on adjudication. Within each course, teachers can approach these topics both from a variety of perspectives and from a number of different doctrinal starting points. Students should not be surprised if their professor presents chapters in an order different from what we have used or adds chapters, cases, or other materials to the course.

Procedure, Politics, and Reform

This book reminds readers regularly about the political environment shaping the work of every institutional actor in criminal justice. The materials consider the changing political priorities that make enforcement especially urgent for certain criminal laws — those punishing drug trafficking, environmental crimes, and sexual assault, to name a few. Such high-priority enforcement efforts influence criminal procedure more generally. Terrorism is the newest and saddest law enforcement priority, and we consider the potential impact of new priorities and doctrines aimed at terrorists on domestic criminal procedure and for more typical crimes.

Students who appreciate the handful of basic political struggles that time and again shape procedural debates will be better able to direct changes in the system and to influence decisions in close cases. The struggles center on questions such as these: Do we trust the police? How important is it to treat suspects similarly? Should we explicitly consider the costs of procedures?

The priorities built into this textbook suggest a return to the treatment of criminal procedure as a genuine procedure course, not a course in constitutional adjudication. The constitutional component remains an indispensable part of the course but is not the sum total of criminal procedure.

The return to a fuller conception of criminal procedure offers enormous opportunities to those who study the system and to those who will soon participate in its operation and evolution. When many institutions can shape a legal system, there are many opportunities for change. We hope each student will complete this course with a sense of the drama and the special challenges of each case and of the entire process. We hope each student will leave school ready to create procedures more sound than those that exist today.

Marc Miller
Ron Wright

Mammoth Lakes, California
Winston-Salem, North Carolina
February 2003



Acknowledgments

Creating the second edition of this book powerfully reminded us of how communities make work more fun and make final products better. Our debts extend to our friends and colleagues, our institutions, our students, our teachers, and our families.

Advice from colleagues around the country came at many stages. Special appreciation goes to Doug Berman, Steve Easton, Sandra Guerra Thompson, Alan Michaels, and David Yellen, who offered periodic suggestions as they taught from the book. We have also learned from two extensive published reviews of this book. See Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 *Buff. L. Rev.* 909 (2001), and Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, *J. Crim. L. & Criminology* (Winter 2003).

Some of the teachers who have used this book contacted us on occasion to suggest improvements that should be evident in this volume. They include Frank Bowman, Darryl Brown, Nancy Gertner, Lenese Herbert, Jim Jacobs, Sam Kamin, Tracey Meares, Kenneth Nunn, David Orentlicher, Leonard Orland, Anne Poulin, Sadiz Reza, Natsu Saito, Jonathan Simon, Rick Singer, and Kate Stith. Steve Turner, the director of the Wilsonville, Oregon, public library, helped us find greater clarity throughout the book.

Scholars who provided wise counsel on the first edition still very evident in the revised volume include Albert Alschuler, Akhil Amar, Barbara Babcock, Adolph Dean, Nora Demleitner, George Fisher, Dan Freed, Mark Hall, Mark Harris, Andrew Kull, Gerard Lynch, William Mayton, Alan Palmiter, Aaron Rappaport, Stephen Schulhofer, Charles Shanor, Michael Smith, Charles Weisselberg, Bert Westbrook, and Deborah Young.

We have both been graced with great teachers, all of whom became friends. We can trace in these pages the influence of Norval Morris, Frank Zimring, Edward Levi,

Richard Epstein, Philip Kurland, David Currie, James Boyd White, Owen Fiss, Robert Burt, Peter Schuck, Steven Duke, and Judges Frank Johnson and John Godbold.

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We have made heavy demands on our libraries and technology experts, and owe special thanks on the second edition to Marcia Baker, Terry Gordon, and Will Haines. Bibliographic help with the initial edition came from Deborah Keene, Holliday Osborne, John Perkins, Lori Levy, William Morse, Stuart Myerberg, and Erika Wayne. Radine Robinson and Beverly Marshall have provided steady administrative support: It is a miracle they have not asked to work with faculty other than us.

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Family debts for so consuming a project are hard to recognize in print, and even harder to repay in life. Joanna Wright (age 13), ever the curious one, showed an interest in everything from exclusionary rules to font sizes. Andrew Wright (age 15) asked questions to remind us that justice for real people must be the bottom line for any legal procedure. Owen Miller, who made his appearance on November 22, 2002, as this second edition went to press, has yet to ask many questions, but he already makes it clear that he will. Conversations with our brothers Travis Wright, who is a police officer, and Craig Miller, who for years worked on justice reform projects and now teaches inner-city high school students history and government, helped us remember that criminal procedure rules guide the behavior of people in very different settings. Other family members (especially Alex Miller, Renata Miller, Katy Miller, Denis Wright, Kyung Ah Wright, and the Ohlingers and Mannings) read parts of the manuscript and forgave us the piles of papers and disks at every family gathering.

Our parents have been our teachers, our friends, and our models. Ron's father, Ronald F. Wright, Sr., died when Ron was a law student, but his energy and optimism pervade this book. Marc's father, Howard, for many years a law professor, provided steady advice from beginning to end. Our mothers, Marian and Shirley, showed a confidence that kept our destination in mind when work seemed nothing but roads.

This book sits between covers only because of the daily encouragement and advice of Amy Wright and Christina Cutshaw. Putting up with writing projects is not part of the wedding vows; perhaps it should be.

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