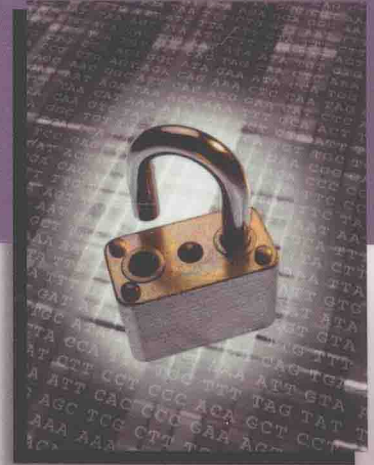


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Criminal Procedures

Prosecution and Adjudication

*Cases, Statutes,
and Executive Materials*



FIFTH EDITION

Marc L. Miller Ronald F. Wright



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CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION

**Cases, Statutes, and
Executive Materials**

Fifth Edition

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PROSECUTION AND ADJUDICATION**

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Preface

The American criminal justice system is huge, complex, and varied. Federal, state, and local governments together spend over \$200 billion each year on policing, prosecution, trial, and punishment. About 2.2 million persons are incarcerated in federal and state prisons, and state and local jails, in the United States at any one time. Another 4.8 million are on probation or parole.

There are almost 18,000 separate police agencies in the United States, with around 800,000 sworn officers. There are even more “private police” and security agents than sworn officers. In an average year, these officers and agents make more than 14 million arrests.

Criminal cases are prosecuted by more than 2,400 prosecutors’ offices, employing about 35,000 attorneys and more than 50,000 additional staff. They obtain about 1 million felony convictions every year, and even more misdemeanor convictions. 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. They all spend time, effort, and money each year running and reshaping their systems. Although the federal system is one of the largest systems standing alone, the state and local systems collectively are much larger. Virtually all misdemeanors are processed in state courts, along with almost

95 percent of all felony convictions. Criminal justice in the United States is overwhelmingly a state and local function.

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 or international 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 characterize 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 offered less explanatory power over time. Traditional issues on the Court’s constitutional criminal procedure docket now occupy less of the attention of judges, attorneys, defendants, victims, and others concerned with 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. For judges, sentencing questions in particular have attained higher priority: Determining the proper sentence in some systems now requires more time from 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 well beyond the skills of case synthesis and develop the ability to appreciate the role of multiple institutions. 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. Reviewing different possible procedural rules encourages critical analysis and helps identify the assumptions held and judgments made in the design of 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 we 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, and to those issues now shaping criminal justice.
- *Street-level federalism.* Federal law, typically in the form of constitutional decisions by the U.S. Supreme Court, still plays an important role in guiding the investigation and prosecution of high-volume street crimes. The interactions of police with citizens and suspects form 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 on procedural rules of public concerns such as terrorism, drug trafficking, domestic abuse, race and wealth disparities, and treatment of crime victims. Funding decisions with regard to criminal justice systems also offer a window into the political setting.
- *Impact of procedures.* We consider the effects 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. We encourage an experimental perspective on the justice system and proposed reforms. This perspective keeps in mind the managerial needs of criminal justice: Any legal rule must apply to multitudes of defendants in overcrowded systems. It also focuses our attention on the social goals of criminal justice systems.

By studying the various ways in which state and local systems have answered crucial procedural questions, students become aware of a broader 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 produce lawyers who know both the current law and the way to shape better law down the road.

Conceptual Anchors

Our emphasis on variety does not mean that we will survey the practices of 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 a 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 with the leading approach and to illuminate alternatives, but we always highlight the uniqueness of the position.

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 decisions. State supreme court decisions summarizing and critiquing a U.S. Supreme Court decision, or a line of cases, represent 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 devote less attention to questions about consistency with past decisions. State supreme court opinions often provide provocative 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.

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. We believe students emerge from this book better able to represent clients, and to pass course and bar examinations. 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, and encompassing 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 favor 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 Fifth Edition

The fifth edition of this book is a response to changes in the field, incorporating emerging themes and major issues. Such themes and issues—the turning points in the law—result 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 years since the first edition of this book appeared include increasing attention to issues of race. For more than a decade there has been public and institutional debate about so-called DWB (driving while black) stops on American highways. The many “innocence” projects have revealed

strings of wrongful convictions. Those wrongful convictions have reframed legal debates about eyewitness identification procedures and about enforcement of prosecutor discovery obligations. The terrorist attacks in New York City and Washington, D.C. on September 11, 2001 produced legal ripples within domestic criminal procedure that are visible to this day. Changing public attitudes about criminal enforcement of marijuana laws have prompted some fascinating prosecutor office policies on declinations in those cases.

The fifth edition also explores police–community relations and the use of force by police that fueled protests in Ferguson, Missouri after the August 2014 shooting of Michael Brown, and the death in Staten Island, New York of Eric Garner in July of 2014. Both cases provoked national debate over the use of force, police rules and practices, the transfer of military equipment and practices to local police, the dramatic increase in the use of body-worn cameras by police, the pervasive impact of cell phones to record police–citizen interactions, and the role and practice of grand juries in assessing and charging (or failing to charge) high profile criminal cases.

We have made changes in every chapter. Some of those changes reflect actual shifts in doctrine, while others are the result of suggestions by teachers and students about cases and materials that worked well in the classroom, and others that might be improved.

Our attention to developments in the states provides a large pool of new cases, statutes, and rules to draw from, keeping the discussion anchored to current reality in criminal justice. For example, most of the cases in this book were decided after 2000. Recent federal developments also find their place in these pages. Significant U.S. Supreme Court cases added to this edition include *Lafler v. Cooper*, *Connick v. Thompson*, *Missouri v. Frye*, *Michigan v. Bryant*, *Hammon v. Indiana*, *Alleyne v. United States*, and *Miller v. Alabama*.

The overall goal of these changes has been to produce a book that remains fresh and engaging while retaining those materials that work especially well in the classroom.

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, immigration and related offenses, and sexual assault, to name a few. Such high-priority enforcement efforts influence criminal procedure more generally. Terrorism has gone from being the newest and most tragic law enforcement priority to a pervasive background theme, and we consider the potential impact of new approaches and doctrines aimed at terrorists on domestic criminal procedure and the implications for more typical crimes.

The theme of jurisdictional and institutional variation draws critical attention to the role of states, whose systems handle almost 95 percent of the felonies prosecuted in the United States. But while the federal and state systems are the most appropriate levels at which to consider constitutional and statutory constraints, the local level is the true locus of criminal justice power. It is also the place where crim-

inal justice systems in the United States engage most citizens. There are roughly 3,000 counties in the United States, including 254 in Texas and 168 in Georgia.

The local foundations of discretionary power in U.S. criminal justice systems are reflected in the funding for those systems. Just over half of all criminal justice funding comes from the local level, just over 30 percent from the state level, and just under 20 percent from the federal level. But funding is not spread evenly across system components. Police services are primarily funded at the local level, prisons are funded at the state level, and the costs of prosecution and adjudication are funded primarily at both the local and state levels. There has been much legal and public debate over the 30-year expansion in the federal prosecution of what traditionally would have been local drug offenses; today, immigration and drug crimes dominate the federal criminal docket, although the federal courts do continue to handle traditional areas of federal interest such as bank robbery and large-scale fraud.

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: What are the purposes of the criminal justice system? In particular, what is the relevance of criminal law and procedure to the social goals of crime control and prevention? How does the theory and practice of federalism inform criminal justice theory and practice? Can we trust the police? How vital is the adversary system and the role of defense counsel to the success of that system? Are we comfortable with the broad discretion exercised on a daily basis by police and prosecutors? How important is it to treat suspects similarly? Should we explicitly consider the costs of procedures?

The priorities inherent in this textbook suggest a return to the study 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 are able to shape a legal system, there are many opportunities for change. We hope each student will leave 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 finish school ready to create procedures more sound than those that exist today.

Marc Miller
Ron Wright

Tucson, Arizona
Winston-Salem, North Carolina
January 2015



Acknowledgments

Creating a new 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.

Some of the teachers who use this book have suggested improvements over the years. They include Raquel Aldana, Tom Alongi, Laura Appleman, Valena Beety, Doug Berman, Stephanos Bibas, Frank Bowman, Irus Braverman, Darryl Brown, Jenny Carroll, Steve Chanenson, Jack Chin, Jennifer Collins, Phyllis Crocker, Deborah Denno, Steve Easton, Nancy Gertner, Aya Gruber, Rachel Harmon, Jeanne Hauch, Thaddeus Hoffmeister, Jim Jacobs, Sam Kamin, Elizabeth Ludwin King, Tamara Lave, Kay Levine, Margaret Lewis, Wayne Logan, Dan Markel, William Marsh, Daniel McConkie, Tracey Meares, Alan Michaels, Tommy Miller, Janet Moore, Kenneth Nunn, Mark Rabil, Song Richardson, Anna Roberts, Jenny Roberts, Siera Russell, Jason Sabio, Laurie Serafino, Kami Simmons, Jonathan Simon, Shandrea Solomon, Kate Stith, Paul Stokstad, Andrew Taslitz, Sandra Guerra Thompson, Dean Valore, Ozan Varol, Robert Wagner, Jonathan Witmer-Rich, David Yellen, Tung Yin, and Stewart Young. It is a great joy for us as editors to learn from them what is happening in classrooms all over the world.

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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*, 93 *J. Crim. L. & Criminology* 789 (2003).

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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Family debts for so consuming a project are hard to recognize in print, and even harder to repay in life. When we spent five years creating the first edition of this book, our children were young, or not yet on the scene. As a kid Joanna Wright, ever the curious one, showed an interest in everything from exclusionary rules to font sizes. Now she is a public health expert in Florida. As a young man Andrew Wright kept reminding us that justice for real people must be the bottom line for

any legal procedure. He is now a teacher. Owen Miller (age 12) continues to be full of questions about everything. Evelyn Miller (now 8) has become interested in reading books with so many words and so few pictures, including parent-approved parts of this one. Wyatt Miller (6) has joined the family conversations about the larger world and society. 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, 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, Karen Morales, Andres Ezequiel Wright Morales, Hunter Clasen, Leo Clasen, Kyung Ah Wright, and the Ohlingers and Mannings) read parts of the manuscript and forgave us for the piles of papers and disks at every family gathering. Tragically, Denis Wright passed away last year. We must imagine as best we can, going forward, what that kind and brilliant skeptic of all government power would have to say about each subject in this book.

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 helped us keep 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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