





# **CRIMINAL PROCEDURES— PROSECUTION AND ADJUDICATION**

**Cases, Statutes, and  
Executive Materials**

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# *Preface*

The American criminal justice system is huge, complex, and varied. Federal, state, and local governments together spend nearly \$100 billion each year on policing, prosecution, trial, and punishment. They employ about 2 million persons in criminal justice activities. In an average year, they make more than 14 million arrests and obtain about 1 million felony convictions. More than 1 million people serve time each year in U.S. prisons, another half million are held in jail on any given day, and another 3.5 million people are on probation or parole.

Criminal cases are prosecuted by more than 2,300 state prosecutors' offices, which employ about 25,000 attorneys and about 40,000 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 has 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 has 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. These defendants and their lawyers care about pretrial detention, the charges filed, the plea agreement they can reach with the prosecutor, their sentences, and possible forfeiture of assets.

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 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 inno-

vate. 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 analysis 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.* 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 process topics.* We focus on procedures and issues of current importance to defendants, lawyers, courts, legislators, and the public. To the extent possible, we devote the most attention to the issues arising in the largest number of cases.
- *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 that 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

The attention to variation does not lead us to survey all 50 states on each issue. A textbook is not, and should not be, a treatise. Rather, the materials highlight the majority and minority views on each topic, as well as the federal view. Almost every important issue reveals sharp divisions. 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. 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.

Studying a variety of possible answers to important procedural questions thus has an unexpected effect: Through criticism and contrast it provides students with a firmer grasp of the federal approach than if only the federal law had been presented. 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. 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 “Bail to Jail” Course

This volume surveys the laws and practices at work between the time a person is charged and the time when the courts finally resolve the offender’s conviction and sentence. The upper-level law school course

devoted to these subjects sometimes goes by the shorthand name “bail to jail.”

Most of the major themes in this volume revolve around prosecutors. (In contrast, the police are the principal institutional focus of most introductory criminal procedure courses.) We consider the broad power of prosecutors in selecting and resolving criminal charges, the power and responsibility of supervising prosecutors to structure the work of line prosecutors, and the centrality of plea bargaining rather than trials in resolving charges. Other topics in this volume that highlight the important role of prosecutors include the interconnections between plea bargaining and sentencing rules and the ongoing influence of racial differences in criminal adjudication.

These materials also devote attention to the capacity of *detailed* procedural rules to achieve justice (as opposed to the use of more generalized standards typical in situations involving the work of police). One of the definitive features of the criminal process from the point of charging onward is that lawyers — prosecutors, defense lawyers, and judges — operate the system. Lawyers may use rules to constrain one another in ways they cannot constrain nonlawyers.

The materials in this book are animated by an essential tension between justice and efficiency. A basic sense of justice, regardless of the consequences, influences how people are treated when they are charged but not yet tried, how guilt or innocence are decided, and ultimately how offenders are punished. At the same time, many criminal justice systems in this country process huge numbers of cases, and administrative needs cannot be ignored.

Criminal procedure is a relatively coherent field. It is not necessary, however, to study the materials in a particular order. Within the adjudications course (as with the introductory course devoted to investigations and police practices), teachers can approach the major topics from a variety of perspectives and starting points. Students using this volume should not be surprised if their professor presents chapters in a different order from the way they appear in the book 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 and sexual assault, to name a few. Such high-priority enforcement efforts influence criminal procedure more generally.

One central question concerns the relationship of any procedural rule to the oft-stated goal of crime control. Which procedural rules, if any,



have the capacity to affect crime rates? And if procedural rules do not generally have any impact on crime rates, then what other goals should serve as the touchstone for developing sound procedures?

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 procedural developments sparking 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.

Mammoth Lakes, California  
Winston-Salem, North Carolina  
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Marc Miller  
Ron Wright



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