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The Real-World Shift in Criminal Procedure

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BOOK REVIEW

THE REAL-WORLD SHIFT IN CRIMINAL PROCEDURE

STEPHANOS BIBAS*

RONALD JAY ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMAN, & DEBRA A. LIVINGSTON, *COMPREHENSIVE CRIMINAL PROCEDURE*. (NEW YORK: ASPEN LAW & BUSINESS, 2001). PP. XXXII, 1598.

MARC L. MILLER & RONALD F. WRIGHT. *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS*, (NEW YORK: ASPEN LAW & BUSINESS, 2001). PP. LI, 1866.

For four decades, criminal procedure scholars have focused on federal constitutional rulings by the Supreme Court.¹ These scholars have emphasized the Warren Court's creation of new federal constitutional procedures for defendants and the pendulum-swing back towards prosecutors under the Burger and Rehnquist Courts.² The main actors in this drama were appellate judges, retrospectively reviewing convictions after jury trials. Scholars have emphasized

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¹ For the sake of brevity, this review refers to the Supreme Court of the United States as the "Supreme Court."

² See Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 195 (1983) (arguing that the two courts' approaches were not as far apart as most commentators supposed).

Supreme Court constitutional rulings on the exclusionary rule and *Miranda* warnings, which pitted probative evidence in court against federal constitutional rights. Many articles still volley back and forth over the latest major Supreme Court decision on *Miranda*, *United States v. Dickerson*.³

This focus on Supreme Court doctrine continues to rule criminal procedure, in both scholarly articles and casebooks. But a shift is afoot. In the last few years, a competing school of thought has begun to challenge the reigning view. A new, younger breed of scholars has emerged, focused much more on how these abstract rules play out in the real world. Scholars are writing about criminal-procedure topics such as politics⁴ and race⁵ that do not fit comfortably within the traditional doctrinal approach. Recent major articles have addressed charging decisions,⁶ plea bargaining,⁷ and sentencing,⁸ topics that

³ 530 U.S. 428 (2000) (holding that 18 U.S.C. § 3501 could not abrogate *Miranda*'s constitutionally based requirement of pre-interrogation warnings); *Miranda v. Arizona*, 384 U.S. 436 (1966). *Dickerson* and *Miranda* are considered so central to criminal procedure, even thirty-five years after *Miranda* was handed down, that last year the *Michigan Law Review* dedicated an all-star symposium issue, comprising six distinct panels, to evaluating *Dickerson*. See Symposium, *Miranda After Dickerson: The Future Concession of Law*, 99 MICH. L. REV. 879 (2001) (comprising contributions by Paul Cassell, Yale Kamisar, Susan Klein, Richard Leo, Laurie Magid, Stephen Schulhofer, David Strauss, William Stuntz, George Thomas, Charles Weisselberg, and Welsh White). Leading criminal procedure scholars continue to publish on the same topic. Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1 (2001); Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L. J. 287 (2001); Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIMINOLOGY 567 (2001).

⁴ The leading scholar on this issue has been William Stuntz. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

⁵ RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis in Criminal Procedure*, 86 GEO. L.J. 1153 (1998); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

⁶ Marc L. Miller & Ronald F. Wright, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 1 (forthcoming 2002).

⁷ *Id.*; Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty-Pleas*, 110 YALE L.J. 1097 (2001); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

⁸ Symposium, *Legal Issues and Sociological Consequences of the Federal Sentencing Guidelines*, 87 IOWA L. REV. 357 (2002); Symposium, *Sentencing Symposium*, 44 ST. LOUIS

traditionally have drawn less attention than have jury trials.⁹ A few more articles consider state law, not just the United States Constitution.¹⁰ And scholars are paying more attention to other actors in the process—not just juries and appellate judges, but also police,¹¹ prosecutors,¹² and informants.¹³ (By “real world,” then, I do not mean the dry approach of a how-to manual. Rather, I mean the myriad sources of law, procedural variants, actors, incentives, and political and social forces that shape, constrain, and contextualize doctrine.) The literature is still dominated by doctrinal analyses of

U. L.J. 269 (2000); Symposium, *The Federal Sentencing Guidelines Ten Years Later*, 91 NW. U. L. REV. 1231 (1997); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001). Indeed, the *Federal Sentencing Reporter* has evolved from a mere reporter of sentencing-related cases into a serious and often scholarly examination of sentencing law.

⁹ See Bibas, *supra* note 7, at 1149-50 & nn.327, 328 (noting that between 1990 and 2000, law reviews published ten times as many articles about criminal jury trials as about guilty pleas or plea bargaining, even though there are twenty-four times as many guilty pleas). Of course, there were some classic earlier articles on plea bargaining, for example, by such distinguished scholars as Albert Alschuler, Judge Frank Easterbrook, and Stephen Schulhofer. See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932-33 (1983); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059 (1976); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308-09 (1983); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988). Though this literature exists, my point is that it is much less copious than the literature on jury trials, even though numerically jury trials are much less important.

¹⁰ Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425 (2000); Miller & Wright, *supra* note 6 (examining New Orleans' charging and plea-bargaining system in detail).

¹¹ For several recent, prominent examples, see Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

¹² Several prominent examples include Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997).

¹³ Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 CARDOZO L. REV. 747 (2002).

Supreme Court case law and discussions of juries, but the real-world approach is coming into its own.

This coming real-world shift, however, has been slow to hit the classroom. Many professors came of age around the shift from the Warren to Burger Courts and have been shaped by these Courts' doctrinal changes. They are used to teaching criminal procedure as federal constitutional law. Besides, students find it simpler to focus on a single source of law. Professors are more familiar with teaching from case law than from police manuals, prosecutorial guidelines, and social-science literature. Many professors never practiced criminal law or practiced long ago, before the era of guidelines sentencing and other recent developments. Furthermore, bar examiners routinely build criminal procedure questions around Supreme Court doctrine. Most importantly, perhaps, many have invested years in teaching out of criminal procedure casebooks that reflect the traditional emphasis on Supreme Court doctrine. Until recently, no other casebooks existed.

Now, however, a new generation of casebooks is available. Marc Miller and Ronald Wright's book, *Criminal Procedures*, breaks away from Supreme Court doctrine. Instead of treating criminal procedure as a monolith, it looks at the variety of approaches taken by states and even occasionally by foreign countries. It looks beyond case law to emphasize statutes, procedural rules, and police and prosecutorial policies. It heeds the role of politics and race and includes social-science material that discusses the real-world impacts of procedures. And it explores these real-world materials and issues through classroom problems and drafting exercises, not just traditional Socratic exploration of case law.¹⁴

Just last year, four leading scholars came out with another casebook along similar lines. Ronald Allen, William Stuntz, Joseph Hoffman, and Debra Livingston's book is entitled *Comprehensive*

¹⁴ MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* xliii, 451-548, 1723-78 (1998) [hereinafter MILLER & WRIGHT]; MARC L. MILLER & RONALD F. WRIGHT, *2002 SUPPLEMENT: CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* (2002) [hereinafter MILLER & WRIGHT 2002 SUPPLEMENT]. This complete textbook is hardcover, but its contents are also available in two less-expensive paperback editions. One contains the materials on police investigation and the second contains the materials on prosecution and adjudication, together with an extra chapter on habeas corpus and collateral attack. MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES—THE POLICE: CASES, STATUTES, AND EXECUTIVE MATERIALS* (1999); MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES—PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS* (1999).

Criminal Procedure. Their book emphasizes Supreme Court cases, but it goes well beyond doctrine to consider policy and practice. Like Miller & Wright, they devote chapters to topics that traditionally get short shrift: charging, guilty pleas and bargains, and sentencing. And, like Miller & Wright, they are sensitive to real-world considerations, including the roles played by politics, race, drugs, and money.¹⁵

These new, real-world casebooks reflect the important shift that is underway in criminal procedure more generally. This review explores the shift in criminal procedure by comparing Miller & Wright and Allen et al.'s real-world casebooks with the more traditional casebooks that focus on Supreme Court doctrine. The traditional doctrinal casebooks still dominate the market: Kamisar et al. is used by fifty-six professors, White & Tomkovicz by forty, Cohen & Hall by thirty-eight, Saltzburg & Capra by thirty-seven, and Dressler & Thomas by thirty-four.¹⁶ In contrast, Allen et al. is used

¹⁵ RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE xxv-xxvi, 3-70, 911-982, 1031-1132, 1287-1352 (2001) [hereinafter ALLEN ET AL.]; RONALD J. ALLEN ET AL., 2002 SUPPLEMENT: COMPREHENSIVE CRIMINAL PROCEDURE (2002) [hereinafter ALLEN ET AL. 2002 SUPPLEMENT].

¹⁶ NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS CASES AND MATERIALS (2d ed. 2000) [hereinafter COHEN & HALL]; NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS CASES AND MATERIALS SECOND EDITION 2002 SUPPLEMENT (2002) [hereinafter COHEN & HALL 2002 SUPPLEMENT]; JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES (1999) [hereinafter DRESSLER & THOMAS]; JOSHUA DRESSLER & GEORGE C. THOMAS, III, 2002 SUPPLEMENT: CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES (2002) [hereinafter DRESSLER & THOMAS 2002 SUPPLEMENT]; YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS (10th ed. 2002); YALE KAMISAR ET AL., 2002 SUPPLEMENT TO TENTH EDITIONS: MODERN CRIMINAL PROCEDURE—BASIC CRIMINAL PROCEDURE—ADVANCED CRIMINAL PROCEDURE (2002) [hereinafter KAMISAR ET AL., 2002 SUPPLEMENT]; STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY (6th ed. 2000) [hereinafter SALTZBURG & CAPRA]; STEPHEN A. SALTZBURG & DANIEL J. CAPRA, 2002 SUPPLEMENT TO AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY SIXTH EDITION (2002) [hereinafter SALTZBURG & CAPRA 2002 SUPPLEMENT]; WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF (4th ed. 2001); WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF (FOURTH EDITION) 2002 UPDATE (2002) [hereinafter WHITE & TOMKOVICZ 2002 SUPPLEMENT]. The information on adoptions comes from e-mail from Katherine E. Freije, Account Manager, West Legal Education Group to Stephanos Bibas, Associate Professor, University of Iowa College of Law (June 3, 2002, 15:21:57) (on file with the author); e-mail from Jodie R. Humphreys, Esq., Central Region Representative, Lexis-Nexis Law School Publishing to Stephanos Bibas, Associate Professor, University of Iowa College of Law (June 4, 2002, 20:34:37) (on file with the author).

by thirty-five professors and Miller & Wright by thirty-four.¹⁷ The real-world books have grabbed a substantial fraction of the market in the last few years, but theirs remains a minority approach.

What I hope to show is that this nascent shift is of huge significance and is welcome. It promises to expand criminal procedure beyond ivory-tower constitutional law to focus on the real-world impact that millions of citizens feel every year. This shift is important not only for students, but for the professors who teach them. Scholarship often builds on classroom topics and insights, and the shift in teaching will reinforce the fruitful new direction in which scholarship is headed. This review explores how the various innovations of the real-world casebooks advance the field past the old debates over the Warren Court. It not only contrasts the old books with the new, but also explains the significance of each shift for teaching and scholarship more generally. This shift is producing a greater variety of approaches, forcing new teachers and scholars to reflect on these issues. And, though it is more complex to teach and less geared to the bar exam, the real-world approach offers much that the doctrinal approach lacks.

Though the new casebooks and approaches will supplement the old, I am not suggesting that they should supplant them. There is room in academia for a variety of approaches and courses, and this new approach will enrich and diversify the existing mix. Nor do I mean to suggest that casebook contents rigidly determine thought and courses. Professors can and do supplement casebook materials, adding materials and emphasizing perspectives not apparent in the books themselves. My thesis is more modest: The new real-world casebooks stimulate and provoke fruitful thought. They challenge scholars, teachers, and students to confront important issues that we have often overlooked.

Part I considers the significance of looking beyond judges and case law to other actors and sources of law. Part II discusses Miller & Wright's shift of focus from federal law to state law and practice. Part III examines how factors beyond doctrine come into play:

¹⁷ E-mail from Carol McGeehan, Associate Publisher, Aspen Publishing to Stephanos Bibas, Associate Professor, University of Iowa College of Law (July 17, 2002, 16:07:31) (on file with the author); e-mail from Carol McGeehan, Associate Publisher, Aspen Publishing to Stephanos Bibas, Associate Professor, University of Iowa College of Law (July 17, 2002, 16:38:07) (on file with the author); e-mail from Nicole Gauvin, Aspen Publishing to Stephanos Bibas, Associate Professor, University of Iowa College of Law (Sept. 30, 2002, 15:55:16) (on file with the author).

politics, race, and drugs. Part IV then looks at the broadening of focus beyond strictly criminal enforcement to civil and quasi-criminal procedures. These include the use of civil and criminal forfeitures, civil commitment of sex offenders, and gang-loitering ordinances. Part V addresses the real-world shift away from jury trials toward the hugely important issues of charging, plea bargaining, and sentencing. This review concludes with thoughts about the significance of these changes for criminal procedure teaching and scholarship. It draws together the various strands into a manifesto for the new real-world scholarship and an agenda for further research. It ends with thoughts on how much further criminal procedure can go toward reflecting the real world.

I. SOURCES OF LAW BEYOND THE COURTS

The first-year law school curriculum is still in the nineteenth century, the era of the common law. Contracts, torts, and property are common-law subjects, notwithstanding the occasional genuflection toward the Restatements or the Uniform Commercial Code. Criminal law is still predominantly about the common law, though the Model Penal Code does introduce a little bit of statutory interpretation. Even the constitutional law course is really about Supreme Court cases, as it spends little time on history, policy, empirical or textual analysis, or actors other than judges.¹⁸ Civil procedure is about the only first-year course that requires detailed study of rules or a code. A few law schools are experimenting with balancing the first-year curriculum with a statutory or regulatory course.¹⁹ But by and large, entering law students are indoctrinated to think of law as case law.

Most criminal procedure courses extend this tradition into the upper-level curriculum. That is why we call them casebooks; we

¹⁸ Thomas E. Baker and James E. Viator, *Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution*, 76 IOWA L. REV. 739 (1991); Neal E. Devins, Correspondence, *The Stuff of Constitutional Law*, 77 IOWA L. REV. 1795 (1992).

¹⁹ For example, New York University is about to launch a new course that will introduce first-year students to the administrative state. Telephone conversation with Rachel Selinfreund Barkow, Associate Professor, New York University School of Law (July 19, 2002). Columbia has likewise experimented with a first-year course entitled "Foundations of the Regulatory State," and Harvard has experimented with a first-year unit on courts, legislatures, and statutes. Curtis J. Berger, *A Pathway to Curricular Reform*, 39 J. LEGAL EDUC. 547, 548-49 n.5 (1989) (Columbia); Todd D. Rakoff, *The Harvard First-Year Experiment*, 39 J. LEGAL EDUC. 491, 494 tbl. 1, 496 (1989).

think of cases as the paradigmatic instructional materials.²⁰ Traditional doctrinal casebooks focus on reported appellate cases, which retrospectively review criminal convictions that have already occurred at trial. Table 1 summarizes the numbers of cases, statutes, and rules of criminal procedure excerpted by each casebook. I have counted only quotations amounting to a full paragraph or more, thus excluding paraphrases and brief quotations:

Table 1

Number of excerpts of cases, statutes, and procedural rules

	Cases	Statutes	Procedural rules
Doctrinal casebooks			
Cohen & Hall	119	38	84
Dressler & Thomas	259	1	0
Kamisar et al.	343	11	6
Saltzburg & Capra	416	19	15
White & Tomkovicz	154	0	0
Real-world casebooks			
Allen et al.	261	6	6
Miller & Wright	230	130	60

As Table 1 reveals, apart from Cohen & Hall, the traditional casebooks are quite case-heavy. Kamisar et al. excerpt eight times as many cases as statutes and rules combined.²¹ Saltzburg & Capra

²⁰ See Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 593, 623 (1997) (noting that casebooks are the most common instructional texts and are "firmly entrenched," used as the primary text by 86% of professors surveyed).

²¹ KAMISAR ET AL., *supra* note 16; KAMISAR ET AL. 2002 SUPPLEMENT, *supra* note 16. I have counted as statutes nine American Bar Association Standards and have counted as procedural rules, one American Law Institute Model Code provision, three Federal Rules of Criminal Procedure, and two United States Sentencing Guidelines. I have not included in the chart the one Department of Justice policy and one Model Rule of Professional Conduct that are in Kamisar et al. *Id.* at 1364, 1491. Note that Kamisar et al. put out a softbound supplement that includes selected federal statutes and the Federal Rules of Criminal Procedure. These materials, however, are not integrated into the text. KAMISAR ET AL. 2002 SUPPLEMENT, *supra* note 16, Apps. B & C.

excerpt twelve times as many cases as statutes and rules combined.²² White & Tomkovicz and Dressler & Thomas are even more case-centered. Neither book excerpts a single state or federal statute or rule of criminal procedure, though Dressler & Thomas have a single ABA standard.²³ Of course, quantity is not quality, but it is difficult to emphasize statutes and rules without some threshold quantity.²⁴ (Professors can add statutes and rules to their courses by assigning supplemental materials. These supplements, however, do not have the benefit of being integrated into the text and explanatory notes.)

Allen et al. also are heavy on the case law. They do, however, balance it with one hundred and thirty-three secondary articles.²⁵ These articles, and the accompanying teacher's manual, do an

²² SALTZBURG & CAPRA, *supra* note 16; SALTZBURG & CAPRA 2002 SUPPLEMENT, *supra* note 16. I have counted as statutes not only the fourteen federal statutes in Saltzburg and Capra, but also three American Bar Association Standards and two American Law Institute Model Code provisions. I have counted as procedural rules not only four Federal Rules of Criminal Procedure, but also eleven United States Sentencing Guidelines. Note that Saltzburg & Capra's supplement reprints lengthy sections of the Federal Rules of Criminal Procedure and the federal USA Patriot Act but does not integrate these into the text.

²³ DRESSLER & THOMAS, *supra* note 16, at 800-05; WHITE & TOMKOVICZ, *supra* note 16; WHITE & TOMKOVICZ 2002 SUPPLEMENT, *supra* note 16. Note that Dressler's supplement includes appendices that reprint relevant provisions of the United States Constitution, various federal statutes (the Bail Reform Act, Speedy Trial Act, habeas corpus statutes, the Jury Selection and Service Act, and statutes governing admissibility of confessions in federal court), and the Federal Rules of Criminal Procedure. These appendices, however, are not integrated into the text, and so I have not counted them in the chart. DRESSLER & THOMAS 2002 SUPPLEMENT, *supra* note 16, at 125-219.

Perhaps the inclusion of Cohen & Hall and White & Tomkovicz is comparing apples and oranges, as the former focuses on adjudication while the latter is about police investigation. (The other casebooks discussed in this review cover both halves.) Statutes and procedural rules play a greater role in adjudication than investigation, so it is understandable that White & Tomkovicz would have fewer of these and Cohen & Hall would have more. Even so, the disparity is striking.

²⁴ A detailed analysis of the quality and usefulness of each statute and procedural rule is beyond the scope of this limited review. Suffice it to say that excerpts from Federal Rule of Criminal Procedure 11 or a state equivalent would contribute greatly to the teaching of guilty pleas. Likewise, the topic of discovery is closely bound up with Federal Rule of Criminal Procedure 16 and its state equivalents. Though Dressler & Thomas, Kamisar et al., and Saltzburg & Capra have some discussion of these rules and include them in appendices to their supplements, of all the doctrinal casebooks only Cohen & Hall include substantial excerpts from them in the book itself. COHEN & HALL, *supra*, at 351-54 (Rule 16), 421-23 (Rule 11).

²⁵ For example, these articles delve into how plea bargaining is driven by prosecutors' control over sentencing, their desire to minimize their workloads, possibly their incentives to penalize aggressive defense lawyers, and defense counsel's limited resources. ALLEN ET AL., *supra* note 15; ALLEN ET AL. 2001 SUPPLEMENT, *supra* note 15; *infra* part V.

excellent job of highlighting the powers and incentives of non-judicial actors.²⁶

Miller & Wright provide by far the most balanced presentation, with many statutes, procedural rules, and a variety of other sources.²⁷ They make a point, however, of including the landmark Supreme Court cases, such as *Gideon*, *Strickland*, *Mapp*, and *Miranda*.²⁸

Exposure to these other sources of law adds much to the course. It makes students comfortable with the variety of sources of law, instead of reinforcing the first-year bias towards courts.²⁹ It teaches students new interpretive techniques, such as canons of construction and the debates over legislative history. Other sources of law also encourage students to see the world prospectively, instead of just retrospectively reviewing convictions at trial. Going forward, actors are guided by many sources besides cases. Police rely on what they learned from the police academy, training manuals, and police department policies and regulations, as well as statutes. Interrogation manuals may shape police questioning much more than do cases, and reported cases may be unrepresentative of routine questioning methods.³⁰ Prosecutors consider internal prosecutorial policies, procedures, and regulations. Caseloads, win/loss records, and political pressures loom large, especially for elected prosecutors,

²⁶ ALLEN ET AL., *supra* note 15, at 1059-75; RONALD J. ALLEN ET AL., *TEACHER'S MANUAL: COMPREHENSIVE CRIMINAL PROCEDURE* 247-50 (2001) [hereinafter ALLEN ET AL. *TEACHER'S MANUAL*]. I have not counted one ABA Model Rule in the figures in the table.

²⁷ MILLER & WRIGHT, *supra* note 14; MILLER & WRIGHT 2002 SUPPLEMENT, *supra* note 14. This book and supplement also excerpt twenty-six executive materials (police manuals, Department of Justice policies and procedures, and government reports and testimony) and seventy-five secondary sources, including ten social-science articles. This variety is a conscious objective of the authors: "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." MILLER & WRIGHT, *supra*, at xliii.

²⁸ *Strickland v. Washington* 466 U.S. 668 (1984); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); MILLER & WRIGHT, *supra* note 4, at 394, 527, 810, 846.

²⁹ See Sheppard, *supra* note 20, at 621-22 (noting the old complaint that casebooks are biased towards case law and away from legislation and executive materials).

³⁰ See Richard Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 277 (1996) ("[L]aw professors, lawyers, and law students have created a formidable law review literature that focuses almost entirely on the doctrinal and ethical aspects of interrogation and confession case law, rather than on the routine activities of legal actors and institutions. Since traditional legal scholarship is based on an analysis of leading cases—which are unrepresentative of the larger universe of court cases and thus may depict atypical police practices as the norm—this literature is by itself both narrow and misleading." (footnote omitted)).

though little of this shows up in appellate cases. Defendants who are deciding whether to plead guilty or gamble and go to trial care about their likely sentences, not just the case law limiting peremptory challenges. Sentences depend much more on sentencing guidelines, judicial discretion, and prosecutorial tactics than they do on appellate case law. And, as Part V discusses, these other sources of law illuminate issues that are rarely appealed and so do not show up in reported cases.

Statutes, regulations, procedures, policies, and discussion of actors' incentives can shift students' attention away from *ex post* review toward *ex ante* forecasting. This prospective emphasis on incentives and constraints facilitates student role-playing. Teachers can challenge students to tackle problems in class, asking them how prosecutors, defense lawyers, police officers, and defendants would respond to various rules. Miller & Wright facilitate this approach by including plenty of real-world problems and drafting exercises.

Scholars can also see more by looking beyond courts. This trend has already begun but is in its infancy. For example, Dan Richman has shown perceptively that limits on using evidence of defendants' prior crimes will skew prosecutors' selection of cases in unintended ways.³¹ In a similar vein, I have discussed how a criminal procedure could interact with sentencing guidelines to give prosecutors unintended leverage in plea bargaining.³² Once we look past judges and cases, we can better see this kind of *ex ante* impact of other sources of law on other actors' behavior. As these articles showed, courts are often blind to the dynamic effects of their rulings on future behavior. Perhaps a richer scholarship about non-judicial actors and sources of law could teach courts to see these impacts and interactions.³³ Broadening the casebooks that train future professors, judges, and legislators is an important step toward correcting this omission in academia and practice.

³¹ Richman, *supra* note 12.

³² Bibas, *supra* note 7.

³³ Todd Pettys has suggested to me that this new emphasis in scholarship could create a virtuous cycle. Scholars might encourage judges and future judges and law clerks (i.e., students) to delve into these other materials and actors' incentives. These judges and clerks might then draft opinions that incorporate this richer real-world perspective. Casebook authors might then include these opinions, which would provide a more comprehensive perspective on the law and so reduce the need for supplemental commentary.

II. EXPLORING STATE LAW

A second staple of traditional law school curricula is federal law. Though a few first-year courses are primarily about state law, many courses center on federal law. This is especially true in criminal procedure, thanks to the view of the Warren Court as the font of criminal procedure. The combination of emphases on case law and federal law has meant that traditional doctrinal casebooks emphasize the role of the Supreme Court. For example, every case excerpted in *White & Tomkovicz* is from the Supreme Court; I did not find a single excerpt from any state authority.³⁴ All but two of the cases excerpted in *Cohen & Hall* are federal, and most of those are Supreme Court cases.³⁵ With three exceptions, every authority excerpted in *Saltzburg & Capra* is federal, and most of those are Supreme Court cases.³⁶ Almost all of the cases excerpted in *Kamisar et al.* and *Dressler & Thomas* are Supreme Court cases.³⁷ (All of

³⁴ *WHITE & TOMKOVICZ*, *supra* note 16; *see also id.* at v ("The cases presented are limited to those decided by the United States Supreme Court.").

³⁵ *COHEN & HALL*, *supra* note 16; *COHEN & HALL 2002 SUPPLEMENT*, *supra* note 16. This book and supplement, by my count, excerpt ninety-seven Supreme Court cases, twenty other federal cases, two federal constitutional provisions (plus the Declaration of Independence), nineteen federal statutes, eighty Federal Rules of Criminal Procedure, and four tables from the U.S. Sentencing Guidelines. In contrast, they excerpt two state cases, zero state constitutional provisions, zero state procedural rules, eleven state statutes, and one state sentencing guideline. They also excerpt eight secondary articles.

³⁶ *SALTZBURG & CAPRA*, *supra* note 16; *SALTZBURG & CAPRA 2002 SUPPLEMENT*, *supra* note 16. By my count, this book and its supplement excerpt 293 Supreme Court cases, 120 other federal cases, fourteen federal statutes, four Federal Rules of Criminal Procedure, and eleven United States Sentencing Guidelines. They excerpt three state cases, zero state statutes, and zero state procedural rules. They also excerpt two American Law Institute Model Code provisions, three American Bar Association standards, and forty-four secondary articles. The supplement also includes lengthy chunks of the Federal Rules of Criminal Procedure and the federal USA Patriot Act.

³⁷ By my count, the *Dressler & Thomas* book and its most recent supplement excerpt 236 Supreme Court cases, fourteen other federal cases, zero federal statutes, and zero Federal Rules of Criminal Procedure, in contrast with nine state cases, zero state statutes, and zero state procedural rules, as well as one ABA standard. *DRESSLER & THOMAS*, *supra* note 16; *DRESSLER & THOMAS 2002 SUPPLEMENT*, *supra* note 16. This count does not include the lengthy appendices to the 2002 Supplement, which reprint in full various federal statutes and the Federal Rules of Criminal Procedure.

By my count, the *Kamisar et al.* and its most recent supplement excerpt 285 Supreme Court cases, forty-one other federal cases, three Federal Rules of Criminal Procedure, two U.S. Sentencing Guidelines, and one Department of Justice policy, in contrast with seventeen state cases, zero state statutes, and zero state procedural rules. (They also include one ALI Model Code provision, nine ABA standards, one Model Rule of Professional Conduct, and seventy-six secondary articles.) *KAMISAR ET AL.*, *supra* note 16; *KAMISAR ET*

these figures count only quotations amounting to a full paragraph or more, thus excluding paraphrases and brief quotations in the notes.) Allen et al. likewise focus on federal law. Almost all of the cases excerpted are Supreme Court cases, and all statutes and procedural rules are federal as well.³⁸ Some traditional doctrinal casebooks, such as Kamisar et al., go so far as to delve into the views of all of the Supreme Court Justices.³⁹

Federal criminal procedure, however, is only a small sliver of the pie. Roughly 95% of felony cases are disposed of in state court. When one includes misdemeanors and violations, the figure exceeds 99.5%.⁴⁰ States still handle most traditional crimes—murder, rape, robbery, burglary, arson, assault, and battery. True, the U.S. Constitution does in places regulate state criminal procedures. But state constitutions, statutes, procedural rules, cases, and policies often go well beyond the federal minimum.⁴¹ Moreover, criminal justice

AL. 2002 SUPPLEMENT, *supra* note 16. These figures do not include the lengthy appendices to the 2002 Supplement, which reprint the Federal Rules of Criminal Procedure and selected federal statutes.

³⁸ By my count, the Allen et al. book and its most recent supplement excerpt 242 Supreme Court cases, twelve other federal cases, and seven state cases. The book and supplement excerpt six federal statutes and six Federal Rules of Criminal Procedure, compared with zero state statutes or procedural rules. They also excerpt about 133 secondary sources (eighty-two law review articles and fifty-one other articles) ALLEN ET AL., *supra* note 15; ALLEN ET AL. 2002 SUPPLEMENT, *supra* note 15. Two of these articles discuss the role of state courts in protecting defendants' rights. ALLEN ET AL., *supra* note 15, at 67-70.

³⁹ KAMISAR ET AL., *supra* note 16, at v (chart of Justices' dates of service), vii ("[W]e have taken pains to set forth the views of *all* the [Supreme Court] Justices in the leading cases."); see WHITE & TOMKOVICZ, *supra* note 16, at v-vii (noting their effort to preserve all of the Supreme Court Justices' reasoning, including often concurring and dissenting opinions, and containing a chart listing the years of service of each recent Justice of the Supreme Court).

⁴⁰ Compare BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, tbl. 5.16 (2001) (58,718 criminal cases were terminated in federal court in fiscal year 2001, of which about 46,439 were felony cases) with *id.* tbl. 5.40 (there were 927,717 felony convictions in state court in 1998) and COURT STATISTICS PROJECT, NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2001, tbl. 7, at 138 (roughly 13,050,399 criminal cases were disposed of in state trial courts in 2000).

⁴¹ Under the doctrine of independent and adequate state grounds, federal courts cannot review state courts' decisions for defendants based on their interpretations of their own constitutions, even if the state courts also recited separate federal grounds for their decisions. See *Michigan v. Long*, 463 U.S. 1032 (1983). This doctrine recognizes that state law has an important role to play distinct from federal law. It also invites state courts to pronounce clearly doctrines that go beyond federal law if they wish to avoid federal review. Miller &

systems involve many actors besides Supreme Court Justices, including police, prosecutors, defense counsel, defendants, and state courts and legislatures.

Miller & Wright break away from the federal approach to focus on state law. The plural title of their book, *Criminal Procedures*, reflects their commitment to the diversity of state and federal approaches. Roughly 62% of their procedural rules, 72% of their cases, and 82% of their statutes come from states rather than the federal government.⁴² Their approach is clever: they include many state cases that discuss the federal rule before rejecting or following it. These cases effectively consolidate the federal approach and focus on the merits of rules, instead of individual Supreme Court Justices and *stare decisis*.⁴³ Miller & Wright use the first explanatory note on each topic to summarize the federal, majority, and significant minority positions.⁴⁴ The course becomes much less about federal constitutional law and more about the main state variations. The

Wright note the vibrancy of this doctrine and devote a subsection to it. MILLER & WRIGHT, *supra* note 14, at 319-24.

States often take advantage of their leeway to deviate from the federal rule. I counted close to forty doctrines in Miller & Wright for which ten or more states deviate from the federal rule. For example, a majority of states have rejected the Supreme Court's approach and required police to notify suspects if a retained attorney is available. A majority of states define the petty-offense exception to the jury-trial right in ways different from the federal approach. And about half of states forbid preventive detention, even though federal law allows it. MILLER & WRIGHT, *supra* note 14, at 623 (availability of retained attorney), 1386-87 (juries for petty offenses); MILLER & WRIGHT 2001 SUPPLEMENT, *supra* note 14, at 202 (preventive detention).

⁴² By my count, Miller & Wright's book and supplement excerpt sixty-one Supreme Court cases, three other federal cases, twenty-one federal statutes, eight Federal Rules of Criminal Procedure, and fifteen U.S. Sentencing Guidelines, compared with 161 state cases, ninety-seven state statutes, and thirty-seven state rules of criminal procedure. (The book also contains three cases and three statutes from other countries, as well as four Model Code provisions, eight ABA sources, fourteen law review articles, and sixty-one other secondary sources (including thirteen government reports and nineteen internal governmental regulations and policies)). MILLER & WRIGHT, *supra* note 14; MILLER & WRIGHT 2001 SUPPLEMENT, *supra* note 14. This use of state materials is one of their conscious objectives: "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." MILLER & WRIGHT, *supra*, at xliii.

⁴³ MILLER & WRIGHT, *supra* note 14, at xliv.

⁴⁴ *Id.*

point is not to teach the law of one particular state, but to expose students to the main variations out there.

Miller & Wright's approach recognizes that states, not federal courts, are now the prime laboratories of experimentation. It used to be that federal law was the source of progressive innovation. The emphasis on federal law stems from a time when the Warren Court was imposing procedures that went well beyond what states already required. But the Rehnquist Court has trimmed back the Warren Court's rules and rarely creates major new rules. Now, state courts and legislatures are more likely to go beyond federal law. In doing so, they may innovate as the Warren Court once did.⁴⁵ Miller & Wright's use of state-law variations highlights this possibility.

There are some advantages to concentrating on federal law. Students find it easier to learn a single body of law and can be bewildered by a wide panoply of alternatives. It takes careful teaching to keep the majority rule and federal rule clear in students' minds. Also, bar examiners continue to test on the Supreme Court's federal constitutional decisions in this area. These advantages of the traditional approach are significant, but there are countervailing considerations. Most students will practice in firms and areas that require them to deal with at least some state-law issues and would benefit from the exposure. And studying state procedures can teach students to cope with complexity and use it to their advantage. When practicing in a jurisdiction where a legal point is unsettled, students can learn to cite authorities from other jurisdictions that have already decided the issue.

The shift from federal to state law broadens criminal procedure scholarship as well. It reminds us that criminal procedure is much more than a corner of federal constitutional law.⁴⁶ Scholars and students can pay more attention to the variety of state procedures and the ways in which different procedures may serve different local needs.

⁴⁵ See Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Incorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63-66 (1996) (noting that the expansion of federal constitutional rights was premised on the idea that state courts would not protect defendants adequately, but now state courts interpret their own constitutions and laws to provide protections as broad as or broader than those provided by federal law).

⁴⁶ Cf. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 4, at 6 (stating that criminal procedure is constitutional law, but rejecting its conventional but artificial separation from substantive criminal law, sentencing, and the funding of defense counsel).

For example, if one read only the federal discovery statutes and rules, one might think that prosecutors never turn over witnesses' names or prior statements until the eve of trial.⁴⁷ A substantial minority of states, however, require pretrial discovery of prosecution witnesses' names and sometimes even their statements.⁴⁸ Even where the law does not require it, in practice prosecutors may turn over this material somewhat earlier. This diversity of practice can spark discussion of the benefits of full disclosure versus the risks of witness intimidation and fabrication of alibis. Perhaps the answer should vary by state or by type of case: disclosure might be desirable in rural states, but not in states with more organized crime or gangs.

Consider another example. Many commentators have thought that plea bargaining is inevitable.⁴⁹ El Paso and Alaska, however, experimented with bans on plea bargaining.⁵⁰ Perhaps these experiments are models for the rest of the country, or perhaps they show that populous states cannot hope to maintain bans.

To take a third example, most scholars criticize the failings of the U.S. Sentencing Guidelines.⁵¹ This chorus of criticism might lead one to believe that determinate sentencing is clearly a failure. Looking at federal sentencing alone, however, is misleading. Many states, such as Minnesota, have more flexible sentencing guidelines. Examining these state guidelines can illuminate how they are better than the federal guidelines, charting a path for sentencing reform.⁵² Scholars have not entirely neglected these state variations, but more cultivation of state-law vineyards would yield richer fruit.

⁴⁷ FED. R. CRIM. P. 16 (making no provision for discovery of prosecution witnesses' names or statements, except for expert witnesses); 18 U.S.C. § 3500 (forbidding discovery of witness statements in federal prosecutions until the witness has testified on direct examination at trial).

⁴⁸ Good examples include Fla. R. Crim. P. 3.220(b)(1)(A); N.J. Ct. R. 3:13-3.

⁴⁹ The classic statement of this position is MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 157-62 (1978). A few scholars, however, have dissented; the most notable is Stephen Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) (contesting the inevitability of plea bargaining by noting that Philadelphia disposes of many cases via speedy bench trials).

⁵⁰ Teresa Carns & John Kruse, *Alaska's Ban on Plea Bargaining Reevaluated*, 75 JUDICATURE 310 (1992); Robert Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987).

⁵¹ The best and most thorough critique is KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

⁵² Two good treatments of the Minnesota system and its virtues are DALE PARENT, *STRUCTURING CRIMINAL SENTENCES* (1988) and MICHAEL TONRY, *SENTENCING GUIDELINES AND THEIR EFFECTS* (1987).

III. MOVING BEYOND DOCTRINE

A third characteristic of traditional casebooks is their strong emphasis on doctrine, especially constitutional doctrine. The staples of the traditional doctrinal casebook are the definitive Supreme Court cases—*Gideon*, *Mapp*, and *Miranda*,⁵³ but also a host of less-famous cases. As Saltzburg & Capra note: “Like most criminal procedure books, this one places much emphasis on constitutional rules.”⁵⁴ Students are comfortable having a black-letter rule to learn and memorize. They came to law school expecting hard-and-fast rules, and they can fit rules into a neat outline. And professors are used to teaching doctrinal rules and exceptions.

These advantages, however, come at a significant price. Criminal procedure is much more rich and complex than just doctrine. Doctrine forms the skeleton, but a host of other considerations add flesh and give life to that skeleton: politics, race, and drugs, to name a few. Traditional doctrinal casebooks include few materials on race, politics, or drugs, beyond the occasional doctrinal subsection. White & Tomkovicz do not discuss politics or race at all. Their discussion of drugs is limited to brief comments on the Supreme Court’s Fourth Amendment drug cases.⁵⁵ Cohen & Hall do a bit more, spending one page discussing racial and gender disparities. They also include standard doctrinal sections on selective prosecution and discrimination in peremptory challenges, plea bargaining, and the death penalty.⁵⁶ Likewise, Saltzburg & Capra have standard doctrinal sections on the use of race in voir dire, peremptory challenges, selective prosecution, and racial profiles for searches. They also have standard sections on drug-test searches under the Fourth Amendment.⁵⁷ None of these books, however, goes much beyond doctrine. Of the doctrinal casebooks, Kamisar et al.

⁵³ *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁴ SALTZBURG & CAPRA, *supra* note 16, at viii.

⁵⁵ WHITE & TOMKOVICZ, *supra* note 16, at 422-24.

⁵⁶ COHEN & HALL, *supra* note 16, at 4-5, (race and gender disparities in statistics), 37-48 (selective prosecution), 415-16 (plea bargaining), 644-62 (peremptory challenges), 753-54, 770-71 (death penalty).

⁵⁷ SALTZBURG & CAPRA, *supra* note 16, at 189-90 (*Terry* stops), 231-37 (reasonable suspicion to stop a suspect), 258-59 (aggressive police tactics), 290-98 (pretextual stops and equal protection), 368-89 (drug testing), 818-24 (selective prosecution, including a one-page critique noting the influence of unconscious racism), 1104-05 (voir dire), 1120-40 (peremptory challenges); SALTZBURG & CAPRA 2002 SUPPLEMENT, *supra* note 16, at 47-60 (drug testing).

and Dressler & Thomas do the most on race (though they say little about politics and drugs). In addition to the standard doctrinal sections on racial topics, they preface their books with some materials that consider the history and policy implications of race.⁵⁸ With these partial exceptions, none of the doctrinal casebooks considers how politics, race, and drugs influence the actions and attitudes of legislators, police, prosecutors, and citizens.

Politics, however, plays an enormous role in criminal enforcement. Many elected state judges fight campaign battles over their toughness on crime.⁵⁹ Legislators pass myriad new criminal statutes to prove their toughness on crime.⁶⁰ District attorneys, who are often elected, campaign on winning high-profile convictions and favorable win-loss ratios.⁶¹ Legislatures team up with prosecutors to make crimes broad, overlapping, and easier to prove. Prosecutors thus have many bargaining chips and can press most defendants to plead guilty, which saves resources and avoids the risk of losing.⁶²

Even more important than politics is the role of race. A greater percentage of minorities are arrested and convicted and receive harsher sentences than whites. They are also much more likely to be victims of crime. Criminal procedure doctrine, however, pays little attention to race. The Supreme Court has rejected almost all challenges to facially neutral criminal procedures that result in large

⁵⁸ DRESSLER & THOMAS, *supra* note 16, at 1-22 (overview of race in criminal justice), 234-44 (pretextual stops), 369-70, 392 (role of race in reasonable suspicion), 1093-99, 1102-07 (race in voir dire), 1116-39 (peremptory challenges), 1151-55 (race-based jury nullification); KAMISAR ET AL., *supra* note 16, at 91-93 (article on history of racism in criminal justice), 93-99 (articles on role of politics and funding of defense counsel), 100-07 (articles on racial profiling), 226-33 (race and pretextual stops), 305-06, 313 (racial profiling), 321, 329-30 (drug testing), 868-82 (selective prosecution), 939-43, 946-48 (discrimination in grand jury composition), 1324-26, 1332-47, 1356-58 (role of race in voir dire and peremptory challenges), 1507-08 (race in sentencing).

⁵⁹ See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995); Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (Sept./Oct. 1999).

⁶⁰ See Stuntz, *supra* note 4; Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

⁶¹ See Miller & Wright, *The Screening-Bargaining Tradeoff*, *supra* note 6 (describing New Orleans District Attorney Harry Connick Sr.'s electoral campaigns); Stuntz, *The Political Politics of Criminal Law*, *supra* note 4, at 534.

⁶² William Stuntz's analysis of this dynamic is excellent. See Stuntz, *supra* note 4.

disparities.⁶³ Yet an exclusive focus on doctrine can miss the subtler ways in which race affects criminal justice. Racial disparities cause many citizens, especially minorities, to lose faith in or at least question the criminal law. This loss of faith can lead to jury nullification or political pressures for reform.⁶⁴ The Supreme Court's suspicion of racism in state police and courts led it to create much of criminal procedure doctrine.⁶⁵ Perhaps these doctrines should not apply as strictly when police are cooperating with minority communities instead of persecuting them.⁶⁶

A related issue is the war on illegal drugs. Some racial disparities flow from the enforcement of drug laws, such as the heavier penalties for crack than for powder cocaine.⁶⁷ More generally, drug crimes are now the paradigmatic crimes in our system. Drug crimes account for about a third of felony convictions;⁶⁸ the percentage is even higher if one includes money

⁶³ See *United States v. Armstrong*, 517 U.S. 456 (1996) (requiring a substantial threshold showing before allowing discovery on a claim of racially selective prosecution); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting a statistical claim that defendants who killed white victims were more likely to receive the death penalty). It has been well over a hundred years since a defendant succeeded in persuading the Court to overturn a prosecution as racially selective. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁶⁴ See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 714 (1995) (proposing racially based jury nullification for drug and other *malum prohibitum* crimes, as a form of political protest against a racially unjust system). Other commentators look at the issue from the perspective of minority victims, who may favor more aggressive law enforcement even if it happens to fall on minority perpetrators. See KENNEDY, *supra* note 5.

⁶⁵ Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

⁶⁶ Tracey Meares and Dan Kahan note that the Supreme Court's vagueness cases were "decided against the background of institutionalized racism" that relied on police to repress minorities. (They discuss *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), in which police in the South used an anti-loitering ordinance to harass interracial couples.) They argue that this distrust of police discretion should not carry over to order-maintenance policing, because this assists minority communities' efforts to control gangs instead of harming them. Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 205, 209. But see Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 821, 827-28 (1999) (contending that white legislators are imposing these laws on minority communities and that seemingly color-blind laws produce continued racial inequities that require stringent constitutional regulation).

⁶⁷ David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283, 1283-84 (1995).

⁶⁸ BUREAU OF JUSTICE STATISTICS, *supra* note 40, tbls. 5.40 (documenting that in 1998, 33.9% of state felony convictions (314,626 out of 927,717) were for drug possession or

laundering and gun and violent crimes related to drugs. And offenders often commit crimes under the influence of drugs or to get money to buy drugs. This emphasis on drugs affects myriad elements of our system. Drug treatment is an important part of rehabilitation, and the new drug courts are premised on helping offenders to overcome drug addiction.⁶⁹ Drug-search cases shape Fourth Amendment law, and high drug caseloads drive law-enforcement priorities and pressures to plea bargain.⁷⁰ Students and scholars think of procedure in trans-substantive terms, but they might adopt a more nuanced view by considering the contexts in which these cases arose. For example, the suspicion needed to make a search reasonable under the Fourth Amendment might vary depending on the importance of the crime being investigated.⁷¹ To understand this point, one must see that the Court's assessment of the war on drugs shapes its doctrine.⁷² The lesson for future lawyers is to couch procedural arguments in terms of their substantive impact. If a court views a crime as a serious problem, it is more likely to issue a procedural ruling for the prosecution, and vice versa.

The real-world casebooks do much more with politics, race, and drugs than simply recite doctrine. Miller & Wright go well beyond the doctrinal discussions of selective prosecution, peremptory challenges, and disparities in capital punishment. They consider race

trafficking), 5.9 (showing that in 2001, 29.7% of federal criminal cases filed (18,425 out of 62,134) were for violations of the drug laws).

⁶⁹ Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000). *But see* Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437 (2000) (Colorado state judge expresses skepticism about the efficacy of drug courts).

⁷⁰ Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (upholding random, suspicionless urinalysis of all students engaged in extracurricular activities because "the nationwide drug epidemic makes the war against drugs a pressing concern in every school"); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (upholding random drug tests for customs employees).

⁷¹ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801-02 (1994).

⁷² For example, the Supreme Court upheld a sentence of life without parole for possessing 672 grams of cocaine against a claim that it was an excessive punishment in violation of the Eighth Amendment. Crucial to the analysis of the controlling opinion was its finding that "illegal drugs represent one of the greatest problems affecting the health and welfare of our population." Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *see also supra* note 70 (citing cases in which the Supreme Court upheld random, suspicionless urinalyses against Fourth Amendment challenge because of the importance of the war on drugs).

at many stages: searches, arrests, bail, cross-racial identifications, charging, sentencing, and punishment. Indeed, they devote an entire chapter to the role of race in criminal justice.⁷³ They consider not only drug testing, profiling, and drug taxes, but also how sentencing differentials between crack and powder cocaine create racial disparities.⁷⁴ They consider pretrial diversion, which typically involves drug treatment, as an alternative to prosecution.⁷⁵ They also devote a short half-chapter to how politics influences legislators, judges, and constitutions in ways that affect criminal justice. This section considers, for example, whether the political imperative of the war on drugs has created “a ‘drug-smuggler exception’ to the Fourth Amendment.”⁷⁶

An awareness of political and racial dynamics recurs throughout the book. To give just one political example, Miller & Wright’s materials go far beyond *Strickland* and effective assistance of counsel in individual cases. They consider also the effectiveness of various systems of providing counsel and note that some statutory schemes are chronically underfunded and overburdened. This leads discussion in a variety of directions. For example, legislators who want to seem tough on crime have little incentive to provide enough funding for defense counsel. Given the separation of powers, can judges goad legislators by invalidating convictions or ordering funding? Should they? They consider whether underfunding in effect compels guilty pleas and whether legislatures are wrong to spend more on prosecution than defense. This analysis of institutional competition and cooperation, incentives, and policies goes well beyond the traditional doctrinal casebook.⁷⁷

Allen et al. are even better at handling these real-world topics. Like Kamisar et al., they begin with an introductory chapter on crime

⁷³ MILLER & WRIGHT, *supra* note 14, at 71-77 (reasonable suspicion), 78-86 (pretextual stops), 352-54 (arrests), 374 (excessive force), 691, 732-37 (cross-racial identification), 923, 939 (bail), 1020-29 (selective prosecution), 1070-72, 1410-21 (voir dire), 1428-57 (peremptory challenges), 1475-76, 1693-94, 1723-30 (racial disparities in general), 1730-42 (capital punishment), 1742-62 (differential participation in crimes and the disparity between sentences for crack and powder cocaine), 1763-77 (prosecutorial charging practices); MILLER & WRIGHT 2002 SUPPLEMENT, *supra* note 14, at 36-49, 203-06.

⁷⁴ *Id.* at 61-70 (drug courier profiles), 274-82 (drug testing), 922-23 (drug testing as condition of bail), 1161-62 (drug taxes), 1742-62 (the crack/powder cocaine sentence disparity).

⁷⁵ *Id.* at 975-85.

⁷⁶ *Id.* at 538-47.

⁷⁷ *Id.* at 868-94.

statistics and secondary literature, including articles on race and drugs. They discuss race not only in doctrinal sections, but also in policy analyses of gang-loitering laws and racial disparities in setting bail and drug sentencing.⁷⁸ And an appreciation of politics runs through the book. For example, they note that prosecutorial charging discretion allows legislatures to pass overbroad criminal laws. Broad laws are politically popular because they are tough on crime: they keep the culpable from getting away, at the cost of criminalizing too much conduct. Legislatures can do so because they trust that prosecutors usually will not charge sympathetic defendants, which would cause a political backlash. Allen et al. then show that one downside of this almost-unreviewable discretion is the danger of racially selective prosecution.⁷⁹

This sophisticated interplay of politics, race, and doctrine teaches students far more about the real world than a simple presentation of the selective-prosecution doctrine would. It also nudges scholars away from proposing doctrines that look good on paper but are unworkable or harmful given real-world politics, racial disparities, and the like. For example, a sentencing rule designed for an ideal world of jury trials can be disastrous where the political reality is that legislatures will not reduce pressures to plead guilty.⁸⁰ One may hope that more scholars will consider not just theoretical ideals, but also the political and racial world in which we actually live.

IV. CIVIL AND QUASI-CRIMINAL ENFORCEMENT

A fourth important difference between the doctrinal and real-world casebooks is that the latter look beyond traditional criminal enforcement. Traditionally, governments have fought crime by arresting perpetrators, prosecuting them for violating criminal statutes, proving guilt beyond a reasonable doubt, and incarcerating them. This traditional criminal approach is still the mainstay of crime control, but in recent years police and prosecutors have used an array of other tools to fight crime, including: order-maintenance policing;

⁷⁸ ALLEN ET AL., *supra* note 15, at 25-26, 43-46 (general commentary), 82-84, 369-70, 457-63, 489-98 (racial profiling), 514 (search and seizure), 542-43 (gang-loitering ordinances), 919-29 (selective prosecution), 929-30 (sentencing policy), 986-87, 1003-04 (pretrial release), 1208-23 (peremptory challenges), 1224-25 (jury nullification), 1289 (capital sentencing); ALLEN ET AL. 2002 SUPPLEMENT, *supra* note 15, at 57-60.

⁷⁹ *Id.* at 916-30; ALLEN ET AL. TEACHER'S MANUAL, *supra* note 26, at 221-23.

⁸⁰ Bibas, *supra* note 7, at 1159 & n.357.

anti-gang loitering injunctions; civil nuisance suits; civil and criminal forfeiture; and civil commitment of sex offenders. These tools are of great practical importance: for example, the federal government alone now forfeits more than half a billion dollars' worth of assets each year.⁸¹ These new tools are powerful and flexible, but some of their flexibility comes from evading traditional safeguards such as juries and proof beyond a reasonable doubt. In short, these cutting-edge weapons in the war on crime are powerful and controversial.

These topics do not, however, fit within the doctrinal purview of traditional criminal procedure casebooks. Of the five doctrinal casebooks, four devote between zero and two pages to all of these topics combined.⁸² Saltzburg & Capra offer somewhat more coverage, though even their treatment is limited to modest doctrinal discussions.⁸³

In contrast, the real-world casebooks not only devote space to these important topics but also consider how they operate in practice. Allen et al. introduce their book with an excerpt that explains how legislatures can recharacterize criminal laws as civil and vice versa. They consider forfeiture in multiple contexts. In addition, they repeatedly consider the roles of police beyond criminal investigation, such as order maintenance and community caretaking.⁸⁴ Miller & Wright devote their entire first chapter to police roles other than traditional criminal law enforcement: community caretaking, enforcing civility, order maintenance, and curfews. They devote another chapter to forfeitures, considering how their procedural protections differ and the tactical and financial incentives that police

⁸¹ MILLER & WRIGHT, *supra* note 14, at 1141.

⁸² COHEN & HALL, *supra* note 16, at 777-79 (forfeitures); DRESSLER & THOMAS, *supra* note 16, at 1346-47 (double jeopardy and civil penalties); KAMISAR ET AL., *supra* note 16, at 1049-50 (same); WHITE & TOMKOVICZ, *supra* note 16 (no coverage).

⁸³ SALTZBURG & CAPRA, *supra* note 16, at 2-5 (the civil/criminal line and civil commitment of sex offenders), 213-14 (anti-gang loitering ordinances), 397 (community caretaking search), 1281-89, 1327-33 (forfeiture), 1337 (civil commitment of insanity acquittees), 1432-41 (civil penalties as punishment for double jeopardy purposes); SALTZBURG & CAPRA 2001 SUPPLEMENT, *supra* note 16, at 1-2 (criminal procedural limits on civil commitment of sex offenders).

⁸⁴ ALLEN ET AL., *supra* note 15, at 36-37 (the civil/criminal line), 48-50 (order-maintenance policing), 226-39 (impact of forfeitures on defendant's choice of counsel), 411-13 (community-caretaking policing), 525-44 (extended consideration of anti-gang loitering laws, police maintenance of order, and the roles of race and politics in these laws), 1302-03 (excessiveness of forfeitures), 1405-26 (applicability of double jeopardy to civil penalties such as forfeitures); ALLEN ET AL. 2001 SUPPLEMENT, *supra* note 15, at 105-06 (applicability of double jeopardy to civil commitment of sex offenders).

and prosecutors have to use them. They also consider tort actions seeking damages or injunctions as alternatives to excluding evidence from illegal searches.⁸⁵

My point is not simply that casebooks should discuss forfeiture, for example. Casebooks can go much further, to explain police and prosecutorial incentives to use and abuse this civil procedure. This matters to students, as it teaches them why these procedures exist, their pros and cons, and how one can use or abuse them. And it matters to scholars, who sometimes reify the doctrinal divides between subjects, such as criminal versus civil procedure. Courts may at times police these boundaries, but actors can and do exploit the overlap.

These artificial doctrinal divides illustrate a more general issue with law school curricula. In the nineteenth century, treatises were organized by real-world subject matter: railroads, charterparties, easements, and so on. We now see these as quaint, musty ways of fragmenting what are “really” property, contracts, and so on. But just as the old subject-matter divisions obscured doctrinal themes, so the modern doctrinal divisions obscure subject-matter themes. One possibility is to go back to subject-matter organization. Another approach may be to create some kind of hybrid, in which courses discuss the interaction of related bodies of law or norms. The criminal procedure course, for example, could include some consideration of civil and quasi-criminal alternatives. Likewise, contracts classes might consider the roles of informal and legally unenforceable agreements and norms such as reciprocity in achieving similar ends. In addition, classes could move away from the artificial isolation of issues; real-world clients do not walk in the door and say, “I have a discrete torts issue for you.” Teachers could instead move toward classroom problems and exam questions that require, for example, analyzing how tort suits against police affect aggressive criminal-law enforcement. Seeing these interactions can benefit scholarship as well as teaching. Scholars, for example, can discuss how proposals for restrictive new criminal procedures may push enforcement to the less-regulated civil side.

Of course, there are always tradeoffs. A three-credit course has only so many hours and so many pages of assignments. More time

⁸⁵ MILLER & WRIGHT, *supra* note 14, at 1-36 (other police roles), 435-49 (tort actions for damages or injunctive relief and criminal prosecutions as alternatives to exclusion of evidence), 1141-89 (forfeiture); MILLER & WRIGHT 2001 SUPPLEMENT, *supra* note 14, at 1-5 (other police roles), 5-18 (anti-gang-loitering ordinances), 219-31 (forfeiture).

spent on forfeiture means less on *Miranda*, say, and more time on real-world context means less on Supreme Court doctrine. Some instructors will include more real-world materials. Others will continue to emphasize Supreme Court doctrine and theory as a simpler and cleaner pedagogical approach. Whether or not one agrees with the real-world emphasis, one must at least confront and ponder these tradeoffs, instead of blindly following traditional methods simply because they are traditional. The addition of the new real-world casebooks helps to provoke thought about these tradeoffs.

V. MORE THAN JURY TRIALS

The final big distinction among casebooks concerns how much they emphasize jury trials versus charging and plea bargaining. Our culture romanticizes jury trials, even though charging decisions and plea bargains matter more in practice. Traditional doctrinal casebooks devote huge chunks of space to jury trials and much less to other important topics. Saltzburg & Capra devote 343 pages (one-fifth of their book) to trial procedure. In contrast, they spend only twenty-five pages on police and prosecutorial charging decisions and thirty-eight pages on guilty pleas and bargains. They devote more space to grand jury screening than police and prosecutorial screening, even though grand juries are little more than rubber stamps.⁸⁶ Dressler & Thomas and Kamisar et al. likewise emphasize trials, though not as much.⁸⁷ Once again, Cohen & Hall are somewhat more balanced than the other doctrinal books, though they too devote the lion's share of their space to trial procedure.⁸⁸

⁸⁶ SALTZBURG & CAPRA, *supra* note 16, at 808-30 (police and prosecutorial charging and screening), 830-60 (grand jury screening), 959-96 (guilty pleas and bargains), 997-1309 (trial procedure); SALTZBURG & CAPRA 2001 SUPPLEMENT, *supra* note 16, at 112-153 (trial procedure). As Chief Judge Sol Wachtler famously observed, a grand jury would indict even a ham sandwich if the prosecutor asked it to. *People v. Carter*, 566 N.E.2d 119, 124 (N.Y. 1990) (Titone, J., dissenting).

⁸⁷ DRESSLER & THOMAS, *supra* note 16, at 795-816 (prosecutorial charging discretion), 817-39 (grand jury screening), 1011-67 (pleas and bargains), 1068-1233 (trial procedure); DRESSLER & THOMAS 2001 SUPPLEMENT, *supra* note 16, at 81-82 (pleas and bargains), 82-85 (trial procedure); KAMISAR ET AL., *supra* note 16, at 844-97 (prosecutorial charging), 932-79 (grand jury screening), 1232-1310 (guilty pleas and bargains), 1311-1442 (trial procedure).

⁸⁸ COHEN & HALL, *supra* note 16, at 23-66 (police and prosecutorial charging), 389-460 (guilty pleas and bargains), 547-712 (trial procedure); COHEN & HALL 2001 SUPPLEMENT, *supra* note 16, at 17-18 (guilty pleas and bargains), 23-28 (trial procedure).

It is not fair to compare White & Tomkovicz to the other casebooks on this score, because it deliberately limits its focus to police work and so would not naturally reach charging, plea bargaining, or sentencing.

This trial-centered approach goes hand-in-hand with the traditional focus on Supreme Court doctrine and case law. Doctrines that are the subject of frequent litigation show up in appellate case law disproportionately often. As a result, the traditional casebooks spend much time on fine doctrinal refinements in these areas. Conversely, issues that do not often make it into appellate courts play minor roles in these books.

One example is the decision by police and prosecutors to charge or decline to prosecute. Because charging discretion is all but unreviewable, there is little case law to include in a traditional casebook. The exercise of this discretion depends on internal police and prosecutorial guidelines, as well as low-visibility, informal customs and practices. Yet charging is immensely important. Many cases end with a decision not to prosecute, and other charging decisions determine the course of plea bargaining. Allen et al. highlight these issues by excerpting the few cases on point and supplementing these with statistics and thoughtful, targeted commentary. Readers come to see the huge practical importance of charging discretion and the dangers of abuse. As they note, one-fifth of felony arrestees are never charged, one-fifth are never convicted (usually because charges are dropped), and one-fifth are never incarcerated (usually because of prosecutorial leniency).⁸⁹ This detailed and concrete discussion helps students to see both the flexible potential for mercy and the risks of discrimination and arbitrariness.

In discussing charging discretion, Miller & Wright go far beyond the standard case law on selective prosecution and grand juries. Their charging chapter considers police screening, prosecutorial declination and diversion, laws that encourage or mandate charges, selection of charges, and selection of system (state criminal court, juvenile court, or federal court). Their excerpts include state and federal cases, police department directives, Department of Justice guidelines, congressional testimony, state and foreign statutes, and prosecutorial guidelines.⁹⁰ As a result, students understand low-visibility police and prosecutorial decisions much better than they could by reading Supreme Court doctrine alone. Both real-world

⁸⁹ ALLEN ET AL., *supra* note 15, at 911-45; ALLEN ET AL. TEACHER'S MANUAL, *supra* note 26, at 221-26. The statistics are from page 911 of the casebook.

⁹⁰ MILLER & WRIGHT, *supra* note 14, at 955-1052; *see also id.* at 340-54 (police discretion in deciding to arrest).

casebooks, in short, cultivate this field more carefully and yield richer harvests.

Another neglected topic is plea bargaining. About 94% of adjudicated felony defendants plead guilty, and most of these result from plea bargains.⁹¹ Yet most doctrinal casebooks limit their treatment to doctrine: when is plea bargaining permissible, what kinds of pressures are impermissible, and what remedies are there for breaches. Supreme Court doctrine is sparse on pleas and bargains, because guilty pleas waive most appellate issues and so are under-represented in appellate cases.⁹² The case-centered doctrinal approach thus spends little space on the dominant case-disposition procedure.

In contrast, Miller & Wright include academic literature on the desirability of plea bargaining, state experiments with banning bargaining, and prosecutorial guidelines on how to bargain.⁹³ This material can be difficult to teach, as it requires students to see the incentives and interplay of prosecutors and other actors. If taught well, it helps students to understand when and why prosecutors bargain and when their superiors, victims, or voters might want to rein them in. Allen et al. take a different but equally effective approach. They give students a sample plea colloquy as well as Federal Rule of Criminal Procedure 11, so students can see what happens in a plea hearing. They also use secondary literature to outline the history and practice of plea bargaining. Students get a

⁹¹ See U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, tbls. 5.21 (in 2001, of 68,633 federal defendants whose cases were not dismissed, 93.8% pleaded guilty or nolo contendere, 2.2% had bench trials, and 4% had jury trials), 5.42 (in 1998, 94% of state felony defendants whose cases were adjudicated were disposed of by guilty plea, 3% by jury trial, and 3% by bench trial).

⁹² Guilty pleas forfeit most appellate or collateral claims based on events occurring before the entry of the plea. See *United States v. Broce*, 488 U.S. 563 (1989) (guilty plea forfeits later double jeopardy claim when that claim turns on further evidence); *Tollett v. Henderson*, 411 U.S. 258 (1973) (race discrimination in selection of grand jury); *McMann v. Richardson*, 397 U.S. 759 (1970) (coerced-confession claim). A few exceptional claims, those that go to the very power of the government to charge the defendant, can be raised on collateral attack. See *Menna v. New York*, 423 U.S. 61 (1975) (double jeopardy claim); *Blackledge v. Perry*, 417 U.S. 21 (1974) (vindictive prosecutorial charging). And most claims that do survive an ordinary guilty plea, such as where one's sentence falls within the statutory range, can be waived as part of a plea agreement. See *State v. Hinners*, 471 N.W.2d 841 (Iowa 1991); *People v. Seaberg*, 541 N.E.2d 1022 (N.Y. 1989); see also *United States v. Mezzanatto*, 513 U.S. 196, 201-02 (1995) (stating that the most defendants' rights are waivable).

⁹³ MILLER & WRIGHT, *supra* note 14, at 1269-1378.

feel for how real lawyers approach the issues by reading interviews with prosecutors and defense counsel. They see how caseloads, procedural complexity, and prosecutorial power over charges and sentences drive bargaining, and how prosecutors punish uncooperative defense counsel. Supplemental materials also show how victims are left out of bargaining and consider whether that is desirable.⁹⁴ By adding this context to the usual Supreme Court cases, Allen et al. move beyond doctrine to a real-world institutional perspective.

The traditional casebooks are in step with the real-world casebooks on one important topic: sentencing. Until the advent of guidelines sentencing a few decades ago, there was almost no law of sentencing, apart from capital-punishment cases. Now, with the growth in sentencing guidelines and appellate opinions interpreting them, most casebooks include substantial materials on sentencing.⁹⁵ The traditional casebooks still lean toward constitutional issues of little practical importance, such as the almost-nonexistent proportionality review of non-capital sentences. On the whole, though, the traditional casebooks have recognized and incorporated this important new body of law.

Far too many law students imagine that their life after law school will resemble Perry Mason's or Supreme Court practice. The real-world casebooks balance the picture, by emphasizing the low-visibility charging and plea bargaining decisions that are the heart of criminal practice.

CONCLUSION

The emergence of two real-world casebooks marks the evolution of the field. Professors now have choices beyond straight Supreme Court doctrine. Those who want to plunge full-throttle into the variety of state and federal cases, statutes, and rules have an excellent option in Miller & Wright. Their exploration of community policing, forfeitures, politics, race, plea bargaining, and sentencing is a

⁹⁴ ALLEN ET AL., *supra* note 15, at 1031-1132.

⁹⁵ COHEN & HALL, *supra* note 16, at 751-802; DRESSLER & THOMAS, *supra* note 16, at 1234-93; DRESSLER & THOMAS 2001 SUPPLEMENT, *supra* note 16, at 86-107; KAMISAR ET AL., *supra* note 16, at 1494-1533; SALTZBURG & CAPRA, *supra* note 16, at 1310-88; SALTZBURG & CAPRA 2001 SUPPLEMENT, *supra* note 16, at 154-57. Compare ALLEN ET AL., *supra* note 15, at 1287-1352; ALLEN ET AL. 2001 SUPPLEMENT, *supra* note 15, at 101-04; MILLER & WRIGHT, *supra* note 14, at 1603-1722; MILLER & WRIGHT 2001 SUPPLEMENT, *supra* note 14, at 263-84. Because White & Tomkovicz is limited to police investigations, it does not include a chapter on sentencing.

welcome break from a monolithic federal discussion of *Miranda* and jury trials. True, this variety is harder to teach and less geared to the bar exam, but the potential rewards of this challenging approach are great. Allen et al. have written more of a hybrid book. They do emphasize Supreme Court cases, but their sophisticated commentary and exploration of real-world topics encourages discussion of areas traditionally neglected. The book and its teacher's manual are exceptionally thoughtful and thought-provoking. They strike a good balance between laying out basic, accessible Supreme Court doctrine and exploring how that doctrine plays out in the real world. Either book is a welcome alternative to the abstract doctrine that dominates the law school curriculum. These new choices supplement and enrich the range of teaching approaches and materials.

What do these real-world shifts portend for criminal procedure? The field is slowly becoming less a corner of constitutional law and more a separate field with its own dignity. It is less the abstract province of the Supreme Court and more a rich, varied landscape with many actors and sources of law. It is about practice as well as doctrine. Practice need not mean a dry, technical how-to manual. This practical field is ripe for more empirical and game-theoretic analyses of how actors respond to incentives. Practice and theory are not inconsistent but should work together. For example, an awareness of practical constraints should inform theory, and induction from practice can lead to theory. The seeds of this approach are sprouting in Allen et al. and Miller & Wright's casebooks, but they are still saplings, not yet trees.

One area that requires more cultivation is how police, prosecutors, defense counsel, and judges actually charge, screen cases, plea bargain, and sentence. Albert Alschuler and Milton Heumann, for example, studied plea bargaining by interviewing many prosecutors, judges, and defense counsel.⁹⁶ It has been thirty years since anyone has done such comprehensive empirical studies of plea bargaining. In the meantime, determinate sentencing has radically changed the bargaining landscape, constraining judges and giving prosecutors new leverage. This kind of empirical work, as well as game-theoretic analyses of parties' incentives, can greatly illumine how the actors use their powers.

⁹⁶ HEUMANN, *supra* note 49, at 21 (describing research done in 1972-73); *supra* note 3 (collecting Alschuler articles) (describing research done in 1967-68).

Another area that needs more work is the use of non-criminal approaches to crime control. Though a few of the casebooks discuss forfeitures, policing methods, curfews, and gang-loitering ordinances, none really addresses nuisance laws or injunctions. Nor did any consider possible civil injunctive or monetary relief from offenders, gun dealers, or landlords of crack houses. One scholar, Neal Katyal, has recently suggested other possibilities. He has explored the use of architectural principles to fight crime by hardening crime targets, building communities, and facilitating surveillance by bystanders and residents.⁹⁷ Another scholar, Darryl Brown, has discussed using curfew laws and other quasi-regulatory measures to treat street crime more like corporate crime.⁹⁸ Criminal procedure could do more to consider this proactive dimension to fighting crime, instead of being almost entirely reactive. This expanded view of crime control would see that the maintenance of order is perhaps more important than detecting and punishing crimes after the fact.

Scholars should also explore more the pros and cons of state procedural variations. Assessments of federalism in other contexts generally pit the benefits of laboratories of experimentation versus the dangers of a race to the bottom. The race-to-the-bottom idea, however, seems inapplicable to crime. With a few exceptions, most crime is local and does not forum-shop. The more cogent question is how much local preferences, crime problems, and moral norms do and should dictate varying criminal procedures. Outside of obscenity law and capital punishment, there is very little scholarly discussion of the role of local mores and attitudes in procedure. Scholars might use the new emphasis on social norms to examine and critique these state and local variations.

Finally, the corollary of detaching criminal procedure from constitutional law is attaching it to its siblings, substantive criminal law and sentencing law. I have argued elsewhere that criminal procedure can go quite wrong when it ignores the impact of sentencing law on plea bargains.⁹⁸ It can go equally astray when it pursues procedural values without considering substantive criminal law.⁹⁹ Putting criminal procedure in a real-world context requires us

⁹⁷ Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

⁹⁸ Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001).

⁹⁸ Bibas, *supra* note 7.

⁹⁹ William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 4; Stephanos Bibas, *Harmonizing Substantive Criminal Law Values and*

to explore how criminal procedure interacts with these other areas of law.

Though scholars have much further to go, Allen et al. and Miller & Wright have made impressive starts. The older pedagogical and scholarly approaches to criminal procedure will benefit from the addition of this new perspective. One can only hope that scholars will continue to explore the real world that scholarship is to inform.

