

PREFACE

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Substantive criminal law issues often dominate public discourse. Yet *The Georgetown Law Journal's Annual Review of Criminal Procedure (ARCP)* is a must-read for prosecutors and defense attorneys, judges and law clerks, and even incarcerated people working on their own defenses or appeals. Over eleven thousand copies of the *ARCP* are distributed annually. Its famous footnotes, updated every year by law students, describe federal criminal procedure across the country, with information spanning hundreds of pages. And unlike most law review footnotes, these ones are important. What gives?

Many practitioners realize the truth—procedural rules play an equal, if not greater, role in criminal law. Procedural rules are important tools that shape how we administer justice in our legal system—so much so that addressing their evolution in painstaking detail remains in high demand year after year by readers of the *ARCP*. Procedural rules mold societal definitions of fairness. They guide the way the public interacts with our criminal justice system. They define courtroom advocacy. And when they are fashioned and applied in a fair manner, they support our democratic culture.

Procedural rules shape our societal definition of justice and, consequently, fairness. I attended law school in the 1970s, soon after landmark Supreme Court cases *Miranda v. Arizona* and *Mapp v. Ohio* were decided.¹ *Miranda* announced an important procedural rule requiring police to inform suspects of their constitutional right not to incriminate themselves. The impact of *Miranda* on our culture and society has been profound—*Miranda* warnings have become prevalent in movies and television, defining what fair policing looks like in our country. Other cases repeatedly emphasizing the special constitutional protection of the home have contributed to a broad societal appreciation that the government cannot enter your house without a warrant.² “Come back with a warrant” doormats are not just for legal nerds; they might get a laugh out of any guest.³ Procedural rules—about *Miranda* warnings, warrants, and more—shape our societal definitions of justice and fairness.

Procedural rules also guide the way society interacts with the justice system. The *Mapp v. Ohio* exclusionary rule provides protections for individuals from unconstitutional searches, serving as a deterrent from illegal governmental activity regardless of how important evidence is to a case.⁴ Procedural rules like *Mapp* make constitutional requirements matter in the justice system. They also shape how victims interact with the justice system. Through procedural protections, victims’ rights laws ensure crime victims are informed, have access to proceedings, and an opportunity to be heard.⁵ By governing how society interacts with the justice system, procedural rules shape how society interprets justice.

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

2. See e.g., *Johnson v. United States*, 333 U.S. 10, 15 (1948); *Payton v. New York*, 445 U.S. 573, 586 (1980).

3. Come Back With a Warrant Durable Funny Indoor Outdoor Doormat, AMAZON, <https://www.amazon.com/HIGH-COTTON-Doormat-Come-Warrant/dp/B00020O572> (product description boasts “[y]our guests will laugh out loud when they arrive at your door”).

4. *Mapp*, 367 U.S. at 655. But see, e.g., *New York v. Quarles*, 467 U.S. 649, 657 (1984); *Harris v. New York*, 401 U.S. 222, 225-26 (1971).

5. See The Crime Victims’ Rights Act, 18 U.S.C. § 3771. See also *A Maryland Court Reinstates Adnan Syed’s Conviction and Orders a New Hearing*, AP (Mar. 28, 2023), <https://www.npr.org/2023/03/28/1166598513/adnan-syed-serial-maryland-court-reinstates-conviction> [<https://perma.cc/UK79-U2SX>] (noting

Procedural rules also define the administration of justice inside the courtroom. In the court of public opinion, the truth is up for grabs—facts can be twisted, emotions can be preyed upon, and bad faith arguments can win the day. But in the courtroom, evidentiary and other procedural rules set boundaries. Every criminal defendant has the right to assistance of counsel, and a jury trial.⁶ But lawyers cannot say or do whatever they want to win. Instead, because courtroom proceedings are for “ascertaining the truth and securing a just determination,”⁷ the rules of procedure and evidence limit what can be presented to the jury as facts and what arguments lawyers can raise. Relevant evidence is kept out of the courtroom if its probative value is substantially outweighed by the risk of “unfair prejudice” to the defendant.⁸ Prosecutors may not make arguments in their closing statements that manipulate the evidence or inflame the jury.⁹ Rules dramatically demarcate the sanctity of the courtroom from our day-to-day lives and shape what advocacy and justice look like. By controlling how presentation and advocacy occur inside the courtroom, these rules reflect and shape how we determine justice.

When I got out of law school, I was lucky to have the opportunity to work on Wall Street, K Street, or Market Street, but I decided to start my legal career on Bridge Street, in White River Junction, Vermont, as a public defender. So, trust me when I say that public defenders do the brunt of the grunt work needed to uphold our procedural rules and ensure they are applied equally. I know it because I lived it. I was working with low-income folks who often faced injustice in many parts of their lives. They had histories of struggle, disappointment, and pain, and some had inflicted pain on others. But our strong procedural rules ensured they enjoyed the same system of justice as everyone else. The rules are not perfect; no one is. But they matter. The outcome was not always the one my client wanted, but I knew they were getting a fair shake.

Public defenders are the realization of our constitutional promise that all criminal defendants have the right to a lawyer, even if they cannot afford one.¹⁰ The right to counsel is the procedural rule to defend all procedural rules. By securing the right to counsel for all, public defenders ensure that “all other rights of the accused are protected.”¹¹ Every day, public defenders ensure everyone is treated fairly under the law, whether they are the richest or poorest person in the courtroom. They use procedural rules to vindicate individual rights and ensure that these rules are applied so that everyone experiences their benefit. In doing so, public defenders ensure that our justice system lives up to its ideals of equal protection and due process. It often goes unappreciated. But it says something about our country when we give even those accused of the worst crimes a competent lawyer to advocate on their behalf. It says something about the strength of our justice system, and the strength of our democratic values. By upholding our procedural rules under fire, public defenders are some of the principal defenders of our justice system and of our country’s values of justice and fairness.

how, in a widely followed case, the Appellate Court of Maryland ordered a new hearing because the state’s victims’ rights protections were violated).

6. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); U.S. CONST. amend. VI.

7. FED. R. EVID. 102.

8. FED. R. EVID. 403.

9. *See Darden v. Wainwright*, 477 U.S. 168, 182 (1986); *see also* *Miller v. Pate*, 386 U.S. 1, 6 (1967) (prosecutors may not deliberately misrepresent the truth); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (prosecutors may not withhold exculpatory evidence).

10. *Gideon*, 372 U.S. at 344.

11. *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

Fair procedural rules are important to a just society. To an individual defendant in the courtroom, and to our society at large, procedural rules communicate what we, as a country, view as justice and fairness. Like us, the rules are not flawless. They strike an imperfect balance between potentially competing values like upholding individual rights and effective law enforcement, or zealous advocacy and sober pursuit of the truth. Their prudent evolution towards realizing our justice system's ideals is crucial. To the extent the rules are fair, our justice system is fair, and to the extent the rules are unfair, our justice system is unfair too. Most critically, justice demands these procedural rules are applied equally. When they are applied unfairly, they damage the very values of justice and fairness they are designed to protect.

Upholding procedural rules demonstrates a commitment to the rule of law. Procedural rules ensure that we are “a government of laws, not of men”; in this way, they serve as the pillars of our commitment to a democratic society. They demonstrate our commitment to the values of truth, justice, fairness, and to individual rights, and they uphold those values even under pressure. To have public trust in a democratic society committed to the rule of law we need our commitment to both these values to be strong. We are currently in a crisis of faith. Public confidence in our institutions is falling amid attacks on our democratic institutions writ large. Faith in our justice system—both law enforcement and the judiciary—is at a record low.¹² Restoring public faith in our democratic institutions will undoubtedly take more than the rules in this book, or the words in the Constitution, but procedural rules are one example of how faith in the system, and each other, can help. The perseverance of our belief in the legal system we created and molded over time—which includes the procedural rules contained in the *ARCP*—demonstrates our steadfast commitment to our shared democratic values. The rules embody our commitment to soberly and fairly pursue justice, not to vilify or persecute. They are both a source of the justice system's internal strength and integrity, and an outward reflection of our commitment to fair treatment, equal justice, and the rule of law.

For those who read and use the *ARCP*—the prosecutors, defense attorneys, law clerks, judges, pro se litigants, and especially public defenders—I hope that you will appreciate anew the importance of the work you are doing to uphold our procedural rules in our current environment. Ensure they are applied fairly and protect individual rights. Ensure that they are applied equally so that our justice system is strong. Your work will shape our concept of justice and strengthen our society's faith in the rule of law. I will continue to work to ensure that Congress recognizes the importance they play in protecting our Constitution and our democracy.

12. See Emily Washburn, *America Less Confident in Police Than Ever Before: A Look at the Numbers*, FORBES (Feb. 2, 2023), <https://www.forbes.com/sites/emilywashburn/2023/02/03/america-less-confident-in-police-than-ever-before-a-look-at-the-numbers>; SHAWN PATTERSON JR. ET AL., *THE WITHERING OF PUBLIC CONFIDENCE IN THE COURTS* (2024).