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Fourth Edition



Joshua Dressler
George C. Thomas III

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CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES

Fourth Edition

■ ■ ■

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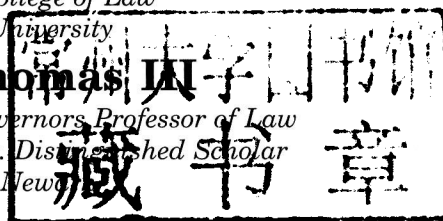
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*To Dottie, my life's partner, for everything
To Sandy Koufax for one thing in particular:
not pitching on Yom Kippur*

—J.D.

*To Gretchen, for our love and friendship,
and for traveling along with me.*

—G.T.

PREFACE

It is a pleasure to teach Criminal Procedure. Much of the course features constitutional law, with its fascinating questions about theories of interpretation and about fidelity to text and history. Criminal procedure also brings students face to face with fundamental policy questions about the appropriate balance between protecting us *from criminals* and protecting us *from the government*. We want the criminal process to solve and prosecute crime but we also want controls that protect our privacy and autonomy. (The aftermath of the September 11 attacks, and recent disclosures about telephone surveillance by the government, make this point all too well.) Most students have had contact with the police, if only to receive a traffic ticket. Even minor events like traffic stops can lead to a search of the car and can manifest racial profiling or other abuses of police authority. Students also “know” about policing from television shows like the late *NYPD Blue* and the endless variations of *Law and Order*.

Television shows over the years have also featured the criminal trial process and the role of lawyers in it. Think of *Perry Mason* in black and white, *Perry Mason* in color, *Law and Order*, and the real-life drama of O.J. Simpson and countless other actual trials. From these shows, and news accounts, the country has acquired a set of beliefs and attitudes about the prosecution, defense, and adjudication of criminal defendants. The focus at this stage of the process shifts to finding the right balance between convicting the guilty in an efficient manner while freeing the innocent and providing fairness to all. Fundamental policy issues underlie much of the doctrine here as well. Does due process permit non-unanimous verdicts or exclusion of jurors on the basis of race? Does due process require prosecutors to turn over all favorable evidence to the defense or only that evidence likely to produce an acquittal?

If criminal procedure is as topical as today’s newspaper, it is also deeply steeped in history. Criminal trials appear in Roman law and Hebrew law. The right to counsel surfaces in Roman law and reappears in the twelfth century laws of Henry I. English history is filled with criminal procedure controversies, from the dispute between Henry II and Thomas Becket in 1168 over the authority of church courts, to the Magna Carta, the reign of Henry VIII, and the Reformation. A study of criminal procedure is not just a search of now but also of our past. In our past, we find the enduring values that shape court decisions today.

A casebook cannot be all things to all people, but it should offer sufficient flexibility to accommodate diverse teaching goals and pedagogical methods. We include materials that encourage students to think about constitutional

theory and judicial craftsmanship as they read cases and learn doctrine. In the selection of cases, less can be more. We have chosen not to edit cases down to their bones in order to include more cases. We offer broad coverage but also give students and professors the chance to dig deep into the important constitutional cases.

Professor Anthony Amsterdam famously observed about Supreme Court jurisprudence, that “once uttered, these pronouncements will be interpreted by arrays of lower appellate courts, trial judges, magistrates, commissioners and police officials. *Their* interpretation * * * for all practical purposes, will become the word of god.” Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785, 786 (1979). We seek the “word of god” by including empirical research data where it exists, political science analyses, and news accounts that illuminate how law works “in the trenches.”

We believe that students should learn early, and think often, about the overarching principles of the subject matter they are learning. In Chapter 1 we display failures of the criminal process as a way to get students to identify appropriate goals for a criminal process. Then we invite them to return again and again to those goals to understand, and sometimes to critique, Supreme Court doctrine. Why does the Sixth Amendment require appointed counsel in almost every case while the Fourth Amendment receives a grudging interpretation? We believe this, and many other, interpretational issues are illuminated by considering the importance that a criminal process places on accurate outcomes, a goal that is inevitably hindered when limitations are placed on the power of government to seek evidence.

As much as we would like the law to be neutral, we are realistic enough to know that it does not always achieve that goal. And we think it important for students to realize the ways in which law fails to achieve neutrality. Thus, we do not skirt—in fact, we confront—the effects of racism and other malignant-isms in the criminal process.

A casebook need not be forbidding to inspire students to display high standards of thought, analysis, and criticism. Users of our book will discover some informality, even humor (heresy!), in places. For us, this style has worked well. We seek balance between principal cases and the Notes and Questions that illuminate or expand on the principal cases. Thus, professors who want to teach the cases can rely on the Notes and Questions to facilitate a more traditional classroom discussion. Those who like the problem method will find enough Problems in conjunction with the Notes and Questions to keep a lively class discussion going. And those, like Dressler and Thomas, who blend the traditional case analysis with the problem method, will find the book especially well suited to that approach.

Outside reading materials. There are many useful sources for additional reading. Among the excellent general resources are Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure* (5th ed. 2010); Wayne R. LaFare, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* (5th

ed. 2009); and Charles Whitebread & Christopher Slobogin, *Criminal Procedure* (5th ed. 2008). For those who want even more coverage of the Fourth Amendment, nothing can compare to Wayne R. LaFare, *Search and Seizure* (4th ed. 2004), an incredible six-volume treatise. For those who want a greater dose of history with their Fourth Amendment, we recommend Thomas K. Clancy, *The Fourth Amendment, Its History and Interpretation* (2008). We have also cited and quoted from other excellent books and articles throughout the casebook.

Editing policies. We prefer students to read judicial opinions in largely intact form. Nonetheless, deletions are necessary. Because the goal of this book is pedagogy, we have not followed all scholarly conventions in identifying omissions from the extracted materials. We have applied the following rules of thumb to extracted materials.

1. Most footnotes and citations have been omitted, always without use of ellipses to indicate their omission. Asterisks have been used, however, to indicate deletions of other textual materials.

2. Numbered footnotes are from the original materials and retain their original numbering. Our “editors’ footnotes” are designated by letter.

Personal acknowledgments. Many people assisted us in producing this edition or its predecessors, or all four, including many colleagues on our respective faculties and throughout the United States and United Kingdom as well as members of the Bar and judiciary. We name a few people here: Phil Bates, Robert Batey, Doug Berman, Susan Brenner, Neil Cohen, Stan Cox, Thomas Davies, Michiael Dimino, John G. Douglass, Jim Ellis, Arnold Enker, Barry Feinstein, Stanley Z. Fisher, Clifford Fishman, Gary Francione, Jeffrey Froelich, Adam Gershowitz, Mark Godsey, Stuart Green, Kenneth Graham, David Harris, Stephen Henderson, Peter J. Henning, Charles Jones, Andy Leipold, Rory Little, Gerard Lynch, Michael Mannheimer, Bernie McShane, Alan Michaels, Sam Pillsbury, and Michael Vitiello.

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