Seven Deadly Sins

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Constitutional Rights and the Criminal Justice System

SECOND EDITION

Mark Denniston
Bruce Bayley
Molly Sween
David R. Lynch

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Mark Denniston
Thank you to my wife Christie and son Anders, and thank you also to students Cooper Maher and Hannah Olsen for research and editing assistance.

Bruce Bayley
To my beautiful wife Heather and my amazing boys, Erik and Logan—thank you for your love and support.

Molly Sween
Thank you to my family and friends for your love and support.

David Lynch
With much thanks as always from Dave to his best friend, Kathy.

All royalties from this textbook will go into the Raechale Elton Memorial Scholarship fund which was created by the family and friends of Ms. Elton to memorialize the life, vitality, and optimism of Raechale. She was pursuing her degree in criminal justice from Weber State University and was set to graduate in the Spring of 2006 before her life was tragically cut short. She chose this profession because she wanted to help troubled individuals and to make an impact on the world. This scholarship provides a lasting way for Raechale to continue doing good deeds in that it benefits future generations of criminal justice students who, like Raechale, plan to use their degree to make the world a better place.

Contents

Introduction

Imagine legislators who create criminal statutes that go too far in suppressing vulgar and offensive expressions. Imagine a judge who secretly meets with a prosecutor to discuss a case. Or consider a police officer who is by nature very intrusive. Consider a jailer who is cruel. Picture a juror that is racist or a cunning prosecutor who gets a conviction by fighting dirty. Imagine a juror that is subservient to authority figures. These negative attributes—intolerance, subterfuge, intrusiveness, cruelty, favoritism, craftiness, and subservience to authority—are what could be termed "the seven deadly sins" of the American criminal justice system.

On the other hand, imagine a criminal justice professional who believes in always being humane and tolerant and knows that he or she must act with transparency. Imagine further that this same person values privacy rights, fair play, and equality. Further imagine that this person is sensitive to the corrupting nature of power, though she and her system colleagues are given extraordinary powers over life, liberty, and property. The person just mentioned could be described as adhering successfully to American constitutional criminal justice values.

Constitutional rights constitute a set of values to which nearly everyone in our society can agree. If America has a "civic religion," its doctrine would be found in the Constitution. There may be some in our society who do not like the protections provided by broad constitutional principles (specific and debatable interpretations aside), but such people seem to be exceedingly rare. In any event, the Constitution does not constitute a set of suggestions for those who work in the domain of criminal justice, but rather constitutes a set of mandates.

Properly approached, the study of constitutional rights can be ethically enlightening because it involves much more than the mere mechanical memo-

rization of a body of black-letter rules and definitions. The careful examination of U.S. Supreme Court and other appellate opinions reveals not only the courts' final rulings on various matters, but provides in detail the (often moral) reasoning behind the courts' decisions. In explicating their rationales, judicial opinion writers typically address the opposite point of view before going on to explain why they sided the way they did. In the process of examining such decisions, students discover a court's ethical reasoning behind its ruling. Such cases make for excellent class discussion, and students often wind up teaching one another while making moral sense of the case with the instructor.

Seven core values in all will be examined in the chapters that follow. These virtues will be introduced via their mirror opposites, which we call the "seven deadly constitutional sins" of the criminal justice system. Once again, these negative attributes or "sins" are intolerance, subterfuge, intrusiveness, craftiness, favoritism, cruelty, and subservience to authority.

Each of these values shall span two chapters. One chapter per value shall be devoted to case law that will help to identify and illustrate the value in a constitutional sense. Then, a companion chapter shall provide a series of practical examples of the value played out in the real world of police and corrections.

Before we plunge into our book-length journey of examining many core values housed in the U.S. Constitution, we should pause to examine the role of the Supreme Court in this process of articulating our constitutional rights. The Court has the luxury of largely selecting the cases it wants to hear. It does not see itself as a court of error focused merely upon fixing legal (or factual) mistakes. Rather the Supreme Court largely sees its role as resolving disputes between lower courts. It is problematic when courts in one jurisdiction (e.g., state courts in New York) disagree on the meaning of the Constitution with courts in other parts of the country (e.g., the Tenth Circuit U.S. Court of Appeals, with jurisdiction over the states of Colorado, Oklahoma, Utah, etc.). When courts across the country disagree about the meaning of the Constitution (or other laws), the U.S. Supreme Court is more likely to agree to hear a further appeal by granting a request for a **writ of certiorari** (an order to hear an appeal)**.** Granting a request for a writ of certiorari, or sometimes more simply referred to as "granting cert." is the mechanism the Court uses to agree to hear an appeal from a lower federal or state court. It takes four of the nine justices on the Supreme Court to agree to issue a writ of certiorari. For some perspective, the Court typically receives over 8,000 certiorari petitions annually, but agrees to hear fewer than 80 cases, so less than 1% of the requests it receives. In short, the Court is not trying to fix mistakes in these cases, but rather to bring uniformity and consistency to the law, across the entire country, especially regarding interpretation of the Constitution.

When the Supreme Court interprets the Constitution, such as when it considers whether to strike down a federal or state statute (or even the legality of a search by a local police officer), it is using the power of **judicial review** (the power to strike down a law or an act of a government official as unconstitutional). While the authority of the Court to use its power of judicial review to declare a law unconstitutional has been long established, the Court did not always see its role in using judicial review as it is now understood in the twenty-first century. Particularly, the Court did not interpret the Bill of Rights as applying against state and local governments for most of American history. You may be surprised to learn that this current understanding of the Constitution, which we take for granted today, is only approximately 60 years old.

Despite the Bill of Rights dating back to 1791 (when the first ten amendments to the Constitution were ratified by the states), a series of crucial changes in the understanding of these ten amendments drastically shifted the scope and application of these values. The three essential ingredients contributing to the shift in understanding of the Constitution are (1) the Bill of Rights, (2) the Fourteenth Amendment to the Constitution, and (3) the Due Process Revolution of the 1960s.

First, many values which we hold as particularly relevant to the criminal justice system (such as freedom of speech, the free exercise of religion, protection against unlawful searches and seizures, the right against self-incrimination, and rights to speedy trials, impartial juries, and protections against cruel and unusual punishments) were articulated in the Bill of Rights. However, originally these rights did not apply in the sense that we have come to understand over the past sixty years. Closer examination of the text of the First Amendment shows why:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first word of the First Amendment is "Congress." The rights articulated in the First Amendment then are literally shielded only against violations by "Congress" (and the federal statutes and federal agents Congress might authorize). State actors, such as state legislatures, governors, local prosecutors, police, and corrections officials had no obligation to ensure the provisions of the Bill of Rights. In the case of *Barron v. Baltimore*, 34 U.S. 243 (1833) the Supreme Court held that the Bill of Rights and its protections did not apply to state and local governments. This was due in part to the states each having their own individual state constitutions, most of which include similar rights

as contained in the Bill of Rights. State actors were thus not lawless; rather it was originally understood that state and local officials had to follow the similar rights as articulated in state constitutions and interpreted by state courts. There were similarities in constitutional rights across states, much as there is today in criminal law, but also significant variations too since states were not bound to follow constitutional precedents in other states or federal courts. The sculpting of fundamental national constitutional rights (as we have come to understand them), afforded to all persons, would not occur until 170 years after the adoption of the Constitution during the Due Process Revolution.

A second critical element necessary before that could happen, however, was the ratification of the Fourteenth Amendment following the Civil War. One of its most critical provisions, the Due Process Clause, reads "nor shall any state deprive any person of life, liberty, or property, without due process of law." Key are the words "any state," making clear that state governments, not just Congress, are also required to provide due process of law. The Due Process Clause encompasses protections against arbitrary and vague laws and provides "any person" in our country with both procedural and substantive due process — including the strict adherence to fair trial procedures and protection of fundamental rights (such as those in the Bill of Rights). The Fourteenth Amendment's Due Process Clause served as the vehicle by which **incorporation** (the process of applying to the states most, but not all, of the provisions in the Bill of Rights) was later achieved during the Due Process Revolution.

The third and final element in our current understanding of the Constitution is the **Due Process Revolution**. Generally considered to have begun in the early 1960s, the Due Process Revolution occurred when the Warren Court (the Supreme Court during the era in which Earl Warren served as Chief Justice of the Supreme Court) used the power of judicial review to begin applying the Bill of Rights to the states, expanded the scope of those constitutional rights, and crafted remedies to enforce those rights. The Due Process Revolution empowered the Court to oversee criminal justice processes in the states and review the actions of state and local government officials.

Today most of the protections of the Bill of Rights are applicable to all persons at all levels of government, regardless of the state in which one resides. In addition to incorporating most of the provisions of the Bill of Rights into the Due Process Clause, and thus making them applicable to states, the Warren Court also took steps to ensure these rights were enforced through effective deterrents against unconstitutional behavior. The Warren Court crafted specific consequences should an individual's rights be violated, such as the exclusionary

rule, which bars unlawfully obtained evidence from being admissible in criminal court proceedings.

While the Warren Court receives the bulk of the credit for expanding constitutional rights and remedies during the Due Process Revolution, this is not a process that ended decades ago. Rather, the Court continues to expand the interpretation of constitutional rights. For instance, as recently as 2019 in *Timbs v. Indiana*, 586 U.S. ___, 139 S. Ct. 682, the Supreme Court clarified that the Excessive Fines Clause in the Eighth Amendment was incorporated and thus applied to and constrained state and local governments. The Court reasoned that the right against excessive fines has historically been central to the fundamental scheme of ordered liberty within the United States and is deeply rooted in the nation's history and tradition. As such the state of Indiana was not free to ignore the Court's precedents interpreting the Excessive Fines Clause, as the Supreme Court of Indiana had maintained.

So what types of interpretive approaches guide the Supreme Court in its decisions regarding constitutional rights? Two perspectives predominate: **originalism** and **living constitution** approaches. Adherents of an originalist approach believe the Supreme Court's authority comes directly from the amendment ratification process—language going through Congress and then the several state legislatures pursuant to Article V of the Constitution. The originalist perspective favors textual and historical analysis of constitutional language and emphasizes the original public meaning of provisions in the Constitution. Functionally, criminal justice reforms should occur through drafting of legislation, or even new constitutional amendments, as opposed to expanding the scope of implied rights via judicial interpretation. This perspective often coincides with the goals of crime control and tends toward prosecution-oriented outcomes.

An alternative living Constitution approach is informed by the recognition that the Framers of the Constitution intentionally employed vague and expansive language. Implicit in the broad wording of the Constitution is the understanding the Court should adopt evolving and adaptive interpretations of constitutional rights. This perspective believes in flexible principles informed by cultural and political changes in society leading to a dynamic and evolving understandings of constitutional rights. The Supreme Court should act as guardian of political minorities, protecting those such as criminal defendants unable to effectively resort to the elected political branches for redress of violations of human dignity. It is appropriate for courts to consciously implement needed criminal justice reforms either through expansion of old constitutional rights or recognition of new implied rights.

As you can see from the above discussion, the function and scope of the Constitution has been open to debate. Its meaning has been substantially revised throughout American history. Central to discussions of justice and what constitutes fair and equitable behavior are questions of how the courts generally, and the Supreme Court in particular, interpret and enforce constitutional rights.

This second edition of *Seven Deadly Sins: Constitutional Rights and the Criminal Justice System* includes updates to all outstanding cases that had yet to be decided when the first edition of this textbook was published. Additionally, several new cases (primarily in odd chapters) and vignettes (primarily in even chapters) have been added to the second edition of this textbook:

- Chapter 1 updates free exercise litigation concerning polygamy, expands the discussion of RFRA and RLUIPA, and features a new case, *Holt v. Hobbs*, discussing the application of RLUIPA to religious freedom claims by prisoners.
- Chapter 2 adds a new vignette regarding food allergies for incarcerated persons.
- Chapter 3 adds a discussion of the application of the *Miranda* case to physical evidence in *U.S. v. Patane*.
- Chapter 4 adds new vignettes exploring inmate pen pals as well as the execution drugs used in Nevada.
- Chapter 5 is reorganized and includes three new cases, *Carpenter v. U.S.*, concerning privacy protections for cell phone location data maintained by wireless providers, *Arizona v. Gant*, limiting searches incident to arrest involving automobiles, and *Utah v. Strieff*, expanding the attenuation exception to the exclusionary rule.
- Chapter 6 adds new vignettes that discuss searches of transgendered inmates and using drones in corrections applications.
- Chapter 8 includes new vignettes about correctional officers smuggling contraband and former inmates attempting to break back into jail.
- Chapter 11 adds *State v. Houston*, with a discussion of how states are responding to the Supreme Court's juvenile sentencing jurisprudence.
- Chapter 12 adds new and timely vignettes discussing information regarding the incarceration of offenders during the COVID-19 pandemic and using the "Baby Shark" song to retaliate against inmates.

- Chapter 14 updates litigation surrounding prosecution for distributing jury nullification fliers.
- Chapter 15 includes an expanded discussion of *Buck v. Bell* as well as the formal overruling of the *Korematsu* case in *Trump v. Hawaii*.

The discussion of the cases in the following chapters are designed to help students quickly identify not just the *what* of the law, but the *why* of the law as well. Instead of lengthy excerpts, the strategy is to use everyday language so that the legal issue, court holding, and explanation of that reasoning are all readily ascertainable. The vignettes on law enforcement and corrections officials are also designed to give readily understandable examples of recent situations that reveal the ethical and moral dilemmas facing officers, administrators, and courts. The authors hope that by the end of the book students have not only been introduced to the content of the law, but also have the tools to begin to evaluate the law for themselves. We hope instructors and students alike will begin to ask questions like has the Supreme Court gone too far in the last 60 years with the Due Process Revolution through overly broad interpretations and applications of the Constitution, or not far enough to protect the rights of minorities and criminal defendants? Thus, discussion questions are provided following each case to help prompt such conversations. It is by asking such questions, and reflecting upon the legal arguments and reasoning the Court has provided, that we hope to enable students to articulate and reflect critically upon the competing values implicit in constitutional interpretation so that students will learn to value, respect, and defend these constitutional rights when in a position to do so.