Criminal Procedure

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Constitutional Constraints Upon Investigation and Proof

NINTH EDITION

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Welsh S. White
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J.J.T.
To Nancy, Vivian, Michelle, Henry, and, of course, Welsh

W.S.W.
To Linda, Kathy, and Ryan

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Preface

Upon completing this revision, the ninth edition of Criminal Procedure: Constitutional Constraints Upon Investigation and Proof, my eyes wandered across the title page. I was struck by the fact that my incomparable collaborator, Welsh White, has been gone for 15 years. It is impossible for me to believe that so much time has passed since I last had the personal and professional pleasure of discussing and recrafting our brainchild with him. Between 1990 and his untimely passing in 2005, we produced five editions together. This is now the fourth time I have flown solo in reshaping the text. I have missed his wisdom, counsel, and spirit each time I have undertaken the project by myself. Once again, I sincerely hope that he would approve of the decisions and changes that I have made.

The text is designed for use in an introductory Constitutional Criminal Procedure course focused on issues raised by pretrial law enforcement investigatory practices. The principal topics covered are searches and seizures, confessions, identification procedures, and the courtroom rules that command the suppression of evidence. There is only one significant structural change in this ninth edition. I have decided that the time has come to eliminate Chapter Six—Entrapment and Related Defenses. I hope I am right that few instructors teach the topics in that chapter in criminal procedure courses. (For any who do teach Chapter Six, the publisher has agreed to make the chapter available to you online.) Some of the other changes I have made in the casebook were dictated by new developments in the law, but during the past five years there have been fewer significant Supreme Court decisions than in the past. A greater number of the modifications in this edition are the product of a desire to condense and of the conclusion that a handful of main cases could be presented more efficiently and economically.

The sole new case accorded main opinion status is *United States v. Carpenter* in Chapter One (whether securing cell site location information from service providers is a Fourth Amendment search). The four new decisions captured in notes include: *Mitchell v. Wisconsin*, *Collins v. Virginia*, *Kansas v. Glover*, and *Byrd v. United States*. The main opinions in the last edition that have been condensed and are now the subjects of notes are: *Georgia v. Randolph, United States v. Place, Maryland v. Buie, Hudson v. Michigan, Massachusetts v. Sheppard, and Missouri v. Seibert*. If any adopters still wish to teach these cases from the full opinions, they are welcome to include the versions found in the eighth edition in their course supplements. In addition, I have trimmed some of the lengthier opinions modestly, taking care not to omit core

reasoning. I have clarified some of the extant notes, and I have added a few to fill some holes spotted while teaching the course.

The fact that there are only five new Supreme Court decisions since the last revision is potent evidence that most of the topics addressed in the text have not seen any significant developments in recent years. There are, for example, no new rulings pertaining to any of the three constitutional limitations on "confessions," and, of course, no new rulings in the long dormant "identifications" areas. The consequence of the Supreme Court's relative lack of interest in criminal procedure subjects and general contentment with the current structure of the casebook is that the ninth edition is less different from its predecessor than any of the earlier revisions.

This casebook has always sought to strike a balance—to furnish enough material to enable clear understanding and informed discussion of the core subjects, but not to overwhelm students with excessive details or confuse them with endless questions. The primary aim remains what it has been from the very start—to facilitate an appreciation of the richness, the complexity, and the significance of the issues raised by the pertinent Bill of Rights provisions. Like the eight prior incarnations of the text, the ninth edition is relatively comprehensive, but not exhaustive. Although the main objective is to present the currently governing constitutional doctrine, some of the supplanted doctrines remain. They can provide an enriching historical context, and they enable students to assess the strength of competing approaches.

I have once again adhered to a strong preference that Welsh and I shared. We strove to allow the Supreme Court to speak for itself as much as possible. Despite substantial editing of the opinions,[1] core analytical elements of the majority and of important concurring and dissenting opinions have been retained.

Two noteworthy features have always distinguished this text from competitors. First, the textual material that introduces chapters and that appears between cases is limited. Welsh and I agreed that a casebook should not be the forum for extended scholarly discussions. Those are better left to treatises, hornbooks, and law review articles. Questions and comments are *focused* and *concise*. The goal is to prompt students to think creatively and independently. Updated bibliographies of pertinent articles appear at the ends of chapters and/or subsections. Students interested in pursuing more extensive discussions of the subjects are invited to review the scholarship cited in these bibliographies.

The second distinctive feature of the casebook is the inclusion of "problems" at the end of chapters or subsections of chapters. The problems, all of which are based on actual federal and state cases, serve a number of purposes. By highlighting specific doctrinal details, some of the problems focus attention upon and reinforce important principles and limitations announced in the decisions. Other problems

1. Substantive deletions have been indicated by ellipses. Although citations to cases and other sources have frequently been deleted, there are no indications of those deletions.

highlight unresolved or debatable issues — issues that are disputed by the lower courts. The problems furnish a practical means of testing and fleshing out students' understanding of the settled doctrines and of the possible answers to the still-open questions. They afford opportunities to apply governing law to novel fact patterns and to exercise and hone analytical skills. While a large majority of the problems found in the eighth edition remain in this edition, I have refreshed most of the chapters with new situations that raise intriguing, challenging, and sometimes surprising, questions.

I believe that the casebook remains true to its original nature as a pragmatic and flexible instructional tool that is suitable for various pedagogical styles. Welsh and I believed that the inclusion of the most significant decisions, the preservation of the critical elements of the Justices' reasoning, and the incorporation of problem situations would prove useful to a range of educational methodologies. The text remains suitable for those who are traditionally Socratic, those who favor a problem-oriented approach, and those who blend different teaching styles.

I am grateful to Mary DeCamp, who ably assisted the quest for decisions I could use as bases for new problems. I am also indebted to Michelle Tomkovicz, my talented law student daughter, who provided a compilation of recent scholarship that enabled me to update the bibliographies. As always, I need to express my deep appreciation for the many research and administrative assistants who have devoted their efforts to producing this casebook through the years. The ninth edition builds on all previous labors.

James J. Tomkovicz
March, 2021

Justices of the United States Supreme Court[1]

	(1)[2]	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
	Warren (1953)[3]	Black (1937)	Frankfurter (1939)	Douglas (1939)	Clark (1949)	Harlan (1955)	Brennan (1956)	Whittaker (1957)	Stewart (1958)
1960			Goldberg (1962–65)[4]					White (1962–93)	
			Fortas (1965–69)		Marshall (1967–91)				
1970	Burger (1969–86)		Blackmun (1970–94)			Rehnquist (1972–86)			
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1980									O'Connor (1981–2006)
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							Sotomayor (2009–present)		
2010				Kagan (2010–present)					
						Gorsuch (2017–present)			
		Kavanaugh (2018–present)							
2020								Barrett (2020–present)	

1. Starting with membership as of 1958
2. Chief Justice
3. Year of Appointment
4. Years on Court

Introduction

This brief Introduction is intended to familiarize students with two foundational subjects: the typical processes of and participants in the American criminal justice system and the constitutional source of restraints upon state law enforcement officers. The excerpt in Part A describes the operation of the criminal justice system. Part B contains a brief history and summary of the regulation of state conduct by Bill of Rights guarantees incorporated through the Due Process Clause.

[A] An Overview of the Criminal Justice System

National Advisory Commission on Criminal Justice Standards and Goals: Courts 11–15 (1973)*

Arrest

The first formal contact of an accused with the criminal justice system is likely to be an arrest by a police officer. In most cases, the arrest will be made upon the police officer's own evaluation that there is sufficient basis for believing that a crime had been committed by the accused. However, the arrest may be made pursuant to a warrant: in this case, the police officer or some other person will have submitted the evidence against the accused to a judicial officer, who determines whether the evidence is sufficient to justify an arrest. In some situations, the accused may have no formal contact with the law until he or she had been indicted by a grand jury. Following such an indictment, a court order may be issued authorizing police officers to take the accused into custody. But these are exceptional situations. Ordinarily, the arrest is made without any court order and the court's contact with the accused comes only after the arrest.

Even if there has been no court involvement in the initial decision to arrest the defendant, courts may have been involved in the case at an earlier stage. The requirement of the Fourth Amendment to the U.S. Constitution that all searches be reasonable has been interpreted to mean that a warrant be obtained from a judicial officer before all searches unless there are specific reasons for not obtaining a warrant. Thus investigations that precede arrest sometimes involve searches made

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pursuant to a search warrant issued by a court. The court role in criminal investigation is broadening in other areas, and procedures are being developed whereby suspects may be compelled to submit to photographing, fingerprinting, and similar processes by court order. The potential for court involvement in the criminal justice system, then, extends to early parts of the police investigatory stage.

Initial Judicial Appearance

In all jurisdictions, a police officer or other person making an arrest must bring the arrested person before a judge within a short period of time. It is at this initial appearance that most accused have their first contact with the courts. This initial appearance is usually before a lower court—a justice of the peace or a magistrate. Thus in prosecutions for serious cases the initial appearance (and some further processes) occur in courts that do not have jurisdiction to determine the guilt or innocence of the accused. Often by the time of the initial appearance, the prosecution will have prepared a formal document called a complaint, which charges the defendant with a specific crime.

At the initial appearance, several things may occur. First, the defendant will be informed of the charges against him, usually by means of complaint. Second, the defendant will be informed of his or her rights, including the constitutional privilege against self-incrimination. Third, if the case is one in which the accused will be provided with an attorney at state expense, the mechanical process of assigning the attorney at least may begin at this stage. Fourth, unless the defendant is convicted of an offense at this point, arrangement may be made concerning the release of the defendant before further proceedings. This may take the traditional form of setting bail, that is, establishment of an amount of security the defendant himself or a professional bondsman whom the defendant may hire must deposit with the court (or assume the obligation to pay) to assure that the defendant does appear for later proceedings. Pretrial release, in some jurisdictions, also may take the form of being released on one's own recognizance, that is, released simply upon the defendant's promise to appear at a later time. Other forms of encouraging a released defendant's later appearance sometimes are used.

In addition to these matters collateral to the issue of guilt, it is at the initial appearance that judicial inquiry into the merits of the case begins. If the charge is one the lower court has authority to try, the defendant may be asked how he or she pleads. If the defendant pleads guilty, the defendant may be convicted at this point. If the defendant pleads not guilty, a trial date may be set and trial held later in this court.

However, if the charge is more serious, the court must give the defendant the opportunity for a judicial evaluation to determine whether there is enough evidence to justify putting the defendant on trial in the higher court. In this type of case, the judge at the initial appearance ordinarily will ask the defendant whether he or she wants a preliminary hearing. If the defendant does, the matter generally is continued, or postponed to give both the prosecution and the defense time to prepare their cases.

The matter will be taken up again later in the lower court at the preliminary hearing. At this proceeding, the prosecutor introduces evidence to try to prove the defendant's guilt. The prosecutor need not convince the court of the defendant's guilt beyond a reasonable doubt, but need only establish that there is enough evidence from which an average person (juror) could conclude that the defendant was guilty of the crime charged. If this evidence is produced, the court may find that the prosecution has established probable cause to believe the defendant guilty.

At this preliminary hearing the defendant may cross-examine witnesses produced by the prosecution and present evidence himself. If the court finds at the end of the preliminary hearing that probable cause does not exist, it dismisses the complaint. This does not ordinarily prevent the prosecution from bringing another charge, however. If the court finds that probable cause does exist, it orders that the defendant be bound over to the next step in the prosecution. As a practical matter, the preliminary hearing also serves the function of giving the defendant and his attorney a look at the case the prosecution will produce at trial. It gives a defense attorney the opportunity to cross-examine witnesses the attorney later will have to confront. This informal previewing function may be more valuable to defendants than the theoretical function of the preliminary hearing.

Filing of Formal Criminal Charge

Generally, it is following the decision of the lower court to bind over a defendant that the formal criminal charge is made in the court that would try the case if it goes to formal trial. If no grand jury action is to be taken, this is a simple step consisting of the prosecutor's filing a document called an information. However, in many jurisdictions the involvement of the grand jury makes the process more complex. There, the decision at the preliminary hearing simply is to bind the defendant over for consideration by the grand jury. In these areas, the prosecutor then must go before the grand jury and again present the evidence. Only if the grand jury determines that there is probable cause does it act. Its action—consisting of issuing a document called an indictment—constitutes the formal charging of the defendant. If it does not find probable cause, it takes no action and the prosecution is dismissed.

In some jurisdictions, it is not necessary to have both a grand jury inquiry and a preliminary hearing. In most federal jurisdictions, for example, if a defendant has been indicted by a grand jury the defendant no longer has a right to a preliminary hearing, on the theory that the defendant is entitled to only one determination as to whether probable cause exists.

Although the defendant is entitled to participate in the preliminary hearing, the defendant has no right to take part in a grand jury inquiry. Traditionally, he has not been able to ascertain what went on in front of the grand jury, although increasingly the law has given him the right, after the fact, to know.

Following the formal charge—whether it has been by indictment or information— any of a variety of matters that require resolution may arise. The defendant's competency to stand trial may be in issue. This requires the court

to resolve the question of whether the defendant is too mentally ill or otherwise impaired to participate meaningfully in his trial. If he is sufficiently impaired, trial must be postponed until the defendant regains competency.

The defendant also may challenge the validity of the indictment or information or the means by which they were issued. For example, the defendant may assert that those acts with which he or she is charged do not constitute a crime under the laws of jurisdiction. Or, if the defendant was indicted by a grand jury, the defendant may assert that the grand jury was selected in a manner not consistent with state or federal law and, therefore, that the indictment is invalid.

A defendant also may—and in some jurisdictions must—raise, before trial, challenges to the admissibility of certain evidence, especially evidence seized by police officers in a search or statements obtained from the defendant by interrogation. In view of the rapid growth of legal doctrine governing the admissibility of statements of defendants and evidence obtained by police search and seizure, resolution of the issues raised by defendants' challenges to the admissibility of such evidence may be more complex and time-consuming than anything involved in determining guilt or innocence.

The criminal law also is increasingly abandoning the traditional approach that neither side is entitled to know what evidence the other side is going to produce until the other side actually presents it at trial. In the main, this has taken the form of granting defendants greater access to such things as physical evidence (e.g., fingerprints) that will be used against them. Access to witness[es'] statements sometimes is required, and some jurisdictions are compelling the defendant to grant limited disclosure to the prosecution.

Arraignment

In view of the potential complexity of pretrial matters, much of the significant activity in a criminal prosecution already may have occurred at the time the defendant makes his or her first formal appearance before the court that is to try him or her. This first appearance—the arraignment—is the point at which the defendant is asked to plead to the charge. The defendant need not plead, in which case a plea of not guilty automatically is entered for the defendant. If the defendant pleads guilty, the law requires that certain precautions be taken to assure that this plea is made validly. Generally, the trial judge accepting the plea first must inquire of the defendant whether the defendant understands the charge against him or her and the penalties that may be imposed. The judge also must be assured that there is some reasonable basis in the facts of the case for the plea. This may involve requiring the prosecution to present some of its evidence to assure the court that there is evidence tending to establish guilt.

Trial

Unless the defendant enters a guilty plea, the full adversary process is put into motion. The prosecution now must establish to a jury or a judge the guilt of the defendant beyond a reasonable doubt. If the defendant elects to have the case tried

by a jury, much effort is expended on the selection of a jury. Prospective jurors are questioned to ascertain whether they might be biased and what their views on numerous matters might be. Both sides have the right to have a potential juror rejected on the ground that the juror may be biased. In addition, both have the right to reject a limited number of potential jurors without having to state any reason. When the jury has been selected and convened, both sides may make opening statements explaining what they intend to prove or disprove.

The prosecution presents its evidence first, and the defendant has the option of making no case and relying upon the prosecution's inability to establish guilt beyond a reasonable doubt. The defendant also has the option of presenting evidence tending to disprove the prosecution's case or tending to prove additional facts constituting a defense under applicable law. Throughout, however, the burden remains upon the prosecution. Procedurally, this is effectuated by defense motions to dismiss, which often are made after the prosecution's case has been presented and after all of the evidence is in. These motions in effect assert that the prosecution's case is so weak that no reasonable jury could conclude beyond a reasonable doubt that the defendant was guilty. If the judge grants the motion, the judge is, in effect, determining that no jury could reasonably return a verdict of guilty. This not only results in a dismissal of the prosecution but also prevents the prosecution from bringing another charge for the same crime.

After the evidence is in and defense motions are disposed of, the jury is instructed on the applicable law. Often both defense and prosecution lawyers submit instructions which they ask the court to read to the jury, and the court chooses from those and others it composes itself. It is in the formulation of these instructions that many issues regarding the definition of the applicable law arise and must be resolved. After — or sometimes before — the instructions are read, both sides present formal arguments to the jury. The jury then retires for its deliberations.

Generally, the jury may return only one of two verdicts: guilty or not guilty. A verdict of not guilty may be misleading; it may mean not that the jury believed that the defendant was not guilty but rather that the jury determined that the prosecution had not established guilt by the criterion — beyond a reasonable doubt — the law imposes. If the insanity defense has been raised, the jury may be told it should specify if insanity is the reason for acquittal; otherwise, there is no need for explanation. If a guilty verdict is returned, the court formally enters a judgment of conviction unless there is a legally sufficient reason for not doing so.

The defendant may attack the conviction, usually by making a motion to set aside the verdict and order a new trial. In the attack, the defendant may argue that evidence was improperly admitted during the trial, that the evidence was so weak that no reasonable jury could have found that it established guilt beyond a reasonable doubt, or that there is newly discovered evidence which, had it been available at the time of trial, would have changed the result. If the court grants a motion raising one of these arguments, the effect generally is not to acquit the defendant but merely to require the holding of a new trial.

Sentencing

Sentencing then follows. (If the court has accepted a plea of guilty, this step follows acceptance of the plea.) In an increasing number of jurisdictions, an investigation called the presentence report is conducted by professional probation officers. This involves investigation of the offense, the offender and the offender's background, and any other matters of potential value to the sentencing judge. Following submission of the report to the court, the defendant is given the opportunity to comment upon the appropriateness of sentencing. In some jurisdictions, this has developed into a more extensive court hearing on sentencing issues, with the defendant given the opportunity to present evidence as well as argument for leniency. Sentencing itself generally is the responsibility of the judge, although in some jurisdictions juries retain that authority.

Appeal

Following the conclusion of the proceeding in the trial court, the matter shifts to the appellate courts. In some jurisdictions, a defendant who is convicted of a minor offense in a lower court has the right to a new trial (trial de novo) in a higher court. However, in most situations—and in all cases involving serious offenses—the right to appeal is limited to the right to have an appellate court examine the record of the trial proceedings for error. If error is found, the appellate court either may take definitive action—such as ordering that the prosecution be dismissed—or it may set aside the conviction and remand the case for a new trial. The latter gives the prosecution the opportunity to obtain a valid conviction. Generally, a time limit is placed upon the period during which an appeal may be taken.

Collateral Attack

Even if no appeal is taken or the conviction is upheld, the court's participation in the criminal justice process is not necessarily ended. To some extent, a convicted defendant who has either exhausted all appeal rights or declined to exercise them within the appropriate time limits can seek further relief by means of collateral attack upon the conviction. This method involves a procedure collateral to the standard process of conviction and appeal.

Traditionally, this relief was sought by applying for a writ of habeas corpus on the ground that the conviction under which the applicant was held was invalid. Many jurisdictions have found this vehicle too cumbersome for modern problems and have developed special procedure for collateral attacks. Despite variations in terminology and procedural technicalities, however, opportunities remain for an accused convicted in federal court to seek such collateral relief from his conviction in federal courts and for those convicted in state courts to seek similar relief in state and, to a somewhat more limited extent, in federal courts.

The matter has become an increasingly significant point of the state-federal friction as issues of federal constitutional law have become more important parts of criminal litigation. Defendants convicted in state courts apparently have thought that federal courts offered a more sympathetic forum for assertions that federal

constitutional rights were violated during a state criminal prosecution. State judges and prosecutors have indicated resentment of the actions of federal courts in reversing state convictions for reasons state courts either considered of no legal merit or refused to consider for what they felt were valid reasons.

In any case, because the collateral attack upon a conviction remains available until (and even after) the defendant has gone through the correctional process, the courts' role in the criminal justice process extends from the earliest points of criminal investigation to the final portions of the correctional process.

[B] Due Process and Incorporation of the Bill of Rights

There can be no question that the Fourth, Fifth, and Sixth Amendment guarantees treated in this casebook were intended to govern the actions of federal law enforcement officers. With respect to state law enforcement officers, an important preliminary question is whether the guarantees of the Bill of Rights regulate state action. Early on, in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L. Ed. 672 (1833), the United States Supreme Court answered that question, holding that the Bill of Rights governs only the federal government and not the states. That holding endures today. Nevertheless, due to the Fourteenth Amendment Due Process Clause, a provision specifically designed to control state action, today the states are generally not free to do that which the Bill of Rights proscribes.

For many years, the members of the Supreme Court debated the extent to which the liberties reflected in various Bill of Rights provisions are a part of the "due process of law" that the Fourteenth Amendment prohibits states from denying. Initially, the prevailing view was that the Due Process Clause required only those rights and procedures that were "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 2d 288 (1937); *see also Adamson v. California*, 332 U.S. 46, 677 S. Ct. 1672, 91 L. Ed. 2d 1903 (1947). This "ordered liberty" approach to interpretation of the Fourteenth Amendment yielded a number of holdings that permitted states to afford fewer rights and liberties than provided for in the Bill of Rights.

Over the years, however, a different approach to the issue evolved. In *Duncan v. Louisiana*, 391 U.S 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), the Court, in an opinion by Justice White, endorsed and explained that approach. The Court explained that a provision of the Bill of Rights is applicable to the states as an integral part of due process if it is "essential to an Anglo-American regime of ordered liberty" or "fundamental to the American scheme of justice." Moreover, in determining whether a particular provision qualifies, the Court will not consider the provision in the abstract, but, rather, will evaluate it against the backdrop of the common-law system of criminal procedure that has developed "contemporaneously in England and in this country." Thus, in deciding that the right to jury trial is applicable to the

states, the *Duncan* Court emphasized the historical role of the jury in England and in this country, noting that for centuries the jury had served as a buffer between the individual and the government.

That approach to deciding whether the substance of a particular Bill of Rights entitlement applies to the states has been called "selective incorporation."[1] While the approach has been "selective" in demanding individual evaluation of each provision, over time it has resulted in the effective "incorporation" of most of the Bill of Rights guarantees.[2] Moreover, the Court has generally refused to dilute those guarantees, but, instead, has found that the content of the Due Process Clause is identical to the content of specific Bill of Rights provisions.

For purposes of the subjects in this casebook, students need to appreciate two basic matters. First, the actual constitutional source of the controls on *state* law enforcement is the Fourteenth Amendment Due Process Clause. Second, the Fourth, Fifth, and Sixth Amendment regulations on law enforcement activity considered in this book have been fully and exactly "incorporated" and applied to the states through that Due Process Clause.

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1. For a discussion of the approach, see Israel, *Selective Incorporation Revisited*, 71 Geo. L.J. 253 (1982).

2. For a summary of the historical development of the Supreme Court's different approaches to deciding whether a provision of the Bill of Rights is a part of the due process of law guaranteed against the states by the Fourteenth Amendment, *see McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 759-765, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (holding that the Second Amendment right to bear arms is applicable against the states because it is "among those fundamental rights necessary to our system of ordered liberty"). Since the Court's extended discussion of the incorporation doctrine in *McDonald*, the Justices have ruled that two additional Bill of Rights safeguards are applicable to the states. In 2019, in *Timbs v. Indiana*, 586 U.S. ____, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019), the Court held that the Eighth Amendment prohibition of excessive fines was a part of due process that states must honor. And in *Ramos v. Louisiana*, 589 U.S. ____, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), the Court overruled an earlier holding that the guarantee of *unanimous* verdicts by 12-person juries did not bind the states. *See Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); *see also Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972). According to *Ramos*, like the Sixth Amendment right to trial by jury, the Fourteenth Amendment Due Process Clause requires that all jury verdicts in trials for "serious" crimes (*i.e.*., those for which an accused is entitled to a jury) must be unanimous. This means that the only protection in the Bill of Rights pertaining to the criminal process that does not apply to the states through the Fourteenth Amendment is the Fifth Amendment requirement of indictment by grand jury "for a capital, or otherwise infamous crime." In *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884), long before the modern era of selective incorporation, the Justices held that states need not adhere to the Fifth Amendment's grand jury indictment mandate.