Chapter 2

The Idea of Due Process

A. Defining Due Process

Add the following footnote at the end of the second full paragraph on page 66:

FN — One final difficulty: Even if the Due Process Clause is best read as incorporating the Bill of Rights, does it render those rights applicable in state criminal cases in exactly the same manner as they apply to federal criminal cases? (This view is sometimes called "jot for jot" incorporation.) Or do the states have greater flexibility to adjust some of the specific terms of those rights? (This view has been called "dual-track" incorporation.) In Ramos v. Louisiana, 590 U.S. ___ (2020), the Supreme Court overruled Apodaca v. Oregon, 406 U.S. 404 (1972) — a case that, due to a 4-1-4 split, reached the odd result of allowing a state to use non-unanimous juries even though the federal government was prohibited from doing so under the Sixth Amendment — and essentially closed the door, once and for all, on "dual-track" incorporation. See also Timbs v. Indiana, 586 U.S. ___ (2019) (unanimously rejecting Indiana's argument for "dual-track" incorporation of the Excessive Fines Clause of the Eighth Amendment).

Chapter 5

The Fourth Amendment

C. Justifying Searches and Seizures

Add the following new note after Note 3 on page 578:

4. In Kansas v. Glover, 589 U.S. ___ (2020), the Court addressed whether a police officer had reasonable suspicion to infer that the person driving a motor vehicle was the owner. The officer had run a routine check of the vehicle's license plate, and received a database "hit" that the registered owner of the vehicle had a revoked driver's license. The officer stopped the vehicle, and the driver (who did turn out to be the owner) ultimately was charged with "driving as a habitual violator."

Justice Thomas, writing for eight members of the Court, concluded that the officer's judgment that the owner and the driver were probably the same person was a reasonable "commonsense inference," although he did not explain *why* he felt that was the case. Justice Sotomayor, the lone dissenter, argued that the majority's approach departed from the Court's well-established requirement that reasonable suspicion should be based only on an officer's established training or experience. Here, she asserted, the officer's reliance on "common sense" basically flipped the burden of proof that requires the police to establish proper grounds for reasonable suspicion.

Justice Sotomayor may well be correct, if the lower courts read the case broadly, but it is important to note that both the majority and Justices Kagan and Ginsburg (in concurrence) took pains to emphasize the narrow scope of the holding — specifically, the fact that the owner of the car had a prior history of ignoring traffic laws, as well as the complete absence of any other facts in the record that might have caused the officer to question whether the driver of the car might actually be someone other than the owner.

D. Reasonableness and Police Use of Force

Add the following new paragraph at the end of Note 4 on page 716:

One important variable in determining whether a police officer's actions are reasonable is the law itself that governs excessive force. If a factual situation has been found to permit or to deny the use of a certain level of force under a certain set of facts, presumably that should be a significant variable for the police to take into account in deciding how to respond to an encounter as well as an important variable in analyzing the objective reasonableness of an action. That, in turn, suggests that the police should be instructed as to the substantive content of the law of excessive force. It turns out that they apparently are not so instructed. See Joanna C. Schwartz, Qualified Immunity's Boldest Lie, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659540, reporting the results of a study of police training and education materials and concluding that "officers are not notified of the facts and holdings of cases that clearly establish the law . . . . Instead, officers are taught the general principles of *Graham* and *Garner* and then are told to apply those principles in the widely varying circumstances that come their way." This lack of instruction on the caselaw affects not only the reasonableness of police use of force, but also the good faith exception to the exclusionary rule, and even more deeply whether the entire exclusionary rule regime is sensible. If police officers do not know the law, it is difficult to see how exclusionary rulings will deter them.

Chapter 10

Pretrial Screening and the Grand Jury

C. Grand Jury Investigations

Add the following new note after Note 3 on page 1123:

4. As noted earlier, the Grand Jury Clause of the Fifth Amendment is not incorporated against the States, and so the use of grand juries in state proceedings varies widely. But the scope of the subpoena power is often comparable to that in the federal system. In Trump v. Vance, 591 U.S. ___ (2020), a New York state grand jury subpoenaed some financial records of President Donald Trump, who resisted on the grounds that that the Supremacy Clause gives a sitting President absolute immunity from complying with state subpoenas; the President argued that having to respond to state subpoenas would inevitably interfere with the performance of his Article II duties. The Supreme Court, by 7-2, rejected the argument. Although the Court recognized that the power to investigate a sitting president could in some circumstances lead to harassment by political opponents, a categorical rule forbidding these subpoenas is not required. The Court noted that, among other things, grand juries are prohibited from engaging in "arbitrary fishing expeditions" (citing *R. Enterprises*, supra), and that federal courts have to power to intervene in state court cases "in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith." The Court also rejected the Solicitor General's more limited argument that a subpoena directed at a sitting President needed to demonstrate a specific showing of need.

Is the potential for federal courts to intervene and quash subpoenas under the *R Enterprises* test really sufficient to protect a President from political harassment? Even if courts are more willing than usual to act when it is the president who is being investigated, isn't the need to respond to subpoenas and litigate their validity itself a disruption that could interfere with the proper functioning of the executive branch?

Chapter 14

The Jury and the Criminal Trial

A. The Right to a Trial by Jury

In Note 4 on pages 1346-1347, delete the sentence (starting with "Nearly ...") that begins at the bottom of page 1346 and carries over to the top of page 1347. In addition, replace the second paragraph of the Note on page 1347 with the following:

Despite the longstanding unanimity rule for federal juries, for nearly four decades the states were constitutionally permitted to proceed with non-unanimous juries as the result of an odd 4-1-4 split on the Supreme Court in the case of Apodaca v. Oregon, 406 U.S. 404 (1972). However, *Apodaca* was finally overruled by Ramos v. Louisiana, 590 U.S. ___ (2020); now, the Sixth Amendment requires unanimous jury verdicts in both state and federal criminal cases.

Chapter 17

Appellate and Collateral Review

A. Appellate Review

At the end of Note 9 on page 1650, add the following new paragraph:

In Davis v. United States, 589 U.S. ___ (2020), a unanimous *per curiam* Court held that "plain error" review under Rule 52(b) potentially applies to all unpreserved errors — factual as well as legal — which meant that the Fifth Circuit's practice of refusing even to consider unpreserved factual errors must be overturned.

B. Collateral Review

At the end of Subsection (d) on page 1680, add the following new paragraph:

In Banister v. Davis, 590 U.S. ___ (2020), the Court held that a motion filed under Rule 59(e) asking a district court to alter or amend its judgment — which must be filed within 28 days of the entry of the judgment, without possibility of an extension — does not constitute a "second or successive" habeas petition that triggers the restrictions of 28 U.S.C. §2244.