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## Teaching Criminal Procedure: Why Socrates Would Use YouTube

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## TEACHING CRIMINAL PROCEDURE: WHY SOCRATES WOULD USE YOUTUBE

STEPHEN E. HENDERSON\* AND JOSEPH THAI\*\*

In this invited contribution to the *Law Journal's* annual Teaching Issue, we pay some homage to the great philosopher whose spirit allegedly guides our classrooms, in service of two concrete goals. One, we employ dialogue to describe the “nuts and bolts” of teaching Criminal Procedure, most of which are equally relevant to any doctrinal law school course (including course description, office hours, seating charts and attendance, class decorum and recording, student participation, laptops, textbooks, class preparation and presentation, and exams). Two, we explain the benefits of using multimedia in the classroom, including a few of the many modules found on our Crimprof Multipedia service. We organize its benefits into four “h’s” (humor, humanization, headlines, and hypotheticals), and we give several examples of each for a topic that pervades criminal procedure: racial (in)justice.

### INTRODUCTION

Most law students know next to nothing about Socrates, the philosopher who lived thousands of years ago in ancient Greece.<sup>1</sup> We, neither one a philosopher, are not much better off. Yet the “Socratic method” pervades law school teaching.<sup>2</sup> At least that is what they put in the brochures.<sup>3</sup> In our

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\*\* Presidential Professor and Watson Centennial Chair in Law, The University of Oklahoma. We express our appreciation to the *Saint Louis University Law Journal*, including Managing Editor Joseph Welling, for providing this opportunity to reflect upon our teaching. Over the years, the authors in the *Law Journal's* “teaching” issues form a veritable “who’s who,” and we are grateful to be included in such company. Our greatest thanks, however, go to our students who consistently remind us why teaching is a wonderful calling.

1. See Debra Nails, *Socrates*, STAN. ENCYCLOPEDIA PHIL. (Mar. 19, 2014), <http://plato.stanford.edu/entries/socrates/> [<http://perma.cc/M2HJ-YPQ8>].

2. See *The Socratic Method*, PRINCETON REV., <http://www.princetonreview.com/law-school-advice/socratic-method> [<http://perma.cc/ZX3W-6A5K>] (last visited Nov. 5, 2015).

3. Sometimes literally. See, e.g., *The Socratic Method*, U. CHI. L. SCH., <http://www.law.u-chicago.edu/prospectives/lifeofthemind/socraticmethod> [<http://perma.cc/SF3M-CJ4K>] (last visited Nov. 4, 2015); Univ. of Ga. Law Sch., *The Socratic Method*, YOUTUBE (Aug. 18, 2010), [http://www.youtube.com/watch?v=ss\\_URqTTRbw](http://www.youtube.com/watch?v=ss_URqTTRbw) [<http://perma.cc/TU4V-9KLN>]; *The Socratic Method*, U. SAN DIEGO SCH. L., <http://www.sandiego.edu/law/student-affairs/academic-success/>

experience, law professors vary widely in their manners of teaching, without a lot of correlation between how “Socratic” each claims to be, and how much learning-by-question and discussion actually takes place.

Nonetheless, two points strike us as salient. One, the modern world knows nothing about Socrates from his own writing; instead, what we know comes solely from his students.<sup>4</sup> It is hard to imagine a better reference for a great teacher than to have been the educator of Plato,<sup>5</sup> and, while we have no Plato to pen our Article, we have been the beneficiaries of many teachers over many years of education. Two, many of Plato’s writings take the form of dialogues, often with Socrates as the principal participant (hence, the “Socratic” method).<sup>6</sup> Why did Plato choose this format? In appropriately Socratic fashion, the Stanford Encyclopedia of Philosophy answers with this question:

The best way to form a reasonable conjecture about why Plato wrote any given work in the form of a dialogue is to ask: what would be lost, were one to attempt to re-write this work in a way that eliminated the give-and-take of interchange, stripped the characters of their personality and social markers, and transformed the result into something that comes straight from the mouth of its author?<sup>7</sup>

This Article risks creating just such a lifeless narrative. Our classrooms are rich discussions, and maybe even a bit of participatory theater, between vastly diverse people: English majors to engineers, protesters to police officers, surgeons to squeamish individuals, pacifists to platoon leaders. Given that law tells the story of humanity’s attempts at organizing our world—both for good and ill—this rich sea of humanity is fertile ground for wonderful dialogue, and there is something antiseptic about any attempt to capture it on this written page. Even if we were to hit all the right notes, we fear the melody might be faint or even seem missing.<sup>8</sup> If so, we would not want it to besmirch the entertaining, enlivening exercise that should be the law school classroom.

With that explanation (or even apology), we press onward in the following manner. Together we have thirty years of experience teaching Criminal Procedure, most of it focusing on the constitutional rules of police

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materials/socratic-method.php [http://perma.cc/9DBS-F9TD] (last visited Nov. 4, 2015). *But see* Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 114 (1999).

4. *See* Nails, *supra* note 1.

5. *See* Richard Kraut, *Plato*, STAN. ENCYCLOPEDIA PHIL. (Sept. 11, 2013), <http://plato.stanford.edu/entries/plato/> [http://perma.cc/R6FK-K7K5].

6. *Id.*

7. *Id.*

8. And while we are on the subject of limitations, we should confess that we of course have no idea what Socrates would have thought of a technology that would arise almost 2500 years after his death.

investigation,<sup>9</sup> and, by the world's standards, we have been successful enough.<sup>10</sup> After some introspection, we believe that people in three circumstances are the most likely to be interested in what we have to say: (1) some small subset of persons related to one of us; (2) those relatively new to the profession or at least new to teaching Criminal Procedure; and (3) those who have not yet taken full advantage of multimedia in the classroom.<sup>11</sup>

For the second group—those fortunate to be joining this great profession or adding a criminal procedure course (and for those never tiring of seeking something new)—Part I describes the “nuts and bolts” of teaching Criminal Procedure, most of which are equally relevant to any doctrinal law school course. While we often choose similar methods, hopefully even by articulating topics, we can help each teacher make her own best choices. As for the age-old “which textbook” question, we bring a wide perspective: we have taught from traditional books and our own materials, have developed an online site providing multimedia modules, have spent significant time developing a crowdsourced textbook platform, and are now self-publishing texts. These options will only continue to grow, and so we try to convey the pluses and minuses of each with an eye towards the future, while not forgetting the past. In homage to the unfolding dynamics of class discussion, as well as to facilitate the airing and explanation of differences, we have set forth our thoughts in dialogue form.

Part II explains the benefits we find in using multimedia in our classrooms. In 2009, we launched the Crimprof Multipedia, which makes hundreds of multimedia teaching modules available to those teaching in the criminal law and procedure curriculum.<sup>12</sup> We have no doubt that these materials enrich our teaching, the benefits of which we organize into four “h’s”: humor, humanization, headlines, and hypotheticals (practice).

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9. As do most law schools, we split our courses into Criminal Procedure I: Investigating Crime and Criminal Procedure II: Prosecuting Crime. We have both taught the former since beginning law teaching; Stephen now also teaches the latter.

10. Students say nice things in our evaluations and to our dean, and we have each been recognized as “Outstanding Professor” and with other honors by our student body.

11. A fourth category of possible readers are students who from this Article may discern some rhyme and reason to teaching methods and choices, which perhaps are not always scrutable at first blush. But, unless compelled, we realize that some students—whose practicality may exceed their curiosity—may stop reading upon realizing that none of this will be on the exam. And to be clear, that is indeed the case.

12. CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/Criminal> [<http://perma.cc/XZZ5-DJ JF>] (last visited Nov. 4, 2015). Editor’s note: access is a free login available to criminal law and criminal procedure professors. Since perma.cc respects login barriers, we will not provide archives for any of the Crimprof Multipedia content cited.

## I. NUTS AND BOLTS

Good teaching shares at least one characteristic of any sort of performance, from Shakespeare to Springsteen: for every fun minute on stage—and it *is* fun—there are many more minutes in the woodshed. Though we were happily oblivious at the time, looking back it is easy to see that every great teacher we enjoyed was not only a master of the material, including being in some manner involved in its development at a serious level, but also a serious student of showmanship. So even as we consider the “nuts and bolts” important, they are rudimentary. Eric Clapton undoubtedly has fine strings, tuners, and pickups, but those alone would not make his guitar sing.

Just as important, Clapton would never try to be Eddie Van Halen, and Chet Atkins would not try to be Angus Young.<sup>13</sup> Like one musician influences another, we learn from our colleagues. But in *our* classrooms, it is imperative that we each be ourselves. Some great teachers are comedians, while others cannot deliver a punch line. Some can instill order (if not fear) like a drill sergeant, while others inspire learning with informality. In articulating some of the nuts and bolts that work for us, we do not mean to insinuate they would be best for others. Perhaps we prefer electric, while acoustic is your thing. It would be a grave mistake for anyone to try teaching precisely like another, no matter how good a teacher that role model might be. (And here we are aware that the “model” may not be much to see.)

At the same time, most every guitar has six strings.<sup>14</sup> Since rules and expectations are the lowest level of the classroom, perhaps some of them are either universal or at least only deviated from by the masters, and we should each hesitate long and hard before assuming we are that. Thus, we have learned, and continue to learn, from the guidelines of our teachers and colleagues, and, hopefully, there is some wisdom in the core of what we share.

*A. The Syllabus/Class Guidelines*

## 1. What’s in a Name? (And Course Description)

*This course examines the constitutional criminal procedure of police investigations, including the Fourth Amendment’s protection against unreasonable search and seizure, the Fifth Amendment’s guarantee of due process and privilege against compulsory self-incrimination, and the Sixth*

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13. All four are selected among the twenty-five greatest guitar players by *Rolling Stone*. See *100 Greatest Guitarists*, ROLLING STONE (Dec. 18, 2015), <http://www.rollingstone.com/music/lists/100-greatest-guitarists-20111123> [<http://perma.cc/V6N5-XHSR>].

14. One can purchase a guitar with anywhere from seven to twelve strings, and, in the latter case, those twelve can be grouped in sets of two or separately along a double neck. As with teachers, some guitarists excel in unique ways.

*Amendment's right to counsel. It is the constitutional law that, along with the First Amendment, prevents our living in a police state.*

–Stephen's Syllabus for Criminal Procedure I: Investigating Crime

*This course examines the constitutional regulation of the criminal process at the investigation stage. Topically, we will focus on Fourth Amendment restraints on searches and seizures and the rules governing confessions under the Due Process Clause, the Fifth Amendment, and the Sixth Amendment. Our primary sources will be Supreme Court cases interpreting these constitutional provisions. Thematically, we will explore the tension between society's need for security and the right of the individual to liberty, privacy, and a fair process.*

–Joe's Syllabus for Criminal Procedure I: Investigating Crime

*This course examines the adjudicatory phase of our criminal procedure, beginning after arrest and continuing through to post-conviction matters. We consider federal constitutional provisions and rules of procedure, the policies underlying those requirements, and their impact on the roles of prosecution and defense counsel. By studying pretrial release, case screening (including prosecutorial discretion), pretrial motions (including the disclosure of exculpatory material), the role of counsel, plea bargaining, the trial process (including the jury and confrontation rights), sentencing, double jeopardy, and post-conviction appeals, we ask the ultimate question of whether we have a legitimate system of criminal justice, meaning a system that is accurate and fair, that respects notions of limited government, and that is reasonably efficient.*

–Stephen's Syllabus for Criminal Procedure II: Prosecuting Crime

**Stephen:** I don't care terribly much about course names; plain and simple is good by me (hence, I teach "Computer Crime").<sup>15</sup> But when it comes to these courses, often they are termed only "Criminal Procedure I" and "Criminal Procedure II," which naturally confuse everyone. Criminal Procedure II sounds like an advanced Criminal Procedure I, when in actuality it almost always covers the adjudicatory phase as opposed to the investigatory phase. I'm not opposed to the traditional numerals—after all, the prosecution follows the investigation—but the course names should then include subtitles to make clear the covered content.

**Joe:** I agree—names should convey content, and simple is good. For example, my course on the First Amendment is called, unimaginatively enough, "First Amendment." But I think everyone gets right away what that course is about and why it's important—whereas Criminal Procedure I and Criminal Procedure II cry out for subtitles. In addition to the reason you give, I've had students every year express surprise and relief that the course is constitutional

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15. The *Law Journal* editors have graciously agreed to very lightly edit our dialogue (e.g. permitting contractions), and to not introduce the usual *Law Journal* barrage of footnotes. Any idiosyncrasies (or even stupidities) are entirely our own.

law rather than a criminal law analogue of civil procedure. And in conversations with lay people, I always need to follow up my answer to the question of what I teach with an explanation of what criminal procedure actually is. Not only does the title fail to register understanding, its opacity often kills the conversation thread. In fact, as the root of the problem seems to be the titles themselves, why not change them instead?

**Stephen:** Good question! I suppose one answer is tradition—those in the academy know the “code”—but that’s never a great answer. It reminds me of the classic Oliver Wendell Holmes dig at antiquated rules.<sup>16</sup>

Another answer might be to avoid advertising that these are courses in constitutional law, lest everyone want to teach them! But that’s obviously not a serious response. So perhaps something like “Constitutional Restraints on Criminal Investigation” and “Constitutional Restraints on Criminal Prosecution” would be superior (or “Constitutional Regulation” of each, as you frame the course in the first sentence of your class description). These are slightly underinclusive for those who teach the relevant Federal Rules of Criminal Procedure, but both courses are, at core, courses in constitutional law.

Looking at the meat of our course descriptions, I set a fairly even keel in Criminal Procedure II, but in Criminal Procedure I emphasize that these are restrictions on what could otherwise be—and historically have most always been—overzealous government actors. Yours is more neutral, appropriately articulating both sides of the coin. Any thoughts on what is important to accomplish with a course description? Should it articulate all main topics? Convey a theme? Something else? (I have to confess I’ve never thought much about this!)

**Joe:** At first, I included a course description because syllabi from friends all had one, and I’m pretty sure I lifted a lot of their language. Over the years, however, I tinkered with it sufficiently that I don’t think a plagiarism checker could match the sources now. (To be clear, other professors should feel free to borrow our syllabi language as well—or let us know how we might improve it!) I prefer giving a general overview of content and theme, but I’ve seen others that—like the Fourth Amendment itself—have much more particularity.

Interestingly, I see that your Criminal Procedure I description is like mine, but your Criminal Procedure II language is more of a laundry list. Why is that?

**Stephen:** I’ll try two reasons. Here’s the first. Criminal Procedure I has a very nice flow, largely because so much of the course is the study of the Fourth Amendment—for me, about seventy percent. Once we finish that, I turn to the constitutional law regulating interrogations and, finally, and quite quickly,

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16. “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

regulating eyewitness identifications. So there is lots of time to develop a few concepts, even if, as is certainly true of the Fourth Amendment, each concept has many facets. And with every topic, we are discussing the restraints on government actors, typically the police, and trying to figure out how to optimally balance our need for safety with our need for liberty.

Criminal Procedure II is very different. I spend a day on pretrial release, and then I am already turning to the different topics of case screening. And that sets the agenda for the course: a couple of days on discovery here, and then part of a day on speedy trial, etc. Hence, I think the course is more in danger of seeming a disparate mish-mash than a unified whole, and I want students to be cognizant of an overarching theme. I have this same task—indeed, even more so—in Computer Crime.

OK; that's my first answer. Here's the second. As you of course know, at our school Criminal Procedure I is a required course. Criminal Procedure II is not, and students tend to have little idea of what the course entails. So it is entirely possible that I've been a bit lazy in my description for Criminal Procedure I!

## 2. Office Hours

*[I designate three to five specific hours per week, and include “and by appointment.”] Check your campus email daily. I may use it to make class updates, including if it becomes necessary to cancel a class meeting. Email is not a good vehicle for all substantive questions. If I don't respond to an email asking such questions, or don't respond to your satisfaction, I will be happy to discuss the matter in office hours.*

—Stephen's Syllabus

*I have an open door policy, and am usually in my office during class days [Mondays and Tuesdays or Thursdays and Fridays] and Wednesdays, if not also during other weekdays. Feel free to drop by with questions or simply to visit. I am also happy to meet by Skype or FaceTime. If you need to visit at length, want to make sure I'm available, or want to Skype or FaceTime me, please make an appointment. You may reach me by email at [thai@ou.edu](mailto:thai@ou.edu).*

—Joe's Syllabus

**Joe:** In my early years, I often kept company with crickets during formal office hours. Of course, I could get some work done during those lonely stretches, but not being able to schedule other things made those hours seem doubly inefficient. So I evolved my policy to welcome walk-ins whenever I'm around as well as to offer the option of virtual visits. By being more flexible as to when and where I'm available for students, I can be less available when I need to.

**Stephen:** That makes good sense, even as I do things a bit differently. I'm certainly willing to meet with students outside of my regular hours (my “and by appointment” clause), but I steer them to my scheduled hours unless they

have a conflict. Often enough it's admittedly just crickets, but there are typically at least a few students who come regularly (especially 1Ls) and others who come sporadically. Between those hours, emails, and admittedly taking comers when my door is otherwise open, this works for me. But I have to confess my door isn't always open. I wish I could leave it so, but I'm just not good enough at being productive through distractions and interruptions. I'm the guy who at the car place or other waiting room will be squirreled away in the farthest corner from the television so I can try to concentrate. Sad but true. But the upside of both of our experiences seems to be that so long as the professor picks a reasonable system and fulfills what she promises, students are happy.

**Joe:** It's certainly a balancing act between accessibility and productivity. One thing that's helped me tremendously to keep an open door policy without killing productivity is a nice set of noise-canceling headphones. I originally bought them for plane rides—to avoid conversations with neighbors as much as to cancel engine noise—but I've found they work great for creating a mental cocoon in the office as well. Mozart for me can melt away the world beyond my peripheral vision, and my conspicuous headphones encourage casual passersby to pass by, while not deterring students on a mission from knocking. My way (like my music) is not for everyone, but I agree: the lesson here is to be reasonably available and consistent, whenever, wherever, or however that might be. Speaking of which, Stephen, I sometimes see you “slumming” in “the Pit,” our once decrepit (but now quite nice) student lounge. Are you holding office hours?

**Stephen:** Indeed. One of my favorite colleagues where I formerly taught held some office hours in a bar adjacent to our campus. That's probably a step too far for me. However, I think there is wisdom in what he was doing—it's always nice for both teacher and students when you can meet outside the confines of the classroom and even of the office. Somehow it's easier to appreciate each other as more than just “teacher” and “student.” So I began experimenting with holding an office hour or two each week in “the Pit.” I take a magazine or book to read, and I talk with anyone who likes. I've enjoyed it. Often we are still talking class, but I also see former students, and it provides a nice chance to catch up.

As for distance communication, I typically rely solely upon email. Do students take you up on Skype and FaceTime?

**Joe:** More and more. It's mutually convenient, and oddly can seem more personal than meeting in the office. I suppose it's partly because the office is a formal setting, whereas students and I usually meet virtually from our homes, and partly because we typically use the medium to see friends and family.

It seems like we've each settled on different ways to meet students that work for us. Whatever one chooses, I think we both would agree that being

reasonably accessible but also establishing reasonable boundaries is essential to both student satisfaction and one's own productivity!

### 3. Seating Chart

*A seating chart will be distributed, and because it will assist in our conversations I will expect to find you in your chosen seat. Therefore, let me know if you would like to make a change.*

—Stephen's Syllabus

**Stephen:** I don't think a single one of my professors in either undergraduate or law school used a seating chart, and yet I have always used one for every class I teach. I'm a bit dumbfounded that I've never considered this until now. What is your experience?

**Joe:** The same, though in law school, we had placards in front of us to help professors call—if not learn—our names. Seating charts make learning names easy for me, but the flip side is that the memory is short-term and contextual. Strangely enough, when I run into former students years later, I can more often recall their positions (“left outfield”) than their names. But students often assume that I don't remember them at all, so my parlor trick of placing them geographically usually impresses and primes forgiveness for being otherwise forgetful.

**Stephen:** I have to admit to being—or at least to feeling—very poor at names, but then I suppose it's not easy when fifty or a hundred new people swing into every term. So I have to work at it, and I often feel like Homer Simpson when he complains that every time he learns something it just pushes out something else (“Remember when I took that home wine-making course and I forgot how to drive?!”).<sup>17</sup> Do you call upon (and thus presumably remember) students by first or last names?

**Joe:** I've always called by first names. I'm more comfortable with that level of (in)formality in class, which is closer to my personality, and which I think helps my students feel at ease and open up. That's not to say there isn't a place for the Professor Kingsfields of the world; formality and fear are great motivators, too, if you can pull it off!<sup>18</sup> Do you think students prefer that we call them by first or last name? I imagine it matters more to students that we learn *one* of their names rather than a *particular* one.

17. “*Secrets of a Successful Marriage*” Script, Season 5, Episode 22, SIMPSONCRAZY.COM, <http://www.simpsoncrazy.com/scripts/successful-marriage> [<http://perma.cc/DZ2U-XPAJ>] (last visited Nov. 5, 2015).

18. If you don't know Kingsfield, you need to read John Jay Osborn, Jr.'s 1970 novel, *The Paper Chase*. Or, if you are the lazier sort, you can watch the movie. See *The Paper Chase*, IMDB.COM, <http://www.imdb.com/title/tt0070509/> [<http://perma.cc/D7X4-8NSL>] (last visited Feb. 11, 2016). We recommend doing both.

**Stephen:** I think that's right, but personally—like you—I use first names. A good friend who teaches undergraduate philosophy students once commented to me that he dresses “down” for class, has students use *his* first name, etc., all because he wants to make sure that any persuasive force comes from the value of his ideas, not from artificial constructs. As with office hours in a bar, I don't take things quite this far (at least not yet!), but I think there is real value in thinking through this. Even for those who conclude—like me—that permitting students to use the natural “Professor” title has benefits outweighing its costs, using student first names might signal just the right amount of informality. Professors, especially new ones, should carefully consider what level of “separation” they consider ideal.

By the way, I've heard you sketch a Panopticon on your seating chart, which gave me a laugh. Is that right?

**Joe:** Even better! I use the actual seating chart for our classrooms, which, with their amphitheater shape and podium in the front center, resembles a Panopticon. And at the bottom of the chart, I drop this quote from Michel Foucault's *Discipline and Punish*, which also elicits laughs from students as they're filling in the chart: “Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?”<sup>19</sup>

#### 4. Attendance

*Credit is earned by taking the course and being prepared for each classroom conversation, not merely by taking the final examination. Unlike most undergraduate studies, the core of our classroom will often be discussion and working through problems and issues together, and therefore one student's lack of preparation and participation affects the quality of the entire class.*

*However, life happens, and you may therefore be absent from seven class sessions without consequence. You will be considered absent if:*

*(1) you arrive late to class or leave during class;*

*(2) you are insufficiently prepared for class and so notify me in advance of class; or*

*(3) you fail to initial the attendance log.*

*If you are insufficiently prepared for class, do not tell me in advance of class, and are called upon, it will count as two absences.*

*Matters of attendance are as much a headache to me as they are to you. Experience has therefore taught that I must have mandatory, bright-line rules which operate without any discretion. For example, it is annoying to be marked absent if you arrive late on account of an automobile accident. Nonetheless, it is far better accounted for by a generous seven-absence*

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19. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

*allotment than by my having to decide whether your proffered reason was adequate. Therefore, subject to the one caveat below, there is no discretion in the administration of these rules, including the following: If you receive over seven absences, each additional absence will result in a third of a letter grade penalty on the final examination (e.g., A to A-). Moreover, in extreme cases, such as exceeding the absence limit early in the course, you may be involuntarily withdrawn. The sole caveat is if you can convince me with clear and convincing evidence that your case is extraordinary and deserves a different result via a written motion with sworn affidavits and any other necessary supporting documentation.*

–Stephen’s Syllabus

*Please make every effort to attend class. Simply doing the readings will not get you very far. I will allow five absences, which you may take for any reason, including but not limited to personal (e.g., go to Cancun), professional (e.g., go get a job), or religious reasons (e.g., go pray). Each absence above the allotted number, regardless of reason, may lower your grade by half a letter. I may count tardiness (i.e., not being in your seat at the moment the bell stops ringing) as an absence. It is the policy of the University to excuse absences for religious observances and to provide, without penalty, the rescheduling of required work that may fall on religious holidays. I do so exclusively through the above allotment of five absences.*

–Joe’s Syllabus

**Joe:** I would rather [fill in the blank with what you loathe most] than deal with attendance. You?

**Stephen:** Amen to that. When I first taught, I didn’t take attendance at all. I figured if a student could ace my exam without showing up, more power to ’em. But a number of things pushed me away from that. One, I learned my contract said I would take attendance (literally . . . there were only about a page of terms, and this was strangely one of them). Two, ABA Standard 308(a) requires us to.<sup>20</sup> And three, because our classes are so participatory, poor attendance negatively affected the level of discourse. So I began to take attendance and then to look for the least painful way to ensure a meaningful system.

**Joe:** I don’t know whether they were required to, but none of my professors in college or law school took attendance. I appreciated that lack of paternalism and took advantage of it. As a professor, however, I’m naturally more inclined to view class discussion as indispensable to the learning process and more willing to do unto others than was done to me. Hopefully, there’s more epiphany than hypocrisy in that change of perspective! In any case, students don’t chafe because my allotment of five absences—two and a half weeks out of fourteen—seems flexible enough to let them “get out of jail” whenever they

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20. ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. std. 308(a) (AM. BAR ASS’N 2015–2016).

need to or simply want to. There are few things less fun or fair than judging whether wedding or funeral—family, friend, or foe?—warrants excuse. It looks like your attendance policy, like mine, is set up to avoid that kind of judgment call.

**Stephen:** Absolutely right. There are lots of possible policy formulations, including one of our colleagues who allots *zero* absences, meaning that every absence must be excused. But like you, I don't want to get into evaluating what is an acceptable reason to miss class and what is not—that seems overly intrusive and ends up pushing my value judgments onto students. Your syllabus language does a really nice job of making this point.

Whatever the chosen specifics, I think all professors should articulate an attendance policy and follow that policy as close to the letter as possible. I recently had a student who missed over half of the class sessions. Without a policy, it is hard to know what one can do, and at some point it seems fraudulent to give credit for a course a student barely took. As for adhering to the policy, it is a terrible lesson to future lawyers to assert rules that are not followed. At some point or another, every lawyer will be faced with an ethical quandary in which putting integrity first is what can save the day. So I'd say exercise mercy when you can but don't turn a blind eye.

#### 5. Class Decorum

*I will bring my very best effort to every class, and I expect you to do the same. So, arrive for class on time, be prepared and ready to begin, and remain for the duration. Colleagues do not walk out on each other, and an attorney who walks out on a judge during a hearing will find the state providing room and board at the local jail. Therefore, as articulated in the Attendance policy, if you leave during class for any amount of time, you will be marked absent. There are of course rare occasions on which you must leave during class—perhaps because you feel ill or because you have an important interview—and likewise rare occasions on which you must arrive late to class. This is why I provide a generous allotment of absences. As a matter of professional courtesy, let me know the reason for such behavior, either before or after as appropriate.*

—Stephen's Syllabus

**Stephen:** There is a bit of M'Choakumchild in my class guidelines.<sup>21</sup> Even as that's purposeful—I'd rather give a first impression of being strict and shockingly be a bit nice—this particular one is tough for me. When I began teaching, I don't believe I expressed any expectations. After all, they should be

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21. M'Choakumchild is a teacher in Charles Dickens' *Hard Times*, whose name seems to say more to readers than his fact-obsessed curriculum. See JOSEPHINE J. CURTON, CLIFFS NOTES ON DICKENS' *HARD TIMES* 19 (1964), <http://www.cliffsnotes.com/literature/h/hard-times/critical-essays/characterization-in-hard-times> [<http://perma.cc/TYK9-PQBK>].

obvious. Law schools make lawyers, and lawyers are professionals. And, thank goodness, since law students are adults, we don't have many problems. But I was surprised that students would walk out of class—which in our classrooms required stepping right past the professor—and return with a cola or other beverage of choice. This never happened in my undergraduate or law school experience, and every time a student left and entered, mine wasn't the only head distracted—the entire class briefly turned to watch. Many students leaving to wet their whistles, and pretty soon the classroom is a tennis match. So I wrote some new guidelines, and they have worked well for me. I know some go even further, having a dress code (e.g. no hats), or requiring students to stand when speaking. One colleague in an earlier era locked the door at the beginning of class (only blocking entrance from the outside, of course!). These are too much for me, but I understand where they come from. You?

**Joe:** I haven't had too many problems with walkouts, but I often teach early morning classes where walk-ins have been more of a problem. It's terribly distracting for everyone when someone comes in late, even if it's only by a minute. So if they are not seated when the bell rings, then, per my attendance policy, I count them absent and ask them not to sign in. Harsh but effective after the first few latecomers of the semester.

As for decorum generally, I don't have an explicit policy like you and, moreover, tend toward the casual, so I must take extra care that students don't confuse the level of formality with the level of professionalism. For example, unless there's an obvious pedagogical benefit to doing so, I never interrupt anyone who is speaking. Most students follow my lead in being professional and respectful, so when someone *is* distracting, I pause briefly to pay *them* attention. The sudden silence and turn of heads usually makes the point well enough.

**Stephen:** Good call. (Though I *do* interrupt students to guide discussion.) It sounds like what we have both found is that typically there aren't problems, but that the professor has to be willing to very briefly play the grump when it becomes necessary, and then—and this might be hard, especially when just beginning teaching—quickly segue back into the class as if nothing happened. These things tend to sit in the back of your mind, and you can grumble about the experience with a colleague afterwards if you need to, but it's important not to dwell on such things during class time.

**Joe:** Indeed, and if it's helpful, think of yourself as the conductor of an orchestra. All eyes are on you to set the appropriate tone and to keep the music moving along gracefully.

**Stephen:** I love that image. I have been told that Harold Koh once asserted the basic requirement of a law school class is that it march, but that the great classes both march and sing. It helps me to think of that before I enter, and when I prepare for, each and every class.

## 6. Student Participation

*As noted above, if you are unprepared and you do not wish to be called on for a class session, you may tell me before class and you will be marked absent for that class. If you are otherwise called upon and are insufficiently prepared, you will receive two absences. Voluntary participation is also welcome and encouraged, but when we need to move on we will. That I cannot always call on a student wishing to be heard is no reflection on the student or the contribution he or she would have made.*

*I call on students primarily using a **computer-generated random list**. Therefore, it is entirely possible that you will be selected despite having been called upon recently.*

–Stephen’s Syllabus

*You may use an absence to attend class but “pass” when called upon (at a rate of one absence per pass). I will also let you pass two other times without using an absence. However, your total number of passes (from whatever source) cannot exceed four. If you fail to notify me before class, in person or by email, of your desire to take a pass, and in my sole judgment you evidence poor recollection of the assigned materials when called upon, you will lose two passes. You will also disappoint me. I will debit first from your freestanding passes; if none remain, I will deduct from your number of allowed absences.*

–Joe’s Syllabus

**Stephen:** I’ll wager we are both on the fortunate end of things, in that, if anything, we get too much student participation and so have to be careful to keep the class on track—an abundance of riches. But riches are rarely evenly distributed. In one of my former church congregations, we always used to get frustrated, as lay leaders, with the SFP problem. That is, the “Same Five People” do *everything*. You help someone move, the SFP show up. You need a class taught, the SFP volunteer. A widow needs a meal? The SFP bake. You need some disaster recovery? Yup, the SFP not only arrive but also bring chainsaws in tow. So gunners aren’t unique to law school, and overeager participation is usually, in my mind, a sign that the SFP are doing great. It’s the others I tend to worry about. That said, nobody wants to hear from any student too often. And I should know because—confession time—I was surely a gunner myself. I’ve learned some ways I believe deal with this effectively in the classroom (I’m still stumped when it comes to a church congregation), but, before tainting the pot, I’d be interested in your recipe.

**Joe:** Ah yes, the SFP. In my teaching experience, the *quantity* of their participation roughly equates, but their *quality* runs the gamut. Many are quite smart and insightful, and their willingness to take first swings is commendable. But no matter how valuable their contributions, viewpoint diversity spices the classroom, and widespread participation promotes widespread engagement. So I stumbled for years from one calling strategy to another to balance opportunities for volunteer with the need to spread the wealth. Then, several

years ago, I came across the list generator at [random.org](http://random.org).<sup>22</sup> [*Cue angels singing.*] The list generator can randomly scramble any list you throw at it—including a class list—and with it, I managed not only to solve the SFP problem but also to introduce some *Hunger Games* fun into the classroom.<sup>23</sup> My primary method now for calling on students in the first instance—whether to recite a case, answer a question, or analyze a hypothetical—is to use what students at first fearfully and later endearingly call “The Randomizer.” Of course, students remain free to assist, react, or rebound, but when not enough do beyond the SFP, I can easily work in more by saying, “Let’s get a random view this time.” Then everyone hushes to see—live, on the big class screens—whom the computer gods will select next for sacrifice.

I know you use The Randomizer, too, but as your syllabus indicates, you come up with a random list *before* class rather than rescrambling *during* class each time a new “volunteer” is needed. I’d love to hear how it has worked for you.

**Stephen:** Yes, this is one I learned from you, though I then modified it, as you note. I always cold called on students, and I never liked the “row by row” or “alphabet” strategies, though I understand them. There’s just a different vibe to a classroom in which any student could be called upon and, therefore, should be prepared. So I would relatively randomly work my way through the class but, for the most part, would finish calling upon everyone once before going back for seconds. Students are of course smart enough to realize what that means—being called upon on the second day of class starts to feel pretty good as the weeks roll on. The Randomizer solves this problem. Depending upon the class size, I put every student’s name in The Randomizer two or three times and then use that list. Of course, sometimes a teacher needs to go off-list for various reasons, but, for the most part, I stick to the list and really like it.

**Joe:** I confess, I gamed the system in law school, mainly by volunteering whenever I was especially prepared and then relaxing for weeks as the professor worked the rest of the room. As you note, The Randomizer puts a stop to that kind of in-class sabbatical. In fact, one semester, a poor guy named David got randomized three days in a row, even though there were over 100 students in that class. I had even joked before randomizing him that third time by saying, “Why bother, let’s just call on David!” Well, he was admirably prepared each time, and a great sport. But once or twice a year, I end up randomizing a student who is *not* prepared. I usually let them stumble for a little while in case they might prove first impressions wrong, but when it

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22. *List Randomizer*, RANDOM.ORG, <http://www.random.org/lists/> [<http://perma.cc/V5KP-9JC8>] (last visited Nov. 4, 2015).

23. If you didn’t know *The Paper Chase*, see *supra* note 18, we get that; it has been a while. But how could anyone today not know *The Hunger Games*? See SUZANNE COLLINS, *THE HUNGER GAMES* 13 (2008).

becomes painfully obvious and unproductive, I pause just perceptibly before moving on by randomizing another student. I'm not sure my way is the most effective, and I am curious how you handle a situation like that.

**Stephen:** One of my least favorite classroom experiences. Because I count two absences if the student is called upon and unprepared (meaning the student didn't take a pass before class began), I have to differentiate between those who deserve this penalty, and those who deserve just the mild disapprobation that you explain. So I try to walk that line, and the "penalty" rarely needs to be invoked. But, like you, I am never sure I've got all this just right. One thing I *am* sure of is that if a professor *does* need to "call out" a student—because, say, a syllabus penalty is being invoked—it should be done as efficiently as possible. Once the point has been made, it's a relief for everyone in the room to move on.

One option, then, for a professor not using The Randomizer and not having to declare an express penalty, is to simply move on from the unprepared student and call upon him or her again the next class. If once again unprepared, it might be time to approach the student outside of class.

Somewhat related, do you call a spade a spade when a student answer is positively wrong, or do you massage it to get to the right place?

**Joe:** If they're factually wrong, I tend to correct them right away without much ado. If they're doctrinally wrong, I try to guide them to the right place if time permits, or perhaps ask other students for a second opinion. But if it's not worth precious class time to do either, and the right answer is fairly obvious, then I do just call a spade a spade. You?

**Stephen:** That's also what I try to do. I'll merely add that there is some truth—or at least understandable reason for—pretty much anything a student will say, in class or out. So I always try to at least quickly recognize that, but I never hide the ball. All students, including the one speaking, deserve the right answer where one exists.

## 7. Laptops

*You may not use a laptop or any other electronic device during class sessions. If you do, you will be marked absent, and the use may be treated as an honor code violation. You are encouraged to use a laptop to write your exam.*

—Stephen's Syllabus

*You may not use laptops, smartphones, or other electronic devices in class for any purpose without prior authorization from me. You are authorized to use an iPad in class solely to access the readings. A breach of this rule may be treated as an honor code violation resulting in referral to the appropriate authority for investigation and disciplinary action.*

—Joe's Syllabus

**Joe:** There was much howling and gnashing of teeth when I first made my classroom a device-free zone. It was almost a decade ago and prompted by two

problems. First, I noticed some students were transcribing everything I said, even the bad jokes, and sometimes so intently that they didn't realize I was calling on them—at least until they typed their own names. Second, others were checking Facebook, shopping on Amazon, or, in one case (as I later learned), winning online professional poker tournaments. I believe I was the first at our school to ban laptops (phones were not yet smart, and tablets were still stone), so for a number of students, my tech-use policy seemed both cruel and unusual. When did you adopt your ban and why?

**Stephen:** I think we were operating in parallel or near unto it—I was then teaching on the East Coast, and I was either the first or second mover at my school as well. My reasons were much like yours. As much as I love technology, it was creating a barrier to communication in my classroom. We still had good discussions, but they weren't quite as great, and hiding behind laptops was becoming too commonplace. Later in that first term, I anonymously polled my students on the ban, and I still use some of their responses in an explanation that I include as an appendix to my syllabus. I'm a huge believer in the benefits of a laptop-free classroom, and, for the most part, students now aren't too upset by it. Often, unlike when we were each blazing new ground, they have been conditioned by similar policies in undergraduate classrooms. For example, my sister teaches computer science and bans laptops. If they can be banned in computer science, surely a ban is fair game in law school! Do you plan to continue?

**Joe:** Definitely. In fact, I think a good number of students now would revolt if I dropped my tech-use ban. I haven't taken a formal poll, but many students over the years have told me that they believe they benefit from being forced to listen more closely and take notes more carefully. Also surprising—or perhaps not—for digital natives is that they enjoy the novelty of a distraction-free environment and strongly feel it enhances class discussion. I know; it sounds like I'm putting words in students' mouths. Do your survey responses back up the informal feedback I'm relating?

**Stephen:** They do, as do more serious studies of typing v. handwriting notes. I describe both in my syllabus appendix, so let me include that here:

Laptops are a tremendous convenience. I used a laptop extensively in law school, including to take all of my exams, and currently enjoy the convenience of the even more portable smartphones, netbooks, and tablets. Although I did not personally use a laptop during class sessions, I recognize that many of you find it a convenient means of note taking. And at OU Law we of course now have the iPad initiative.

Unfortunately, most of us prove unable to limit laptop or tablet use to taking notes, even when class guidelines threaten consequences for other usage.<sup>24</sup>

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24. See Jeff Sovern, *Law Student Laptop Use During Class for Non-Class Purposes: Temptation v. Incentives*, 51 U. LOUISVILLE L. REV. 483 (2013).

This stifles critical discussion. The more of you who distract yourselves with other tasks, the fewer persons, and therefore viewpoints, from which we hear.

Moreover, research suggests that using a laptop leads to more transcribing, and less active learning, which means less effective learning.<sup>25</sup> In other words, even if you do *not* multitask during class, you still learn less effectively. So, when you are frustrated by your inability to handwrite more quickly during class lectures, do not curse your slow wrist. Instead, thank the poor little guy and spend some time rethinking your note-taking strategy. You likely need to do more and/or different out-of-class preparation.

I am not an expert in the cognitive science, and I am sure we have not heard the last word on that matter. But I do know that the classroom experience is markedly better without electronic devices. Not only do the devices often place a physical barrier between teacher and student, but the answers we are looking for in the law school classroom require a synthesis of previous preparation and class discussion that is no more found on your laptop screen than it is in your course text. The bar review course you will take after graduation is all about information transmission. The law school classroom is much more where you should learn to think like, and express yourself like, a competent attorney. Nobody would take a laptop to a golf or tennis lesson to transcribe everything the instructor said, and the same can be said for the law school classroom.

There are of course counterarguments. For one, the libertarian argues it is her business if she chooses to fritter away the class time for which she is paying a small fortune. After all, in an earlier day she might have done so via the crossword puzzle or via a creative sketch of the professor. But unlike other forms of flushing away your tuition dollars, misuse of a laptop or tablet distracts those fellow students who *are* trying to remain engaged. No matter how interesting the lecture, it is difficult to keep one's eyes from straying to multimedia content. Moreover, the barrier it places between speaker and listener exists no matter its substantive use, and the fewer active class participants we have, the worse the class experience.

When I first banned laptops I took an anonymous student survey partway through the term, and received twice as many positive as negative reactions. Some of the written comments follow:

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25. See, e.g., Cindi May, *A Learning Secret: Don't Take Notes With a Laptop*, SCI. AM. (June 3, 2014), <http://www.scientificamerican.com/article/a-learning-secret-don-t-take-notes-with-a-laptop/> [<http://perma.cc/37XZ-N3PA>]; Robinson Meyer, *To Remember a Lecture Better, Take Notes by Hand*, ATLANTIC (May 1, 2014), <http://www.theatlantic.com/technology/archive/2014/05/to-remember-a-lecture-better-take-notes-by-hand/361478/> [<http://perma.cc/5SLD-A5HD>]. Both articles rely upon research published in a journal called *Psychological Science*. See Pam A. Mueller & Daniel M. Oppenheimer, *The Pen Is Mightier Than the Keyboard: Advantages of Longhand Over Laptop Note Taking*, 25 PSYCHOL. SCI. 1159 (2014), <http://pss.sagepub.com/content/25/6/1159> [<http://perma.cc/HUB8-Z6SN>]. There is considerable discourse on the subject, beginning with the following article and continuing since: Kevin Yamamoto, *Banning Laptops in the Classroom: Is It Worth the Hassles?*, 57 J. LEGAL EDUC. 477 (2007).

“I think it is much better without laptops. I had come into this semester with the thinking that I would not use a laptop (having used one my first two years) because I realized I was spending more and more time on other things as opposed to paying attention. I attribute that to becoming more comfortable with school and less fear that I’d be called on spur of the moment. A few of my friends had decided to do the same thing as me. I think that the overall consensus among students is that it’s positive for learning, though some people would still prefer to be able to burn some time online. I think that your class has the most in depth discussion (aside from my seminar) of any class I am taking right now and I think that laptops have something to do with that. I think it’s a good move to ban them completely.”

“I am a third year regular division student. I didn’t use a laptop first semester first year and did very well (top 10% of my class). Second semester I used a laptop for more than the first half of the semester and found myself overly distracted and taking poorer notes. I found myself ‘transcribing’ rather than thinking about what I was writing down. With handwritten notes I find that I focus more on what the professor and others are saying. Needless to say, my grades second semester first year were much worse than first semester. Second year I went strictly back to notetaking and have stayed the course. It has definitely paid off. I also appreciate the fact that there are less distractions from others who are surfing the internet during class. Nothing frustrates me more than when a fellow student of mine, who I observe spending 75% of class online doing stuff entirely unrelated to class, asks a simply dumb or redundant question that had already been asked or that was covered by the professor IF one had been paying attention.”

“I was kind of angry at you at first when you banned laptops because nintendo is normally how I get through class (I never even bothered with notes, the internet, instant messenger, just straight nintendo). . . . [T]hank you very much for keeping class interesting for me. Just like Professor [omitted]’s classes (which I never took a computer to anyway) I DO NOT miss my laptop in your class at all.”

“The only reason I have found to dislike the ban so far is that I won’t be able to track the Phils tonight since we have late class. Barring the World Series issue, I have greatly appreciated being forced to ‘go back to my roots’ and learn the old fashioned way. I’ve retained much more information in this class thus far than I have in prior semesters and have even banned myself from using laptops in all other classes because I have found it to be so helpful. Plus, now I don’t waste hours of my time reading perezhilton to find out about the latest Britney scandal. I believe that has made me a better person.”

“I was irritated by the email in the beginning of the semester regarding the ban. I use my laptop in the rest of my classes. However, I found not using a laptop forces me to be better prepared for class. This is very helpful for me in the long run because I work for a civil firm and have a firmer grasp on the civil side of the law. I may opt to not use my laptop in class if I take future criminal law classes.”

I continue to receive unsolicited supportive emails, like this from 2013: “I was thinking about emailing you earlier today about how much I appreciate your ‘no laptops’ policy. In two of my classes there are people who sit in front of me doing intensely fast-paced yet utterly mundane things on their computer nonstop throughout the entire class period, none of which have anything to do with the issues being discussed (facebook-->gmail-->espn-->reddit-->repeat). It really disrupts my ability to appreciate what are otherwise interesting classes. Thinking about asking both Professors to be moved to a new seat! Basically, every Professor should have your rule.”

This is not to say, of course, that every student was or has been in favor of the ban, and I take such opinions very seriously. But one cannot have his cake and eat it too, and thus laptops and all other electronic devices are prohibited in my classroom.

If nothing else, perhaps you will find new talents that will someday lead you to win the National Cartoonist Society award for Best Newspaper Comic Strip multiple times.<sup>26</sup> This student seems to be on his or her way:

“I am slower at taking notes by hand and have missed information because of it. Despite the above I feel like I have learned more and am more engaged in your class than in any other this semester. My artistic abilities are also benefiting. You should see my doodles, they are breathtaking!”

## 8. Recording

*Recording of a class session or any portion thereof is **not permitted**. Violation of this policy will be considered a violation of the honor code. “Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed.” *United States v. White*, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting). “Freedom of debate might be stifled and independence of thought checked if jurors [students] were made to feel that their arguments and ballots were to be freely published to the world.” *Clark v. United States*, 289 U.S. 1, 13 (1933) (Cardozo, J., for a unanimous Court). “[P]ublicity hampers communication. When people are speaking freely, they say things that eavesdropping strangers are likely to misconstrue. When they speak guardedly because they are afraid that a stranger is listening in, the clarity and candor of their communication to the intended recipients are impaired. There is a social value in frank communications, including being able to try out ideas on friends or colleagues without immediate exposure to attacks from rivals or ill wishers.” Judge Richard A. Posner, *Privacy, Surveillance, And Law*, 75 U. Chi. L. Rev. 245, 246 (2008). We will have frank discussions about important, and sometimes*

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26. See STEPHAN PASTIS, SGT. PIGGY’S LONELY HEARTS CLUB COMIC 7–8 (2004). Mr. Pastis was a law student when he began to draw Rat during class, which ultimately became *Pearls Before Swine*. It was, incidentally, a tremendously good comic in its early years.

*difficult or uncomfortable, issues in every class session, and therefore cannot permit recording.*

–Stephen’s Syllabus

**Joe:** Great quotes and wise rule. I used to think my tech-use policy sufficiently clear and categorical to preclude recording. However, I may reconsider (and copy your language, if you don’t mind) because I have heard from a few students that some of their colleagues record *all* of their classes, while others do so for absent friends, but neither set seek preclearance from their professors. Of course, I would spot any recording that is open and notorious, and hope none are doing it stealthily in violation of my tech-use policy, not to mention the trust of everyone else in the room. Nevertheless, a separate explicit policy may be salutary to: (a) remove any doubts; (b) supply good reasons; and (c) reassure students.

**Stephen:** My language is there for the copying! In the day of live video streaming and all of the rest, recording in a Socratic classroom just seems the death knell of so much of what we do. Students have to feel free to test their advocacy skills on topics that much of society would simply avoid in polite conversation. There is no way that can happen if there is even a threat of it landing on YouTube.

#### 9. Syllabus (Reading Assignments)

*We will discuss upcoming assignments on a weekly basis, but the following is a tentative list.*

–Stephen’s Syllabus

*To allow for flexibility, each week’s assignments will be emailed to your OU account the preceding week.*

–Joe’s Syllabus

**Stephen:** The first time I taught, I totaled up the number of pages I wanted to cover in the textbook, divided by the number of class sessions, and used that to gauge roughly where I should be after each class. But I didn’t distribute anything like that to my students; I gave them more carefully crafted assignments on a weekly basis. That said, I was surprised how closely I maintained the required pace.

Now, I hand out a list of expected readings in the class syllabus/guidelines, and I stick to that fairly religiously. After all, every term has the same fourteen weeks. But I don’t include dates on those readings, and I would recommend against doing so. It’s better to maintain some flexibility, and you never want to create expectations you can’t keep. Students might dislike that more than anything. From your syllabus language, it looks like you have essentially the same policy, but I’m wondering if, in practice, you vary more from term to term.

**Joe:** I think I do, and it's by design. At first, it was just a matter of survival. My first semester teaching was as an adjunct, I still had a full-time job billing hours, and on top of that I was a new father. Crazy times. I sent out assignments at the end of each week because they were not ready before then, but doing so also lent flexibility along the way. Nowadays, like you, I have a fourteen-week battle plan based on the previous year. However, I don't give students the plan with the syllabus. I still send out assignments weekly to give myself wiggle room to speed up or slow down as well as to expand, contract, or otherwise alter coverage in response to events on the ground—including student interests and needs, my own evolving interests and pedagogical sense, and, of course, current events. But to counter the impression that my coverage and pace vary with the winds, I'd say eighty to ninety percent of both stay the same from year to year, including all the leading cases and major areas. Moreover, change is a lot of work, and I am but mad north-north-west.

Looking back, I see two trends in the evolution of my coverage in all of my substantive courses, including Criminal Procedure I. One, I've tended to exchange breadth for depth. It's not so critical to me anymore to cover every corner of a doctrine as it is for students to understand, appreciate, and apply the core that is covered. Second, I work through more problems in class, including those from the multimedia materials that we'll discuss in the second half of this Article. How has your coverage changed since you started teaching?

**Stephen:** Similar to yours. One, over the years I cut a lot of textbook notes or other material that I don't find essential. In part, this is simply a reflection of greater experience with the material, and thus greater ability to be discerning, as you describe. But, as you also explain, it moreover reflects a decision to favor depth over breadth. There is a tendency when one begins teaching to think a good teacher must teach every facet of every issue, when frankly that is a recipe for distressed and confused students. As in a good oral argument, I now keep lots of great material for use only if a student inquires.

And I definitely run more classroom problems. Working hypothetical problems and current events in class is incredibly enriching and rewarding, as well as great fun, and so it is well worth cutting some case discussion. The bottom line is that a law school classroom is about much more than information transmission, and, if we keep that in mind, these tradeoffs probably become more obvious.

## *B. The Textbook*

### **Course Text**

*Joshua Dressler & George C. Thomas III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES (5th ed. 2013) (hardcover).*

... OR ...

*Joshua Dressler & George C. Thomas III, CRIMINAL PROCEDURE: INVESTIGATING CRIME (5th ed. 2013) (softcover).*

### Optional Reference Text

*Joshua Dressler & Alan C. Michaels, Understanding Criminal Procedure Volume 1: Investigation (6th ed. 2013).*

–Stephen’s Syllabus for Criminal Procedure I: Investigating Crime

*Our main text is my digital coursebook, Constitutional Restraints on Policing, available on Amazon for the Kindle platform. Readings may also come from the Internet and other sources.*

–Joe’s Syllabus for Criminal Procedure I: Investigating Crime

### Course Texts

1. *Joshua Dressler & George C. Thomas III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES (5th ed. 2013) (hardcover).*

... OR ...

*Joshua Dressler & George C. Thomas III, CRIMINAL PROCEDURE: PROSECUTING CRIME (5th ed. 2013) (softcover).*

2. 2015 Supplement.

### Optional Reference Text

*Joshua Dressler & Alan C. Michaels, Understanding Criminal Procedure: Volume Two, Adjudication (4th ed. 2006).*

–Stephen’s Syllabus for Criminal Procedure II: Prosecuting Crime

**Joe:** This is a tough one for new professors! Having fought the Goldilocks fight for ten years—casebooks are as varied as teaching styles and coverage; and each to varying degrees are overinclusive *and* underinclusive in selection, are too heavy *and* too light in editing, and have editorial content that is too much, too little, or otherwise just not right—I finally bit the bullet and wrote my own. It’s a match made in heaven, and, though I’m certainly open to polygamy in this context, I doubt my bespoke marriage would be as perfect a fit for others. But before getting into my dating history with casebooks, I wonder whether yours has been as fraught with frustration and compromise.

**Stephen:** When it comes to teaching Criminal Procedure, I’ve been monogamous: Dressler and Thomas from the start. Well, come to think of it, that isn’t quite true—I used another text for one year, and then made the switch. But I’ve been teaching their text for many years since. It is an excellent text, and they are wonderful colleagues—willing to be mentors and friends—and so I’m quite happy with it, as are students. And personally, I’d recommend that any new teacher select this or an equivalent “standard.”

That said, I hear every frustration you express and am excited to see you go the route of self-publishing. There is no doubt that the reign of the traditional casebook publishers is coming to an end, no matter how they try to

“plus” this or “interactive” that. But your path to self-sufficiency was not just a straight jump . . . shall we explain our interim experiments before learning more about your new text?

**Joe:** Sure. Our partnerships in crime have certainly been fun for us and, hopefully, useful for others to hear about. A long time ago in a galaxy far, far away . . . sorry, wrong origin story! Back in 2009, we launched the Crimprof Multipedia, an online trove of multimedia content for professors teaching criminal law and procedure courses.<sup>27</sup> We started with content we already used in class—dash cam videos, cell phone footage, movie and TV clips, historical documents, photos, cartoons, etc.—and built pages around them to provide “off-the-shelf” teaching modules for other professors. We encouraged users to contribute content so that eventually the site would snowball as a “crowdsourced” multimedia teaching resource. Well, seven years into the project, the site has grown to hundreds of pages and hundreds of users from around the world, so by those measures, I think we succeeded. But the two of us remain by and large the biggest contributors to the website, which perhaps we should have foreseen given how busy everyone else is with their own work!

**Stephen:** Yes, we experimentally verified the free-rider phenomenon! But, that’s OK. If our multimedia materials are enhancing teaching elsewhere, then we’re happy.

I’ll explain our next conspiracy. With the Multipedia humming along, a few years back we began work on creating a platform for the crowdsourced production and reading of law school coursebooks. I suppose we can go easy on describing that work here since we have another article explaining it.<sup>28</sup> But in a nutshell, it would enable law professors to adopt, adapt, or author course modules for their texts, assembling them like Legos. (And who doesn’t like Legos?) As for reading, it would enable students to interact with other readers in that classroom, in that school, or anywhere in the world; and to benefit from historic comments, survey responses, and answers from the same. Although we made it through alpha testing, and I’m still a big believer in the concept, we are currently stymied by lack of funding, and I suppose by the distraction of our many other individual projects. So that brings us back to your self-published casebook. You’ve now taught with it for a couple of terms . . . how was it?

**Joe:** I loved it and, more importantly, so did most students. It’s a digital textbook optimized for the Kindle iPad app, with edited cases and multimedia modules instead of notes. Like our Crimprof Multipedia (from which some of the material is adapted), the modules have commentary and questions built around videos, photos, music, maps, and other multimedia materials that attempt to engage and educate. Folks who are curious can look through the

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27. CRIMPROF MULTIPEDIA, *supra* note 12.

28. Stephen E. Henderson & Joseph Thai, *Crowdsourced Coursebooks*, 51 ALBERTA L. REV. 907 (2014).

textbook on Amazon, so I won't go into more detail about it.<sup>29</sup> However, there are some takeaways from my experience worth sharing.

First, to give more background, the textbook came into being not only because of the Goldilocks problem I was having but also because of my experience authoring a different law school textbook (on the Supreme Court) with a traditional legal publisher.<sup>30</sup> The process was slow, and, while the editorial cycles added value, I didn't think they were worth the wait or loss of ownership and autonomy. Academic monographs may still need the editorial apparatus that traditional publishing routes provide, but for casebooks or similar textbooks, self-publishing is definitely worth considering. In addition to the advantages of retaining ownership and control (including setting prices that are student-friendly), self-publishing allows you to edit and add content on your own schedule. For instance, if you go with a digital platform, you can update your book as often as you'd like throughout the year to incorporate breaking developments and new materials.

Second, editing cases made me read them—for the first time in many years, if ever—in their entirety, footnotes and all. There were a lot of gems that I discovered, which other authors had discarded due to their own editorial preferences or constraints, which were not necessarily mine. In fact, I edited less aggressively than I thought I would because much of the reasoning and rich language I came across were too good to cut. (Surprisingly, many students agreed.)

Third, not everything was roses. Editing cases takes a lot of time, as does finding, learning, and managing the process of self-publishing that is right for you and your students, if not also for the broader market. At our law school, students are given iPads, so I could go digital only. Most students either loved, didn't mind, or eventually got used to reading cases on a screen, but some never fully adjusted. Finally, as you know from our efforts to build a crowdsourced coursebook platform, no existing publishing platform is perfect. To note a few shortcomings with Kindle, it is not possible to add comments in the margins, and its "popular highlights" feature is a far cry from the interactive social reading experience we had envisioned for our platform.<sup>31</sup>

Now that I've taught from my own textbooks, I can't go back to using others. Many are terrific, like Dressler and Thomas, but none fit as well as

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29. JOSEPH THAI, *CONSTITUTIONAL RESTRAINTS ON POLICING: A MULTIMEDIA TEXTBOOK ON CRIMINAL PROCEDURE* (2015) (ebook), <http://www.amazon.com/Constitutional-Restraints-Policing-Multimedia-Coursebook-ebook/dp/B00OP64V0K> [<http://perma.cc/3SRG-QM5H>].

30. RICHARD SEAMON, ANDREW SIEGEL, JOSEPH THAI & KATHRYN WATTS, *THE SUPREME COURT SOURCEBOOK* (2013).

31. *Kindle User's Guide: 2nd Edition*, AMAZON, [http://s3.amazonaws.com/Kindle\\_4.1.0/Kindle+User's+Guide+2nd+edition.pdf](http://s3.amazonaws.com/Kindle_4.1.0/Kindle+User's+Guide+2nd+edition.pdf) [<http://perma.cc/P686-NK3P>]; see also Henderson & Thai, *supra* note 28, at 912.

mine. So next up for me is writing one for First Amendment. Are you tempted to author your own textbook?

**Stephen:** Very much so, and I think many will join me after reading your candid assessment of the experience. As much as I'm a fan of George Thomas, Joshua Dressler, and their work, it seems past time for me to make my own judgment calls about everything that you note. Frankly, as you know, after some years of teaching it becomes an unpleasant tedium to reannotate every new version of a text that is published, and I'm itching to make all of my own editorial judgments in terms of new court decisions and public events. So I may be knocking on your door to learn the low-level logistics, and I suspect—knowing you—that you will likewise graciously answer any other comers, even as we should also consider simply adopting what you have created!

**Joe:** Thanks. You are indeed always welcome to come knocking—and loudly if I have on headphones. I'm also glad to show the ropes to anyone else who's interested, including new professors who may simply want to explore all options. Folks in the field generously offered advice and materials when I started out teaching, and it's a cycle worth repeating!

### C. *Class Preparation and Presentation*

**Stephen:** When I began teaching I received good advice: a new professor should expect to spend something like eight hours out of the classroom for every hour inside it. If there is a substitute for that—time—I haven't found it, even as preparation of course takes less time than it used to. Like Rush said, "All the World's a Stage,"<sup>32</sup> and students expect you to not only know the material but also to put on a reasonably good show. At least they appreciate it if you do. Part of that, I think, is putting on a happy face and enjoying the classroom. Students don't want to know of your car troubles, spouse troubles, or tax troubles, unless you can quickly make it relevant and/or at least humorous. (However, if you get a free ride in the back of a police cruiser, I can tell you they *do* want to hear about that.)

**Joe:** Agree completely. Just as there's no substitute for preparation, there's none for enthusiasm. It's infectious, as is ennui. To throw back Rush lyrics at you (and extirpate all doubt that we are old), "Invisible airwaves crackle with life . . . ."<sup>33</sup>

**Stephen:** I'm tempted to follow with Queen ("Radio Ga Ga"), but that would probably be taking it one too far. So I'll ask this—can we articulate any "rules of the classroom" that might be useful to a new(er) professor? I'll actually start with one I learned from fellow Crimprof Andrew Leipold when, as a newbie, I attended the AALS New Law Teachers Conference. I highly recommend the

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32. RUSH, *ALL THE WORLD'S A STAGE* (Mercury Records 1976). OK, so Shakespeare said it first. WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7.

33. RUSH, *The Spirit of Radio*, on *PERMANENT WAVES* (Mercury Records 1980).

conference and just about anything from Leipold (who has won “Teacher of the Year” so often it’s pretty much the Leipold trophy there at Illinois).

The rule is this: *never* make a joke at a student’s expense, no matter how funny it strikes you. You will always regret it. Good advice, I think. You can laugh with them—and should! But never at them.

**Joe:** True, and so, too, I think, the converse—you can laugh at yourself plenty. Sometimes you can share something funny and personal in service of a teaching lesson, or sometimes you’ve messed up explaining something, and it’s better to call yourself out than leave students misguided or confused. I think students appreciate seeing a more human and humble side to their professors, and remember those moments (and hopefully, those lessons!) better. Do you have another teaching rule to share?

**Stephen:** Sure—I can give one related to your great point. While you *should* poke appropriate fun at yourself, you should *not* emanate a lack of confidence. These actually dovetail, as good humor expresses confidence. What I’m thinking of here are especially new teachers. Some of them think they should step into that first class and give an oral resume in order to demonstrate that they belong. Unfortunately, that has the opposite effect. Every professor has been hired by the school, and that’s evidence of qualification enough. (And besides, I don’t like any warm up in a first class—it’s much more effective and fun to get right to work, returning later to cover some guidelines or rules as necessary.) Is there a rule you would share?

**Joe:** Last from me, and not so much a universal rule as a teaching suggestion: cultivate a habit of understanding before disagreeing. For example, in class, when a student expresses a view that seems misplaced, I usually follow up with questions to better understand the bases for the student’s position—and to confirm my understanding, and to rephrase and reinforce that view as persuasively as I can. Then, if the view remains doubtful to me, and important enough pedagogically to dispute, I’ll begin an assault on it, attacking vulnerable positions to see how well the student (or others, if they wish) can defend them. But as a result of my efforts to understand, students generally seem receptive to my pushback, seeing the episode as an educational exercise in considering all sides to find the best one rather than a reflexive attempt to promote a personal viewpoint.

In life, generally, I’ve found the exercise of understanding before disagreeing not always easy but worthwhile—not least because, sometimes, it’s made me change my own mind! And so the habit is not just something I try to cultivate for the sake of classroom learning, but something I hope my students will keep for life.

**Stephen:** That’s powerful for the classroom and meaningful for life. Let me share a source in which I found some similarly powerful wisdom: *What the*

*Best College Teachers Do* by Ken Bain.<sup>34</sup> (There is also a differently authored volume entitled *What the Best Law Teachers Do*,<sup>35</sup> but as much as I dearly love several involved—especially my own mentor and friend, Andrew “Taz” Taslitz, who left this life far too early—that volume didn’t hit me like Bain’s first. And I say Bain’s first because I have also read—and made my kids read—Bain’s *What the Best College Students Do*.<sup>36</sup> My kids are still pretty angry with me for that experience.)

So what’s the magic of Bain’s *What the Best College Teachers Do*? My key takeaway was that the best teachers have a goal not merely to teach but also to transform. Of course, I aim to convey information and lots of it. I’ve no interest in either hiding that ball or in making things seem simpler than they actually are. But Barbri will convey information that students then regurgitate on the Bar Exam. If that’s all Barbri does, that’s success. If that’s all I do, I deem that failure. Especially since most of my students won’t practice criminal law, I’d like my courses to change preconceived notions and life perspectives. In other words, a class that sings won’t merely affect a student the day of the Bar Exam and won’t even just create someone who “thinks like an attorney,” but it will forever change—even if just a little—how she perceives and interacts with the world as a citizen and attorney. She will become a person who doesn’t stop after carefully analyzing what the law is, but who probes whether socially and morally it is the right law to have.

Highfalutin, perhaps, but I’d encourage every new teacher—and most old timers, too!—to check out Bain’s “major conclusions,” which run from pages fifteen to twenty-one of his text.<sup>37</sup> Good stuff. Now, having sermonized so high, can I quickly give a few “lessons learned” that are more lowbrow?

**Joe:** Absolutely. I’m listening.

**Stephen:** OK. Quickly,

1. Never run a hypothetical to which you don’t know the answer. Of course, it’s okay to run a hypothetical to which you know there is *not* an answer or at least not a clear one. But you should know *why* there is not.

2. When you get asked a question to which you don’t know the answer—and it will happen!—only “punt” if it is way in left field (asking about contracts). Otherwise, reason from what the class has learned (“Well, let’s apply what we know to see if we can figure it out . . .”). After class, check whether you got it right. Nine times out of ten, you will, and the class learned from your analogical reasoning. In the rare instance in which you got it wrong, either send an explanatory email or start up with this during the next class (“Although we intuited how courts might approach this, they actually go a

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34. KEN BAIN, *WHAT THE BEST COLLEGE TEACHERS DO* (2004).

35. MICHAEL HUNTER SCHWARTZ ET AL., *WHAT THE BEST LAW TEACHERS DO* (2013).

36. KEN BAIN, *WHAT THE BEST COLLEGE STUDENTS DO* (2012).

37. BAIN, *supra* note 34, at 15–21.

different way, and there's a good reason for that . . ."). Students learn even more from this.

3. In general, don't be shy about sending follow-up emails to a class discussion that clarifies or extends a point. Students really appreciate this, even if none or few typically reply or further engage. You tend to find out later, perhaps in student discussions or from course evaluations, that they were nonetheless appreciatively learning.

4. It is better to cover some things well than everything poorly, especially if you want good evaluations (we've already talked about this, but it is worth emphasizing).

5. Watch what you ask for. If you solicit suggestions on your teaching and don't take them, students are likely to resent your failure to implement. (And how can you avoid this when one student will suggest you move faster and one that you slow down? One that you take more student questions, and one that you shut them up?)

Phew; that's all. Sorry for monopolizing there, and I probably owe at least several of these to Leipold.

#### D. Exams

*Your grade will typically be determined entirely by your performance on the final exam, as adjusted according to the Attendance policy. In extraordinary circumstances, your grade may be increased or reduced based on class participation. The exam is closed book, meaning you will not be permitted to use the casebook or personal notes during the exam. The only thing you will be allowed to reference is one handwritten 8.5 by 11 inch page (double sided) of notes, the content of which is your personal creation.*

*An exam packet including past exam questions is available on the school's exam website.*

–Stephen's Syllabus

*Your grade will be based primarily on a final exam. However, extra credit may be given for quality class participation. Negative credit may be given for lack of preparation or poor attendance, as discussed above.*

–Joe's Syllabus

*This is a limited open book exam. You may use the assigned reading materials and textbooks, my slides, your notes, and outlines you have made or to which you have substantially contributed, but not commercial outlines or treatises.*

–Joe's Final Exam

**Joe:** Ah, final exams. So like children—full of possibilities, promise, and planning, but they never quite turn out the way you expect. And fun to make, but a whole lot of work after!

As with parenting, there are many different exam styles, of course. For starters, compare what we allow students to use during exams. Mine is mostly open book, whereas yours is mostly closed. I took both kinds of exams in law

school and found both could be fair. However, as a student, I preferred (at least in theory) having the burden of memorization lifted so I could concentrate the sweat and angst of exam prep on analysis and the big picture. And also taking into account the world of practice—where it is largely open book, and where superior analysis often seems in shorter supply than string cites—I err on the side of letting students bring in more rather than less.

That said, as a student, I think I would have done well by your limitation. Even with the freedom to bring anything and everything to a final exam—and the neurosis to do just that—I was infamous in my study group for producing “Short Torts,” “Slim Crim,” and other one- to two-page outlines, which was largely all I ended up consulting when I took exams. The process of reduction was a great way for me to learn the materials and see the big picture.

**Stephen:** That’s the way I look at it—students learn a great deal from having to digest the entire course and prepare a brief couple of pages. And criminal practitioners have to argue without books when a client’s life may be on the line, and certainly her freedom and livelihood. Ditto for most practitioners in client interviews and other environments where even the portable electronic library generally can’t be consulted. So I think there are probably arguments for both sides as to what is “most realistic,” and perhaps that isn’t even a meaningful criterion for the purposefully artificial construct of a school exam.

That said, when I first taught, I gave entirely open book exams, and I only had *one* closed book exam in all of my law school experience (indeed, it was the only exam I even had to take on school property!). And I see value in both. My reason for moving to mostly closed book was, honestly, rather paternalistic. Most of my colleagues chose closed book exams, and my students made the poor choice of studying less for mine because they thought they could look it up during the test. That doesn’t work.

I know there is at least one other significant change I have made to my exams over the years, but let me ask you that first—anything you have changed?

**Joe:** I’ve made two major changes and, hopefully, both for the better. First, I made my exams less complex and comprehensive, if not less difficult. Gone are the days of three issue spotters, each with several suppression items to consider, and on top of that one policy question that only a law review article could adequately answer. Now, I aim for relatively concise issue spotters that (a) check doctrinal basics as well as (b) push key boundaries, and a flexible policy question that gives students leeway to demonstrate broad and critical understanding. Second, I’ve expanded my no-answer period at the beginning of the exam, when students are free to read the questions and outline their answers, or take a nap, a bathroom break, or even smoke (outside, of course), but not start typing or writing their actual answers. I used to give fifteen minutes, but nowadays I allot forty-five to sixty depending on how difficult I think the exam is. This enforced thinking time has generally improved clarity

and organization and, for the most part, has eliminated panicked stream-of-conscious answers as well as shotgun ones. Oh—there’s actually a third, and arguably major, change. I switched from *The Simpsons* characters to *Family Guy*.<sup>38</sup> Fewer students were relating to the former show, and the latter is still funny.

What about your exams—have they evolved, too?

**Stephen:** Definitely in the sense of your first point. Every new professor is told that exams cannot be too easy but doesn’t believe it. I didn’t. I wrote questions that *I* found interesting. That was a mistake. Although they still worked in the sense of curving the classroom, my early exams were simply too long and too hard. Relatedly, I’ve learned not to include red herrings or at least to use them very sparingly. They pose problems when every student, or even most every student, falls for them, and don’t offer much upside. In short, on a timed exam, fewer students will recognize clever subtleties than you imagined, leaving little bang for the buck.

I have also moved to always including multiple choice as a portion of my examination and really like this. (Indeed, I’m becoming convinced that an all multiple choice exam can be at least as good as what law schools traditionally dish out.) Multiple choice questions offer the chance at broad coverage, which is difficult in a reasonable, realistic essay question—just how many police interactions can Bart or Stewie realistically have in a single “episode”?—and they painlessly distribute students on the full spectrum of the grading curve. That said, good multiple choice questions—meaning a student who knows the right answer is not tricked out of it, but a student who does not know the right answer gets it wrong—are very difficult to write. So time saved on the back end (grading) is spent on the front end.

We both stick to a single final examination (no midterms or quizzes), and I have no plans to move away from this. You?

**Joe:** None! I think my final exam is a fair assessment of the students’ learning, and I can live without the additional work of interim tests. Besides, I like the luxury of teaching and learning for their own sakes during most of the semester, and I worry that this Platonic sense would be lost if students always had exams on their minds.

Since we both stick to a single exam, how students do on it is obviously critical. But I wonder whether *how* we grade matters as much as how *well* we

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38. We understood not knowing *The Paper Chase*, see *supra* note 18, and we can make peace with not knowing *The Hunger Games*, see *supra* note 23, (one might even be better off for it once the movies came out), but there really cannot be any excuse for not knowing *The Simpsons* or *Family Guy*. So, we do hope these footnotes are entirely unnecessary. See *The Simpsons*, IMDB.COM, <http://www.imdb.com/title/tt0096697> [<http://perma.cc/8UUF-3ZL2>] (last visited Oct. 28, 2015); *Family Guy*, IMDB.COM, <http://www.imdb.com/title/tt0182576> [<http://perma.cc/PRZ3-QF5W>] (last visited Oct. 28, 2015).

grade. For example, when I started teaching, I had an elaborate table for assigning points for issues and subissues, but issue spotters seem to develop a life of their own; and, for better or worse, some students always managed to take them to unexpected places. In the end, how students did on my point system usually aligned with my gut sense, and, when they didn't, I felt my gut was more trustworthy than my grid. So I've ditched the grid and gone with what some would call the "Gestalt" method, but I do leave notes so that students can understand why I assigned a particular grade.

How about you? Grid, gut, or other?

**Stephen:** Technically other but, in the end, not very different from you. I neither pre-assign any number of points, nor do I create any sort of table. But I do award points (checkmarks) as I read each essay and take them away for significant mistakes. In the end, I sum up those checks but, for the very reasons you note, do not allow the grade to be entirely determined by them when I have reason to do otherwise.

Overall, I'm increasingly persuaded it doesn't matter *how* we grade as long as we, of course, take it very seriously. I still agonize over assigning grades because they matter, and because I'm well aware of my imperfections. But one of our colleagues often repeats some good wisdom: whatever the grading method, we might be off on the margins (e.g. assign a B+ when the "right" grade was a B), and that's where we tend to agonize. But we aren't going to be dramatically off (e.g. assign an A+ when the "right" grade was a B). It's just not going to happen.

On a related note, I notice that you (like me) leave wiggle room in your syllabus to adjust grades up or down for class participation, but that you (like me) usually don't do it. Why?

**Joe:** First, our law school requires anonymous grading of final exams, and I believe that's a wise rule that protects both students and professor. Leaving class participation out of the picture helps preserve the integrity of anonymous grading. I'm human enough to not want to give students whom I've gotten to know and enjoyed teaching during the semester a low grade, particularly if it's obvious that they've come to class week after week prepared and engaged. But, objectively, as you indicate, the exams separate themselves into different quality strata—A's are indeed distinctly better than B's, which are quite better than C's, and so on. It's simply not fair to give the same grade to students who do not demonstrate the same level of knowledge, understanding, and analysis. (As for the margin of error in grading, which I agree is half a letter at most, I point out to students that it is as likely to help as to hurt them, and, if they suspect the latter, they can always take more of my classes to try to average it out.)

Second, keeping track of class participation would be a pain and a distraction but almost necessary, I think, if participation is to be taken into account objectively and systematically. So I leave wiggle room for class

participation, but because I don't keep track on a daily basis, I generally don't adjust grades in light of it. Instead, I do so only when Jupiter and Venus are in conjunction, meaning: (1) the anonymously graded exam sits on the fence between two grades, and (2) it would not seem surprising or unfair to anyone in the class that the student's contributions throughout the semester tipped the grade one way or another. Hopefully, that keeps me honest.

One last question: do you hold review sessions or otherwise help students prepare for exams?

**Stephen:** I do, and I think I've run the gamut. Some years, I've held extra office hours the day before the exam, meaning I hang out in the office and answer whatever questions come in the door. Other years, I've held much the same but in a classroom setting. And sometimes I have run a review session in which students submit answers in advance so I can attempt to order—and perhaps organize—the questions into a more rational whole. Honestly, I can't say one system is better than another. I think they can all work just fine, and I also have no problem with a professor simply wrapping up on the last day of class after finishing new material. I've never done that, but this is law school, and I think it's certainly fair play.

The only thing I probably would suggest is to consider when should be the drop-dead day and time for questions. In my opinion, panicked questions thirty minutes before the exam not only don't do much good, but they can be positively unfair: it becomes difficult for the best of us not to give cues as to what might or might not have made it onto the exam. If a student asks precisely what is most tested, how full an answer do you provide? So some professors might want to have that cutoff before they write (or at least finalize) the exam, and an eventual cutoff strikes me as a good idea for everyone.

**Joe:** Speaking of cutoffs, let's move on to multimedia in teaching!

## II. MULTIMEDIA

Both education and technology have come a long way since films were shown during only physical education class.<sup>39</sup> Indeed, in the age of massive open online courses, video lectures are sometimes the primary means of information transmission. But while distance education and the flipped classroom are important topics in their own right, we focus here on the benefits of enhancing the traditional law school classroom—and in particular criminal procedure classes—with multimedia teaching materials.

We so strongly believe in the potential for multimedia content to engage and educate students that, as noted in our discussion above, we created the Crimprof Multipedia in 2009 to share (and promote the sharing of) such

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39. See, e.g., Max Minzner, *Breaking Bad in the Classroom*, 45 N.M. L. REV. 397 (2015); ADAM M. GERSHOWITZ, *THE WIRE: CRIME, LAW, AND POLICY* (2013).

materials.<sup>40</sup> On the Multipedia, professors can find hundreds of pages of categorized, searchable multimedia modules for teaching in the criminal law and procedure curriculum. The content is as diverse as video and images can be, ranging from still photographs and cartoons to interrogation videos and animated clips. In order to give a sense of both why and how we use such material in our classes, we will focus on a single meta-topic that pervades criminal procedure: race.<sup>41</sup>

As Tamara Lawson explained in these pages some years ago in urging the teaching of civil rights, criminal procedure provides a natural forum for frank discussions about racial (in)justice in America.<sup>42</sup> The traditional two-part criminal procedure framework offers the opportunity to discuss how race relations play out both on the streets and in the courtroom. But frank discussions can be difficult discussions, needing—among other things—to respect the personal experiences and beliefs of diverse students, to provide perspective where life has not, and to move beyond mere platitudes or political correctness. Moreover, complications can arise when the teacher is not a minority (or is of a different minority than that being discussed) or when there are few of the “targeted” minority students in the classroom. Some of those students may want to speak to these issues—indeed, sometimes boldly—but others will want to avoid public declarations about these sensitive topics, and they should certainly feel no obligation to speak.<sup>43</sup>

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40. See *supra* Part I(B); CRIMPROF MULTIPEDIA, *supra* note 12.

41. For other insights and suggestions for incorporating race into teaching Criminal Procedure, see Cynthia Lee, *Making Black and Brown Lives Matter: Incorporating Race Into the Criminal Procedure Curriculum*, 60 ST. LOUIS U. L.J. 481 (2016).

42. See Tamara F. Lawson, *Mainstreaming Civil Rights in the Law School Curriculum: Criminal Law and Criminal Procedure*, 54 ST. LOUIS U. L.J. 837, 838 (2010). Lawson explains as follows:

Law school has a luxury we often take for granted: it has the benefit of time and space unrestrained by the pressures of lawyer-client obligations and, therefore, provides students with the liberty to explore issues, mold their analysis, and experiment with problem solving in a dynamic way. This is an extravagance that does not exist in law practice. Particularly with regard to civil rights issues that have the potential to foster politically and culturally charged discussions, it is important for the law professor to carve out an academic safe space for these debates. Further, law school is the time students should be most encouraged to step outside their comfort zone and grapple with complex situations, competing interests, and the concept of just and unjust punishments within our legal system. It is from this pedagogical perspective that I embrace the intersection of civil rights and criminal law and procedure and explore it with my students.

*Id.*

43. Perhaps some minorities might claim its members *do* have some moral obligation to speak, an issue on which we are asserting no position. We are merely urging that no such position or pressure should be asserted in the law school classroom. We also note that a teacher, of course, should never assume a student of a particular race would have a particular viewpoint; even when well intentioned, that would be among the most unfair and misguided racial profiling.

We use multimedia for at least four purposes, including when it comes to integrating issues of race: for humor, for humanizing, for headlines, and for hypotheticals. Below, we present examples of each.

A. *Driving While Black (Traffic Stops)*

In *Whren v. United States*, the Supreme Court acknowledged that a racially motivated pretextual stop would violate the Constitution, but only as a matter of the Equal Protection Clause and not the Fourth Amendment.<sup>44</sup> This makes such challenges almost impossible to bring, and so it is important that students discuss the phenomenon of “driving while black.” One way to introduce the topic is through reports, such as those from the American Civil Liberties Union<sup>45</sup> or Bureau of Justice Statistics.<sup>46</sup> According to 2011 data, “[a] black driver is about 31 percent more likely to be pulled over than a white driver, or about 23 percent more likely than a Hispanic driver.”<sup>47</sup> And, close to home for many Oklahomans, Native Americans are stopped at an even higher rate.<sup>48</sup>

These statistics are powerful and potentially effective, but it can be difficult to generate meaningful discussion. Students are understandably reticent when it comes to serious talk about race, and—like Starbucks customers—they can resent having the topic thrust upon them.<sup>49</sup> Sometimes, however, humor can get the conversation flowing. We thus have successfully used the trailer from *Men in Black II*, in which the following conversation takes place as a self-driven car pulls up, and the “driver” is then sucked into the steering wheel:

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44. *Whren v. United States*, 517 U.S. 806, 813 (1996).

45. David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU (June 1999), <http://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [<http://perma.cc/SD8S-M8D3>].

46. Matt Durose & Lynn Langton, *Data Collection: Police-Public Contact Survey*, BUREAU JUST. STAT. (2011), <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=251> [<http://perma.cc/A3ZV-AUGY>].

47. Christopher Ingraham, *You Really Can Get Pulled Over for Driving While Black*, *Federal Statistics Show*, WASH. POST: WONKBLOG (Sept. 9, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/> [<http://perma.cc/698U-SWC3>].

48. *Id.*

49. Sam Sanders, *Starbucks Will Stop Putting the Words 'Race Together' on Cups*, NPR (Mar. 22, 2015), <http://www.npr.org/sections/thetwo-way/2015/03/22/394710277/starbucks-will-stop-writing-race-together-on-coffee-cups> [<http://perma.cc/2BP9-SXWA>] (discussing the end of a much-criticized campaign in which baristas wrote “race together” on coffee cups).

Agent K (Tommy Lee Jones): Does that come standard?

Agent J (Will Smith): Actually, it came with a black dude, but he kept getting pulled over.<sup>50</sup>

Also effective is content from Chris Rock's "How to Not Get Your Ass Kicked by Police" segment, which includes (and portrays) this advice: "If you have to give a friend a ride, get a white friend. A white friend can be the difference between a ticket and a bullet in the ass."<sup>51</sup> Or, there is the episode in the third season of *Family Guy* in which Peter learns that he has a black ancestor and shares that revelation on television. When he is later pulled over—without apparent reason—and the officer makes the connection, things go downhill:

Officer: Hey, you're that black guy I saw on the news conference, ain't you?

Peter: Uh . . . yeah . . . that's me.

Officer (into radio): This is car 15, I'm gonna need backup. I've got a stolen vehicle here.

Peter: But this is my car.

Officer (into radio): Suspect's getting belligerent.

Peter: What?

Officer (into radio): Officer down. [He proceeds to fall on the pavement as three other police cruisers screech into view.]<sup>52</sup>

Or, from the same season, there is the high-tech police van—"the latest in law enforcement technology"—that automatically handcuffs and Mirandizes a white suspect but, for a black character, brings out the clubs and plants a gun.<sup>53</sup> Any of these clips, or several in combination, can take some of the edge off a serious topic and thereby get conversation flowing.

If humor does not set the desired tone, or if a teacher needs a way to humanize what for too many in some classrooms will seem the "other" in these circumstances, then it helps to put the shoe on the other foot. And thanks to two Philadelphia police officers, this can be done. In 1999, a young, white male was driving his BMW through a predominantly black neighborhood, heading to work after visiting his (black) girlfriend.<sup>54</sup> The problem? To the

50. *Men in Black Driver Clip*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Men%20in%20Black%20II%20Driver%20Clip.mp4>.

51. *Chris Rock (Driving While Black)*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Chris%20Rock%20DWB.mp4>.

52. *Family Guy Driving While Black*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Black%20Peter%20Pulled%20Over.mp4>.

53. *Family Guy Police Van*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Family%20Guy%20Police%20Van.mp4>.

54. Elisa Ung, *Lawsuit Says Racial Bias Prompted Search of Driver, Car*, PHILA. INQUIRER, Sept. 17, 1999, at B1, [http://articles.philly.com/1999-09-17/news/25487015\\_1\\_white-officers-search-and-seizure-racial-bias](http://articles.philly.com/1999-09-17/news/25487015_1_white-officers-search-and-seizure-racial-bias) [<http://perma.cc/8TBZ-SVBX>].

officers, the driver, Robert Hluchan, Jr., was out of place and therefore must be there to purchase drugs. We can watch what happened as a result—a fifteen-minute traffic stop that has Hluchan in handcuffs and includes a visual strip search—thanks to two black gentlemen, living in an adjacent apartment, who captured it on video camera.<sup>55</sup> The two provide an often poignant and sometimes hilarious running commentary, and it is not lost on students that Hluchan surely only won his civil suit (it settled) thanks to the existence of their video.<sup>56</sup>

And there is always “dribbling while black.” According to a study reported in the *Quarterly Journal of Economics*, 4% more fouls are called against players officiated by opposite-race referees, and players earn 2.5% more points on nights when games are officiated by a referee crew matching their race.<sup>57</sup> In the provocative words of one study author, “Basically, it suggests that if you spray-painted one of your starters white, you’d win a few more games.”<sup>58</sup> So a teacher can select her team’s—or the local team’s—least favorite foul that is “cross racial,” grab the video on YouTube, and generate good discussion, including about the potential for subconscious bias in policing.<sup>59</sup>

In short, as we use it, multimedia does not teach the myriad issues surrounding the phenomenon of driving while black, and how they relate to constitutional criminal procedure. That is our job. What the multimedia does is make the classroom more enjoyable and effective, breaking the ice with humor and humanizing those affected.

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55. *Driving While White*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Driving%20While%20White.mp4>.

56. If you show the Hluchan stop in class, students will be interested to learn some of the other exploits of one of the officers. See Daniel Denvir, *Why Is Eric Burke Still a Philly Cop?*, PHILA. CITY PAPER, Jan. 31, 2013, at 10, <http://citypaper.net/cover/why-is-eric-burke-still-a-philly-cop/> [<http://perma.cc/227W-XQQN>]; Robert Moran, *Controversial Police Officer Passed Over for Promotion*, PHILA. INQUIRER, Dec. 20, 2005, at B4, [http://articles.philly.com/2005-12-20/news/25421731\\_1\\_internal-affairs-probes-court-officer-strip-search](http://articles.philly.com/2005-12-20/news/25421731_1_internal-affairs-probes-court-officer-strip-search) [<http://perma.cc/9F7Q-WJML>]; Robert Moran, *A Costly Police Officer for Philadelphia*, PHILA. INQUIRER, Nov. 28, 2005, at A1, [http://articles.philly.com/2005-11-28/news/25430255\\_1\\_court-officer-police-disciplinary-hearing-settlements](http://articles.philly.com/2005-11-28/news/25430255_1_court-officer-police-disciplinary-hearing-settlements) [<http://perma.cc/2VYD-PR67>].

57. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. ECON. 1859, 1885 (2010).

58. Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, N.Y. TIMES, May 2, 2007, at A1, <http://www.nytimes.com/2007/05/02/sports/basketball/02refs.html> [<http://perma.cc/7JZN-5UW7>].

59. A follow-up study can be used to discuss whether awareness of bias can reduce or even eliminate its effects. See Christopher Ingraham, *What the NBA Can Teach Us About Eliminating Racial Bias*, WASH. POST: WONKBLOG (Feb. 25, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/25/what-the-nba-can-teach-us-about-eliminating-racial-bias/> [<http://perma.cc/3PAN-T9DL>] (discussing a follow-up study that found no racial effects in the period following the release of the first study).

B. *Walking While Black (Terry Stops)*

Because experiences and perspectives—with policing in particular—can vary so widely by race, class, and place, it can be difficult for students to appreciate the personal toll of racial bias in policing unless they have encountered it themselves. This is so with *Terry* stops. In the dry language of judicial opinions, they may be described as “brief, investigatory stop[s]”<sup>60</sup> or “seizures that involve only a brief detention short of traditional arrest,”<sup>61</sup> but, in real life, especially for minority men in poor urban neighborhoods, they may be rough, invasive, degrading, and potentially deadly.<sup>62</sup> How can a professor convey their experiences and perspectives to students who do not share those demographics?

As with traffic stops, statistics may help set the stage. Take, for example, New York City’s aggressive stop-and-frisk program under Mayor Bloomberg, which as far as we know yielded the largest dataset of *Terry* stops in the country. At its height from 2008–2012, the New York Police Department (NYPD) conducted well over half a million *Terry* stops a year.<sup>63</sup> Those stops disproportionately occurred in poor minority neighborhoods (illustrated by a slide with a New York City map showing distribution of stops<sup>64</sup>), and staggeringly befell young minority men (illustrated by a slide with pie charts showing that, in 2012, young black men made up 25.9% of NYPD stops, but only 1.9% of the city population; young Latino men made up 14.7% of NYPD stops, but only 2.8% of the city population; and young white men made up only 3.9% of NYPD stops, but 2.0% of the city population<sup>65</sup>).

What might account for such racially disparate policing? One might give students a few seconds to ponder this question, and even allow some hands to rise before seguing to “one respected commentator’s disturbing hypothesis for the disparity”:

Commentator (Stephen Colbert): They stopped more young black men than there are in New York City. That can mean only one of two things. Either

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60. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

61. *United States v. Mendenhall*, 446 U.S. 544, 551 (1980) (quotations and citations omitted).

62. We do not mean to minimize the danger to officers conducting *Terry* stops or traffic stops. Our Multipedia has materials that illustrate the risks quite effectively. However, our focus here is on using multimedia materials to discuss race and policing rather than other (if sometimes related) issues.

63. *Stop-and-Frisk Data*, NYCLU, <http://www.nyclu.org/content/stop-and-frisk-data> [<http://perma.cc/QJH4-TKJK>] (last visited Oct. 28, 2015).

64. Matthew Bloch et al., *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES (July 11, 2010), <http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html> [<http://perma.cc/A4UX-VCSC>].

65. NYCLU, *STOP-AND-FRISK 2012*, at 7 (May 2013), [http://www.nyclu.org/files/publications/2012\\_Report\\_NYCLU\\_0.pdf](http://www.nyclu.org/files/publications/2012_Report_NYCLU_0.pdf) [<http://perma.cc/6JSK-YC9Q>].

they're targeting young black men so often that the same ones get frisked over and over *or* the much simpler explanation . . . Interdimensional Black People.

Clearly, clearly, there is a rift in the race-time continuum. They are coming over from other dimensions to be black at us. These minorities are traveling here via some kind of *black* hole—I'm sorry, excuse me, I'm sorry, *African-American* hole.

Now folks, I want to make it clear I have nothing against black people from *this* dimension. Those are the good ones. But black people from other worlds? Who knows if they're friendly? In those other dimensions, for all I know, my evil twin is a horrible racist, and those black interdimensional interlopers might be here for revenge. NYPD, I beg you to stop and frisk all of them!<sup>66</sup>

Of course, in his comic genius, Colbert casts aside as improbable the most likely explanation. But neither humor nor numbers can tell the whole story—at least not the full *human* story. For that, nothing beats cell phone footage of *Terry* stops by the targets themselves, which is as close as students can get to walking (while black) in their shoes.

One may play, for instance, this 2011 audio recording by a black teenager in Harlem who on a single day was stopped multiple times and secretly recorded one of those encounters:

Officer: Oh, you again, man.

Alvin: I just got stopped like two blocks ago.

Officer: You know why? You look very suspicious.

Alvin: Cause you're always looking at me crazy.

Officer: Cause you keep looking back at us, man. Don't do that shit.

. . . .

Alvin: Cause you're always like stopping . . . I just got stopped two blocks away.

Officer: Put your hands up.

Officer: Because you keep doing that shit, man . . . Listen to me. When you were walking the block with your hood up and you keep looking back at us like that . . .

Officer: Why do you have a fucking empty bookbag?

Officer: We think you might have something.

Alvin: Cause I had my hoodie in there.

Officer: You have your hoodie on your body. Why you a fucking wise ass?

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66. *Colbert on New York City Stop and Frisk*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/Criminal/Public/Upload/Colbert%20on%20Stopping%20Interdimensional%20Black%20People.mp4>.

Alvin: Well, cause it was cold.

Officer: You want me to smack you?

Alvin: You're gonna smack me?

Officer: Yeah.

Alvin: You're gonna smack me?

Officer: You a wise ass?

Alvin: No, you asked me why I had a bookbag on.

Officer: Who the fuck are you talking to? Who the fuck do you think you're talking to?<sup>67</sup>

According to Alvin, in a documentary of the encounter by *The Nation*,<sup>68</sup> the officers then grab and frisk him. The audio continues:

Officer: You wanna go to jail?

Alvin: For what?

Officer: Shut your fucking mouth.

Alvin: What am I getting arrested for?

Officer: For being a fucking mutt. You know that?

The officers grow increasingly angry and aggressive, with one threatening to “break your fucking arm off right now.” From the sounds in the recording, the encounter takes a hard physical turn. Alvin explains in the documentary that an officer is pushing him backwards. He does not rise to the provocation, and the audio ends with him being ordered to “take a fucking walk.”

For students, hearing this encounter unfold “live” can humanize the minority experience of a “brief, investigatory stop” more powerfully than third-person summaries in case reports<sup>69</sup> or even first-person accounts in

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67. *Audio NYC Stop and Frisk*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/Criminal/GetFile.aspx?File=%2fAudio%20of%20NYC%20Stop%20and%20Frisk.mp3>. A few points to note about our transcription. First, we leave in expletives to convey the full force of the encounter without any whitewashing. Second, because it is sometimes difficult from the audio recording of the fast-moving encounter to tell which of the two officers is speaking, we use “Officer” for both. When two are speaking in a row (or over each other), their dialogue is separated to indicate the lines come from different officers. For the sake of clarity, some remarks in the background are omitted.

68. See Ross Tuttle & Erin Schneider, *Stopped-and-Frisked: 'For Being a F\*\*king Mutt'*, THE NATION (Oct. 8, 2012), <http://www.thenation.com/article/stopped-and-frisked-being-fking-mutt-video/> [http://perma.cc/9454-Z49R].

69. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 624–58 (S.D.N.Y. 2013) (recounting over a dozen NYPD stops and frisks, most of which the district court found unconstitutional, in a decision enjoining NYPD’s stop-and-frisk program as it then existed).

documentaries.<sup>70</sup> It might also encourage minority students to share their own (dis)similar experiences or, just as well, take the pressure off of them to do so. Additionally, real life recordings like this can serve as excellent “hypotheticals.”

For example, after leading students through a discussion of *Illinois v. Wardlow*, in which the Court concluded that unprovoked flight in a high crime area gave rise to reasonable suspicion,<sup>71</sup> a professor might play this recording of Alvin’s experience and then ask students whether “looking back” at officers in Harlem suffices for reasonable suspicion, or whether any other specific and articulable facts in this encounter bolster the constitutionality of this stop. If our classroom experience is any indication, students will be quite invested and engaged in the analysis of this problem.

A similarly powerful cell phone recording captures a recent cross-racial *Terry* stop in Philadelphia. White officers stopped two men walking (while black) in a poor neighborhood. One of them video records, apparently unbeknownst to the officers. From initial questions, the justification for the stop seems to be that one of them said “hi” to someone (a drug dealer, one of the officers later asserts) as they walked past:

Officer: Did you know that guy sitting down there at that step?

Individual: Nah.

Officer: You know the guy that was sitting down there on the step putting his boots back on? Then why were you talking to him?

Individual: I was just saying “hi” to him.

Officer: Why? You don’t say “hi” to strangers.

Individual: Why not?

Officer: Not in this neighborhood.<sup>72</sup>

The rest of the video includes the officers threatening to “split your wig open,” offering shifting and increasingly flimsy justifications for the stop (e.g. jaywalking and a hypothetical tip), arguing over the legality of the stop and roughness of the frisk (“Everybody thinks they’re a fucking lawyer and they don’t know jack shit”), and admonishing, “Don’t come to fucking Philadelphia; stay in Jersey . . . we don’t want you here anyway; all you do is weaken the fucking country.”

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70. See, e.g., Julie Dressner & Edwin Martinez, *The Scars of Stop-and-Frisk*, N.Y. TIMES: OP-DOCS (June 13, 2012), <http://www.nytimes.com/video/opinion/10000001601732/the-scars-of-stop-and-frisk.html> [<http://perma.cc/5JG5-L635>]. As the Rush song says, “Show me, don’t tell me. Let’s see exhibit A.” RUSH, *Show Don’t Tell*, on PRESTO (Atlantic 1989).

71. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

72. *Terry Stop in Philly 9-27-2013*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Police%20Terry%20Stop%20in%20Philly%209-27-2013.mp4>. Again, the fast-flowing and sometimes overlapping dialogue has been edited slightly for clarity.

Like the previous recording, this one can be used at a basic level as a hypothetical to probe the meaning of reasonable suspicion under *Wardlow* and other precedents governing *Terry* stops. Using both in this way can also lead the discussion (back) to the issue of race. With the recording fresh in mind, a professor might ask students whether such cases adequately account for our country's problems with racial prejudice and distrust, or whether—for example, by making reasonable suspicion arguably easier to find in poor minority neighborhoods—they make matters worse.

C. *Fleeing While Black (Walter Scott Shooting)*

In the spring of 2015, as many of us were teaching either the investigations portion of Criminal Procedure or substantive Criminal Law, a white police officer in North Charleston, South Carolina, shot and killed the fleeing Walter Scott.<sup>73</sup> The encounter began as a traffic stop for a nonfunctioning taillight, and students in a criminal procedure course were well equipped to analyze the dash camera video of the initial stop.<sup>74</sup> As described above, running this sort of practice in class helps students engage with and better understand the material. Of course, such practice can also come from fictional depictions. For example, a relatively short clip from the third season of *Breaking Bad* depicts Walter White, Jesse Pinkman, and a very knowledgeable junkyard owner attempting to keep DEA Agent Schrader from entering an RV drug lab.<sup>75</sup> Just under four minutes of video raises everything from the special rules governing searches of closely regulated industries, to standing (including for stolen property), to open fields, to plain view, to searches of homes, to the automobile exception, to the newly revised trespass-conception of search, to exigent circumstances. Life as a police officer suddenly appears less simple than students might have presumed.

But there is additional advantage when the hypothetical is pulled from the headlines, as in the shooting of Scott. One, students are, of course, most interested, at least those who pay some attention to the news (and this includes those who do so only vicariously, questioned about news stories by family and friends). Two, carefully working through the headlines hopefully instills a life precedent. If students become used to analyzing the constitutionality of current events in class, they are much more likely to continue that practice when they

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73. See Michael S. Schmidt & Matt Apuzzo, *Officer Is Charged With Murder of a Black Man Shot in the Back*, N.Y. TIMES, Apr. 8, 2015, at A1, <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<http://perma.cc/FYL3-2HK8>].

74. See *Walter Scott Traffic Stop*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Walter%20Scott%20Traffic%20Stop.mp4>.

75. See *Breaking Bad: Sunset (Season 3, Episode 6)*, WIKIA, <http://breakingbad.wikia.com/wiki/Sunset> [<http://perma.cc/4WFF-A7WC>] (describing the episode).

graduate, and thereby better educate themselves and their social groups, whether or not they ever practice in this area of law.

So, quickly, what might students determine about Officer Slager's initial traffic stop? The first thing some attentive student is bound to notice is the irony of the song playing on the officer's radio, Everlast's "What It's Like."<sup>76</sup> But, despite that twist of fate, Officer Slager seems to operate within the confines of the Constitution, and, moreover—so far—he appears civil and professional.<sup>77</sup> Given the objective rule of *Whren v. United States*,<sup>78</sup> a traffic stop is permissible upon probable cause of any criminal traffic infraction, and, under *Terry v. Ohio*, reasonable suspicion will likewise suffice for an investigatory stop.<sup>79</sup> Indeed, according to the Court's recent decision in *Heien v. North Carolina*—another instance of a stop predicated upon an alleged taillight violation—the stop is constitutional, even if Slager were mistaken in his interpretation of what South Carolina law requires, so long as that mistake was reasonable.<sup>80</sup> Especially since the dash camera video appears to demonstrate the violation ("The reason for the stop is your third brakelights out"), Officer Slager's testimony would likely establish the necessary reasonable suspicion or probable cause. Furthermore, all of Slager's actions preceding Scott's flight were in furtherance of that justified investigatory purpose and, therefore, do not run up against the no-extension principle announced in the then-pending *Rodriguez v. United States*.<sup>81</sup> Whether the professor wants to quickly review *Terry* or *Whren* or take a deeper dive, it is worth showing the stop that is generating the headline news.

As for the tragic events that follow, the relevant Fourth Amendment law could be covered in criminal procedure but is more likely covered in criminal law along with the more general rules of the justification of law enforcement. So a professor there might show the mobile phone footage of the shooting,<sup>82</sup>

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76. Katie Atkinson, *Everlast on 'What It's Like' Playing in Dash-Cam Video Before Walter Scott's Death: 'It's Just Ironic'*, BILLBOARD (Apr. 11, 2015), <http://www.billboard.com/articles/news/6531506/everlast-what-its-like-dash-cam-walter-scott-response> [http://perma.cc/69T9-RZCA].

77. This, of course, is not always the case. See, e.g., Shawn Cohen, *Cop Who Berated Uber Driver Is Stripped of Badge and Gun*, N.Y. POST (Apr. 1, 2015), <http://nypost.com/2015/04/01/cop-that-berated-uber-driver-stripped-of-badge-and-gun/> [http://perma.cc/3GQK-ZAJM].

78. *Whren v. United States*, 517 U.S. 806, 818 (1996).

79. *Terry v. Ohio*, 392 U.S. 1, 33 (1968).

80. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014).

81. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). For a great example of an officer fishing for consent following completion of a stop, see *Profiled for Disc Golfing*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Profiled%20for%20disc%20golfing.mp4>.

82. See *South Carolina Police Shooting 04-2015 Clip1*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/South%20Carolina%20Police%20Shooting%204-2015%20Clip1.mp4>.

articulate Officer Slager's initial justification (namely that he feared for his life when Scott took his stun gun),<sup>83</sup> and have students analyze potential criminal liability. The class could begin with the substantive requirements of murder<sup>84</sup> and debate whether the arguably purposeful or extremely reckless killing could be mitigated to manslaughter.<sup>85</sup> Then, on to the justification of self-defense (not when Scott was running *away*),<sup>86</sup> and to the justification of law enforcement.<sup>87</sup> Here, the class would carefully distinguish the relevant jurisdiction's criminal law<sup>88</sup> from the Fourth Amendment requirements of *Tennessee v. Garner*,<sup>89</sup> and analyze each. Under *Garner*, the necessary probable cause of serious bodily injury or death seems highly questionable, and then—especially meaningful for students who have not already seen the complete video—the professor might show the officer run to pick up the stun gun and seemingly plant that evidence.<sup>90</sup> What *might* have been justified based on alleged facts now looks much more like murder.

Headline videos thus not only make for excellent substantive practice but also educate more generally and, hopefully, inculcate longstanding values of careful analysis. Indeed, they are often more valuable than headline discussions lacking video: when what is really in dispute are facts, when those facts relate to an emotionally-charged topic, and when there is no shared ability to witness and thereby intelligibly debate those facts, discussion can degrade if factual disagreements masquerade as, or are allowed to overshadow, legal arguments.<sup>91</sup>

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83. See Schmidt & Apuzzo, *supra* note 73.

84. See, e.g., MODEL PENAL CODE § 210.2 (1962).

85. See MODEL PENAL CODE § 210.3(b).

86. See MODEL PENAL CODE § 3.04.

87. See MODEL PENAL CODE § 3.07.

88. Some professors would have the time and find it worthwhile for students to analyze South Carolina's criminal code; others would have their students apply a code they had already studied, such as the Model Penal Code.

89. *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985).

90. See *South Carolina Police Shooting 04-2015 Clip2*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/South%20Carolina%20Police%20Shooting%204-2015%20Clip2.mp4>.

91. A case in point would be the police shooting in Ferguson, Missouri, especially before the grand jury reports and other evidence were released. See Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (last updated Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [http://perma.cc/2KEA-VG3H].

*D. Serving as a Juror While Black*

In 1987, Philadelphia Assistant District Attorney Jack McMahon gave a presentation to prosecutors on jury selection.<sup>92</sup> Other than for those it trained, it might have remained unknown. It did for a decade. But then McMahon ran for district attorney, upon which his opponent, the sitting district attorney, released the tape when a current employee “suddenly remembered” it.<sup>93</sup>

McMahon’s instruction runs about an hour, and much of the content is at least not objectionable and is potentially helpful to a new prosecutor. There is also significant content that is quite troubling, however, including descriptions of how he would lie to judges in order to avoid a bad venire, and how one should use peremptory strikes to remove certain black jurors on stereotypical grounds, which the Supreme Court had declared unconstitutional.<sup>94</sup> Upon release, the presentation created legal headaches for the office that have continued for years.<sup>95</sup>

It is one thing to have a class read and discuss *Batson v. Kentucky*, and quite another to get an unvarnished look into the world which gave rise to that opinion. McMahon’s presentation contains assertions like these: “The blacks [from] the low-income areas are less likely to convict. I understand it. It’s an understandable proposition. There’s a resentment for law enforcement. There’s a resentment for authority. And, as a result, you don’t want those people on your jury.”<sup>96</sup>

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92. See *Philadelphia ADA McMahon on Jury Selection Part 1 of 2*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Philadelphia%20ADA%20McMahon%20On%20Jury%20Selection%20Part%201%20of%202.mp4>; *Philadelphia ADA McMahon on Jury Selection Part 2 of 2*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Philadelphia%20ADA%20McMahon%20On%20Jury%20Selection%20Part%202%20of%202.mp4>; see also *Former Philadelphia Prosecutor Accused of Racial Bias*, N.Y. TIMES, Apr. 3, 1997, at A14, <http://www.nytimes.com/1997/04/03/us/former-philadelphia-prosecutor-accused-of-racial-bias.html> [<http://perma.cc/U9L6-NCEX>].

93. *Former Philadelphia Prosecutor*, *supra* note 92. It is wonderful how an election can jog the memory. In the words of then-attorney and now fellow Crimprof Jules Epstein, whose client was affected by the tape’s release, “Let’s not mistake this for a noble act. I wasn’t getting any videotapes in nonelection years.” *Id.*

94. See *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (prohibiting racially-based peremptory challenges). For an edited version containing only the more controversial portions, see *Philadelphia ADA McMahon on Jury Selection*, CRIMPROF MULTIPEDIA, [http://jackson.law.ou.edu/criminal/public/upload/Philadelphia%20ADA%20McMahon%20On%20Jury%20Selection\\_Trimmed.mp4](http://jackson.law.ou.edu/criminal/public/upload/Philadelphia%20ADA%20McMahon%20On%20Jury%20Selection_Trimmed.mp4) (running just over sixteen minutes).

95. See, e.g., *Wilson v. Beard*, 426 F.3d 653, 655 (3d Cir. 2005) (discussing the presentation). A simple Westlaw search locates at least thirty reported cases in the Third Circuit considering the relevance of McMahon’s presentation (“jack memahon” /s (tape or lecture or videotape)).

96. *Philadelphia ADA McMahon on Jury Selection Part 2 of 2*, *supra* note 92, at 08:57.

Hearing these arguments, which urge illegality but are not merely bald assertions of racial animus, encourages meaningful classroom discussion. McMahon continues, “[I]t may appear as if you’re being racist or what-not, but, again, you’re just being realistic. You’re just trying to win the case. And the other side is doing the same thing.”<sup>97</sup> Hence,

[I]f you’re going to take blacks, you want older blacks. You want older black men and women, particularly men. Older black men are very good . . . . They are from a different era and a different time and have a different respect for the law . . . . The other thing is: blacks from the South [are] excellent . . . . If they are from South Carolina and places like that, I’ll tell you, I don’t think you can ever lose a jury with blacks from South Carolina. They are dynamite . . . . They are law and order.<sup>98</sup>

Why not older black women? Because, according to McMahon, they have a “motherly instinct” for young black defendants.<sup>99</sup> And as for younger black women,

Young black woman are very bad. There is an antagonism, I guess maybe because they are downtrodden on two respects. They’ve got two minorities: they are women and they’re blacks, so they are downtrodden on two areas and they somehow want to take it out on somebody and you don’t want it to be you.<sup>100</sup>

McMahon goes on to explain he does not like an all-white jury because its “racist attitude” might be dismissive of the entire prosecution, including of its typically black witness.<sup>101</sup>

Watching the video will make students (and professors) cringe, but there is no better way to travel back in time, and to get students to speak openly and seriously about these issues. McMahon’s presentation also has fodder for serious discussion of the prosecution and defense roles,<sup>102</sup> and for

97. *Id.* at 09:13.

98. *Id.* at 15:30.

99. *Id.* at 16:25.

100. *Id.* at 17:10.

101. *Philadelphia ADA McMahon on Jury Selection Part 2 of 2*, *supra* note 92, at 18:20.

102. According to McMahon:

The caselaw says that the object of getting a jury—and I wrote it down, I looked in the cases because I had to look this up, because I didn’t know this is the purpose of a jury. Voir dire is to get a competent, fair, and impartial jury. Well, that’s ridiculous. You’re not trying to get that. Both sides are trying to get the jury most likely to do whatever they want them to do. And, if you go in there, anyone of you think you are going to be some noble civil libertarian and try to get jurors—“Well, he says he can be fair, I’ll go with him”—that’s ridiculous; you’ll lose. You’ll be out of the office. You’ll be doing corporate law. . . . You’re there to win. And in order to win—and the defense is there to win, too—and the only way you are going to do your best is to get jurors that are as unfair and more likely to convict than anybody else in that room. . . . Because the defense is doing the

consideration of our jury system more generally.<sup>103</sup> Finally, students will be very interested to learn that the video's release did *not* derail his lackluster campaign for district attorney; to the contrary, it boosted his chances, though he was not ultimately successful.<sup>104</sup> Nor did it hurt his criminal defense practice, including for at least some of the black clients he would have struck from a jury. In the words of the grandmother of one of his black clients, "What [McMahon] said may have been offensive, but it's actually what they do. They pick to benefit [their cases]. He was caught saying what everybody else does."<sup>105</sup> If you want to have serious conversations about the criminal attorney's role—perhaps, for example, there is far less problem with his defense practice than his prosecution—it is difficult to do better than to lead with McMahon.

#### E. *Parenting While Asian*

From the first frame of the interrogation video, the image is arresting.<sup>106</sup> A slight teenage girl sits sobbing, head bowed, while two sizable detectives face her across a utilitarian desk in a small room, backs to the viewer. She is Asian; they are white. As with Greek tragedies, the excerpt seems to start *in medias res*:

Officer 1: Okay, you tell us the truth and I can guarantee you will feel better.

Teen: I'm tell—I'm telling the truth—

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exact same thing. If you think that it is some noble thing, that it is some esoteric game, you're wrong and you'll lose.

*Id.* at 06:50.

103. According to McMahon:

You do not want smart people. I wish we could ask everyone's IQ. If you could know their IQ, you could pick a great jury all the time. You don't want smart people because smart people will analyze the hell out of your case. They have a higher standard. They hold you up to a higher standard. They hold the courts up to a higher standard because they are intelligent people. They take those words "reasonable doubt," and they actually try to think about them. And you don't want those people.

*Id.* at 11:48.

104. See Suzanne Sataline, *Now, They Know His Name: Otherwise, Infamous Tape Changed Little for Jack McMahon*, PHILA. INQUIRER, June 11, 1997, at B1, [http://articles.philly.com/1997-06-11/news/25526226\\_1\\_blacks-tape-andorra](http://articles.philly.com/1997-06-11/news/25526226_1_blacks-tape-andorra) [<http://perma.cc/EK25-2W7G>].

105. *Id.*

106. *Nga Truong Interrogation Excerpt 1*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/public/upload/Nga%20Truong%20Interrogation%20Excerpt%201.mp4>. The Multipedia hosts the full interrogation, which is over two hours in length, as well as excerpts suitable for in-class use, the first of which is quoted here. For the full interrogation, see *Nga Truong Interrogation*, CRIMPROF MULTIPEDIA, <http://jackson.law.ou.edu/criminal/Content%20-%20Nga%20Truong%20Interrogation.ashx>.

Officer 2: You didn't tell us the truth. Somebody hurt that baby. The baby didn't suffocate on the mattress.<sup>107</sup>

The teenager is sixteen-year-old Nga Truong who is being worked over by two detectives of the Worcester, Massachusetts Police Department about the death of her one-year-old baby the day before. More than two hours later, drained physically and psychologically, Ms. Truong confesses, with halting words and with her interrogators' help on details, to smothering her boy. She is immediately arrested and jailed for murder. She stays in custody for nearly three years awaiting trial, and she is released only after her prosecution collapses upon a court ruling that her confession was coerced.<sup>108</sup>

It is impossible to overstate the effectiveness of interrogation videos, such as this one, in bringing to life for students the constitutional concerns raised by confession cases before and after *Miranda v. Arizona*.<sup>109</sup> While showing how the sausage is made may not turn one into a vegetarian, it may persuade one to be more discriminating about which to consume.

In this regard, the interrogation of Ms. Truong is an exemplar of the many techniques condemned in *Miranda*, from the "Mutt and Jeff" ploy of good cop/bad cop,<sup>110</sup> to the maximization of guilt (including fabrication of scientific evidence),<sup>111</sup> to the minimization of culpability,<sup>112</sup> to utter isolation and unyielding questioning.<sup>113</sup> To take just one example of the power dynamics and knowledge differential that contributed to Ms. Truong's confession, both detectives misleadingly promise throughout the interrogation that she will receive "help" and "treatment" from social workers—on top of "minimal" punishment, "if any," in the juvenile system—if she confesses, but she will face the full fury of the criminal justice system if she does not take this only opportunity to cooperate.

On the issue of race, Ms. Truong's case illustrates that its influence can be subtle and difficult to assess in the context of interrogations. Factually speaking, to what extent did Ms. Truong's race factor into the detectives'

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107. *Nga Truong Interrogation Excerpt 1*, *supra* note 106, at 0:01.

108. *See* *Commonwealth v. Nga Truong*, No. CV20090385, 2011 WL 1886500, at \*10 (Sup. Ct. Mass. Feb. 25, 2011). The trial court also found that she did not validly waive her *Miranda* rights as a juvenile under applicable state court precedents. *Id.* at \*8. For excellent reporting on this case, including more background detail than is presented here, as well as a post-release interview of Ms. Truong, see *Anatomy of a Bad Confession*, WBUR.ORG, <http://www.wbur.org/tags/worcester-coerced-confession> [<http://perma.cc/LWG4-KN7Y>] (last visited Nov. 21, 2015).

109. *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

110. *See id.* at 452.

111. *See id.* at 453. The "bad cop" falsely alleges scientific proof that her baby was smothered to death.

112. *See id.* at 451–52. Both detectives mitigate her alleged guilt by affirming the unfairness and stress of having to help her mother raise her siblings in addition to her own baby.

113. *See id.* at 449–51.

seeming certainty and aggressive questioning about her guilt?<sup>114</sup> To what extent did the race of both sides contribute to the power dynamics in the interrogation room? And, legally speaking, should Ms. Truong's race be considered as one of "the characteristics of the accused" in assessing the voluntariness of her confession under "the totality of circumstances?"<sup>115</sup> If so, how?

As students debate the relevance of race to interrogations empirically and constitutionally, it may be fitting to inform them that the *Miranda* majority was itself conflicted over casting the problem of coerced confessions even partly in racial terms. Chief Justice Warren's initial draft of the *Miranda* opinion highlighted the history of blacks being "subjected to physical brutality—beatings, hanging, and whipping—employed to extort confessions."<sup>116</sup> But Justice Brennan balked on the grounds that framing the constitutional difficulty with incommunicado interrogations in racial terms would hinder the public's acceptance of the rules imposed by the opinion, and, moreover, the problem concerns "poverty more than race."<sup>117</sup> Whether because Warren agreed with either point or because he needed Brennan's fifth vote, he gave in. Among the former chief justice's papers is a typeset draft opinion with the passages referencing race emphatically crossed out and replaced by hand with race-neutral language. A slide with an image of that page<sup>118</sup> could open up a broader discussion as to whether race should be considered—and, if so, how explicitly—in the constitutional rules of criminal procedure and their justifications.

#### CONCLUSION

As we have confessed, we do not know whether the enigmatic Socrates would have used YouTube had he lived in the twenty-first century and taught Criminal Procedure. But we are convinced that the use of multimedia materials

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114. For example, Asians are more likely to live in multigenerational households, Richard Fry & Jeffrey S. Passel, *In Post-Recession Era, Young Adults Drive Continuing Rise in Multi-Generational Living*, PEW RES. CTR. (July 17, 2014), <http://www.pewsocialtrends.org/2014/07/17/in-post-recession-era-young-adults-drive-continuing-rise-in-multi-generational-living/> [<http://perma.cc/E3KC-EN52>]; and, in the experience of one of the authors (Thai) working with the Vietnamese immigrant community in Massachusetts, it was not uncommon for older sisters to care for younger siblings while their parents worked. The detectives, here, did not seem to grasp that Ms. Truong's responsibilities for her siblings might have been the norm in her community rather than an unusual and unfair situation, much less one that presumably would have pushed the teenager to kill her own baby.

115. *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (internal quotations omitted).

116. RICHARD SEAMON, ANDREW SIEGEL, JOSEPH THAI & KATHRYN WATTS, *THE SUPREME COURT SOURCEBOOK* 500 (2013).

117. *Id.* at 501.

118. *See id.* (also on file with authors and available upon request).

benefits teaching, and we hope a few of the other things we have learned have also been useful to share. If nothing else, just remember, “[n]ever try to tell everything you know. It may take too short a time.”<sup>119</sup>

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119. NORMAN FORD, *HEADMASTERS COURAGEOUS* (1958).