

Criminal Procedure: Investigations

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Law 693
Fall 2012
M/W 10:40 – 12:05

Office hours: Tues. 1-3pm, whenever my door is open, and by appt.

This course is primarily an introduction to the law of the Fourth and Fifth amendments, with some attention also paid to the right to counsel. American constitutional law imposes very few substantive limits on the legislature's criminal lawmaking power. Partly as a result, we rely very heavily on procedural law – distinguishing legal from illegal searches and seizures and defining the right against self-incrimination – to limit the reach of the criminal justice system. To practice criminal law today is to practice in a largely procedural world. This course should help you to grasp the basic structure of that world and so to prepare for the very intense and demanding nature of practice in it.

Required Materials (available for purchase at the USM Bookstore and on reserve at the Garbrecht Library):

Allen, Stuntz, Hoffmann, Livingston, and Leipold, eds., *Criminal Procedure: Investigation and Right to Counsel*, 2nd ed. (Aspen, 2011) [hereinafter “CB”]

Allen, Stuntz, Hoffmann, Livingston, and Leipold, eds., *Comprehensive Criminal Procedure*, 3rd ed., 2012 Supplement (Aspen, 2012) [hereinafter “Supp.”]

All other readings will be posted on the course Blackboard website. Students should bring these website materials (preferably in hard copy, but PDF versions stored on your laptops will also work) to the relevant class sessions. The use of laptops in this class should be strictly limited to note taking related to the class discussion at hand. Time permitting, we may make some use of Supreme Court oral arguments available via the Oyez Project at www.oyez.org. If you have an iPhone, iPad, or Android phone, consider downloading the free “OyezToday” application, which you can find at the same website.

How and when to find me:

Office hours are from 1-3pm on Tuesdays. Another good time to catch me is right after class. If my door is open, feel free to come in. And if all else fails, email me for an appointment.

Evaluation and attendance:

The grade in this course will be based on a twenty-four hour take-home exam. The exam may be picked up at the Registrar's office on Wednesday or Thursday of the first week or Monday, Tuesday, or Wednesday of the second week. The exam must be

picked up between 1:30 and 2:00 pm and returned within 24 hours. Class participation is expected of everyone in the class, but will affect the final grade only in borderline cases (that is, where your exam performance falls very closely between two half-letter grades). Barring a medical or family emergency, students who miss more than four classes may be asked to withdraw from the course.

In addition to the exam and class participation, the course requirements include a short (no more than three double-spaced pages) critique of the actual oral argument before the Supreme Court in one of the cases we will read over the course of the semester. Your critique should identify areas where the attorneys for either side could have done a stronger job in making their cases or responding to questions from the bench. I will distribute a sign-up sheet on which you can indicate your case preference during the second or third week of class. This exercise will not be graded, but (again) may serve as a factor affecting the final grade in borderline cases falling between two half-letter grades.

Schedule of Meetings and Readings:

Part One: The Values of Constitutional Criminal Procedure

1. Sept. 5: Due Process

CB 81-104, 1035-1037
Maine State Constitution, Article I (Declaration of Rights)

2. Sept. 10: Equality

CB 133-140, 172-188

3. Sept. 12: Privacy, Dignity, and Property

CB 291-321 (end of note 2)

Part Two: The Fourth Amendment

*** NO CLASS SEPT. 17 OR 19; MAKEUP CLASSES SCHEDULED FOR SEPT. 28 AND OCT. 26 ***

4. Sept. 24: Introduction, the exclusionary rule versus damages

CB 337-361

5. Sept. 26: The definition of “searches” (I) – *Katz* and *White*

CB 361-385

6. Sept. 28: The definition of “searches” (II), privacy and technology (**Makeup class, held in Room 522A from 12:10 – 1:10 pm today**)

CB 385-405
Supp. 41-59

7. Oct. 1: “Seizures” and consent

CB 405-418, 641-658
Pittsfield, Maine P.D. consent-to-search form

8. Oct. 3: Warrants and the meaning of probable cause

CB 418-449
Supp. 59-60

9. Oct. 10: Exigent circumstances and emergencies

CB 449-465
Supp. 60-73

10. Oct. 15: Plain view, automobile searches

CB 465-495

11. Oct. 17: The arrest power

CB 495-515
Supp. 73-75

12. Oct. 22: Searches incident to arrest

CB 515-535

13. Oct. 24: Stops and Frisks

CB 535-569
Supp. 19-23
Russ Buettner and William Glaberson, “Stop-and-Frisk May soon Hit Judicial Roadblocks,” *The New York Times*, July 10, 2012

14. Oct. 26: The racial profiling debate (**Makeup class, held in Room 522A from 12:10 – 1:10 pm today**)

CB 569-597
Supp. 75-79

15. Oct. 29: “Special needs” and police use of force

CB 597-614, 630-640

16. Oct. 31: Good faith exceptions to the exclusionary rule, standing

CB 658-685

Supp. 79-92

17. Nov. 5: Fruit of the poisonous tree, impeachment

CB 685-710

Part Three: The Fifth Amendment

18. Nov. 7: Contours and limits of the privilege

CB 712-713, 722-726 (*Kastigar v. United States*), 729-738, 741-743 (end of first full pgh, including footnote 1), 751-759

19. Nov. 12: Introduction to police interrogation, *Miranda*

CB 759-794

20. Nov. 14: Custody, interrogation, and required warnings

CB 794-814

Supp. 93-105

21. Nov. 19: *Miranda* invocations, *Miranda* waivers – *Moran v. Burbine*

CB 814-841

Supp. 106

22. Nov. 21: *Miranda* waivers – *Berghuis v. Thompkins*, *Dickerson*

CB 841-868

23. Nov. 26: *Seibert*, *Patane*, Sixth Amendment limits on police interrogations

CB 868-897

Part Four: Complex Investigations

24. Nov. 28: Introduction to subpoenas and grand juries

CB 321 (beginning of note 3)-336, 989-1004,

25. Dec. 3: The grand jury's investigative powers

CB 1004-1034

26. Dec. 5: Undercover agents and entrapment

CB 26-40

Sarah Stillman, "The Throwaways," *The New Yorker*, Sept. 3, 2012