

CRIMINAL PROCEDURE: INVESTIGATION

Fall 2023

Course 206 001

Syllabus

Prof. Lerner

(August 7, 2023)

Class Schedule:

Class meets Tuesday and Thursdays at 9:50 to 11:15 am.

Required course material:

Saltzburg, Capra, and Gray, American Criminal Procedure: Investigative (12th ed. 2022). This is a softbound book. Please observe that I am not assigning Criminal Procedure: Cases and Commentary, which is a hardbound book that is more expensive. The assigned book ("Investigative") consists of the first 6 chapters or 1,055 pages of the Cases and Commentary book. Also, you do not need to buy the supplement. As explained below, I do not recommend using the 11th edition of the casebook.

Classroom attendance and participation:

I will circulate a sign-in sheet every class. The ABA prohibits students who miss more than 20% of classes from taking the final exam. I reserve the right to raise or lower a student's final grade based on the quality of his or her participation.

Classroom discussion:

Many of the cases and articles we will study involve sensitive and controversial topics. You should expect to hear opinions that are contrary to your own beliefs. You are encouraged to formulate reasoned responses and refutations. Students are free to speak their minds on relevant subject matter, and they are expected to do so in a professional manner.

Internet policy:

Use of your phone or the internet in any form is prohibited during class. If students have a special need to be able to access the internet during a class, they should notify me.

Office hours:

Immediately after class. I am also happy to meet in-person or via Zoom at other times. Please feel free to email me at clerner@gmu.edu.

Learning Outcomes:

By the end of the course students should understand the core constitutional principles governing interactions between police and suspects

in criminal investigations. Specifically, students should be able to do the following:

- Identify and evaluate constitutional issues related to arrest and search and seizure.
- Identify and evaluate constitutional issues related to interrogations and confessions.
- Identify and evaluate arguments in judicial opinions.

Final exam:

The exam will be given on December 6 at noon.

Reading assignments:

We will cover about 35 pages in the textbook per class. Supplemental readings will also be assigned. I have provided below a topic outline and a tentative list of reading assignments for each class during the semester. This list is almost certain to be revised over the course of the semester. I will email the class every Thursday evening confirming the assignments for the following week.

Assignment for first class (Tuesday, August 22):

Saltzburg, Capra & Gray, American Criminal Procedure Investigative (12th ed. 2022) 866 to 873 [866-873] (Brewer v. Williams) and 1 to 4 [1-6] (what is a criminal case). The bracketed pages refer to the 11th edition.

Is the result in Brewer (child murderer goes free as the result of a technical violation of law) “intolerable in any society which purports to call itself an organized society,” (Burger, C.J., dissenting), or have “[t]he dissenters . . . lost sight of the fundamental constitutional backbone of our criminal law. . . . [G]ood police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously,” (Marshall, J., concurring)? [Unfortunately, these quotes from the Burger and Marshall opinions, which were included in earlier editions of the casebook, have been omitted from the 11th and 12th editions.] After discussing Brewer, we will ask: what are the goals of any system of criminal procedure.

Tentative Reading Assignments. These assignments will almost certainly be manipulated throughout the semester, as we fall behind and speed ahead. I’ve put in brackets the page numbers in the 11th edition, but note that these cross-references are inexact and **there is material in the 12th edition that is missing from the 11th edition.** (There is also material in the 11th edition that has been dropped from the 12th edition; at various places, the casebook editors have jumbled the material around, making it difficult to provide

precise cross-references.) Students are responsible for all the material in the 12th edition. On balance, I strongly recommend that students use the 12th edition.

Class 1 [Aug 22]: 866 to 873, 1 to 4 (intro and what is a criminal case) [866-873, 1-6]

Class 2 [Aug 24]: 5 to 15, 33 to 59 (incorporation and Katz) [6-16, 35-45]

Class 3 [Aug 29] & Class 4 [Aug 31]: 59 to 118 (Katz revisited and applications of Katz) [45-103]. Note that I will cover the materials in pages 59 to 118 [45-103] in a slightly different order than what is presented in the casebook.

Class 5 [Sept 5]: 118 to 149 (what is a seizure and intro to warrant requirement) [63-65, 231-251, 103-109]

Class 6 [Sept 7]: 149 to 186 (Gates and probable cause) [109-150]

Class 7 [Sept 12]: 186 to 208 (warrant requirement) [150-173]

Class 8 [Sept 14]: 209 to 245 (executing warrant and arrests) [173-212]

Class 9 [Sept 19]: 245 to 278 (Terry stops) [212-231, 266-274]

Class 10 [Sept 21]: 278 to 300 (Terry stops) [251-266, 274-282]

Class 11 [Sept 26]: 300 to 343 (Terry stops and searches incident to arrest) [282-326]

Class 12 [Sept 28]: 343 to 379 (searches incident to arrest) [326-366]

Class 13 [Oct 3]: 379 to 405 (arrests for minor offenses, pretextual searches, and plain view) [366-391]

Class 14 [Oct 5]: 405 to 448 (automobile searches and exigent circumstances) [391-436]

No class October 10: observe Monday schedule.

Class 15 [Oct 12]: 448 to 500 (administrative searches) [436-480, 493-503]

Class 16 [Oct 17]: 500 to 521, 533 to 561 (administrative searches, consent searches, and Title III) [480-493, 503-512, 526-562]

Class 17 [Oct 19]: 562 to 597 (exclusionary rule) [562-600]

Class 18 [Oct 24]: 597 to 637 (exclusionary rule) [600-641]

Class 19 [Oct 26]: 638 to 667 (exclusionary rule and intro to 5A) [641-673]

Class 20 [Oct 31]: 667 to 705 (privilege against self-incrimination) [673-711]

Class 21 [Nov 2]: 705 to 742 (privilege against self-incrimination and due process) [711-747]

Class 22 [Nov 7]: 743 to 775 (Miranda and Dickerson) [747-778]

Class 23 [Nov 9]: 775 to 801 (Miranda) [778-801]

Class 24 [Nov 14]: 801 to 836 (Miranda) [802-836]

Class 25 [Nov 16]: 836 to 876 (Miranda waivers and Massiah) [836-876]

Class 26 [Nov 21]: 876 to 894 (Massiah) [876-894]

Topic Outline

I. Introduction: Basic Themes of Class

II. The Fourth Amendment

A. Introduction to the Fourth Amendment; what is a search or seizure

1. Katz v. United States

2. Katz revisited: Jones

3. Applications of Katz

B. The warrant requirement

1. Prerequisites to getting a warrant and what is probable cause

2. Obtaining and executing the warrant

3. When to apply (or not apply) the Warrant Clause
 - a. Arrests
 - b. Terry stops
 - c. Searches incident to arrest
 - d. Pretextual stops
 - e. Plain view, plain touch
 - f. Cars
 - g. Exigent circumstances
 - h. Administrative searches and special needs
 - i. Consent
 - j. Wiretapping
 - C. Remedies for Fourth Amendment violations
 1. The exclusionary rule and alternatives
 2. Good faith
 3. Standing
 4. Fruits of the search
 5. Inevitable discovery
 6. Illegally seized evidence in non-criminal contexts
 7. Procedural issues
- III. Self-incrimination
- A. Policies and scope of privilege
 - B. What is compulsion

- C. What is protected and immunity
- D. Confessions and due process
- E. Miranda and Dickerson
 - 1. Exceptions to Miranda
 - 2. Open questions after Miranda
 - 3. Waiver of Miranda rights
- E. Confessions and the Sixth Amendment right to counsel: Massiah