

CRIMINAL PROCEDURE: INVESTIGATION

Fall 2021

Course 206 001

Syllabus

Prof. Lerner

(August 20, 2021)

Class Schedule:

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

Required course material:

Saltzburg & Capra, American Criminal Procedure Investigative (11th ed. 2018). 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 1,036 pages of the Cases and Commentary book. Also, you do not need to buy the supplement.

Classroom attendance and participation:

The ABA prohibits students who miss more than 20% of classes from taking the final exam. The morning of each class, please report your attendance to Jane Barton, jbarto1@gmu.edu, with the following text: "I attended Professor Lerner's Criminal Procedure class on [Date]. [Name]." If you were unable to attend class because you received a covid yellow, and attended remotely, please report your attendance to Jane Barton with the following text: "I received a covid yellow and attended Professor Lerner's Criminal Procedure class remotely on [Date]. [Name]." Students who attend the class remotely in such circumstances will count as present for ABA purposes.

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:

I will remain after class and will answer any questions. Given the university's restrictions, there will not be "office" hours, but I will schedule a time when I will meet with students in the courtyard—no masks required—with details to be determined. I am also happy to arrange a time to talk on the phone or have a zoom meeting. 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 10 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 afternoon confirming the assignments for the following week.

Assignment for first class (Tuesday, August 24):

Saltzburg & Capra, *American Criminal Procedure Investigative* (11th ed. 2018) 866-873 (Brewer v. Williams) and 1-6 (what is a criminal case)

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 edition.] 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.]

Class 1 [Aug 24]: 866-873 and 1-6 (intro and what is a criminal case)

Class 2 [Aug 26]: 6-16 and 35-45 (incorporation and Katz)

Class 3 [Aug 31] & Class 4 [Sept 2]: 45 to 103 (Katz revisited and Applications of Katz) [Note that I will cover the materials in pages 45 to 103 in a slightly different order than what is presented in the casebook.]

Class 5 [Sept 7]: 103 to 132 (Warrant requirement and Gates)

Class 6 [Sept 9]: 190 to 192, 132 to 160 (Warrant requirement)

Class 7 [Sept 14]: 160 to 189 and 192 to 199 (Executing warrant and arrest power)

Class 8 [Sept 16]: 199 to 231 (Arrests and Terry)

Class 9 [Sept 21]: 231 to 282 (Terry stops)

Class 10 [Sept 23]: 282 to 326 (Terry stops and search incident to arrest)

Class 11 [Sept 28]: 326 to 366 (Search incident to arrest applied to cars and cellphones)

Class 12 [Sept 30]: 366 to 398 (arrests for minor offenses, pretextual stops, plain view, and car searches)

Class 13 [Oct 5]: 398 to 436 (car searches and exigent circumstances)

Class 14 [Oct 7]: 436 to 480 (administrative searches)

No class October 12: observe Monday schedule.

Class 15 [Oct 14]: 480 to 512 (administrative searches)

Class 16 [Oct 19]: 526 to 562 (consent searches and Title III)

Class 17 [Oct 21]: 562 to 600 (exclusionary rule)

Class 18 [Oct 26]: 600 to 641 (exclusionary rule)

Class 19 [Oct 28]: 641 to 673 (exclusionary rule and intro to 5A)

Class 20 [Nov 2]: 673 to 711 (privilege against self-incrimination)

Class 21 [Nov 4]: 711 to 747 (privilege and self-incrimination and due process)

Class 22 [Nov 9]: 747 to 778 (Miranda and Dickerson)

Class 23 [Nov 11]: 778 to 801 (Miranda)

Class 24 [Nov 16]: 801 to 826 (Miranda)

Class 25 [Nov 18]: 826 to 861 (Miranda waivers)

Class 26 [Nov 23]: 861 to 894 (Massiah and the 6th amendment)

Topic Outline--Subject to revision

I. Introduction: Basic Themes of Class: Saltzburg & Capra 866-873; 1-16

II. The Fourth Amendment

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

1. Katz v. United States, 35-45

2. Katz revisited, 45-63

3. Applications of Katz, 63-103

B. The warrant requirement

1. Prerequisites to getting a warrant and what is probable cause, 103-149; 190-192

2. Obtaining and executing the warrant, 150-192

3. When to apply the Warrant Clause

a. Arrests, 192-212

- b. Terry stops, 212-315
 - c. Search incident to arrest and pretextual stops, 316-373
 - d. Pretextual stops, 373-382
 - e. Plain view, plain touch, 383-391
 - f. Cars, 391-412
 - g. Exigent circumstances, 412-436
 - h. Administrative searches and special needs, 436-512
 - i. Consent, 526-548
 - j. Wiretapping and computer searches, 548-562
- C. Remedies for Fourth Amendment violations
- 1. The exclusionary rule and alternatives, 562-579
 - 2. Good faith, 579-611
 - 3. Standing, 611-622
 - 4. Fruits of the search, 622-647
 - 5. Inevitable discovery, 647-652
 - 6. Illegally seized evidence in non-criminal contexts, 652-661
 - 7. Procedural issues, 661-665

III. Self-incrimination

- A. Policies and scope of privilege, 667-679
- B. What is compulsion, 679-693
- C. What is protected and immunity, 693-728

- D. Confessions and due process; the special federal standard, 728-747
- E. Miranda and Dickerson, 747-778
 - 1. Exceptions to Miranda, 778-801
 - 2. Open questions after Miranda, 802-826
 - 3. Waiver of Miranda rights, 826-861
- E. Confessions and the Sixth Amendment right to counsel: Massiah, 861-894