Criminal Procedure: Fourth and Fifth Amendments
Professor Schulhofer
Spring 2020

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S = Supplement: posted on NYU Classes
Bkg = background reading: Familiarity with this material is very important, but it will not be examined in detail on any particular class day

Case names and article authors listed in parentheses are just topic reminders for the pages in question; unless otherwise indicated, they do not limit the scope of the assigned reading, which includes all of the material within the span of the pages identified.

Dates listed for particular assignments are tentative only. They give you a rough idea of where we expect to be on any given date, and what assignment will follow next when we complete any given assignment. But class discussion is important, and I do not want to cut off productive dialogue prematurely, just to stick to a predetermined schedule. I will adjust the pace of reading on a class-by-class basis as needed.

Make-Up Classes: Classes will be cancelled on Thurs. Jan. 16th and Tues. Feb. 18th. Make-ups will be held on Fri. Feb. 14 and Fri. Feb. 21, both days from 2:00 - 3:50 p.m. in VH 206.

Controversial Topics: All law school classes address controversial issues. But many topics in criminal procedure -- including stop-and-frisk, the racial distribution of police intervention, and police use of deadly force -- are not just intellectually contested. These issues have affected many students personally, as well as being politically and emotionally fraught. They can be difficult to discuss. Yet effective advocacy, whether in litigation or in policy forums, often requires that intensely objectionable viewpoints be taken seriously and professionally assessed or refuted, not simply dismissed as offensive or ridiculous. Accordingly, assigned reading and class discussion will require attention to topics and perspectives that can be personally upsetting or emotionally hard to deal with. Please be aware that sensitive matters of this kind will arise, and please feel free to discuss with me your concerns about them.
Outline and *Tentative* Assignments

*Thurs. Jan. 16: class cancelled*

**Class #1 – Tues., Jan. 21**

I. Introduction:
   
   A. The Institutions of Criminal Procedure  
      Bkg: CB 3-10
   
   B. Policing  
      CB 36-39 (Harmon, Skolnick-Bailey)  
      CB 22-23 (Tyler)  
      CB 32-33 (Ferguson Report)  
      S #1 (Carbado & Richardson)

   C. Judicial Oversight  
      CB 53-59 (Amsterdam)  
      CB 79-81 (through p. 81 line 3 only) (*Duncan*)  
      CB 83-84, note 1 only (*Duncan & race*)

**Class #2—Thurs. Jan. 23**

II. Foundations of the Fourth Amendment
   
   A. The Concept of “Due Process”  
      Bkg: CB 63-66  
      CB 20-22 (Stuntz)  
      CB bottom of 71 (“Rule of Law”) through CB 79  
      CB 84-86, notes 2-4 only

   B. Fourth Amendment history  
      CB 321-24  
      S #1 (Schulhofer, *Fourth Amendment Tradition*)

   C. Protected interests, Part I -- low-tech  
      CB 346-52 (*Katz*)

**Class #3 – Tues. Jan. 28**

C. Protected interests, Part I (cont’d)  
   
   CB 353-57 (notes 2 and 4-7 only)  
   CB 357-70 (*Riley; Bond; Place; Jardines*)
Class #4—Thurs. Jan. 30
C. Protected interests, Part I (cont’d)
   CB 377-81, through note 2 (Greenwood)
   CB 473-75, through end of Hicks majority opinion

III. Searches and Arrests
   A. The warrant requirement
      Bkg: S #1 (Rule 41) (Note: all of Rule 41 is important background, but
      please pay particular attention to Rule 41(f)(1) & (f)(3).
      CB 417-26
      CB 426-29, notes 1, 2, 3 & 6 only
      CB 430-32 note 9 only (Summers; Rettele)
      S #1 (Warrant Requirement - Main Issues)

Class #5—Tues. Feb 4
B. Probable Cause
   CB 432-442 (Draper; Spinelli; Gates)
   CB 442-447, through note 8
   CB 497-98 note 4 -- Pringle only (i.e. skip references to Houghton; start
   with 4th sentence of note 4).

Class #6 – Thurs. Feb. 6
C. Warrantless Searches & Seizures
   1. Exigent circumstances
      CB 449-62 (Mincey; Ky v. King)
      S #2 (Minn. v. Olson)
   2. Plain View
      CB 472-78 through note 6 (Hicks; Horton)
      CB 788-89, note 6 only (U.S. v. Comprehensive Drug Testing)

Class #7-8 -- Tues. Feb. 11; Thurs. Feb. 13
   3. Arrests
      CB 498-506 (Watson; Riverside; Payton; Steagald)
      CB 579-90 (Atwater)
   4. Search incident to arrest
      CB 606-12 (Chimel)
      S #2 (Md v. Buie)
      CB 612-14, notes 1 & 2 only (Robinson)
      S #2 (Riley)

MAKE-UP:
Class #9 – Fri. Feb. 14
   4. Search incident to arrest (cont’d)
      S #2 (Belton)
      CB 615-16, note 6 only (Thornton)
      CB 616 through CB 625 note 4 (Gant)
Tues. Feb. 18: class cancelled

Thurs. Feb. 20: legislative Monday; no class

MAKE-UP:
Class #10 – Fri. Feb. 21
5. Automobile searches
   CB 479, through bottom of the page
   S #2 (Carney)
   CB 480-90 (Acevedo)
   CB 615-21: review Thornton & Gant in light of Acevedo

Class #11 -- Tues. Feb. 25
D. Searching/Seizing without Probable Cause -- Consent
   CB 507-15, through note 5 (Schneckloth)
E. Searching/Seizing without Probable Cause -- Stop & Frisk
   1. -- Introduction
      CB 530-40 (Terry)
      CB 541-43, notes 1 & 2 only

Class #12-13 -- Thurs. Feb. 27; Tues. March 3
E. Searching/Seizing without Probable Cause -- Stop & Frisk (cont’d)
   2. The requirement of “reasonable suspicion”
      CB 551-58, through note 2, but skip CB 554 note 2 (White; J.L.; Navarette)
      CB 558 (starting with Wardlow), through CB 564 note 2
   3. The meaning of a limited stop
      CB 404-17 (Drayton; Hodari)
      CB 544-46, notes 4-6 only (Dunaway; Royer; Place)
   4. Power to frisk
      CB 550, notes 5 & 6 only (Dickerson)
   5. Floyd v. City of NY
      S #3 (Floyd; related readings on stop & frisk)
      Discussion with court-appointed monitor

Class #14 – Thurs. March 5

F. Pretexual Police Action; Profiling
   CB 571-79 (Whren)
      CB 565- top 2 lines of CB 570.
      S #4 (readings on racial profiling)

G. Excessive Force
   CB 682-90 (Garner; Scott v. Harris; Plumhoff)
      S #5 (readings on police use of deadly force)
Class #15 – Tues. March 10

H. Administrative Searches
   CB 526-30, through end of Camara majority opinion
   CB 643-53, through note 5 (Edmund)
   CB 656 1st full ¶ through 658, last full ¶ (Safford; Chandler; Griffin; O’Connor)

I. Fourth Amendment Review
   PROBLEM CASE

Class #16 – Thurs. March 12

IV. Protected Interests, Part 2 -- Sophisticated surveillance

A. Undercover agents and informants
   CB 370-377, through note 3 (U.S. v. White)

B. New developments: technological, statutory, & constitutional
   S #6 (Smith v. Md; Pen-register Statute)
   CB 382-90 (Kyllo)

Tues. March 17 & Thurs. March 19: Spring break, no classes

Class #17 – Tues. March 24

   C. Digital surveillance; data mining
      CB 390-402, through note 2 (Jones)
      Bkg: CB 753-755
      CB 756-58 (Title III)
      CB 761-63 (SCA)
      S #6 (§2703; Carpenter)

Class #18 – Thurs. March 26

V. Fourth Amendment Remedies
   CB 324-36 (Mapp)
   Bkg: CB 336-45
   CB 694-701, through note 3 (Leon)
   CB 715-17 (standing: Jones; Rakas; Rawlings)

Class #19 -- Tues. March 31

VI. Line-Ups
   CB 138-49 (Wade; Kirby; Ash; Manson)
Class #20 -- Thurs. April 2

VII. Police Interrogation
   A. Introduction
      Bkg: S#7 (Inbau)
   B. The Privilege Against Self-Incrimination -- Underlying Policies
      CB 805-09 (through end of the indented quote)
      CB 822-23 (notes 4-5 only) (Murphy; Balsys)
      CB 825-26, through 1st full ¶ (“compulsion”)
      S #7 (Schulhofer, “Privilege”)
   C. The Due Process Requirement of “Voluntariness”
      CB 861-69
      Supp #7 (Stroble; Spano)

Class #21 – Tues. April 7

   D. Sixth Amendment Rights
      CB 870-72 (Massiah -- majority opinion only)
      CB 873-74 (Escobedo only)
   E. Fifth Amendment Rights
      CB 875-87 (Miranda)
      CB 887-88 (note 1 only)
      CB 890 (note 4 only)
      S #7 (Schulhofer -- Reconsidering)

Class #22 – Thurs. April 9

   F. The Scope of Miranda
      1. Threshold Requirements -- custody
         S #7: (Beckwith)
         CB 892-95 (Berkemer; Murphy)
         S #7: (Mathiason)
         CB 896-901 (J.D.B.; Howes)

Class #23 – Tues. April 14

   2. Threshold Requirements -- Interrogation
      CB 901-12 (Innis; Perkins; Muniz)
   3. Warnings
      Bkg: CB 912-15
   4. Invocation or Waiver?
      CB 891-92 (“The Scope of Miranda”)
      CB 954-55 (note 1 only) (Butler)
Class #24 – Thurs. April 16

4. Invocation or Waiver (cont’d)
   CB 929-38 (Moran & notes 1-2 only)
   CB 941-42 (notes 4-7) (Spring; Moran; state cases)
   S #7 (Davis; Berghuis)

5. After Waiver
   CB 938-41 (note 3 only) (Miller v. Fenton)

Class #25 – Tues. April 21

5. After Invocation
   CB 915-22, through note 3 (Mosley; Edwards; Davis; Smith)
   CB 925-29, notes 6-10 (Roberson; Minnick; Shatzer)

Class #26 – Thurs. April 23

G. The Sixth Amendment Right to Counsel
   CB 979 – 89, through note 2 (Brewer; Henry; Kuhlman)
   S #7 (Cobb)
   CB 990-93, notes 5 & 7 only (Moulton; Moran)
   S #7 (Montejo)

Class #27 – Tues. April 28

H. Voluntariness after Miranda
   CB 890-91, note 5 only (Connelly)
   CB 938-41 (note 3 only) (review Miller v. Fenton)

I. Assessing the Law of Police Interrogation
   CB 961 – 65 (Dickerson only)
   CB 965-66 (notes 1-4 only)
   CB 956 – 59
   S # 7 (Wilson; Caplan; Drizin & Leo; Leo; Video Statute)

Class #28 – Thurs. April 30

VIII. Police Interrogation Review

PROBLEM CASE

IX. Wrap-up of 4th, 5th & 6th Amendments