

# **CRIMINAL PROCEDURE**

LAWS #547, § 2

Fall Semester 2024

Mondays and Wednesdays 9:10-10:35 a.m., Room 395

Zoom ID: <https://widener.zoom.us/j/7175413941>

## **PROFESSOR MICHAEL DIMINO**

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### **INTRODUCTION**

This course is predominantly about the constraints that the Fourth and Fifth Amendments place on the government's investigation of crime. We also cover some of the Sixth Amendment's right to counsel as it relates to criminal investigation. Criminal Adjudication (LAWS #613) covers the remaining issues in the criminal-justice process from "bail to jail."

Criminal procedure can be tremendously exciting because of the drama that attends criminal investigation, but also because it involves so many fundamental themes of the law: government versus individual rights; privacy versus security; courts versus legislatures and executives; federal power versus the states; the evolution of the law and the role of history in constitutional interpretation; procedure versus substance; good versus evil; and right versus wrong.

### **REQUIRED TEXT**

The required casebook is JOSHUA DRESSLER ET AL., CRIMINAL PROCEDURE: INVESTIGATING CRIME (West Academic 8th ed. 2023) (hereinafter "Casebook"), ISBN 978-1-685-61953-4. You should ensure that your book comes with Casebook Plus access. Sign up for our Casebook Plus "course" by going to [eproducts.westacademic.com](https://eproducts.westacademic.com) and using this course code: CRSE-KB44-SURL-73QF-8J3H.

In addition, you must purchase and bring to class KATHY SWEDLOW, CORE CRIMINAL PROCEDURE: LEARNING THROUGH MULTIPLE-CHOICE QUESTIONS (2d ed. 2022), ISBN 978-1-5310-2245-7. You can use the book independently as a study aid, but we will also discuss several of the book's questions in class as review exercises.

### **RECOMMENDED TEXT**

You are certainly free to read whichever study aids you desire, but in the past many students have benefited from JOSHUA DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE (Volume 1: Investigation) (8th ed., Carolina Academic Press 2021), ISBN 978-1-5310-2153-5.

### **COURSE OBJECTIVES**

Unlike Criminal Law, which focuses on statutes and common-law decisions, Criminal

Procedure is based principally on the United States Constitution and precedents from the U.S. Supreme Court. There are two main objectives. First, you will learn established doctrine; in other words, you will learn the rules of law that the Supreme Court has already formulated through its cases interpreting the Fourth, Fifth, and Sixth Amendments. For example, you will learn when warrants are required, when the police must read suspects the *Miranda* warnings, and when evidence must be excluded from criminal trials. This basic knowledge is essential for success on the bar exam and for practicing criminal law. Second, you will learn to analyze legal issues that have no clear answer, and you will use precedent, text, history, policy, &c. in formulating arguments about how to resolve those issues. Knowing doctrine and case holdings is necessary but not sufficient.

### **GRADING**

Your course grade will be based on your performance on a closed-book final exam. In addition, the quality and quantity of your class participation may cause your grade to be adjusted.

The exam will consist of several multiple-choice questions and at least one essay. The multiple-choice questions will test your ability to apply the law to questions in a format similar to that which you will see on the Multistate Bar Exam. The essay will present a scenario where the correct answer is less clear. You will need to analyze the legal issues presented and to craft arguments about how those issues should be resolved. You should be prepared to discuss the holdings and doctrines of cases we have covered, policy implications, doctrinal tensions, and arguments about how the Constitution should be interpreted. The essay will require you to make both arguments and counterarguments, largely through the use of analogies based on precedent, and the exam will also require you to analyze the strengths and weaknesses of each argument.

### **CLASS RECORDINGS**

Classes will be recorded on Zoom and the links will be posted on TWEN. The recordings will be deleted after 30 days or on the day of the exam, whichever is earlier. Students may not distribute, save, or copy the class recordings or any portion thereof. Students are welcome to watch class recordings as many times as they wish—no special code or permission is necessary to access the recordings. Watching a class on Zoom (even in real time) does not count as class attendance.

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## ASSIGNMENTS

In reading cases, pay particular attention to footnotes in case excerpts; casebook editors eliminate all but the important ones, so the inclusion of a footnote is a good indication that the point therein discussed is worthy of attention. Unless otherwise noted, the assignments begin and end at rather obvious section breaks.

You must complete the assigned Casebook Plus questions (denoted as CB+), by the date of the final exam. This syllabus includes dates by which I recommend that you complete each section of multiple-choice questions, but there is no penalty for missing those deadlines. If you do the questions on time, they will serve as “formative assessment” tools that allow you to assess your progress in the course and to ask me any questions necessary to solidify your understanding of the material before we move on to the next portion of the course. The grade you receive on the Casebook Plus questions will not become part of your course grade, but I require you to make a good-faith effort to answer the questions correctly. If you merely click-through the questions, you will be depriving yourself of the opportunity the questions provide to review material and to reinforce your understanding of important concepts.

**Tuesday, Aug. 20:            The Exclusionary Rule and Liberty vs. Justice**

**Pages 69-92 and 504-509 of the Casebook.**

According to PRISCILLA H. MACHADO ZOTTI, *INJUSTICE FOR ALL: MAPP V. OHIO AND THE FOURTH AMENDMENT* 183-84 (2005), the document presented to Dollree Mapp was not a search warrant, but an affidavit signed by a judge, which should have been filed with a clerk and converted into a warrant, but was not.

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**Monday, Aug. 26:            What Are “Searches” and “Seizures”?**

**Pages 93-113 and 188-191 of the Casebook.**

**CB+: Chapter 2**

How would you address Notes 2 and 8 on pages 100 and 102?

Make sure you memorize the tests for assessing whether a search or a seizure has occurred. Remember that the test does not determine whether a search is constitutional, but only whether there was a search at all.

In *Kyllo v. United States*, 533 U.S. 27 (2001), which we will cover shortly, Justice Scalia, writing for the Court, stated that the doctrine resulting from Justice Harlan’s *Katz* concurrence “has often been criticized as circular, and hence subjective and unpredictable.” (The

quote is on page 134 of the Casebook.) What is circular about the *Katz* test? How does *Katz* differ from *Goldman* and *Olmstead*?

Why is placing a listening device on the outside of a telephone booth a “search” while placing a listening device on an informant is not?

Be prepared to discuss Note 6 on pages 112-113.

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**Wednesday, Aug. 28: Curtilage and Open Fields**

**Pages 113-131 of the Casebook.**

Should it make a difference if Oliver had completely surrounded his property with barbed wire and guard dogs?

Is *Oliver v. United States* (pages 122-124) faithful to *Katz*?

Should we sacrifice our expectation of privacy over all items that we share with third parties, or only those items that we share voluntarily? If the latter, what should be meant by “voluntarily”?

Throughout Chapter 3 of the Casebook, consider the Court’s varying treatment of these two questions: (1) Does the *method* of conducting the search matter? (2) Can a person maintain a reasonable expectation of privacy as to *some* exposure of property or communications, but not as to the remainder?

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**Monday, Sept. 2: Labor Day (No Classes)**

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**Wednesday, Sept. 4: Searches with Modern Technology**

**Pages 131-157 of the Casebook.**

Should *Kyllo* have come out the other way if the structure involved were a warehouse? An office building? Consider the same questions with respect to *Florida v. Jardines* (page 177) when you read that case.

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**Monday, Sept. 9:**

**Privacy and Trespass**

**Pages 157-188 of the Casebook.**

How did the Court distinguish the GPS data in *Carpenter* from the telephone and bank records in *Smith* and *Miller*? Do you find the distinction convincing? In other words, did *Carpenter* cut back on *Smith* and *Miller*, or did it merely decline to extend those precedents? Should either *Smith* or *Miller* be overruled?

Is it a “search” if a drug-sniffing dog is walked on the sidewalk around a neighborhood to detect the odor of drugs emanating from houses? What if the dog is walked through the hallway of an apartment building? What if the drug-detection device is not a dog but a machine? What if the machine detects not drugs but radioactivity?

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**Wednesday, Sept. 11: Standing**

**Pages 481-504 of the Casebook.**

**CB+: Chapter 3**

Do you agree with then-Justice Rehnquist in *Rakas* that “standing” is not a separate concept, or was Justice Blackmun correct (in Note 6 on page 495) that standing should be analyzed separately from the question whether the Fourth Amendment is implicated? Does *Byrd v. United States* (pages 492-493) split the difference?

Expect to discuss *Rawlings* and the rest of Notes 3-5 on pages 502-504.

If someone lends his car to a friend and the police search the vehicle on the road, who can contest the search: the friend, the owner, or both?

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**Monday, Sept. 16:**

**Probable Cause**

**Pages 193-222 of the Casebook.**

What do you make of *Draper* and the use of *Draper* by the Justices in *Spinelli* and *Gates*?

Why does the Court abandon *Spinelli*? Are the reasons adequate, in your view?

Is Justice White correct in *Gates* that probable cause existed, even under *Spinelli*?

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**Wednesday, Sept. 18: Reasonable Suspicion**  
**Pages 432-449 and 305-314 of the Casebook.**

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**Monday, Sept. 23: Arrest Warrants; Warrant Execution**  
**Pages 223-253 of the Casebook.**  
How do you resolve the Problem in Note 9 on page 234?

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**Wednesday, Sept. 25: Stops and Frisks**  
**Pages 387-410 of the Casebook.**  
Be sure you can state *Terry*'s holding and analyze the applicability of the Fourth Amendment to each step of the encounter between Terry and Officer McFadden.  
Why did *Terry* not hold that probable cause was satisfied here? Do you agree with the Court that Officer McFadden's stop of Terry was constitutional even absent probable cause?  
Take particular note of Justice Harlan's *Terry* concurrence.  
Expect to be asked about Note 5 on pages 405.  
N.B. *Sibron v. New York*, Note 12 on page 410.

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**Monday, Sept. 30:**

**Arrests vs. Investigative Stops vs. Voluntary Encounters**

**Pages 410-432 of the Casebook.**

What explains the different outcomes of *Mendenhall* and *Florida v. Royer* (pages 413-414)?

When, if at all, do you think that Ms. Mendenhall was seized?

When, if at all, do you think the police had reasonable suspicion to detain Ms. Mendenhall?

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**Wednesday, Oct. 2:**

**Searches Incident to Lawful Arrest (SILA)**

**Pages 253-286 of the Casebook.**

Pay special attention to Note 4 on pages 257-259 as well as Notes 7 and 9 on pages 272-274.

How do you answer Note 5 on page 271?

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**Monday, Oct. 7:**

**Protective Sweeps/Searches of Cars Incident to a Lawful Arrest**

**Pages 449-461 and 287-305 of the Casebook.**

For Note 2 on page 291, look at the mode of analysis, and not just whether the *results* are consistent.

Be sure you pay attention to *Knowles* and *Atwater*, discussed in the Notes following *Belton*.

Justice White dissented in both *Chimel* and *Belton*. Can his positions be reconciled?

Be sure you know both situations where, under *Gant*, a search of a car will be permitted incident to the arrest of an occupant of the car. Is a warrant exception justified in each situation? What is the *Gant* Court's justification for each part of its rule?

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**Wednesday, Oct. 9: Automobile Exception**

**Pages 314-338 (through Note 7) of the Casebook.**

What are the differences between the automobile exception and the warrantless searches of cars that are sometimes permitted incident to the arrest of vehicle occupants?

*Collins v. Virginia* (pages 325-327) held that there was a search of the suspect's curtilage when the police entered the back portion of his driveway to inspect the motorcycle parked there. In so holding, the Court stressed that the curtilage is part of the home for constitutional purposes. Therefore, because the police could not have entered the suspect's home to search for the motorcycle, neither could they have entered the curtilage. Has the Court consistently treated entries onto the curtilage the same as entries into the home itself? Compare *United States v. Santana*, 427 U.S. 38 (1976) (page 232 of the Casebook). Should the curtilage be protected to the same extent that the structure of the home is protected?

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**Monday, Oct. 14: Plain View**

**Pages 338 (starting with Note 8) - 358 of the Casebook.**

Is Justice Scalia's position in *Acevedo* consistent with his positions in *Thornton* and *Gant*?

Who has the better of the debate between Justices Stevens and Scalia on the propriety of warrantless searches of containers *outside* of automobiles?

How do you answer the questions in Note 3 on pages 345-346?

Does the plain-view doctrine authorize searches, seizures, or both?

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**Wednesday, Oct. 16: Consent**

**Pages 358-386 of the Casebook.**

Note 8 on page 367 makes an important doctrinal point.

Do the false-friend cases in the what-is-a-search section affect your analysis of *Georgia v. Randolph*?

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**Monday, Oct. 21: Special-Needs Searches; Independent Source**

**Pages 461-480 and 509-515 of the Casebook.**

**CB+: Chapter 4**

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**Wednesday, Oct. 23: Attenuation; “Good Faith” Exception**

**Pages 516-535 of the Casebook.**

*Wong Sun* has the most confusing set of facts of any case in the course. Take time to understand them and to understand the basis for the Court’s conclusion as to each piece of evidence.

Keep in mind that, despite its name, the “good-faith” exception to the exclusionary rule does not focus on the good or bad faith of the officer conducting the search. Rather, the question is objective reasonableness: “whether a reasonably well trained officer would have known that the search was illegal.”

Is it appropriate for courts to subject the exclusionary rule to cost-benefit analysis?

Should *Leon*’s good-faith exception apply when an officer reasonably but mistakenly believes that he can engage in a warrantless search because of a warrant exception?

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**Monday, Oct. 28: Expanding the “Good-Faith” Exception**

**Pages 535-562 of the Casebook.**

**CB+: Chapter 5**

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**Wednesday, Oct. 30:    The Fifth Amendment: Voluntariness and *Miranda***  
**Pages 587-607 and 620-638 of the Casebook.**  
**CB+: Chapter 6**

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**Monday, Nov. 4:        The Reaction to *Miranda***  
**Pages 639-672 of the Casebook.**

Are the *Miranda* warnings required by the Constitution? If so, why does the Fifth Amendment's ban on compulsory self-incrimination result in the exclusion of a confession that the Court refuses to find "involuntary in traditional terms" (page 624)? If not, how does the Court have the power to overturn the state court's judgment of conviction without holding that the Constitution has been violated? Does *Quarles* affect your answer?

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**Wednesday, Nov. 6:    *Miranda* Custody**  
**Pages 672-695 of the Casebook.**

Make sure you commit to memory the tests for both custody and interrogation.

Should "custody" depend on whether the suspect was actually being detained, whether the suspect thought he was being detained, or whether a reasonable person in the suspect's position would have thought he was being detained?

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**Monday, Nov. 11:**      ***Miranda* Interrogation/Invocation of *Miranda* Rights**

**Pages 695-720 of the Casebook.**

Is the Court's test for "interrogation" objective or subjective?

Should a suspect's un-*Mirandized* answers to "routine booking questions" be admissible at trial? Why or why not?

What difference does it make if someone invokes his *Miranda* rights rather than simply not waiving them?

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**Wednesday, Nov. 13:**      ***Miranda* Waiver/The Sixth Amendment Right to Counsel**

**Pages 721-751 of the Casebook.**

**CB+: Chapter 7**

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**Monday, Nov. 18:**      **Comparing *Miranda* and *Massiah***

**Pages 751-783 of the Casebook.**

**CB+: Chapter 8**

What are the differences between the rights to counsel provided by the Fifth Amendment/*Miranda* and the Sixth Amendment?

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**Wednesday, Nov. 20:**      **Identification Procedures and the Right to Counsel**

**Pages 805-834 of the Casebook**

**CB+: Chapter 10**