

CRIMINAL
PROCEDURE:
INVESTIGATIONS

SYLLABUS

FALL 2012

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CRIMINAL PROCEDURE: INVESTIGATIONS

COURSE READER

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The Fourth Amendment

A Fourth Amendment Flowchart

I. WHAT IS A "SEARCH" (OR A "SEIZURE")?

This first set of cases all present the following question: What sorts of investigatory measures can law enforcement undertake *without* a warrant, probable cause, or even reasonable suspicion? If activity by law enforcement does not amount to a "search" (or "seizure"), as that term has been defined by the courts, it lies outside the scope of the Fourth Amendment.

Introduction: *Olmstead v. United States* (U.S. 1928)

Introduction + “Reasonable Expectation of Privacy”: *Katz v. United States* (U.S. 1967)

In overruling *Olmstead*, a Prohibition-era case, *Katz* fundamentally reshaped the threshold Fourth Amendment “search” inquiry, so that the required analysis would henceforth focus on whether the law-enforcement activity at issue infringed upon a defendant’s “reasonable expectation of privacy.” We’ll begin the course by discussing this approach to the Fourth Amendment, its strengths and limitations, and some possible alternatives.

The Phone Booths, etc., in Katz v. United States

Bad In-Tent-ions?

CLASS THREE: AUGUST 30, 2012

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Reasonable Expectation of Privacy—False Friends: *United States v. White* (U.S. 1971)

Here, in one of its first post-*Katz* cases, the Court held that the “false friend” rule—whereby a person cannot complain of an unlawful “search” if their “friend” turns out to be in cahoots with law enforcement, and wearing a wire—survived *Katz*. Did the result in *White* render the “reasonable expectation of privacy” approach incoherent?

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Reasonable Expectation of Privacy—“Shared” Information: *Smith v. Maryland* (U.S. 1979)

Do you have a reasonable expectation of privacy in the telephone numbers you dial, as tracked by a “pen register” deployed with the consent (and the premises) of the telephone company (or, for that matter, in the IP addresses of the websites that you visit, as tracked through your ISP, and then handed over to the police)? Per *Smith* and its progeny, the answer is no, you don’t. Does that mean that law enforcement can use a pen register (or similar device used to track IP information) whenever it wants to do so? No, it doesn’t, because in this context, statutes as well as Constitutional rules apply to constrain law enforcement. We’ll consider the optimal roles of statutes vs. constitutional rules in this

class, as well as the range of remedies that courts and legislatures may adopt for violations of the rules they prescribe.

The Role of Statutes and State Law

CLASS FOUR: SEPTEMBER 4, 2012

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Reasonable Expectation of Privacy—Open Fields: *United States v. Dunn* (U.S. 1987)

Today, we'll consider the “search” rules that apply in and around residences. Taking for granted the protections that adhere *inside* of a residence, *Dunn* lays out the factors used to distinguish between the “curtilage” that surrounds a residence—which receives *some* protection under the Fourth Amendment (but not as much as the interior of a residence does; we'll discuss why)—and the relatively unprotected “open fields” that lay outside of the curtilage.

Motions to Suppress, Section 1983 Suits, and Habeas Corpus Petitions

Reasonable Expectation of Privacy—Around the Home: *People v. Camacho* (Cal. 2000) and *People v. Chavez* (Cal. App. 2008)

The question of what law enforcement officers can do around a residence without their activity amounting to a “search” is too important to leave to just one case. *Camacho* and *Chavez* address an important issue that the United States Supreme Court has not addressed, post-*Katz* (though we may gain some clarity in the upcoming Term)—what types of basic surveillance (*e.g.*, looking through a window) can a police officer take *within* the curtilage?

Curtilage and City Dwellers?

Reasonable Expectation of Privacy in the Workplace?

Drug Tests and Sniffs

CLASS FIVE: SEPTEMBER 6, 2012

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Reasonable Expectation of Privacy—Trash: *California v. Greenwood* (U.S. 1988)

Do you have a reasonable expectation of privacy in your trash, after it's been placed for pickup, outside of your curtilage? No, according to the *Greenwood* court. But, as we'll discuss, several state courts have interpreted their respective state constitutions as affording greater protections against "trash" searches by law enforcement.

Abandonment?

Flyovers

Reasonable Expectation of Privacy—High Technology—Infra-Red Cameras: *Kyllo v. United States* (U.S. 2001)

The *Kyllo* Court considered the use of infrared cameras, which can be deployed from "public" areas, but detect heat emanating from the interior of private residences. The use of these devices under such circumstances raises the question—does the lawful vantage point of the officer, or the nature of the information they obtain, control the Fourth Amendment analysis?

"Reasonable Expectation of Privacy," Redux: *United States v. Jones* (U.S. 2012)

Earlier this year, the United States Supreme Court dropped a bombshell when it ruled that the installation of a GPS device upon a suspect's automobile amounted to a "search." Does this ruling signal a fundamental change in how the Court will approach Fourth Amendment issues? Or will the Court's decision be limited to the use of GPS devices?

The Court Documents in Jones

CLASS SIX: SEPTEMBER 11, 2012

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Reasonable Expectation of Privacy—Touching: *Bond v. United States* (U.S. 2000)

Per *Katz*, one has no reasonable expectation of privacy as to a passing *visual* observation of something that's left in plain sight of the general public. But what about a *tactile* inspection of something that's been placed in a position where it could be felt by members of the public? *Bond* addressed this touchy issue.

Reasonable Expectation of Privacy—Private Searches: *People v. Wilkinson* (Cal. App. 2008)

Wilkinson illustrates the distinction between private searches (which do not implicate the Fourth Amendment) and searches by law enforcement and their agents (which do).

Though the basic divide between private and “public” searches is easily grasped, every once in a while, difficult agency questions can arise.

Proposition 8

When has a Seizure Occurred? (I): *California v. Hodari D.* (U.S. 1991)

As we will see, a “consensual” contact by law enforcement requires no suspicion at all; a detention requires reasonable suspicion; and an arrest requires probable cause. When does a contact represent a consensual encounter, and when is it (or does it become) a detention? *Hodari D.* addresses this issue.

When has a Seizure Occurred? (II): *United States v. Drayton* (U.S. 2002)

As had *Hodari D.*, in *Drayton* the Court considered when a “seizure” occurs, only this time, the Court addressed an alleged seizure occurring in the closed-quarters setting of a passenger bus.

What Is a Seizure of a Thing, as Opposed to a Person?

CLASS SEVEN: SEPTEMBER 13, 2012

ASSIGNMENT: COURSE READER PAGES 161–185

II. THE NECESSARY PREDICATE(S) FOR A “SEARCH” OR SEIZURE: PROBABLE CAUSE, REASONABLE SUSPICION, AND WARRANTS

Assuming that law enforcement activity does amount to a “search” or a “seizure,” law enforcement must have a rationale for its actions that rises above a mere “hunch” that wrongdoing is afoot. In the event of a *seizure*, either “reasonable suspicion” or “probable cause” is required, depending on whether the seizure amounts to an investigatory detention (which requires reasonable suspicion that a crime may be, is being, or has been committed—a pretty low threshold) or an arrest (which requires probable cause that a crime has been committed, a greater quantum of proof). With a *search*, probable cause is normally required, with the principal exception being a “frisk” (as to which a brand of reasonable suspicion will suffice). Furthermore, either a valid warrant or a recognized warrant exception (of which a frisk is one) is necessary for most “searches” (or “seizures” of property) to occur. This section of the course will address the reasonable suspicion and probable cause standards, and their various applications.

Probable Cause and Reasonable Suspicion

The Probable Cause Standard: *Illinois v. Gates* (U.S. 1983)

Gates replaced the prevailing, two-pronged approach toward determining whether a warrant states probable cause with a more amorphous “fair probability” standard that considers the “totality of the circumstances.” Who benefits from this shift? What are the benefits and drawbacks of a relatively rigid test, as compared to a more amorphous standard?

The Affidavit in Gates

When Does Probable Cause Exist?: *Maryland v. Pringle* (U.S. 2003)

Though the Court more or less ducked the issue presented in *Pringle*—whether probable cause could exist to arrest multiple individuals for the same crime, assuming (1) that a crime definitely was committed, but (2) it was most likely committed by only one of the suspects—the case remains interesting for its analysis of the probable cause issue before it.

Does It Compute?

Arrests

Springing a Leak?

Plate Error?

Probable Cause—Objective vs. Subjective?: *Whren v. United States* (U.S. 1996)

In a “pretext” stop, an officer uses reasonable suspicion of Offense A as an excuse to stop a vehicle, so that the officer can conduct an investigation that is really directed at the possible commission of Offense Y (e.g., stopping a vehicle for a broken taillight, to see if the driver is under the influence of alcohol). The *Whren* Court considered whether these detentions are permissible, or whether officers should be permitted to detain vehicles (and people therein) only when they subjectively intend to investigate the offense that permitted the detention, or (under an alternative formulation) when a “reasonable officer” would stop the vehicle for the offense in question.

“Collective Knowledge” and “Wall” Stops

CLASS EIGHT: SEPTEMBER 18, 2012

ASSIGNMENT: COURSE READER PAGES 186–215

Reasonable Suspicion: *Terry v. Ohio* (U.S. 1968)

The Supreme Court in *Terry* recognized, for the first time in Court history, the validity of a type of detention (now known as “*Terry* stops” or “investigatory detentions”) and a type of search (“frisks”) on a quantum of evidence less than probable cause. What took so long?

Fair Frisk, or Foul?

Stop-and-Frisk Litigation

Traffic Stops

Drawing a Bead on Trouble?

When Does Reasonable Suspicion Exist? (I): *Illinois v. Wardlow* (U.S. 2000)

Assuming that law enforcement has no proper basis for detaining you, you have an absolute right to refuse to interact with the officer. But what if you take flight at the sight of a police officer—does this act, by itself, give rise to reasonable suspicion, such that an officer *now* can detain you? And what does “flight” mean in this context, anyway?

Exercise: Larry Craig

When Does Reasonable Suspicion Exist? (II): *United States v. Arvizu* (U.S. 2002)

The Supreme Court provided some helpful reminders regarding the sorts of behavior that will give rise to reasonable suspicion under the “totality of the circumstances” in this unanimous reversal of a Ninth Circuit decision.

CLASS NINE: SEPTEMBER 20, 2012

ASSIGNMENT: COURSE READER PAGES 216–223, 225–242

When Does Reasonable Suspicion Exist? (III): *Florida v. J.L.* (U.S. 2000)

Some of the information that police receive comes in the form of anonymous tips. How much information must an anonymous tipster communicate, and how much corroboration is required, for their tip to give rise to reasonable suspicion?

What Can an Officer Require Incident to a Detention?: *Hiibel v. Sixth District Court* (U.S. 2004)

Hiibel addresses this question: Can a state law, consistent with the U.S. Constitution, make it a crime for you to refuse to identify yourself as part of a lawful detention?

Hypothetical: Hiibel + Frisk = Pat-Down for Identification?

The Exclusionary Rule

The South Florida Cop Who Won't Stay Fired

Comparative Perspectives on the Exclusionary Rule: *Regina v. Harrison* (Supreme Court of Canada 2009)

In *Regina v. Harrison*, we'll go north of the border to check out how Canada applies its exclusionary rule.

Search Warrants

Warrant Drafting Exercise (In-Class)

CLASS TEN: SEPTEMBER 25, 2012

ASSIGNMENT: COURSE READER PAGES 243–271

Search Warrants—Particularity and Overbreadth: *United States v. SDI Future Health, Inc.* (9th Cir. 2009)

This Ninth Circuit decision offers an interesting discussion of the circumstances in which an employee of a private business has a reasonable expectation of privacy in its offices, and an overview of the “overbreadth” and “particularity” problems that afflict some search warrants.

Search Warrants—Standard Provisions: *People v. Balint* (Cal. App. 2006)

We continue our discussion of warrants with this interesting California Court of Appeal decision, which considered whether a computer could be seized under a boilerplate “indicia of dominion and control” clause, which is included in most search warrants as a matter of course.

Search Warrants—Mistaken Descriptions: *Maryland v. Garrison* (U.S. 1987)

What happens when a search warrant misstates an address, or contains what turns out to be an ambiguous address (e.g., “1214 Chapel Street, New Haven, CT,” when 1214 Chapel Street turns out to be a three-unit apartment building)? *Maryland v. Garrison* dealt with one such situation.

Simply for Purposes of Comparison

Groh v. Ramirez

Arrest Warrants: *Payton v. New York* (U.S. 1980)

Payton struck down a New York law that permitted the warrantless entry of residences in order to arrest a felony suspect, concluding that an arrest warrant is required to make these in-home arrests—unless an exception to the warrant requirement applies.

The “Knock and Announce” Rule

CLASS ELEVEN: SEPTEMBER 27, 2012

ASSIGNMENT: COURSE READER PAGES 158–159, 272–290, 299–300

III. EXCEPTIONS TO THE WARRANT REQUIREMENT

There exist numerous exceptions to the warrant requirement, in addition to the investigatory detentions and frisks discussed in *Terry*: consent, plain view, the emergency exception, exigent circumstances (including evanescent evidence and hot pursuit), searches incident to arrest, a variety of exceptions applicable to vehicles, border searches, checkpoints, and a range of administrative and “special needs” searches. Does a common denominator exist to these exceptions? Are they all mere outgrowths of a “reasonable” reading of the Fourth Amendment?

Exceptions to the Warrant Requirement

Consent

Warrant Exceptions—Consent: *United States v. Drayton* (U.S. 2002)

We return to *Drayton* to review its handling of the consent issue implicated in that case; the Court also offers a helpful overview of the law regarding first-party consent.

Warrant Exceptions—Consent: *Georgia v. Randolph* (U.S. 2006)

Here, the Court considered what officers should do when confronted with a situation in which one party with authority grants consent to search a residence, but another party, also with authority and present at the premise, refuses.

Well-Briefed Consent?

Warrant Exceptions—Consent: *United States v. Stabile* (3rd Cir. 2011)

We will encounter *Stabile* (or at least parts of it), a recent computer-search case, three, count 'em, three times this semester. Today, we will review the court's discussion of third-party consent, an issue that arises quite often with computer searches.

He Otter Know Better?

CLASS TWELVE: OCTOBER 2, 2012

ASSIGNMENT: COURSE READER PAGES 301–310, 290–295

Warrant Exceptions—Plain View: *Arizona v. Hicks* (U.S. 1987)

The “plain view” exception to the warrant requirement—a rule that relates to seizures, more than searches—permits the seizure of items found in an officer’s “plain view,” but only if the officer lawfully occupies the vantage point from which the initial observation of the item is made, it is immediately apparent (a probable cause standard is used here) that the item in plain view represents evidence of a crime, and the officer has a lawful right of access to the seized item. *Hicks* considered whether these elements were satisfied in a robbery case.

Warrant Exceptions—Plain View: *Horton v. California* (U.S. 1990)

Most courts once considered “plain view” applicable only when the discovery of the evidence in question was inadvertent. *Horton* concluded that most courts were wrong.

“Plain Smell” and “Plain Touch”

Warrant Exceptions—Plain View: *United States v. Stabile* (3rd Cir. 2011)

We return to *Stabile* to take up its analysis of how the “plain view” doctrine applies to computers, and to searches undertaken pursuant to warrants.

CLASS THIRTEEN: OCTOBER 2, 2012

ASSIGNMENT: COURSE READER PAGES 311–337

Warrant Exceptions—Emergency Exception: *Brigham City, Utah v. Stuart* (U.S. 2006)

Here, the Court applied the emergency exception to the warrant requirement. As described in *Brigham City*, this exception might be regarded as one part plain view (just discussed), one part exigent circumstances (to be addressed next).

The “Community Caretaking” Exception

A “Murder” Exception to the Fourth Amendment?

Warrant Exceptions—Exigent Circumstances (Hot Pursuit): *Warden v. Hayden* (U.S. 1967)

One of the best-known warrant exceptions is “hot pursuit,” which under certain conditions permits the warrantless entry into a residence when in fresh pursuit of a suspect. But as we’ll see, there exist some important limitations on this seemingly broad exception.

Warrant Exceptions—Exigent Circumstances: *People v. Thompson* (Cal. 2006)

In *Thompson*, the California Supreme Court distinguished United States Supreme Court precedent in upholding, pursuant to the exigent circumstances exception to the warrant requirement, an officer’s warrantless entry into a house to preserve blood-alcohol evidence in a DUI investigation.

Warrant Exceptions—Exigent Circumstances: *Hopkins v. Bonvicino* (9th Cir. 2009)

On facts similar to those presented in *Thompson*, the *Hopkins* court begged to differ with the California Supreme Court’s interpretation of the law. This split raises the question: What are officers expected to do when the evidence they seize can be used in a criminal prosecution, but they can be found civilly liable for obtaining it?

The Relationships Between Federal and State Precedent

Take It or Leave It?

CLASS FOURTEEN: OCTOBER 4, 2012

ASSIGNMENT: COURSE READER PAGES 338–366

Searches Incident to Arrest

Warrant Exceptions—Search Incident to Arrest: *Chimel v. California* (U.S. 1969)

Chimel redefined the proper scope of a “search incident to arrest,” a longstanding but seemingly ever-shifting-in-its-particulars exception to the warrant requirement.

Warrant Exceptions—Search Incident to Arrest: *People v. Diaz* (Cal. 2011)

In *Diaz*, the California Supreme Court authorized the search of a cell phone incident to a suspect’s arrest. We’ll consider whether this ruling harmonizes with the rationales behind this exception to the warrant requirement.

SB 914

DNA Collection from Felony Arrestees

Warrant Exceptions—Search Incident to Arrest (Protective Sweeps): *United States v. Lemus* (9th Cir. 2009)

One type of search incident to arrest permits the suspicionless search of the area immediately adjacent to a person arrested inside a residence, from which an attack might be launched by a confederate, and a “protective sweep” of other areas when reasonable suspicion exists that confederates of the arrestee may be lying in wait there. *Lemus* marries these exceptions with the “plain view” exception to uphold a fairly aggressive search by law enforcement.

Inventory Searches

Swept up in Things?

CLASS FIFTEEN: OCTOBER 9, 2012

ASSIGNMENT: COURSE READER PAGES 367–407

Prisoner, Probationer, and Parolee Searches

Warrant Exceptions: Jail Intake—*Bull v. City and County of San Francisco* (9th Cir. 2010)

We won't read the full set of opinions in *Bull*, which upheld as against a Constitutional challenge a local policy of undertaking visual strip searches on all new jail inmates prior to their admission into the general jail population. (The United States Supreme Court would [by a narrow margin] reach the same conclusion not long afterward.) Instead, we'll read Judge Kozinski's thoughtful concurring opinion, which addresses some of the latent fairness issues inherent in Fourth Amendment cases.

Warrant Exceptions—Checkpoints: *United States v. Fraire* (9th Cir. 2009)

Fraire involves a checkpoint search at an entry and exit point to one of our National Parks. In addition to affording Professor Graham with the opportunity to tell one, possibly two, of his boring park ranger stories, *Fraire* provides a good overview of the current law regarding checkpoints. In short, courts focus first on the "primary purpose" of the checkpoint (cf. *Whren*), and then, review the checkpoint for its reasonableness.

Warrant Exceptions—Border Searches: *United States v. Flores-Montano* (U.S. 2004)

Some searches are reasonable simply because they occur at the border. In *Flores-Montano*, we'll consider what border authorities can do even *without* reasonable suspicion of a crime.

Warrant Exceptions—Border Searches: *United States v. Montoya de Hernandez* (U.S. 1985)

And what can happen if these border authorities *do* have reasonable suspicion? *Montoya de Hernandez* is not for the squeamish.

Warrant Exceptions—Border Searches: *United States v. Cotterman* (9th Cir. 2011)

Recently heard by an *en banc* panel of the Ninth Circuit, *Cotterman* considers the permissibility of a thorough examination of a computer that was seized at the border, but examined at a different location, well within the nation's interior.

Warrant Exceptions—Special Needs Searches: *People v. Maikhio* (Cal. 2011)

"Special needs" represents a catch-all for several different types of searches that are undertaken for purposes other than the apprehension of criminals *per se*. We'll discuss special-needs searches through the lens of this recent decision by the California Supreme Court that involved a game warden, a stakeout, and a spiny lobster. (Really.)

CLASS SIXTEEN: OCTOBER 11, 2012

ASSIGNMENT: COURSE READER PAGES 408–432

Warrantless Vehicle Searches

Warrant Exceptions—Vehicle Searches on Probable Cause: *California v. Acevedo* (U.S. 1991)

Acevedo represents the Supreme Court’s latest interpretation of the so-called “vehicle exception” to the warrant requirement, whereby a thorough search of a vehicle is permissible given probable cause—without the need to procure a warrant beforehand.

If the Car’s Not A-Movin’, the Court’s Not Approvin’?

Warrant Exceptions—Vehicle Searches on Probable Cause: *California v. Carney* (U.S. 1985)

Carney, which involved a search of a motor home under the aegis of the vehicle exception, underscores the breadth of, and rationales behind, this exception to the warrant requirement.

In the Bag?

Warrant Exceptions—Search of a Vehicle Incident to Arrest: *Arizona v. Gant* (U.S. 2009)

The search incident to arrest exception also applies to arrests conducted in the vicinity of vehicles, but the parameters of this exception are a little different when vehicles are involved. *Gant* clarified the rules relating to this exception insofar as vehicles are concerned.

Another Purse Problem

CLASS SEVENTEEN: OCTOBER 16, 2012

ASSIGNMENT: COURSE READER PAGES 433–456

IV. EXCEPTIONS TO AND LIMITATIONS OF THE EXCLUSIONARY RULE

OK, the police screwed up. A search and resulting seizure were unlawful under the Fourth Amendment. Does this mean that the seized evidence *must* be excluded from evidence at trial? Not necessarily. For one thing, the defendant may lack “standing” to

challenge the illegal conduct. “Standing” means that a defendant must show that the unlawful activity violated *his* or *her* reasonable privacy expectations—not just the expectations of someone else. (The Court has instructed practitioners not to use the word “standing” in this context, but they still do.) Moreover, even if the defendant does have “standing,” in some cases law enforcement may successfully invoke one (or more) of several exceptions to the exclusionary rule.

(Don’t Call It) “Standing”

Standing: A Flowchart

Limitations of the Exclusionary Rule—The Standing Requirement: *Rakas v. Illinois* (U.S. 1978)

Limitations of the Exclusionary Rule—The Standing Requirement: *Minnesota v. Carter* (U.S. 1998)

A violation of the Fourth Amendment, on its own, does not necessarily mean that a defendant will be able to pursue a motion to suppress. The defendant must establish that the illegality infringed upon *his* or *her* reasonable privacy expectations. This “standing” rule has defeated many a suppression motion, as *Rakas* and *Carter* illustrate.

Limitations of the Exclusionary Rule—The Standing Requirement: *Brendlin v. California* (U.S. 2007)

In *Brendlin*, the California Supreme Court, building on the United States Supreme Court’s decision in *Hodari D.*, had held that a passenger was not automatically detained as a result of a vehicle stop, and thus lacked standing to challenge an allegedly illegal stop. The Supreme Court granted certiorari, and unanimously reversed.

Limitations of the Exclusionary Rule—The Standing Requirement: *Rawlings v. Kentucky* (U.S. 1980)

When do you lose a reasonable expectation of privacy in your personal property? Well, we touched upon this subject while discussing “abandonment” a while back; we’ll close the loop with the United States Supreme Court’s discussion in *Rawlings*.

CLASS EIGHTEEN: OCTOBER 18, 2012

ASSIGNMENT: COURSE READER PAGES 295–298, 459–464, 456–458, 465–494

Exceptions to the Exclusionary Rule

Exceptions to the Exclusionary Rule—Independent Source and Inevitable Discovery: *United States v. Stabile* (3rd Cir. 2001)

We return to *Stabile* for the third and final time, this time to pick up its overview of the independent source and inevitable discovery exceptions to the exclusionary rule.

Exceptions to the Exclusionary Rule—Attenuation of the Taint: *Wong Sun v. United States* (U.S. 1963)

In *Wong Sun*, the Court observed that not all evidence that represents the “but for” product of police illegality will necessarily be excluded from evidence because of the police impropriety. As to some evidence, the “taint” of the illegality will become sufficiently “attenuated” as to justify the admission of subsequently obtained evidence. But when does the “taint” become sufficiently attenuated?

Exceptions to the Exclusionary Rule—Attenuation of the Taint: *Hudson v. Michigan* (U.S. 2006)

In *Hudson*, a narrow majority of the Court found the exclusionary rule inapplicable to violations of the “knock and announce” rule that governs the execution of warrants.

Exceptions to the Exclusionary Rule—Attenuation of the Taint: *People v. Brendlin* (Cal. 2008)

Brendlin offers another example of how, under the attenuation of the taint exception to the exclusionary rule, even a defendant found to have standing to attack an unlawful search may not prevail upon a motion to suppress.

Exceptions to the Exclusionary Rule—Attenuation of the Taint: *New York v. Harris* (U.S. 1990)

The Supreme Court has found the exclusionary rule inapplicable in certain situations where (in the Court’s opinion) this “punishment” didn’t fit the officers’ “crime.” *Hudson* offers one example of this sort of analysis; *Harris*, another.

Exceptions to the Exclusionary Rule—Attenuation of the Taint: *Rawlings v. Kentucky* (U.S. 1980)

We’ll return to *Rawlings* to pick up its (brief) discussion of attenuation of the taint.

Exceptions to the Exclusionary Rule—Good Faith: *United States v. Leon* (U.S. 1984)

The “good faith” exception to the exclusionary rule remains the most nebulous of the various exceptions. *United States v. Leon*, the wellspring of this doctrine, applied the

“good faith” exception to situations where review of a warrant and its supporting materials reveals that the magistrate lacked (by a little) a “substantial basis” for finding probable cause.

Exceptions to the Exclusionary Rule—Good Faith: *Herring v. United States* (U.S. 2009)

Herring reviews other contexts in which the Court has applied the “good faith” exception to the exclusionary rule, and extended the exception to a situation in which police negligently allowed a withdrawn arrest warrant to remain in a central database, thereby producing an arrest that led to the seizure of evidence. Post-*Herring*, the question becomes, in what *other* sorts of situations will courts apply the exception?

Impeachment

CLASS NINETEEN: OCTOBER 23, 2012

ASSIGNMENT: COURSE READER PAGES 495–496

B. THE FIFTH AMENDMENT

I. Due Process

The Fifth Amendment (Part I): Identifications

CLASS TWENTY: OCTOBER 25, 2012

ASSIGNMENT: COURSE READER PAGES 497–513

The Fifth Amendment (Part II)

People v. Coomer

Due Process—Confessions: *Arizona v. Fulminante* (U.S. 1991)

Due-process issues in connection with confessions by defendants don’t crop up as often as they used to, mostly due to *Miranda*. *Fulminante* represents an exception, since *Miranda* didn’t apply under the circumstances.

Harmless Error

Due Process—Confessions: *Colorado v. Connelly* (U.S. 1986)

The *Connelly* Court considered whether due process was offended when a confession spontaneously given by a mentally disturbed individual was introduced into evidence at his trial. Answering this question in the negative, the Court clarified that police misconduct represents an essential element of any due-process claim alleging an involuntary confession.

Due Process—Confessions: *United States v. Braxton* (4th Cir. 1997)

Finally, to wrap up our consideration of the law regarding involuntary confessions, we'll read this recent Fourth Circuit decision.

Trickieration, Redux

CLASS TWENTY-ONE: OCTOBER 30, 2012

ASSIGNMENT: COURSE READER PAGES 514–531, 222–224

II. The Privilege Against Self-Incrimination

The Privilege Against Self-Incrimination: *Schmerber v. California* (U.S. 1966)

Schmerber relates one of the basic limits to the reach of the Self-Incrimination Clause, namely, its inapplicability to physical, as opposed to testimonial, evidence.

The Privilege Against Self-Incrimination: *Hiibel v. Sixth District Court* (U.S. 2004)

We return to *Hiibel* to consider its treatment of the self-incrimination issue raised by the defendant in that case. When, if ever, will it violate the Fifth Amendment to require a suspect to tell his name to law enforcement?

The Privilege Against Self-Incrimination: *United States v. Hubbell* (U.S. 2000)

Somewhat surprisingly (to laypeople), the privilege against self-incrimination does not necessarily protect against the compelled production of pre-existing documentary evidence. However, the act of production is often itself “testimonial” in nature, which can provide suspects with a Fifth Amendment argument against disclosure of documents or other information sought by law enforcement.

Hubbell: *A Brief Recap*

Password-Protected?

CLASS TWENTY-TWO: NOVEMBER 1, 2012

ASSIGNMENT: COURSE READER PAGES 532–561

The Privilege Against Self-Incrimination: *Miranda v. Arizona* (U.S. 1966)

The Court's decision in *Miranda* fundamentally altered police practice, while at the same time providing fodder for conservative attacks on the Warren Court.

The Miranda Rights

A Miranda Roadmap

McNabb-Mallory

Miranda and the Constitution

The Privilege Against Self-Incrimination—*Miranda*—The “Custody” Requirement: *Oregon v. Mathiason* (U.S. 1977)

While officers are free to give *Miranda* advisement in other situations, as well, *Miranda* warnings are required only prior to custodial interrogations. *Oregon v. Mathiason* considers what amounts to “custody” in this context.

The Privilege Against Self-Incrimination—*Miranda*—The “Custody” Requirement: *People v. Pilster* (Cal. App. 2006)

Whereas *Oregon v. Mathiason* involved a stationhouse interrogation, many difficult *Miranda* issues arise in connection with questioning in the field. While routine questioning during a traffic stop does not amount to custodial interrogation, as *People v. Pilster* indicates, some field contacts can escalate into custodial situations.

Beating the Police to the Punch?

The Privilege Against Self-Incrimination—*Miranda*—The “Interrogation” Requirement: *Rhode Island v. Innis* (U.S. 1980)

Innis takes up the “interrogation” requirement that’s subsumed within a *Miranda* claim. But did the *Innis* majority correctly apply the standard it related?

CLASS TWENTY-THREE: NOVEMBER 6, 2012

ASSIGNMENT: COURSE READER PAGES 562–593

The Privilege Against Self-Incrimination—*Miranda*—The Necessary *Miranda* Advisements: *Florida v. Powell* (U.S. 2010)

To what extent can police officers deviate from the “script” of *Miranda* advisements? *Florida v. Powell* represents the Court’s latest take on this subject.

The Privilege Against Self-Incrimination—*Miranda*—Invocation and Waiver: *Davis v. United States* (U.S. 1994)

The Privilege Against Self-Incrimination—*Miranda*—Invocation and Waiver: *Berghuis v. Thompkins* (U.S. 2010)

How clear does a suspect have to be in invoking his or her *Miranda* rights? As *Davis* and *Berghuis*, read together, establish, the answer is “pretty darned clear.”

Clarification, or Conniving?

Miranda Invocation and Waiver: Post-Berghuis

The Privilege Against Self-Incrimination—*Miranda*—Consequences of Invocation (Right to Silence): *Michigan v. Mosley* (U.S. 1975)

What happens when a suspect invokes his (or her) right to silence under *Miranda*? Can police re-initiate questioning? If so, under what circumstances? Though more than three decades old, *Mosley* still lays out the pertinent law.

The Privilege Against Self-Incrimination—*Miranda*—Consequences of Invocation (Right to Counsel): *Edwards v. Arizona* (U.S. 1981)

What about a suspect's invocation of the right to counsel? When, if ever, can the police re-initiate questioning? *Edwards* relates the far more stringent rule that applies to invocations of this right, as compared to invocations of the right to silence.

Additional *Miranda* Material

The Privilege Against Self-Incrimination—*Miranda*—Consequences of Invocation (Right to Counsel): *Maryland v. Shatzer* (U.S. 2010)

Many years ago, a *Law & Order* episode considered whether a suspect's invocation of his right to counsel precluded the re-initiation of questioning, forever. *Shatzer* makes it clear that the answer to this question is “no,” but the Court's decision does not address every possible scenario in which an invocation of this right may (or may not) “dissipate” over time.

A Perfect Storm?

CLASS TWENTY-FOUR: NOVEMBER 8, 2012

ASSIGNMENT: COURSE READER PAGES 594–612

The Privilege Against Self-Incrimination—*Miranda*—*Miranda* Exceptions (Public Safety): *New York v. Quarles* (U.S. 1984)

The Court in *Quarles* recognized an exception to the *Miranda* requirement that permits limited questioning in and as necessary to resolve certain emergencies. Is this a reasonable relaxation of *Miranda*, or does it unduly complicate what was intended as a bright-line rule?

A Terrorism Exception to Miranda?

The “Routine Booking Questions” Exception

The Privilege Against Self-Incrimination—*Miranda*—*Miranda* Limitations: *United States v. Patane* (U.S. 2004)

In addition to limiting the scope of the *Miranda* rule, the Rehnquist Court also pared back the remedies that exist for *Miranda* violations. In *United States v. Patane*, the court concluded that physical evidence obtained as a result of a *Miranda* violation would not be regarded as “fruit of the poisonous tree.”

Able and Baker

Miranda Mishap?

The Privilege Against Self-Incrimination—*Miranda*—Limits Upon the Suppression Remedy: *Missouri v. Seibert* (U.S. 2004)

Speaking of possible “fruit of the poisonous tree” issues, what about a defendant’s own, *Mirandized* statements, obtained after a violation of *Miranda* in an earlier interrogation of the defendant? A divided court in *Seibert* grappled with the admissibility of the second set of statements on these facts.

CLASS TWENTY-FIVE: NOVEMBER 13, 2012

ASSIGNMENT: COURSE READER PAGES 613–630

C. The Sixth Amendment: Right to Counsel

The Sixth Amendment

The Right to Counsel: *Massiah v. United States* (U.S. 1964)

Massiah applied the exclusionary rule to situations in which the prosecution deliberately elicits incriminating statements from a defendant after the initiation of formal judicial proceedings, at which time the Sixth Amendment right to counsel attaches. Because *Miranda* and *Massiah* are both principally concerned with statements elicited from the defendant (indeed, post-*Patane*, *Miranda* is exclusively so), it’s easy to confuse the two. We’ll discuss some of the “easy” distinctions, then proceed to a few more difficult scenarios.

The Right to Counsel—*Massiah*—Application: *Brewer v. Williams* (U.S. 1977)

Brewer features a spirited conversation among the justices as to the costs and benefits associated with the exclusion of evidence obtained in violation of the Sixth Amendment, as construed in *Massiah*. *Brewer* also underscores how, in contrast with the rule applicable to *Miranda* violations, the “fruit of the poisonous tree” doctrine does apply to violations of a defendant’s Sixth Amendment rights.

The Miranda and Sixth Amendment Right to Counsel

CLASS TWENTY-SIX: NOVEMBER 15, 2012

ASSIGNMENT: COURSE READER PAGES 631–648

The Right to Counsel—*Massiah*—Application: *Randolph v. People of the State of California* (9th Cir. 2004)

Conversations with jailhouse informants (“snitches”) normally don’t implicate *Miranda*, since they are not “interrogations” within the scope of the *Miranda* rule. But once Sixth Amendment rights attach, police must be extremely careful in how they deploy these informants. *Randolph* demonstrates why—though not all courts agree with what they perceive as *Randolph*’s “extension” of *Massiah*.

The Right to Counsel—*Massiah*—Limitations: *Texas v. Cobb* (U.S. 2001)

Texas v. Cobb prescribes that the Sixth Amendment right, as construed in *Massiah*, is offense-specific, meaning that it’s defined by and limited to the four corners of the charging instrument involved in the judicial proceeding at hand. Questioning about other, uncharged crimes—even crimes closely related to the charged offenses—will not run afoul of *Massiah*.

Hypothetical: Massiah Mistake?

The Right to Counsel—*Massiah*—Waiver: *Montejo v. Louisiana* (U.S. 2009)

In *Montejo*, the Court revisited the rules that govern a defendant’s waiver of his or her Sixth Amendment rights, replacing a strict standard for waiver with a significantly more liberal approach.

CLASSES TWENTY-SEVEN AND TWENTY-EIGHT: NOVEMBER 20 AND 27, 2012

These classes will be review (and possibly, update) sessions, with no required reading at this time.

OTHER INFORMATION ABOUT THE INSTRUCTOR AND COURSE

Instructor: Kyle Graham

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Teaching Style: I use the Socratic method, and call on students in alphabetical order. A student who is either absent when called upon or completely unprepared (without prior explanation to the instructor) may have his or her grade reduced for poor class participation. If a student is absent or completely unprepared (again, without prior explanation) when called upon a second time, a reduced grade is a near certainty, and I may remove the student from the class roster.

The bottom line is this: You'll get a lot more out of this course if you keep up with your reading. At a minimum, do your reading when you're on call, or within the shadow of being on call. Please do me (and yourself) this one favor: know that I don't accept "pass" as a response to a question. **If you're on call and didn't do the reading, please come talk to me ahead of class.** Things happen that prevent proper class preparation; I understand. If you *don't* come to me ahead of time, and are unprepared, you'll still be on call. We'll just work from first principles, and I'll make the proper notes re: class participation.

Computer and Phone Policy:

Computers: Except as expressly authorized in advance by me, you should only use your laptop computer in class for taking notes, consulting case briefs or notes, or accessing online legal sources. Unrelated internet surfing, e-mailing, chatting, texting, playing video games, etc., is frowned upon. I reserve the right to reduce your class participation grade if I observe you using your computer in a prohibited manner.

Cell phones: Again, except as expressly authorized in advance by me, you may not use your cell phone in class, and I reserve the right to reduce your class participation grade if you use your telephone in a prohibited manner. As a courtesy, please turn off your cell phone before class begins.

Final Examination: The final examination in this course will consist of essay and short-answer questions.

Office Hours: I will relate my office hours during our first class session. As a matter of course, you are invited to contact me at the e-mail address provided on the previous page. The one condition I impose upon questions asked over e-mail is this: please send me your proposed answer, and your reasoning, along with your question.

