UNDERSTANDING CRIMINAL PROCEDURE
Volume 1: Investigation
LexisNexis Law School Publishing
Advisory Board

Paul Caron
Charles Hartsock Professor of Law
University of Cincinnati College of Law

Olympia Duhart
Professor of Law and Director of Lawyering Skills & Values Program
Nova Southeastern University Shepard Broad Law School

Samuel Estreicher
Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

Steven I. Friedland
Professor of Law
Elon University School of Law

Joan Heminway
College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried
Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus
Haynes Professor of Law
William and Mary Law School

John Sprankling
Distinguished Professor of Law
McGeorge School of Law

Melissa Weresh
Director of Legal Writing and Professor of Law
Drake University Law School
To The Girls In My Life: Lucy Belle and Maya Shoshana

&

To Noah’s Wonderful Caretakers: Izzy, Gabby, Sophie, Pam and Gus

— J.D.

To Barbara and Roger Michaels: Thank you, for everything

— A.C.M.
PREFACE

This text is intended for use in law schools, although we can report with pleasure that legal scholars, practicing attorneys, and judges have found it of value in their work.

This volume is intended for use in criminal procedure courses focusing primarily or exclusively on police investigatory process. Such courses are variously titled: Criminal Procedure I; Criminal Procedure: Investigation; Criminal Procedure: Police Practices; Constitutional Criminal Procedure; etc. Because some such courses also cover the defendant’s right to counsel at trial and on appeal, this text includes a chapter on this non-police-practice issue. This sixth edition incorporates the many significant changes in the law that have occurred since publication of the last edition.

Because UNDERSTANDING CRIMINAL PROCEDURE is primarily designed for law students, it is written so that students can use it with confidence that it will assist them in course preparation. Indeed, frequently professors recommend or assign this text to their students to improve classroom dialogue. Based on the experience of prior editions, as well, we are confident that this sixth edition will continue to prove useful to scholars, practicing lawyers, and courts.

The text covers the most important United States Supreme Court cases in the field. Where pertinent, the Federal Rules of Criminal Procedure, federal statutes, and lower federal and state court cases are considered. The broad overarching policy issues of criminal procedure are laid out; and some of the hottest debates in the field are considered in depth and, we think, objectively.

Readers should find the text user-friendly. Students who want a thorough grasp of a topic can and should read the relevant chapter in its entirety. However, each chapter is divided into subsections, so that readers with more refined research needs can find answers to their questions efficiently. We also include citations to important scholarship, both classic and recent, into which readers may delve more deeply regarding specific topics. And because so many of the topics interrelate, cross-referencing footnotes are included so that readers can easily move from one part of the book to another, if necessary.

Gender policy of the Text. Obviously, women as well as men fill all the roles in the criminal justice system: lawyer, judge, police officer, legislator, criminal suspect, and victim. Accordingly, in even-numbered chapters, we use the male pronoun to describe hypothetical and generic parties in the criminal justice system; in odd-numbered chapters, women get equal time. Based on comments we have received about this policy, most readers like the approach or, at worst, find it only temporarily distracting.

Acknowledgments. Many persons helped make these volumes possible. We can name only a few here. Professors Lee Lamborn and the late Joseph Grano read and commented on every page of every chapter of the manuscript for the first edition. Professor George Thomas did the same with the second edition. Various people have commented on drafts of chapters of later editions. The text is much better because of their generous assistance. Mistakes and omissions are the result of our stubborn refusal to listen to advice.
PREFACE

We thank our families for their love and support.

Joshua Dressler
Alan C. Michaels
January 2013
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter 1 INTRODUCTION TO CRIMINAL PROCEDURE</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 1.01 THE RELATIONSHIP OF “CRIMINAL LAW” TO “CRIMINAL PROCEDURE”</td>
<td>1</td>
</tr>
<tr>
<td>§ 1.02 SOURCES OF PROCEDURAL LAW</td>
<td>2</td>
</tr>
<tr>
<td>[A] Formal Sources</td>
<td>2</td>
</tr>
<tr>
<td>[B] Informal Sources: A Taste of Reality</td>
<td>4</td>
</tr>
<tr>
<td>§ 1.03 STAGES OF A CRIMINAL PROSECUTION</td>
<td>5</td>
</tr>
<tr>
<td>[A] Investigatory Stage</td>
<td>5</td>
</tr>
<tr>
<td>[1] Search and Seizure</td>
<td>5</td>
</tr>
<tr>
<td>[2] Interrogation</td>
<td>6</td>
</tr>
<tr>
<td>[3] Identification Procedures</td>
<td>6</td>
</tr>
<tr>
<td>[C] Adjudicatory Stage</td>
<td>7</td>
</tr>
<tr>
<td>[1] Issuance of a Complaint</td>
<td>7</td>
</tr>
<tr>
<td>[3] First Appearance Before the Magistrate</td>
<td>8</td>
</tr>
<tr>
<td>[6] Pretrial Motions</td>
<td>10</td>
</tr>
<tr>
<td>[7] Trial</td>
<td>10</td>
</tr>
<tr>
<td>[8] Sentencing and Post-Trial Proceedings</td>
<td>11</td>
</tr>
<tr>
<td>[a] Sentencing</td>
<td>11</td>
</tr>
<tr>
<td>[b] Appeal</td>
<td>11</td>
</tr>
<tr>
<td>[c] Collateral Attack of a Conviction: Habeas Corpus</td>
<td>11</td>
</tr>
<tr>
<td>§ 1.04 STUDYING CONSTITUTIONAL LAW CASES</td>
<td>13</td>
</tr>
<tr>
<td>[A] Read Concurring and Dissenting Opinions</td>
<td>13</td>
</tr>
<tr>
<td>[B] Learn Case Names</td>
<td>13</td>
</tr>
<tr>
<td>[C] Count Votes</td>
<td>14</td>
</tr>
<tr>
<td>[D] Learn the Views of Individual Justices</td>
<td>14</td>
</tr>
<tr>
<td>[E] Be Sensitive to Supreme Court History</td>
<td>15</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 2 OVERARCHING POLICY ISSUES IN CRIMINAL PROCEDURE</th>
<th>21</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 2.01 NORMS OF THE CRIMINAL PROCESS</td>
<td>21</td>
</tr>
<tr>
<td>§ 2.02 ALTERNATIVE MODELS OF CRIMINAL JUSTICE</td>
<td>22</td>
</tr>
<tr>
<td>[A] Overview</td>
<td>22</td>
</tr>
<tr>
<td>[B] Crime Control Model of Criminal Justice</td>
<td>23</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

[C] Due Process Model of Criminal Justice .......................... 24
§ 2.03 THE ROLE OF “TRUTH” IN THE CRIMINAL JUSTICE SYSTEM 26
§ 2.04 ACCUSATORIAL VERSUS INQUISITORIAL SYSTEMS OF JUSTICE ........................................... 29
§ 2.05 RACE, GENDER, AND ECONOMIC CLASS IN THE LAW .......... 31
§ 2.06 WHO SHOULD DEVISE THE RULES OF CRIMINAL PROCEDURE? 33
§ 2.07 FORMULATING THE RULES OF CRIMINAL PROCEDURE: SOME OVERARCHING CONTROVERSIES .................... 34
  [A] Bright-Line Rules versus Case-by-Case Adjudication .......... 34
  [B] Subjectivity versus Objectivity: Rule-Making to Avoid Pretextual Conduct ............................................. 37

Chapter 3 INCORPORATION OF THE BILL OF RIGHTS .......... 41
  § 3.01 INCORPORATION: OVERVIEW .................................. 41
  [A] Nature of the Issue ................................................. 41
  [B] Importance of the Debate ........................................... 42
  § 3.02 INCORPORATION THEORIES .................................... 43
  [A] Full Incorporation .................................................. 43
  [B] Fundamental Rights ................................................. 43
  [C] Full-Incorporation-Plus ........................................... 44
  [D] Selective Incorporation ............................................. 44
  § 3.03 THE INCORPORATION DEBATE .................................. 45
  [A] Overview of the Debate ............................................ 45
  [B] What Did the Framers Intend? ..................................... 45
  [D] Which Doctrine is More Libertarian? ............................ 46
  [E] Which Theory Is Structurally Preferable? ....................... 47
  § 3.04 WHICH THEORY HAS “WON” THE DEBATE? .................. 47

Chapter 4 FOURTH AMENDMENT: OVERVIEW .................. 49
  § 4.01 A WARNING BEFORE BEGINNING THE FOURTH AMENDMENT JOURNEY .............................................. 49
  § 4.02 THE TEXT AND SOME (HOPEFULLY) USEFUL INITIAL OBSERVATIONS ............................................ 50
  § 4.03 WHAT DOES THE FOURTH AMENDMENT SEEK TO PROTECT?: AN OVERVIEW ........................................ 52
  [A] The Supreme Court’s View ......................................... 52
  [B] The Reflections of Some Scholars .................................. 54
  § 4.04 SOME THINGS TO KNOW AT THE OUTSET .................. 55
  [A] Standing to Raise Fourth Amendment Claims ................... 55
  [B] Exclusionary Rule .................................................... 56
TABLE OF CONTENTS

[C]  Pretrial Nature of Fourth Amendment Issues .......................... 56
[D]  “Private” Searches and Seizures ...................................... 57
[E]  Who Are “the People” Protected by the Fourth Amendment? .......... 58
§ 4.05  FOURTH AMENDMENT CHECKLIST ................................. 60

Chapter 5  FOURTH AMENDMENT: “PERSONS, HOUSES, PAPERS, AND EFFECTS” ................................................. 63

§ 5.01  SIGNIFICANCE OF THE CONSTITUTIONAL PHRASE ............. 63
§ 5.02  “PERSONS” ............................................................ 63
§ 5.03  “HOUSES” ............................................................. 64
§ 5.04  “PAPERS AND EFFECTS” .......................................... 65

Chapter 6  FOURTH AMENDMENT TERMINOLOGY: “SEARCH” ................. 67

§ 6.01  WHY “SEARCH” LAW MATTERS ..................................... 67
[A]  Constitutional Significance of the Term “Search” ...................... 67
[B]  An Important Question for Further Consideration ..................... 68
§ 6.02  “SEARCH”: ORIGINAL “TRESPASS” ANALYSIS .................. 68
§ 6.03  “SEARCH”: KATZ v. UNITED STATES AND THE NEW “PRIVACY” ANALYSIS .................................................. 70
[A]  An Overview ............................................................... 70
[B]  Majority Opinion: In Search of a New Test ............................ 71
[C]  Concurring Opinion: A New “Search” Test ............................ 72
[D]  Analysis and Critique of the New Test ................................ 73
[1]  Overview ................................................................. 73
[2]  Should We Have the Subjective Prong? ................................ 74
§ 6.04  POST-KATZ “SEARCH” JURISPRUDENCE: AN OVERVIEW .......... 78
[A]  What Has Katz Wrought? ................................................. 78
[2]  Subjective Prong ........................................................ 79
[3]  Objective Prong ........................................................ 79
[B]  Lurking Issues ............................................................ 80
§ 6.05  SURVEILLANCE OF CONVERSATIONS BY “FALSE FRIENDS” .... 81
[A]  “False Friends” versus Katz ........................................... 81
[B]  False Friends ............................................................. 82
[C]  “Wired” False Friends ................................................... 84
§ 6.06  OPEN FIELDS ................................................................ 85
[A]  Rule and Rationale ......................................................... 85
[B]  “Open Field” versus “Curtilage” ....................................... 86
[C]  Criticism of the Open-Fields Doctrine ................................. 87
§ 6.07  AERIAL SURVEILLANCE .............................................. 88
## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[A]</td>
<td>Rule</td>
<td>88</td>
</tr>
<tr>
<td>[B]</td>
<td>Surveillance by Airplanes</td>
<td>88</td>
</tr>
<tr>
<td>[C]</td>
<td>Surveillance by Helicopters</td>
<td>89</td>
</tr>
<tr>
<td>§ 6.08</td>
<td>USE OF DOGS AND OTHER “LIMITED” INVESTIGATIVE TECHNIQUES TO DISCOVER CONTRABAND</td>
<td>92</td>
</tr>
<tr>
<td>[A]</td>
<td>Dog-Sniffs</td>
<td>92</td>
</tr>
<tr>
<td>[B]</td>
<td>Beyond Dogs</td>
<td>94</td>
</tr>
<tr>
<td>§ 6.09</td>
<td>TECHNOLOGICAL INFORMATION GATHERING</td>
<td>94</td>
</tr>
<tr>
<td>[A]</td>
<td>In General</td>
<td>94</td>
</tr>
<tr>
<td>[B]</td>
<td>Pen Registers</td>
<td>96</td>
</tr>
<tr>
<td>[C]</td>
<td>Electronic Tracking Devices: The “Beeper Cases”</td>
<td>97</td>
</tr>
<tr>
<td>[D]</td>
<td>Thermal Imaging Devices</td>
<td>99</td>
</tr>
</tbody>
</table>

### Chapter 7  FOURTH AMENDMENT TERMINOLOGY:

**“SEIZURE”** ........................................ 105

<table>
<thead>
<tr>
<th>§ 7.01</th>
<th>CONSTITUTIONAL SIGNIFICANCE OF THE TERM “SEIZURE”</th>
<th>105</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 7.02</td>
<td>SEIZURE OF PROPERTY</td>
<td>105</td>
</tr>
<tr>
<td>[A]</td>
<td>General Rule</td>
<td>105</td>
</tr>
<tr>
<td>[B]</td>
<td>Special Issue: Installation of Electronic Devices On or In Personal Property</td>
<td>106</td>
</tr>
<tr>
<td>§ 7.03</td>
<td>SEIZURE OF PERSONS</td>
<td>107</td>
</tr>
<tr>
<td>[A]</td>
<td>Overview</td>
<td>107</td>
</tr>
<tr>
<td>[B]</td>
<td>The <em>Terry</em> Definition</td>
<td>108</td>
</tr>
<tr>
<td>[C]</td>
<td>The <em>Mendenhall</em> “Reasonable Person” Test</td>
<td>108</td>
</tr>
<tr>
<td>[1]</td>
<td>In General</td>
<td>108</td>
</tr>
<tr>
<td>[2]</td>
<td>Some Applications of the Test</td>
<td>109</td>
</tr>
<tr>
<td>[a]</td>
<td>Seizure by Questioning?</td>
<td>109</td>
</tr>
<tr>
<td>[b]</td>
<td>Factory Sweeps</td>
<td>111</td>
</tr>
<tr>
<td>[c]</td>
<td>Bus Sweeps</td>
<td>111</td>
</tr>
<tr>
<td>[D]</td>
<td>Embellishment on the <em>Terry-Mendenhall Test</em>: The Submission-to-Authority Problem</td>
<td>114</td>
</tr>
</tbody>
</table>

### Chapter 8  FOURTH AMENDMENT: “PROBABLE CAUSE”  117

<table>
<thead>
<tr>
<th>§ 8.01</th>
<th>THE CONSTITUTIONAL ROLE OF “PROBABLE CAUSE”</th>
<th>117</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 8.02</td>
<td>PROBABLE CAUSE: GENERAL PRINCIPLES</td>
<td>118</td>
</tr>
<tr>
<td>[A]</td>
<td>“Probable Cause”: Definition</td>
<td>118</td>
</tr>
<tr>
<td>[B]</td>
<td>“Probable Cause”: Objective versus Subjective</td>
<td>118</td>
</tr>
<tr>
<td>[C]</td>
<td>“Probable Cause”: Arrests versus Searches</td>
<td>119</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

[D] “Probable Cause”: With or Without Warrants .......................... 119
[E] “Probable Cause”: Search For and Seize What? .......................... 120
[F] Special Issue: “Probable Cause” and Pretextual Police Conduct ...... 122

§ 8.03 DETERMINING “PROBABLE CAUSE”: OVERVIEW ............ 123
[A] Types of Information: In General ........................................ 123
[B] “Bald and Unilluminating” Assertions .................................. 124
[C] Direct Information ....................................................... 124
[D] Hearsay (“Informant”) Information .................................... 125

§ 8.04 THE AGUILAR TWO-PRONGED TEST ............................ 126
[A] In General ............................................................... 126
[B] Basis-of-Knowledge Prong ............................................. 127
[1] In General ............................................................... 127
[2] “Self-Verifying Detail” .................................................. 127
[C] Veracity Prong ........................................................... 128

§ 8.05 THE GATES “TOTALITY OF THE CIRCUMSTANCES” TEST ...... 130
[A] The Test Explained ...................................................... 130
[B] Criticism of Gates ..................................................... 131

§ 8.06 PROBABLE CAUSE IN “ADMINISTRATIVE SEARCHES”: THE REASONABLENESS STANDARD AND THE CAMARA PRINCIPLE . 133

§ 8.07 HOW PROBABLE IS “PROBABLE CAUSE”? ..................... 134
[A] Governing Law ........................................................... 134

[C] “Probable Cause” as a Sliding Scale? ................................. 138
[1] Is There a Sliding Scale? .............................................. 138
[2] Should There Be a Sliding Scale? .................................... 139

Chapter 9 ARRESTS ......................................................... 141

§ 9.01 “ARREST”: OVERVIEW ............................................. 141
[A] Definition ..................................................................... 141
[B] “Arrest” versus “Seizure” .............................................. 141

§ 9.02 ARRESTS: COMMON LAW AND STATUTORY ARREST RULES . 142

§ 9.03 CUSTODIAL ARRESTS FOR MINOR OFFENSES .............. 142

§ 9.04 GROUNDS FOR ARREST: “STOP AND IDENTIFY” STATUTES . 145

§ 9.05 ARREST WARRANTS: CONSTITUTIONAL LAW ................ 146
[A] Overview ................................................................. 146
[B] Arrest in a Public Place: The No-Warrant Rule .................. 147
[1] In General ............................................................... 148
TABLE OF CONTENTS

Chapter 11 WARRANTLESS SEARCHES: EXIGENT CIRCUMSTANCES ................................................................. 179

§ 11.01 EXIGENCE EXCEPTION: EXPLAINED .................................................. 179
§ 11.02 INTRUSIONS INSIDE THE HUMAN BODY ........................................... 181
§ 11.03 EXTERNAL SEARCHES OF THE BODY .............................................. 182
§ 11.04 ENTRY AND SEARCH OF A HOME .................................................. 183

Chapter 12 SEARCHES INCIDENT TO LAWFUL ARRESTS ............. 185

§ 12.01 WARRANT EXCEPTION: IN GENERAL ............................................ 185
[A] Rule ............................................................................ 185
[B] Rationale of the Warrant Exception ........................................... 185
[C] Probable Cause ................................................................ 186
[1] For the Search .................................................................. 186
§ 12.02 WARRANT EXCEPTION: IN GREATER DETAIL .................... 187
[A] The Arrest ................................................................... 187
[1] “Full Custodial” .............................................................. 187
[2] Lawfulness of the Arrest ................................................. 189
[B] Contemporaneity of the Search ............................................ 189
[1] Area within Arrestee’s Immediate Control .......................... 189
[2] Closets and Other Spaces Adjoining the Place of Arrest .... 190
[3] Of the Person ................................................................. 190
[C] Scope of the Search .......................................................... 191
[1] Search of the Person ....................................................... 191
[2] Area within the Arrestee’s Immediate Control .................. 191
[a] In General ................................................................ 191
[b] Automobiles ................................................................. 192
§ 12.03 CHIMEL v. CALIFORNIA: SETTING THE RULE’S CONTOURS ...... 193
§ 12.04 UNITED STATES v. ROBINSON: THE TRAFFIC ARREST CASE .... 195
[A] The Holding .................................................................. 195
[B] Robinson versus Chimel ................................................ 196
§ 12.05 SEARCHES OF AUTOMOBILES INCIDENT TO ARREST .......... 197
[A] New York v. Belton .......................................................... 197
[B] Thornton v. United States ................................................. 200

Chapter 13 SEARCHES OF CARS AND CONTAINERS THEREIN ...... 205

§ 13.01 AUTOMOBILE SEARCH WARRANT EXCEPTION: GENERAL RULES .................................................. 205
TABLE OF CONTENTS

[A] Important Overview ........................................... 205
[B] Searches “At the Scene” ...................................... 206
[C] Searches “Away From the Scene” .............................. 207
[D] Probable Cause Requirement ................................. 207

§ 13.02 AUTOMOBILE SEARCH WARRANT EXCEPTION: THE “MOBILITY” RATIONALE ................................. 208
[A] Carroll v. United States: True Mobility ....................... 208
[B] Chambers v. Maroney: A Controversial View of “Mobility” ... 209
[C] Coolidge v. New Hampshire: Departing From Chambers ....... 211

§ 13.03 AUTOMOBILE SEARCH WARRANT EXCEPTION: LESSER PRIVACY, A NEW RATIONALE ....................... 213

§ 13.04 CALIFORNIA v. CARNEY: THE MOBILITY AND LESSER-EXPECTATION-OF-PRIVACY RATIONALES AT WORK ... 215

§ 13.05 SPECIAL PROBLEM: SEARCH OF CONTAINERS FOUND IN CARS .................................................. 216
[A] Clarification of the Issue ...................................... 216
[1] In General ..................................................... 216
[2] What is a “Container”? ........................................ 216
[B] General Rule .................................................. 217
[C] How the Container Rules Developed .......................... 218
[1] United States v. Chadwick .................................... 218

Chapter 14 “PLAIN VIEW” AND RELATED DOCTRINES ............ 227

§ 14.01 PLAIN VIEW: GENERAL PRINCIPLES ....................... 227
[A] Elements of the Doctrine ..................................... 227
[B] Rationale of the Doctrine ................................. 227

§ 14.02 “PLAIN VIEW”: EXAMINING THE ELEMENTS IN DETAIL ........ 228
[A] Element 1: Lawful Vantage Point ........................... 228
[B] Element 2: Right of Access to the Object ................. 229
[C] Element 3: Right to Seize is “Immediately Apparent” ...... 229

§ 14.03 THE PLAIN VIEW DOCTRINE AT WORK: ARIZONA v. HICKS .... 230


§ 14.05 EXPANDING ON PLAIN VIEW: USE OF OTHER SENSES ......... 234
[A] “Plain Hearing” and “Plain Smell” Doctrines .................. 234
[B] “Plain Touch” (or “Plain Feel”) Doctrine ........................ 234
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter 15</th>
<th>INVENTORY SEARCHES</th>
<th>237</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 15.01 AUTOMOBILE INVENTORIES</td>
<td>237</td>
<td></td>
</tr>
<tr>
<td>[A] General Principles</td>
<td>237</td>
<td></td>
</tr>
<tr>
<td>[B] The Inventory Exception: In Detail</td>
<td>239</td>
<td></td>
</tr>
<tr>
<td>[1] Administrative Non-Pretextual Nature of the Search</td>
<td>239</td>
<td></td>
</tr>
<tr>
<td>[2] “Routine” Nature of the Inventory</td>
<td>240</td>
<td></td>
</tr>
<tr>
<td>[a] In General</td>
<td>240</td>
<td></td>
</tr>
<tr>
<td>[b] Nondiscretionary Inventories</td>
<td>241</td>
<td></td>
</tr>
<tr>
<td>[c] Discretionary Inventories</td>
<td>241</td>
<td></td>
</tr>
<tr>
<td>[3] Automobile Owner’s Wishes</td>
<td>241</td>
<td></td>
</tr>
<tr>
<td>[4] Scope of an Inventory</td>
<td>242</td>
<td></td>
</tr>
<tr>
<td>[a] Containers</td>
<td>242</td>
<td></td>
</tr>
<tr>
<td>[b] Locked Portions of the Automobile</td>
<td>242</td>
<td></td>
</tr>
<tr>
<td>[c] Inspection of Papers</td>
<td>243</td>
<td></td>
</tr>
<tr>
<td>§ 15.02 ARREST INVENTORIES</td>
<td>243</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 16</th>
<th>CONSENT SEARCHES</th>
<th>245</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 16.01 PRELIMINARY OBSERVATIONS: PRAGMATISM, THE POLICE, AND THE SUPREME COURT</td>
<td>245</td>
<td></td>
</tr>
<tr>
<td>§ 16.02 CONSENT SEARCHES: GENERAL PRINCIPLES</td>
<td>247</td>
<td></td>
</tr>
<tr>
<td>[A] General Rule</td>
<td>247</td>
<td></td>
</tr>
<tr>
<td>[B] Rationale for the Rule</td>
<td>247</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 17</th>
<th>TERRY v. OHIO: THE “REASONABLENESS” BALANCING STANDARD IN CRIMINAL INVESTIGATIONS</th>
<th>261</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 17.01 TERRY v. OHIO: AN OVERVIEW TO A LANDMARK CASE</td>
<td>261</td>
<td></td>
</tr>
<tr>
<td>§ 17.02 TERRY v. OHIO: THE OPINION</td>
<td>263</td>
<td></td>
</tr>
<tr>
<td>[A] Majority Opinion</td>
<td>263</td>
<td></td>
</tr>
<tr>
<td>[B] Justice Harlan’s Concurring Opinion</td>
<td>267</td>
<td></td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

§ 17.03 “REASONABLE SUSPICION” ........................................... 268
[A] In General ....................................................... 268
[B] Types of Information ........................................... 269
[1] Overview .................................................... 269
§ 17.04 DISTINGUISHING A “TERRY STOP” FROM AN ARREST .......... 280
[A] Overview to the Issue ......................................... 280
[B] Length of the Detention ......................................... 280
[C] Forcible Movement of the Suspect ............................. 281
[1] In General .................................................... 281
[2] Special Problem: Removal from an Automobile After a Lawful Stop ......................................................... 281
[D] Existence of “Less Intrusive Means” ............................ 283
§ 17.05 GROUNDS FOR “TERRY STOPS” ................................ 284
[B] Nature of the Offense .......................................... 284
[C] Fingerprinting .................................................. 285
§ 17.06 WEAPONS SEARCHES: OF PERSONS ............................. 285
[A] Permissibility .................................................. 285
[B] Method ......................................................... 286
[1] Pat-Down (Frisk) .............................................. 286
[2] After the Pat-Down ............................................ 287
§ 17.07 EXTENDING TERRY: WEAPONS SEARCHES OF AUTOMOBILES . 287
§ 17.08 EXTENDING TERRY: PROTECTIVE SWEEPS OF RESIDENCES . . . 289
§ 17.09 EXTENDING TERRY: TEMPORARY SEIZURES OF PROPERTY . . . 290

Chapter 18 MORE “REASONABLENESS” BALANCING: SEARCHES AND SEIZURES PRIMARILY CONDUCTED FOR NON-CRIMINAL LAW PURPOSES .............. 293
§ 18.01 OVERVIEW ............................................... 293
§ 18.02 ADMINISTRATIVE SEARCHES .............................. 294
§ 18.03 INTERNATIONAL BORDER SEARCHES AND SEIZURES ........ 296
[A] At the Border .................................................. 296
[B] Near the Border ............................................... 297
[1] In General .................................................... 297
[2] Roving Border Patrols ........................................... 298

xvi
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 18.04</td>
<td>AUTOMOBILE INSPECTIONS AND CHECKPOINTS</td>
<td>299</td>
</tr>
<tr>
<td>[A]</td>
<td>Automobile License and Vehicle Registration Inspections</td>
<td>299</td>
</tr>
<tr>
<td>[B]</td>
<td>Automobile Checkpoints</td>
<td>301</td>
</tr>
<tr>
<td>[1]</td>
<td>Sobriety Checkpoints</td>
<td>301</td>
</tr>
<tr>
<td>§ 18.05</td>
<td>“SPECIAL NEEDS” SEARCHES AND SEIZURES</td>
<td>307</td>
</tr>
<tr>
<td>[A]</td>
<td>In General</td>
<td>307</td>
</tr>
<tr>
<td>[B]</td>
<td>Searches of Persons, Personal Property, and Premises</td>
<td>308</td>
</tr>
<tr>
<td>[1]</td>
<td>Searches Directed at Public School Students</td>
<td>308</td>
</tr>
<tr>
<td>[2]</td>
<td>Searches Directed at Public Employees</td>
<td>310</td>
</tr>
<tr>
<td>[3]</td>
<td>Searches Directed at Probationers</td>
<td>311</td>
</tr>
<tr>
<td>[C]</td>
<td>Drug and Alcohol Testing</td>
<td>312</td>
</tr>
<tr>
<td>[1]</td>
<td>Fourth Amendment Factors in Evaluating Testing</td>
<td>312</td>
</tr>
<tr>
<td>[a]</td>
<td>Public Employees</td>
<td>313</td>
</tr>
<tr>
<td>[b]</td>
<td>Public School Students</td>
<td>315</td>
</tr>
</tbody>
</table>

### Chapter 19  
FOURTH AMENDMENT: STANDING  

§ 19.01  
THE ROLE OF “STANDING” IN FOURTH AMENDMENT LAW  

[B]  
Is “Standing” a Separate Concept?  

§ 19.02  
RATIONALE OF THE STANDING REQUIREMENT  

§ 19.03  
THE LAW OF STANDING: PRE-RAKAS v. ILLINOIS  

[A]  
In General  

[B]  
Automatic Standing  

§ 19.04  
STANDING TO CONTEST A SEARCH: RAKAS v. ILLINOIS  

[A]  
The New Approach  

[B]  
The Impact of Rakas: A Closer Look  

[1]  
Search of Another Person’s Residence  

[a]  
When the Owner or Lessor is Absent  

[b]  
When the Owner or Lessor is Present  

[2]  
Search of One’s Own Automobile When Absent  

[3]  
Search of Another Person’s Automobile  

[a]  
When the Owner is Absent  

[b]  
When the Owner is Present  

[4]  
Contesting a Search Resulting in the Seizure of One’s Own Property  

§ 19.05  
STANDING TO CONTEST A SEIZURE: POST-RAKAS  

xvii
# TABLE OF CONTENTS

*Chapter 20*  
FOURTH AMENDMENT: EXCLUSIONARY RULE  

<table>
<thead>
<tr>
<th>§ 20.01</th>
<th>HISTORICAL DEVELOPMENT OF THE FOURTH AMENDMENT EXCLUSIONARY RULE</th>
<th>339</th>
</tr>
</thead>
<tbody>
<tr>
<td>[A]</td>
<td>Rights versus Remedies</td>
<td>339</td>
</tr>
<tr>
<td>[C]</td>
<td>Exclusionary Rule for the States?</td>
<td>340</td>
</tr>
</tbody>
</table>

| § 20.02 | RATIONALE OF THE EXCLUSIONARY RULE | 343 |
| § 20.03 | IS THE EXCLUSIONARY RULE CONSTITUTIONALLY REQUIRED? | 344 |
| [A] | Political and Historical Overview | 346 |
| [B] | Is There Historical Foundation for the Exclusionary Rule? | 347 |
| [C] | Does the Exclusionary Rule Deter Constitutional Violations? | 348 |
| [D] | Is the Rule (Even If It Deters) Worth Its Cost? | 351 |
| [1] | Should This Question Even Be Asked? | 351 |
| [2] | The “Costs” | 352 |
| [a] | The Rule Protects the Wrong People | 352 |
| [b] | The Rule Promotes Cynicism | 354 |
| [c] | The Rule Results in Disproportionate Punishment | 355 |

| § 20.04 | EXCLUSIONARY RULE: SHOULD IT BE ABOLISHED? | 346 |
| [A] | Political and Historical Overview | 346 |
| [B] | Is There Historical Foundation for the Exclusionary Rule? | 347 |
| [C] | Does the Exclusionary Rule Deter Constitutional Violations? | 348 |
| [D] | Is the Rule (Even If It Deters) Worth Its Cost? | 351 |
| [1] | Should This Question Even Be Asked? | 351 |
| [2] | The “Costs” | 352 |
| [a] | The Rule Protects the Wrong People | 352 |
| [b] | The Rule Promotes Cynicism | 354 |
| [c] | The Rule Results in Disproportionate Punishment | 355 |

| § 20.05 | WHEN THE EXCLUSIONARY RULE DOES NOT APPLY: IN GENERAL | 357 |
| [A] | Non-Criminal Proceedings | 358 |
| [1] | In General | 358 |
| [2] | Habeas Corpus | 358 |
| [B] | Criminal Proceedings | 359 |
| [1] | Non-Trial Proceedings | 359 |
| [2] | At a Criminal Trial | 359 |
| [a] | Impeachment Exception | 359 |
| [b] | Knock-and-Announce Exception | 360 |

| § 20.06 | WHEN THE EXCLUSIONARY RULE DOES NOT APPLY: THE POLICE CULPABILITY FACTOR | 362 |
| [A] | Historical Overview | 362 |
| [1] | The “Good Faith” Rule | 363 |
| [a] | In General | 364 |
| [b] | Improperly Executed Warrants | 365 |
TABLE OF CONTENTS

[C]  Warrantless Searches: Moving Beyond Leon 367
[a]  Reliance on Court-Managed Databases 368
[b]  Reliance on Police-Managed Databases 369
[3]  Reliance on Binding Precedent 371

§ 20.07  “FRUIT OF THE POISONOUS TREE” DOCTRINE 373
[B]  Conceptual Overview 374
[1]  General Principles 374
[2]  Identifying the Poisonous Tree 374
[C]  Independent Source Doctrine 375
[D]  Inevitable Discovery Rule 378
[E]  Attenuated Connection Principle (The Wong Sun Rule) 379
[1]  Overview 379
[3]  Other Attenuation Factors 381
[a]  Temporal Proximity 381
[b]  Intervening Events 381
[i]  In General 381
[ii]  Intervening Act of Free Will 381
[c]  Flagrancy of the Violation 382
[d]  Nature of the Derivative Evidence 382

Chapter 21  INTERROGATION LAW: OVERVIEW 385
§ 21.01  REFLECTIONS ON MODERN INTERROGATION LAW 385
§ 21.02  POLICE INTERROGATION TECHNIQUES: HISTORICALLY AND AT PRESENT 386
§ 21.03  INTERROGATION LAW: CONSTITUTIONAL ISSUES 388
[A]  Was the Confession Obtained Involuntarily (or by Coercion)? 388
[1]  Due Process Clause 388
[2]  Fifth Amendment Compulsory Self-Incrimination Clause 388
[C]  Was the Defendant Entitled to Counsel? 390
[1]  Sixth Amendment Right to Counsel 390
§ 21.04  INTERROGATION LAW: AN OVERVIEW TO THE POLICY DEBATE 391
[A]  Societal Ambivalence Regarding Confessions 391
[1]  Why the Public Favors Confessions 391
TABLE OF CONTENTS

[B] The Modern Debate ........................................ 415
[2] Compelled Self-Accusation As a Moral Wrong .......... 416

§ 23.04 THE FIFTH AMENDMENT PRIVILEGE: THE ELEMENTS ........ 420
[A] “No Person” .................................................. 420
[B] “Shall Be Compelled” ...................................... 421
[C] “In Any Criminal Case” .................................... 422
[D] “To Be a Witness Against Himself” .................... 423
[a] “Testimonial or Communicative” Evidence: The Rule .......... 423
[b] Application of the Rule .................................. 424
[2] Seriousness of the Threat of Incrimination ............ 426

§ 23.05 PRIVILEGE AGAINST SELF-INCRIMINATION IN THE POLICE INTERROGATION CONTEXT ..................... 427
[A] General Principles ........................................... 427
[1] Original, Bright-Line Approach ......................... 427
[B] Remedies for Violation of the Fifth Amendment Privilege ...... 430
[1] Requirement of State Action ............................. 430
[2] Standing to Raise Claim ................................ 430
[a] Constitutional Basis of the Exclusionary Rule ............. 431
[b] Scope of the Exclusionary Rule ......................... 432
[i] Impeachment ............................................. 432
[ii] Fruit-of-the-Poisonous-Tree Doctrine .................. 432

Chapter 24 INTERROGATION LAW: MIRANDA v. ARIZONA ...... 435
§ 24.01 MIRANDA: A BRIEF OVERVIEW AND SOME REFLECTIONS .... 435
§ 24.02 MIRANDA: PLACING THE CASE IN HISTORICAL CONTEXT .... 436
§ 24.03 THE ROAD TO MIRANDA: ESCOBEDO v. ILLINOIS .......... 438
§ 24.04 MIRANDA: THE CASE .................................. 440
[A] The Facts ..................................................... 440
[B] The Holding .................................................. 440
[1] What Rights Does a Suspect Have In the Interrogation Room? .... 440
[a] Self-Incrimination ......................................... 440
[b] Right to Counsel .......................................... 440

xxi
TABLE OF CONTENTS

[3] Waiver of a Suspect’s “Miranda Rights” .............................. 442
   [a] In General .................................................. 442
[4] Enforcing the Rights ........................................... 442
   [a] Privilege Against Self-Incrimination ....................... 442
   [b] Right to Counsel ........................................... 443
   [C] Reasoning of the Court ..................................... 443
[1] Custodial Interrogation As “Compulsion” ........................ 443
[2] The Limited Importance of Confessions in Law Enforcement ... 444
[3] Fifth Amendment Values and the Importance of the Adversarial
    System ......................................................... 444
§ 24.05 CRITICISMS OF MIRANDA .................................. 445
   [A] “Miranda Did Not Go Far Enough” ........................... 446
   [B] “Miranda Went Too Far” .................................... 446
   [1] “Miranda Lacks Historical and Textual Support” .............. 446
   [3] “Miranda is Anti-Confession and Pro-Fox Hunt” ............... 448
§ 24.06 IS MIRANDA A CONSTITUTIONALLY BASED DECISION? ......... 452
   [A] Act 1: Congress and Miranda ................................ 452
§ 3501 Admissibility of confessions .................................. 452
   [B] Act 2: Miranda as a “Prophylactic Rule” ..................... 453
   [C] Act 3: Miranda is (Sort of) Re-Constitutionalized .......... 454
   [1] Dickerson v. United States .................................. 454
   [2] Dickerson’s Significance ..................................... 455
§ 24.07 MEANING OF MIRANDA: “CUSTODY” .......................... 457
   [A] General Principles .......................................... 457
   [B] Commonly Asked “Custody” Questions ........................ 459
       [2] Does Miranda Apply Outside the Police Station? ......... 459
   [C] When Is an Interrogation Not a Miranda “Interrogation”? .. 463
       [4] Does Miranda Apply to a “Terry Stop”? ................ 461
       [5] Are Miranda Warnings Required In All “Coercive Environments”? 461
§ 24.08 MEANING OF MIRANDA: “INTERROGATION” .................. 462
   [A] In General ................................................. 462
       [1] Rule .......................................................... 462
   [B] When Is an Interrogation Not a Miranda “Interrogation”? .. 463
§ 24.09 ADEQUACY OF MIRANDA WARNINGS .......................... 464
§ 24.10 WAIVER OF MIRANDA RIGHTS ................................. 466
TABLE OF CONTENTS

[A] In General ................................................. 466
[1] Overview .................................................. 466
[2] Types of Waiver: Express versus Implied ......................... 466
[3] Elements of a Valid Waiver .................................. 467
   [a] Generally .............................................. 467
   [b] Voluntariness of the Waiver ................................ 467
   [c] Knowing and Intelligent Waiver ........................... 468
   [1] Overview .................................................. 472
   [3] Right to Counsel .......................................... 473
      [a] The Edwards v. Arizona Rule ............................ 473
      [b] When the Edwards Rule Does Not Apply .................. 474
         [i] Ambiguous Request for Counsel ......................... 474
         [ii] Request for Counsel for Non-Miranda Purposes ...... 476
         [iii] Release from Custody ................................ 476
         [iv] Anticipatory Request for Counsel ..................... 477
§ 24.11 CUSTODIAL INTERROGATION: WHEN MIRANDA WARNINGS ARE NOT REQUIRED .... 477
   [A] Public-Safety Exception ................................... 477
   [B] Covert Custodial Interrogation ............................. 480
   [C] Routine-Booking-Questions Exception ......................... 480
§ 24.12 SCOPE OF THE MIRANDA EXCLUSIONARY RULE .................. 481
   [A] Impeachment Exception .................................... 481
   [B] Fruit-of-the-Poisonous-Tree Doctrine ......................... 482
      [1] In General .............................................. 482
Chapter 25 INTERROGATION LAW: SIXTH AMENDMENT RIGHT TO COUNSEL ............. 491
§ 25.01 MASSIAH v. UNITED STATES .................................. 491
   [A] Historical Overview ..................................... 491
   [B] Massiah: The Opinion ..................................... 492
   [C] Making Sense of Massiah: The Sixth Amendment Role of Counsel .... 493
§ 25.02 THE SIXTH AMENDMENT (MASSIAH) RIGHT TO COUNSEL:
SUMMARY ..................................................... 496

xxiii
Chapter 27

ENTRAPMENT

§ 27.01 ENTRAPMENT: IN GENERAL

§ 27.02 ENTRAPMENT: THE SUBJECTIVE TEST

[A] Rule

[1] In General

[2] Proving Predisposition

[B] Rationale of the Rule

[C] Procedural Features of the Rule

§ 27.03 ENTRAPMENT: THE OBJECTIVE TEST

[A] Rule

[B] Rationale of the Rule

[C] Procedural Features of the Rule

§ 27.04 ENTRAPMENT: THE DEBATE

[A] Overview

[B] Criticisms of the Subjective Test

[1] “The Legislative Intent Rationale is Fictional”


[C] Criticisms of the Objective Test

[1] “The Test Leads to Inappropriate Results”

[2] “The Test’s Stated Rationales are Indefensible”

§ 27.05 ENTRAPMENT: DUE PROCESS

Chapter 28

THE RIGHT TO COUNSEL: AT TRIAL AND ON APPEAL

§ 28.01 OVERVIEW: THE IMPORTANCE OF DEFENSE LAWYERS IN THE ADVERSARY SYSTEM

§ 28.02 WHEN THE RIGHT TO COUNSEL APPLIES

§ 28.03 THE RIGHT TO COUNSEL: AT TRIAL

[A] The Right to Employ Counsel

[B] Indigents: The Right to Appointed Counsel

[1] Overview

[2] The Road to Gideon

[a] Powell v. Alabama

[b] Johnson v. Zerbst

[c] Betts v. Brady


[a] Argersinger v. Hamlin

[b] Scott v. Illinois

[c] Alabama v. Shelton
TABLE OF CONTENTS

[d] Two More Cases: Nichols and Gagnon .......................... 558
[5] Implementing the Right to Appointed Counsel ..................... 559
§ 28.04 THE RIGHT TO COUNSEL: ON APPEAL ....................... 561
[A] Inapplicability of the Sixth Amendment .......................... 561
[B] First Appeal (as of right) ........................................ 562
[1] In General ..................................................... 562
[C] Subsequent (Discretionary) Appeals .............................. 564
[D] First (Discretionary) Appeal After a Guilty Plea .............. 565
§ 28.05 THE RIGHT OF SELF-REPRESENTATION ..................... 567
[A] The Defense: Who is In Charge? .................................. 567
[B] Faretta v. California .............................................. 567
[1] Recognition of the Right ......................................... 567
[3] Current Status of Faretta .......................................... 570
[C] Procedural Issues .................................................. 571
[1] Competence ....................................................... 571
[3] Timeliness of the Request ......................................... 573
[4] Hybrid Representation ............................................. 574
[5] Standby Counsel ................................................... 574
[6] Legal Significance of Poor Self-Representation .................. 575
[7] Legal Effect of an Erroneous Denial of the Right ............... 575
§ 28.06 THE RIGHT TO REPRESENTATION BY ONE’S PREFERRED ATTORNEY .............................................. 575
[A] In General ....................................................... 575
[B] Special Problem: Seizing Lawyers’ Fees ........................... 576
§ 28.07 INTERFERENCE WITH THE RIGHT TO COUNSEL ......... 578
§ 28.08 EFFECTIVE ASSISTANCE OF COUNSEL: GENERAL PRINCIPLES ............................................. 579
[A] Nature of the Issue .................................................. 579
[B] “Ineffective Assistance”: The Strickland Test ..................... 580
[1] Overview .......................................................... 580
[2] The First Prong: Deficiency of Representation .................... 582
[a] The Standard ....................................................... 582
[b] Deficiency: Supreme Court Case Law ............................. 583
[i] Failure to Perform Ordinary Tasks — Held Not Unreasonable .. 583
[ii] Failure to Perform Ordinary Tasks — Held Unreasonable ..... 585
[iii] Ignorance of Relevant Law ........................................ 586
[a] The Standard ....................................................... 587
[b] Prejudice: Supreme Court Case Law ................................ 588
[c] Prejudice: Special Problems ....................................... 591
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[i]</td>
<td>The Factually Guilty Defendant</td>
<td>591</td>
</tr>
<tr>
<td>[ii]</td>
<td>The Sleeping Lawyer</td>
<td>592</td>
</tr>
<tr>
<td>§ 28.09</td>
<td>EFFECTIVE ASSISTANCE OF COUNSEL: CONFLICTS OF INTEREST</td>
<td>593</td>
</tr>
<tr>
<td>[A]</td>
<td>Nature of the Issue</td>
<td>593</td>
</tr>
<tr>
<td>[B]</td>
<td>Pretrial Procedures to Avoid Conflicts</td>
<td>594</td>
</tr>
<tr>
<td>[C]</td>
<td>Post-Trial Proof of a Conflict</td>
<td>594</td>
</tr>
<tr>
<td>[D]</td>
<td>Waiver of the Right to Conflict-Free Representation</td>
<td>595</td>
</tr>
<tr>
<td>§ 28.10</td>
<td>EFFECTIVE ASSISTANCE: THE ROLE OF ETHICAL CANONS</td>
<td>596</td>
</tr>
</tbody>
</table>

**TABLE OF CASES** .................................................. TC-1

**TABLE OF STATUTES** ............................................... TS-1

**INDEX** ............................................................. I-1