
CONTENTS

<i>Preface</i>	xxi
<i>Acknowledgments</i>	xxiii
PART I	
FRAMEWORK FOR CRIMINAL PROCEDURE	1
CHAPTER 1	
INTRODUCTION	3
Introduction	3
A. The Criminal Process	5
1. Criminal Complaint and Investigation	6
2. Arrest	7
3. Arraignment and Bail	8
4. Indictment and Preliminary Hearings	10
5. Pre-Trial	10
6. Trial	12
7. Sentencing	14
8. Appeal	15
B. The Constitutional Protection of Individual Rights	15
1. The Bill of Rights	16
<i>Fourth Amendment</i>	16
<i>Fifth Amendment</i>	16
<i>Sixth Amendment</i>	16
<i>Fourteenth Amendment</i>	16
2. State Constitutional Provisions	17
<i>New York State Constitution Section 12</i>	17
<i>Massachusetts State Constitution Article XIV</i>	18
<i>Florida State Constitution Article 12</i>	18

C. Incorporation	18
1. Selective Incorporation	19
<i>Palko v. Connecticut</i>	19
Notes & Questions on Selective Incorporation	23
2. Total Incorporation	24
<i>Adamson v. California</i>	24
<i>Duncan v. Louisiana</i>	30
Notes & Questions on Total Incorporation	36
D. The Goal of Criminal Procedure	37
<i>Packer, Two Models of the Criminal Process</i>	38
Notes & Questions on Packer's Two Models	47

PART II

THE FOURTH AMENDMENT: REQUIREMENTS AND REMEDIES

51

CHAPTER 2

WHAT IS A SEARCH?

53

Introduction

53

A. Reasonable Expectation of Privacy

54

Katz v. United States

55

Notes & Questions on Expectations of Privacy

59

B. Privacy in Communications

59

1. Government Agents Wearing Wires

60

United States v. White

61

Notes & Questions on Agents Wearing Wires

64

2. Phone Records of Numbers Dialed and Received

64

Smith v. Maryland

65

Notes & Questions on Telephone Pen Registers

70

3. Bulk Collection of Telephony Metadata

71

ACLU v. Clapper

72

Klayman v. Obama

78

Notes & Questions on Bulk Metadata

81

C. Surveillance of Property

82

1. Aerial Fly-Overs

83

California v. Ciraolo

83

Notes & Questions on Aerial Surveillance

88

2. Thermal Imaging

89

Kyllo v. United States

90

Notes & Questions on Thermal Imaging

97

3. Contraband-Sniffing Dogs

99

Florida v. Jardines

100

Notes & Questions on Contraband-Sniffing Dogs	106
D. Privacy in Discarded Garbage	108
<i>California v. Greenwood</i>	108
Notes & Questions on Garbage	114
E. Privacy in Public Movements	115
1. GPS Tracking of Automobiles	116
<i>United States v. Jones</i>	116
Notes & Questions on GPS Tracking	123
2. Cell Phone Location Data	124
<i>Carpenter v. United States</i>	125
Notes & Questions on Cell Phone Location Data	131
F. Practice & Policy	133
∞ Data encryption on smart phones	134
CHAPTER 3	
THE WARRANT REQUIREMENT	137
Introduction	137
A. Probable Cause	138
1. Information from Informants	139
<i>Illinois v. Gates</i>	140
Notes & Questions on Informants	146
2. Information from Victims and Eyewitnesses	146
3. Information from the Police	147
B. The Particularity Requirement	148
<i>Groh v. Ramirez</i>	148
Notes & Questions on the Particularity Requirement	153
C. The Knock-and-Announce Requirement	154
<i>Richards v. Wisconsin</i>	157
Notes & Questions on Announcement	161
D. Detention Incident to a Search	165
<i>Bailey v. United States</i>	165
Notes & Questions on Detentions During Searches	170
E. Mistakes	171
<i>Maryland v. Garrison</i>	172
Notes & Questions on Good Faith Mistakes	176
F. Practice & Policy	177
∞ The creation of the FISA court	177
∞ Minimization procedures	179
∞ Access to information	180

CHAPTER 4	
EXCEPTIONS TO THE WARRANT REQUIREMENT	185
Introduction	185
A. Exigent Circumstances	187
1. Hot Pursuit	188
<i>Warden, Maryland Penitentiary v. Hayden</i>	188
Notes & Questions on Hot Pursuit	190
2. Emergency Aid	192
<i>Michigan v. Fisher</i>	192
Notes & Questions on Emergency Aid	196
3. Destruction of Evidence	197
<i>Kentucky v. King</i>	198
Notes & Questions on Destruction of Evidence	202
B. Plain View	204
<i>Arizona v. Hicks</i>	205
Notes & Questions on the Plain View Exception	208
C. Automobiles	209
1. Defining the Automobile	210
<i>California v. Carney</i>	210
Notes & Questions on Defining the Automobile	213
2. Containers Located in Automobiles	213
<i>California v. Acevedo</i>	214
Notes & Questions on Containers	217
3. Automobiles in the Curtilage	219
<i>Collins v. Virginia</i>	219
Notes & Questions on the Curtilage	221
D. Search Incident to Arrest	223
<i>Chimel v. California</i>	223
<i>Arizona v. Gant</i>	227
Notes & Questions on Searches Incident to Arrest	233
E. Inventory Searches	234
1. Impounded Cars	234
<i>South Dakota v. Opperman</i>	234
Notes & Questions on Automobile Inventory Searches	239
2. Arrested Persons	240
<i>Maryland v. King</i>	241
Notes & Questions on Personal Inventory Searches	249
F. Consent	251
<i>Schneckloth v. Bustamonte</i>	251
<i>Illinois v. Rodriguez</i>	257
Notes & Questions on Consent	262

G. Special Needs	266
1. Administrative Inspections	267
<i>New York v. Burger</i>	267
Notes & Questions on Administrative Inspections	273
2. Border Crossings	274
<i>United States v. Montoya de Hernandez</i>	276
Notes & Questions on Border Inspections	283
3. Checkpoints	285
<i>Michigan Department of State Police v. Sitz</i>	285
Notes & Questions on Checkpoints	290
4. Schools	292
<i>Safford Unified School Dist. No. 1 v. Redding</i>	293
Notes & Questions on School Searches	299
5. Government Employees	301
<i>City of Ontario v. Quon</i>	302
Notes & Questions on Government Employment	306
6. Jails and Prisons	307
<i>Florence v. Board of Chosen Freeholders of County of Burlington</i>	308
Notes & Questions on Jail and Prison Searches	313
H. Probation and Parole	314
<i>United States v. Knights</i>	315
Notes & Questions on Probation and Parole	318
I. Practice & Policy	319
∞ Screening technologies at the airport	320
∞ Consent or special needs	321
∞ Post-9/11 screening enhancements	323
 CHAPTER 5	
SEIZING PERSONS	325
Introduction	325
A. Defining Personal Seizure	326
<i>United States v. Mendenhall</i>	327
Notes & Questions on the Definition of Seizure	332
B. Requirements for Arrest	338
1. The Warrant Requirement for Arrests	338
<i>United States v. Watson</i>	338
Notes & Questions on Arrest Warrants	343
2. Home Arrests	344
<i>Payton v. New York</i>	345
Notes & Questions on Home Arrests	350
3. Protective Sweeps During Home Arrests	351
<i>Maryland v. Buie</i>	352
Notes & Questions on Protective Sweeps	356

4. Crimes Subject to Arrest	357
<i>Atwater v. City of Lago Vista</i>	358
Notes & Questions on Crimes Subject to Arrest	364
C. Stop and Frisk	365
1. The Authority to Stop and Frisk	367
<i>Terry v. Ohio</i>	367
Notes & Questions on Terry Stops	376
2. Failure to Disclose Identity	380
<i>Hübel v. Sixth Judicial District Court of Nevada, Humboldt County</i>	381
Notes & Questions on Failure to Disclose Identity	387
3. The Reasonable Suspicion Standard	390
<i>Florida v. J.L.</i>	390
<i>Navarette v. California</i>	393
<i>Illinois v. Wardlow</i>	396
Notes & Questions on Reasonable Suspicion	400
4. Profiling	401
<i>United States v. Sokolow</i>	402
Notes & Questions on Profiling	405
5. Racial Disparities	406
<i>Floyd v. City of New York</i>	406
Notes & Questions on Racial Disparities	415
D. Practice & Policy	415
☞ Who is Floyd?	416
☞ Fagan's statistical analysis	417
☞ The remedies ordered to reform New York's program	419
☞ The Trespass Affidavit Program	420
CHAPTER 6	
THE EXCLUSIONARY RULE	421
Introduction	421
A. Origins of the Rule	423
<i>Weeks v. United States</i>	424
Notes & Questions on the Origins of Exclusion	427
B. Application in State Courts	428
<i>Mapp v. Ohio</i>	429
Notes & Questions on the Exclusionary Rule in State Courts	434
C. Defining the Scope of Police Misconduct	436
<i>Davis v. United States</i>	436
Notes & Questions on the Scope of Misconduct	442
D. Standing	443
<i>Rakas v. Illinois</i>	443
<i>Brendlin v. California</i>	451
Notes & Questions on Standing	454

E. Exceptions	456
1. Independent Source	457
<i>Murray v. United States</i>	458
Notes & Questions on the Independent Source Exception	463
2. Inevitable Discovery	465
<i>Nix v. Williams</i>	465
Notes & Questions on Inevitable Discovery	471
3. Attenuation of the Taint	472
<i>Brown v. Illinois</i>	473
Notes & Questions on Attenuation of the Taint	478
4. Good Faith	480
<i>Herring v. United States</i>	481
Notes & Questions on Good Faith	487
5. Knock and Announce	488
<i>Hudson v. Michigan</i>	489
Notes & Questions on Knock and Announce	494
F. Practice & Policy	496
∞ A law and economics approach to the exclusionary rule	496
∞ The empirical evidence of deterrence	497
∞ The risk of perjury	498
∞ Alternative remedies to the exclusionary rule	499

PART III

**THE FIFTH AND SIXTH AMENDMENTS:
DUE PROCESS AND COUNSEL** 501

CHAPTER 7

SELF-INCRIMINATION AND THE FIFTH AMENDMENT 503

Introduction 503

A. Requirements for the Privilege 505

 1. Risk of Incrimination 505

Kastigar v. United States 506

 Notes & Questions on Risk of Incrimination 513

 2. What and Who Does the Privilege Protect? 515

Schmerber v. California 516

Fisher v. United States 518

 Notes & Questions on Testimonial Acts 521

B. Voluntariness 523

 1. Threats of Physical Force 523

Arizona v. Fulminante 524

 Notes & Questions on Threats of Force 526

2. Deception	528
<i>Leyra v. Dennis</i>	528
<i>Lynnum v. Illinois</i>	531
Notes & Questions on Deception	534
3. Psychological Pressure	535
<i>Spano v. New York</i>	535
Notes & Questions on Psychological Pressure	540
C. Warnings During Custodial Interrogation	543
1. The <i>Miranda</i> Rule	543
<i>Miranda v. Arizona</i>	544
<i>Dickerson v. United States</i>	555
Notes & Questions on the <i>Miranda</i> Rule	559
2. Defining Custody	560
<i>Oregon v. Mathiason</i>	560
<i>Berkemer v. McCarty</i>	563
<i>J.D.B. v. North Carolina</i>	570
Notes & Questions on the Concept of Custody	576
3. Defining Interrogation	578
<i>Rhode Island v. Innis</i>	578
<i>Illinois v. Perkins</i>	585
Notes & Questions on Interrogation	590
4. Waiver	591
<i>Berghuis v. Thompkins</i>	592
<i>Michigan v. Mosley</i>	600
Notes & Questions on Waiver	605
5. Exceptions	606
<i>Harris v. New York</i>	606
<i>New York v. Quarles</i>	610
Notes & Questions on <i>Miranda</i> Exceptions	615
6. Evidentiary Consequences of <i>Miranda</i> Violations	616
<i>Oregon v. Elstad</i>	617
<i>Missouri v. Seibert</i>	621
Notes & Questions on Evidentiary Consequences	624
D. Practice & Policy	625
☞ How common are false confessions?	625
☞ Why do innocent suspects confess?	626
☞ Why do so many suspects waive <i>Miranda</i> rights?	627
☞ Proposals for institutional change	628

CHAPTER 8

RIGHT TO COUNSEL DURING INTERROGATIONS 631

Introduction 631

A. The Fifth Amendment Right to Counsel 633

- 1. Cessation of Interrogation 633
 - Edwards v. Arizona* 634
 - Notes & Questions on Cessation of Interrogation 637
- 2. Ambiguous Quasi-Invocations 638
 - Davis v. United States* 638
 - Notes & Questions on Ambiguous Quasi-Invocations 644
- 3. Waiver After Invocation 646
 - Minnick v. Mississippi* 646
 - Notes & Questions on Waiver After Invocation 652
- 4. Resumption of Interrogation 652
 - Maryland v. Shatzer* 653
 - Notes & Questions on Resumption of Interrogation 661

B. The Sixth Amendment Right to Counsel 661

- 1. The Derivation of the Right 662
 - Massiah v. United States* 662
 - Notes & Questions on *Massiah* 666
- 2. Interrogations for Different Offenses 667
 - Texas v. Cobb* 667
 - Notes & Questions on Interrogations for Different Offenses 673
- 3. Waiving the Sixth Amendment Right 674
 - Brewer v. Williams* 675
 - Montejo v. Louisiana* 679
 - Notes & Questions on Waiver 686
- 4. Violations of the Sixth Amendment Right 687
 - United States v. Henry* 687
 - Notes & Questions on “Deliberately Inciting” 694

C. Practice & Policy 697

- ∞ The *Hammad* decision 697
- ∞ Are government prosecutors covered by the Model Rules? 699
- ∞ Suppression 699

CHAPTER 9

IDENTIFICATIONS 701

Introduction 701

A. Right to Counsel During Identifications 703

- 1. Counsel for Physical Lineups After Initiation of Formal Charges 705
 - United States v. Wade* 705

Notes & Questions on Post-Indictment Lineups	712
2. Counsel for Identifications Prior to Formal Charges	713
<i>Kirby v. Illinois</i>	713
Notes & Questions on Pre-Indictment Showups	718
3. Counsel for Non-Corporeal (Photographic) Identifications	718
<i>United States v. Ash</i>	719
Notes & Questions on Photographic Lineups	727
B. Due Process and Unnecessarily Suggestive Identifications	727
<i>Foster v. California</i>	728
<i>Simmons v. United States</i>	732
Notes & Questions on Suggestive Identifications	735
C. Reliability	738
1. Reliability as a Pathway to Admission	739
<i>Neil v. Biggers</i>	739
<i>Manson v. Brathwaite</i>	743
Notes & Questions on Indicia of Reliability	751
2. Unreliable Identifications Without Police Misconduct	753
<i>Perry v. New Hampshire</i>	753
Notes & Questions on Suggestiveness Without Police Misconduct	760
D. Practice & Policy	761
∞ Blind administration	761
∞ Pre-identification instructions	762
∞ Lineup construction	762
∞ Preventing feedback loops	762
∞ Multiple viewings	763
∞ Simultaneous or sequential lineups	763
∞ Composite sketches	764
∞ The dangers inherent in showups	765
∞ Estimator variables	765
∞ Cross-racial identifications	766
<i>Table of Cases</i>	767
<i>Index</i>	773