

## **Criminal Procedure**

LCR 906 | 3 Credits | Fall 2023

Course website: <https://mycourses.unh.edu/courses/111416>

Professor Mailyn J. Fidler

### **Contact Information**

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### **Course Schedule**

Tuesday/Thursday 1:00-2:10pm, in Room UNHL 200.

Attendance is required per ABA rules (see below).

### **Office Hours**

Thursdays, 2.15 to 3.45 pm in Office 358 (no appointment needed).

Other office hours available on request. Depending on availability and preference they will take place either in person or on Zoom.

### **TL;DR: here is some important info about the way this class works.**

- This class involves two writing assignments, in addition to the final.
- I cold call everyone, all the time (see details below). Even though this sounds tough, students report actually liking it! It equalizes classroom talking and lowers the stakes of each particular cold call.
- We will learn the doctrine. But we will *also* discuss whether the law should be the way it is.
- This is a constitutional law class, despite the term “procedure” in the title!
- When in doubt, reach out.
- Turn on email notifications for our Canvas course – that’s the primary way I’ll communicate with you!

### **Course Description**

Criminal procedure is a difficult but important subject to study. We are called to read deeply about a system many think is broken and to read details about people in their worst moments. This class is also more personal than many in law school: most will not have experienced a torts dispute, but many have been affected or know someone affected by the criminal justice system.

This course is critical for those who want to practice criminal law AND is also a central bar prep course. That means there are (at least) two distinct audiences for this class! That means there will be moments in this class particularly directed at one or the other audience. If something isn't to your liking, remember it might be the other audience's favorite (at least a professor can hope, right?!)

Even if this is a bar prep class for you (which is totally fine!), it's my hope that this course will give you a special window, beyond doctrine, into an area that not many people know much about. You will be able to speak "the language" of this world in ways that most can't, which comes with a special responsibility. If we want a public that knows more about this area than what Law & Order shows – you're a key part of that. In particular – the Supreme Court is poised to make key changes to this body of law during your lifetime, and understanding the pros and cons of the different directions this can go will be key to your practice and citizenship.

### **Wait, this is a constitutional law course?**

Yes! This is a constitutional law course in the guise of procedure. This course focuses on the constitutional regulation of criminal procedure, which means we study the Fourth, Fifth, and Sixth Amendments. Indeed, we usually read the Federal Rules of Criminal Procedure all of one time during this course. For better or for worse, these amendments are what the bar covers. But, it's also important to get a grasp on the more practical aspects. That's where our writing assignments and some additional material comes in.

### **Texts**

Kamisar's Basic Criminal Procedure: Investigation, 16<sup>th</sup> Edition. I know it stinks to have to purchase new books, but the 15<sup>th</sup> edition is by this point very out of date and won't be comparable to what we're using in class. Speak to me if the book is a financial burden.

All other readings will be posted on Canvas.

### **Assignments**

"By midnight" means at the end of the day indicated, so 11:59 pm of the stated date. Your grade in the class is determined as follows:

- 10% -- Search Warrant Exercise. Due **Sunday, Sept. 24**, at midnight, through Canvas.

- You will draft a search warrant affidavit for a set of facts. In some jurisdictions, lawyers draft search warrants. In others, lawyers review them. This will give you training to do that. It also allows you to explore the issues from the prosecution's point of view: how can you make sure that your search procedures stand up in court?
- 20% -- (Partial) Motion to Suppress. Due **Sunday, Nov. 5**, at midnight.
  - You will draft part of a motion to suppress for the same set of facts. This is one of the key jobs of defense lawyer and gives you training in this kind of writing. It allows you to review that same set of facts from the reverse point of view.
- 65% -- Final Exam.
  - The three-hour exam will be proctored. You will be allowed to access any materials we have used in class during the exam, but you will not be allowed to access the Internet.
- 5% -- OPTIONAL – Practice Packet
  - I will upload a “Practice Packet” towards the end of the course. If you choose, you may complete this packet before the final for a complete/incomplete grade (yes, that means 100% if you complete it!) If you submit it, you may choose to reduce the amount that either a) your assignments or b) your final counts towards your grade. You must indicate this at the time you turn in the packet. Completion means answering every question, in full sentences and formal legal analysis, but it need not be overly long. If you'd like feedback on your packet, please turn it in 48 hours before the final. Otherwise, you may turn it in at midnight prior to the final.
- Participation
  - Grades may be adjusted up or down one level based on participation/attendance.

## **Cold-Call Policy**

I call on everyone through cold-calling. (Some folks call this “whole room” popcorn-style cold-calling). This method allows for high engagement and equity in class participation. To receive full participation credit, even if you are not sure of the answer, I expect you to respond and work with me in a back-and-forth exchange to the benefit of the class. Answers that demonstrate you have clearly not read the material will result in not full participation credit. That said, there will also be additional opportunities to discuss beyond cold-calling. If you're ever frustrated with the direction that discussion is going in – you're allowed to intervene! Don't shut down. This kind of discussion is a key part of being a lawyer.

## **Different Opinions Needed**

We will often debate big questions, and it is crucial to our growth as lawyers to hear a range of opinions. I hope you will participate. And I hope you will disagree with me! A ground rule in this class is that we will not assume what someone says is their personal viewpoint. You are allowed to explore arguments without being held to it outside the classroom. Indeed, you will often see me switching sides of an issue to facilitate this kind of discussion. That said, please speak with professionalism and respect.

### **Late Policy**

A late assignment will be marked down one grading category (e.g., A to A-) for every day it is late. However, in circumstances that warrant it, including mental/physical health issues or family deaths, we can make other arrangements. Please don't hesitate to contact me to discuss if you feel you are in such a situation.

### **Grading**

Students will be graded according to UNH Law's grading policies. That means that the course will have a B average.

### **Laptop Policy**

Laptops are allowed in class because I know that some people do better when they are allowed to take notes on their computers (including me!) But if laptops become a problem, I reserve the right to change this policy.

### **Recording Policy**

I will not record this class, nor is recording permitted of this class, with exception of the review sessions. I understand that this makes making up missed classes more difficult. I do, at my discretion, allow live Zoom attendance if you are ill. The reason I do this is to encourage frank conversation on difficult topics without worry that those conversations will be archived. NOTE: students with disability accommodations that include text or audiovisual recording are excepted from this policy, although they may not share those recordings with others.

### **Attendance and Participation**

This course follows the ABA's rules on attendance. If you're planning to be absent and would like to avoid that awkward moment where I could call you and you're

not there, please email me before class, and I'll take you off the roster for that day.

## **Plagiarism & Conduct**

I take plagiarism seriously. This course is subject to our school's conduct code, available at <https://catalog.unh.edu/law/juris-doctor-academic-rules-regulations/conduct-code/>.

Please note that plagiarism involves using anyone else's work as your own without attribution. This applies to other current or former students' work, any information taken directly from the Internet, ChatGPT and the like, and materials written by your instructor. The course will use TurnItIn analysis.

## **Disability Accommodations**

According to the Americans with Disabilities Act (as amended, 2008), each student with a disability has the right to request services from UNH to accommodate their disability. If you are a student with a documented disability or believe you may have a disability that requires accommodations, please contact Student Accessibility Services (SAS).

Accommodation letters are created by SAS with the student. Please follow-up with your instructor as soon as possible to ensure timely implementation of the identified accommodations in the letter. Faculty have an obligation to respond once they receive official notice of accommodations from SAS, but are under no obligation to provide retroactive accommodations.

For more information, contact SAS: 227 Smith Hall, [www.unh.edu/sas](http://www.unh.edu/sas), 603.862.2607, 711 (Relay NH) or [sas.office@unh.edu](mailto:sas.office@unh.edu).

## **ABA Learning Outcomes**

The ABA requires us to tell you what the learning outcomes are for each course. In this class, you will learn the history and current state of the law of criminal procedure, encompassing the 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Amendments to the U.S. Constitution. You will be able to apply this law to a fact pattern. You will be able to devise arguments in favor of clients. And you will think deeply about the role of this law in American life; about the ways it succeeds and fails, and about what the future of this area should look like.

## COURSE SCHEDULE

### **Class 1 – Aug. 22 – Introduction to Criminal Procedure**

- a. Scan 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendments (Canvas)
- b. Kamisar p. 2-14 (through §3 n.2) (Steps in the Criminal Justice Process)
- c. History of Criminal Procedure Packet (Canvas)
- d. Kamisar p. 19-24 (top) (Incorporation Doctrine)

### **UNIT 1—SEARCH**

This is our foundational doctrinal unit, and also one of the more complex units of the course. The Fourth Amendment prohibits unreasonable searches and seizures. This unit starts by investigating what a “search” is, because if something is not a search, the Fourth Amendment doesn’t apply. We will delve into the primary test – the reasonable expectation of privacy test – and the competing property-based test. We will also look at how technology is challenging Fourth Amendment doctrine.

### **Class 2 – Aug. 24 – Reasonable Expectation of Privacy, Part I**

- a. *Intro*, Kamisar p. 213-214
- b. *Katz*, Kamisar p. 214-221 (top)
- c. *Kyllo*, Kamisar p. 240-46 (through n.3)
- d. *Dunn*, Kamisar p. 221-27 (through n.6)

Optional reading: Butler, *The White Fourth Amendment* (Canvas), Sklansky, *Stonewall and Searches* (Canvas); ANNA LVOVSKY, *VICE PATROL: COPS, COURTS, COURTS AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL* (BOOK)

### **Class 3 – Aug. 29 – Reasonable Expectation of Privacy, Part II**

- a. *Greenwood*, Kamisar p. 228-32
- b. *Caballes*, Kamisar 246-47
- c. *DNA*, Kamisar 247-248
- d. Kerr, *Four Models of the Fourth Amendment*, p. 504-26 only (Canvas)  
Reading tip: read this to get a general grasp on the four different models. You can use these as analytic tools for Fourth Amendment cases.

#### **Class 4 – Aug. 31 – Property-Based Approaches**

- a. *Jones*, Kamisar 271-76
- b. *Jardines*, Kamisar 276-80
- c. Fidler, *Warranted Exclusion, Section B. (Canvas)*

Reading tip: this provides you with a simple summary of the major objections to property-based approaches. We will use these to compare and contrast the privacy and property approaches.

#### **Class 5 – Sept. 5 – New Fourth Amendment Horizons**

- a. Review *Jones*, Kamisar 271-72
- b. *Carpenter*, Kamisar 257-270 (top)
- c. Fidler, *Local Police* excerpts (Canvas)

Reading tip: read this to get a sense of some of the new technologies that police are deploying.

Optional reading: Fields, *Fourth Amendment Without Police* (Canvas);  
Discovery of Stingrays longform piece (Canvas)

## UNIT II – “PROCEDURE” OF CRIMINAL PROCEDURE (PART I)

This unit focuses on the key steps that law enforcement and the prosecution must undertake to comply with the Fourth Amendment, and what options are available to defendants when they do not. The Fourth Amendment requires that “no warrants shall issue, except upon probable cause.” In this unit, we tackle both probable cause and what procedural requirements exist around issuing warrants.

### Class 6 – Sept 7 – Probable Cause

- a. *Illinois v. Gates*, top of 296- top of 306
- b. *Maryland v. Pringle*, 306- top of 309
- c. Choose **ONE** of the following probable cause affidavits:
  - a. Kohberger murder probable cause affidavit (Canvas)
  - b. Jan. 6 Capitol Assault probable cause affidavit (Canvas)Reading tip: read for what kind of information is marshalled for probable cause, as well as for stylistic moves.

### Class 7 – Sept. 12 – Warrants

- a. Warrants intro, Kamisar 309-312 (top)
  - i. *Note: we will cover dissipation of probable cause in class*
- b. *US v. Banks*, Kamisar 312-319
- c. *Payton v. New York*, Kamisar 323-327 (top)
  - d. *Horton v. California*, Kamisar 319-323

### Class 8 – Sept. 14 – Remedies: Exclusionary Rule & Alternatives

Note: this day serves as a bridge to the next unit (exceptions) so pay attention to where exceptions exist from the exclusionary rule.

- a. *Entick v. Carrington*, Kamisar 201-206
  - i. *Skip notes 3 through 5*
- b. *Mapp v. Ohio*, Kamisar 206-213 (pay particular attention to n.4-6)
- c. *US v. Leon*, Kamisar 493-500 (through end of n.2)\*
- d. *Davis v. US*, Kamisar 505-508 n.1



### UNIT III – FOURTH AMENDMENT EXCEPTIONS

Baseline Fourth Amendment doctrine is riddled with exceptions. We will start learning those exceptions in this unit. In particular, the law has a very unique “law of cars,” which we will spend two days on. We will consider how broad these exceptions are and should be, and the collateral consequences of these exceptions, especially with respect to race and policing.

#### **Class 9 – Sept. 19 – Search Incident to Arrest (SITA) & Exigent Circumstances**

- a. *Chimel*, Kamisar p. 333-338 (SITA on private premises)
- b. *Chadwick*, Kamisar p. 338-343 (SITA of closed container)
- c. *Warden v. Hayden*, Kamisar p. 327-331 (Exigent circumstances)
- d. *Kentucky v. King*, Kamisar p. 331-333 (Exigent circumstances)

#### **Class 10 – Sept. 21 – Law of Cars Part I**

- a. *Whren v. United States*, Kamisar p. 343 (bottom)- 352 (top)
  - i. Skip notes 1 & 12
- b. *California v. Carney*, Kamisar p. 352 (top)- 356 (top)
- c. *California v. Acevedo*, Kamisar p. 356 (top) – 359

Optional readings: *The Senate’s Only Black Republican Opens Up About Being Mistreated by Cops* (Canvas); David Harris, *Driving While Black*, 84 Minn. L. Rev. 265 (1999) (Canvas); Pierson, *A large-scale analysis of racial disparities in police stops across the United States* (Canvas).

**NOTE: Search Warrant due Sunday, Sept. 24 at midnight**

#### **Class 11 – Sept. 26 – Law of Cars Part II (SITA for Cars)**

- a. *Robinson*, Kamisar p. 379-387 (skip n. 3)
  - i. Pay particular attention to the note on *Riley v. California*
- b. *Arizona v. Gant*, Kamisar p. 360-366
- c. Refresh your memory on *Caballes*, Kamisar p. 246-247

Optional readings: Seo, *The New Public* (excerpts) (Canvas); Officer Moynihan Gravely Injured article (Canvas); Woods, *Traffic without Police* (Canvas); Seo, *Policing the Open Road* (book).

#### **Class 12 – Sept. 28 – Administrative Searches**

- a. Kamisar p. 427-437 (top)

**Class 13 – Oct. 3 – Consent Searches**

- a. *Schneckloth v. Bustamante*, Kamisar p. 437-444
- b. *Fernandez v. California*, Kamisar, p. 445-453
  - i. Pay particular attention to *IL v. Rodriguez* note

Optional readings: Bar-Gill and Freidman, *Taking Warrants Seriously* (excerpt);  
Sommers, *Psychology of Consent* (Canvas)

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**Class 14 – Oct. 5 – FOURTH AMENDMENT REVIEW DAY**

*No additional reading.*

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## UNIT IV – FOURTH AMENDMENT APPLIED TO PERSONS

We have one remaining Fourth Amendment topic to cover – seizure of persons, which comes in many varieties, the most prominent one being arrests. This unit covers the basic legal requirements for arrests, as well as two of the most controversial areas of criminal procedure.

First, stop and frisk: this police interaction lives somewhere between search and seizure of persons. This practice involves interactions between police and individuals with something less than probable cause. This area of law is deeply controversial in significant part for its racially disparate enforcement.

Second, we close by looking at the laws governing police use of excessive force, which often arises in arrest or Terry stop contexts. The law here largely focuses on the concept of “reasonable force.” We will critique this standard and connect it to broader conversations about race, policing, and remedies.

**NOTE:** Many of these readings/concepts are troubling and challenging. Heads up.

### Class 15 – Oct. 10 – Arrests & Seizure of Persons

- a. *Harmon, Why Arrest, Part I (Canvas)*  
Reading tip: scan this article for broader perspective on what legal and social consequences follow from an arrest.
- b. *Watson*, Kamisar p. 366 (bottom) – 371
- c. *Atwater v. City of Lago Vista*, p. 372-379 (top)
- d. *Bostick*, Kamisar bottom of 280-284 plus n.2, n.4, n. 7-9, n. 10 (Seizure)  
Note: I will cover *Torres*, Kamisar 290-95 (Seizure), in class

### Class 16 – Oct. 12 – Stop & Frisk

- a. *Terry v. Ohio*, Kamisar p. 387 (bottom) – 396 (skip n.4)
- b. *Illinois v. Wardlaw*, p. 396-400 (though n.2) (Stop)
- c. *Kansas v. Glover*, p. 403-405 (through n.1) (Stop)
- d. *Scope of Terry Stops*, p. 408-411 (through n. 5)
- e. *Cause to Frisk*, p. 412-413 (Frisk)
- f. *Minnesota v. Dickerson*, p. 414-417 (top) (Frisk)

Optional reading: Butler, *Stop and Frisk & Torture Lite* excerpt (Canvas)

### Class 17 – Oct. 17 – Excessive Force

- a. *Graham v. Connor*, Kamisar p. 417-423
  - a. Pay particular attention to n. 2 on *TN v. Gardner* (deadly force)
- b. *City of Tahlequah v. Bond*, p. 423-427

a. *Skip n. 3*

## **UNIT V -- “PROCEDURE” OF CRIMINAL PROCEDURE (PART II)**

In this unit, we return to the exclusionary rule. As with everything in crim pro, there are exceptions to that rule! We will study these exceptions. We will also look at who has legal standing to bring a legal claim. The bar really likes all of these topics. We cover these rules largely through Fourth Amendment cases, but we will start to cover how these rules apply to the Fifth and Sixth Amendments.

### **Class 18 – Oct. 19 – Standing & de Minimis Exception**

**Total pages: 15**

- a. *Rakas v. Illinois*, Kamisar p. 454-466 (skip n. 5)
- b. *Minnesota v. Carter*, Kamisar p. 466-69

### **Class 19 – Oct. 24 – Fruit of the Poisonous Tree (FOPT) Day I**

- a. FOPT intro & *Wong Sun v. US*, Kamisar p. 469-72
- b. Attenuation material, Kamisar p. 472-80

### **Class 20 – Oct. 26 – FOPT Day II**

- a. Cause in fact material, Kamisar p. 480-83
- b. Inevitable discovery material, Kamisar p. 483-87 (through n.5)

## UNIT VI – Fifth Amendment Rights

This unit focuses on the Fifth Amendment, which governs interrogations and confessions. When and how may the government ask you questions? What rights may the person being questioned assert? We will probe the many judicially-created nuances of the definitions of custody, interrogation, etc.

### Class 21 – Oct. 31 – Introduction & Triggers

NOTE: This is one of the heaviest reading days; plan accordingly.

- a. Historical background, p. 537-38, 540-41, last two paragraphs of 543, 555  
*Note:* this section contains description of historical police tactics and racial violence that we would today consider torture. Heads up given the nature of the material.
- b. *Miranda v. Arizona*, Kamisar p. 557-74  
*Note:* I will post a “quick” guide to Miranda warnings on Canvas, which often serves as a useful companion to the case itself.
- c. Miranda triggering conditions, Kamisar p. 574-76

### Class 22 – Nov. 2 – Custody & Interrogation

- a. *JDB v. North Carolina*, Kamisar p. 576-579 (custody) (skip notes)
- b. *Howes v. Fields*, Kamisar p. 579-583 (custody)
- c. *Rhode Island v. Innis*, Kamisar p. 584-593 (interrogation)
  - i. *Skip n. 7 & 9, 12-14*
- d. *Pennsylvania v. Muniz*, Kamisar p. 593-595 (interrogation)

**NOTE: Motion to Suppress due Sunday, Nov. 5 at midnight**

### Class 23 – Nov. 7 – Sufficiency, Exceptions & Waiver

- a. Public safety doctrine, Kamisar p. 595-600 (exceptions)
  - a. Skip notes 6 & 7
- b. *Duckworth v. Egan*, Kamisar p. 601-604 (sufficiency)
- c. Notes on p. 604-606 (waiver)
- d. Notes on 615-617 (implied waiver)
- e. *Berghuis v. Thomas*, p. 617-621 (implied waiver)

## **Class 24 – Nov. 9 – Remaining Miranda Problems**

- a. Invoking, Kamisar 635-641
- b. Scope, Kamisar 627-631 (majority only), 641-643
- c. Voluntariness test and, Kamisar p. 692-700
- d. FOPT, Kamisar 719-722 (skip notes), 724-726 (majority), plus notes on 729

*Note: For future public defenders and prosecutors: the following cases will be important for you, but we don't cover them in class: Chavez v. Martinez and Colorado v. Connelly.*

## **Class 25 – Nov. 14 – Fifth Amendment Right to Counsel**

- a. Invoking, Kamisar p. 622-627
- b. Scope, Kamisar p. 627-635 (skip n.4 after Davis)
- c. *Moran v. Burbine*, Kamisar p. 607-612 (through n.5) (waiver)
- d. False confessions material, Kamisar p. 710-716

NOTE: today we will watch footage from the *Commonwealth v. Nga Truong* case, which involves the death of a child and an interrogation/confession from a juvenile that the court ruled was coerced. If you have concerns about watching something involving these issues, please reach out and we will make alternative arrangements.

## **UNIT VII – SIXTH AMENDMENT RIGHTS**

We close the semester with the Sixth Amendment right to counsel – which, for future public defenders, will form the backbone of your careers. We will address why and when this right attaches, as well as take a closer look at one circumstance the bar likes to test.

### **Class 26 – Nov. 16 – Sixth Amendment Right to Counsel Part I**

- a. *Gideon v. Wainright*, Kamisar p. 67-73 (read only notes 2, 3, 5, and 8)
- b. Misdemeanor context, 73-75
- c. *Rothgery v. Gillespie County*, Kamisar p. 79-85
- d. *Brewer v. Williams*, Kamisar p. 666-672 (through n. 1)

### **Class 27 – Nov. 28 – Sixth Amendment Right to Counsel Part II**

- a. Waiver, Kamisar 676-78
- b. Invocation, Kamisar 681-683 (majority only)
- c. Scope, Kamisar 686-690      SKIP KENNEDY CONCURRENCE
- d. Pre-trial identification, 738-741, note 1 on 745-46, and n. 5 on p. 747-749

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### **Class 28 – Nov. 30 – FOURTH AMENDMENT REVIEW DAY**

*No additional reading.*

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**FINAL AS SCHEDULED**