

---

# TABLE OF CONTENTS

|                     |    |
|---------------------|----|
| TABLE OF CASES..... | XI |
|---------------------|----|

|                           |          |
|---------------------------|----------|
| <b>Introduction .....</b> | <b>1</b> |
|---------------------------|----------|

## **Chapter 1. The Fourth Amendment: Origins and the Foundations of Modern Doctrine .....**

|  |           |
|--|-----------|
| <b>1. Origins of the Fourth Amendment .....</b>                              | <b>3</b>  |
| The Writs of Assistance Case (Paxton’s Case) .....                           | 3         |
| Argument by James Otis Against the Writs, as Recalled by John<br>Adams ..... | 5         |
| M.H. Smith, The Writs of Assistance Case .....                               | 8         |
| Entick v. Carrington .....   | 8         |
| Virginia Declaration of Rights .....   | 24        |
| Massachusetts Constitution .....   | 24        |
| Constitution of the United States, am. IV.....                               | 24        |
| Act for the Collection of Revenues .....                                     | 24        |
| Wrexford v. Smith.....   | 25        |
| The King v. Dr. Purnell .....  | 25        |
| <b>2. Historical Note: Origins of the Police .....</b>                       | <b>29</b> |
| <b>3. The Federal Regime Based on <i>Boyd v. United States</i> .....</b>     | <b>31</b> |
| Boyd v. United States .....  | 31        |
| Weeks v. United States.....  | 40        |
| Olmstead v. United States .....  | 46        |
| <b>4. Search and Seizure in the States.....</b>                              | <b>58</b> |
| People v. Defore.....  | 58        |
| Irvine v. California.....  | 65        |
| People v. Gonzalez .....   | 77        |
| Mapp v. Ohio .....   | 78        |

## **Chapter 2. Brief “Seizures” of the Person for Purposes of Investigation or Citation .....**

|   |            |
|---|------------|
| <b>1. Introduction: The Doctrinal Architecture of Modern Fourth<br/>Amendment Law .....</b> | <b>87</b>  |
| <b>2. Historical Note: Street Patrol Before <i>Terry</i> .....</b>                          | <b>89</b>  |
| <b>3. <i>Terry</i>.....</b>   | <b>90</b>  |
| Terry v. Ohio .....   | 90         |
| <b>4. When Has a Citizen Been “Seized” for Fourth Amendment<br/>Purposes?.....</b>          | <b>107</b> |
| United States v. Ford.....  | 107        |
| <b>5. Reasonable Suspicion .....</b>  | <b>112</b> |
| United States v. Valentine .....  | 112        |
| <b>6. Incidental Protective Search Power.....</b>   | <b>126</b> |
| United States v. Askew .....  | 126        |
| United States v. King .....   | 143        |
| <b>7. Limits.....</b>   | <b>146</b> |
| Rodriguez v. United States.....   | 146        |
| United States v. Leal .....   | 156        |

|   |   |            |
|---|---|------------|
| 8.  | Empirical Note: Studying Police Patrol Practices .....                              | 161        |
|   | Floyd v. City of New York .....   | 163        |
| 9.  | The Role of Federalism .....  | 168        |
|   | State v. Arreola-Botello .....  | 169        |
| <b>Chapter 3. “Seizures” of the Person: Arrests .....</b> |   | <b>185</b> |
| 1.  | Classification as Arrest and the Probable Cause Standard.....                       | 185        |
|   | Cortez v. McCauley .....  | 185        |
|   | Maryland v. Pringle .....   | 202        |
|   | Hill v. California .....  | 206        |
| 2.  | Required Judicial Authorization.....  | 208        |
|   | United States v. Watson.....  | 208        |
|   | County of Riverside v. McLaughlin .....   | 214        |
|   | Shadwick v. City of Tampa.....  | 229        |
| 3.  | Incidental Search Authority—Right to Force Entry .....                              | 233        |
|   | United States v. Johnson.....   | 233        |
|   | Mascorro v. Billings .....  | 239        |
| 4.  | Search Incident to Arrest .....   | 246        |
|   | United States v. Brown .....  | 246        |
|   | United States v. Tejada .....   | 250        |
|   | Arizona v. Gant .....   | 254        |
|   | Riley v. California & United States v. Wurie.....                                   | 267        |
| 5.  | Limits.....   | 286        |
|   | Virginia v. Moore .....   | 286        |
|   | Tennessee v. Garner .....   | 294        |
|   | Cardenas v. Fisher.....   | 309        |
| <b>Chapter 4. Search for Evidence.....</b>                |   | <b>315</b> |
| 1.  | The “Reasonable Expectation of Privacy” Test .....                                  | 315        |
|   | United States v. Jones .....  | 315        |
|   | a. “Open Fields” .....  | 333        |
|   | United States v. Vankesteren .....  | 333        |
|   | b. Magic Bullets.....   | 338        |
|   | Florida v. Jardines .....   | 338        |
|   | c. The Assumption of Risk and Third Party Doctrines .....                           | 353        |
|   | United States v. White.....   | 353        |
| 2.  | Historical Note: Origins of the Third Party Doctrine.....                           | 370        |
|   | Carpenter v. United States .....  | 373        |
| 3.  | The “Warrant Requirement” .....   | 423        |
|   | a. Overview of the “Requirement” and the “Exigent<br>Circumstances” Exception ..... | 423        |
|   | Mincey v. Arizona.....  | 423        |
|   | O’Brien v. City of Grand Rapids .....   | 428        |
|   | b. Search Incident to Arrest .....  | 429        |
|   | c. Vehicle Exception .....  | 429        |
|   | United States v. Kelly.....   | 429        |
|   | United States v. Camou.....   | 435        |
|   | d. Inventory Searches .....   | 446        |
|   | United States v. Lopez.....   | 446        |

|  |   |            |
|--|---|------------|
| e.   | “Plain View” .....  | 453        |
|  | Horton v. California .....  | 453        |
| 4.   | Requirements of a Valid Warrant.....  | 461        |
| a.   | “Probable Cause” .....  | 461        |
|  | Illinois v. Gates .....   | 461        |
| b.   | “Neutral and Detached” Magistrate .....   | 481        |
|  | State v. Brown .....  | 481        |
| c.   | “Particularly Describing . . .” .....   | 487        |
|  | Levenduski v. State.....  | 487        |
| d.   | Veracity of the Affidavit.....  | 491        |
|  | People v. Gales .....   | 491        |
| 5.   | Manner of Execution.....  | 499        |
| a.   | “Knock and Announce” .....  | 499        |
|  | Whittier v. Kobayashi .....   | 499        |
| b.   | Incidental Detention and Search Powers .....  | 504        |
|  | Muehler v. Mena .....   | 504        |
| 6.   | Electronic Surveillance Warrants.....   | 514        |
|  | U.S. Department of Justice, U.S. Attorneys Manual, Criminal<br>Resource Manual.....   | 514        |
| 7.   | Consent Searches .....  | 524        |
|  | United States v. Price .....  | 524        |
| 8.   | The “Special Needs” Doctrine.....   | 535        |
|  | Cassidy v. Chertoff.....  | 535        |
|  | City of Los Angeles, Calif. v. Patel.....   | 554        |
| 9.   | Border Searches .....   | 569        |
|  | United States v. Cano .....   | 569        |
| <b>Chapter 5. Fourth Amendment Remedies.....</b> |   | <b>587</b> |
| 1.   | Habeas Corpus .....   | 587        |
|  | L.A.E. v. Davis .....   | 587        |
| 2.   | Damage Actions Under State Tort Law .....   | 588        |
|  | Spears v. Akron Police Department.....  | 588        |
|  | Timmons v. Metropolitan Government of Nashville and Davidson<br>County.....   | 593        |
|  | Niderstadt v. Town of Carrizozo .....   | 603        |
| 3.   | The Constitutional Tort Action Under 42 U.S.C. § 1983.....  | 611        |
|  | 42 U.S.C. § 1983 Civil Action for Deprivation of Rights .....   | 611        |
|  | Presidential Proclamation Calling Attention to the Act Commonly<br>Known as the Ku Klux Law, and Enjoining Obedience<br>Thereto ..... | 611        |
|  | Poolaw v. Marcantel.....  | 612        |
|  | 42 U.S.C. § 1988 .....  | 631        |
|  | Poy v. Boutselis .....  | 631        |
|  | Angiolillo v. Collier County .....  | 641        |
|  | Town of Newton v. Rumery .....  | 646        |
| 4.   | Note on Institutional Competence and Systemic Feedback Loops .....  | 661        |
| 5.   | <i>Bivens</i> Actions Against Federal Officers .....  | 663        |
|  | Big Cats of Serenity Springs v. Rhodes .....  | 663        |

|    |  |     |
|----|--|-----|
| 6. | The Exclusionary Rule .....  | 679 |
| a. | Standing.....  | 679 |
|    | Atkins v. Commonwealth .....   | 679 |
|    | Carter v. State.....   | 684 |
| b. | Attenuation, Independent Source, and Inevitable Discovery .....                    | 691 |
|    | Utah v. Strieff.....   | 691 |
|    | State v. Le.....   | 703 |
| c. | Collateral Proceedings.....  | 709 |
|    | Logan v. Commonwealth .....  | 709 |
| d. | Impeachment.....   | 713 |
|    | Wilkes v. United States .....  | 713 |
| e. | Good Faith—and the Future of the Exclusionary Rule.....                            | 729 |
|    | Herring v. United States .....   | 729 |
|    | Davis v. United States .....   | 743 |
| f. | Comparative Note—the Exclusionary Rule in Canada .....                             | 758 |
|    | Constitution Act, 1982, Part I (Canadian Charter of Rights<br>and Liberties) ..... | 759 |
|    | The Queen v. Grant .....   | 759 |
| 7. | Institutional Reform Litigation .....  | 761 |
|    | City of Los Angeles v. Lyons .....   | 761 |
|    | Floyd v. City of New York .....  | 780 |
|    | 42 U.S.C. § 14141 Cause of Action.....   | 784 |
|    | United States v. City of Detroit, Michigan, and Detroit Police<br>Department ..... | 785 |
|    | United States v. City of Detroit, Michigan, and Detroit Police<br>Department ..... | 788 |
| 8. | Empirical Note: Studying Institutional Reform Injunctions .....                    | 797 |

## **Chapter 6. Self-Incrimination Clause Limits on Police**

|    |  |            |
|----|--|------------|
|    | <b>Investigations.....</b>   | <b>799</b> |
| 1. | Origins of the Fifth Amendment.....  | 799        |
|    | Lilburne’s Case.....   | 799        |
|    | Act for Regulating the Privy Council and for taking away the<br>Court commonly called the Star Chamber ..... | 806        |
|    | William Blackstone, IV Commentaries on the Laws and Customs<br>of England.....                               | 808        |
|    | James Joiner’s Case.....   | 808        |
|    | Virginia Declaration of Rights .....   | 811        |
|    | Massachusetts Constitution.....  | 811        |
|    | Constitution of the United States, am. V .....   | 811        |
|    | Judiciary Act, 1789, § 33 .....  | 811        |
| 2. | Philosophical Note: What (if Anything) Justifies the Privilege<br>Against Self-Incrimination? .....          | 811        |
|    | Murphy v. Waterfront Commission of New York Harbor .....   | 811        |
|    | Jeremy Bentham, Rationale of Judicial Evidence, in VII Works of<br>Jeremy Bentham .....                      | 812        |
|    | James Fitzjames Stephen, I History of the Criminal Law of<br>England.....                                    | 818        |

|    |   |     |
|----|---|-----|
| 3. | General Fifth Amendment Doctrine: Compulsion, Testimonial Evidence, Incrimination .....                     | 818 |
|    | Vogt v. City of Hays, Kansas .....  | 818 |
|    | United States v. Ponds .....  | 836 |
| 4. | <i>Miranda</i> Doctrine: Basic Principles.....  | 851 |
|    | Miranda v. Arizona .....  | 851 |
|    | Dickerson v. United States .....  | 880 |
| 5. | <i>Miranda</i> Doctrine, First Level: “Custody” and “Interrogation” .....                                   | 895 |
| a. | “Custody” .....   | 895 |
|    | Howes v. Fields.....  | 895 |
| b. | “Interrogation” .....   | 906 |
|    | United States v. Woods .....  | 906 |
| 6. | <i>Miranda</i> Doctrine, Second Level: “Waiver,” “Invocation,” “Counsel,” “Silence,” and “Initiation” ..... | 914 |
|    | Berghuis v. Thompkins.....  | 914 |
|    | United States v. Hutchins .....   | 937 |
| 7. | The <i>Miranda</i> Exclusionary Rule.....   | 955 |
|    | United States v. Nichols .....  | 955 |

### **Chapter 7. The Sixth Amendment Counsel Clause as a Limit on**

|    |  |            |
|----|--|------------|
|    | <b>Police Investigations .....</b>   | <b>965</b> |
| 1. | Origin and Evolution of the Sixth Amendment Counsel Clause .....                 | 965        |
|    | William Blackstone, IV Commentaries .....  | 965        |
|    | Massachusetts Constitution .....   | 966        |
|    | Constitution of the United States, am. VI.....                                   | 966        |
|    | Judiciary Act of 1789 .....  | 966        |
|    | An Act for the Punishment of Certain Crimes Against the United States 1790 ..... | 967        |
|    | United States v. Bollman .....   | 967        |
|    | Gideon v. Wainwright.....  | 969        |
|    | Escobedo v. Illinois.....  | 972        |
|    | Kirby v. Illinois .....  | 980        |
| 2. | “Attachment” .....   | 987        |
|    | Rothgery v. Gillespie County .....   | 987        |
| 3. | “Critical Stages” .....  | 1009       |
|    | Alexander v. Smith .....   | 1009       |
|    | United States v. Kon Yu-Leung .....  | 1013       |
| 4. | Waiver.....  | 1022       |
|    | Montejo v. Louisiana.....  | 1022       |
| 5. | The Sixth Amendment Exclusionary Rule .....                                      | 1044       |
|    | Kansas v. Ventris .....  | 1044       |
|    | United States v. Coker.....  | 1051       |
|    | State v. Hunton.....   | 1062       |

### **Chapter 8. Due Process Limits on Police Investigations .....**

|    |   |      |
|----|---|------|
| 1. | Origins of the Fifth Amendment Due Process Clause.....                                | 1067 |
|    | Edward S. McKechnie, Magna Carta: A Commentary on the Great Charter of King John..... | 1067 |
|    | Edward Coke, II Institute on Magna Carta .....  | 1068 |

|    |  |      |
|----|--|------|
|    | Virginia Declaration of Rights .....   | 1068 |
|    | Ratification of the Constitution by the State of New York .....                                  | 1068 |
|    | Constitution of the United States, am. V .....   | 1069 |
|    | Constitution of the United States, am. IV, Section 1 .....                                       | 1069 |
| 2. | Historical Note: Due Process, Race, and the Supreme Court<br>1919–1939.....                      | 1069 |
|    | Brief of Black Cops Against Police Brutality as Amicus Curiae in<br>Support of Respondents ..... | 1069 |
| 3. | Due Process as “Fundamental Fairness” .....  | 1072 |
|    | <i>Brown v. Mississippi</i> .....  | 1072 |
|    | <i>Crooker v. California</i> .....   | 1078 |
| 4. | Due Process as “Incorporation” .....   | 1086 |
|    | <i>Adamson v. California</i> .....   | 1086 |
| 5. | The Due Process Voluntariness Doctrine Since <i>Miranda</i> .....                                | 1105 |
|    | <i>Dye v. Commonwealth of Kentucky</i> .....   | 1105 |
| 6. | Due Process and Eyewitness Identifications .....   | 1116 |
|    | <i>Perry v. New Hampshire</i> .....  | 1116 |
|    | <i>United States v. Sanders</i> .....  | 1137 |
|    | <i>United States v. Delgado</i> .....  | 1145 |
|    | INDEX .....  | 1151 |