

Criminal Procedure: Pre-Trial – Fall Semester 2020

- PROFESSOR:** Stan Cox
- E-MAIL:** stan.cox@siu.edu
- OFFICE:** Room 222 (but we will meet virtually for one on one visits)
- OFFICE HOURS:** Make appointments directly with me; I usually have multiple days and times available and am happy to field your questions and talk about CrimPro.
- REQUIRED TEXT:** You may use either the paperback or the hardbound version of the Dressler, Thomas, and Medwed Criminal Procedure casebook (7th Ed). The softbound version includes all the chapters from the hardbound version that we will be looking at this semester (and a few more). The hardbound version includes additional chapters we will not be looking at this semester. Page numbering is the same in both versions.
The paperback version is: Criminal Procedure, Investigating Crime (7th Edition)
The hardbound version is: Criminal Procedure: Principles, Policies, and Perspectives (7th Edition)
- MEETING TIMES:** This class is scheduled to meet Mondays and Wednesdays from 10:30 - 11:45. Where and how we meet is subject to change, based on COVID concerns. Currently we are scheduled for Mondays and Wednesdays in Room108 (Courtroom). **BUT LOOK FOR ANNOUNCEMENTS IN TWEN OR ELSEWHERE** that may change this. Some of you will be attending only via Zoom from the beginning, and we may all need or choose to switch to Zoom later on - we shall see.

Welcome! Criminal Procedure: Pre-Trial (CrimPro) is a course that explores issues about which almost everyone has strong opinions. Who doesn't have opinions about what places or things ought to be off limits to police snooping unless there is some reason to suspect that crime is afoot? And who doesn't have opinions about exactly how much suspicion or evidence to support potential criminal wrongdoing police ought to have to allow them to search where/what they otherwise would not have a right to, or to arrest someone they believe has committed a crime, or to stop someone for a while to investigate further. Once a person is detained, arrested, or charged with crime, who doesn't have opinions about how much leeway the police should have to try to pressure information out of that person? This course explores all of these things and more!

Our focus is on the federal constitutional limits on police investigation. States can place additional limits on state police activity either by statute or state constitutional provisions. Congress can pass laws that restrict what federal and often state police are permitted to do. We don't look at these additional limits on police activity in this course very much – just occasionally, to remind us that the balances allowed under the federal constitution can be

modified, and that they sometimes have been modified when (some) folk are particularly uncomfortable with what the federal constitution otherwise allows police to do.

So, to repeat, our focus is nearly completely on the federal constitutional limits on police investigation. CrimPro is a constitutional law course. It studies the parts of the Constitution that restrict police activity. For some of you this may be your first constitutional law course, or you may be taking it concurrently with Constitutional Law. Be aware that the Justices, as you do, also have strong opinions about what the police should be allowed to do, and they have differing views as to how or whether the federal constitution speaks to those issues. We will sometimes spend as much time with dissenting and concurring opinions as with the majority opinion. This is so because the logic of those opinions can be as valid as the logic of the majority opinion and because constitutional law can change as the Court shifts over time either towards a more liberal or a more conservative approach to these issues. Having said that, one of the important goals of this course is for you to learn the currently controlling law in this bar-tested area and to be able to apply that law correctly to fact patterns. For CrimPro you will need to know both what the law currently is, and why some Justices want it to be that way while others want it to be different.

We will spend more than half of the semester on the Fourth Amendment. The law there is described by one of our case book authors as “a mess.” We will then spend several days on the law governing police interrogation, which might not be regulated as the Warren Court hoped, or might be wrongheaded, but at least is not as much a conceptual mess. Next we will briefly examine the Sixth Amendment right to counsel that (sometimes) limits police interrogation, and is a doctrine oddly conceived and perhaps on its way to irrelevance. We hope to conclude with a very brief look at the eyewitness identification doctrine, which largely ignores the quite substantial body of evidence about eyewitness identification procedures posing serious risks for innocent suspects. At the end of the day (or end of the course) you may come to the conclusion that the Court has not provided very strong rules to regulate police investigation. If you do come to that conclusion, my reminder to you would be that there are other ways besides using the federal constitution to regulate police investigation, and that the Court’s law in this area does not give police investigation a complete blank check. Some of you may end up concluding oppositely that the Court’s law in this area handcuffs the police more than would be desired. I look forward to your discussions about these matters.

Course TWEN page. Be sure to add our course TWEN page entitled “Criminal Procedure: Pre-trial,” and pay attention to announcements there and in class regarding materials posted and assignments required to be submitted.

Learning goals: Students will come to understand the doctrines of constitutional law relating to search and seizure, interrogation, and (if time allows) eyewitness identification; be able to apply those doctrines correctly to fact patterns; and be able to evaluate and criticize those doctrines.

Workload expectations. Students are expected to prepare a *minimum* of 2 hours outside of class for each hour (calculated on a 50-minute basis) of in-class time. Note that the requirement of 2 hours of out-of-class work per week per credit hour represents a *minimum* standard. If necessary to complete assignments and achieve professional competency, students are expected

to spend whatever additional time is needed to complete assigned work so as to understand and be able to apply and critique the constitutional doctrines involved.

COVID flexibility and requirements. Given the continuing pandemic, we will need to be potentially flexible as to how class might be conducted. For health reasons (mine, yours, the state's, the community's) it might become advisable to move completely to Zoom instead of having live classes. Individual meetings are currently planned to be via Zoom rather than in person, and are always welcomed.

For those of you attending classes live (you, me, all of us), we are required to wear masks regardless of any ability and requirement to socially distance. We will see how this affects our classroom experience as we try out this new learning experience. It may cause us to choose to do some sessions by Zoom or it may become no big deal as we get used to teaching and learning while masked. I also plan to do some sessions only by Zoom, but will announce those beforehand if we are still using as our default approach the hybrid method of some attending live and some by Zoom.

Laptops discouraged. No studies support the use of laptops in class, and many studies document their harmful effect on student learning when used in class. Given the current COVID crisis, we may need to use laptops for class more than is good for us. IF we do so, be sure to have ONLY the course windows open – nothing else, please. If I can operate w/o laptops for the class live, I will try to do so. All other e-devices are required to be off or in airplane mode at all times during class.

Class Attendance will be governed by the SIU Law rules as to absences. I reserve the right to count tardiness as an absence, especially if it happens more than once or is substantial in length. Attendance and participation via Zoom is the same as attendance live.

Grades will be based on a final exam to be given at the date and time scheduled by the Registrar, unless administrative decisions are made this semester that modify that.

Our final exam will likely be open book and taken via TWEN, but more details on that will be provided during the semester and as I get your feedback as to if that format would be your preference. The exam will be a mixture of multiple choice and essay questions.

Practice Questions. I plan to provide sample questions to you during the semester, both multiple choice and essay, similar to those that will be in your final exam, that you can use to assess your understanding, and on which I would be happy to give you feedback. You will be required to submit one practice essay to fulfill the Writing Across the Curriculum (WAC) requirement. I may also have one or more multiple choice exercises be required. What you score on these, if I give them, would not affect your grade, but you would be required to do it/them, as with the WAC, as a d alcourse requirement.

Expected Readings for the whole semester will be provided later (I am still struggling with what reasonably can be cut). Expected readings for the first five classes are included at the end of this document.

Conclusion. Bring to this class your enthusiasm, curiosity, and, yes, even your strong opinions. I look forward to seeing you soon!

Additional SIU policies and procedures

EMERGENCY PROCEDURES: We ask that you become familiar with Emergency Preparedness @ SIU. Emergency response information is available on posters in buildings on campus, on the Emergency Preparedness @ SIU website, and through text and email alerts. To register for alerts, visit: <http://emergency.siu.edu/>.

DISABILITY POLICY. SIU Carbondale is committed to providing an inclusive and accessible experience for all students with disabilities. Disability Support Services coordinates the implementation of accommodations. If you think you may be eligible for accommodations but have not yet obtained approval please contact DSS immediately at 618-453-5738 or disabilityservices.siu.edu. You may request accommodations at any time, but timely requests help to insure accommodations are in place when needed. Accommodations and services are determined through an interactive process with students and may involve consideration of specific course design and learning objectives in consultation with faculty. Upon completion of a Disability Accommodation Agreement with DSS, students should bring the agreements for each course to the School of Law Registrar's Office to ensure the School of Law provides the proper classroom and examination accommodations. Accommodation request and renewal forms can be found here: <https://law.siu.edu/academics/>.

SALUKI CARES. The purpose of Saluki Cares is to develop, facilitate and coordinate a university-wide program of care and support for students in any type of distress—physical, emotional, financial, or personal. By working closely with faculty, staff, students and their families, SIU will continue to display a culture of care and demonstrate to our students and their families that they are an important part of the community. For Information on Saluki Cares: (618) 453-2461, or siucares@siu.edu, <http://salukicare.siu.edu/index.html>. At the School of Law, Assistant Dean Judi Ray is also available to help students access university resources. Her email is judiray@siu.edu, and her phone number is 618- 453-3135.

COVID-19. As a condition of on-campus enrollment, all SIUC students are required to engage in safe behaviors to avoid the spread of COVID-19, including the requirement that all students wear a mask in campus buildings, including classrooms, laboratories, and studios when others are present, regardless of social distancing. Students are expected to follow physical or social distancing guidelines by keeping at least 6 feet from others, and practicing good hand hygiene. Failure to comply with this policy may result in dismissal from the current class session. If the student refuses to leave the classroom after being dismissed, the student may be referred to the Office of Student Rights and Responsibilities. SIUC will follow federal, state and county public health recommendations and mandates in all decisions relating to university operation. Students should regularly review the link for the SIUC COVID-19 response.

Beginning Readings (subject to change)

August 17:

Getting the Supreme Court's attention

Read: pp 9-35

Norms that might influence constitutional interpretation

Read: pp 35-45 (stop after note 3)

These readings are for introductory purposes and not on the detail of rules that we will learn later (for example do not overstress as to the rule take away in *Powell*). Hopefully, however, they spark your attention.

August 19:

Intro to the 4th Amendment

Read: pp 67-70 (study the text carefully)

Exceedingly brief intro to the exclusionary rule (we will study the exclusionary rule in considerably more detail later - this is just to let you know it exists in some fashion)

Read: pp 70-72 (stop before "Note"); pp 82-83 (parts III, IV & V of majority opinion in *Mapp v Ohio*); pp 89-90 (note 8 only)

Begin: What is a Search?

Read: pp 91-110 (*Katz* reasonable expectation of privacy test; *White* test of voluntarily revealed info)

(NB: This "What is a search?" unit has many twists, turns, and potential changes of direction. Enjoy the ride!)

August 24

What is a Search?

Read: 111- 28

(The many cases in the notes count as importantly for precedential purposes as any main case, so do spend time there.)

August 26

What is a Search?

Read: 128-54 (the modern world meets the 4th Amendment)

August 31

What is a Search?

Read 154-85 (The Roberts Court continues to try to sort it out)

MORE READINGS TO FOLLOW - STAY TUNED