

AP-LS Student Committee

Privacy and the Fourth Amendment: Basics of Criminal Procedural Analysis for Government Searches and Seizures

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Introduction

This primer is intended to supplement the pre-conference workshop hosted by the Student Committee at the 2018 AP-LS Annual Conference. For the third annual pre-conference workshop, the Student Committee has chosen to focus on Criminal Procedure, the body of law that governs the criminal justice process, specifically the 4th Amendment and protections against unreasonable government search and seizure. This topic was selected because of the impact psychology has had and could have on this area of law. The 4th amendment doctrine is based on assumptions about human behavior that could be better informed by psychological research. Both the workshop and this primer are meant to give an overview of criminal procedure with specific emphasis on the 4th amendment, and provide an introduction to basic legal analysis.

The topics that follow were carefully selected to help psychologists in training understand the context in which they will be working, and to help them understand how their colleagues in the legal field frame analyses. Although many of these doctrines are commonly practiced, it is important to keep in mind that jurisdictions— and therefore legal doctrines—vary. We hope that you will find this to be a valuable resource to which you can reference throughout your psychology-law training. If you have any questions, please feel free to contact the presenters, below:

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The Criminal Process

Although it varies across jurisdictions, the average criminal process in the United States unfolds in the following steps:

1. The crime
2. **The investigation**
3. The arrest
4. The booking
5. Initial charging decision
6. Filing a complaint
7. The first appearance
8. Preliminary hearing
9. Grand Jury Review (federal and some states)
10. Filing Indictment or Information
11. Arraignment
12. **Pretrial Motions, discovery, plea negotiations**
13. Trial
14. Sentencing
15. Appeals
16. Post-conviction petitions

Sources of Criminal Procedure

The law of Criminal Procedure guides how the criminal process occurs and provides limitations on the exercise of state power to enforce the criminal law. Criminal procedure law is derived from:

- The United States Constitution (specifically the Bill of Rights and Due Process Clause of the 14th Amendment)
- Federal common law or case law
- Federal Rules of Criminal Procedure

The Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”

Over the course of our history the 4th Amendment has been understood to represent “. . . **the right to be let alone** . . .”¹ and “protects privacy and security of individuals against arbitrary invasions by governmental officials.”² The 4th Amendment doctrine today has become very complicated and broad. It impacts people in many settings other than the criminal process, such as stop and frisk, mass surveillance and NSA data collection, and immigration raids. However,

¹ *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

² *Camara v. Municipal Court*, 387 U.S. 523 (1967).

for the purposes of this primer, the focus is on the 4th Amendment analysis in the criminal context.

Within the context of criminal procedure, the 4th Amendment protects citizens against unreasonable search and seizure by the government during the investigative phase of the criminal process. It is a limitation on police conduct while investigating crimes. Defendants may file a pretrial motion to suppress to challenge the admission of evidence obtained through a search or seizure that allegedly violated the 4th Amendment.

Incorporation

Courts have held that those protections laid out in the Bill of Rights that have been deemed “fundamental rights” apply to the states through the Due Process clause of the 14th Amendment. Therefore, those rights that are considered central to being American are enforceable against both federal and state government actors³. Those rights that have been incorporated include:

- 1st Amendment
- 2nd Amendment
- **4th Amendment**
- 5th Amendment (except right to grand jury indictment)
- 6th Amendment
- 8th Amendment (only the cruel and unusual punishment clause)

The Fourth Amendment Analysis

To analyze a motion to suppress based on the 4th amendment, the court must conduct a two-step analysis:

1. Is the 4th amendment violated?
 - a. Is there a 4th amendment event?
 - i. Who is the individual interacting with?
 - ii. What is the nature of the activity?
 - b. Are the requirements of the 4th amendment satisfied?
 - i. Is the search or seizure reasonable?
 - ii. If not, does the search or seizure fit into one of the exceptions?
2. Should the evidence be excluded?
 - a. Apply the exclusionary rule and good faith exception

³ District of Columbia v. Heller, 554 U.S. 570 (2008).

1. Is the 4th amendment violated?

a. Is there a 4th amendment event?

i. Is there a state actor?

The Bill of Rights of the United States Constitution only protects individual rights from **state actors**.⁴ In order for the 4th Amendment to apply, there must action by a government agent, such as a police officer from the local police department or an agent from the Drug Enforcement Agency.

ii. What is the nature of the activity?

1. What is a **search**?

a. What activity?

- i. Touching or entering property without permission⁵ or
- ii. Activity that invades other protected privacy interests⁶

b. Standard to determine **protected privacy interests**?

- i. Activity violates the reasonable expectation of privacy⁷
 1. **Subjective:** the individual actually expected privacy
 2. **Objective:** expectation that society is prepared to recognize as reasonable
- c. The interest must belong to the defendant challenging the search⁸

2. What is a **seizure**?

- a. Of property is an interference with **possessory** interest
- b. Of person is an interference with a liberty interest
 - i. Test: If a reasonable person would **feel free to leave** the encounter under the totality of the circumstances?⁹

b. Are the requirements of the 4th amendment satisfied?

i. Is the search or seizure **reasonable**?

1. In accordance with a **warrant issued by a judge** or magistrate upon **probable cause it is reasonable**.

- a. Probable cause for a search means, under the totality of the circumstances, there is a fair probability that certain items are the fruits, instrumentalities, or evidence of a crime, and that these items to be searched or seized are presented to be found in the place to be searched¹⁰
- b. Probable cause for a seizure means, under totality of the circumstances, there is a fair probability that a crime has been committed and that the

⁴ Civil Rights Cases, 109 U.S. 3 (1883).

⁵ Olmstead v. United States, 277 U.S. 438 (1928).

⁶ Katz v. United States, 389 U.S. 347 (1967).

⁷ Id. at (Harlan, J. concurrence).

⁸ Rakas v. Illinois, 439 U.S. 128 (1978). Note that this bullet refers to “standing,” the ability to assert a claim before the court because a violation has been committed against an individual. You should be aware that standing is separate analysis, but is beyond the scope of this presentation.

⁹ United States v. Mendenhall, 466 U.S. 544 (1980).

¹⁰ Hicks v. Arizona, 480 U.S. 321 (1987).

- person or property to be seized committed the crime or is the fruit, instrumentality, or evidence of a crime.¹¹
2. **Without a warrant**, the court examines the totality of the circumstances to assess the reasonableness of the search or seizure.¹² The court determines whether the search or seizure fits into one of the warrant exceptions:¹³
 - a. Search incident to a lawful arrest
 - b. **Plain view**¹⁴
 - c. Hot pursuit, evanescent evidence, and exigent circumstance
 - d. Consent
 - e. Stop and frisk
 - f. **“Automobile” Exception**¹⁵
 - g. Other: balancing the need for the search with the individual interests
- ii. **Plain View**
 1. The police may make a warrantless seizure of anything in plain view when:
 - a. They are legally authorized to be on the premises
 - b. Discover evidence, fruits, or instrumentalities of crime or contraband;
 - c. Which is in plain view; and
 - d. Have probable cause to believe that the item is evidence, fruits, or instrumentality of a crime.¹⁶
 - iii. **“Automobile” Exception**
 1. No warrant is required to search a vehicle when an officer has probable cause because:
 - a. Mobility threatens access to any evidence and increases exigency;
 - b. Lesser expectation of privacy due to windows; and
 - c. Subjected to pervasive regulation of all vehicles traveling on public roads.¹⁷
 2. If probable cause to search the vehicle, officers can search the entire vehicle and all the containers inside the vehicle that might reasonably contain the object or items for which they are searching.¹⁸

2. Should the evidence be excluded?

Upon determination that the search or seizure did not meet the requirements of the 4th amendment, the courts must decide whether the evidence obtained through the search or seizure is admissible in a criminal trial. Evidence directly obtained as a result of the 4th amendment violation, as well as secondary evidence that are the fruits of illegal activity are inadmissible against the defendant.¹⁹ This is called the **Exclusionary Rule**.²⁰ The

¹¹ Michigan v. DeFillippo, 443 U.S. 31 (1979).

¹² South Dakota v. Opperman, 428 U.S. 364 (1976).

¹³ Arizona v. Gant, 556 U.S. 332 (2009).

¹⁴ Hicks, 480 U.S. 321 (1987).

¹⁵ Carroll v. United States, 267 U.S. 132 (1925); California v. Carney, 417 U.S. 386 (1985).

¹⁶ Hicks, 480 U.S. 321 (1987).

¹⁷ Id.

¹⁸ United States v. Ross, 456 U.S. 798 (1982); Wyoming v. Houghton, 526 U.S. 295 (1999) (including passengers belongings).

¹⁹ Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

Exclusionary Rule seeks to provide a remedy to the civilian wronged and to deter state actors from infringing on the rights guaranteed by the United States Constitution.

However, when there is a violation, evidence is not automatically excluded. The lower courts engage in case-by-case balancing. **The district court weighs the governmental interest against the individual right at issue.** Specifically, in the context of the 4th amendment they balance the **purpose of the exclusionary rule**, to deter police misconduct, **against the costs of excluding probative evidence.**²¹ Evidence will be excluded from trial when the exclusion furthers to goals of deterring police misconduct.

The application of the of this balancing test has evolved in various contexts to suggest that “the exclusionary rule more generally modified to permit the introduction of evidence obtained in the **reasonable good-faith that a search or seizure was in accord with the 4th amendment.**”²² Suppression of evidence is appropriate only when if the officers were **dishonest or reckless** in preparing for a warrant or making a probable cause determination or could not have had an **objective belief** in the existence of probable cause.²³

The good faith inquiry examines whether, under the totality of the circumstances, a reasonably well-trained police officer would have objectively known that the search was illegal.²⁴ The Court has provided space for police officers to make objectively reasonable mistakes of fact and mistakes of law.²⁵

Appellate Review

If the motion to suppress evidence obtained illegally under the 4th amendment is denied and the evidence is allowed into a criminal trial, the defendant may appeal the motion. However, the defendant must object when the evidence is entered into the record to preserve their objection.

On appellate review, the higher courts will apply the harmless error test to evaluate the decision of the lower court. The harmless error test is a deferential test, meaning the appellate court gives the lower court’s determination great weight. For a conviction to be upheld and stand, the state bears the burden of showing that, beyond a reasonable doubt, that the admission of evidence was harmless error and the conviction would have resulted even without the allegedly improperly admitted evidence.²⁶

²⁰ Weeks, 232 U.S. 383 (1914); Mapp, 367 U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471 (1963).

²¹ Herring v. United States, 555 U.S. 135 (2009).

²² United States v. Leon, 468 U.S. 897 (1984).

²³ Id.

²⁴ Id.

²⁵ Heien v. North Carolina, 574 U.S. ____ (2014).

²⁶ Chapman v. California, 386 U.S. 18 (1967).

Basic Legal Analysis - IRAC

Lawyers are advocates for their client. In criminal law, this might mean that defense attorneys are responsible for presenting the argument that the state's action violated the Fourth Amendment and that the fruits of that violation should be excluded at trial. Alternatively, prosecuting attorneys might need to argue that the Fourth Amendment was not violated. One way lawyers approach the task of reading cases to make this argument and writing briefs to present their own argument is using the **IRAC** method of legal analysis. This method provides for the structure by identifying or signaling 4 important components of the analysis:

Issue: Statement of the legal issue being considered

Rule: Statement of the relevant rule of law

Analysis: Application of the relevant rule of law to the facts of the case

Conclusion: A summary conclusion of the case

Application of IRAC to 4th Amendment Problems

Now you get to apply the IRAC analysis to the 4th amendment problems found in the presentation. The facts and issues have been provided for you. Please use the 4th amendment analysis presented above to apply the rules to those facts.