



HOT TOPICS IN CRIMINAL LAW AND PROCEDURE

Fall 2020

T,Th 1:00-2:30

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Introduction

Welcome to the Hot Topics Seminar! I have planned what I hope will be an exciting semester with guest lecturers and documentaries, as well as some interesting readings. Given the extraordinary events of this year with the killing of George Floyd and the national events spurred by it, we will focus to a greater extent on the complicated history of race in this country and how it has played out in the criminal justice system. This is not an easy or comfortable subject to discuss, and the topic can elicit a great deal of emotion. Whatever your feelings about issues of race in this country, I ask you to keep an open mind and approach the readings and the discussions with a genuine desire to learn something new. As future leaders, you will become the prosecutors, defense attorneys, judges and other government leaders who will navigate these issues and set policies. I have finally reached the conclusion that we could not truly understand today's events without first learning more about the history of race relations in this country so that we better understand how the current problems came to be. Hopefully, in doing so, we might begin to find positive steps that we can take as a nation to move forward toward a more peaceful, productive and just future for all.

If you are worried about writing a seminar paper, don't be. It is within your reach to write a solid research paper, so long as you work consistently all semester. If you have other heavy demands on your time, you may want to consider taking either cutting back on those demands or taking a seminar later in your law school career. In order to write a good paper, you will need to spend time researching, reading, taking notes, outlining, and then fleshing out the paper. Crafting a good paper will require many, many revisions. Writing the footnotes involves taking the time to include all the necessary information in the proper form, and this task takes more time than you might imagine. Thus, you should

plan to devote yourself to writing your paper this semester. I will work closely with each of you throughout the process.

Requirements

1. If you miss more than three classes, you will be dropped from the course. The Executive Assistant for my faculty suite, Ms. Lillian White, will distribute an attendance sheet prior to each class session.
2. Class preparation and participation will be taken into account in determining the final grade. You should be prepared to discuss all of the assigned readings for the course.
3. **A seminar paper of at least 10,000 words or approximately 35 pages.** You may exceed that length, but shorter papers are not satisfactory. The final paper, as well as the prospectus and all drafts, must be original work, based on original legal research. (See note on originality below.) You may select any topic relating to criminal law or criminal procedure, subject to my approval. We will discuss a list of possible topics in class, and you may choose one of these or propose a different topic.
4. A short **prospectus** (two to five pages) is required. The prospectus should briefly explain the topic and the thesis (ie. main proposal or observation made) of the paper. You may not be in a position to state your thesis at this point, and that is fine. Students often convert their prospectus into the introduction for their papers.
5. **Two drafts** of the seminar paper will be required.

The quality of the prospectus and drafts will not be taken into account in determining the final grade, so long as they demonstrate a *good faith effort* toward the development of the research project. However, the final grade will be negatively affected by the failure to submit either of the two drafts in a timely manner. If you require an extension, you should speak to me about it *in advance* of the deadline. I expect you to conduct yourselves professionally in meeting your deadlines.

6. **An oral presentation of your research paper** (15 minutes + 5 minutes for Q&A).

Zoom Classroom Requirements

1. *You must be connected to the internet videoconference when class starts.* If your schedule allows it, try to join the meeting 15-20 minutes before class begins. I've scheduled the Zoom session to begin at 11:30 am and enabled you to join the meeting before the host joins. You also can (and should) test your video and audio beforehand.

2. You must join with *video turned on*. Your computer must have a working video and quality audio capability, joining by audio-only due to your lack of video capability may be treated as an absence (you may need an external mic or headset for sufficient audio capability).

You must present your face and upper body area professionally in the video stream. Eating “on camera” is not a professional presentation.

It’s best to try to join the meeting from a Wi-Fi local area network, like the one you probably have at home. Your bandwidth likely will be higher there than if try to you participate from a mobile network, such as by trying to join the meeting on your phone while not at home.

Given that you should have your video on, you may want to consider placing your computer in a location that provides you with *appropriate lighting on your face and with an appropriate background*. You may want to use a virtual background, rather than having the camera show whatever is behind you in the room in which you are participating. The virtual background options offered through the Zoom client are pretty distracting, however, so you should another that you download for from the internet. Again, the important thing is to have a non-distracting, static background, whether real or virtual.

3. During class, I encourage you to *keep your mic muted* until you are called upon or if you have a question/comment you want to offer during the Q & A period. If possible, it’s obviously best to try to participate in a place where there isn’t much background noise. Barking dogs, crying children, etc. make it hard not just on you, but on everyone else when you unmute yourself.

4. If your computer is a laptop, you must *not be traveling or engaged in other distracting activities* during class.

5. *You may not join the class from a phone.*

6. You must *identify yourself with your class roll name* in the Zoom software.

7. Please note that the *class will be recorded automatically*, so you should be aware that if you talk to another student before the class begins, you may be recorded. Links to the recordings will be posted to the Blackboard webpage for this class.

Counseling and Psychological Services

Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you

know is in crisis. No appointment is necessary for the “Let's Talk” program, a drop-in consultation service at convenient locations and hours around campus.
http://www.uh.edu/caps/outreach/lets_talk.html.

Nomenclature

If you want me to refer to you in any particular way—including name pronunciation, nickname, gender pronoun, etc.—just tell me and I'll respect any such preference.

Guidelines for Writing Papers

1. An Important Rule Relating to the Requirement of Originality:

Although you are undoubtedly aware of the rules forbidding plagiarism, keep in mind that there is also a requirement that your work be original. Even if plagiarism is avoided by properly citing all references to another's work, you may still not be doing truly original work. Merely re-telling another author's article, for example, if properly footnoted, does not constitute plagiarism, but neither is it original.

Thus, your research should focus on primary legal authority: judicial opinions, legislation, legislative history, administrative regulations and decisions, rules of procedure and ethics. You may also rely on related writings from other disciplines such as the social sciences, natural sciences, and the like. Government reports, while presenting the findings of government studies and investigations, are nonetheless as important as primary legal authority because they represent governmental findings. Finally, you may rely on media or historical accounts: newspaper or magazine articles, as well as historical accounts in history books.

You may consult secondary legal materials, such as law review articles, legal treatises, restatements, university press books, A.L.R. annotations and legal encyclopedias. However, do not rely too heavily on these materials as it would diminish the significance of your own research. If you rely principally on someone else's research, which is what these materials represent, then you are not presenting your own original research.

2. How to Submit Papers

All submissions should be Word documents, sent as attachments to email messages addressed to me.

3. Some Guidelines for Writing Papers

Throughout the process, please **BACK UP YOUR WORK** so you don't lose your paper if your computer crashes. **I do not consider computer disasters as valid excuses for tardiness of drafts.**

Also, please **print out** and organize your research materials. Using hard copies allows you to take notes and highlight relevant text. It will also enable you to have ready access to your research for footnoting purposes and to re-read items as needed.

Before you submit your first draft:

1. Please number your pages.
2. Your paper should start with a title, followed by your name, both centered.
3. Your text should be in 12 pt. font and footnotes in 10 pt. font with one-inch margins on the left and right sides. Text is double spaced, with no additional spaces between paragraphs or sections. Footnotes are single spaced within and between notes.
4. **This is critical:** write your footnotes as you go. Even if you don't put them in perfect Bluebook format, you should at least keep track of your sources as you go. If you don't, you can get yourself into problems with possible plagiarism. Even more likely, you will end up spending an inordinate amount of time at the end trying to find the sources for your quotations or cited ideas.

Before you submit your second draft:

1. Once you begin working on your second draft, it will be permissible to refer to law review articles. You can think about incorporating the viewpoints of other authors into the text of your paper, checking your research against that in the articles, and/or just using the articles as additional support for points you already make in your paper. Contrary viewpoints can simply be acknowledged, or you can attempt to distinguish them or explain why you think your position is more sensible or reasonable.
2. Think about telling your story three times: (1) first in your introduction; (2) then in the body of the paper; and (3) in your conclusion. Your introduction should give an overview of the entire paper in a straightforward and evenhanded fashion. Be sure to explain your thesis and conclusions, too—don't hide the ball. End your introduction with a roadmap section that explains how each of the major sections of the paper is organized. Each major section of your paper should then advance your thesis in some way. Remind the reader of how each section is relevant to your thesis.
3. As best you can, try to use short, simple sentences. Think about topic sentences for your paragraphs, and work toward smooth transition between sections of the paper. I'll try to help you with the latter.
4. Select a title that gives the reader sufficient information about your topic. It need not be too long or wordy, but it should help the reader to understand the general topic.

As you complete the final version:

1. Before turning in your final papers, please check your footnotes for Bluebook compliance. The legal research teachers are happy to assist you if you have any questions.
2. Your conclusion should be brief, from one paragraph to about two pages or so. The conclusion should not need too many footnotes. This is where you can be a little more emotional or forceful in advancing your position.

Paper Topic Suggestions

If you are having trouble selecting a topic of your own or feel free to choose one of these:

1. The admissibility of arson evidence in Texas in civil cases as compared to criminal cases.
2. The admissibility of questioned documents expert testimony in civil cases as compared to criminal cases in Texas.
3. Recent studies on parole and probation revocation in Texas show that revocations contribute substantially to incarceration rates. Study the law and jurisprudence of either parole or probation revocation.
4. Research on “Mistakes of Fact” Defenses in Texas as compared to other states and the MPC. Does the Texas defense create an internal inconsistency in the penal code? Is the defense in need of revision by the legislature?
5. “Transferred Intent” in the Texas Penal Code as compared to similar provisions in other states. Does the provision in the TPC effectively eliminate the requirement of proximate cause? Is it in need of revision by the legislature?
6. The use of “Risk Assessment Instruments” in making bail decisions. Relevant legal challenges and policy issues.
7. How should latent print (fingerprint) examiners be allowed to characterize their conclusions regarding the comparison of a defendant’s prints to the prints obtained in the investigation of a crime? What is the proper characterization of the likelihood that the print could belong to a different person?
8. Prosecutorial misconduct cases in Texas. Are prosecutors properly following the Michael Morton Act’s requirements? What changes might the legislature consider to improve its operation? Have we seen ethics complaints against prosecutors resulting in punishment by the state bar?
9. Supreme Court’s decisions on privacy and the use of big data such as facial recognition software. What should the Fourth Amendment protect? Should Congress pass additional privacy protection?
10. Jail safety and the mentally ill. What does Texas law require to protect people who suffer from mental illness and may have suicidal tendencies?
11. Can convicted persons challenge their convictions if the conviction relies on forensic evidence that is later discovered to have been unreliable? Texas law allows for habeas petitions to challenge junk science. Discuss the Ex parte Henderson dispute and the current state of the law.
12. Eyewitness identification evidence. What does the Tillman case hold? What are the pertinent qualifications for expert witnesses on eyewitness identification? Are the requirements too restrictive? Can jury instructions be used instead? Are there pattern instructions? Should there be?
13. Crime Lab Problems—Do they create a duty for the state to notify the defense and to investigate the integrity of past convictions that involved forensic evidence tainted by

- the lab problem? Is there a due process right to have the state notify people that their cases included faulty scientific evidence?
14. Convictions can have consequences in immigration law. Defense attorneys are now required to warn their clients of these consequences under the Supreme Court's Padilla decision on the Sixth Amendment right to effective assistance of counsel. How are the Texas courts addressing Padilla challenges to the effectiveness of people's attorneys?
 15. Texas legislature recently changed the law regarding jailhouse informant testimony. What changes does the new law make? Why was it enacted? Does the same reasoning apply to other types of problematic evidence? Critique the new law. How does it compare to the Texas rules on the testimony of accomplices?
 16. Police-worn body cameras. What is the HPD policy? How does it compare to model policies? Does the use of body cameras raise privacy issues in domestic violence cases, in medical settings, or in schools? What, if anything, does the 21st Century Policing Task Force Report say about body cameras and other types of surveillance? What is the current discussion following the George Floyd protests around body cameras?
 17. The use of Municipal Fines and Fees. What is the due process case law in Texas on the imposition of fines without a hearing on ability to pay? What is the federal case law? How might Texas law be amended to diminish the problem of jailing poor people due to inability to pay the fines and fees assessed for traffic violations? What are the current proposals following the George Floyd protests?
 18. Police chases and intentional crashing of suspects' vehicles. What is the Fourth Amendment case law? Supreme Court and Fifth Circuit cases.
 19. Discuss the law surrounding a criminal defendant's ability to obtain the source code for software such as that used for facial recognition, risk assessment instruments, and the like. Do they have a right to see it, or can private companies block them from seeing it by means of protective orders and invoking trade secrets?
 20. Examine the differing standards for the admissibility of scientific evidence in civil courts as compared to criminal courts in Texas. Why should a state have different standards for the same type of evidence? Are there differences in fact, or is one standard more exacting than the other?
 21. Child sexual assault testimony and the Confrontation Clause. What can prosecutors do when their child victims are too young to testify effectively? Examine the procedures set out in the Texas Code of Criminal Procedure. Are they consistent with Crawford?
 22. Consider the Supreme Court's relatively recent case on racial discrimination by jurors in a criminal case and allowing courts to consider this type of evidence to challenge a conviction. What should lawyers do during jury selection to try to prevent this type of bias? What is the social science on jury selection and the questioning of potential jurors? How do the findings of these studies square with the Supreme Court's holding in *Batson* which finds it unconstitutional to discriminate against potential jurors on account of their race.
 23. What is the current view of blood splatter evidence? Is it admitted in criminal cases? Should it be?

Required Books

Plain English for Lawyers.

Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas.*

Plessy v. Ferguson: A Brief History with Documents (Brook Thomas, ed.)

Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America*

Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*

Schedule and Assignments

Aug. 25

Getting Started on Your Research Paper: Choosing a Topic

We will get to know each other and discuss possible paper topics. Please read the paper topic suggestions (found above). We will discuss these topics or any others you may have. Ideally, you will select a topic by the first class.

Homework: After the first class, you should do research on your paper by discussing your project with a research librarian. ***Find and make a hard copy*** of relevant primary materials such as cases, statutes, legislative history, and articles from other disciplines like psychology, history, science, or the like. You may also make copies of secondary materials such as law review articles. We will discuss your research in class on August 27th.

Aug. 27

Race and Criminal Justice: Native Americans

[*The Largely Forgotten Osage Murders Reveal a Conspiracy Against Wealthy Native Americans*](#) (2018 interview with David Grann author of *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI*).

[*Broken Promises: Continuing Federal Funding Shortfall for Native Americans*](#) (U. S. Commission on Civil Rights 2018), pp. 12-28 and Ch. 1.

[*Supreme Court Ruling Affirms Native American Rights in Oklahoma*](#) (NYT, 7/9/20)

- Sept. 1** Read chapters 1-5 of *Plain English for Lawyers*. Please check your work by comparing your answers to those at the back of the book.
[History of Policing, Parts 1-6.](#)
- Sept. 3** **Race and Criminal Justice: Colonial Era**

Slave Patrols: Law and Violence in Virginia and the Carolinas, pp. 1-40, 105-220.
- Sept. 8** **Race and Criminal Justice: Reconstruction Era**

Plessy v. Ferguson: A Brief History with Documents.
- Sept. 10** **No class. Prospectus due at 5:00.**
- Sept. 15** **No class.** Read chapters 6-9 of *Plain English for Lawyers*. Please check your work by comparing your answers to those at the back of the book.
- Sept. 17** **Race and Criminal Justice: Civil Rights Era**

Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America (pp. 1-123)
- Sept. 22** **No class. Individual appointments to discuss papers.**
- Sept. 24: 3:30 pm** **Race and Criminal Justice: the History in Houston**

In lieu of a class meeting, we will be attending this program which we can discuss at the October 1st class as well as the assigned readings.

"Black, Brown, and Blue: A Historical Discussion of Policing in Houston,"

A link to the Zoom meeting will be provided when you register for the event on Eventbrite, here: <https://www.eventbrite.com/e/black-brown-and-blue-a-historical-discussion-of-policing-in-houston-tickets-117463204607>

For questions and further information, please e-mail Dr. Wes Jackson at wtjacks2@central.uh.edu

If you have a class conflict, the video of the program will be available after the program.

- Sept. 29** **No class. Individual appointments to discuss papers.**

Oct. 1

Race and Criminal Justice: Today

Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys* in *POLICING BLACK MEN* (A. Davis, ed., 2017) (available on Blackboard).

Lopez, [Defund the Police? Here's what that really means](#)

Audrey McGlinchy, [Austin City Council Proposes Cutting Police Funding by a Third. It Could Vote Wednesday](#), KUT (Aug. 11, 2020)

Oct. 6

Race and Criminal Justice: Today

Marc Mauer, *The Endurance of Racial Disparity in the Criminal Justice System* in *POLICING BLACK MEN* (A. Davis, ed., 2017) (available on Blackboard).

Oct. 8

Race and Criminal Justice: Mexican-Americans

William D. Carrigan and Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848-1928*, *Journal of Social History* (2003) (available on Blackboard).

[Article on the Texas Rangers.](#)

[Hernandez v. Texas](#), 347 U.S. 475 (1954).

Fri., Oct. 9

First drafts due.

Oct. 13

No class. Individual appointments available to discuss first drafts, as needed.

Oct. 15

No class. Individual appointments available to discuss first drafts, as needed.

Oct. 20

Eyewitness Identification Testimony

Garrett, Ch. 3

[Texas Model Policy on Eyewitness Identifications](#)

Oct. 22

Criminal Justice Fines and Fees, and Money Bail

[Mercenary Justice](#) pp. 1175-1196

SCOTT-HAYWARD AND FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM, chapters 2 & 4 (2019) (available on Blackboard).

Oct. 27 Discussion of Documentary and Report on Wrongful Convictions

[*Murder on a Sunday Morning*](#). Please view the documentary on your own, and we will discuss it in class.

[Report of the Timothy Cole Exonerations Review Commission](#), pp. 1-26

Oct. 29 Forensic Science: Assessing Scientific Validity

Garrett, Ch. 4

Cops in Lab Coats, Chapters 3 (available on Blackboard) (Chapter 2 is optional reading)

Nov. 3 No class. **Second drafts due by 5:00.**

Nov. 5 Forensic Science: Assessing Scientific Validity

Jonathan Koehler, [*How Trial Judges Should Think about Forensic Science Evidence*](#)

Thompson and Casarez, [*Solving Daubert's Dilemma for the Forensic Sciences through Blind Testing*](#)

Nov. 10 No class. Individual appointments to discuss paper.

Nov. 12 Research Project Presentations

Nov. 17 Research Project Presentations

Nov. 19 Research Project Presentations

Nov. 24 Research Project Presentations

Dec. 1 No class. **Final paper due by 5:00.**