

伊曼纽尔法律精要影印系列

Criminal Procedure

[美] 史蒂文·L·伊曼纽尔/著
(Steven L. Emanuel)

刑事诉讼程序



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刑事诉讼程序

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总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化,评介人才标准将国际化,教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器,维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则,也不单单是说理论道的公平教义,还是具有可操作性的精细的具体专业技术。像医学专业一样,这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出:“为适应经济全球化和科技革命的挑战,本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业,以及为适应我国加入WTO后需要的金融、法律等专业,更要先行一步,力争三年内,外语教学课程达到所开课程的5%~10%。暂不具备直接用外语讲授条件的学校、专业,可以对部分课程先实行外语教材、中文授课,分步到位。”

引进优质教育资源,快速传播新课程,学习和借鉴发达国家的成功教学经验,大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求,中信出版社与外国出版公司合作,瞄准国际法律的高水平,从高端入手,大规模引进畅销外国法学院的外版法律教材,以使法学院学生尽快了解各国的法律制度,尤其是欧美等发达国家的法律体系及法律制度,熟悉国际公约与惯例,培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书,作者均为富有经验的知名教授,其中不乏国际学术权威或著名诉讼专家,历经数十年课堂教学的锤炼,颇受法学院学生的欢迎,并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门,以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括:

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书,是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是:内容精炼,语言深入浅出,独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领,浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析,归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著,这套丛书历经不断的修改、增订,吸收了最新的资料,经受了美国成熟市场的考验,读者日众。这次推出的是最新版本,在前几版的基础上精益求精,补充了最新的联邦规则,案例也是选用当今人们所密切关注的问题,有很强的时代感。该丛书强调法律在具体案件中的运用,避免了我国教育只灌输法律的理念与规定,而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度,可准确快捷地了解美国法律的精髓。精心选取的案例,详尽到位的解析,使读者读后对同一问题均有清晰的思路,透彻的理解,能举一反三,灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插,有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学校院的主流课程,是学习美国法律的代表性图书,美国

著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

About Aspen Law & Business Legal Education Division

Aspen Law & Business is proud to welcome Emanuel Publishing Corp.'s highly successful study aids to its list of law school publications. As part of the Aspen family, Steve and Lazar Emanuel will continue their work on these popular titles, widely purchased by students for more than a quarter century. With the addition of the Emanuel titles, Aspen now offers the most comprehensive selection of outstanding publications for the discerning law student.

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Abbreviations Used in Text

ALI Model Study — American Law Institute, *Model Code of Pre-Arraignment Procedure*

Ferdico — John Ferdico, *Criminal Procedure for the Law Enforcement Officer* (West Publ., 1975)

K,L&I — Kamisar, LaFave & Israel, *Modern Criminal Procedure Casebook* (West Publ., 8th Ed., 1994)

K&S — Kadish and Schulhoffer, *Criminal Law and Its Processes* (Little, Brown & Co., 6th Ed. 1995)

L&I — LaFave & Israel, *Criminal Procedure*, 3 Vol. unabridged vers. (West Publ., 1984 w/ 1991 Supp.)

Nutshell — Israel & LaFave, *Criminal Procedure in a Nutshell* (West Publ., 1975)

U.S.L.W. — U.S. Law Week, Supreme Court sections (BNA)

Preface

Thanks for buying this book.

Here are some of its special features:

- **“Casebook Correlation Chart”** — This chart, located just after this Preface, correlates each section of our Outline with the pages covering the same topic in the four leading Criminal Procedure casebooks.
- **“Capsule Summary”** — This is an 63-page summary of the key concepts of the law of Criminal Procedure, specially designed for use in the last week or so before your final exam.
- **“Quiz Yourself”** — At the end of nearly every chapter we give you short-answer questions so that you can exercise your analytical muscles. There are about 90 of these questions, each written by me.
- **“Exam Tips”** — These alert you to what issues repeatedly pop up on real-life Criminal Procedure exams, and what factual patterns are commonly used to test those issues. We created these Tips by looking at literally hundreds of multiple-choice and essay questions asked by law professors and bar examiners. You’d be surprised at how predictable the issues and fact-patterns chosen by profs really are! The Tips are located at the end of nearly every chapter.

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:¹

1. During the semester, use the book in preparing each night for the next day’s class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you’ve just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel*.
2. If you make your own outline for the course, use the *Emanuel* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel*.
3. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you about one day.
4. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions. You can find these quickly by looking for *Quiz Yourself* entries in the Table of Contents. When you do these questions: (1) record your short “answer” on the small blank line

1. The suggestions below relate only to this book. I don’t talk about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn’t mean I don’t think these other steps are important — it’s just that in this Preface I’ve chosen to focus on how I think you can use this outline.

provided after the question, but also: (2) try to write out a “mini essay” on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays.

5. Three or four days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with step 4, so that you use the Tips to help you spot the issues in the short-answer questions. You’ll also probably want to follow up from many of the Tips to the main outline’s discussion of the topic.
6. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your thinking and writing juices flowing; and (2) re-scan the *Exam Tips* (spending about 2-3 hours).

I’m very pleased that Emanuel Publishing Corp. is now part of the Aspen Law & Business family; in my opinion, Aspen is the most outstanding publisher of materials for law students and practicing lawyers.

Good luck in your Criminal Procedure course. If you’d like any other publication of Aspen Law & Business, you can find it at your bookstore or at www.aspenpublishers.com.

Steve Emanuel

Larchmont NY

September, 2002

CASEBOOK CORRELATION CHART

(Note: general sections of the outline are omitted from this chart. NC = not directly covered by this casebook.)

| Emanuel's Criminal Procedure Outline (by chapter and section heading) | Allen, Stuntz, Hoffman & Livingston Comprehensive Criminal Procedure (1st ed. 2001) | Kamisar, LaFare, Israel & King Modern Criminal Procedure (10th ed. 2002) | Kamisar, LaFare, Israel & King Basic Criminal Procedure (10th ed. 2002) | Saltzburg & Capra American Criminal Procedure (5th ed. 1996) |
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CASEBOOK CORRELATION CHART (continued)

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|--|---|--|---|--|
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CASEBOOK CORRELATION CHART (continued)

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CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed. The order of topics is occasionally somewhat different from that in the main outline.

CHAPTER 1

CONSTITUTIONAL CRIMINAL PROCEDURE GENERALLY

I. STATE PROCEDURES AND THE FEDERAL CONSTITUTION

- A. Meaning of "criminal procedure":** The term "criminal procedure" refers to the methods by which the criminal justice system functions. Here are some of the topics that are usually included within criminal procedure:
1. The *arresting* of suspects.
 2. The *searching* of premises and persons.
 3. The use of *electronic surveillance* and *secret agents*.
 4. The *interrogation* of suspects, and the obtaining of *confessions*.
 5. The use of *line-ups* and other pre-trial identification procedures.
 6. The *Exclusionary Rule*, and how it affects the admissibility of evidence obtained through methods that violate the Constitution.
 7. The right to *counsel*.
 8. *Grand jury* proceedings.
 9. *Bail* and preventive detention.
 10. *Plea bargaining*.
 11. The right to a *speedy trial*.
 12. Pre-trial *discovery*.
 13. The *Double Jeopardy* clause.
- B. Focus on U.S. Constitution:** Many aspects of criminal procedure are regulated by the U.S. Constitution, particularly the Bill of Rights (the first ten amendments). As discussed below, most federal constitutional provisions concerning criminal procedure are binding on state proceedings as well as federal ones.
1. **Non-constitutional issues:** The states are free to develop their own procedures for dealing with criminal prosecutions, as long as these do not violate the federal constitution.
- C. Applicability of Bill of Rights to states:** In deciding how the federal constitution applies to state criminal prosecutions, the Supreme Court follows the "*selective incorporation*" approach. Under this approach, not all rights enumerated in the Bill of Rights are applicable

to the state, but if *any aspect of a right* is found to be so necessary to fundamental fairness that it applies to the states, then *all aspects* of that right apply. Thus if a right is applicable in state courts, its *scope* is the same as in federal courts. [2]

1. **All but two rights applicable to states:** All Bill of Rights guarantees have been held applicable to the states, except for two. [5] The two Bill of Rights guarantees that have *not* been found applicable to the states are:

- a. **Bail:** The Eighth Amendment's guarantee against *excessive bail* (so that apparently, a state may choose to offer bail, but may then set it in an "excessive" amount); and
- b. **Grand jury indictment:** The Fifth Amendment's right to a *grand jury* indictment (so that a state may decide to begin a prosecution by using an "information" prepared by the prosecutor rather than a grand jury indictment).

D. **Raising constitutional claims in federal court:** A defendant in a state criminal proceeding can of course raise in the proceeding itself the claim that his federal constitutional rights have been violated (e.g., by the use against him of a coerced confession or the fruits of an illegal search and seizure).

1. **Federal habeas corpus:** But the state criminal defendant has in some situations a *second chance* to argue that the state trial has violated his federal constitutional rights: he may bring a *federal* action for a writ of *habeas corpus*. The defendant may bring a habeas corpus proceeding only after he has been convicted and has exhausted his state appellate remedies. The petition for habeas corpus is heard by a *federal district court judge*. If the judge finds that the conviction was obtained through a violation of the defendant's constitutional rights, he can order the defendant released (usually subject to a new trial). [5]

- a. **Limits:** There are significant limits on the kinds of arguments a defendant can make in a federal habeas corpus proceeding. Most important, in search and seizure cases, if the state has given D the opportunity for a "*full and fair litigation*" for his Fourth Amendment claim (that is, the defendant got a fair chance to argue that evidence should not be introduced against him because it was the fruit of an illegal search or seizure), D may not make this argument in his *habeas corpus* petition, even if the federal court is convinced that the state court reached the wrong constitutional conclusion. [*Stone v. Powell*] [5]

II. STEPS IN A CRIMINAL PROCEEDING

A. Here is a brief summary of the steps in a criminal proceeding:

- 1. **Arrest:** When a police officer has probable cause to believe that a suspect has committed a crime, the officer makes an *arrest*. An arrest may occur either with or without a warrant (most are made without a warrant). Arrest usually involves taking the suspect into custody and transporting him to the police station. [7]
- 2. **Booking:** At the police station, the suspect undergoes "*booking*," which includes entering information about him into a police blotter, photographing and fingerprinting him. [7]
- 3. **Filing complaint:** A prosecutor now decides whether there is enough evidence to file charges; if so, the prosecutor prepares a "*complaint*." [7]
- 4. **First appearance:** After the complaint has been filed, the suspect is brought before a *magistrate*. In most states, this is called the "*first appearance*." Here, the magistrate informs D of

the charges, notifies him that he has the right to counsel, and sets bail or releases D without bail. [7]

5. **Preliminary hearing:** If the case is a felony case, a “*preliminary hearing*” is held. Again, this is in front of a magistrate, and usually involves live witnesses so the magistrate can determine whether there is probable cause to believe that D committed the crime charged. [8]
6. **Filing of indictment or information:** In the federal system, or in a “grand jury” state, the next step is for a grand jury to hear the prosecutor’s evidence and to issue an *indictment*. In a non-grand-jury state, the prosecutor now prepares an “*information*,” reciting the charges. [8]
7. **Arraignment:** After the indictment or information has been filed, D is “*arraigned*”; that is, he is brought before the trial court and asked to plead innocent or guilty. [8]
8. **Pre-trial motions:** Defense counsel now makes any pre-trial motions. [9]
9. **Trial:** Next comes the *trial*. If the charge is a felony, or a misdemeanor punishable by more than six months in prison, all states (and the federal system) give D the right to have the case tried before a *jury*. [9]
10. **Sentencing:** If D pleads guilty or is found guilty during the trial, he is then *sentenced* (usually by the judge, not the jury). [9]
11. **Appeals:** A convicted defendant is then entitled to *appeal* (e.g., on the grounds that the evidence admitted against him at trial was the result of an unconstitutional search). [9]
12. **Post-conviction remedies:** Both state and federal prisoners, even after direct appeal, may challenge their convictions through federal-court *habeas corpus* procedures. [9]

CHAPTER 2

ARREST; PROBABLE CAUSE; SEARCH WARRANTS

I. GENERAL PRINCIPLES

- A. **Fourth Amendment:** The Fourth Amendment to the U.S. Constitution provides, “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 Warrants 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.” [13]
- B. **Applies to both searches and arrests:** The Fourth Amendment thus applies both to *searches and seizures* of *property*, and to *arrests* of persons. [14]
 1. **Invalid arrest no defense:** Generally, the fact that D was *arrested in an unconstitutional manner* makes *no difference*: a defendant may generally be tried and convicted regardless of the fact that his arrest was made in violation of the Fourth Amendment. [14] However, when evidence is seized as part of a *warrantless search* conducted *incident to an arrest*, the evidence will be excluded as inadmissible if the arrest was a violation of the Constitution (e.g., the arresting officer did not have probable cause to believe that D had committed a crime). [14]

2. **Probable cause for issuance of warrant:** Where a search or arrest warrant is issued, the Fourth Amendment requires that the warrant be issued only based on "*probable cause*." This requirement is quite strictly enforced.
3. **Where warrant required:** A warrant is usually *required* before a *search or seizure* takes place, unless there are "exigent circumstances." An *arrest* warrant, by contrast, is usually *not* constitutionally required.
4. **Search must always be "reasonable":** Whether or not there is a search warrant or arrest warrant, the arrest or search *must not be* "*unreasonable*."
5. **Probable cause for warrantless search or arrest:** But there is *no* requirement in the Fourth Amendment that a warrantless search or seizure take place only upon *probable cause*. This is why police may conduct a brief "stop and frisk" even without probable cause: they are making a Fourth Amendment "seizure," but merely need some reasonable suspicion, not probable cause. (See *Terry v. Ohio*, discussed below.)

II. AREAS AND PEOPLE PROTECTED BY THE FOURTH AMENDMENT

- A. **Katz "expectation of privacy" doctrine:** A Fourth Amendment search or seizure only takes place when a person's "*reasonable expectation of privacy*" has been violated. [15] [*Katz v. U.S.*]

1. **Waiver of privacy right:** A person's conduct may mean that he has *no* reasonable expectation of privacy in a particular situation. If so, no Fourth Amendment search or seizure will result, even if the police are doing something which a non-lawyer would think of as being a "search" or "seizure."

Example: D puts some papers into a public trash bin, unaware that the police are watching his conduct through binoculars. Because a person who disposes of trash normally does not have a "reasonable expectation of privacy" as to the trash, the police do not commit a Fourth Amendment search or seizure when they go through the trash bin's contents and remove the papers belonging to D (and use these in a subsequent prosecution of D).

- a. **Contexts:** Some types of evidence which are likely to be found *not protected* by any "reasonable expectation of privacy" are: (1) *abandoned property*, such as *trash*; (2) things that can be seen from an *aerial overview*, or from the perspective of a person *stationed on public property* (e.g., a police officer stands on a sidewalk and looks through binoculars into a window at the front of D's house); (3) things a person says or does while *in public* (e.g., D1 talks to D2 in a restaurant, while a police officer is eavesdropping nearby); and (4) information the police learn by use of *other senses* while the police are in a place they have a right to be (e.g., the police use dogs to smell luggage in airports and, thus, detect drugs).
2. **Significance of trespass:** If the police have committed a *trespass* or a *physical intrusion* against a person's property, their conduct is *more likely* to be found to *violate* the person's reasonable expectation of privacy than if no trespass or physical intrusion takes place. [16]

Example: Border guards walk onto a bus (which they have a right to do), and then squeeze each passenger's luggage in the overhead luggage rack. Because this squeezing is a physical intrusion, it violates the luggage owner's reasonable expectation of privacy (and is therefore a Fourth Amendment search). That's true even though there would not

have been a Fourth Amendment search had the police merely *looked* at the luggage from the aisle. [*Bond v. U.S.*] [16]

- a. **Presence or absence of trespass not dispositive:** But presence or absence of physical intrusion or trespass is *just one factor* — it's not dispositive. So the "reasonable expectation of privacy" rule means that police conduct may still be a Fourth Amendment search or seizure even though the police do *not* commit a trespass — if the facts are such that D had a reasonable expectation that his possessions, conduct or words would remain private, the absence of police trespass will be irrelevant. [17]

Example: In *Katz, supra*, FBI agents placed electronic eavesdropping equipment on the outside of a public telephone booth from which D, a bookmaker, conducted his business. *Held*, even though D made his phone calls on public property, and the agents did not commit trespass in installing their devices, D's reasonable expectation of privacy was violated, so the agents conducted a Fourth Amendment search. "The Fourth Amendment protects people, not places."

- B. **Standard for determining:** For the defendant to get Fourth Amendment protection in a particular situation, two tests must be satisfied: (1) the person must show an *actual, subjective*, expectation of privacy; and (2) the expectation must be one that *society* recognizes as being "*reasonable*."

- C. **Curtilage:** The "reasonable expectation of privacy" concept intersects with the concept of "*curtilage*." The curtilage of a building typically refers to the *land and ancillary buildings* that are associated with a dwelling. In the case of a typical private house, for instance, the front and back yard and garage are all parts of the curtilage. [17]

1. **Significance of curtilage:** In general, a person has a *reasonable expectation of privacy with respect to the curtilage*, but *not* with respect to *open fields outside the curtilage*. (This is always subject to the exception that a person does not have a reasonable expectation of privacy as to things that can be *seen from public property*.) [18-19]

Example 1: D fences in his back yard with a 10-foot high wall, and grows marijuana in the back yard. Officer climbs over the wall and takes photos of the marijuana bushes. Since the back yard is part of D's curtilage, he has a reasonable expectation of privacy with respect to that area, and Officer has carried out a Fourth Amendment search (which will be invalid unless done with probable cause, and which may be invalid because no warrant was procured).

Example 2: D owns a 100-acre farm, with a farmhouse near one edge. D grows marijuana in the very middle of the 100 acres. The fields (except perhaps those that are immediately adjacent to the farmhouse) are not part of the curtilage. Therefore, if Officer enters D's property and photographs the marijuana plants, he is not infringing on D's reasonable expectation of privacy, and is thus not committing a Fourth Amendment search. This is probably true even if D has fenced in the entire 100 acres, and placed "No Trespassing" signs throughout. [*cf. Oliver v. U.S.*] [18]

- D. **Transfer to third person:** The fact that D has *transferred property* or *information* to a *third person* may indicate that D no longer has a reasonable expectation of privacy with respect to that property. [19]

1. **Phone numbers:** For example, a person who makes a telephone call in effect transfers to the local telephone company knowledge of the number called. Consequently, the person has