

#### Fourth Amendment:

- (1) Is it a search/seizure under 4A?
- (2) Was it “reasonable”?

#### SEARCH:

Is it a search?

- 1) CPA (Constitutionally Protected Area)
  - Based on formal property rights.
  - Ostensibly rejected in *Katz*. But really, booth was CPA.
  - Court keeps revisiting this protected area idea. (*Kyllo*)
- 2) Expectation Test (*Katz*) → Assumption of Risk (*White*)
  - Harlan *Katz* formulation (this is the test):
    - **Exhibited Subjective Expectation of Privacy +**
    - **Society considers that expectation reasonable (REOP)**
  - Often a probability assessment → how common (combined w/ normative judgment considering state crime control needs)
  - If the cops have access in a way that’s regularly populated by regular people, then OK to do it (e.g., flyovers).
  - Conceivability in the extreme (as assumption of the risk)—anything someone could conceivably do (e.g., *Greenwood* – garbage; *Dow Chemical* – flyover, high-res camera)—court backed away in *Riley* to require some kind of regularity.
  - Assumption of risk depends on how risk defined. E.g., *Bond* (assume risk other passengers might touch/shove, but not “feel in an exploratory manner”). Possible narrowing of *Greenwood*.
    - Criticism (Harlan in *White*): Recants Expectations/Assumption of risk test – makes meaning of search dependent on public expectations; actually, should scrutinize the intrusion w/ the crime interest, and see if desirable to interpose warrant requirement.
- 3) Sensory Intrusiveness
  - Categorical determinations of hierarchy of senses (not contextual)
    - Touching more intrusive than Looking (*Bond*)

- Looking more intrusive than Smelling (*Place*).
  - Hearing = Looking (*Katz*) ?
- This is an *affective assessment* (combined w/ normative focus on the emotional harm suffered).
- Rejected Approaches:
  - Balancing test b/w crime control and individual rights—never explicitly happens—it is submerged in the doctrine.
  - Literalism – only tangible things can be searched (J. Black, *Katz* dissent) – rejected

**REOP Factors: ← this is a normative question!**

- 4A protection ≠ Property Rights (*Oliver, Katz*) (physical trespass neither necessary nor sufficient for 4A violation).
- Home: REOP. Castle, sanctity, CPA. *Kyllo, Payton*. (But see: standing, if it's not your own home.)
- Open fields: No REOP in open field (*Oliver*) – categorical exception. (Maybe violates first prong instead, i.e., demonstrated subjective expectation of privacy. See Harlan concurrence in *Katz*.)
- Curtilage: REOP. (Fact-intensive inquiry – unlike open fields)
  - *Dunn* – 4-part inquiry for whether something is curtilage: (1) proximity to home; (2) whether area is included w/in enclosure surrounding home; (3) nature of use (intimate activities?); (4) steps taken by resident to prevent passers-by from observing.
  - Can extend beyond the “first fence” around home. But 50 yards away is outside. (*Dunn*)
- Knowing exposure – no REOP if expose to public view, even if in home (assumption of risk). Open fields (*Oliver*), garbage (*Greenwood*), movements in public (*Knotts*), airspace (*Ciraolo, Riley*), talking to accomplices (*White*).
- Bugged Informants: No REOP. Assume risk when blab to confederate. (*White*)
- Aerial Surveillance: No REOP if members of public can commonly reach vantage point, even if physical invasion of same area would be a search (e.g., *Ciraolo*—yard w/in curtilage, 1,000 ft up; *Riley*—greenhouse had REOP from ground, 400 ft up)—at

least so long as use naked eye. (But even high-res camera in *Dow Chemical* was OK b/c didn't reveal intimate details.)

- Falls under Open Fields doctrine (no 4A protection): "a view of open fields is not a search." "since any member of the public could've done it legally, no violation" Florida v. Riley.
- Riley (majority/O'Connor): If flight legal, burden on D to prove sufficiently *rare* to support REOP (& 4A protection).
- Riley (Blackmun, dissent): If flyover < 1,000 ft. (i.e., *Ciraolo*), Pros should have to prove sufficiently common to defeat presumption of REOP.
- Bags in Public Transit: Physical manipulation of bag on a bus is a search. REOP in bag.
- Search Limited to Illegal Activity: Canine Sniff/Drug Testing. No search! If scope is limited to finding illegal behavior/contraband not a search → *Place* (dog sniff), *Caballes* (dog sniff at traffic stop), *Kyllo* (heat-sensor—didn't satisfy), *Bond* (luggage squeeze—didn't satisfy). (No REOP in illegal activity.) Provides PC for warrant (*Caballes*).
- Technology: Using **sense-enhancing technology** (*not in general public use*) to obtain info about the interior of CPA (that couldn't otherwise have been obtained w/o physical intrusion) is a search. (*Kyllo*). BL rule.
  - Key is whether the police, using some scientific device could've made observation w/ naked eye just like any ordinary citizen. If so, no search. Ok if "any member of the public could legally" have done it. *CA v Ciraolo*. However, where high-technology aids police to observe what they could not otherwise not have seen then there is a search. Need BL rule b/c home is too intimate to make fine distinctions about how intimate the details revealed were (like in *Dow Chem*); plus can't know at outset whether intimate details will be revealed.
  - Kyllo Dissent (Stevens): Emissions are "outside," in public domain. Further, BL rule dissolves when technology enters common use—an unclear event, and arguably when homeowner requires *more* protection, not *less*.
- Would dog sniff of home be a search?

- Yes: Heightened “intimacy”/REOP in home, revealing details of interior that couldn’t otherwise be obtained. BL rule. (Kyllo)
- No: Simple up/down test; can know at outset that no intimate details will be revealed (Place, Kyllo). Dog isn’t technology. *Bergmann* (IA).
- Movements outside home: no REOP in movement over public roads. (*Knotts*)
- Illegal activity: no REOP in illegal activity. *Caballes* (dog sniff traffic stop), *Place* (dog sniff luggage), *Carter* (drugs, acquaintance’s apt.)
- Heartbeat monitor: Can determine if people inside vehicle. Search? Yes: REOP/no assumption of risk. No: limited manner and content revealed, like canine sniff.
- Email: REOP in email. *Maxwell*. But no REOP if send email to someone else.
- GENERAL FACTORS – In assessing REOP, consider: (1) intent of framers; (2) “the uses to which individual has put a location”; (3) “societal understanding that certain areas deserve the most scrupulous protection from government invasion.” - *Oliver*

#### Ultimate question:

- **Is this the sort of police practice that should be regulated?** (If not a 4A “search,” no regulation at all.)
- Real issue: How intrusive is it—how much of “you” (dignity) will be revealed.
- J. Harlan in *White*
  - Recants his reasonable-expectation formulation in *Katz* – rules the court makes will shape the public’s expectations – cops can just go on TV every night and say expect us to search you everywhere.
  - Prefers balancing test: “The question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement.” p. 371
- Policy Questions:
  - Institutional competency—should court decide what’s “reasonable”? – force legislature.
  - One major problem: Constitutionalizing all these questions—might be better to ask the people what they think—force legislative decisions

- Maybe we would have more protection if people were deciding, than if court, terrified of getting in way of law enforcement, were.
- Note: Doctrine doesn't ask the question "What *should* the cops be doing?"
  - Cops are not normal people! Don't just fixate (as the doctrine does) on what average people can/do do. Even if it is okay for a stranger to fly over home, may still be different for cops to do it, with the purpose of "getting you." Or even to park outside home—why should we think that's okay?
  - But flip side: Even if ordinary people can't do something, doesn't mean cops shouldn't be able to—they have a different mission. We want cops have to investigate somehow. We've told them they have to get information before they do something—so that's what they're trying to do.
- Surreptitiousness of cops' conduct – cuts both ways
  - If point of 4A is to hide secret details, then you're grateful to know if you're being followed.
  - If point of 4A is that the omnipresent state spooks you out, then knowing that you're being followed is the exact harassment we're worried about.

## SEIZURE

### Free to Terminate Encounter test:

- Seizure =
  - (1) Reasonable person doesn't feel free to leave or otherwise terminate the encounter, based on totality of circumstances (contextual analysis) *Bostick*; AND
  - (2) slightest application of physical force (even w/o submission); or (2) actual submission to show of authority. (*Hodari*).

- Objective test: Free to leave based on POV of reasonable innocent person. *Bostick*.
- Totality of Circumstances: Per se rules inappropriate—must look at all circs. *Drayton*.
- Intentional: State must restrict freedom through “means intentionally applied.” (*Brower*—roadblock crash) (not a seizure if D just runs into wall on his own).
- Actual Submission: If no physical contact, seizure does not occur until subject actually submits. (*Hodari*). Not a stop until cop actually catches the person. If suspect moving, no seizure. Anything suspect does while still moving can supply RS or PC for stop.
- **Note**: Seizure test is formalistic, like CPA-style search test (have you been touched? Is there a physical show of authority?). Not about reasonable expectations.
- Normative question: Do we really want cops to be able to board buses and start questioning people? Do you think the cops should be able to chase people w/o probable cause?

### Relevant Factors:

- Bostick factors: (1) Cop was obviously armed but did not remove gun from pouch; (2) Cop advised passenger of right to refuse consent.
- Drayton factors: No application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice → no seizure.
- Royer: Where cops held onto ticket, took luggage, and walked to new room → seizure.
- INS v. Delgado: Questioning at factory with cops at exits → no seizure.

- Hodari: D fled upon police car approach. Pursued on foot; while running, threw away crack; then cop tackled. Crack admissible. Scalia wouldn't even think that saying "Stop or I'll Shoot" constitutes a stop if the person *doesn't* stop.
- Hodari dicta: Even if seizure effected, not necessarily a continuing arrest during period of fugivity, if D escapes. If touch: seizure. If escape: no longer a seizure.
- Brendlin: When stop car, all passengers are seized (even if only driver is "target"). Submission to authority can be signaled by staying inside car.
- Burrell: Officer follows guy from bus stop and places his hand on his elbow, asks to talk to him; D just says, "It's registered." So then he frisks him. Court held it was not a forcible stop under *Bostick*. Placing hand on elbow considered usual manner in which to attract attention. What about Hodari? Need intent?
- Paradis article: If touch, w/ intent to disperse but not arrest, unclear if seizure. If tear gas touches D, then probably seizure. If misses, unclear. Depends on submission?

## PROBABLE CAUSE

**Probable Cause = Facts that warrant person of reasonable caution to believe that a crime has been or is being committed**, or that evidence of a crime will be found somewhere.

*(Brinegar)*

- PC For Search: PC to believe that: (1) Items to be searched for are connected w/ criminal activity; and that (2) items will be found in place to be searched.
- PC For Arrest: PC to believe that (1) crime has been committed; and that (2) person to be arrested committed it.
- Practical, non-technical conception. *(Brinegar)* Common-sense. *(Gates)*
- Purpose of PC: to justify police intrusion.
- Likelihood vs. Magnitude: Only the likelihood of the crime matters. Not the magnitude or nature of the crime. Purse vs. Baby doesn't matter. Why? Need clarity for split-second decisions.
- Current or past crime: Impossible to have PC of yet-to-be committed crime.
- Objective: PC is determined objectively; not cop's subjective belief. *(Alford)*
- Police officer's mere belief or unarticulated suspicion is not enough. *(Nathanson)*
- Multiple Suspects: 3 guys in car. Reasonable officer could conclude there was P/C to believe all 3 Ds committed crime of possession, solely or jointly (can presume joint enterprise, if none speak up to claim the drugs). *(Pringle)*. Compare with *Ybarra* (frisk of every patron in a tavern. No RS.); *Di Re* (Tip identified single suspect in car. No RS to frisk other passengers.) Follow purse-snatcher into alley, hear trunk slam, there are 2 cars – can search both. (But note: PC might only extend to trunk there.) *Houghton* (don't need PC specific to passenger's belongings to search it, if have PC generally for car, b/c search of purse less invasive than bodily search, under *Di Re*).
- Dismantling. In 7th Cir., cannot dismantle car panels during otherwise valid search unless have PC that panel contains evidence. *(Ornelas)* – but can slash the upholstery w/o special PC. *(Carrol)*
- Collective Knowledge of Police: Arresting officer needn't have independent knowledge of arrestee criminal activity

- Staleness: PC to support warrant contains temporal limitation that depends on the circumstances. Case-by-case determination of staleness. Bigger problem for search than arrest.
- Remember: Need PC for car, even if falls under auto exception to W requirement!

<p><b>Old View: PC = Sufficient Facts + Veracity + Basis for Knowledge</b> (<i>Spinelli</i>)</p>
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- **Sufficient facts (SF)**:
  - What happened? Has to add up to evidence of a crime (even if veracity and basis for knowledge are perfect).
- **Veracity (V)**:
  - **Credibility**: Reason to believe the information.
    - For cops: satisfied by oath
    - For citizen complaints: satisfied by threat of criminal penalty.
    - For anonymous informants: satisfied by past “reliability.”
  - **Corroboration**: Corroboration of *substantial amount of detail* in tip by the police may help satisfy veracity (V).
    - **PC = Tip + Corroboration (?)**
    - Basic Principle:
      - Detail alone (w/o corroboration) never enough for V. Must overcome “good liar” presumption. Tip cannot self-verify veracity!
      - Once you confirm insider content—have an informant who’s apparently on the inside, who told you the truth about a bunch of stuff – at that point, have PC.
    - Corroboration goes to reliability.
      - “Because an informant is right about some things, he is more probably right about other facts.” (*Gates*, quoting J. White concurrence in *Spinelli*, which he referred to w/ suspicion as the *Draper* principle).
      - “If tip fails under either or both of the two prongs [i.e., V or BK], PC may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports

both the inference that the informer was generally trustworthy and that he made his charge on the basis of information obtained in a reliable way.” (*Gates*, J. White concurrence).

- Note: *Gates* court says corroboration maybe not sufficient to satisfy formal *Spinelli* V prong, but suffices for *Gates*’ “practical, common-sense” totality of circumstances PC determination.
- Facts logically connected to crime. Stronger inference when the verified details, though not amounting to PC themselves, are logically connected to the crime. I.e., material (like 2 phone lines to gambling), rather than neutral or irrelevant (like wearing tan suit and walking fast, to drugs).
  - See: “[*Draper* principle applies] particularly since information from the informant which was verified was not neutral, irrelevant information but was material to proving the gambling allegation.” – *Spinelli*, White, J., concurring.
- Facts not generally accessible to public. Stronger inference when the verified details seem to require personal observation.
  - “But it is arguable that on these facts it was the informant himself who has perceived the facts, for the information reported is not usually the subject of casual day-to-day conversation.” – *Spinelli*, White
- E.g., *Gates*: Corroboration that Sue would drive to FL, Lance would fly there a few days later, then Lance would drive back—sufficient.
- Prof: skeptical that corroboration can make up for a truly anonymous informant—if corroborate guilty facts, no longer need the tip; if corroborate innocent facts, may just have a good liar.
- **Basis for Knowledge (BK):**
  - Description of how info acquired.
    - Personal knowledge best. If not, must show why indirect sources are reliable. E.g., hearsay admission against own interests.

- BK is independent requirement b/c even truthful people can be wrong. Even the pope can't give tip on ipse dixit alone. No better than bare assertion by police officer on oath.
- **Self-verification:** Sufficient detail in tip can supply implicit BK (facts reveal inside knowledge/integral involvement). (Gates, White concur)
  - **PC = SF + Veracity + Depth of Detail in Tip**
  - E.g., *Draper*: specific train, specific clothing, “tan zipper bag,” walking fast. Provided BK. Also, corroborated V.

<p><b>New View: Totality of the circumstances analysis. (<i>Gates</i>)</b></p>
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- Task of issuing magistrate is to make a practical, common-sense decision whether, **given all the circumstances** set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, **there is a fair probability** that contraband or evidence of a crime will be found in a particular place.
- Note: Not a wholesale rejection of V + BK – still need a little bit of each, at least. But strong showing of one can compensate for weak showing of the other.
- Hypos:
  - Purse snatcher runs into alley; hear car trunk slam; frisk the thief, no purse. Search the car? Yes, PC. If 2 cars? Yes, *Pringle*. 3? Yes? 4?
  - Anonymous tip w/ sufficient facts (but no V or BK). Then cop corroborates entire tip. PC. Tip is irrelevant—cop has V and BK.
  - Anonymous tip w/ lots of innocent detail (day, time, exact intersection, which clothing), and that briefcase contained cocaine, but no V or BK. Cop then observes all but the contents of the briefcase. PC? Yes, *Draper*, *Gates*. BK self-verifying, V corroborated. If knew so much about details of D’s movements and choice of clothing, must have known about D’s illegal activities. (*Gates*)
  - Anonymous tip that D has cocaine in his house. Informant is reliable, but no supporting data provided. Tip has V but not BK. Under *Spinelli*, not enough—no better than the cop’s oath. After *Gates*, maybe OK; strong showing of V can compensate for weak showing of BK. Criticism: (White, concurrence from

*Gates*): “Quixotic” to allow no-BK statement from honest informant, but not conclusory statements from “honest” policeman—which violates *Nathanson*.

- Cop tells Magistrate he thinks D has cocaine. Can’t explain why he believes this, but reminds him that he’s never been wrong in the past. No PC; cop’s say-so can’t suffice.
- Note: Informants’ tips especially important for drug crimes. (see p. 436).

**Standard of Review for PC:**

- If have warrant, “substantial basis” review. (*Gates*)
  - Highly deferential: “Magistrate had a substantial basis for concluding that probable cause existed.”
  - Incentive to get warrants.
- If no warrant, “de novo with due weight review. (*Ornelas*)
  - Determinations of PC reviewed de novo.
  - Findings of historical fact reviewed for clear error.
  - Due weight to inferences by trial judges and officers.

## WARRANTS

### Two different interpretations of warrants under 4A:

- (1) Warrant clause – qualification of first clause – informs us what is reasonable.
  - Here, warrant is a good thing to be encouraged.
- (2) Warrant clause is wholly separate from first clause—only check on searches and seizures is whether it’s reasonable or not.
  - Here, warrant is a bad thing, to be kept in serious check. Bad b/c warrant immunizes police; get out of jail free card—want to keep it limited.
- Katz adopts first interpretation—searches w/o warrants are per se unreasonable.

### Warrant Preference:

- Incentive to get warrant:
  - More deferential review of PC determination. Compare *Gates* (warrant – substantial basis) with *Ornelas* (no warrant – de novo).
  - Get benefit of the doubt, if have warrant.
- Note: Cops do not have to show warrant to the D! (*Grubbs*)
- Seems strange to prefer warrants:
  - (1) Firstly, may not have been considered a good thing in Constitution.
  - (2) Plus, unusual to do ex ante review of conduct before it happens—usually post hoc review, can compensate parties for what happened, set up principles that guide others’ conduct ex ante. Ex post: adversarial, in-depth. Ex ante: ex parte, cursory.
- Bad arguments for warrants:
  - “Neutral and detached” magistrate – this is part of the caselaw, but empirically, magistrates just grant—rubber stamp
  - Extra “check”
  - Harm is “special” – lots of important harms are adjudicated ex post.
- Good arguments for warrants:
  - Having to ask permission shapes behavior (if cops know the rules, will not ask for permission in at least some set of circumstances that are really over the top)

- Reduce post-hoc bias: Hard for judge to be neutral in a suppression hearing—always have evidence of criminality, judge might be inclined to let it in (hard to think there wasn't P.C., since the cops turned up drugs).
- Harm is difficult to quantify/value—better to avoid on the front end.
- Disincentivize false testimony by cops -- less able to lie when must state relevant facts before evidence is found; (“truthifying” - cops making up the facts that they know they need to show – after the fact, cops may know better what they need to embellish.)
- Slows cops down?
- Cons of warrants:
  - Costly
  - Lots of bureaucracy
  - Time-consuming and difficult for cops to get warrants (this can also be a ‘pro’)
- Magistrate’s role in issuing warrants:
  - Task of issuing magistrate is to make a practical, common-sense decision whether, **given all the circumstances** set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, **there is a fair probability** that contraband or evidence of a crime will be found in a particular place. - *Gates*
- Anticipatory Warrants
  - Must satisfy two-part test (*Grubbs*):
    - (1) P.C. that the triggering event will occur;
    - (2) P.C. that if the triggering condition occurs, there will be contraband, or evidence of a crime being committed.
  - Triggering conditions do not have to appear in warrant (b/c cops don’t even have to show the warrant). (*Grubbs*)
  - Would have worked in *Gates*.

Exceptions to the warrant requirement:

- Exigency
- Automobile Exception

- Plain “View” (or touch, hear, ...)
- Arrest

Exceptions to warrant requirement AND PC:

- SILA
- Consent
- Regulatory Searches (w/ generality or mini-cause)

## EXIGENCY

Exigency is an exception to the warrant requirement. (But still need PC!!!!)

1. Is there PC? [Still need PC!]
2. Is there exigency?
  - a. Injury to people
  - b. Fleeing suspect
  - c. Destruction of evidence
3. Did police create their own exigency?
  - a. If police could sneak off and get warrant, no exigency. *Vale*. Not allowed to subvert warrant process in this way.
  - b. But – police can flush out suspects into the open using deceptive phone call, according to Tennessee Supreme Court. [isn't this creating your own plain view, not creating own exigency? – still didn't search the house].
4. What is the scope of the exigency?
  - a. Scope of search/seizure **limited by scope of the exigency**. *Hayden, Mincey*.
  - b. If looking for guns, can't look somewhere that couldn't fit a gun. *Hayden*. If looking for something small like coins, can look many more places. E.g., *Horton*.
5. Did police exceed scope of exigency?
  - a. Cut some slack, b/c only by a few minutes in chaotic situation? *Hayden*.
  - b. Went way too far, e.g., 4 days after homicide. *Mincey*.

Need forward & backward exigency:

- Forward Exigency (3 options):
  - Injury to people
  - Fleeing suspect
  - Destruction of evidence
- Backward Exigency: Unforeseeable need (couldn't have gotten warrant)

Scope of search/seizure **limited by scope of the exigency**. *Hayden, Mincey*.

**Note:** Prof thinks exigency could cover all of the exceptions to the Katz warrant requirement:

- Cars – exigency (should be limited to true exigency).
- Plain view – exigency (D now alerted that police have seen it).
- Law of arrest – categorical exigency when people outside homes.

**Exigency Cases:**

**Hayden.** Can pursue fleeing suspect into home and search for man and guns.

**Mincey.** 4-day search exceeds scope of exigency.

**Vale.** Can't create own exigency, if have opportunity to get a warrant.

**Officer's Call handout.** Can create your own plain view.

**McArthur.** Scope of exigency only extends to least-intrusive act (e.g., seizure).

## AUTO EXCEPTION

Auto Exception is an exception to the warrant requirement. But still need PC!!! Make sure to keep PC & car exception separate!!

### Rules:

- **Car Rule:** If have PC for car (or vehicle), may conduct “probing” search of any part of it, including compartments, containers, glove compartment, trunk, passengers’ belongings. Ross/Acevedo/Houghton. But maybe not dismantle. Ornelas.
  - Scope of search is limited by nature of PC, not by car exception. Ross.
  - If car on private property, maybe requires unforeseeable need. Coolidge, Cardwell. (But overruled by Carney?)
  - Some kind of ready mobility is probably still required. Carney.
  - Cannot search passengers’ persons w/o targeted PC. Houghton, Di Re.
- **Container Rule:** If have PC only for a container in a car, then can search the container, but only the container. Acevedo.
  - But if car has not yet started, maybe cannot search container. Chadwick (if survives Acevedo).
  - If have PC for a container *outside* a car, can only seize the container; may not search w/o a warrant. Acevedo dissent.

### Requirements:

- Mobility (inherent mobility of cars satisfies → categorical).
  - But Carney (mobile home) suggests if ready mobility were truly lacking (e.g., no tires), might be outside exception (“so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle.”)
  - Mobility of cars determined at time of stop, not time of search. Chambers (b/c of incentives).
  - NOTE: For containers *outside* cars, mobility determined at time of *search*, not seizure (once immobilized). Sanders. (this proposition seems like it survives Acevedo for the outside-car context).

- Unforeseeable need?? → maybe if on private property
  - Coolidge (unoccupied + private driveway + ample oppy to get warrant → need warrant)
  - Cardwell (unoccupied + public parking lot + ample oppy to get warrant → search OK).
  - Carney (occupied + public place + seeming oppy to get warrant → search OK).

### **Probable cause:**

- Car exception does not affect need for PC; PC for a container in a car does not create PC for other parts of the car and search can't expand beyond scope of where PC exists—Acevedo
- However, where PC exists to search for contraband in a car → PC to search all containers therein without individualized PC for each container—Houghton

### **Justifications (adapts as doctrine progresses):**

- Inherent ready mobility—Carroll (creates exigency)
- Disincentivize dangerous search conditions, even when no ready mobility—Chambers
- Lesser expectation of privacy in cars b/c seldom serves as one's residence or repository for personal effects—Cardwell
- Lesser expectation of privacy b/c cars travel on public thoroughfares and public can see into them—Cardwell
- Lesser expectation of privacy of cars b/c of pervasive regulation—Chadwick (as compared to footlocker which is not), Carney
- Heightened potential for removal in car. Cardwell. (Bullshit! More in home!)
- Prof thinks rule for both cars and containers should be only based on exigency: If exigent, search it; If not, immobilize it. (Note: Maybe exigency increases when there are passengers in the car.)

### **Cases:**

Carroll. Upholstery, search OK, mobility → exigency.

Coolidge. Parked in home driveway, not OK, no unforeseeable need.

Chambers. Towed to station, OK, determine mobility at time of stop, not search.

Cardwell. Paint samples, OK, reduced privacy expectation (plain view, used for transport).

Chadwick. Footlocker, car not moving, not OK, cars are regulated, not lockers.

Sanders. Suitcase, car moving, not OK, can seize but not search (no longer mobile).

Ross. Drugs in trunk, OK, if have PC for car, can search containers inside.

Acevedo. Drugs in bag in trunk, OK, overrules Sanders, can search containers in cars.

Carney. Mobile home, OK, ready mobility, regulation, lesser privacy.

Houghton. Passenger's purse in backseat, OK, balancing: ready mobility + joint enterprise.

Di Re. Searching passenger's pockets, not OK (body searches more intrusive, says Scalia).

## PLAIN VIEW

Plain View is an exception to the warrant requirement for SEIZURES, not searches.

- If it's in plain view, no privacy interest. Only interest is possessory → therefore, only seizures relevant.
- Note: Doctrine also includes plain touch, hear, feel, smell. (e.g., *Dickerson*- frisk).

Requirements:

- (1) Legitimately on the premises (in the “grab area”) at the time of *seizure*.
- (2) Immediately apparent (that it's seizable) – *Hicks* suggests this means PC.
- (3) \*\*Inadvertent discovery (meaning no prior PC) (disputed—*Horton* says not necessary).

Rationale:

- Once cops see the contraband/evidence, creates exigency b/c confederates know that cops know about the things.

Watch out for exceeding scope! – if exceed scope, no longer legitimately on premises.

- *Hicks* – search based on exigency – examining stereo goes beyond scope.
- *Dickerson* – frisk for weapons – fondling small plastic bag in jacket pocket exceeds.
- *Horton* – finding guns while searching for coins is OK.
- Remember: Plain view does not enlarge the scope of a search! Even if don't require inadvertence, will not expand scope of search. Still delimited in same way.

## ARREST

### Arrest Rules:

- Can arrest people outside homes w/o warrant:
  - Misdemeanors: if committed in officer's presence.
  - Felonies: just need PC (*Watson*)
- In home, need arrest warrant + PC that at home. (*Payton*)
- In third party's home, need search warrant. (*Steagald*)
- Can arrest for any crime, even non-jailable offenses (*Atwater*). But may not arrest in extraordinary manner. (*Atwater*).
- If arrested w/o warrant, must appear before magistrate w/in 48 hrs. (*McLaughlin*)

### Reasoning:

- Arrests w/o warrants:
  - Categorical exigency (more often than not: mobility + unforeseeable need)
  - Misdemeanor/felony distinction from old common law. *Watson*.
    - Felons – dangerous, exigency to get felon off the street, plus punishments severe, likely person would flee, felons were notorious.
    - Misdemeanor – b/c citizen arrest, either get a warrant or you see it (obviously close in time); stationary society – less risk flight.
  - Can't distinguish b/w jailable and non-jailable offenses, b/c need BL rule (but still need to witness offense, if only misdemeanor.) *Atwater*.
  - If D answers door at home, can arrest w/o warrant under *Watson* if felony. (*Santana* cited in *McArthur*).
  - Anomaly: Can seize (arrest) person w/ PC but w/o W, but need W to seize evidence, despite stronger interest in personal liberty.
- Arrests w/ warrants:
  - Least likely to be mobile when home – so require W. *Payton*.
  - If no exigency, need SW to protect 3rd party privacy. *Steagald*.
  - Odd that don't need SW for home.
  - Remember: If you have exigency, can go inside to arrest even w/o warrant!

### Remedy for Unlawful Arrest

- RULE: An unlawful arrest, by itself, has no impact on subsequent criminal prosecution. Even if arrest is improperly conducted, arrest is still valid if have PC—don't have to let the person go. But *fruits* of unlawful arrest are excluded.
  - Otherwise, could just release, and then immediately re-arrest.
  - Bad arrests only matter if cops then find something that D wants to suppress.
  - If arrest D w/o PC, then subsequent statements excluded b/c fruit of unlawful arrest.
  - But, if arrest D w/ PC (but through defective procedure, e.g., at home but w/o A.W.), subsequent confession at stationhouse not excluded b/c not the fruit of the illegal aspect of the arrest, i.e., not a fruit of the fact D was arrested at home instead of on street.
- RULE: Have to get before a magistrate w/in 48 hours if arrest w/o warrant. County of Riverside v. McLaughlin
- Why do we care about wrong arrests?
  - Liberty is at stake.
  - Mistakes.
  - Arbitrariness.
  - Profiling.
  - Additional searches. Incentive to arrest where otherwise wouldn't, because want to do the further thing.

## SEARCH INCIDENT TO LAWFUL ARREST (SITA)

SILA is exception to warrant and PC requirement.

Basic Rule:

- After lawful arrest:
  - Can search PERSON and GRAB AREA. (*Chimel*)
  - Can conduct PROTECTIVE SWEEP of IAA in house. (*Buie*)
  - Can search passenger compartment of CAR, if arrested in car. (*Belton*)
- Categorical rule: do NOT need PC, RS, W, or actual exigency.
- Two justifications (categorical exigency):
  - Disarm: protect safety of the officers.
  - Preserve evidence: Likely to find evidence in place where arrested.

### Search of person

- **BL Rule:** When arrest someone, can search person and all containers on him (*Robinson*).
- Based on categorical exigency – more likely than not.
- No case-by-case adjudication: doesn't matter if no possible evidence of crime (e.g., revoked license, as in *Robinson*), or no possible violence (e.g., pacifist).
- This is a good BL rule:
  - Very bright.
  - Accurate: More often than not, the potential for danger is there.
  - Need to forego case-by-base: Arrests are chaotic, kaleidoscopic; Hard for cop to figure out the risk in the moment.
  - Pretext: Less worrisome, b/c limited scope.

### Search of Grab Area

- Standard: Can search “grab area” around D for weapons or evidence (*Chimel*).
- “Grab area” = “area within [arrestee’s] immediate control – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” (*Chimel*)
- Beyond grab area, need warrant.

- Does not extend to entire house. (*Chimel*.) Even if have PC for house and AW, need SW for search, absent true exigency (e.g., *Hayden*). Ever-present risk that evidence in home may be destroyed (e.g., by wife, or confederates) is not enough—would prove too much (e.g., extends to arrests on street) (*Chimel, Vale*).

### Protective Sweep of Immediately Adjacent Area

- Standard: Can conduct “protective sweep” of areas immediately adjoining arrest area when executing AW in home. (*Buie*).
- Rationale: Protect cops from danger.
- Can only look for *people*, not evidence. May extend only to “cursory inspection of those spaces where person may be found.” (*Buie*)
- E.g., can look into adjoining closets, from which confederates could launch immediate attack.
- Need articulable suspicion to extend outside of IAA. (*Buie*)

### Search of Cars

- **BL Rule:**
  - If arrest occupant (or maybe “recent occupant” (*Thornton*)) of vehicle, can search entire passenger compartment of vehicle (*Belton*), including glove compartment and containers (e.g., jacket pocket – *Belton*).
  - Not including trunk (need PC) or passengers’ persons (need RS).
  - Must arrest. If no arrest, no SITA (even if *could* have arrested). (*Knowles*)
- Rationale: Items in car are generally in grab area (*Belton, Thornton*).
- Note: if develop PC in course of SITA, then free to search whole car under *Acevedo*.
- When suspect outside car (and controlled), rule unclear:
  - *Thornton* majority – *Belton* applies to “recent occupants.”
  - Scalia’s *Thornton* concurrence may govern (maybe 5 votes)
    - Test: If D not in car, can search car if crime for which arrested yields PC that there’s evidence in the car. Note: Scalia’s test could extend to trunk.
  - Reasoning:
    - If D handcuffed outside car, risk of grabbing weapon is remote.

- SILA is not a “right” to search; only justified by necessity.
    - “Belton should be limited to cases where it is reasonable to believe evidence relevant to the crime of the arrest might be found in the vehicle.”
  - Upshot:
    - For no-evidence crimes (e.g., traffic stops), probably no search.
    - Note: No greater than auto exception; i.e., can search whole car if PC for car. But: maybe could extend to houses too (i.e., reject *Chimel*’s grab area limitation).
  - SILA can still justify grab-area search for **weapons** (even w/o PC).
- Criticism: This is a bad BL rule
  - Line isn’t bright – e.g., who is recent occupant? When “occupant” determined?
  - No need to forego case-by-case adjudication; in *Belton/Thornton*, D was outside car at time of search, situation has been controlled.
  - Lose too much accuracy – not likely there is true danger or threat of destruction of evidence
  - Pretext – incentive to make traffic arrests for drug searches.

If arrest is not lawful:

- So long as arrest is lawful under 4A (i.e., have PC, or misdemeanor + in presence), SITA permissible, even if arrest violates state law. (*Virginia v. Moore* (2008) Supp. 106).
- If arrest not lawful under 4A (i.e., PC was lacking), probably no SITA. Reasons:
  - Court seems to prefer formalistic BL rule here: SITA only applies to lawful arrests. *Moore* indicates argument hinges on whether arrest was lawful.
  - Plus, court preferred BL, formalistic test in *Knowles* to require actual arrest (not just authority for arrest, where cop issues citation instead.)
  - Analogies:
    - Consent – Maintain rigid lawful/unlawful distinction re whether consent valid.
    - GF: no GF exceptions w/o warrants – would expand cops’ discretion (as here, if allowed GF or reasonableness exception to SILA).
  - Plus, can sue for tort under common law if arrest unlawful.

- But argument for SITA: same danger/threat of evidence destruction, whether arrest lawful or not. Why should cop get shot for making mistake?

Bright Line Rules should be:

- Bright!
- Get same results as w/o the rule, most of the time.
- Genuine need to forgo case-by-case assessment.
- Must consider incentives → pretext.

**SILA cases:**

Chimel. Can search person and “grab area” incident to arrest, w/o PC. But not whole house.

Robinson. Revoked license. Heroin in crumpled cigarette pack. OK, b/c SILA is BL rule.

Belton. Speeding. Saw marijuana, evacuated occupants, arrested. SILA of car OK - BL rule.

Thornton. D exited car before cop arrived. SILA still OK, even though far outside grab area.

Knowles. No SILA allowed if no arrest, even if could have arrested.

Buie. Protective sweep of home in areas immediately adjoining arrest area is OK.

Moore. So long as arrest is lawful under 4A, SILA is permissible (even if state law differs).

## INVENTORY SEARCHES

### Concept:

- If impounding car, allow inventory search to guard against claims of stolen goods.
- Not for searching for criminal evidence. Can only search as predicate for impounding.
- Theoretically shouldn't be exception to warrant requirement, b/c only regulatory, but rule is too loose. Should have a fixed regimen every time police impound a car.
- Bertine gives cops discretion about whether to impound and inventory or just leave on street—inadequate safeguard (not full generality).

### Cases:

- Illinois v. Lafayette
  - Inventory search of car. Upheld b/c just search for inventory, not to find crime.
- South Dakota v. Opperman
  - Inventoried bag – D says he could have just waived any claims about lost goods to forgo inventory.
  - Court upholds- don't have to ask D which he prefers.
- Colorado v. Bertine (1987), p. 549
  - D contests b/c no procedures—cops got to choose whether to impound or just lock and park.
  - Court still upholds. Gives cops another option for rummaging out drugs.

## CONSENT

Consent is an exception to both the warrant requirement and PC.

Rules:

- Consent must be voluntary, based on totality of circumstances. *Bustamonte*.
  - State must prove consent was freely and voluntarily given. *Bustamonte*.
  - But: knowledge of right to refuse is merely a factor; not dispositive. *Bustamonte*.
  - Psychological factors about which cop has no reason to know may be relevant.
  - Police need not inform D that seizure is over before requesting consent. *Robinette*.
- Scope of search determined by objective reasonableness. *Jimeno*.

Third Party Consent:

- For shared property, anyone w/ common authority may authorize search. *Matlock*.
- If person consents, need not ask D for consent, even if would be easy to do so. *Matlock*.
- Police must reasonably believe person has authority to allow search of premises (“apparent authority”). *Rodriguez*. Not enough to just have a key.
- Search is invalid w/r/t a present co-occupant who is presently refusing search. *Randolph*.
- Remember standing!! If no REOP in the area, admissible anyway, regardless of consent!

Consent is vitiated if unlawfully seized. But OK if lawfully seized. (*Bustamonte*).

- Best explanation why: application of FOPT.

Two ways to conceptualize consent searches:

- Not a search (no REOP under *Katz* when open up to police) ← 3rd party consent cases point to this rationale more.
- It’s a search, but it’s reasonable (consent makes it reasonable). ← waiver idea might be more here.

Court rejects possible BL rules:

- Have to warn people that they don’t have to consent (considered in *Bustamonte*)

- Have to warn people if they've been detained that they are free to go (considered in *Robinette*)

Bustamonte rule would have been a good BL rule: Must inform of right to refuse consent—

- BL rule more likely to align with “correct” result (i.e., people consent when in fact voluntary)
- Very bright—just tell the rule.
- Pretext—would help avoid.
- Lose anything by foregoing case-by-case adjudication? Argument that lose the free-flow of informal exchange. This is BS. Makes things harder when people know their rights.

**Want to preserve realm of consent searches, for autonomy reasons.** Hard to take account of coercive circumstances beyond informing of right to refuse. But should at least do that!

Third Party Consent issues:

- If police do search and find evidence against person X, it is admissible so long as someone with (apparent) authority to authorize search authorized the search. (*Rodriguez*)
- **REMEMBER STANDING:** It is admissible against you NO MATTER WHAT if you didn't have a REOP in the place that was searched.
- Note: Rationale can't be based on knowing and intelligent waiver – not waiving!
  - Court uses assumption of risk language—suggests not a search at all.
- Search is valid as to absent co-occupant. *Frasier* (duffel bag).
- PLUS: Not required to ask both occupants, even if both there. *Matlock*.
- BUT: Present co-occupant who is objecting: search invalid as to him. *Randolph*.
- Upshot: Probably cannot use plain view here even if his drugs are out, or else would obviate *Randolph* rule. But: maybe could freeze the scene a la *McArthur*, go get warrant based on observations. Though this still seems to be using evidence against D you wouldn't have had, absent the “illegal” search as to him...
- FURTHER: If there is PC + Exigency, can enter. No longer illegal as against the objector. But no PC just b/c person objects. But if other person says, “yes, come inside, I will show you his drugs,” now there's PC. Plus exigency, b/c D heard her say that.



## PRETEXT AND PROFILING

### Pretext:

- Pretext problem is: If X, then Y. Cops will do X, just to do Y.
- Two distinct problems:
  - (1) Privacy invasion—if A is easy, too easy for cops to wend their way into private lives (Amsterdam: worried about *unjustified* searches);
  - (2) Discretion—choice to do B, C, D gives cops a lot of discretion that can be used invidiously, e.g., by using race (Amsterdam: worried about *arbitrary* searches).
- Pretext is *not* actionable under 4A. *Whren*.
- If race is used, get strict scrutiny as protected class under 14A Equal Protection Clause.
  - Must prove *intent* to discriminate based on race → can show intent through disproportionate impact and/or deviation from common practices (use police protocols and procedures, and disparate impact data).
- If race is not used, only get rational-basis review under 14A.
  - Only successful case: *Kail* (combat prostitution through bicycle bell enforcement—arbitrary and irrational).
- How to fix pretext? If X, then Y. Can either fix X, or fix Y.
  - Require record-keeping
    - Will help prove problem
    - Will also shape police behavior b/c they'll be conscious
  - Change the Y
    - E.g., must have suspicion about the particular Y you will search for. (Can't stop for traffic, then search for drugs.) *Whren* rejects.
  - Reduce/Limit the X's
    - “Public order” offenses – can be void for vagueness. E.g., *Morales*.
    - Traffic laws – if law is clear, then 4A cannot limit.
    - PC is necessarily dependent on jurisdiction's substantive criminal law.

### Racial Profiling:

- Using race as proxy for **propensity** to commit certain crime (as compared to investigating a specific crime in which race is a listed characteristic of the suspect).

- Line blurs together in terrorism—if worldwide conspiracy to commit terrorist acts—it’s still propensity, but blurs together.
- Arguments:
  - Efficiency – more likely to find crime in black population
  - Rights – but intruding on people’s rights
  - Consequentialism – profiling may actually make the problem worse (Harcourt)

**Cases:**

Whren. Pretextual traffic stop, found drugs, OK. (no limit on Y, if X is clear).

Morales. Chicago gang loitering ordinance – void for vagueness (trying to limit X’s).

Kail. Combat prostitution through bicycle bell enforcement—arbitrary under 14A.

Oneonta. Investigated all 200 black people to solve single robbery. OK. Racial profiling?

Hiibel. “Stop and identify” statute. If RS for Terry stop, OK for state to require D ID himself.

Brown v. Texas. If no RS for stop, may not require D to ID himself → too discretionary.

Lawson. Black man arrested 15 times for no ID. Stop & identify statute void for vagueness.

Atwater. Can arrest for any crime, even non-jailable offenses.

Weaver. “Roughly dressed” young black male in KC airport. Terry stop OK.

Condelee. “Sharply dressed” black female in KC airport. Terry stop OK.

Royer. Terry stop in airport based on “drug courier profile.” Scope exceeded.

Sokolow. Terry stop in Honolulu airport based on “drug courier profile” upheld (not racial).

## REASONABLENESS – TERRY STOPS

### **Threshold: when mini-cause “reasonableness” applies:**

- Relevant rubric of police action: proactive or preventive policing, involving “necessarily swift action predicated upon on-the-spot observations of the officer on the beat,” that cannot be subjected to warrant requirement. – *Terry*.
- Whenever intrusion is sufficiently minimal to justify departing from traditional PC + Warrant model. – E.g., *Sharpe*.

### **Terry Rules:**

- If articulable suspicion that crime is afoot → can stop and ask questions.
- If articulable suspicion that armed and dangerous → can frisk outer body.
- Both stop and frisk must be (1) justified at inception; (2) limited in scope.
  - Scope of frisk: *only* to finding weapons.
  - Scope of stop: reasonable duration to verify or dispel suspicion.
- Must be “articulable” in order to adjudicate ex post (hunch is no good).
- Must be *reasonable*, under all circumstances: balance government & individual interest:
  - Interest: Crime control → allows cop to approach → then ask questions.
  - Interest: Officer safety → allows protective frisk.

### **Scope of Stop (line b/w justified Terry Stop and Seizure requiring PC):**

- Detention should be no longer than reasonably necessary – e.g., few minutes.
  - *Place*: 90 mins is too long!
  - *Sharpe*: 20 mins. OK, especially b/c extended by evasive actions of co-defendant.
  - *Montoya de Hernandez*: 16 hours OK, b/c border protection strong interest.
- Officer should “diligently pursue” productive means of investigation likely to verify or dispel his suspicions quickly. *Sharpe*.
- Probably cannot transport the suspect to another place. *Royer*. Cannot transport a suspect to the police station without PC. *Dunaway*.
- When considering intrusiveness, balance against law enforcement purposes. *Sharpe*.  
(contra: Marshall dissent – stop must not be intrusive b/f consider law enforcement aims).

### **Scope of Frisk:**

- Generally—a pat down of outer clothing. *Terry*.
- Can shine flashlight into car to search for weapons, if RS, and D near car. *Long*.
- Can't keep feeling once determine object isn't a weapon. *Dickerson*.

### **Reasonable Suspicion:**

- Less demanding than PC in terms of quantity, content, and reliability of info. *White*.
- Unlike for PC, RS can be about a future crime. *Terry*.
- RS is less than 50/50, but more than inchoate suspicion or hunch. *Sokolow*.
- Due regard granted to officer's unique experience and training.
- Lower standard of reliability for tip for RS than PC. *Alabama v. White*.
- Anonymous tip that cannot be corroborated cannot provide RS. *J.L.* (unless it's a bomb).
- Unprovoked flight from police in high crime area provides RS. *Wardlow*.
- Satisfying "drug courier profile" amounts to RS. *Sokolow, Royer, Weaver, Condelee*.

### **Stops based on RS:**

- Can stop a person or car on RS, even just of traffic violation. This is SEIZURE.
- Must be temporary, last no longer than necessary to effectuate purpose of stop. *Royer*.
- Must use least intrusive investigative method to verify/dispel suspicion quickly. *Royer*.
- *Sharpe* – 40 mins. *Montoya* – 16 hrs.
- If RS, can demand I.D. If stop-and-identify statute, can arrest if refuse.
- Can order driver & passengers out of a car, even if no RS for exiting car. *Mimms, Wilson*.
- If RS of danger, can frisk and briefly search interior of car. *Long*.

### **Traffic Stops (based on PC) → at some point, need RS for more:**

- Can stop a car for PC of traffic violation (or other crime). This is SEIZURE.
- Once stopped, can asked for license & registration & run computer checks w/o RS.
- Can ask all occupants to exit the car w/o RS. *Mimms, Wilson*.
- Can use drug dog w/o RS so long as does not extend length of stop. *Caballes*.

- Any statements made by D are admissible, even w/o Miranda. Berkemer.
- If cop does more (multiple cops, extra demands, intimidating voice, etc.) need RS.
- Can frisk and search interior of car based on RS of danger.
- If move the D, e.g., to the station house, need PC.

### Cases:

Terry: If RS of criminality, can stop. If RS of danger, frisk.

Royer: Moving D to room 40 feet away, took 15 minutes → exceeded Terry.

Place: Took bags from LGA to JFK for “sniff” test w/o PC, took 90 minutes → too long.

Hodari D.: If run away, no seizure until cop grabs you. OK.

Sharpe: Stopped car for 15 min. on RS of drug transport. OK Terry stop.

Sokolow: Drug courier profile Terry stop in airport, OK.

Weaver: Drug courier profile Terry stop in airport, OK.

Condelee: Drug courier profile Terry stop in airport, OK.

Dunaway: Transporting D to stationhouse exceeds Terry—requires PC.

Sharpe: 20-min Terry stop of van on side of road OK.

Mimms: Can order driver out of car at legit traffic stop w/o RS, then do frisk if develop RS.

Wilson: Can order passengers out of car too w/o RS.

Long: Can look inside car if RS of danger.

Dickerson: Once conclude object isn't a weapon, can't keep feeling it.

White: Anonymous tip can supply RS if corroborated (less reliability than PC is OK).

J.L.: Anonymous tip that doesn't predict behavior can't justify Terry stop (unless it's bomb).

Arvizu: Innocent facts can amount to RS in combination.

Wardlow: High crime area + unprovoked flight = RS.

Montoya de Hernandez: Can detain (16 hrs!) at border until verify not introducing harmful agent.

Flores-Montano: Can disassemble gas tank at border—even w/o any suspicion.

## REASONABLENESS - REGULATORY SEARCHES

Threshold:

- Step 1: Whether it's criminal enforcement.
  - If so, then Katz applies (unless it's Terry).
  - If not, then special circumstances.
- Step 2: Special circumstances – balance intrusion against gov't interest
- Step 3: Adequate alternate safeguards

### Special Circumstances:

- Must have regulatory purpose.
  - If primary purpose is crime control (i.e., apprehending suspect of particular crime)  
→ must meet Katz model. (If only secondary, maybe OK. Edmond.)
- Most often:
  - Schools (e.g., Vernonia)
  - Government as employer (e.g., Ortega)
  - Administrative searches (e.g., Camara)
  - Airports
  - Public safety – generalized health/safety concern (e.g., Sitz - DUI checkpoint)
  - Terry-style stops (if construe as an interest in getting weapons off street)
- Note: Sometimes special circumstances are themselves determined by reasonableness balancing test, i.e., see if Katz applies by looking at nature of intrusion, gov't interest.
- Note: If find anything during special circumstances search, admissible! (plain view)

### Interest Balancing:

- “The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.” Brown v. Texas (1979).
- Three-part test: (Brown v. Texas)
  1. Gravity of the public concerns served by the seizure; (gov't interest)
  2. Degree to which the seizure advances the public interest; (effectiveness, ‘hit rate’)
  3. Severity of the interference w/ individual liberty. (intrusiveness)

- Safeguards should satisfy underlying concerns of warrant requirement (PC & particularity):
  - Searches w/o adequate justification
  - Searches that are arbitrary
  - Searches that are discriminatory
  - Searches that are overbroad (exceed necessary scope)

### **Alternate Safeguards:**

- **Generality** (e.g., roadblocks, admin searches)
  - Requirements:
    - Must be truly general, e.g., everyone, or random, or in accord w/ admin regs (watch out for invidious targeting, e.g., roadblock location).
  - Rationale:
    - Political process – citizens will complain if too onerous
    - Limits discretion
    - Costs more – police only do it if really important
    - Reduces harm – less stigma
- **Mini-cause** (e.g., Terry) – reasonable suspicion ← not a very good safeguard!
  - Requirements:
    - Justified at inception (by RS)
    - Limited in scope
  - Rationale:
    - Some suspicion-based investigation simply can't fit into *Katz*.
  - Possible qualification:
    - Maybe should be limited to special circumstances, e.g., schools.
    - In general criminal context, looks troubling. Like watered-down *Katz* (“more slide than scale”). Doesn't seem to meet 4A.

### **Cases:**

*Camara (1967)*: Admin housing inspection, OK, generality.

*Burger (1987)*: Junk yard search, OK, admin (\*\* fishy – crime control interest, pre-*Edmond*).

Martinez-Fuerte (1976): Checkpoint near Mexican border, OK.

Prouse (1979): License & registration stop. Not OK b/c not general. OK if checkpoint.

Sitz (1990): DUI checkpoint. OK. Primary purpose getting drunk drivers off street.

Edmond (2000): Drug interdiction checkpoint. Not OK- primary purpose crime control.

Lidster (2004): Roadblock to get info re hit-and-run. OK. Just trying to get info.

T.L.O. (1985): Search of high school student's purse based on RS. OK. Schools.

Ortega (1987): Search of government employee desk on suspicion. OK.

Chandler v. Miller (1997): Random drug testing for state public office not OK. No need.

Flores-Montano (2004): Can disassemble gas tank at U.S. border w/o any suspicion. Border.

Vernonia (1995): Suspicionless drug testing of student athletes. OK. School.

Earls (2002): Suspicionless drug testing of all extracurricular students. OK. School. (no need!)

## WHEN REASONABLENESS REQUIRES *MORE*

Rule:

- Both *instance* of search/seizure and *manner* of search/seizure must be reasonable. Even if have PC + Warrant, search/seizure can be unreasonable because of the *manner* in which it is accomplished.
- Do interest-balancing to determine if particular act exceeds its justification (same interest-balancing as the overall balancing): Crime Control vs. Individual.

Garner (1985), p. 658

- Unreasonable to use deadly force to apprehend fleeing felon—even if PC re felony is met—unless have PC that suspect poses significant threat of death or serious physical injury to officers or others.
- Individual interest: Life – ultimate.
- Government interest in crime control: Court “polls” the states and PD depts.

Winston v. Lee (1985), p. 553

- “Search” inside robber’s body for shopkeeper’s bullet would be unreasonable, even if PC and warrant requirements are met, because bullet could only be removed through serious surgery requiring general anesthesia.

Atwater (2001), p. 518:

- Leaves open possibility that arrest can be effected in “extraordinary” way—here, she was arrested in the ordinary way, even though think might not have had to be arrested.

## EXCLUSIONARY RULE

### History:

- Weeks v. United States (1914)
  - Established exclusionary rule for 4A violations in federal cases.
- Wolf v. Colorado (1949)
  - 4A incorporated against the states. But didn't include exclusionary rule.
- Mapp v. Ohio (1961)
  - Applied exclusionary rule against the states as part of 4A itself.

### Rationales for Exclusionary Rule:

- Personal Rights (rights = remedy)
  - Right w/o a remedy is no right at all.
  - W/o exclusionary rule, 4A has "no value." – *Weeks*.
- Judicial integrity
  - Brandeis: If government is law-breaker, breeds contempt for the law.
  - (beats Cardozo's argument: It's not fair the criminal should go free just because the constable has blundered.)
- Deterrence ← barely mentioned in Mapp.
  - General deterrence: If can't prosecute, will deter cops from breaking the law.
  - Limits on deterrence: Not everything cops are doing is w/ purpose of introducing evidence in court.

### Alternative Remedies:

- Civil lawsuits against officer for money damages
  - Problems:
    - Not a deep enough pocket for lawyers to take the case
    - Qualified Immunity (cop is only liable if law clearly established)
    - Over-deterrence (if sued, cops won't run into houses to save people)
- Civil lawsuits against government for money damages
  - Problems:
    - States have immunity from money damages under 11A.
    - Municipalities are only liable if results from official policy handed down by authorized official – doesn't cover rogue cop actions.
    - Possibility for over-deterrence.
- Civil lawsuits against government/police force for injunction
  - Problems:
    - Must be established practice.
    - P must show likely to suffer again (e.g., chokeholds in *L.A. v. Lyons*)
- Punish cop through administrative remedies
  - May satisfy deterrence, but no vindication for personal rights.
- Criminal sanctions for cop

- Shaming/Dialogue – e.g., make cop give public admission/apology.

## STANDING

### Rule:

- Can only apply exclusionary rule if the “challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it.” – *Rakas*.
- Note: Rehnquist says standing is subsumed under substantive 4A doctrine. – *Rakas*.
- D “must demonstrate that he personally has expectation of privacy in place searched, and that his expectation is reasonable.” – *Carter*.

### Rationales:

- Supporting:
  - Personal Rights – only get to vindicate your own rights; no vicarious assertions.
  - Judicial Integrity – excluding evidence defrauds the jury.
- Against
  - Deterrence – for optimal level of deterrence, should allow any citizen to suppress.
  - Judicial Integrity – courts shouldn’t be complicit in wrongdoing by government.

### Who Has Standing:

- Rejected rule: “anyone legitimately on premises where search occurs may challenge its legality.” – *Jones* (repudiated by *Rakas*).
- Overnight guest in 3rd party home has standing. *Olson*.
- Social guests in 3rd party home have standing. *Carter* dissent + Kennedy + Breyer.
- Visitors w/ mere fleeting and insubstantial connection w/ home do not. *Carter* Kennedy.
- Passengers in cars have standing. *Bustamonte*.
- Passengers in cars who neither own car nor evidence do not have standing. *Rakas*.
- If only present for business transaction for a matter of hours, no standing. *Carter* maj.
- If break into someone else’s house, no standing. (implicit in *Carter*).
- Deliveryman, or someone who left possessions at another’s home do not have standing.
- No standing for searches of financial documents held by bank officer. *Payner*.

### Cases:

*Jones*. Friend lent him apartment. Yes, standing. (But “legit on premises” rule overruled.)

Rakas. Passenger in car—owner not in car. No standing.

Olson. Overnight guest in private home. Yes, standing.

Carter. Two-hour stay in home, not social. No standing.

Payner. Search of hotel room & briefcase of banker. No standing for client.

## FRUIT OF THE POISONOUS TREE

### Rule:

- Evidence derived from 4A violation (of you!) is excluded as “fruit of poisonous tree.”
- Test: Whether the evidence “has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” – *Wong Sun*.

### Process:

- But-for test → evidence would not have been seized but for the illegal act.
- However, can “purge” taint if: (consider rationales!)
  - Attenuation – long or complicated causal chain can dissipate taint. Consider:
    - Passage of time, e.g., *Ceccolini*.
    - Intervening events – especially acts of free will, e.g., *Wong Sun*, *Ceccolini* (but reading Miranda doesn’t break taint. *Brown v. Illinois*).
    - Flagrancy of illegality – less need for deterrence if inadvertent. *Ceccolini*.
    - “Theoretical” attenuation – rationale attenuated. See *Hudson*.
  - Independent Source (illegality no longer but-for cause)
    - Two roads – some cops went one way, other cops went the other.
    - Don’t want police *worse* off than w/o illegality.
    - E.g., *Murray* – all info in warrant independent from entry to warehouse.
  - Inevitable Discovery (illegality no longer but-for cause)
    - Cops “would have” discovered, not “could have” discovered.
    - Answer counterfactual: Had the police not illegally discovered the evidence in question, would they have kept investigating in a different way long enough to find it legally? (Not simply a counterfactual in which cops don’t act illegally. *Hudson*, Breyer, dissenting.)
    - Can’t extend “inevitable discovery” to warrant requirement, or else would swallow the rule (e.g., had PC, so would have gotten a warrant).
    - Probabilistic – only preponderance of the evidence standard.

- E.g., Williams – search party “would have” found body, even w/o “Christian burial” speech.

### **Rationales:**

- Personal Rights
  - Favors FOPT. Largely ignored in the cases.
- Judicial Integrity
  - Favors FOPT – illegality taints entire judicial process; government should not benefit from its own wrongdoing. Silverthorne Lumber.
  - Disfavors exceptions – no matter how much you wash, still tainted.
  - But: suppressing reliable evidence at criminal trial is bad, b/c want truth.
- Deterrence \*\* (primary)
  - Favors FOP – prevent violations in future; eliminate incentive.
  - Favors exceptions – cops shouldn’t be in “worse” position b/c of illegality; plus if attenuated, police can’t anticipate, no deterrence value.
  - Court relies on deterrence a lot, b/c then you get to balance.

### **Remember Standing!**

- If evidence obtained *downstream* of your 4A violation, get exclusion under FOPT.
- If evidence obtained *upstream* of you, no exclusion, b/c no standing.

### **Criticisms:**

- Ceccolini – should have asked whether witness would have come forward on her own.
- Wong Sun – unlikely D would have come back the next day of his own accord.
- Murry – no condemnation of clearly illegal behavior!

### **Cases:**

Wong Sun – Attenuation. Admit statements when voluntarily return 3 days later.

Ceccolini – Attenuation. Live witness can act of own volition, more attenuated.

Williams - Inevitable discovery. Search teams 2 miles away would “inevitably” have found.

Murray - Independent source. Warrant obtained w/o using info from peeking into warehouse.

Segura - Unlawful entry, then search warrant lawfully obtained. OK, independent source.

Harris – Illegal *aspect* of the arrest must have caused the discovery (e.g., arrest at home).

Ramirez –Broke window during otherwise lawful entry. OK, not causally related.

## IMPEACHMENT

### Rule:

- Can't use fruits of unlawful search or seizure in case-in-chief. But, can introduce for impeachment purposes (for credibility purposes only).
- Prosecution can cross-examine using questions based on the evidence, so long as relevant or germane (even if D didn't contradict the suppressed evidence in direct). *Havens*.
- May use tainted evidence to impeach "statements made in response to proper cross-examination reasonably suggested by the direct examination." *Havens*
- But only to impeach D—not other witness. *James*.

Note: Impeachment, Standing, and FOPT exceptions create *incentives* to commit 4A violations, b/c of collateral benefits:

- Evidence against other suspects (standing).
- Further evidence about the same suspect (FOPT exceptions).
- Prevents D from taking stand at trial (impeachment).

### Cases:

*Walder*: D lied on direct exam about prior crime. Impeachment w/ prior evidence OK.

*Agnello*: On cross, P asked, "have you ever seen narcotics?" Then introduced. Not OK.

*Harris*: D claimed on direct that heroin was baking soda. Impeachment w/ prior statement OK.

*James*: Impeachment of a *witness* w/ D's prior statement not OK (only the D himself).

## GOOD FAITH

### Rule:

- Exclusionary rule does *not* bar use of evidence in case-in-chief when officers acted in reasonable reliance on a facially valid warrant.
- Officer's reliance on warrant must be **objectively reasonable**. *Leon*.
- GF exception applies to warrants, statutes, and computer data. *Leon, Krull, Evans*.
- GF exception does *not* apply if reliance not objectively reasonable, i.e.:
  - Affidavit was intentionally or recklessly false.
  - Magistrate “wholly abandoned judicial role.”
  - Affidavit utterly lacking indicia of probable cause.
  - Warrant facially deficient, e.g., fails to particularize place to be searched.
- GF exception does *not* apply when cops act on their own (e.g., no warrant).

### Reasoning:

- 4A does not *compel* exclusionary rule; just a prophylactic.
  - [Maybe states could replace w/ some other effective rule.]
- Further, the sole justification for the rule is *deterrence*:
  - Exclusionary rule cannot “cure” the prior wrong—therefore, cannot be based on personal rights.
- Therefore, constitutional power to impose exclusionary rule only arises when the deterrence value outweighs its cost.
  - Costs: Lost convictions (plus, recidivism) due to exclusionary rule.
  - Benefits: Altering police officers' future behavior. When cops act in good faith, there is nothing to deter—they acted properly. Therefore, benefits are zero for applying exclusionary rule to good faith violations.
- Prof: Balancing test should be:
  - Costs: Only convictions lost if apply exclusionary rule in cases of GF reliance.
  - Benefits: # of people searched based on GF reliance w/o finding evidence.

### Cases:

*Leon*. GF reasonable reliance on facially valid warrant. OK, no exclusion.

Krull. GF reliance on unconstitutional state statute. OK, no exclusion.

Evans. GF reliance on clerk's computer error re arrest warrant. OK, no exclusion.

Groh. Cop himself wrote the warrant but omitted places & things to be searched. Not OK.

## SPECIFIC VIOLATIONS

### KNOCK-AND-ANNOUNCE RULE

#### **Rule:**

- Knock-and-announce rule:
  - Cops must announce presence, wait reasonable time to allow resident opportunity to open door.
  - K&A not necessary if RS that: (1) threat of violence; (2) destruction of evidence; (3) futile.
- Violation of knock-and-announce rule does *not* result in exclusion of evidence.

#### **Reasoning:**

- Inevitable Discovery
  - Would have found evidence if had entered w/o violating K&A rule.
  - This mischaracterizes meaning of inevitable discovery. (Breyer, dissent)
- “Theoretical” Attenuation
  - Application of exclusionary rule will not vindicate entitlement protected by K&A rule – it’s about not disturbing, not shielding evidence from government.
- Cost/Benefit Analysis
  - *Every* application of exclusionary rule must satisfy cost/benefit analysis.

#### **Cases:**

Hudson – Cops only waited 3 seconds before entering, found gun. OK, no exclusion.

Segura - Unlawful entry, then search warrant lawfully obtained. OK, independent source.

Harris – Illegal *aspect* of the arrest (i.e., at home) did not cause statement. OK.

Ramirez –Broke window during otherwise lawful entry. OK, not causally related.

## FIFTH AMENDMENT

### Text:

- No person . . . shall be compelled in any criminal case to be a witness against himself.

### Requisites for privilege:

- Compulsion
- Testimony (“Witness”)
- Incrimination (“Against Self”)

### Rationales for privilege:

- Government conduct:
  - Compulsion – but not compulsion per se, only if results in testimony
  - Reliability – but could just corroborate, if this were the only concern
  - Accusatorial – two sides battling it out, don’t have to help other side
- Cruel Trilemma – D has no good choice (only applies if under oath):
  - Incriminate yourself
  - Be silent – held in contempt
  - Lie – commit perjury
- Humanity rationales: ← less important (dismissed by immunity statutes, e.g., *Ullman*)
  - Autonomy/Freedom of Expression – control your own speaking rights.
  - Privacy/Dignity – unseemly to be forced to be vehicle of own undoing.

### Immunity: State can compel testimony so long as immunize you.

- Only required to give use and derivative use immunity. *Kastigar*.
- Optionally can give transactional immunity. *Brown*.
- If subsequently prosecute, burden on state to prove *independent source* for all information. (But will be hard for D to challenge. Marshall dissent in *Kastigar*.)
- No protection for “dignity” harms or other “undoings” that aren’t criminal. *Ullman*.
- Cannot impeach w/ immunized statements. *Portash*. But can use in subsequent perjury prosecution. *Apfelbaum*.

**Testimony: Privilege only protects testimonial, not demonstrative, evidence:**

- 5A prohibits “the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.” – *Holt*.
- Testimonial evidence (protected):
  - Communicative, by D himself. *Schmerber*.
  - E.g., words, nodding. Probably lie detector test too, b/c trying to determine guilt or innocence on basis of physiological responses *in conjunction with* answers.
- Demonstrative evidence (not protected – can compel):
  - Real, physical, not meaningfully dependent on D’s participation.
  - E.g., blood tests, fingerprinting, photographing, measurements, writing or speaking for identification, to appear in court, to stand, to assume a stance, to walk, make a particular gesture, or try on a blouse. *Schmerber, Holt*.
  - But if *threat* of pin prick elicits confession, testimonial. *Schmerber* FN 9.

**Privilege does not extend to exculpatory “no.” *Brogan*.**

- Federal law prohibits falsely denying conduct to federal investigators. See *Brogan*.
- States can criminalize it as well.
- If so, when interrogated, remaining silent or admitting guilt are the only options.
- No trilemma in the station house – silence isn’t damning (can’t use against you).
- Note: Hard to reconcile w/ *Walder* (right to deny elements of offense at trial).
- Note: Seems that you can lie to investigators *unless* statute prohibits.

## VOLUNTARINESS

### COMMON LAW VOLUNTARINESS (5A)

Rule:

- 5A protects against “compulsion” → therefore, confessions must be voluntary. *Bram*.
- Voluntariness requires: (*Bram*)
  - Confession must be free and voluntary.
  - No threats or violence
  - No direct or implied promises, however slight
  - No improper influence
  - Not the result of hope or fear on the mind. *Bram*.
- Applies to pretrial interrogation. *Bram*.
- Coercion must emanate from the state to be constitutionally cognizable. *Connelly*.

### DUE PROCESS VOLUNTARINESS (14A) – SHOCKS THE CONSCIENCE

Rule:

- State violates due process of law if action “offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.” *Brown v. Miss.*
- Prohibits:
  - Physical torture (e.g., whippings). *Brown v. Mississippi*.
  - Sleep deprivation. *Ashcraft*.
  - Sustained pressure of unrelenting interrogation (even if sleep, eat). *Watts*.
  - Psychological threats of violence. *Payne*.
- “A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice.” – *Watts*.
- Court shifts focus from whether D’s will was overborne to whether cops’ conduct is acceptable in free society. See, e.g., *Brown, Payne*.

## FIFTH AMENDMENT

### MIRANDA

- Required warnings:
  - Right to remain silent
  - Statements can be used against you in court (informing adversarial)
  - Right to a lawyer
  - Lawyer will be appointed if can't afford
  
- BL Rule: Must give the warnings – irrelevant if the person knew rights.
- But even if receive warnings, can still raise claims:
  - Voluntariness (*Bram*).
  - Due Process shocks the conscience – backstop (*Brown*, torture, truth serum)
- Police custodial interrogation is inherently compelling.
- 5A applies to stationhouse interrogation.
- No statement is admissible unless dispel compulsion (through warnings).
- Waiver:
  - [A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental . . . and not simply a preliminary ritual to existing methods of interrogation." – *Miranda*
  - Deception, trickery, seduction not allowed in pre-waiver, or to elicit waiver (though allowed in interrogation post-waiver).

### IN CUSTODY

- Rule: Under arrest/not free to leave = “in custody.” *Orozco*.