1. Was it a search? P. 2-4

Stuff I messed up in practice

* Arrest: (1) PC? (2) Warrant required?
* Warrant required: Exceptions? Exclusion?
* Search subject to regulatory scheme: (1) analyze constitutionality of the scheme, (2) was it a search, (3) warrant, (4) exceptions, (5) exclusion
* *Miranda*: Even if not warned, Δ can still invoke
	+ Either way: Custody, interrogation, honor the right
	+ Apparently BF believes you can waive without being warned?
* For 6th Am. Qs, also do 5th Am. first!
* BF believes Good Faith works for things like consent also

Spring 2013

Barry Friedman – Criminal Procedure – Attack Outline

|  |  |
| --- | --- |
|  | *Katz* – Subjective expectation + reasonable? |
|  | Third Party (*White/Miller/Smith*) |
|  | Knowing Exposure (*Ciraolo/Riley/Kyllo*) |
|  | Open Fields (*Oliver/Dunn*) |
|  | Dog-Sniff (*Place/Jardines/Caballes*) |
|  | Tracking Technology |

1. Was it a lawful seizure? P.6-7
2. Was the search incident to a warrant? Executed within its scope? Was there PC? P. 8-9

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| --- | --- |
|  | Warrant? |
|  | Executed within scope? Not unreasonable? |
|  | Probable Cause? |
|  | Informant? (Facts/Veracity/BK?) |
|  | NEXT: Exceptions!!! |

1. Was there an exception to the warrant requirement? P.10-17

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| --- | --- |
|  | **PC?** |
|  | Exigency? 🡪 Scope/Freeze/Officer created? |
|  | Automobile? Container in automobile? |
|  | Plain View? |
|  | Arrest without Warrant? Search Incident? |
|  | Consent? |
|  | NEXT: Exclusion?!? |

1. Was this a Reasonableness Search? Mainly p.18, see p. 18-27

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|  | Test of reasonableness requires balancing |
|  | Primary purpose not law enforcement |
|  | Adequate safeguards |

1. Was this a *Terry* stop? P.20-21

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|  | Stop triggered by specific and articulable facts? |
|  | Appropriate scope of the stop? |
|  | Appropriate behavior during stop? |
|  | Appropriate scope of the frisk? |

1. Does the evidence need to be excluded? 28-34

Arrest & Attendant Search

* PC for Arrest?
* Warrant needed?
* Exceptions if needed?
* Exclusions

Search w/ Regulatory Scheme

* Was there a search?
* Is the scheme constitutional/reasonable?
	+ Is *this* search ok under the scheme?
	+ Primary purpose?
	+ Does scheme lower REP (*Katz*)?
* PC for search?
* Exceptions?
* Exclusions?

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|  | Evidence in violation of 4A is excluded |
|  | Standing? |
|  | FOPT? |
|  | Used for impeachment? |
|  | Good Faith? |

1. Part of updated 4th Am. for technology? P.35-38
2. 5th Am. Due process violation? P.40-43

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|  | Was Δ compelled? *Bram* |
|  | Did Δ incriminate himself? Immunized? |
|  | Communicative or demonstrative? |

1. 5th Am. *Miranda* violation? P.44-55

|  |  |
| --- | --- |
|  | Δ in custody? |
|  | Δ interrogated? *Innis* Majority vs. Stevens |
|  | Δ knew it was police? |
|  | Invoke silence or attorney? |
|  | Waived? 🡪 Don’t forget FOPT! |
|  | Admit in violation of *Miranda*? |

1. 6th Am. right to counsel violation? P.56-58

|  |  |
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|  | 5th Am. Violation? 🡪 *Miranda*/voluntary? |
|  | Attached? |
|  | *Massiah* – Deliberate Elicitation? |
|  | Waived? (*Montejo*) |
|  | If violated, throw in impeachment (*Ventris*) |

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|  | *Katz* – Subjective expectation + reasonable? |
|  | Third Party (*White/Miller/Smith*) |
|  | Knowing Exposure (*Ciraolo/Riley/Kyllo*) |
|  | Open Fields (*Oliver/Dunn*) |
|  | Dog-Sniff (*Place/Jardines/Caballes*) |
|  | Tracking Technology |

1. **TEXT OF THE 4th AMENDMENT**
	1. 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
2. **SEARCH**
	1. **Generally**
		1. **Test (*Katz* – Harlan Concurring)**: Δ has a **legitimate expectation of privacy**?
			1. Did Δ exhibit a subjective expectation of privacy? (Subjective)
			2. Is this something that society is prepared to recognize as reasonable? (Objective)
			3. If yes to both 🡪 Search under 4th Amendment 🡪 Warrant required
		2. **Examples**
			1. Wire on outside of a phone booth 🡪 Search (*Katz*)
			2. Spike-Mic 🡪 Search (*Silver*)
			3. Stethoscope on wall 🡪 No search (*Golden*)
	2. **Third Party Doctrine**
		1. **Test (*White*)**
			1. Δ has no expectation of privacy in what he knowingly exposes to a third party
			2. Δ has assumed the risk that the accomplice will inform police 🡪 **No Search**
		2. **Counter** – Consider normative argument that once police are engaged in an active effort to ascertain information, it is a search (*C.f. White*, Harlan, J. Dissenting)
		3. **Examples**
			1. Information told to informant (*Hoffa*)
			2. Information recorded by accomplice, later given to police (*Lopez*)
			3. Information told to informant that is wearing a wire from police (*White*)
			4. Drugs purchased by undercover operative of the police (*Lewis*)
			5. Checks, deposit slips, and other financial records given to a bank (*U.S. v. Miller*)
			6. Pen register that records numbers dialed on an individual’s phone exposed to phone company (*Smith v. MD*)
	3. **Knowing Exposure to the Public**
		1. **Test** – What a person knowingly exposes to the public, even in his own home or office, is not subject of 4th Amendment protection (*Katz*)
		2. **Examples**
			1. Anyone could see the property that was searched (*Ciraolo*)
			2. Anyone could open/disturb what was collected (*Greenwood*)
				1. BUT Probing feel of a bag that is exposed to public is a search (*Bond*)
			3. Can the public be there? (*Riley*); Is the public there with regularity? (*Riley* O’Connor Concurring)
			4. **Technology**
				1. Aerial photography using $22k telephoto camera ≠ Search (*Dow Chemical*)
				2. Police use sensory-enhancing technology on the home and the device is not in general public use 🡪 **Search** (*Kyllo*)
		3. **Policy** – Consider that the police are doing something fundamentally different than the presence of the passive public
	4. **Open Fields**
		1. **Test** – Things placed in Δ’s open field that are found by police even if police violate positive law to see it (trespass) (*Oliver*, *Dunn*)
			1. 4th Amendment only covers “persons, houses, papers, and effects”
		2. **Curtilage** (*Dunn* – **Friedman** calls shenanigans on this test in practice)
			1. Proximity to the home
			2. Whether it is included within an enclosure around the home
			3. Nature of the uses to which the area is put
			4. Steps taken to protect the area from observation by passers by
		3. **Examples**
			1. Police discover MJ farm on Δ’s property 1mi from home (*Oliver*)
			2. Meth lab in barn 50y from fence surrounding residence (*Dunn*)
				1. Police crossed barbed wire fences, etc.
	5. **Dog-Sniff**
		1. Sniff by a drug dog ≠ a search because it only reveals existence of contraband (*Place* – The suspicion needed to warrant the sniff may be less than PC for that reason)
		2. Dog sniff of car exterior during *legally* stopped automobile (speeding) is not a search so long as it does not *unreasonably prolong* the stop (*Caballes*)
		3. Dog sniff at the front door of the home is a search (*Jardines* – Trespass reasoning)
		4. **Challenging the Dog** (*Harris*)
			1. Totality of the Circumstances
			2. Training/certification records > field records
			3. Δ can cross-examine officer or test validity of training
			4. Particular circumstances of *this* dog sniff
			5. Issue – What if dog is too sensitive 🡪 false positive for past drug presence?
	6. **Tracking Technology**
		1. Installing beeper in chloroform with manufacturer consent and tracking Δ for a short time after is not a search (*Knotts*) 🡪 Exposed to the public
		2. Tracking the beeper for a long time may become a search if it reveals information that couldn’t be obtained through visual surveillance (*Karo* – Not a search in this case)
		3. *United States v. Jones* (2012) – GPS tracker on automobile (effect)
			1. Majority – Search if it is a common-law trespass with an attempt to obtain information in a constitutionally protected area (persons, houses, papers, effects)
			2. Alito Concurring – *Katz* – Short term monitoring ok (*Knotts*), long term is not 🡪 difference in degree = difference in kind
			3. Sotomayor Concurring – GPS is cheap and cost is usually a check on what police do; could people reasonably expect their movements to be recorded/aggregated?
				1. Rethink expectation of information disclosed to 3rd parties
	7. **Common Law** – Trespasses by the police would constitute a search
	8. **Policy**
		1. Searches should be based on objective indicia of an individual’s desire to keep something private (*Katz*) – focus should be on positive law, CIs should always require warrants
		2. 4th Am. is about unchecked/uncontrolled executive power and coercion
	9. **Cases**
		1. **Generally**
			1. *Katz v. U.S.* (1967) – Δ charged with transmitting wagering info by phone; FBI attach electronic listening/recording device to outside of Δ’s public phone booth
				1. Holding: Search under 4th Amendment 🡪 Requires warrant

Searches without warrants are *per se* unreasonable

* + - * 1. Black Dissenting – Textual (“phone booths” are not enumerated in 4th Amendment) – A conversation can’t be “searched” or “seized” – Framers were aware of eavesdropping (constable hiding in the carriage)
		1. **Third Party**
			1. *U.S. v. White* (1971) – Police record conversations using an informant wearing a wire
				1. Holding: Not a search under 4th Amendment
				2. Reasoning: Accomplice can always go to police (*Hoffa*), recording provides a more accurate reproduction of the conversation

Court finds that this breaks *Katz* at prong 2

* + 1. **Knowingly Exposes to Public**
			1. *CA v. Greenwood* (1988) – Officer collected trash bags discarded by Δ to get warrant to search Δ’s house
				1. Reasoning: Bags given to 3rd party, could be disturbed by animals/children/snoops
				2. Dissent – Just because something *could* happen shouldn’t break prong 1
			2. *CA v. Ciraolo* (1986) – Not a search when police inspect Δ’s curtilage from plane flying over at 1k feet – Public can fly there 🡪 no expectation of privacy
				1. Note – Fence blocked inspection from the street
			3. *FL v. Riley* (1989) – Not a search when police inspect a greenhouse from a helicopter at 500ft 🡪 FAA regulations allow public to be there
				1. O’Connor Concurring 🡪 allow Δ to prove public is not there with regularity
				2. **Friedman**: Empirically wrong 🡪 how many choppers @ 400ft *really*?
			4. *Bond v. U.S.* (2000) – Probing feel of a bag on a bus by border patrol is a search
				1. Reasoning – Δ’s expectation is that someone won’t manipulate the bag to ID the contents although many people may handle the bag
			5. Technology
				1. *Kyllo v. U.S.* (2001) – Police use thermal camera to see Δ’s garage wall and roof are hot, used with electric bill to get search warrant

Search if police use a device that isn’t in general public use that provides details of what’s inside the home that would otherwise be unknown

Dissent – “Off-the-wall” vs. “through-the-wall” 🡪 police detected *emissions*

1. **SEIZURES**
	1. **Analysis**
		1. **If Δ is sitting still (e.g. on a bus – situation where Δ doesn’t want to leave)**
			1. Would a reasonable person feel free to decline the officer’s request or terminate the encounter? (*Bostick*) – People on a bus are not seized (*Bostick*)
			2. Police do not have to inform Δ he is free to leave if Δ is not seized (*Drayton*)
				1. Factors (*Mendenhall*)

Threatening presence of several officers, display of weapon by officer, physical touching of Δ’s person, use of language or tone of voice indicating compliance may be compelled

* + 1. **If Δ is sitting in a car**
			1. Δ is seized if the car is stopped for reasons unrelated to Δ (*Brendlin*)
		2. **If Δ is running away from police**
			1. Seizure by physical force requires complete loss of freedom to escape (*Hodari D.*)
			2. Policy – Incentive to not run from police, but **BF** says better to stick with *Bostick*
		3. **Once Δ has been stopped**
			1. Police do not need to inform Δ of the right to terminate the encounter (*Drayton*)
		4. **If Δ is unlawfully seized**
			1. Δ cannot consent to search (*Drayton* – Unlawful seizure vitiates consent)
			2. Δ’s statements are inadmissible even if Δ is *Mirandized* (*Brown v. IL*)
	1. **Cases**
		1. **Deadly Force**
			1. *Tennessee v. Garner* (1985)
				1. Test – Deadly force is allowed if there is probable cause to believe Δ poses a significant threat of death or serious physical injury to the officer/others
				2. Police shot (knowingly) unarmed Δ as he fled
				3. Analysis

Common law 🡪 Deadly force was acceptable

Jurisdictions – 21 states allow, 23 don’t

7.5% of police municipalities allow, 86.8% don’t

3.8% of burglaries are violent crimes

* + - * 1. Policy

State jurisdictions are “the people” – laboratories to test theories

Changed circumstances – Lethality of weapons, and definition of “felony”

Police may be considering liability, police policy/action may not align

* + 1. **Busses**
			1. *Florida v. Bostick* (1991) – It is not a seizure when police approach bus passengers as long as a reasonable person would feel free to decline to cooperate
			2. *United States v. Drayton* (2002)
				1. 3 cops on bus, consent search of Δ’s bag and person 🡪 drugs
				2. Holding – Police don’t have to inform passengers they don’t have to cooperate
				3. Factors (*Mendenhall*)

Threatening presence of several officers, display of weapon by officer, physical touching of Δ’s person, use of language or tone of voice indicating compliance may be compelled

* + 1. **Cars**
			1. *Brendlin v. California* (2007)
				1. Police stop car with good tags to check on expired registration 🡪 illegal
				2. Officer recognizes passenger as parole violator with outstanding warrant
				3. Submitting to authority

If fleeing, once overpowered

If sitting in a chair, not choosing to get up and leave

* + - * 1. Holding – All car occupants are seized during a police stop
		1. **Chase**
			1. *California v. Hodari D.* (1991)
				1. Officer chases kid, Δ sees officer, ditches crack before officer tackled him
				2. Holding – Either application of physical force, or submission constitute seizure 🡪 to be seized, Δ must yield
				3. Policy – Incentivize people stopping when told by police
1. **WARRANTS – GENERALLY**

|  |  |
| --- | --- |
|  | Warrant? |
|  | Executed within scope? Not unreasonable? |
|  | Probable Cause? |
|  | Informant? (Facts/Veracity/BK?) |
|  | NEXT: Exceptions!!! |

* 1. **Rule**
		1. Searches without warrants are *per se* unreasonable (*Katz*)
	2. **Scope**
		1. Set out the what/when/how of the search and what can be seized
		2. **MUST ASK**
			1. What was the PC for?
			2. What are you expecting to find?
			3. Where should officers be allowed to look?
			4. Can’t search for a shotgun in someone’s wallet – **ANALYZE THE PC!**
		3. *Grubbs* – Can get anticipatory warrants contingent on specific facts
	3. “**Knock and announce**” requires police to knock and announce their presence except under certain circumstances
	4. **PC Gap** – Policy concern about when police have suspicion but not PC
1. **WARRANTS – PROBABLE CAUSE**
	1. **Generally**
		1. **Rule**
			1. Facts and circumstances within the officer’s knowledge, and of which they had reasonably trustworthy information that are sufficient that a person of reasonable caution would believe that a crime has been or is being committed (*Brinegar*)
		2. **Examples**
			1. Swearing regarding affirmance of belief or suspicion is not sufficient (*Nathanson*)
	2. **Association**
		1. **Rule**
			1. PC for members of a group can create guilt by association (cars not bars)
		2. **Examples**
			1. Δ is a passenger in a car, police find drugs in the car 🡪 PC to search all passengers assuming all passengers are in a joint venture (*Pringle*, 2003)
			2. Car passengers will often be engaged in a common enterprise (*Houghton*)
			3. Search warrant for a bar does not permit searching all bar patrons (*Ybarra*, 1979)
				1. Requires individualized suspicion
	3. **Informants**
		1. **Test** (*Aguilar*/*Spinelli*) – **Address TOTC under *Gates*!**
			1. Sufficient facts to support criminality
				1. Do the facts, as stated, add up to a violation of the law?
			2. Veracity/reliability
				1. Corroboration of details can provide veracity
				2. **BUT** confirming innocuous facts does not count WRT the crime
			3. Basis for knowing
				1. Level of detail can be self-verifying – how else would they know? (*Draper*)
			4. **Consider** *AL v. White* – RS on a bad tip to stop a car (*see* p.20)
		2. **Examples**
			1. Bare statement by informant of belief/suspicion is not enough (*Aguilar*)
			2. Tracked Δ, found 2 phone #s at apartment, associated with criminals
				1. CI says Δ operating betting enterprise with 2 #s 🡪 no V/BK (*Spinelli*, 1969)
			3. Reliable informant gives tip with details about clothing, time of arrival, manner of walking 🡪 details provide BK (*Draper*, 1958)
		3. **Hypos**
			1. Reliable CI says he bought drugs from Δ and says Δ is dealing 🡪 PC
			2. Reliable CI says he saw drugs in Δ’s locker, says Δ is dealing 🡪 PC
			3. CI says Δ is dealing drugs 🡪 no PC, no BK
			4. CI says he saw Δ dealing drugs 🡪 no PC, no V
			5. Reliable CI says he saw Δ selling something from his locker 🡪 no PC, no SF
			6. Reliable CI tells officer he saw Δ traveling with gym bag, says Δ is dealing 🡪 PC, BK self-verifying
			7. CI says Δ is dealing out of locker, details about how transactions occur 🡪 PC, BK self-verifying, V can be corroborated
		4. **Totality of the Circumstances**
			1. *Illinois v. Gates* (1983)
				1. Overrules *Spinelli* for Totality of the Circumstances
				2. Anonymous CI gives detailed tip to police about Δ selling drugs

Agents corroborate facts about trip to FL and car trip back then search

* + - * 1. Holding: Sufficient PC to search, BK self-verifying and V corroborated
				2. Dissent: (1) Agents don’t fully corroborate details, (2) Details that are corroborated are consistent with innocent trip to FL
			1. *Ornelas v. U.S.* (1996)
				1. Drug interdiction stops Oldsmobile in motel lot

These cars are often used to hide drugs – series of steps allows officer to dismantle part of the car to find 2kg of cocaine

* 1. **Standard of Review**
		1. Review is highly deferential on appeal for search incident to warrant (*Gates*)
			1. Reviewing court looks for substantial basis for magistrate issuing warrant
		2. Review is *de novo* for warrantless search (*Ornelas*)
			1. Findings of fact reviewed under clear error
			2. Due weight to inferences drawn from those facts by judge/police
	2. **Pretext**
		1. Officer motivation is irrelevant so long as there is PC for a violation (*Whren*)

|  |  |
| --- | --- |
|  | **PC?** |
|  | Exigency? 🡪 Scope/Freeze/Officer created? |
|  | Automobile? Container in automobile? |
|  | Plain View? |
|  | Arrest without Warrant? Search Incident? |
|  | Consent? |
|  | NEXT: Exclusion?!? |

1. **EXCEPTIONS TO THE WARRANT REQUIREMENT**
	1. **Exigent Circumstances**
		1. **Test**
			1. Police can search **with PC** but without warrant in exigent circumstances
				1. Concerns – Hot Pursuit, Destruction of Evidence, Threat to police or public
		2. **Examples**
			1. Police in hot pursuit of suspect who robbed cab company (*Hayden*, 1967)
			2. **But** warrantless entry of home for DUI (no-jail offense) not enough (*Welsh*, 1984)
				1. **Friedman** argues sanctity of home > destruction of evidence for minor crime
		3. **Scope**
			1. Permissible scope is as broad as necessary to prevent suspect from resisting or escaping – can search a washing machine for weapons (*Hayden*)
			2. Exigency entitling search ends when exigency ends – can’t search home for 4d after officer shooting, only enough to ensure no loss of evidence (*Mincey*, 1978)
		4. **Freeze Situation**
			1. PC to believe Δ had drugs in home allowed temporary (2hr) seizure of Δ (can’t enter unaccompanied) to prevent destruction of evidence while getting warrant (*McArthur*, 2001)
		5. **Officer Created Exigency**
			1. Generally – Officers cannot create the exigency (*Vale*), but officer created exigency is ok so long as they don’t violate/threaten to violate the 4th Amendment (*King*)
			2. *Vale v. Louisiana* (1970)
				1. Officers have warrant for Δ-arrest, witness drug deal at house 🡪 move in for arrest (rather than get search warrant for home to find drugs), make arrest
				2. Police do cursory search of home, but do a detailed search when the wife/brother arrive (dissent says this is exigency)
				3. Holding – No exigent circumstances, after cursory search to verify no destruction of evidence, they should have got a warrant
			3. *Kentucky v. King* (2011)
				1. Officers watch drug deal, move in, Δ bails, chase to apartment
				2. Don’t know which of 2 doors, but officers smell MJ from 1 – knock, hear “shuffling,” breach the door under exigent circumstances (wrong door)
				3. Holding – Exigency justifies warrantless search if police conduct preceding exigency is reasonable – no violation of 4th Amendment

Knock with no PC, wave gun, enter without exigency

* + - * 1. Dissent – No exigency without knock, lock down and get warrant
			1. **Friedman** points out the interaction between *Vale* and *King* – both times they could have waited/froze the situation and got a warrant

|  |  |
| --- | --- |
|  | **PC?** |
|  | Consider exigency? |
|  | Point out interaction with *Jones* |
|  | Containers in car? 🡪 see p.12 |

* 1. **Automobiles**
		1. **Test**
			1. Police can search automobiles **with PC** but without warrant
				1. *See* p.12 – PC to search car, search car (*Ross*), PC to search container, search container (*Acevedo*)
				2. Concerns – Exigency (*Carrol*/*Coolidge*/*Chambers*), Lower expectation of privacy (*Cardwell*/*Carney*)
				3. *See also* Search incident to Arrest – Can search passenger compartment if arrestee is unsecured within reaching distance, or there is reason to believe there is evidence of the offense of arrest contained within (*Gant*)
		2. **Examples – Exigency (Old Rationale)**
			1. Police search car for whiskey w/out warrant 2mo after controlled buy – search is OK, no time for warrant and exigency from mobile car (*Carroll*, 1925)
			2. Search of car in police impound is OK since search was allowable at the site of the arrest based on PC they committed armed robbery (*Chambers*, 1970)
			3. Impound and search of car NOT OK when Δ is arrested at house, and wife is taken to relative 🡪 ample time to get warrant (*Coolidge*, 1971)
		3. **Examples – Lower Expectation of Privacy (New Rationale, No Exigency)**
			1. *Cardwell v. Lewis* (1974)
				1. Officers with PC took scrapings and tire impressions from car in public lot
				2. Police had car keys, and time to get warrant (no exigency)
				3. Holding: Warrantless search/seizure was OK
				4. Reasoning – Search of car is less intrusive than home

Cars are on public roads, subject to regulations

Things are in plain view (paint/tires)

Cars used for transportation, not storage

* + - 1. Mobile homes are subject to automobile exception (*Carney*, 1985)
			2. **NOTE** – Very unclear what effect *Jones* (p.3) on these cases – trespass
		1. **Policy**
			1. **Friedman** argues that without exigency, police should freeze the scene and get a warrant – also note that *Jones* and *Cardwell* can’t co-exist (paint scraping)
		2. **Containers in Cars**

**ASK – What is the PC for? What is the offense? Where would you expect to find evidence?**

* + - 1. **New Test –** Police can search **with PC** and without warrant subject to below
				1. **FIRST – PC**
				2. PC to search container allows search of container without warrant (*Acevedo*)
				3. PC to search car allows search of entire car and any containers therein (*Ross*)
				4. **SCOPE – Search within allowable scope**
				5. Includes passenger’s belongings that can conceal evidence (*Houghton*)
				6. Search of passenger’s physical person needs individualized suspicion (*DiRe*)
				7. Search of non-moving car may still require warrant (*Chadwick*)
				8. *See also* Search incident to Arrest – Can search passenger compartment if arrestee is unsecured within reaching distance, or there is reason to believe there is evidence of the offense of arrest contained within (*Gant*)
				9. **Friedman** argues this gives incentive for police to point to generalized PC

Consider: if police find drugs in one place 🡪 PC to search everywhere?

Dangerous logic: If police have PC, warrant is forthcoming, so why bother

Car exception should be subsumed by exigency 🡪 *Chambers* is wrong

* + - 1. **Examples – New Test**
				1. Controlled drug pick up, Δ went into house and came out with bag, police wait til he drives away, stop, arrest and search – PC for container within car doesn’t require search warrant (*Acevedo*, 1991 – *overruling* *Sanders*)
				2. Car stopped for speeding, officer sees needle in driver’s shirt pocket, searches passenger purse 🡪 No warrant necessary (*Houghton*, 1999)
			2. **Old Test**
				1. PC to search container in car requires seizure and search warrant (*Chadwick*/*Sanders*/*Robbins*)
				2. PC for the car allows search of car and any containers within (*Ross*)
			3. **Examples – Old Test**
				1. Agents follow Δ from train to car, stop before moving and search including massive footlocker they had been carrying 🡪 Need warrant (*Chadwick*, 1977)
				2. Agents wait til Δ is in moving taxi, stopped and luggage searched 🡪 Need warrant (*Sanders*, 1979 – *overruled* in *Acevedo*)
				3. Agents stop Δ for erratic driving, smell MJ, arrest and search finding 2 opaque plastic-wrapped bricks of MJ in trunk 🡪 Need warrant (*Robbins*, 1981)

Powell Concurring – Manifested subjective expectation of privacy

* + - * 1. Agents stop, arrest and search Δ’s car on PC he is dealing *from the car* 🡪 No warrant necessary if PC extends to entire car 🡪 found heroin in paper bag within (*Ross*, 1982)
	1. **Plain View**

|  |  |
| --- | --- |
|  | **PC?** |
|  | Consider exigency? |
|  | Legitimately on premises? |
|  | Immediately apparent? |

* + 1. **Test**
			1. Police can seize items in plain view, **with PC** IF
				1. They are legitimately on the premises (*Horton*) AND
				2. Criminal character of the object is immediately apparent (PC – *Hicks*)
			2. No inadvertence requirement (*Horton*)
			3. CONSIDER THE SCOPE OF THE SEARCH, ANALYZE PC!
			4. *Terry* pat down can only go far enough to identify weapons 🡪 SCOPE! (*Dickerson*, 1993) 🡪 **Can plain touch, but can’t probe**
			5. **Friedman** argues this should be a question of exigency, but LOP and IA provide protection for privacy and possessory interests respectively
		2. **Examples**
			1. Police arrive to search for V’s & weapons based on PC from bullet fired into adjacent apartment, officer examines stereo to get serial # 🡪 stolen
				1. Moving the equipment was a search not justified by plain view (*Hicks*, 1987)
			2. Search warrant specifies coins from robbery, but not weapons; officer sees and seizes weapons during search – discovery was not inadvertent
				1. Can find anything in plain view within scope of warrant (*Horton*, 1990)
		3. **Policy**
			1. Item is already present 🡪 waste of time/resources
			2. Confederates may move or destroy it
			3. Property interest vs. exigency due to destruction of evidence
	1. **Arrest without Warrant**
		1. **Test**
			1. Police can arrest Δ in public **with PC** without warrant for
				1. Misdemeanor or felony committed in police presence (*Watson*)

Even for minor crime (*Atwater*)

* + - * 1. Felony committed not in police presence (*Watson*)
				2. Breach of the peace (*Watson*)
			1. Police can enter the home of
				1. Δ w/ warrant and PC that Δ is present (*Payton*, 1980)

Warrantless felony arrest is not allowed in Δ’s home (*Payton/Watson*)

* + - * 1. Another with arrest & search warrant (or exigency) (*Steagald*)
			1. Arrest cannot be conducted in an unreasonable manner (*Atwater*)
			2. Warrantless arrest against statute is ok under 4th Amendment (*Moore*)
				1. NOTE: Does not create poisonous tree!
			3. Δ must have judicial determination within 48hrs of warrantless arrest and without unreasonable delay, or be released (*City of Riverside v. McLaughlin*)
				1. Does not *necessarily* result in exclusion of evidence!
		1. **Policy**
			1. Concerns
				1. Loss of liberty, ruining Δ’s life (loss of job, suspicion, etc.)
				2. Risk of flight, Public safety
		2. **Cases**
			1. Δ arrested w/out warrant on tipster’s signal he has stolen credit cards, consent search of car finds cards 🡪 valid arrest (*Watson*, 1976)
			2. Entry of Δ2’s home to find Δ1 required search warrant to find evidence against Δ2 and can result in civil liability without exigency (*Steagald*, 1981)
			3. *Atwater v. Lago Vista* (2001)
				1. Δ arrested w/out warrant for no seatbelt only punishable by fine ok
				2. O’Connor dissent – Unbound discretion has grave potential for abuse

Burden on officer to articulate facts related to flight risk and safety

* + - 1. Search incident to warrantless arrest violating state statute yielding drugs is ok (*Moore*, 2008)
	1. **Search Incident to Arrest**
1. Δ restrained 🡪 no search
2. Δ unrestrained 🡪 search passenger compartment
3. RS 🡪 search passenger compartment
	* 1. **Test**
			1. **Is this a lawful arrest based on PC?**
				1. Δ must first be arrested before police can conduct the search (*Knowles*)
			2. **Search of Person & Place**

Reasonable suspicion rather than PC is what separates this search from a traditional auto search. Only can search passenger compartment (including glove box) without PC for trunk subject to *Bertine* regulatory search

* + - * 1. Police may search anything on Δ’s person or effects (*Robinson*) and anything in the grab area where Δ might get a weapon or destroy evidence (*Chimel*)
				2. Police may do a protective sweep for confederates with reasonable suspicion confederates could hide where they search (closets, etc.) (*Buie*, 1990)
			1. **Search of Car**
				1. Police may search the passenger compartment if Δ is unsecured within reach of the car (*Gant*, *overruling Belton*/*Thornton* restoring *Chimel*)
				2. Police can search the car with **reasonable suspicion** there is evidence of the offense Δ is arrested for inside (*Gant*, *Acevedo* [Scalia Concurring])
			2. **Inventory Search** – *Bertine* – “Inventory” search of vehicle after arrest for DUI
		1. **Policy**

May/may not need clear guidelines for inventory search

* + - 1. Generally – Officer safety and destruction of evidence
			2. Bright line rules
				1. Is the rule bright? (Precision)
				2. Do results approximate the result from case-by-case adjudication? (Accuracy)

Is there a need to give up case-by-case adjudication?

* + - * 1. Does the rule err correctly given tradeoff between rights and risk of injury?

What is the danger of pretext? E.g. *Payton*/*Steagald* modify *Watson* searches of places; *Gant* modifies *Belton*/*Thornton* pretext searches of cars

* + 1. **Examples – Search of Person & Place**
			1. Arrest warrant for Δ for jewelry robbery does not allow invasive search of home incident to arrest – only grab area (*Chimel*, 1969)
			2. Δ arrested for driving with expired license, search of person yields cigarette pack with heroin inside – reasonable under 4th Amendment (*Robinson*, 1973)
				1. Officer testified he had no fear of a weapon or attack
				2. Marshall Dissent – No officer safety concern in opening the pack 🡪 search
		2. **Examples – Search of Automobile**
			1. *Belton* (1981) – Police can search passenger compartment including containers incident to arrest
			2. *Thornton* (2004) – Police can search passenger compartment including containers incident to arrest even if Δ has already exited the vehicle
			3. *Arizona v. Gant* (2009)
				1. Δ arrested for driving with suspended license
				2. Holding: *Belton* search not allowed after Δ is secured, search can be justified when it is reasonable to believe that evidence of the offense of arrest may be found within 🡪 no pretextual traffic stop
				3. Scalia Concurring – Would allow search for reasonable suspicion of crime of arrest or PC of another unrelated crime
				4. Alito Dissent – Factors to overrule *stare decisis*: Whether precedent engendered reliance, changed circumstances, precedent is unworkable, precedent is undermined by later decisions, poor reasoning in precedent
	1. **Consent**

|  |  |
| --- | --- |
|  | Consent voluntary? 🡪 Factors |
|  | Search within the scope? |
|  | Consent by third party? |

* + 1. **Test**
			1. Consent must be **voluntarily given** under TOTC (*Bustamonte*)
				1. Factors (TOTC)

Was the situation coercive?

How many officers?

Did it sound like a question?

Was there a threat of getting a warrant?

* + - * 1. Δ does not need to be informed of right to refuse (*Bustamonte*) or instructed that Δ is “free to go” after lawful seizure concludes (*Robinette*) 🡪 TOTC
			1. **Scope of consen**t
				1. Objective reasonableness – What would a typical person understand consent to cover? (*Jimeno*)
				2. Reasonable scope doesn’t include prying open locked briefcase (*Wells*, 1989)
			2. **Third Party Consent**
				1. T must have common authority over the searched area (*Cupp*/*Matlock*)

**Friedman** asks whether a roommate could consent to the search of another roommate’s room

* + - * 1. Police must reasonably believe T had common authority (*Rodriguez*)
				2. A physically present co-occupant can refuse to permit entry (*Randolph*)

Note: Can’t remove Δ in order to circumvent this rule (*Randolph*)

**Friedman** argues that the absent roommate will almost certainly refuse, so why should it matter that he’s present?

* + - * 1. **Friedman** argues consent should be limited to those that own or live in the space, police must ask for specific authority to search a given room – consider if there is exigency, or enough PC to stop and get warrant
		1. **Examples – Consent Generally**
			1. Consent of driver to search car yields stolen checks of passenger 🡪 valid consent even if not informed of the right to refuse (*Schneckloth v. Bustamonte*, 1973)
			2. Δ pulled over and verbally warned for speeding, then consent search yields drugs 🡪 valid consent even if stop is prolonged and Δ not informed he’s free to go (*Robinette*, 1996)
		2. **Examples – Scope**
			1. Consent of driver after running red light yields cocaine in paper bag on floor 🡪 scope is wherever objectively reasonable (*Jimeno*, 1991)
		3. **Examples – Third Party Consent**
			1. Cousin of murder suspect can consent to search of common bag (*Cupp*, 1969)
			2. Consent of third party with common authority is valid over absent, non-consenting Δ handcuffed in police car (*Matlock*, 1974)
			3. Consent of third party to search “our” apartment valid if officers have reasonable belief of common authority (*Rodriguez*, 1990)
			4. *Georgia v. Randolph* (2006)
				1. Plurality – Consent search of shared dwelling over express refusal of physically present resident is not justifiable

Can be no evidence Δ was removed to avoid objection

* + - * 1. Breyer Concurring – TOTC, or plurality if bright line, Dissent – AofR
		1. **Policy**
			1. Helps bridge PC gap
			2. Ability to consent in lieu of waiting for warrant
			3. Consent to search for a crime unrelated to the person giving consent
			4. Consent of third party
				1. Assumption of risk – But consider maid can’t let police into hotel room
				2. Common authority/control – *but see Randolph*
				3. Lesser expectation of privacy
				4. Consider – When T actively solicits police, interests of parties are divergent
1. **REASONABLENESS MODEL**

|  |  |
| --- | --- |
|  | Test of reasonableness requires balancing |
|  | Primary purpose not law enforcement |
|  | Adequate safeguards |

* 1. **Friedman** – Warrant model, Reasonableness model, Rules to protect police (*Terry*)
	2. **Investigative vs. Regulatory Searches – “Court View”**
		1. **Primary Purpose**?
			1. General law enforcement against individuals invokes *Katz*
			2. Officer safety invokes *Terry* reasonableness (*See* p. 20)
			3. Primary purpose is not law enforcement for generalized stops (*Edmond*)
		2. **Individualized Special Need**: School (*T.L.O.*), Convict status (*Samson*/*Knights*), Government employee (*Ortega*/*O’Connor*)
			1. Balance
				1. Government interest – Level of intrusion – Efficaciousness
			2. Adequate Safeguards 🡪 Articulable facts
				1. Unjustified? – Arbitrary? – Discriminatory?
		3. **Regulatory Special Need**: DUI checkpoint (*Sitz*), Border checkpoint (*Martinez-Fuerte*), investigating crime – “information seeking” (*Lidster*), drug-testing athletes (*Veronia*) or after-school activities (*Earls*), prison safety (*Florence*)
			1. *Brown v. Texas* Balancing
				1. Government interest – Level of intrusion – Efficaciousness
			2. Should be **narrowly tailored** to a **compelling government interest** (SS)
			3. Adequate Safeguards 🡪 Typically Political Check
				1. Generality, “misery loves company” (*Prouse*/*Sitz*), “warrant equivalent” (*Camara*/*Burger*), randomness (*Sitz*), regulated industry (*Burger*), inventory search (*Bertine*)
		4. ***Terry* Stop and Frisk**
			1. Stop/search is justified at its inception based on articulable facts
				1. Tip – Tips ok w/ sufficient detail (*White*), predictive future conduct? (*J.L.*)
				2. “Courier Profile” – *Arvisu*/*Weaver*/*Pratt/Royer*
				3. Unprovoked flight in high crime area (*Wardlow*)
			2. Search is related in scope to what justified the stop
				1. Can’t take to police station (*Dunaway*) or separate room (*Royer*)
				2. 90min too long (*Place*), 20min ok (*Sharpe*) *but see Montoya*
				3. Search of person (*Terry*) or car (*Long*) where weapons can be found
		5. **Slide the other way?**
			1. Officers must act reasonably and use appropriate procedures (*Schmerber*)
			2. Plain “touch” is ok, but can’t probe pockets to determine contents (*Dickerson*), can’t require surgery on RS – invasive/unreasonable (*Winston*), no deadly force without PC that Δ is a threat to officer or public (*Garner*)
			3. *See also* p. 21
		6. **Problems with the Reasonableness Model**
			1. Always potentially law enforcement at the end of the day (*T.L.O.*)
			2. Circular hit rate problem
			3. Historical – Requirements get lower as search is more general (framer’s concern)
			4. Clarity – Impossible to tell whether *Katz* or reasonableness applies
			5. Unclear what facts are important
			6. Judges rather than juries are balancing
				1. Amar – Jury should decide, there should be remedies when police misbehave
			7. Too flexible, difficult to predict *ex ante*, hindsight/observe bias
			8. Constitutional – 4th Am. is an individual right which should invoke strict scrutiny under DPC challenge 🡪 regulatory searches should require compelling governmental interest and narrow tailoring
			9. Argument that *Terry* is *sui generis* – Modern stop & frisk could not possibly be based on officer safety 🡪 They rarely ever find guns 🡪 justified on false assumption that where you find drugs, you will find guns
			10. Argument that RS to justify the stop has ratcheted down to nothing (*AL v. White*; *Wardlow* – unprovoked flight)
			11. Remember that officer’s subjective motivation is irrelevant for 4th Am. when search is objectively reasonable (*Whren*)
				1. But perhaps exclude evidence outside the scope of the original stop
	3. **Investigative vs. Regulatory Searches – “Friedman View”**
		1. **Investigative Search**
			1. Factors
				1. Investigation of a specific crime
				2. Search for an individual suspect
				3. Cause-based – Ordinary law enforcement
			2. Test – Classic 4th Amendment – PC + Warrant or Exception
				1. Possible exception for school, workplace, and convicts
			3. Result on finding of investigative search
				1. Require cause (PC), warrant, and limited scope (particularity)
			4. High hit rate indicates effective scheme
		2. **Regulatory Search**
			1. Factors
				1. Generalized suspicion – Effects lots of people invoking political safeguards

Should be **narrowly tailored** to a **compelling government interest** (SS)

* + - * 1. Programmatic

If there is no generality, government must justify the search

Government interest in the program, and why *this* group is the focus

Evidence that (a) there is a problem, and (b) it is unique to this group

* + - * 1. Deterrent based
			1. Low hit rates can be a sign of effective scheme
	1. ***Terry* Stop and Frisk**

|  |  |
| --- | --- |
|  | Stop triggered by specific and articulable facts? |
|  | Appropriate scope of the stop? |
|  | Appropriate behavior during stop? |
|  | Appropriate scope of the frisk? |

* + 1. **Test (*Terry*)**
			1. Officer must point to specific and articulable facts which, taken with inferences from those facts, reasonably warrant a carefully limited search of the outer clothing to discover concealed weapons
				1. Must be justified at its inception
				2. Scope of the search must be related to its justification
			2. Balance government interest (safety of the officer) against intrusion on Δ
			3. Harlan Concurring – Officer should have constitutional grounds to stop beyond the liberty of anyone to approach and ask questions
			4. White Concurring – Δ has no obligation to respond to questions
		2. **Triggering the Stop – Articulable Facts Warranting Reasonable Suspicion**
			1. Officer witnesses Δ’s “casing” a store for daylight robbery (*Terry*, 1968)
			2. **Friedman** – Courts assume officers can always walk up and talk to people, but this can’t be right 🡪 need some kind of suspicion
			3. Tips
				1. Tip about Δ’s car, time of departure, destination, and indication she is carrying cocaine – reasonable suspicion to stop, consent search (*AL v. White*, 1990)

**Friedman** argues this is barely enough for RS – consider how this vitiates the informant case law

* + - * 1. Tip about “black man in plaid shirt at bus stop carrying gun” is unreasonable – no prediction of future conduct (*White*) for reasonable suspicion (*J.L.*, 2000)
			1. Courier Profile
				1. Border patrol stops minivan with 2 adults and 3 kids, consent search yields 100lb of MJ (*Arvisu*, 2002)

|  |  |
| --- | --- |
|  | Tip? |
|  | Courier profile? |
|  | Unprovoked Flight? |

Factors: Minivan type used by smugglers, On a road used by smugglers and vacationers, Trip at a time when agents were on shift change, Van slowed when it saw police, Driver had stiff posture, Kids waved abnormally, Kids knees were propped up on something, Van was registered somewhere that drugs originate from

**Friedman** argues this would only work at the border: looking for terrorists

* + - * 1. *Weaver*

Officers looking for “roughly dressed black men” carrying drugs in airport

Δ exits plane rapidly, officers chase to ask questions

No ticket/ID, but provided name/address

Officer asks to detain bag to get search warrant, Δ refuses

When entering taxi, officer grabs bag, Δ swats hand away

Officer arrests Δ for assault 🡪 search incident to lawful arrest

Holding: Valid Search

* + - * 1. *Pratt* dissent – Critical of the “drug courier profile”
			1. Unprovoked flight in high-crime area sufficient for stop (*Wardlow*, 2000)
				1. 4 car officer caravan, Δ sees them and runs, they chase then feel gun in his bag during pat down
		1. **Scope of the Stop**

*KY v. King* – Police can knock on doors

* + - 1. “Arrest-Like Stop”
				1. Taking Δ to police station, not informed he’s under arrest, but not free to go is indistinguishable from arrest 🡪 requires PC (*Dunaway*, 1979)
				2. Δ fit “drug courier profile” (1-way tix, different name, Δ is nervous) – officers remove him to room to get consent to search luggage 🡪 suppressed because when he produced the key it was outside of *Terry* (*Royer*, 1983)
			2. Length of Stop
				1. Holding Δ for 90min is too long (*Place*, 1983) – BUT brief detention to get a drug dog is ok
				2. Agent stops car for drug interdiction, “smells MJ” and conducts search – 20min between stop and search is reasonable (*Sharpe*, 1985)

Consider whether police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly

Frisks are for weapons (*Terry*)

Can “frisk” a car on RS there are weapons (*Williams*)

Can only “frisk” passenger compartment where weapons can be found (*Long*)

* + 1. **Scope of Frisk**
			1. Frisk can be a protective search of outer clothing for weapons (*Terry*)
			2. Police can “frisk” a car based on RS there are weapons (*Williams*, 1972)
			3. Search of passenger compartment, limited to areas where a weapon can be found, based on reasonable suspicion that Δ is dangerous and may gain control of a weapon (*Long*, 1983)
			4. Frisk is only for weapons, can’t manipulate something to determine if it is contraband 🡪 must be immediately apparent (*MN v. Dickerson*, 1993)
			5. Officers cannot require Δ to undergo surgery to recover a bullet needed as evidence to convict Δ after robbery (*Winston*, 1985)
		2. **Permissible Behavior by the Officer – Reasonably Executed**
			1. Officer can order driver out of vehicle without suspicion (*Mimms*, 1977)
				1. Subsequent frisk because of “bulge” in clothing finding gun reasonable
			2. Officer can order passengers out of vehicle after stop (*Wilson*, 1997)
				1. Subsequent frisk is separate inquiry based on articulable suspicion

*AZ v. Johnson* (2009) – Search of car passenger, stopped for insurance related violation by gang task force

Noticed passenger watching as officers approached, dressed in Crips colors, pat down reveals gun

* + - 1. Officers may require Δ’s to remain nude for long enough to ensure officer safety – even if executing the warrant when actual Δ moved away (*Rettele*)
	1. **Roadblocks**
		1. **Test**
			1. *Brown v. Texas* (1979)
				1. Nature of the intrusion
				2. Government interest
				3. Effectiveness
			2. Unreasonable if primary purpose is ordinary law enforcement (*Edmond*)
		2. **Examples**
			1. Single “routine” stop by officer to check ID, drugs in plain sight (*Prouse*, 1979)
				1. Standardless, unconstrained discretion is unreasonable
				2. Roadblock to check IDs would pass under *Brown*
			2. Border immigration stops are reasonable (100mi) (*Martinez-Fuerte*, 1976)
				1. Detention for over 16hrs reasonable after refusal to submit to x-ray on reasonable suspicion of drug trafficking acceptable and court ordered rectal exam after attempting to avoid bowel movement (*Montoya de Hernandez*)
			3. DUI roadblocks are reasonable (*Sitz*, 1990)
			4. Can include disassembling/reassembling the gas tank of a car (*Flores-Montano*)
			5. Roadblock to ask for info about hit and run is permissible because primary purpose is to help find perpetrator of a known crime, not general crime control (*Lidster*, 2004 – “Information seeking”)
			6. *Indianapolis v. Edmond* (2000)
				1. City roadblock to detect drugs with drug dogs
				2. Holding – Roadblock is unreasonable if primary purpose is to detect ordinary criminal wrongdoing
			7. NOTE: *Lidster* is a drunk driver busted at the roadblock, *Edmond* is a § 1983 case brought by people who did nothing wrong.
	2. **Kids**
		1. **Test**
			1. Individualized Suspicion (*T.L.O.*)
				1. Search must be justified at its inception
				2. Search must be limited in scope to its purpose (what gave rise to it)
			2. Generalized Suspicion (*Brown v. Texas*)
				1. Nature of the intrusion
				2. Government interest
				3. Effectiveness
		2. **Examples – Individual Suspicion**
			1. *New Jersey v. T.L.O.* (1985)
				1. Vice principal searches Δ-purse on reasonable suspicion of smoking rule violation 🡪 finds rolling papers 🡪 searches and finds MJ
				2. No *loco parentis* or diminished expectation of privacy arguments
				3. Search is reasonable because justified at inception and scope was calculated to yield evidence of the suspected offense (smoking)
				4. Balancing

Maintaining order in the schools

Warrant requirement is onerous for school environment

* + - * 1. *But see Edwards* – Δ was turned over to police 🡪 law enforcement purpose
			1. Unreasonable strip search of 13y/o girl to find contraband pain killers (*Redding*)
		1. **Examples – Generalized Suspicion**
			1. *Veronia Sch. Dist. v. Acton* (1995)
				1. Suspicionless drug testing for all afterschool sports
				2. Balancing – Reasonable

Public school interest in curbing drug abuse

Student privacy interests

Collection was unintrusive

Tests only for drugs, not turned over to law enforcement

* + - 1. Constitutional drug testing for all extracurricular activities (*Earls*, 2002)
	1. **Convicts**
		1. Probation officers can search probationer’s home on reasonable suspicion – Based on special need (*Griffin*, 1987)
		2. Probation officer/cop can search probationer on reasonable suspicion – Based on consent (*Knights*,2001)
		3. *Samson* (2006)
			1. Parolee searched by police officer on zero suspicion results in methamphetamine
			2. Holding – Valid suspicionless search
			3. Balancing – TOTC
				1. Parolees have very low expectation of privacy
				2. Government wants to ensure Δ isn’t committing crimes still
			4. **Friedman** is uncomfortable with this unbridled discretion for officers, only possible justification would be special rule restricting to parolees
	2. **Employees**
		1. **Test**
			1. Government can search if it is justified at inception and limited in scope
			2. Government can also conduct random searches (*Von Raab*)
		2. Upheld statute for drug tests after train accidents
		3. Overturned drug testing for candidates for GA state offices
		4. *O’Connor v. Ortega* (1987) – Upheld search of doctor at government hospital
	3. **Administrative Searches and Alternative Safeguards**
		1. **Test**
			1. Requires regulatory warrant equivalent (administrative standards) (*Camara*)
				1. Limit officer discretion – Time, place, scope (*Burger*)
				2. Notice that search is possible (*Burger*)
			2. Balance (*Burger*)
				1. Substantial government interest that informs regulatory scheme
				2. Inspection is necessary to further regulatory scheme
			3. Factors (*Camara*)
				1. History of this type of inspection

Closely regulated industry (*Burger*)

* + - * 1. Public interest in curbing dangerous condition
				2. Reasonable alternatives
				3. Level of intrusion (not looking for personal effects)
		1. **Examples**
			1. *Camara* (1967)
				1. Government entering private homes for safety inspection
				2. Holding: Inspection is unreasonable 🡪 requires regulatory warrant equivalent

Time between inspections, age of building, etc. – objective criteria

* + - 1. *Burger* (1987)
				1. Regulatory inspection of a junk yard by auto-crimes division

Δ operating without license or police book, search finds stolen cars

* + - * 1. Holding: Inspection and search were reasonable

Junk yards are closely regulated

State interest in limiting stolen cars

Junk yards are the outlet for stolen cars 🡪 inspection helps

Warrant substitute

Operator is on notice inspection is possible

Scope is defined in statute

Only occurs during regular hours, only vehicle-dismantling and related industries, inspectors can examine records and any vehicles or parts which are subject to the record keeping that are on premises

* + - * 1. Dissent – No limit on searches, no guidance about how places are chosen, authorizes search solely to look for criminal activity

Once license and police book were not there, they should have got a warrant

* + - * 1. NOTE: Possibly abrogated by *Edmond*
				2. **Friedman** argues this is crime-fighting (tip) clothed as administrative since Burger wasn’t part of the scheme
			1. *Florence* (2012) – Jail strip searches are reasonable without reasonable suspicion so long as arrestee is being admitted into the general jail population
			2. *Villamonte-Marquez* – Valid warrantless boarding of vessel by customs is not invalid because officers had state policemen following informant tip that vessel was carrying drugs
	1. **Pretext**
		1. *Whren* (1996)
			1. Police notice Δ stopped too long at stop sign, U-turn causes Δ to drive away
			2. Stop Δ for civil traffic violation, arrest for drugs in plain view
				1. Δ argues stop was pretext for search/arrest
			3. Holding – Stop was reasonable 🡪 PC of crime + exigency
				1. 4th Amendment is only concerned with reasonableness of the stop
				2. Officer’s subjective motivation is irrelevant
				3. Concerns about pretext are for EPC under 5th/14th Amendment
		2. Solutions
			1. Treat all the same 🡪 inefficient use of resources
			2. Record-keeping 🡪 easy to game
			3. Action before the trigger – Change traffic/drug laws to prevent pretextual use
			4. Motivations 🡪 Subjective determinations are difficult in individual cases
			5. Action after the trigger 🡪 Officer must articulate specific facts leading to search
			6. Exclusionary rule
			7. Require consent
		3. Concerns
			1. Race disparity/discrimination
			2. Undue intrusion
			3. Low effectiveness/efficacy
	2. **Profiling**
		1. Whitman – Race can be *a* but not *the* factor
		2. DOJ
			1. Ordinary crime – Only in specific investigations for specific suspect
				1. Cannot be used in routine law enforcement decisions
			2. National security – To the extent permitted by the Constitution
				1. Limited only by EPC
		3. EPC Analysis – Use of race in profile triggers strict scrutiny
			1. Requires
				1. Facial classification (i.e. we stop all people of a race)
				2. Specific discriminatory intent (i.e. I stop *this* person *because* of his race)
			2. Normally rational basis
				1. Legitimate purpose
				2. Rationally related to that purpose
			3. Race based pretext invokes strict scrutiny
				1. Compelling state interest
				2. Solution is narrowly tailored to the solution you’re seeking
		4. Harcourt – Profiling Muslims post-9/11 doesn’t work because of substitution effects (profile is a moving, adaptive target) (*see* O’Connor in *Arvisu* – arguing that profiling post-9/11 may be ok)
		5. Kennedy – Creates a “race tax”
		6. **Freidman** – Profiling causes two problems – analysis should be strict scrutiny
			1. Causes hit rates to go up within the profiled group so becomes self-fulfilling
				1. Can’t be examined *ex post*, requires *ex ante* random selection to confirm statistical bias exists between races otherwise there is observer bias
			2. Narrow tailoring requires knowing how many people of a race commit a crime
				1. Given a higher hit rate in one pool than another, the probability of anyone being a terrorist is so low that targeting one group will still fail strict scrutiny
				2. Can’t just round up thousands of people based on a single attribute
			3. Profiling invokes strict scrutiny under EPC – Compelling interest (crime control/deterrence), narrowly tailored (stats showing proclivity, something else)
1. **THEORIES AND HISTORY OF THE 4TH AMENDMENT**
	1. Test is about reasonableness and concerns for general warrants
		1. Scalia (warrants immunized officers for trespasses), Amar, Taylor
		2. People must be secure against unreasonable searches, and no warrants shall issue without probable cause
	2. **Friedman** – Historically the trend at the time of the framing was towards more specific warrants, reasonableness searches dangerously approach general warrants
	3. Amsterdam
		1. The problem with the reasonableness model is deference – appeals court to trial court and trial court to police 🡪 too much = no safeguards
		2. Without articulable rules, police are unconstrained
		3. To make the 4th Amendment internally coherent
			1. Warrantless searches that exhibit the same characteristics as general warrants and writs must be deemed unreasonable if there is no principled basis for distinguishing them from general warrants and writs

|  |  |
| --- | --- |
|  | Evidence in violation of 4A is excluded |
|  | Standing? |
|  | FOPT? |
|  | Used for impeachment? |
|  | Knock and Announce |
|  | Good Faith? |

1. **ENFORCING THE 4TH AMENDMENT – EXCLUSIONARY RULE**
	1. **Analysis**
		1. **Rule** – Evidence resulting from an unlawful search is excluded at trial
			1. Personal rights, judicial integrity, police deterrence (*Mapp*)
		2. **Standing** – Were **Δ’s** 4th Am. rights violated because **Δ had a reasonable expectation of privacy** in what was searched? (*Rakas*) (Personal Rights Policy)
			1. Automobile passengers have no standing to challenge seizure of evidence from vehicle if they own neither vehicle or the evidence (*Rakas*)

*Carter* Majority – Focus on fleeting nature of interaction and ability to exclude others

*Carter* Kennedy – More natural interpretation of REP

*Rakas* for cars

NOTE *Ybarra/Pringle* – Δ would always have REP of his person 🡪 standing

* + - 1. Δ can’t challenge search of acquaintance’s purse finding Δ’s drugs when Δ had not sought nor had been given access to the purse in the past (*Rawlings*)
			2. Temporary guest for “purely commercial transaction” – no REP (*Carter*)
			3. Regular business associate probably has REP
			4. Overnight house guest has REP (*Olson*)
			5. Regular social guest probably has REP (*Carter* dissent + Breyer + Kennedy)
			6. Fleeting social guest probably has REP (*Carter* dissent + Breyer + Kennedy)
			7. Renter/hotel guest has REP
			8. Innocent bystander has standing to object to search of his person, but not the home (*Rakas*/*Ybarra*)
			9. **Friedman** argues this is *personal* rights, if integrity – would require exclusion on any violation, if deterrence – standing should be for anyone violated
		1. **Fruit of the Poisonous Tree**
			1. But-for the illegal search, would the evidence have been found? 🡪 Exclude
				1. Unless the evidence was found through an **independent source** (*Murray*)

Magistrate decision cannot be based on illegally obtained info

DC must determine police would have applied for warrant without the illegal entry

* + - * 1. Unless the evidence would have been **inevitably discovered** (*Nicks*)
			1. Proximate Cause – Was the later evidence found in a way (time/location/etc.) sufficiently **attenuated** from the original police misconduct? 🡪 (*Wong Sun*)
				1. **Live witness testimony** is attenuated if evidence from illegal search was not used to coerce, and illegal search was not conducted *for the express purpose* of finding witnesses (*Ceccolini*, 1978) – Based on free will
		1. **Impeachment**
			1. Π cannot use illegally obtained evidence for case-in-chief
			2. Δ has no right to perjury (*Havens*)
			3. **Π can use illegally obtained evidence to impeach Δ’s credibility**
				1. If Δ lies on direct, Π can bring in evidence on cross (*Walder*)

In general, Δ has a right to make a direct denial of charges against him

* + - * 1. Π can bring in prior inconsistent (illegally obtained) statement (*Harris*)
				2. Π can bring in evidence for any question on cross that is reasonably within the scope of direct (however attenuated) (*Havens*)

i.e. After direct denial (*Walder*), Π can ask about issues related to the offense and bring in excluded evidence to rebut perjured testimony

* + - 1. Statements made by Δ in violation of *Miranda* can’t be used to impeach statements made by anyone other than Δ (*IL v. James*, 1990)
			2. *Havens* creates a large deterrence problem – keeps Δs off the stand
		1. **Good Faith**
			1. Evidence isn’t excluded if police do an illegal search relying in good faith on
				1. A facially valid, but later invalidated, warrant (*Leon*)

Not good faith reliance if

Magistrate was mislead

Magistrate was not neutral/detached – Wholly abandoned judicial role

Warrant wholly lacks PC such that it is objectively baseless

Or warrant is general – lacks specificity/particularity

* + - * 1. A later invalidated statute (*Krull*)

Unless statute is *clearly* unconstitutional – One good bite argument

* + - * 1. Binding judicial precedent that is later overruled (*Davis*)
				2. Computer error due to judicial clerk error (*Evans*)
				3. Computer error due to police clerk’s negligent error (*Herring*)

Error must be nonrecurring and attenuated negligence

Requires at least gross or systematic negligence in database maintenance

Or if police are recklessly maintaining database or knowingly putting false information in to make later pretextual arrests

* + 1. **Knock and Announce**
			1. Police must knock and announce their presence unless PC to believe harm to the police, evidence being destroyed, or futile – reduce injuries and property damage
			2. Violation of knock and announce does not result in exclusion (*Hudson*)
			3. Police can always get a no-knock warrant
			4. Appropriate remedy is money damages
		2. **Policy**
			1. **Friedman** argues *Murray* is wrong on judicial integrity, deterrence (encourages police to search first then seek warrant), and personal rights
			2. **Friedman** argues live witness is wrong since it is akin to inevitable discovery but with essentially no burden of proof
			3. **Friedman** argues inevitable discovery is ok, so long as it is *actually* inevitable, otherwise police simply will always claim it was inevitable
			4. **Friedman** argues impeachment WRT prior inconsistent statements (5th Am. violations) is troubling because it is entirely ambiguous which statement Δ is actually not telling the truth – moreover violation of *Miranda* assumes custodial interrogation is *inherently compelling*
	1. **Generally**
		1. *Mapp v. OH* (1961)
			1. Δ denied police entry to her home without warrant on instruction by lawyer
			2. Police forced in, flashed fake warrant, arrested Δ in ensuing altercation
			3. Search of home yields obscene literature
			4. *Weeks* (1914) – Exclusionary rule against federal government
			5. *Wolf* – 4th Amendment enforceable against states, but no exclusionary rule
			6. Holding: Exclusionary rule applies against states
		2. **Policy**
			1. Having 4th Am. rights with no remedy is meaningless – but only helps guilty
			2. Deterring police misconduct – but police are attenuated from crim. Proceeding
			3. Judicial Integrity – tainted evidence vs. reluctance to let guilty walk
	2. **Standing** – Personal rights
		1. **Rule** – Δ has standing to challenge evidence only if the Δ’s rights were violated – Δ must have a reasonable expectation of privacy in what was searched
		2. *Minnesota v. Carter* (1998)
			1. Officer gets tip, stands on lawn and views Δ bagging cocaine through front window – gets warrant – arrest and search Δ when they leave in car
			2. Δ’s challenge “search” when officer looked through window
				1. Insufficient PC (no veracity/BK on tip)
			3. Breyer concurring argues this is not a search (*Ciraollo*) – but people commonly look through windows?
			4. Excluded? NO standing – Δs didn’t own/rent the apartment, only temporary guests for “purely commercial transaction” 🡪 no expectation of privacy
		3. *Rakas v. IL* (1978) – Passengers in car have no standing to challenge search of car and admission of gun that weren’t theirs – car didn’t belong, no expectation
		4. *Rawlings v. KY* (1980) – Δ put his drugs in woman’s purse, police searched – no standing, owned drugs, but no expectation in purse
		5. *MN v. Olson* (1990) – Overnight guests have a reasonable expectation of privacy
		6. *Payner* (1980) – Δ charged with falsifying tax return challenged documents that officer photographed – at instruction of prosecutor, officers lured bank official away, broke into his hotel room and photographed documents 🡪 no standing
	3. **Fruit of the Poisonous Tree**
		1. **Hypos**
			1. Police, without PC/warrant, break into Δ’s home and find evidence 🡪 exclude
			2. Police, break in and find a map to place with evidence 🡪 Exclude
			3. Police break in and find map, no evidence – wait around and stumble on evidence in the area 🡪 Admissible – path was interrupted 🡪 Attenuation
			4. Police break in and find planner implicating A, find A who gives police information to find evidence against Δ 🡪 Admissible (*Cecollini*)
			5. Police break in, find map to evidence, return to station, A calls and tells where evidence is 🡪 Admissible – Independent source (*Murray*)
			6. Police break in, find map to evidence, bust Δ – after publicity of bust, A calls and says he knew where the evidence was 🡪 *maybe* not admissible
				1. Without publicity, A would have never surfaced
			7. Police break in, find map to evidence – meanwhile are conducting a search for evidence in the same area 🡪 Admissible – inevitable discovery (*Nicks*)
		2. **Concepts**
			1. Attenuation: Link between illegal search and evidence is strung out
			2. Independent Source: Evidence obtained through an independent, legal means
			3. Live Witness: Person comes forward on their own free will
			4. Inevitable Discovery: e.g. Massive search/manhunt in the same area
		3. **Cases**
			1. *Murray* (1988) – Police following Δ based on CI, follow to warehouse, follow 2 cars from warehouse, pull over, arrest, search 🡪 MJ
				1. Police illegally enter the warehouse and find burlap wrapped bales, leave and get a warrant 🡪 search finds MJ in bales
				2. Holding: Evidence admissible if (1) magistrate was not relying on illegal info and (2) police would have gone for warrant without illegal entry
			2. *Nicks* – Inevitable discovery of body when search party was over 2mi away
			3. *Cecollini* (1978) – Officer illegally finds evidence of gambling at flower shop; different officer later interviews clerk at shop who testifies 🡪 Admissible
	4. **Impeachment** – Judicial Integrity
		1. *Walder v. United States* (1954)
			1. Δ indicted for heroin, evidence excluded – later indicted for similar, evidence is informants
			2. On direct, Δ makes sweeping statement that he’s never had drugs
				1. Π is allowed to introduce previously excluded evidence to impeach
			3. Rule – Δ may deny claims lodged against him, but anything beyond opens the door to rebuttal of those claims on cross
		2. *Harris v. New York* (1971)
			1. Inadmissible statements under *Miranda* – admitted to selling undercover drugs – on direct, Δ testifies it was baking soda
			2. Rule – Π is allowed to introduce prior illegally obtained inconsistent statement to rebut denial on direct
		3. *United States v. Havens* (1980)
			1. A busted for drugs sewn into t-shirt, implicates Δ who is caught – police illegally seize t-shirt with holes in it that match pockets in A’s shirt
			2. Δ takes stand and denies charges (*Walder*) – on cross, Π asked whether Δ had anything to do with A’s t-shirt, then allowed to introduce suppressed shirt
	5. **Good Faith Exception** – Deterrence
		1. *United States v. Leon* (1984)
			1. Δ arrested and searched finding drugs on warrant that is later invalidated
				1. CI info was stale – insufficient veracity; other data was ambiguous 🡪 no PC
			2. Holding: Evidence obtained pursuant to subsequently invalidated warrant executed in good faith is not excluded
				1. Reliance must be objectively reasonable

Magistrate can’t be mislead

Magistrate must be neutral/detached – Abandon judicial role

Warrant cannot be objectively baseless (no PC at all)

Or warrant cannot be a general warrant (no specificity/particularity)

* + - 1. Reasoning
				1. 4th Am. contains no remedy (*But see Mapp* – Exclusionary rule must be part of Constitution to apply to states – but Constitution may only require when there is sufficient deterrence)
				2. Deterrence theory – Exclusion only required when it will deter police

Society benefit by deterring 4th Am. violations (when good faith reliance)

Society cost of letting guilty go (when there is good faith reliance)

* + - * 1. Majority: 0.6-2.4% felony and 2.8-7.1% of drug cases are lost by exclusion

But question is how many of these are based on good faith

* + 1. *Illinois v. Krull* (1987) – Good faith exception applies to search in reliance of later invalidated statute – unless statute was clearly unconstitutional
		2. *Davis v. Unites States* (2011)
			1. *Belton* automatic search of automobile incident to lawful arrest; *Gant*  decided during appeal making search lawful when conducted but unlawful under *Gant*
			2. Holding: No exclusion when police reasonably rely on binding judicial precedent that is later invalidated
			3. Dissent: Concern that Δ won’t have incentive to challenge precedent (freezing the law); majority argues Δ always has incentive to distinguish precedent
		3. *Arizona v. Evans* (1995) – No exclusion when police relied on a warrant that was quashed but still in computer due to judicial clerk error
		4. *Herring v. United States* (2009)
			1. Investigator learns Δ is at Sheriff’s to get something from impounded truck
			2. Police administrative error indicates erroneously Δ has a warrant
			3. Arrest and search yields gun
			4. Holding: When an error arises from nonrecurring and attenuated negligence, no exclusion – To exclude, police conduct must be sufficiently deliberate that it can be deterred, and sufficiently culpable that deterrence is worth the price
				1. Requires at least gross negligence or systematic negligence in record keeping
				2. Exclusion allowed if police are recklessly maintaining a database or knowingly putting in false information to make pretextual arrests later
			5. NOTE: Tort system relies on assumption that basic negligence is deterrable
	1. **Knock and Announce Violation**
		1. *Hudson v. MI* (2006) – Violation of knock and announce do not result in exclusion
			1. Normal exception to knock and announce is no-knock warrant, or impracticable
			2. Appropriate remedy is damages (§ 1983), privacy interest isn’t furthered because police have a warrant, evidence would have inevitably been discovered either way
	2. **Alternative Remedies** – Bar-Gill/Friedman, *Taking Warrants Seriously*
		1. Reasons for remedies: Deterring police, compensating victims of police misconduct
			1. In the law, there is preference for *ex post* remedies – cheaper (Stuntz)
			2. Common remedies against police fail – Remedy does not match the harm, low detection/enforcement, *ex post* bias (only guilty people challenge, *see Murray*)
		2. Possibilities: Citizen review boards (police brutality); internal affairs; criminal prosecution (rare); administrative remedies (never); money damages; exclusion
		3. Money Damages (§ 1983) and Immunity
			1. Could sue officers
				1. Good faith immunity (only liable if in violation of clearly established constitutional rule), empty pockets, indemnification, could over-deter
			2. Could sue municipality
				1. Immune from suit unless suing over a policy (have to prove there is a policy approving/encouraging the police conduct), damages are a tax on population
			3. Could sue state – Immune from suit under 11th Am.
			4. Damages are often small, though psychological damage large, high litigation cost
		4. *Ashcroft v. Al-Kidd* (2011) – Constitutional to hold Δ for 15d based on material witness warrant – collapse of immunity doctrine, no “clearly established” law because no one thought insane shit like this would ever happen
		5. Exclusionary rule is inadequate because there is a lack of clarity, incentivizes “testilying,” and sanctions are attenuated from the jokers violating people’s rights
			1. Vicious circle: Because of *ex post* bias, judges have inventive to let evidence in; constant exceptions to the “rule” makes the doctrine vague, murky, insoluble
		6. Suggested Solution: Warrants as remedies – Require warrants whenever practicable
			1. Maintain only the exigency exception, rethink consent searches, eliminate all else
			2. No judge-shopping (avoid everyone rushing to “rubber stamp” magistrates)
			3. Requires officers to stop and think – Argument is that this leads to significantly less searching without a concomitant reduction in police efficacy
		7. Implementation – Warrants are much more practicable now (phones, Skype, etc.), testlying is harder with strong warrant requirement, includes administrative schemes and arrests, when warrants are impracticable (*Terry*) – have police record themselves
			1. Even without all the warrants, if officers have to record themselves and justify everything to magistrate after, they will self-edit
1. **UPDATING THE 4TH AMENDMENT: TECHNOLOGY**
	1. **Analysis**
		1. **Computers**
			1. Warrant specifies computers, or circumstances create RS that evidence is on the computer (*Payton*)
			2. Rules (*Comprehensive Drug*)
				1. Magistrate should insist government waive plain view
				2. Segregate/redact info outside the warrant by independent personnel
				3. Warrants/subpoenas must disclose *actual* risk of destruction of information as well as prior efforts to seize that information in other judicial fore

Government must rely on 3rd party unless evidence that they will hide stuff

* + - * 1. Search protocol designed to uncover only information where there is PC

Special technology to parse files

* + - * 1. Government must return/destroy anything outside the scope of the warrant
			1. Δs have a reasonable expectation of privacy in the content of their email (*Warshak*), SCA is unconstitutional as applied insofar as it allows warrantless search of emails – subject to ISP agreement eliminating the expectation
			2. Difference in degree = difference in kind (distinguish file-cabinet analogy)
		1. **Text Messages (*Quon*)**
			1. People have reasonable expectation of privacy in text messages
			2. Government employers may investigate evidence of misfeasance
				1. Look at operational realities to see if suspect has REP
				2. If yes, then balance equities

Reasonable at inception? Reasonably related in scope?

* + 1. **DNA (*King v. MD*)**
			1. Statute requiring suspicionless DNA collection from subset of arrestees is unconstitutional as applied when ID of Δ is not a question (finger print/photo)
				1. TOTC – DNA when ID is not in question is investigatory and can wait for conviction
	1. **Computers and Emails**
		1. *United States v. Payton* (9th Cir. 2009)
			1. Search of home for drugs and evidence of drug sales
			2. Warrant specifies ledgers, but not computers –computer search finds child porn
			3. Holding: If computer isn’t specified in warrant, circumstances must indicate evidence sought after will be found on the computer
				1. Police should seize the computer and get a specific warrant
				2. *See Giberson* – Printer attached to computer had fake ID printouts 🡪 PC to search computer
			4. **Friedman** argues this is wrong as the computer would be the logical place to look
		2. *United States v. Comprehensive Drug Testing* (9th Cir. 2009)
			1. Government tried to subpoena records of all baseball player drug tests at CDT, lost, got specific warrant for 10 players that they had PC for
			2. Warrant specifies procedures to protect others privacy, but allows for seizure of computers because concerns the files are heavily intermingled – Police ignored all procedures, seized the “Tracey Directory” with all players private info
			3. Rules
				1. Magistrate should insist government waive plain view
				2. Segregate/redact info outside the warrant by independent personnel
				3. Warrants/subpoenas must disclose *actual* risk of destruction of information as well as prior efforts to seize that information in other judicial fore

Government must rely on 3rd party unless evidence that they will hide stuff

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Special technology to parse files

* + - * 1. Government must return/destroy anything outside the scope of the warrant
		1. *United States v. Warshak* (6th Cir. 2010)
			1. SCA allows government to subpoena emails on server for over 180d
			2. Also allows government to order ISP to hold emails on server that would otherwise be deleted – then subpoena after 180d
				1. Government seized 27,000 emails from Δ
			3. Holding: This is a search, Δ manifested subjective and reasonable expectation of privacy in the emails – SCA is unconstitutional as applied
			4. Consider 3rd party doctrine
				1. No expectation of privacy in bank records (*Miller*) or pen-register details (*Smith v. MD*) (like email “cover info”)
				2. Storage/transfer vs. use – You expect you accountant to look at your records, you give your email to ISP as a bailment for them to transfer to the recipient

Is this closer to accountant or bank?

* + - * 1. Standing – Whose rights were actually violated?
		1. *D.O.J. v. Reporters Comm. For Freedom of the Press* (1989)
			1. Holding: FOIA request to FBI for rap-sheet info amounted to violation of Δ’s expectation of privacy because, even though info was public, aggregation of that info brings in the privacy interest
		2. **Text Messages** – *City of Ontario v. Quon* (2010) – Police audits text-beepers because of excessive overages; uses discovered information for disciplinary action; officer challenge search – holding: Quon had REP in texts, but government action was reasonable
	1. **DNA**
		1. *King v. MD* (MD, 2012)
			1. MD law getting DNA from arrestees for “crimes of violence” is unconstitutional as applied to Δ – arrest for assault, DNA search hits rape cold-case
			2. *State v. Raines* (MD, 2004) – Suspicionless DNA from convicts is constitutional
			3. Search? – Yes – Swab (though *de minimis*), and analysis 🡪 2 searches
			4. Holding: Only could require DNA for identification if Δ’s identification could not be made through traditional photograph or fingerprinting
			5. TOTC – DNA collection after positive ID is investigatory, can wait for conviction
		2. **Friedman**
			1. Government argument that past crimes are part of ID is bogus
			2. Consider: Bail hearing – past crimes reads onto whether you get bail
				1. But, line drawing problem (justifies search of Δ’s home), and not testing everyone, just “crimes of violence” (strict scrutiny because not generalized)
			3. Generalized – Only subset of arrestees, would have to show that they are more likely to be perpetrators of cold-cases (tailoring problem)
		3. Familial Searches
			1. CA has large regulatory scheme that creates RS on finding of familial DNA match in CODIS 🡪 police may investigate to find other PC – on PC, can arrest and get DNA to match
			2. Standing problem – Original Δ subject to the search, not Δ from cold-case
			3. Is search justified at the outset? 🡪 see “general searches” reasonableness
		4. Phenotype Testing
			1. Unknown cols-case DNA used to determine phenotype of perpetrator
			2. Known DNA from criminal determines “propensity to commit violent crime”
	2. **Databases and Data-Mining**
		1. Erin Murphy
			1. Uses of databases that should trigger 4th Am. – Background check (suspicionless), target/suspect, match (from crime scene), pattern (profiling/terrorism)
			2. Steps in creating databases that should trigger 4th Am.
				1. Acquisition (Concerns about errors, suspect info, 3rd party doctrine [*but see* *Jones*, Sotomayor Concurring], other agency info [not subject to 3rd party])
				2. Storage, sharing across government agencies, searching (**Friedman** argues this should require PC – can’t search for tax evasion on traffic stop)
				3. Use of results – difference in degree = difference in kind (*see also Kyllo* – commonly available technology?)
			3. Big question whether databases are regulatory or investigative
		2. **Friedman**
			1. Remember government is doing something different than private citizens
			2. Consider: Does gov. have cause and justification to do the particular search?
				1. Government has particularized suspicion
				2. Government has a series of events and finds commonalities
				3. Government is doing something like regulation
			3. Distinguish – Collection, searching, retention, and aggregation of data
1. **CODIFICATION**
	1. Kerr – Courts should defer to legislature – Congress is faster, employs greater expertise, hears multiple public viewpoints, is democratically accountable, understands technology, creates *ex ante* rules, creates clear and comprehensive rules
	2. Solove – Courts should not defer to legislature – Laws have too many gaps (*see* SCA), laws aren’t adequately updated (courts are on the cutting edge), laws don’t provide remedies, courts can call experts/amici, capture, congress doesn’t consider the Constitution, courts are the ones interpreting statutes at the end of the day
	3. **Friedman** – Courts can spur legislation by deciding cases on extreme ends of the spectrum, Solove concern is that courts won’t overturn laws that need to be overturned
		1. Big problem of capture through law enforcement and private actors (private prisons, etc.) in the area of criminal law – law abiding public is diffuse and appathetic
	4. Amsterdam
		1. Premise: We have massive, comprehensive regulation of things like clean air and farming, but zero regulatory oversight of police
		2. Argues that everything police do should be subject of a statute or regulation, particularized *ex ante* rules, then have judicial doctrine about whether the rule complies with the 4th Am.
		3. Rationale – Better decisions (must consider outcomes), more fair and equal, more visibility, greater likelihood police will follow regulations, takes care of *ex post* bias in the courts

|  |  |
| --- | --- |
|  | Was Δ compelled? *Bram* |
|  | Did Δ incriminate himself? Immunized? |
|  | Communicative or demonstrative? |

1. **5TH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION**
	1. **Text of the 5th Amendment**
		1. No person… shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”
	2. **Text of the 6th Amendment**
		1. In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense
	3. **Generally**
		1. Four bodies of law – 6th Am. right to counsel; 5th Am. voluntariness test (and related due process voluntariness); 5th Am. *Miranda*
			1. *Miranda* does not change *Massiah*/*Escobedo*; confession must still be voluntary even after voluntary waiver of *Miranda*; right to counsel attaches at interrogation stage, but can be waived after *Miranda* warning
	4. **Elements of 5th Amendment Privilege – Analysis for Due Process Violation**
		1. **Compulsion (*Bram*)**
			1. Confession must be voluntary under TOTC (*Bram*)
				1. Russel on Crimes – A confession… must be free and voluntary: …must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence

Remember to focus on facts here, compare – distinguish case law!

* + - 1. Physical abuse of Δ (*Brown v. MS*, 1936); 36hrs interrogation (*Ashcraft*, 1944); days of relay questioning, 12hrs/d (*Watts*, 1949); psychological pressure through threats of a mob on uneducated African American (*Payne*, 1958)
			2. Pressure must be applied by investigators
				1. Coercion due to Δ’s mental illness does not qualify (*Connelly*, 1986 – schizophrenic confesses because God told him to)
		1. **Incrimination (*Kastigar*)**
			1. At least use and derivative use immunity to compel testimony (*Kastigar*)
				1. Courts are very strict about derivative use issues (*North*, D.C. Cir. 1990 – required line-by-line consideration of testimony/independent data)
				2. Derivative data can be attenuated (*Helmsley*, 2d Cir. 1991 – News article on testimony prompts reporter investigation later used for tax fraud case)
				3. 5th Am. doesn’t extend to risk of prosecution by foreign nation (*Balsys*, 1998)
				4. 5th Am. doesn’t protect against use of testimony in other government decision
			2. Result of waiving privilege (*Brown v. Walker*)
				1. Witness must make full disclosure, be subject to cross-examination
				2. Witness can be compelled if crime is barred by SOL
				3. Witness can be compelled even if testimony can bring him into disrepute

*See also Ullmann* – Transactional immunity is sufficient

* + - * 1. Witness can be compelled if he has been given immunity/pardon
		1. **Testimony (*Schmerber*)**
			1. 5th Am. protects testimonial/communicative evidence, not demonstrative/physical evidence
			2. E.g. can compel finger print, photo, try on clothing, say something (precedes officer inquiry – like BAL); cannot compel lie detector (response to interrogation)
	1. **Policies Underlying the Privilege (*Murphy*)**
		1. Personhood (Not really a consideration after *Brown v. Walker*/*Ullmann*)
			1. Privacy, autonomy, dignity, freedom of expression
		2. Reliability (Coercion on pain of contempt is allowed)
			1. Coercion can result in unreliable confessions or inhumane treatment of Δs
			2. Judicial integrity/reliability
		3. State Burden (Primary consideration now)
			1. Government has the burden of proof – “Put the government to its proof”
			2. Accusatorial vs. Inquisitorial system
			3. People should not be a tool in their own undoing
		4. Alternatives
			1. Videotaping, ban custodial interrogation, *City of Riverside* solution – require magistrate before 48hrs or exclude (*See McNabb*/*Mallory*)
			2. Have the magistrate conduct the questioning on threat of contempt
	2. **Cases – Generally**
		1. *Trial of Aaron Burr* (1807)
			1. Δ refuses to testify as to whether he prepared a document
			2. Government argued testimony could be compelled so long as the testimony itself is insufficient to convict Δ
			3. Holding: Witness must judge for himself whether to answer – can’t be compelled
		2. *Murphy v. Waterfront Commission of New York Harbor* (1964)
			1. Policies that underlie privilege
				1. Trilemma of self-accusation, perjury or contempt – unwilling to subject Δ
				2. Preference for accusatorial over inquisitorial system
				3. Fear of inhumane treatment and abuses
				4. Putting government to its proof – Government should leave people alone until good cause is shown for disturbing them, and requiring the government to shoulder the load in its contest against Δ
				5. Individual right to privacy
				6. Distrust of self-deprecatory statements
				7. While privilege shelters some guilty, it protects many innocent
		3. *Schmerber v. California* (1966)
			1. Δ convicted of DUI, officer instructed doctor at hospital after accident to take blood and measure BAL – Δ had refused on advice of counsel, but compelled
			2. Holding
				1. 6th Am. is not violated when lawyer gives erroneous advice
				2. 4th Am.: This is a search, on PC, no warrant 🡪 exigency

*McNeely* requires property damage or other facts making this a serious infraction before allowing blood test

Subject to reasonable means and procedure – doctor in hospital

NOTE: Blood test is not *per se* exigency, look at TOTC (*McNeely*)

* + - * 1. 5th Am. argument that Δ is compelled to bear witness against himself

5th Am. only protects testimonial/communicative evidence, not demonstrative/physical evidence

E.g. can compel finger print, photo, try on clothing, say something

E.g. cannot compel lie detector (response to interrogation)

* 1. **Cases – Immunity Statutes**
		1. *Counselman v. Hitchcock* (1892)
			1. Government argues “use immunity” is sufficient to compel testimony
				1. Testimony itself can’t be used in trial, but derivative evidence is allowed
			2. Holding: Use immunity is insufficient to compel testimony
				1. No protection from police using testimony to drum up leads, 5th Am. applies to all criminal proceedings (including indictment)
		2. *Brown v. Walker* (1896)
			1. Holding: Transaction immunity satisfies the demands of the 5th Am.
				1. Testimony operates as a complete pardon for the offense to which it relates
			2. Result of waiving privilege
				1. Witness must make full disclosure, be subject to cross-examination
				2. Witness can be compelled if crime is barred by SOL
				3. Witness can be compelled even if testimony can bring him into disrepute
				4. Witness can be compelled if he has been given immunity/pardon
			3. Fields dissenting: 5th Am. protects also from infamy/disgrace not just criminality
		3. *Ullmann v. United States* (1956)
			1. Prosecution for failing to testify to grand jury about Δ being communist
			2. Δ argued testimony would result in a loss of his job, expulsion from labor unions, state registration, state investigation statutes, passport eligibility, general public opprobrium such that he really wasn’t given immunity at all
			3. Holding: Transactional immunity is sufficient to compel testimony (*Brown*)
			4. Douglas dissenting: Concern about related offenses (attenuation), 5th Am. should safeguard dignity/infamy; Constitution places right of silence *beyond the reach of the government*
		4. *Kastigar v. United States* (1972)
			1. Holding: Use and derivative use immunity is sufficient to compel testimony
				1. Does not provide complete pardon, but heavy burden on the government to demonstrate data came from an independent source
			2. Marshall dissenting: Concerns about fact finding process for derivative data; government can simply assert it is independent, and Δ has to ferret out contrary evidence; even good faith prosecutor doesn’t know what other cogs in the machine are doing
	2. **Cases – Compelled Testimony**
		1. *Bram v. United States* (1897)
			1. Δ accused of murder, investigator strips him, lies (indicates friend already testified against him) – gets confession
			2. Holding: Violation of 5th Am.
				1. Applies outside courtroom, confession must be voluntary (TOTC)
				2. Russel on Crimes – A confession… must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence
		2. *Watts v. Indiana* (1949)
			1. 12hrs/day questioning for days straight yields confession
			2. Voluntariness is fact-specific TOTC test – precedent is murky, appellate courts are poorly situated to determine facts, facts take place in private interrogation rooms and it becomes a swearing contest between Δ and police
			3. Jackson dissenting: Voluntariness turns on point where testimony is unreliable
				1. So long as testimony can be/is corroborated, it should be allowed
				2. Overriding considerations about search for the truth
				3. Appeals courts should be deferential to lower court findings of fact

|  |  |
| --- | --- |
|  | Δ in custody? |
|  | Δ interrogated? *Innis* Majority vs. Stevens |
|  | Δ knew it was police? |
|  | Invoke silence or attorney? |
|  | Waived? 🡪 Don’t forget FOPT! |
|  | Admit in violation of *Miranda*? |

1. **POLICE INTERROGATION – *MIRANDA* DOCTRINE AND 5TH AMENDMENT**
	1. **Analysis**
		1. **STOP** – Irrespective of *Miranda*, **both** waiver of *Miranda* **and** confession must be voluntary under *Bram*, keep in mind *McNabb/Mallory* rule for prompt presentment!
		2. **Interrogation triggers *Miranda* if: Custody, interrogated, knowing it is police**
			1. This is custodial interrogation being inherently coercive and dispelling coercion
				1. *See* Kamisar!
			2. **Suspect in Custody?**
				1. Δ is in custody if he is **taken to the station**, or **otherwise deprived of his freedom of action** in any significant way (*Orozco*)

Examples of custody

Questioning in Δ’s bedroom after arrest (*Orozco*, 1969)

Examples of not custody

Voluntarily providing papers to IRS agents, free to leave (and did so) at any time (*Beckwith*, 1976)

Δ voluntarily comes to station, interview 30min, free to leave (*Mathiason*)

Road-side questioning for routine traffic stop (*Berkemer*)

* + - * 1. **Situation may become** custody if police conduct renders Δ in custody for practical purposes – Degree associated with formal arrest (*Berkemer*)

Roadside stop curtail freedom to degree = formal arrest (*Berkemer*)

Would a reasonable person in Δ’s position feel he was free to go? (*J.D.B.*)

Consider suspect’s age (*J.D.B.*)

* + - * 1. Questioning Δ who is already in prison does not involve the same shock as arrest, prisoner is only in custody if the **environment presents the same inherently coercive pressures as in *Miranda*** (*Howes v. Fields*, 2012) – No “talismanic” power to freedom of movement
			1. **Suspect Interrogated? (*Innis*)**
				1. Suspect is interrogated under *Miranda* when a person in custody is subjected either to **express questioning** or **its functional equivalent**

Functional equivalent: Words or actions on the part of police that the *police* **should know are reasonably likely** to elicit an incriminating response

Questions normally attendant to arrest/booking don’t count (*Muniz*, 1990)

FN7: Officer intent is not dispositive but is an indicator

* + - 1. **Suspect know it was Police?**
				1. *Miranda* is not required when the suspect is **unaware he is speaking to law enforcement** and gives a voluntary statement (*Perkins*) – No pressure of custody, not inherently coercive
		1. **Adequate *Miranda* Warning?**
			1. *Miranda*: Police must inform Δ that he has the right to remain silent, that any statement he does make may be used as evidence against him, that he has the right to the presence of an attorney, that if he cannot afford one, one will be appointed for him
			2. Particular form irrelevant so long as it reasonably conveys Δ’s rights (*Powell*)
			3. Unlawful seizure vitiates *Miranda* warning (*Brown v. IL*)
		2. **Right to Silence Invoked or Waived?**

|  |  |
| --- | --- |
| Required to invoke | Must unambiguously invoke (*Berghuis*) |
| Result of invoking | Police must scrupulously honor Δ’s right – But can re-engage after 2hrs (*Mosley*) |
| Required for waiver | Suspect (1) receives and (2) understands warning, (3) waives by making an un-coerced statement to police (course of conduct indicating waiver) (*Berghuis*) |

* + - 1. Δ must clearly and **unambiguously invoke** the right to remain silent (*Berghuis*)
				1. On invocation, police must s**crupulously honor** Δ’s right (*Mosley*)
				2. But can engage in more interrogation after **2hrs** for different crime (*Mosley*) or same crime (lower courts applying *Mosley*)
			2. A suspect who has **received and understood** *Miranda* warnings, **waives the right** to remain silent **by making an un-coerced statement** to police (*Berghuis*) (course of conduct indicating waiver)
			3. **Friedman** – Trickery is ok, but not to get waiver
		1. **Right to Attorney Invoked or Waived?**

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| --- | --- |
| Required to invoke | Δ must unambiguously invoke (*Davis*)Agree to talk, but not sign statement without counsel is not enough (*Barrett*)Later statements can’t be used to undermine earlier invocation (*Smith* 1984) |
| Result of invoking | Police can’t reinitiate interrogation without counsel (*Edwards*) even if consulted with attorney (*Minnick*) – unless 14d break in custody (*Shatzer*) or suspect initiated conversation and waived (*Bradshaw*) |
| Required for waiver | Waiver must be voluntary, knowing and intelligent relinquishment of a known right (*Edwards*)* Voluntary and with full awareness of the nature of the right (*Burbine*)

Waiver is valid even if attorney is trying to contact Δ (*Moran*) |

* + - 1. Δ must **unambiguously invoke** right to counsel (*Davis*, 1994)
				1. Agree to talk, but refuse to sign statement w/out counsel insufficient (*Barrett*)
				2. When Δ invokes, police **can’t reinitiate interrogation without counsel** (*Edwards*) **even if Δ has consulted with counsel** (*Minnick*)
				3. **14d break** in custody is enough to re-*Mirandize* and interrogate (*Shatzer*)
			2. **Waiver** must be a knowing and intelligent relinquishment or abandonment of a known right or privilege (*Edwards*) – 2 elements (*Moran v. Burbine*)
				1. (1) Waiver must be voluntary – Product of a free and deliberate choice rather than intimidation, coercion, or deception (*Burbine*)
				2. (2) Waiver must be made with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon (*Burbine*)
				3. When Δ invokes, waiver is not established by showing Δ responded to further *police initiated* custodial interrogation even if *Mirandized* (*Edwards*)
				4. On invocation, police must scrupulously honor Δ’s right (*Mosley* – **BF**)
			3. When Δ invokes, no interrogation until counsel is made available ***unless Δ himself* initiates further communication** with police (*Edwards*/*Bradshaw*)
				1. Δ must “evince[] a willingness and a desire for a generalized discussion about the investigation” (*Bradshaw*)

“Well, what is going to happen to me now?” (*Bradshaw*)

* + - * 1. Waiver is valid even if attorney is trying to contact Δ and police lie about it to Δ and/or attorney (*Moran v. Burbine*)
				2. Valid waiver is implied from **suspect initiated, *Mirandized*, un-coerced statement** (*Berghius* – **Friedman** argues this governs)
		1. **Admit Evidence in Violation of *Miranda***
			1. Statements that are involuntary are excluded and create poisonous tree (*Chavez*)
			2. *Miranda* is a constitutional rule (*Dickerson*), but remedy sweeps broader than the right, so voluntary statements violating *Miranda* when government interest outweighs individual interest
			3. **Impeachment –** Voluntary statements in violation of *Miranda* can be used for impeachment (*Harris*)
			4. **Public Safety Exception** – Immediate police need or overriding public safety concern creates a public safety exception making statements and evidence derived from the statements admissible (*Quarles*)
			5. **Question First**
				1. Suspect questioned in violation of *Miranda*, *Mirandized*, then re-questioned?

If violation is **deliberate and in bad faith** – statement is inadmissible without curative measures

Factors to find adequate curative measures:

Completeness/detail of the questions and answers in the 1st round

Overlapping content of the two statements

Timing and setting of the 1st and 2nd round of questioning

Continuity of police personnel

Degree to which the interrogator’s questions treated the 2nd round as continuous with the first

If violation **is not deliberate and in good faith** – prior voluntary statement in violation of *Miranda* is cured by warning and voluntary waiver (*Elstad*, *Seibert*)

* + - 1. **Physical Fruits of a *Miranda* Violation**
				1. Physical fruits (demonstrative) of a *Miranda* violation are admissible (*Patane*)
	1. **Generally**
		1. *Massiah v. United States* (1964)
			1. Δ is out on bail pending trial
			2. Δ made statements to co-conspirator that had turned state’s evidence and had radio transmitter under the seat of his car allowing police to listen in
			3. Testimony of officer helped to convict Δ
			4. 5th/6th Am. – Holding: Δ was denied his rights when Π used his own incriminating words which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel
			5. Note: no 4th Am. problem (*U.S. v. White* – 3rd Party), and standing (not Δ’s car)
		2. *Escobedo v. Illinois* (1964)
			1. Δ arrested, not charged, invoked right to counsel
			2. Attorney in building, but denied access while Δ questioned and confesses
			3. Holding: Where the investigation is no longer a general inquiry into an unsolved crime, but focuses on a specific suspect, The suspect has been taken into police custody, The police carry out a process of interrogations that lends itself to eliciting incriminating statements, The suspect has requested and been denied the opportunity to consult with his lawyer, The police have not effectively warned him of his right to remain silent, The confession is not voluntary
			4. Summary – Fact intensive holding amount to: When suspect is being interrogated, has invoked right to counsel, but is denied opportunity to speak with his lawyer – 6th Am. violation

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| --- |
| **Nexus of 5th and 6th Amendments** |
|  | Who | Trigger | What police/Government Can’t do |
| Miranda | Police; suspect must know it is police (*Perkins*) | Custody – Literal (*Orozco*, *Beckwith*, *Mathiason*) or coercive situation (*Berkemer*, *J.D.B.*, *Howes*) | Interrogation – Express questioning or functional equivalent – words police should know reasonably likely to elicit incriminating response (*Innis*) |
| 6th Am. Massiah | Government (*Massiah*) | Post-initiation, applies at critical stages (*Burbine/Rothgery*) | Deliberate elicitation (*Massiah*/*Brewer/Henry*), can get statements through luck (*Kuhlmann*)Can get info about other crimes where proceedings haven’t started for those crimes (*Moulton*) |

* + 1. *Miranda v. Arizona* (1966)
			1. Part I: History of police practices shows custodial interrogation is *inherently* coercive/compelling
			2. Part II: 5th Am. applies to custodial interrogation (i.e. *Bram* applies at station)
			3. Part III: Police must inform Δ that he has the right to remain silent, that any statement he does make may be used as evidence against him, that he has the right to the presence of an attorney, that if he cannot afford one, one will be appointed for him
			4. Δ may waive his/her rights provided waiver is voluntary, knowing, and intelligent
				1. If Δ invokes right to attorney, or indicates he/she doesn’t want to be questioned 🡪 no questioning
				2. Δ can invoke the right at any time, even after some questioning
			5. Policy
				1. Ensures Δ knows his/her rights and police will respect them; Informs Δ this is an adversarial process; Attorney helps to mitigate the coercive problem
			6. Criticism
				1. If police interrogation is inherently compelling, why does hearing your rights solve the problem that the waiver could be compelled too?
				2. How can someone who is incapable of being questioned without a lawyer be competent to make a decision about waiving their rights?
				3. Overbroad – Constitution proscribes involuntary statements – *Miranda* will exclude some spontaneous voluntary statements that *Bram* would not
				4. Case is more reminiscent of legislation than common law development
			7. Note: Court indicates that some other procedure may be implemented to substitute for the *Miranda* warning
				1. Key is determining the most important elements of the decision
				2. Note **Kauper** suggests that the accused should be promptly brought before a magistrate for interrogation supported by the threat that refusal to answer questions will be used against Δ at trial
	1. **Custody**
		1. *Beckwith v. United States* (1976) – Not custody when Δ voluntarily provided papers to IRS agents, during conversation Δ was free to leave
			1. Dissent: *Miranda* should apply when Δ is the focus of an investigation
		2. *Oregon v. Mathiason* (1977) – Δ voluntarily shows at station, conversation for 5min with officer, lies about finding Δ’s prints at scene 🡪 confession, free to go after
			1. Holding: No indication Δ’s freedom to depart was restricted 🡪 no custody
		3. *Berkemer v. McCarty* (1984) – Δ suspected of DUI admits to 2 beers and smoking MJ, instructed not free to go, failed field sobriety, passed breathalyzer at stationhouse, also signed incriminating statements at stationhouse
			1. Holding: *Miranda* applies to misdemeanors, but not to road-side questioning for routine traffic stop
				1. Brief/temporary/public 🡪 not inherently coercive
				2. *Miranda* would apply if Δ is subject to treatment that renders him “in custody” for practical purposes
		4. *J.D.B. v. North Carolina* (2011) – 13y/o suspected of burglary, taken from class by uniformed officer, questioned by 2 police and 2 administrators without legal guardian
			1. Officer makes threat to put Δ in juvenile detention pending trial, Δ confesses
			2. Holding: Age must be considered for determining whether Δ is in custody
			3. Dissent argues *Miranda* is a bright line, voluntariness test kicks in when *Miranda* is under-inclusive
	2. **Interrogation**
		1. *Rhode Island v. Innis* (1980)
			1. Δ *Mirandized*, invokes right to attorney, officers instructed not to question, in the car officer elicits incriminating statement by discussing possibility of a handicapped child being injured by the shotgun
			2. Holding: *Miranda* kicks in for express questioning or functional equivalent
				1. Words or actions beyond normally attendant to arrest, that the police should know are reasonably likely to elicit an incriminating response
				2. FN7: officer intent is not dispositive but is an indicator
			3. Stevens dissenting
				1. Will you please tell me where the shotgun is so we can protect handicapped schoolchildren from danger?
				2. If the man sitting in the back seat with me should decide to tell us where the gun is, we can protect handicapped schoolchildren from danger
				3. It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself
				4. Test – Whether a reasonable person would consider what was said a question
		2. **Friedman** argues that asking whether a reasonable suspect would feel compelled to talk erodes the rule
		3. *Illinois v. Perkins* (1990) (5th Am.)
			1. Undercover agent planted in Δ’s cell. Δ makes incriminating statements.
			2. Holding: Statements admissible under *Miranda* when suspect is **unaware he is speaking to police** and gives a **voluntary** statement
			3. Normative issue: *Miranda* is about coercion during custodial interrogation – use of trickery is fine without coercive circumstances
	3. **Adequate Warning**
		1. *Florida v. Powell* (2010)
			1. *Miranda* warning deficient because it seemed to suggest Δ could only speak to his attorney before questioning, holding that it reasonably conveyed Δ’s right to attorney both at the outset and during questioning
	4. **Right to Remain Silent**
		1. *Michigan v. Mosley* (1975)
			1. Δ questioned, invoked right to remain silent, *Mirandized* and questioned 2hrs later by different officer for different crime
			2. Holding: Police must scrupulously honor Δ’s right to remain silent
				1. 2hr gap was sufficient since questioning stopped the first time when invoked
				2. *Westover* – Δ got no warning first time, warnings for second time insufficient
		2. *Berghuis v. Thompkins* (2010)
			1. Δ refused to sign form indicating he understood *Miranda*, but read one of the rights out loud on the form, conflicting info about whether he verbally acknowledged – Δ remained silent during interrogation until answering “yes” to series of 3 questions at the end, last one was incriminating
			2. Holding
				1. Δ must unambiguously invoke right to remain silent
				2. A suspect who has **received and understood** the *Miranda* warnings, and **has not invoked** his *Miranda* rights, **waives the right** to remain silent **by making an un-coerced statement** to the police

Main point is reading *Miranda*, “heavy burden” is preponderance

* + - * 1. Voluntariness does not consider moral/psychological pressures to confess emanating from sources other than official coercion
			1. Sotomayor Dissenting
				1. Makes no sense to have right to remain silent be predicated on Δ not remaining silent
				2. *Miranda* and *Butler* establish a court “must presume that a Δ didn’t waive his rights,” the prosecution bears a “heavy burden” in attempting to demonstrate waiver; the fact of a “lengthy interrogation’ prior to obtaining statements is ‘strong evidence” against a finding of valid waiver; “mere silence” in response to questioning is “not enough;” and waiver may not be presumed “simply from the fact that a confession was in fact eventually obtained”
		1. **Friedman** argues that trickery to get statement is ok, but probably not for waiver
			1. **BUT *SEE Burbine*** – Police deception may violate Due Process if it is the kind of misbehavior that **so shocks the sensibilities of civil society** that would warrant exclusion of evidence
	1. **Right to an Attorney**
		1. *Edwards v. Arizona* (1981)
			1. Δ invoked right to attorney, police don’t get attorney, question next day resulting in incriminating admission, Δ insists no waiver
			2. Holding
				1. Waiver must be a knowing and intelligent relinquishment or abandonment of a known right or privilege
				2. When Δ invokes, waiver is not established by showing Δ responded to further *police initiated* custodial interrogation even if *Mirandized*
				3. When Δ invokes, no interrogation until counsel is made available *unless Δ himself* initiates further communication with police
			3. *Distinguish Mosley* as right to remain silent, not right to counsel
		2. *Oregon v. Bradshaw* (1983) – Initiating
			1. Δ arrested, invokes right to attorney – during jail transfer asks “well, what is going to happen to me now?” 🡪 ensuing conversation gets Δ to agree to polygraph which leads to confession
			2. While some inquiries – asking for water, use phone/bathroom – would not count, his question “evinced a willingness and a desire for a generalized discussion about the investigation”
		3. *Minnick v. Mississippi* (1990)
			1. Δ invokes right to counsel, speaks with attorney, later re-*Mirandized*, waives, interrogated leading to confession
			2. Holding: When counsel is requested, police can’t reinitiate interrogation without counsel whether or not Δ has consulted with counsel
		4. *Maryland v. Shatzer* (2010)
			1. Δ interrogated in 2003 about child abuse, invoked right to counsel, questioned 2.5y later by different officer, re-*Mirandized*, got waiver and confession
			2. Holding: When Δ is released from custody, returns to normal life for some time before later interrogation, little reason to think waiver is coerced
				1. 14d is long enough break in custody to re-question
				2. **Friedman** argues this partially abrogates *Edwards*; selected especially for its egregious facts
		5. *Moran v. Burbine* (1986)
			1. Δ arrested, held at station, sister gets him a lawyer who calls station
				1. Police lie to lawyer indicating they won’t question Δ
			2. Δ waives and confesses
			3. Holding: Δ may waive *Miranda* provided it is voluntary, knowing and intelligent
				1. Waiver must be voluntary – Product of a free and deliberate choice rather than intimidation, coercion, or deception
				2. Waiver must be made with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon
			4. Due Process
				1. Police deception may rise to a violation of due process
				2. On these facts, this isn’t the kind of misbehavior that **so shocks the sensibilities of civil society** that would warrant exclusion of evidence
		6. **Friedman** argues this is backwards, right to silence should be primary concern
	2. **Admitting Evidence in Violation of *Miranda***
		1. **Impeachment**
			1. *Harris v. New York* (1971) – Holding: Voluntary statements obtained in violation of *Miranda* can be used for impeachment
		2. **Invoking Right to Remain Silent**
			1. *Doyle v. Ohio* (1976) – Holding: Can’t use post-arrest silence following *Miranda* warning on cross-examination – violation of DPC because silence is ambiguous
			2. *Jenkins v. Anderson* (1980) – Holding: Can question Δ about why he didn’t turn himself in for 2wks on cross-examination for murder when claiming self-defense
		3. **Public Safety Exception**
			1. *New York v. Quarles* (1984)
				1. Δ arrested in supermarket with empty holster, officer asks where gun is, Δ tells officer, Δ *Mirandized*, waiver/confession
				2. Holding: Gun and statement admissible under “public safety exception”

Immediate need, concerns about accomplice or public injury

Cost is too high to give *Miranda* warning

* + - * 1. Normative Concern

*Miranda* = custodial interrogation is inherently coercive – no balancing

These are the cases where misconduct is the biggest concern

Court is arguing that a *Miranda* violation does not create poisonous tree

* + - 1. **Friedman** argues that if public safety rule is real, then wouldn’t it *always* outweigh concerns about *Miranda*? Also, public safety concerns are always present WRT letting someone go
		1. **Question-First**
			1. *Oregon v. Elstad* (1985)
				1. Rejects fruit of the poisonous tree doctrine for confession after initial confession then *Miranda* then subsequent confession
				2. Holding: If first statement is *voluntary*, Δ is not disabled from waiving and confessing after later *Miranda* warning

Because *Miranda* is prophylactic, violation doesn’t create poisonous tree

If first statement isn’t voluntary 🡪 poisonous tree

* + - 1. *Missouri v. Seibert* (2004)
				1. Police practice of questioning first, getting confession, *Mirandize*, get waiver and written/recorded confession 🡪 whether confession 2 is admissible?

In this case there is specific intent to undermine *Miranda*

* + - * 1. Holding (Souter plurality): Second confession is only admissible if there is something that causally breaks the chain between the 1st and 2nd confession
				2. Factors to find adequate curative measures:

Completeness and detail of the questions and answers in the 1st round

Overlapping content of the two statements

Timing and setting of the 1st and 2nd round of questioning

Continuity of police personnel

Degree to which the interrogator’s questions treated the 2nd round as continuous with the first

* + - * 1. Rule – For bad faith, go to factors (Souter, Kennedy, Breyer); For good faith, go to *Elstad* (statement voluntary? Waiver?) (O’Connor + Kennedy)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Souter (4 w/ Breyer) | Kennedy | Breyer | O’Connor (4) |
| Bad Faith – Intentionality | No – But bad faith makes curing nearly impossible | Yes | Yes | No |
| Can midstream warnings be effective? | Yes | Yes | Fruit of the poisonous tree analysis | Voluntariness and waiver (*Elstad*) |
| Curative Measures | Factors | Factors |  |  |

* + 1. **Physical Fruits**
			1. *United States v. Patane* (2004) – Plurality
				1. Δ being arrested, interrupts *Miranda* warning indicating he understands his rights – officer asks him about his gun, Δ makes statements about gun eventually consents to search of room to get gun
				2. Holding: *Miranda* protects violations of the self-incrimination clause, not implicated by admitting **physical** fruit of a **voluntary** statement

*Miranda* failure to warn is not a poisonous tree (only if admitted at trial)

Rule – Gun is admissible 🡪 not fruit of the poisonous tree

Demonstrative vs. testimonial evidence

* + - * 1. Stealth overrules *Brewer/Nicks* (physical body in violation of *Massiah*)
	1. **Stealth Overruling**
		1. Schulhofer
			1. Paradox – if *Miranda* really has so little impact on confessions and conviction rates, why bother defending it?
				1. Symbolic purpose is not irrelevant
				2. The new psychological ploys are better than physical coercion
				3. If you overrule *Miranda*, we’re right back to where we started
		2. Arguments that state *Miranda* as a prophylactic that swings wider than the 5th Am. state that *Miranda* violations don’t necessarily create a poisonous tree
			1. Therefore the violation happens when evidence is introduced at trial, not when interrogation happens (unless involuntary)
		3. **Friedman** argues that the *Miranda* decision held that custodial interrogation is inherently compelling, thus there is no such space between *Miranda* and the 5th Am.
			1. Absent something equally effective, police must use *Miranda*
		4. Consider: Can’t admit un-*Mirandized* statements except for impeachment or public safety, BUT in drug and gun offenses you rarely need the statements
			1. Stats: 20% of people invoke, lots of people talk for whatever reason – Limiting factor being *McNabb/Mallory/City of Riverside* prompt presentment
		5. **Stealth Overruling (Friedman)**
			1. *Miranda* is effectively overruled – Doesn’t matter if you warn, but if you do, you’re virtually guaranteed to get the statement in
			2. *Casey* factors due to later doctrine have vitiated the rule
			3. Why not just overrule? – Judicial minimalism (small steps, *but see Montejo*), hard to wrangle justices, *stare decisis*, concern about backlash (*see Citizens United*)
			4. Acoustic Separation – Court doesn’t want to get bitched at for overruling *Miranda*
				1. So they do it on the sly 🡪 police/lower courts all behave like it is overruled
				2. Cases discussing *Seibert/Patane* hinge heavily on whether the judge is a democrat or a republican
			5. Encourages defiance of the law and makes the doctrine unclear
		6. ***Miranda* as Prophylactic or as Constitutional Rule**
			1. *United States v. Dickerson* (2000)
				1. Holding: *Miranda*, being a constitutional decision of the Court, may not be overruled by an Act of Congress – governs admissibility of statements

*Miranda* applies against the states (must be Constitutional rule)

Legislature can make something like *Miranda*, but not less

Automatically provide a lawyer, video all interrogation, etc.

*Miranda* is embedded in routine police practice/part of national culture

Experience suggests TOTC is inadequate

* + - * 1. Scalia Dissenting: *Miranda* isn’t a constitutional rule, *Marbury* only lets SC-USA win for interpreting Constitution, he will apply § 3501 now
				2. Effect: Possibly overrules *Quarles* (balancing), *Elstad* maybe ok if applying FOPT, *Harris* maybe ok because two separate issues butting heads
			1. **Friedman** argues that either (1) *Miranda* is a constitutional rule, and cases allowing evidence in violation of *Miranda* need to be overruled/distinguished; (2) *Miranda* is not constitutional rule and § 3501 governs; or (3) *Miranda* is not constitutional rule, but court can announce “prophylactic” rules to implement the constitutional rule when details are difficult
			2. **Friedman** argues that *Miranda* held custodial interrogation to be inherently coercive, absent some other warning or procedure to dispel the coercion, police have to do *Miranda*
				1. Court argues that the violation happens when evidence is introduced at trial, not when interrogation happens 🡪 no poisonous tree is created

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|  | 5th Am. Violation? 🡪 *Miranda*/voluntary? |
|  | Attached? |
|  | *Massiah* – Deliberate Elicitation? |
|  | Waived? (*Montejo*) |
|  | If violated, throw in impeachment (*Ventris*) |

1. **6TH AMENDMENT RIGHT TO COUNSEL**
	1. **Analysis**
		1. **Right to counsel attaches** at the first judicial proceeding or indictment (*Rothgery*)
			1. Δ has **right to have counsel present** at all critical stages (*Rothgery*)
				1. Critical stage is any stage necessary to guarantee Δ effective assistance at trial
				2. Interrogation is a critical stage
		2. Government can’t **deliberately elicit** statements from Δ after right attaches (*Brewer*)
			1. Statements to informant **that deliberately elicits statements** are inadmissible (*Henry*), but **volunteered** statements to an informant that **does not** deliberately elicit them are admissible (*Kuhlmann* – “Luck and happenstance”)
				1. But informant can’t elicit statements by threatening with assault from other inmates (*Fulminante*)
			2. Statements elicited from Δ **about a new crime for which proceedings have not been initiated** are admissible for that crime (*Moulton*)
			3. **Does not matter if Δ knows it is the government** (*Massiah/Henry*)
		3. If Δ **waives right** to counsel for *Miranda*, he also waives his 6th Am. right (*Montejo*)
			1. **STOP** – Did Δ invoke? (*Davis*) – Did Δ invoke at arraignment? – May need to invoke again at questioning (unclear from *Montejo*)
			2. It is unclear (not clear and knowing) Δ is waiving WRT informants (*Henry*)
			3. **Question First**: *Probably* allowed to use curative measures after undercover questioning (*Seibert* – attenuation reasoning); If Δ knows it is the government you’ve got more direct FOPT/*Seibert* problem.
			4. Δ may waive his right to counsel at trial through required procedures (*Faretta*)
		4. Statements in violation of *Massiah* **are admissible for impeachment** (*Ventris*)
			1. Note, unlike *Miranda*, the violation occurs as soon as the government deliberately elicits statements from Δ irrespective of whether Δ knows it is the government

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| **Nexus of 5th and 6th Amendments** |
|  | Who | Trigger | What police/Government Can’t do |
| Miranda | Police; suspect must know it is police (*Perkins*) | Custody – Literal (*Orozco*, *Beckwith*, *Mathiason*) or coercive situation (*Berkemer*, *J.D.B.*, *Howes*) | Interrogation – Express questioning or functional equivalent – words police should know reasonably likely to elicit incriminating response (*Innis*) |
| 6th Am. Massiah | Government (*Massiah*) | Post-initiation, applies at critical stages (*Burbine/Rothgery*) | Deliberate elicitation (*Massiah*/*Brewer/Henry*), can get statements through luck (*Kuhlmann*)Can get info about other crimes where proceedings haven’t started for those crimes (*Moulton*) |

* 1. **When Right Attaches**
		1. *Moran v. Burbine* (1986) – Holding: Right attaches at first formal charging proceeding, after that Δ gets an attorney during any questioning
		2. *Rothgery v. Gillespie County Texas* (2008) – Holding: Right to counsel attaches at first hearing, right is to have counsel present at all critical stages
			1. Police interrogation is a critical stage
			2. Critical stage is any stage necessary to guarantee Δ effective assistance at trial
	2. **When Right is Attached**
		1. *Brewer v. Williams* (1977)
			1. Δ seen carrying body of missing girl, turns himself in in Davenport, arraigned and has counsel in Davenport and Des Moines – unambiguously invoked, during transit to Des Moines officer delivers “Christian Burial Speech” resulting in conversation that Δ leads police to girl’s body
			2. Consider 5th Am.: Δ read rights? (yes); Δ in custody and interrogated? (yes, *Innis*); Δ invoke? (yes, counsel); Δ initiate? No; Δ waive? No
				1. Note: If Δ does not initiate, speaking is not a waiver (*Edwards*), if Δ does initiate, speaking may be a waiver (*Bradshaw*)
			3. 6th Am. – *Massiah*
				1. Issue: Did police deliberately attempt to elicit incriminating statements from Δ after arraignment? Yes 🡪 Statements inadmissible (*Massiah*)
			4. 3 Hypos: All inadmissible (*Massiah*), only 3rd *maybe* inadmissible (*Miranda*)
				1. Δ questioned after arrest, without police present, by officer posing as a waitress in a diner (police let Δ go in unaccompanied)

Valid under *Miranda* (non-custodial/coercive, Δ doesn’t know it is police (*Perkins*), invalid under *Massiah*

* + - * 1. Δ questioned at station in interrogation room with no police by an officer posing as the mother of the victim

Valid under *Miranda* (*Perkins*), invalid under *Massiah*

* + - * 1. Δ in car with police, police instruct weather man to deliver Christian Burrial Speech over the radio

Close under *Miranda*/*Innis*, invalid under *Massiah*

* 1. **Informants**
		1. *United States v. Henry* (1980) – Holding that post-indictment statements to jailhouse informant that deliberately elicited statements absent waiver are inadmissible under 6th Am. (*Massiah*)
		2. *Kuhlmann v. Wilson* (1986) – Holding that volunteered statements to jailhouse informant are admissible over 6th Am. so long as Δ made them spontaneously, and informant didn’t elicit them – “luck and happenstance”
			1. *But see* Brennan Dissenting: Informant elicited by talking to Δ about the crime over several days, the fact that the final catalyst was something else strains elicitation standard
			2. **Friedman** argues this would also include installing a bug in the cell
		3. *Maine v. Moulton* (1985) – Holding: Co-Δ turned state’s evidence *can* elicit statements for any crime Δ has not been indicted for
		4. *Arizona v. Fulminante* (1991) – Holding: Informant cannot elicit statements by using threat of assault from other inmates, offering protection for confession 🡪 involuntary
	2. **Waiving the Right**
		1. *Montejo v. Louisiana* (2009)
			1. Δ accused of crime, read rights, waives and confesses
			2. Brought in front of judge, appointed counsel (unclear if he asked for counsel)
			3. Police get him and he leads them to his gun, writes letter of apology to V’s widow
			4. Issue: Letter admissible?
				1. *Michigan v. Jackson* – Once right has attached and asserted (requested), police can’t seek waiver without counsel present
			5. Reasoning – Overruling *Jackson*
				1. Purpose of *Jackson* was to prevent police badgering, but *Miranda*-*Edwards*-*Minnick* already ensure Δ the choice to have counsel present
				2. Rule – Waiving 5th Am. right and 6th Am. right are the same
				3. If Δ doesn’t want to speak without counsel present, Δ need only say as much
		2. **Policy**
			1. Normative issue: 6th Am. is about guaranteeing effective assistance at trial and interrogation is a critical phase of trial – distinct from 5th Am. concerns
				1. *Faretta* held that it is nearly impossible to go *pro se* in criminal proceedings
				2. Professional responsibility dictates you *never* approach opposing party without counsel present during civil litigation
			2. Consider: There are times the 6th Am. applies and 5th Am. doesn’t – Trigger is different, standards are different for questioning, etc.
			3. Undermines the adversarial process; Δ should be required to have lawyer present for waiver – Adversarial process reaches “the right result,” 🡪 Δ is not competent to defend himself, power imbalance, Δ doesn’t fully appreciate his rights – *Montejo* standard doesn’t actually address these concerns
	3. **Admitting Evidence in Violation of 6th Am./*Massiah***
		1. *Kansas v. Ventris* (2009) – Statements made in violation of *Massiah* can be used for impeachment
			1. Consider: Violation occur at questioning or admitting statement? 🡪 Scalia attempts to separate right and remedy; BUT **Friedman** argues that once trial begins, realistically the interrogation will only occur illegally 🡪 deterrence!
			2. **Friedman** argues 6th Am. is about right to counsel, period, not a prophylactic!

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| **5th Amendment** – ----- denotes cases that erode the right |
| Case | Year | Rule |
| *Massiah* | 1964 | Police cannot question Δ without attorney once 6th Am. right has attached and critical phase (i.e. interrogation) |
| *Escobedo* | 1964 | Fact intensive holding amounting to right to attorney after Δ invokes |
| *Miranda* | 1966 | Custodial interrogation is inherently coercive, providing warnings dispels that coercion and reassures Δ that his rights will be honored |
| *Orozco* | 1969 | Questioning in bedroom after arrest is equivalent to custodial interrogation |
| *Harris* | 1971 | Voluntary statements in violation of *Miranda* can be used for impeachment |
| *Mosley* | 1975 | Police must scrupulously honor the right – 2hr gap was sufficient since questioning stopped the first time Δ invoked |
| *Doyle* | 1976 | Can’t use post-arrest silence following *Miranda* warning on cross-examination – violates DPC because silence is ambiguous |
| *Beckwith* | 1976 | Voluntarily producing papers to agents, free to leave is not custody |
| *Mathiason* | 1977 | Voluntary interview with police at station, police lie, get confession, Δ leaves 🡪 not custody |
| *Innis* | 1980 | Interrogation is words/actions beyond normally attendant to arrest that police should know are reasonably likely to elicit an incriminating response |
| *Edwards* | 1981 | Waiver must be knowing and intelligent relinquishment of a known right, when Δ invokes – no waiver by response to police initiated interrogation – when Δ invokes, no further interrogation until counsel is provided unless Δ initiates |
| *Bradshaw* | 1983 | “Well, what is going to happen to me now?” enough to count as Δ initiating willingness to talk generally to police (note that asking for water/bathroom not enough) |
| *Berkemer* | 1984 | *Miranda* applies to misdemeanor but not normal road-side questioning |
| *Smith* | 1984 | Later statements can’t be used to undermine earlier invocation of right to counsel |
| *Quarles* | 1984 | Public safety exception to *Miranda* |
| *Elstad* | 1985 | If an un-*Mirandized* statement is voluntary, there is no poisonous tree that stops Δ from waiving *Miranda* later and making a confession |
| *Burbine* | 1986 | Δ may waive *Miranda* provided it is voluntary, knowing, and intelligent – does not matter if Δ is aware a lawyer is trying to contact Δ (note that police trickery can violate Due Process if it shocks the sensibilities of civil society) |
| *Perkins* | 1990 | Statements by Δ to someone when Δ is unaware he is speaking to police and gives voluntary statement are admissible (5th Am. only!) |
| *Minnick* | 1990 | When counsel is requested, can’t reinitiate interrogation without counsel, even if Δ has consulted with counsel |
| *Davis* | 1994 | Right to counsel must be unambiguously invoked |
| *US v. Dickerson* | 2000 | *Miranda* is a constitutional decision of the court, thus can’t be overruled by an Act of Congress 🡪 embedded in routine police practice/part of national culture |
| *Seibert* | 2004 | Bad faith question-first tactic requires curative measures (factors); good faith question-first violation of *Miranda* is under *Elstad* |
| *Patane* | 2004 | Physical fruits of a *Miranda* violation are admissible (note: still must be a voluntary statement) |
| *Powell* | 2010 | Warnings don’t have to be literal, just have to get the point across |
| *Shatzer* | 2010 | 14d break is long enough break in custody to requestion after Δ asserts right to counsel |
| *Berghuis* | 2010 | Suspect who receives and understands *Miranda*, waives the right by making an un-coerced statement to police |
| *J.D.B.* | 2011 | Age is considered in determining whether Δ is in custody |
| *Howes v. Fields* | 2012 | Person in prison doesn’t automatically mean custody – need inherently coercive pressures as in *Miranda* |

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| *Escobedo* | 1964 | Fact intensive holding amounting to right to attorney after Δ invokes |
| *Brewer* | 1977 | Police violate the 6th Am. when they deliberately attempt to elicit incriminating statements from Δ |
| *Henry* | 1980 | Post-indictment statements to jailhouse informant that deliberately elicited statements inadmissible |
| *Moulton* | 1985 | Informant can elicit statements from Δ for any crime Δ has not been indicted for |
| *Kuhlmann* | 1986 | Volunteered statements to jailhouse informant are admissible so long as Δ made them spontaneously and informant didn’t elicit – “luck and happenstance” |
| *Moran v. Burbine* | 1986 | Right attaches at first formal charging proceeding |
| *Fulminante* | 1991 | Informant can’t elicit statements by using threat of assault from other inmates |
| *Rothgery* | 2008 | Right attaches at first hearing, counsel present at critical stages, critical stages are necessary to guarantee effective assistance at trial (interrogation is critical stage) |
| *Montejo* | 2009 | Waiving the right to counsel under 5th or 6th Am. are both governed by *Miranda*-*Edwards*-*Minnick* |
| *Ventris* | 2009 | Statements made in violation of *Massiah* can be used for impeachment |