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# Background

1. The Criminal Justice System
	1. Goals
		1. Controlling and preventing crime
		2. Ascertaining guilt or innocence
		3. Maintaining confidence in the justice system/following the rules and the integrity of law enforcement
		4. Factual accuracy
		5. Protecting individual rights (privacy, security, and self-incrimination)
		6. Equality
	2. Practical considerations
		1. These rules don’t constrain how LE acts, but how prosecutions happen after the fact
		2. Prosecutors will focus on cases where they had probable cause (PC)
2. The 14th Amendment and Selective Incorporation
	1. Three schools of interpretation on procedural due process:
		1. Ordered liberty: due process is equivalent to fundamental fairness
		2. Total incorporation: due process is the first 8 amendments
		3. Selective incorporation: SCOTUS should look to particular clause in the Bill of Rights to determine Due Process
			1. Fundamental principles should be incorporated against the states
			2. More flexible than selective incorporation
			3. More objective than ordered liberty

# Foundations of the Fourth Amendment

1. **Fourth Amendment**: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.
	1. Does not prohibit searches and seizures
	2. Allows reasonable searches and seizures
	3. If something is not a search or not a seizure, not restricted by the 4th amendment
2. Is it a search? Factors to consider
	1. Physical intrusion/trespass: relevant but not controlling
		1. *Katz*: no intrusion, still a search
	2. Subjective expectations of privacy: not controlling
		1. If can be observed with the naked eye: not a search
	3. Sophisticated technology: relevant but not decisive
	4. Degree of intimacy: may be important (may deny protection for things less intimate than *Katz*) but not controlling
		1. Actual
		2. Potential
		3. Basically drops out: impossible to draw a line between what is intimate and what isn’t
	5. Home
	6. Voluntary assumption of the risk/third party doctrine
3. Reasonable versus unreasonable searches
	1. Generally: greater intrusion needs greater justification
	2. *Katz v. US*
		1. **Facts**: FBI agents had attached an electronic listening and recording device to the outside of the phone booth. The petitioner was convicted of transmitting wagering information by telephone in violation of a federal statute.
		2. **Test**: does the individual have (1) an actual expectation of privacy (2) that society is prepared to recognize as reasonable?
		3. **Holding**: violation of an actual expectation of privacy upon which D justifiably relied while using the closed telephone booth constituted a “search and seizure” within the meaning of the Fourth Amendment.
	3. Third party doctrine: Assumption of the risk in items turned over to third parties🡪waiver of Fourth Amendment rights
		1. *California v. Greenwood*
			1. **Facts**: police searched through garbage on curb
			2. **Holding**: even if D has a subjective expectation of privacy, there is no actual expectation of privacy in items handed over to a third party.
		2. *US v Scott*: Greenwood applies even to shredded documents
		3. *Ex Parte Jackson*: postal mail privacy
			1. If sealed, as if the sender still has possession of it
			2. Outside and weight open to inspection, as are open things like newsletters
		4. *Miller:* Bank records; once turned over, no legitimate expectation of privacy
		5. *US v. Warshak*: Stored Communications Act violates 4th amendment by allowing seizure of private emails from internet service provider without a warrant (subscriber expects reasonable privacy in emails stored by ISP)
	4. Inside the home
		1. *Kyllo v. US*: by obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search (at least where technology not in general public use)
			1. Firm and bright line at entrance to the house
		2. *Hicks*:
			1. Serial number on turntable protected
	5. Area around the home
		1. Open fields: not protected
			1. *Oliver v. US*: “The special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields.”
				1. Test of legitimate expectation of privacy: does the gov't's intrusion infringe upon the person and societal values protected by the 4th amendment?
				2. Rationale: a trespass would not necessarily violate reasonable expectations of privacy (4th amendment not designed to protect activity in a cornfield)
			2. *Florida v. Riley*: surveillance by the police of a partially covered greenhouse in a helicopter did not constitute a search
				1. No expectation that there would not be things flying at this altitude that couldn't see in
			3. *California v. Ciraolo*: surveillance of fenced backyard from a plane at 1000 feet did not constitute a search.
		2. Curtilage: may be protected if the individual reasonably may expect that the area immediately adjacent to the home will remain private. This is determined through the use of four factors:
			1. The proximity of the area to the home,
			2. Whether the area is included within an enclosure surrounding the home,
			3. The nature of the uses to which the area is put, and
			4. The steps taken by the resident to protect the area from observation by people passing by it.
	6. Public places
		1. *State v. Bryant*: private area in a public place protected (bathroom stall)
		2. *Hudson v. Palmer*: 4th amendment does not apply to prison cell--yields to institutional security
		3. *Bond v. US*: traveler’s personal luggage is protect (“effects”)—squeezing soft luggage is a search (carry on, expect in your sights/privacy)
		4. *US v*. *Place*: dog sniff is not a search
			1. Limited, less intrusive than a normal search and only alerts authorities to the presence of a contraband item.
		5. *Illinois v. Caballes*: dog sniff of a vehicle not a search
		6. *US v. Jacobsen*: if package opened by private parties in police presence contained white powder, police could lawfully test powder
	7. Sophisticated technology
		1. Test: Does the device have the potential to reveal intimate personal information?
			1. Example: canine sniff does not have that capability🡪 is not protected
		2. *Kyllo v. US:* obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search- at least where (as here) the technology in question is not in general public use.
		3. *Silverman v.* US: search occurs when a spike mike intrudes into the speaker’s side of the wall
		4. *Goldman:* no search occurs when a slap mike is put on the outside of a wall.
		5. *Olmstead v US:* talking on the phone shows an intent to broadcast and is not protected by the 4th amendment (overruled by Katz)
		6. *US v. Knotts*: use of beeper not a 4th amendment search: just augmenting sensory abilities of sight they could have used instead
		7. *US v. Karo*: for beepers, monitoring beeper does fall under 4th amendment when it reveals information that could not have been obtained through visual surveillance
		8. *Dow Chemical Co. v. US*: mere vision enhancement does not give rise to constitutional problems
		9. *US v. Maynard:* Use of GPS device to track suspect is a 4th amendment search--defeated his reasonable expectation of privacy
4. Protected interests: Intrusions subject to reasonableness requirement
	1. Protected:
		1. *Katz* (phone booth)
		2. *Bryant* (Toilet Stall)
		3. *Kyllo*
		4. *Bond*
		5. *Hicks*
	2. Not protected:
		1. *Smith* (third-party information)
		2. *Place*
		3. *Oliver*
		4. *Greenwood*
	3. Wiretapping (Communications Act of 1934)

# Searches and Arrests

1. The warrant requirement: authorization from neutral magistrate (Federal Rules of Criminal Procedure)
	1. Rationale
		1. Hindsight bias
		2. Freeze the record: written record of what the facts actually were before the search
		3. Not just a rubber stamp
		4. Prevent ex-post manipulation of the fact-finding process
	2. Neutral and detached magistrate
		1. *Coolidge*: since state official who issued warrant later chief prosecutor, requirement not met
		2. *Connally*: magistrate only paid for warrants but not denials, so requirement not met
		3. *Shadwick*: two tests
			1. Neutral and detached
			2. Capable of determining whether probable cause exists
			3. NOT exclusively lawyer or judge
		4. *Davis*: no magistrate-shopping; one's decision is binding
	3. Particular description of the place to be searched
		1. *Steele*: enough that officer with warrant can ascertain and identify
		2. *Blackburn*: if not all the descriptive facts fit but no real doubt, okay
		3. *Garrison*: warrant was valid when issued and officer's failure to realize over breadth of warrant objectively understandable and reasonable, so execution of warrant valid
	4. Particular description of the items to be seized
		1. Greater degree of ambiguity tolerated when police did best they could under the circumstances
		2. General description sufficient when nature of objects makes less descriptive unlikely
		3. Less particular description of property that is because of its nature contraband is okay
		4. When omitting facts would not have helped officer to find, okay
		5. Error in description not basis for questioning if officer able to tell that object seized was the right one from description
		6. Greater description needed when property lawful in smaller quantities
		7. Greater needed if objects of same general classification likely to be found
		8. Greatest care when consequences of seizure could be innocent articles
		9. Just because some things improperly seized doesn't mean that warrant not sufficiently particular
		10. 4th amendment's particularity requirement doesn't require particularity with respect to criminal activity suspected
		11. Some leeway if more time could have revealed more details but more time might have allowed defendant to remove or destroy evidence
	5. Within 10 days
	6. Daytime (unless authorized for a different time)
		1. *Gooding*: need additional justification for nighttime search
	7. Knock and announce (no knock authorized if knocking and announcing their presence would be dangerous or futile or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.)
		1. Limited on sneak and peek:
			1. Showing of reasonable necessity for delay of advance notice
			2. Notice of search within a reasonable time of covert entry
		2. Gaining entry
			1. Can break down door after announcing LE, but not if that ignores countervailing LE interests
			2. *Richards*: to justify no-knock entry, police need reasonable suspicion that announcing their entrance would be dangerous or inhibit effective investigation of the crime
				1. Officers can exercise judgment independent of warrant
			3. *Banks*: time before police can conclude they have been refused admittance: reasonable time for someone to get to door

## May only look where the items described in the warrant might be concealed and the search must cease as soon as the items named in the warrant are found.

* 1. Preference for warrants, but not necessary
		1. Many searches made and upheld without warrant
		2. Never needed for a crime committed in a public place
1. Probable Cause: all evidence taken together enough for magistrate to determine probable cause exists
	1. Sources of information
		1. Victim: is the general description is sufficient to justify the arrest of any one person?
		2. Police observation (defendants acting suspicious when questioned)
		3. Official channels
		4. Informants
	2. Evidentiary hearing requirements
		1. Warrantless arrest: yes
		2. Arrest with warrant: upon showing of why not to believe warrant
		3. Can call a named informant
		4. Rarely allowed to challenge an affidavit
	3. Informants: source information
		1. *Spinelli*
			1. **Facts**: A search warrant was issued based on an affidavit containing the following information: FBI had tracked Spinelli’s movements from Illinois into St. Louis, Missouri and into a particular apartment. The apartment contained two telephones. The FBI stated that Spinelli is known to local law enforcement as a gambler. Informant’s tip stated that Spinelli was operating a gambling operation in which he accepted wagers and disseminated wagering information by means of two telephones.
			2. **Holding**: The application for the warrant was inadequate because it failed to set forth the underlying circumstances necessary to enable the magistrate to independently judge the validity of the informant's information.
			3. *Aguilar* test for probable cause when law enforcement seeks a search warrant and a magistrate signs a warrant:
				1. “Basis of knowledge:” how informant came by the information in the tip (informant is credible)

Circumstances that led the informant to think whatever he/she is reporting

Independent evidence verifying informer’s story

Can be satisfied with details

* + - * 1. The magistrate must be informed of the reasons to support the conclusion that informant has veracity (is reliable).

Given correct information before

Corroboration has to be something sufficiently unusual

But doesn’t have to be criminal in and of itself

Can satisfy prong 2 if something only an insider would know

* + - 1. **Problem:** does not address police fabrication
		1. *Illinois v. Gates*: substantial basis
			1. **Facts**: Police received anonymous letter describing drug smuggling activities of neighborhood couple.
			2. **Test abandoned**: An informant’s “veracity,” “reliability,” and “basis of knowledge” are highly relevant, but they are not separate and independent requirements to be rigidly met in each case.
				1. Veracity: no basis for letter author as credible--> no showing of probable cause
				2. Encourages excessively technical dissection of informants' tips, when totality would be better (honest citizen example)
			3. **Holding:** The task of the magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
				1. Affidavit must provide magistrate with enough information to form a substantial basis for determining the existence of probable cause

## Leaves room for anonymous citizen informants, which are very important to effective law enforcement.

* + 1. *Mass. v. Upton*
			1. **Facts:** Unidentified female called 911 and told officers that a motor home containing stolen items, including jewelry, silver, and gold, was parked behind respondent's home, she had seen the stolen items, but refused to identify herself because "he'll kill me." When the officer told the caller that he knew her name because he had met her and she had been identified as respondent's girlfriend, the caller admitted her identity and told the officer that she had broken up with respondent and "wanted to burn him." Officer verified that a motor home was parked on the property and, while other officers watched the premises, prepared an application for a search warrant. Magistrate issued the warrant, and a subsequent search of the motor home produced the items described by the caller and other incriminating evidence.
			2. **Holding:** The “totality of the circumstances” test, rather than the “two-pronged test,” was applicable to determining the validity of a search warrant issued on the basis of an affidavit which relied on an informant's tip.
				1. Prong 1 strong: informant gives a lot of detail
				2. Prong 2: corroboration of trailer’s location not enough, and motivation for lying.
				3. No delegation: magistrate made the judgment of her trustworthiness and it is enough.
		2. Probable cause:
			1. For arrest: that a crime has been committed and that the person to be arrested committed it
			2. For search: that certain items are the fruits, instrumentalities, or evidence of a crime and are to be found at a certain place
	1. Informants: odds
		1. *Ybarra*
			1. **Facts**: informant had told police that tavern bartender kept heroin behind the bar for sale. The police obtained a search warrant for the tavern and bartender.
			2. **Holding:** Search of the (9-13) tavern customers in addition to the tavern and bartender lacked probable cause and was unconstitutional—propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person
		2. *Rettele*: okay for police to make them get out of bed and stand there naked
		3. Victim descriptions: Victim-witness cases don't need to show reliability of victim, as opposed to in informer cases
			1. No gain expected for giving information usually only one opportunity, so no way to show previous reliability
			2. Critical question usually is whether the general description given by the victims or witness sufficient to justify the arrest of any one person
	2. *Maryland v. Pringle*
		1. **Facts:** In addition to the driver and a backseat passenger, defendant was a front seat passenger in a vehicle which was stopped for speeding. Upon a consensual search, a significant amount of cash was found in the glove compartment of the vehicle and drugs were discovered between the back-seat armrest and the back seat. Although defendant subsequently admitted that the drugs and cash were his, none of the vehicle occupants admitted to ownership of the drugs at the time of the search, and all three occupants were arrested.
		2. **Holding**: Officer had probable cause to believe that defendant was in possession of the drugs. It was an entirely reasonable inference that any or all three of the occupants had knowledge of, and exercised dominion and control over, the drugs, and thus a reasonable officer could conclude that there was probable cause to believe defendant committed the crime of possession of drugs, either solely or jointly. It was also reasonable for the officer to infer a common enterprise among the three occupants, in view of the likelihood of drug dealing in which an innocent party was unlikely to be involved.
		3. **Probability analysis:** Drugs in backseat; Pringle not the owner of the car nor the driver—what is the basis for inferring his involvement?
			1. Probability analysis: 1/2 chance he is involved
			2. Probable cause: need 51% or more

## However, drugs in the backseat, in addition to the money in front of him and other factors, were enough for the Court.

## Warrantless Arrests

* 1. First step: still need probable cause
	2. *US v. Watson*
		1. **Facts**: Informant told police that he had met with Watson who had given him a stolen credit card and had agreed to furnish additional cards. The police follow the informant to the meeting and arrest Watson when signaled by the informant.
		2. **Holding**: the police do not need a warrant for a misdemeanor or felony committed in the officer’s presence or for a felony not committed in his presence if there were reasonable grounds for making the arrest.
			1. Just because he had time to get one doesn't mean he had to
	3. Public Places

## *Payton v. New York*

## **Facts**: felony arrest in public

* + - 1. **Holding**: Seizure of property in plain view involves no invasion of privacy and is presumptively reasonable assuming that there is probable cause to associate the property with criminal activity. The warrant exception for felonies not committed in the officer’s presence does not extend to making the arrest in a person’s home. You need a warrant absent exigent circumstances. But you do not need a warrant if the arrest takes place in a public place.
			2. But can go in without search warrant if arrest warrant (Searching for people on the basis of an arrest)
			3. Cannot threaten to make them come out (violates 4th amendment)

## *US v. Santana*: warrantless arrest was constitutional when women was standing directly in the doorway (public place).

* + 1. *Steagald*: looking for Lyons, found Steagald and drugs, prosecuted, conviction reversed
			1. Arrest warrant for Lyons inadequate safeguard of Steagald’s protection in his own home
		2. *Atwater*: warrantless arrests for misdemeanors not resulting in breach of the peace permitted
	1. Use of force
		1. *Garner*: use of deadly force to arrest fleeing felon sometimes unreasonable under the 4th amendment
			1. Where the suspect poses no immediate threat to the officer and not threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so
		2. *Graham v. Connor* test: 4th amendment reasonableness standard applies to all claims that LE has used excessive force in the course of an arrest of a free citizen
			1. Requires careful attention to facts of each case
			2. Embody allowance for fact LE has to make split second decisions
			3. Asks whether actions of officer objectively reasonable
	2. Extended detention
		1. *Gerstein*
			1. 4th amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following an arrest
		2. *County of Riverside*: 48 hours for judicial determinations is prompt, but even if 48 hours if delayed unnecessarily may not be prompt

## Warrantless Searches: exceptions to the warrant requirement

* 1. Search requirements
		1. Probable Cause AND Warrant
		2. OR Exception
	2. How does the court examine?
		1. Finely tuned, case-by-case basis under totality of the circumstances OR
			1. *Olson*
			2. *Chimel*
		2. Bright lines: clear, readily administrable standards
			1. *Watson*
			2. Pre*-Chimel: Rabinowitz*
	3. Exception: Exigent circumstances
		1. Test for exigency:
			1. Imminent need AND
				1. Escape
				2. Destruction of evidence
			2. No prior opportunity to get a warrant AND
			3. No “less intrusive alternative”
				1. Example: cordoning off while warrant procured (*Olson*)
				2. *Vale*: will destroy the drugs which police have P.C. to believe are inside—choice of you come out or we go in
		2. Rationales
			1. What are the interests at stake?
				1. Would hamper effective law enforcement if warrants always required
				2. Individual privacy
				3. Sometimes a lesser intrusion on rights to search them there without warrant than to lock them up for 24 hours
				4. Worry over staleness: get a warrant and can’t find them before it expires
			2. History: what was the historical common law rule?
				1. Felony arrest historically allowed without a warrant (as long as there is P.C.)
				2. BUT felonies at the time of the framing different than today
		3. *Vale v. Louisiana:*
			1. **Facts**: Defendant was arrested on street outside his home after police witnessed what they had probable cause to believe was a drug sale.
			2. **Holding**: Unreasonable to allow warrantless search of house, even though had arrested man with warrant, because got him outside
			3. **Rationale:** An arrest on the street does not provide its own exigent circumstances so as to justify a warrantless search of arrestee’s house
		4. Is there an alternative?
			1. *Grummel* alternative: secure the premises to the extent necessary to prevent destruction of evidence until a warrant could be obtained
				1. Either ask people to leave or have officer stay there while another one gets a warrant
			2. *Segura*: It was reasonable for the police to secure the premises for 19 hours because of “administrative delay” while a search warrant was obtained.
			3. *McArthur*: officer stood outside door with owner and watched when he went back in—okay
		5. *Mincey*: seriousness of offense itself not enough to make exigent circumstances exist
		6. *Warden*: reasonable when entered house to look for many of description given and for weapons used in robbery
		7. *Minnesota v. Olson*
			1. **Facts**: looking for robbery suspect, burst into his home without a warrant or consent
			2. **Holding**: 4th amendment rights violated. Defendant, as overnight guest in upstairs duplex, had a reasonable expectation of privacy in the premises which was protected by the Fourth Amendment and, thus, had standing to challenge his warrantless arrest, and there were no exigent circumstances that justified warrantless entry to make arrest.
			3. **Rationale:** Warrantless intrusion into a house may be justified by hot pursuit of a fleeing felon or imminent destruction of evidence or need to prevent escape or risk of danger
	4. Exception: Search incident to (valid) arrest
		1. Summary of Search Incident to Arrest:

## On-person- per se automatic search (*Robinson*)

## Off-person

* + - * 1. Grabbing area (*Chimel*)
				2. Immediate adjacent area (*Buie*)
				3. Beyond adjacent area requires reasonable suspicion (*Buie*)

## Car: can search passenger area of car because items there are assumed to be in grabbing area (*Belton*, *Thornton*)

* + - 1. Limits
				1. Does not allow to look inside cigarette pack in desk drawer absent other special circumstances (otherwise would give police incentive to leave the guy unhandcuffed while they search)
				2. Substantive limit: if suspected for TV robbery, can’t look in a folder; if for insider trading, can
				3. Potential for destructible evidence
		1. *Chimel v. California*
			1. **Facts**: Police had arrest warrant for Chimel. The police proceeded to look through the entire three-bedroom house, including the attic, the garage, and a small workshop. Searched, accompanied by wife, of things not in plain sight, seized some things, admitted into evidence
			2. **Holding**: Unreasonable under 4th and 14th amendments.
			3. **What is reasonable**? Grabbing area at time of arrest.
				1. Search the person arrested in order to remove any weapons🡪 Otherwise officer’s safety would be endangered
				2. Search for and seize any evidence on the arrestee’s person🡪 Prevent concealment or destruction
				3. Can also search the “**grabbing area”** into which an arrestee might reach in order to grab a weapon or evidentiary items.
		2. *Maryland v. Buie*
			1. **Facts**: Police obtained arrest warrant for armed robbery suspect (Buie). Police went to his home and arrested him in his basement. The police went back into the basement to see if anyone else was inside and found evidence from the robbery.
			2. **Holding**: Fourth Amendment permits properly limited protective sweep (closets and other spaces “**immediately adjoining”** the place of arrest from which an attack could immediately be launched) in conjunction with in-home arrest when searching officer possesses reasonable belief based on specific and articulable facts that area to be swept harbors individual posing danger to those on arrest scene.
				1. No need for probable cause or reasonable suspicion.

## To search beyond the “immediately adjoining” area, the police need reasonable suspicion.

## *Arizona v. Hicks*

## **Facts**: Police entered premises from which shots were fired and saw suspicious stereo equipment. The police moved some of the equipment around to read the serial numbers.

## **Holding:** This was in violation of the Fourth Amendment. Outside scope of permissible search. The officer could not move television around and could only look at it without a search warrant and probable cause.

## **Rationale:** Merely looking at something in plain view is not a search, but the officer here did more.

* + 1. *US v. Robinson*
			1. **Facts**: Police pulled Robinson over for driving after revocation of his license. The officer placed Robinson under arrest and executed a **search** **on his person**. The search uncovered a cigarette pack, which the officer then opened and found capsules containing heroin.
			2. **Holding**: Full search reasonable under 4th amendment: can look inside cigarette pack
			3. **Reasoning:** danger to the officer is greater with objects he is exposed to for an extended period of time; need to disarm the suspect and to preserve evidence on his person.
			4. **Dissent**: need to examine case by case; could take cigarette pack but no reason to look inside.
		2. Limits
			1. Physical distance
			2. Substantive (criminal)
			3. Temporal: places currently grabbable
				1. *Buie*: red running suit allowed; as a precautionary matter, can look into immediately adjoining rooms from which attack could possibly be launched without probable cause or reasonable suspicion
				2. Articulable facts (step below PC): an objective reason, like suspect another perpetrator
	1. Exception: Pretext arrests
		1. Perfectly valid for Fourth Amendment concerns
		2. *Whren*
			1. **Facts**: Police officers patrolling in “high drug area” became suspicious of a certain truck. After the truck made a turn without signaling, the police pulled him over. After seeing drugs in the car, the police arrested the occupants.
			2. **Holding:** The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.
			3. **Rationale:**
				1. Constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved;
				2. Temporary detention of motorist who the police have probable cause to believe has committed civil traffic violation is consistent with Fourth Amendment's prohibition against unreasonable seizures regardless of whether “reasonable officer” would have been motivated to stop the automobile by a desire to enforce the traffic laws; and
				3. Balancing inherent in Fourth Amendment inquiry does not require court to weigh governmental and individual interests implicated in a traffic stop.
		3. *Atwater*: arrest was reasonable even though officer couldn’t give a reason
			1. **Rationale**: Fourth Amendment doesn’t require a case by case analysis
			2. Gov't interest in readily administrable rules
				1. Can't draw line on penalty; officer on street might not know
				2. Administrability
				3. Very few minor arrests anyways, not enough to justify a new body of constitutional law
		4. *Mota:* search was incident to a custodial arrest and that federal courts had to determine the reasonableness of the arrest in reference to state law governing the arrest. The court found that Cal. Penal Code § 853.5 (1985) did not allow officers to take defendants into custody for an infraction. The court concluded that a custodial arrest for an infraction was unreasonable, and thus unlawful, under U.S. Const. amend. IV. Because the custodial arrest was invalid, the court held that the evidence should have been suppressed.
		5. *Moore*: can make an Atwater arrest on probable cause even if state law prohibits; the constitutionality has a meaning that cannot be altered by state law
	2. Exception: Automobile searches incident to arrest
		1. *New York v. Belton*
			1. **Facts:** Police pull car over. Officer smells marijuana and has the suspects get out. Officer takes jacket out of backseat, unzips the pocket and finds drugs.
			2. **Holding:**  When a policeman makes a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to that arrest, search the passenger compartment of that automobile. Can also search containers in that area. Rejects temporal limitation on car grabbing area. (Opposite of Chimel)
			3. **Rationale:** Want to have bright-line rule that stuff inside the car is inside the grabbing area (not trunk though). Don’t want to have case by case adjudication of details.
		2. *Knowles*

## **Facts**: Knowles was pulled over for speeding and issued a **citation** (not arrested). The police searched the car and found marijuana.

## **Holding**: Unconstitutional. No arrest like in *Belton* or *Thornton*, so no need to protect the officer or preserve evidence.

* + - 1. **Rationale**: Threat to officer safety from issuing a traffic citation less than in custodial arrest; no need to discover and preserve evidence and officer not exposed to danger for an extended period of time.
		1. *Thornton*
			1. **Facts**: Suspect pulls into parking lot and gets out of car. Police arrest him, handcuff him, and put him backseat of police car. The police go on to search his car.
			2. **Holding**: So long as arrestee was a recent occupant of vehicle, officers may search that vehicle incident to arrest
			3. **Rationale:** the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. The officer should not be punished for playing it safe and waiting for a suspect to exit his car before arresting him.
		2. *Arizona v. Gant*
			1. **Facts**: After Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat.
			2. **Holding**: If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception to the warrant requirement, namely protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy, are absent, and the exception does not apply. The search-incident-to-arrest exception to the Fourth Amendment's warrant requirement did not justify the search because
				1. Police could not reasonably have believed that respondent could have accessed his car at the time of the search since the five officers outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched respondent's car, and
				2. Police could not reasonably have believed that evidence of the offense for which respondent was arrested might have been found in the car since he was arrested for driving with a suspended license, an offense for which police could not expect to find evidence in the passenger compartment of his car.
			3. **Legacy**
				1. Overrules *Belton*: no longer a separate category for cars in S.I.A area
				2. *Belton* still exists where grabbable in car and reasonable suspicion (if being arrested for an offense where the evidence could be in the car) (if traffic offense, no)
				3. Does not apply to trunk
				4. Police may search the passenger compartment of a vehicle incident to a recent occupant’s arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.
	1. *Exception*: automobile searches not incident to arrest
		1. Rationale
			1. Originally based on mobility, then to lower expectation of privacy
			2. Regulations, inspections, pervasive regulation
			3. In and out of public sphere
		2. *Carney*
			1. **Facts**: Police search mobile home after observing Carney selling marijuana out of it (but discussion is of cars in general).
			2. **Holding**: search was reasonable under the “automobile exception” to general warrant requirement.
			3. **Rationale**: Twofold:
				1. Cars are “readily mobile” and can be quickly moved out of the jurisdiction before evidence can be obtained.
				2. Lower expectation of privacy with respect to one’s automobile as a result of the pervasive regulation of automobiles capable of traveling on public highways.
			4. Extends Belton and Gant to mobile homes as well as cars; scope of the search to the entire vehicle, not just passenger area (ready mobility)
				1. Locked car trunk
				2. A sealed package in a car trunk
				3. A closed compartment under the dashboard
				4. The interior of a vehicle’s upholstery
				5. Sealed packages inside a covered pickup truck
		3. *California v. Acevedo*
			1. **Facts**: D picked up a package the police knew contained marijuana and took it to his apartment. He walked out to his car with a brown paper bag about the size of the package, placed bag in trunk of car and drove off; the police then stopped him, opened the trunk and bag, searched the bag and found the marijuana.
			2. **Issue**: Does the 4th amendment require police to obtain a warrant to open a sack in a movable vehicle because they lack probable cause to search the whole car?
			3. **Holding**: If there is probable cause to search for contraband in an automobile, the police can search all containers found in the automobile. The same probable cause to believe that a container held drugs allowed the police to arrest the person transporting the container and search it. The Fourth Amendment did not compel separate treatment for an automobile search that extended only to a container within the vehicle.
			4. **Rationale**: History of heightened privacy expectation of personal luggage

## *US v. Chadwick*:

## **Facts**: Arrested on informant tip with footlocker believed to contain narcotics, under exclusive control of FBI agents when they opened it.

## **Holding**: Unreasonable for Government to conduct search of footlocker without the safeguards that a judicial warrant provides, even where agents lawfully seized the footlocker at the time of the arrest of its owners and there was probable cause to believe that it contained contraband.

## **Rationale**: By placing personal effects inside a double-locked footlocker, defendants manifested an expectation that the contents would remain free from public examination, no less than one who locks the doors of his home against intrusion, and there being no exigency, unreasonable. Warrantless search of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest or if no exigency exists.

* + - 1. **BUT**: *Acevedo*: once luggage touches a car, it is fair game
		1. *Wyoming v. Houghton*
			1. **Holding**: police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search. Items in automobile not distinguished by ownership
		2. *Colorado v. Bertine*
			1. **Holding**: Routine inventory searches not subject to warrant requirement
			2. **Rationale:** Deference to police caretaking procedures designed to protect and secure vehicles in police custody
		3. *People v. Diaz* (CA Sup. Ct.)
			1. **Holding**: stored data in text message folder of cell phone was proper subject of search incident to arrest.

## Stop and Frisk

* 1. Summary

## Was there a stop? (did individual feel free to not cooperate)

## Was there basis for the stop? (founded suspicion)

## Was the scope of the stop permissible? (duration and intrusiveness)

## Was there a frisk?

## Was there basis for the frisk? (armed and dangerous)

## Was the scope of the frisk permissible? (pat down for weapons)

* 1. Intrusions short of “arrest” or “search”
		1. *Terry*
			1. **Facts**: Detective observed three men repeatedly looking into a store, walking away, then coming back. The detective believed the men to be casing a store for a robbery and that they might be armed. Detective approached the men, identified himself and asked for their names. He then spun Terry around and patted his breast pocket and found a pistol. He found a pistol on the second but not the third man.
			2. **Question**: is it always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest?
			3. **Holding:** search permissible without PC
				1. Stop equivalent to a seizure, so must be reasonable
			4. **Rationale:** the Fourth Amendment does not prohibit the police from stopping a person for questioning when the police have a **reasonable suspicion** that an individual may be armed and dangerous, even when that suspicion does not amount to probable cause necessary to arrest the individual for a crime. Safety issues (like a protective sweep); officer’s duty to intervene.
			5. **Test:** Dual inquiry:
				1. Was the officer's action justified at its inception?
				2. Was it reasonably related in scope to the circumstances which justified the interference? Carefully limited search of the outer clothing in an attempt to discover weapons which might be used against the officer?
				3. Not probable cause standard, but unreasonable (constitutional) standard
				4. Government interest justifying intrusion: Would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the action taken was appropriate?
		2. *Florida v. Bostick*
			1. **Facts**: Police boarded a bus right before it was to depart and asked Bostick, admittedly without any suspicion, for his identification and if they could search his bag.
			2. **Holding**: No seizure occurs when police ask questions of an individual so long as the officers do not convey a message that compliance with their requests is required. Refusal to cooperate without more does not justify the minimal level of objective justification needed for a detention or seizure
			3. **Test**: Would a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter?
			4. **Dissent**: person not advised of his rights does not know this
				1. Technically free to leave; practically not free to leave
		3. *US v. Drayton*
			1. **Facts**: Like Bostick, but with pat-down; three policemen boarded a bus, and one of them asked Brown and Drayton if he could search their bags and person. They both agreed and the subsequent search revealed cocaine taped to their legs.
			2. **Holding:** No seizure.
			3. **Rationale:** no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. Passengers "could have left bus"
		4. *CA v. Hodari*
			1. **Facts**: Hodari fled upon seeing an approaching police car, only to be pursued by police on foot, after which Hodari tossed away crack cocaine.
			2. **Issue**: Does a seizure occur if the suspect does not yield, if there has been a "show of authority?
			3. **Holding**: No seizure unless there is a **physical laying on of hands** or application of physical force to restrain movement or, where that is absent, **submission** to the assertion of authority. A police pursuit in attempting to seize a person does not amount to a “seizure” within the meaning of the Fourth Amendment.
		5. *Brendlin v. CA*: would a reasonable person in the passenger's position in the car have believed himself free to terminate the encounter between the police and himself? No passenger would feel free to leave.
		6. Factors to consider

## The threatening presence of several officers

## The display of a weapon

## Physical touching by the officer

## Language or tone indicating that compliance is compulsory

## Prolonged retention of a person’s personal effects

## A request by the officer to accompany him to the police station or a police room

* 1. Required basis for a stop: Grounds for temporary seizure for investigation
		1. *US v. Cortez* test for reasonable suspicion (required for forcible stop):
			1. Must be based upon the totality of circumstances (a series of innocent acts can add up to a reasonable suspicion)

## Must be objectively describable evidence, not just subjective hunches

## The assessment must raise particular or individualized suspicion that the person being stopped is engaged in wrongdoing.

* + 1. Forcible stop:
			1. Physical force OR
			2. Show of authority
			3. Example: Touching an elbow equals a stop
		2. *Sibron v. NY*
			1. **Facts**: Police officer observed Sibron continually from 4pm-12am and during that time saw Sibron in conversation with six or eight persons the officer knew to be drug addicts. However, the officer could not hear what they were saying and did not see anything pass between Sibron and the other men. The officer nonetheless approached Sibron, told him to come outside, thrust his hand in Sibron’s pocket and pulled out heroin.
			2. **Holding**: No grounds for a stop
				1. Conversations with addicts not enough; could not hear or see anything passed
				2. Not a reasonable inference to support intrusion of privacy: The inference that persons who talk to narcotics addicts are engaged in the criminal traffic of narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual’s personal security.
			3. **Concurrence**: Not like Terry in that a violent crime might be about to be committed
				1. Assess need for immediate action
		3. *Florida v. JL*
			1. **Facts**: Police received an anonymous tip that a young black male was standing at bus stop with plaid shirt and carrying a gun.
			2. **Holding:** an anonymous tip alone not enough to show basis of knowledge or veracity and justify a stop and frisk.
			3. **Rationale:** There were no indicia of reliability along with the anonymous tip. There was no predictive information that the police could have used to test the informant’s credibility.
				1. If corroborated, can show indicia of reliability
				2. Has to be reliable in its assertion of ILLEGALITY, not just identification
			4. **Exception**: Places where privacy expectation is diminished, like airports and schools
		4. *US v. Sokolow*: matched profile of drug courier
			1. Amounted to reasonable suspicion, enough
		5. *Illinois v. Wardlow*:
			1. **Holding**: being in an area known for heavy drug trafficking and unprovoked flight (not a mere refusal to cooperate) from the police is enough to justify a stop and frisk.
			2. **Rationale**: For a totality of the circumstances analysis, a suspicious location can be one circumstance with other circumstances to raise suspicion that person committing a crime
			3. **Concurrence**: totality of the circumstances must always dictate the result
	1. Permissible extent of a stop
		1. The stop needs to be limited in scope by “time”, “duration”, or “length” and “intrusiveness”, each taking into account the offense reasonably suspected.
		2. *US v. Royer*
			1. **Holding**: Because defendant was being illegally detained when he consented to the search of his luggage, the consent was ineffective to justify the search.
			2. **Rationale**: Once you move a suspect to another location, it is more intrusive and more like an arrest instead of a *Terry* stop.
		3. *Hiibel v. 6th*
			1. State law can impose a requirement that a suspect ID himself without violating the 4th amendment
		4. *Illinois v. Caballes*:
			1. **Facts**: D travelling 6 mph over speed limit, stopped, used dog sniff.
			2. **Issue**: did use of drug dog enlarged traffic stop into drug investigation?
			3. **Holding**: sniff would only change character of traffic stop if infringed on respondent's constitutionally protected privacy, hold it did not
			4. Up until then, had to be reasonably related to the scope of the stop
		5. *Ohio v. Robinette*: Subjective intentions of officer did not make continued detention illegal under 4th
		6. *US v. Place*: Temporary seizure of effects
			1. **Issue**: is there a time limit for Terry stops?
			2. **Holding**: Unclear. The Court refuses to adopt a specific time limit for *Terry* stops, but noted that “we have never approved a seizure of the person for the prolonged 90-minute period involved here…”.
		7. *Dunaway v. NY*:
			1. **Facts**: The police located petitioner and took him into custody. Although he was not told he was under arrest, he would have been restrained if he had attempted to leave. He was taken to the police headquarters, and questioned after being given Miranda warnings. Petitioner waived his right to counsel and made incriminating statements.
			2. **Holding:** Detention for custodial interrogation intruded on the interests protected by the Fourth and Fourteenth Amendment of the constitution and held that the police violated the constitution when, without probable cause, they seized petitioner for interrogation. While proper Miranda warnings were given and petitioner's statements were "voluntary" for purposes of the Fifth Amendment, they were inadmissible since no intervening events broke the connection between petitioner's illegal detention and his confession.
	2. Basis and permissible extent of a frisk
		1. Frisk: officer must be able to point to specific facts from which he inferred individual armed and dangerous
			1. Limit: once determine not a weapon/no threat, can't go further under Terry
			2. Use of race: just because blacks commit more crimes than whites doesn't mean that most blacks commit crimes
		2. *Adams v. Williams*
			1. **Facts:** officer told by informant suspect had a gun
			2. **Holding:** ample reason to fear for his own safety🡪justified.
		3. *Brown v. City of Oneonta*
			1. Race in investigation of crimes?
			2. If in description, okay to use: no EQP violation
			3. Certain individuals can still proceed with claims under 4th
			4. Not questioned solely based on race but the legitimate description given by the victim of the crime
			5. Need discriminatory intent
			6. The ones who were "seized" can have their cases go forward
		4. *Davies*
			1. How far can gov't go in preventing FUTURE attacks
	3. Profiling
		1. *Brown v. City of Oneonta* (2d Cir. 2000)

## **Facts**: Someone broke into a house and attacked an old woman. She told the police that the assailant was a young black man who, as they struggled, cut himself on the hand. A police canine unit tracked the assailant’s scent to the SUCO campus. The police attempted to locate and question every black male student at SUCO. Once this failed to produce a suspect, they conducted a “sweep” of Oneonta, stopping and questioning every non-white person on the streets and inspecting their hands for cuts. The police stopped over 200 black residents.

## **Holding:** Not violation of Equal Protection Clause because they were not stopped solely on their race, but based on the victim’s description.

* + 1. On an individual basis: “But-for” causation: but for the use of race, the target would have been treated differently
		2. Department of Justice, Policy Guidance Regarding Racial Profiling

## In June 2003, the Department of Justice offered its view on the proper consideration of race in law enforcement.

## The guidelines state that in “traditional law enforcement activities,” race cannot be considered in a traffic stop or other investigatory activity unless there is a specific victim description.

## Even “national security and border integrity” activities are limited by the Constitution. This means that people can be signaled out by race for heightened scrutiny only if there is a specific threat or intelligence.

* + 1. Pros
			1. Victim descriptions: narrows down who to search for But hard to separate from profiling), efficiency
		2. Cons
			1. Not efficient in profiling
			2. Externalities
			3. Moral objections
			4. Squelching individuality
			5. Stereotyping (bad when inaccurate)
			6. Predictive generalizations
			7. Racial skewing
		3. How to get around
			1. Generalities
			2. Condemn race as a predictive judgment (except okay not to do this at borders)
			3. Weigh efficiency concerns with cost-benefit concerns
			4. Moral principle: nothing intrinsically problematic with making predictive generalizations in race, but in law enforcement setting, tends to turn stigmatizing and subordinating
			5. Costs can be ignored because they are externalized onto the suspects (can’t get into a cab on a rainy night); losing the trust and cooperation of the community—when find policies fair, more likely to work with and alert the police

## Consent

## Consent searches are frequently relied upon by the police because they involve no time-consuming paper work and offer an opportunity to search even when probable cause is lacking.

* 1. Question is if “voluntary” consent is fruit of earlier misstep
		1. As defense counsel, argue consent was involuntary, though it can be voluntary even with detention (*Schneckloth*)
	2. *Schneckloth v. Bustamonte*
		1. **Facts**: stopped car in the middle of the night with lights out. Passenger claiming to be the vehicle owner’s brother consented to a search of the car. Driver helped in the search by opening the trunk and glove compartment. Stolen checks were found leading to passenger Bustamonte being arrested.
		2. **Question:** What must state prove to demonstrate consent voluntarily given?
		3. **Test:** Totality of the circumstances (Designed to be done in the courtroom-impossible on the streets)
			1. Search may result in LESS inconvenience later for searchee, and properly conducted is constitutionally permissible
			2. But consent cannot be coerced
			3. To establish waiver (Johnson): state must demonstrate an intentional relinquishment or abandonment of a known right or privilege
		4. **Holding**: when the subject of a search is not in custody and the state attempts to justify a search on the basis of his consent, the 4th and 14th amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied
			1. Voluntariness a question of fact from the circumstances

## Knowledge of right to refuse is a factor to be taken into account, but the prosecution *does not* have to prove the defendant knew he had a right to refuse as a prerequisite to establishing voluntary consent.

* 1. Some jx’s focus on state of mind of consenter, some on state of mind of officer
		1. Fails if judicially determined he lacks mental capacity
	2. Why would people consent if they know they have something illegal in the car?
		1. Think they have to
		2. Think they would suffer adverse consequences if they don’t
		3. Consent under both of these is involuntary
		4. But, hard to show involuntary without an express threat
		5. Don’t even have to give notice that they don’t have to consent (would “destroy informality”
	3. *Jimeno*: if consent to search car, containers inside included, but nature of container (locked briefcase?) also important
	4. Third party consent
		1. How to determine?
			1. Assume the risk by allowing this person access to the possession?
			2. But what if without consent? Assumption of the risk drops out.
			3. Apparent authority can sometimes be enough
			4. Sometimes even if no assumed risk, the consent of the other is binding (apparent authority is sufficient)
			5. Real question: did the police do something unreasonable—if intrusion is reasonable, it will be okay
		2. *Illinois v. Rodriguez*
			1. **Facts:** Woman who called it "our" apartment unlocked doors and gave officers permission to enter, drug paraphernalia in plain view. Motion to suppress on basis woman had no authority to grant permission--no common authority: took key, not on lease, had moved out
			2. **Test**: Common authority rests on mutual use of the property by persons generally having joint access or control for most purposes
				1. Can bypass reasonableness with consent/consent of cotenant
			3. **Gov’t**: defendant's former roommate still retained control over defendant's apartment and, therefore, had common authority over the premises to consent to the police search. Even if the roommate lacked control or authority, the search and seizure was still proper under the Fourth Amendment because the police reasonably believed that she had authority to consent.
			4. **Defendant**: Permitting a reasonable belief of common authority would cause his Fourth Amendment rights to be "vicariously waived."
			5. **Holding**: "common authority" rested on mutual use of the property and that there was sufficient proof in the record that the State failed to satisfy its burden that defendant's former roommate had joint access or control over the apartment. The officers' reasonable belief that the roommate had common authority over the apartment could have validated the search, but the lower courts failed to render a decision on the issue.
		3. *Randolph*: if wife gives consent and husband is there and refuses to consent, no consent
		4. *Gonzalez-Valle:* If spite, no consent
			1. Police on notice person not acting with authority
			2. But, if wife takes husband’s drugs to police station, okay
		5. Employee can consent for manager if acting as agent for principal
			1. Again, exception for spite
			2. Derivative authority (different than husband-wife which is equal, actual authority)
		6. *Duran:* Can give consent for a place she doesn’t use if apparent authority
			1. Outbuilding wife didn’t use
			2. Limits: his closet and her closet; locked drawer she has no key to
		7. *Fraizer v. Cupp*
			1. **Facts**: Shared gym bag police should not be expected to know where the line is drawn
			2. **Holding**: Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. In allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside.
		8. *Stoner*: Hotel clerk cannot give consent to search a hotel room
		9. Bailer-bailee: limited by custom and law to certain boundaries
			1. When turned over to a third party, no reasonable expectation of privacy, no consent necessary, and not a search (like the garbage bag case)
			2. But yes with suit to dry cleaner—access for specific, narrow purpose, and police should recognize this

## Administrative Searches

* 1. Exceptions to probable cause
		1. Individualized suspicion (*Terry*)
		2. Search/seizure conducted pursuant to some neutral criteria guarding against arbitrary selection of those subjected to the procedures

## Whenever departure from the usual warrant and/or probable cause requirements is claimed on the basis of some “special need”, it is necessary that this need be sufficiently different from the state’s ordinary law enforcement interest.

* 1. Two prong balancing test:
		1. Is there a special need distinct from ordinary law enforcement? If not, no balancing—automatically unconstitutional
			1. Immanency exception
		2. If yes, balance the special government need with the privacy intrusion
	2. Reasons for allowing administrative searches
		1. Less “scary” than if a cop searching? No, could use as pretext
		2. Not going to use fruits in criminal prosecution? No, as long as the search is valid, can use the fruits (*Sitz*)
	3. What qualifies as an administrative search?

## Safety inspections (*Camara*)

## Border searches

## Vehicle checkpoints for illegal immigrants (*Martinez-Fuerte*)

## Vehicle checkpoints for drunk drivers (*Sitz*)

## Search of students in school (*T.L.O.*)

## Supervision of parolees and probationers

## Drug testing (Von Raab, Skinner, Vernonia, Earls)

## Other “special needs”

* 1. *Camara v. Municipal Court*
		1. **Facts:** A city ordinance gave city building inspectors the right to enter any building at reasonable times in furtherance of their code enforcement duties.
		2. **Holding**: the administrative search was not peripheral to the occupant's Fourth Amendment interests because a criminal prosecution could and did result from his refusal to submit. Probable cause would still be required for issuance of a warrant for an administrative search, but the standard was lower than for issuance of a warrant in criminal cases. The standard would be met by a reasonableness showing, in light of the reasonable goals of code enforcement.
		3. Can’t have general reasonable suspicion: has to be individualized
	2. *State v. Olsen*
		1. Defendant challenged his convictions for possession of narcotics. Defendant argued that the warrantless search of the premises to determine the cause of the fire was unreasonable and was a pretext for the narcotics investigation.
		2. **Holding:** the officials remained at defendant's home for a reasonable amount of time to investigate the fire because the investigation was necessary for public safety to help prevent the recurrence of the fire. The prompt, warrantless investigation into the origin of the fire was reasonable and justified since the firefighters saw and smelled various chemicals while putting out the fire. The court concluded that the warrantless fire investigation was valid and was not a pretext for a criminal search. Although the warrantless narcotic investigation was not justified and was illegal, the evidence gathered was cumulative and the trial court did not err when it refused to exclude the evidence.
	3. *MacWade v. Kelly*
		1. **Facts**: suspicionlesss container searches implemented on the New York City subway system in order to safeguard against a terrorist attack.

## **Special Needs Doctrine**:

* + - 1. **First**, as a threshold matter, the search must “serve as its immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation”.
			2. **Second**, the court determines whether the search is reasonable by balancing several competing considerations including (1) the weight and immediacy of the government interest, (2) the nature of the privacy interest allegedly compromised by the search, (3) the character of the intrusion imposed by the search, and (4) the efficacy of the search in advancing the government interest.
		1. **Holding**: the special needs doctrine may apply even where, as here, the subject of a search possesses a full privacy expectation.

## **Rationale:** The court held that this program satisfies the special needs exception to the Fourth Amendment’s usual requirement of individualized suspicion because (1) preventing a terrorist attack in the subway is a special need; (2) that need is weighty; (3) the program is a reasonably effective deterrent; and (4) even though the searches intrude on a full privacy interest, they do so to a minimal degree.

* 1. *Chandler v. Miller*

## **Facts:** Georgia requires candidates for designated state offices to certify that they have taken a drug test and that result was negative.

## **Test:** A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. But there are exceptions based on “special needs, beyond the normal need for law enforcement”.

* + - 1. Courts must undertake a context-specific inquiry, examining the private and public interests advanced by the parties.
			2. Where the privacy interest implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by requiring individualized suspicion, a search may be reasonable despite absence of such suspicion.

## **Holding**: Unreasonable.

## The Court held that the drug testing requirement in the Georgia statute were nonintrusive.

* + - * 1. The candidate could provide the specimen in the office of his or her physician.
				2. The test results were first given to the candidate, who controls further dissemination.

## However, the Court held that there was no important governmental interest.

* + - * 1. No fear or suspicion of drug use by state officials
				2. No real threat to public safety
				3. Candidates already subject to daily scrutiny, which enables citizens to detect any drug use on their part

## *Nat’l Treasury Employees Union v. Von Raab* (1989)

## **Holding:** the Court upheld a Customs Service policy of requiring drug testing for positions directly involving drug interdiction or requiring the employee to carry a firearm. There is a “compelling” interest in making sure these employees are not illicit drug users.

## *Vernonia School District 47J v. Acton* (1995)- the Court upheld random drug-testing program for high school athletes. High school students have lesser expectation of privacy and the state has a significant interest in deterring drug use by schoolchildren.

## *Bd. Of Education v. Earls* (2002)- extends *Vernonia* to the drug testing of students wishing to participate in nonathletic extracurricular activities.

* 1. *Clifford*: burning building creates exigent circumstances to enter and remain for a reasonable amount of time after, but to enter again later, need administrative warrant
	2. *Ramsey*: inspecting mail entering country allowed (limit: reading correspondence)
		1. Does not carry over to vehicles entering the country--no requirement of some higher level of suspicion in highly intrusive searches
	3. *TLO*: school officials don't need a warrant to search student on their property if reasonable grounds for suspicion (balance child's expectations of privacy and schools' legitimate need to maintain learning environment)
	4. *City of Indianapolis v. Edmond* (2000)

## The Court held that a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics was unreasonable.

## “We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”

## In *Martinez-Fuerte* and *Sitz* the Court held that suspicionless stops at highway checkpoints for the purposes of intercepting illegal immigrants and combating drunk driving and were reasonable, because these programs were designed primarily to deal with the problems of policing the border and the necessity of ensuring roadway safety

* 1. Vehicle checkpoints
		1. *Almeida-Sanchez*: probable cause
		2. *Ortiz:* even at a permanent checkpoint away from the border, search for aliens not permissible absent probable cause
		3. *Martinez-Fuente*: no individualized suspicion to briefly question vehicle occupants near border for illegal immigrant status
			1. Less intrusion if fixed checkpoint
			2. Less discretion
		4. *Prouse*: may not stop individual vehicles just to check license and registration without reasonable suspicion
			1. Need reasonable suspicion (government interest almost trivial—seeing if license up to date)
			2. Intrusion versus promotion of legitimate gov’t interests
		5. *Sitz*: sobriety checkpoint program upheld
		6. *Gilmore*: upheld terrorist checkpoints; need ID to enter airport, baggage screening, some passengers subjected to more questions
		7. *Edmund*: narcotics (impermissible)
	2. Home/Office
		1. *Camara*: fire safety
		2. *Burger*: auto offices
		3. *Hicks*: turntable
	3. Urinalysis
		1. *Von Rabb*: customs agents
		2. *Chandler:* high office candidates
			1. Bodily fluids protected by the 4th amendment
		3. *Ferguson*: blood testing/urinalysis of pregnant women at the hospital already
			1. Not for criminal prosecution, but prevention of neonatal problems
			2. Impermissible
		4. *Veronia*: High school athletes (permissible)
		5. *Earls*: HS pom-pom and honors (permissible)
	4. Other school
		1. *TLO*: student search based on reasonable suspicion
			1. Even though based on discretion, can still be permissible
		2. *Safford*: HS girl for drugs (reasonable suspicion) (impermissible)
	5. How to tell if permissible or not?
		1. If it is a very reduced privacy interest and the government need is high, will pass muster
		2. But some don’t fit this
			1. *Ferguson*: interest in the health of babies not enough/have to test for other things anyway
			2. *Earls*: high intrusion and gov’t interest low, but passes
		3. Is the purpose of the program law enforcement or other?
		4. Isn’t the 4th amendment supposed to provide a sheltered space for people to go about their business without government intrusion?
			1. Evenhandedness not enough to shield from 4th amendment concerns
		5. Routine and automatic—so less concern about LE discretion we might otherwise have?
			1. BUT *Earls*: picking a discreet community
	6. What doesn’t play a role?
		1. Government need
		2. Discretion or lack of it
		3. Law enforcement conducting the search or not
		4. Fruits of search used for prosecution
	7. What is playing a role
		1. Scariness
		2. Stigmatization
		3. Potential for abuse

|  |  |
| --- | --- |
| Probable Cause AND Warrant OR | Search Incident to arrest |
|  | **Out of Car: “least intrusive alternative”** | **In car** |
|  | **On person** | **Off person** |  |  |
|  | Bright line | Grabbing area | Belton |  |
|  |  | Beyond Grabbing Area | Gant (purse) |  |
|  |  | Immediately adjoining area/beyond |  |  |

# Surveillance (wiretapping, eavesdropping, secret agents)

## Informants

## Overview: No reasonable expectation of privacy in these scenarios, which led the Court to determine that secret agents do not threaten privacy enough to merit Fourth Amendment limitation. No warrant or court order is needed.

* + 1. Informant can testify and record
		2. Not reasonable to assume the people you are talking to won’t betray you.

## *Hoffa v. US*:

## **Holding**: however strongly a defendant may trust an apparent colleague, his expectations are not protected by the Fourth Amendment when it turns out that the colleague is a government agent communicating with authorities.

* + 1. **Rationale**: 4th amendment protects hotel rooms and verbal statements, but here, not relying on security of the room, but that Partin would not betray his confidence. The 4th amendment does not protect misplaced belief confidante will not reveal his wrongdoing.
		2. **Dissent**: in this case, incentives and background of Partin rendered him suspicious, and present in places (attorney-client meetings) that he should not have been; bugging device that followed Hoffa
	1. Hoffa affirmed in *US v. White*
		1. **Holding:** wearing a wire (either recording or a wire) doesn't make agent's conduct a 4th amendment search (no different than agent without a wire)
		2. **Dissent**: should employ balancing; more intrusive the method, more self restraint by officers necessary/warrants
	2. *US v. Longoria*
		1. Does speaking in a language the informant doesn't understand violate reasonable expectations of privacy?
		2. No--might have concealed Spanish knowledge as he concealed recording equipment
	3. *US v. Mayer*: investigation threatening 1st amendment rights is permitted when justified by a legitimate law enforcement purpose that outweighs any harm to 1st amendment interests
		1. **Holding:** FBI undercover investigation did not violate defendant's First Amendment right of association as a member of organization that opposed sexual age-of-consent laws.
	4. *Gouled* v. US: there is a limit to scope of consent; can't enter legitimately but steal docs while person temporarily out of the room
1. Wiretapping: enforced by Title III (wire interception statute)
	1. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress adopted legislation granting law enforcement officials extensive powers to conduct wiretapping and electronic surveillance.
	2. As amended in 1986 by the ECPA, Title III prohibits the “interception” of “wire, oral or electronic communications” unless such interception is authorized by the statute. This covers e-mail, cell phone communications, other modern communication techniques, as well as electronic storage and processing of information.
	3. Except for emergencies (threat to national security), no electronic surveillance is permitted without a properly authorized application.
	4. Each application must be in writing and under oath and include a “full and complete” statement of the circumstances justifying the belief that an order should be issued, including:
		1. details as to the particular offense
		2. a particular description of the communication facility
		3. a particular description of the “type of communication” sought to be intercepted
		4. “the identity of the person, if known, committing the offense, and whose conversation is to be intercepted”
	5. Basically, “there must be probable cause to believe that a particular person involved in a designated crime will have discussion pertinent to that crime using a particular phone (or at a particular place) during a specified time period”.
	6. Under Title III, surveillance “must terminate upon attainment of the authorized objective, or in any event in thirty days” and notice must be given to the person under surveillance within 90 days of termination.
	7. What is covered:
		1. Not admissible to intercept cell phone call in public of suspected drug dealer without an informant
		2. But, if no real expectation of privacy, not an oral communication under the statute
		3. Email not a wire communication under the statute, but could be an e-communication; not prohibited to tap
		4. Under this, videotapes without soundtracks become admissible
			1. Live feed versus going back to retrieve tape; live feed unclear
			2. Constitutional? If no warrant, violation of 4th, with warrant, as long as described with particularity, okay
		5. Entering the house without knocking to place the camera?
			1. Violation of 4th unless fits exception
			2. Once permissible electronic surveillance, covert entry becomes necessary, though problematic
			3. Covert entry implicitly authorized by the statute
	8. *US v. Turk*
		1. Used tape found in car when lawfully arresting someone else's that recorded him making statements, later used to perjure him
		2. Interception under Title III, but not impermissible (exempted when one party is himself the interceptor)
		3. No new and distinct interception occurs when the contents of a communication are revealed through replaying of a previous recording, so seizure and replaying by officers not an aural acquisition
2. Other Statutory Privacy Laws

## Federal Wiretap Act: strict requirements to bug/tap, but can do if have PC and satisfy other requirements

## Electronic Communications and Privacy Act to extend to the internet/stored communications

## Patriot Act

## Regulates content and non-content information

# Counter-terrorism

1. FISA v. Title III

## FISA is the statute which establishes a legal regime for “foreign intelligence” electronic surveillance separate from ordinary domestic law enforcement electronic surveillance which is covered under Title III.

## FISA is aimed at regulating the collection of “foreign intelligence” information in furtherance of U.S. counterintelligence, whether or not any laws were or will be broken.

## Under FISA, surveillance is generally permitted based on a finding of probable cause that the surveillance target is a “foreign power” or an “agent of a foreign power”, not like in traditional law enforcement surveillance which requires probable cause that a crime is or will be committed.

## A “foreign power” under FISA is not limited to a terrorist group or a hostile foreign government, but is defined broadly to include any “foreign-based political organization not substantially comprised of U.S. persons”.

## The definition of foreign agent, if it pertains to a U.S. person, is more closely tied to criminal activity. It requires that the U.S. person knowingly engages in clandestine intelligence gathering activity or knowingly engages in sabotage or international terrorism.

## FISA proceedings are secret and only the government presents its side.

## Surveillance can be up to one year for foreign governments and 90 days for their agents.

## No notice needs to be provided until prosecution is initiated.

## So even if foreign, if just looking for drugs, not covered

## But foreign political organizations don’t have to be doing anything criminally illegal to be monitored

## Newest amendments: can use FISA even where primary purposes is criminal prosecution (but then might no longer be an administrative search)

## *Mayfield:* Was there probable cause to believe Mayfield committed a crime?

* + 1. Religion as playing a role in probable cause?
		2. Lack of post-action scrutiny—less incentive for FBI to be careful
		3. FISA is unconstitutional
1. Why FISA instead of Title III?
	1. No notice needs to be given
	2. No remedies
	3. Time difference for warrant
	4. FISA court is secret (but ordinary court basically secret too?)
	5. Suppression hearing almost impossible under FISA
	6. Blows a hole in the oversight system
	7. *US v. US District Court (Keith)*
		1. 4th amendment governs, but leaves open foreign exception
		2. US citizen surveyed electronically, 4th amendment governs. Three prongs:
			1. Courts do have the knowledge
			2. Secrecy not necessary
			3. Gov't burden not so great it outweighs constitutional value (balancing of interests)
	8. Gov't got around the statute's issue because of Title III's exception--President has authority to survey nationally
	9. Title III does not govern, 4th amendment does
	10. Lower standard: something that looks
	11. \*\*\*Is the FISA court the neutral and detached magistrate?\*\*\*
	12. Warrant requirement is different, does that mean the magistrate is different?
	13. US person on US soil, 4th governs
2. TSP
	1. Shortly after the attacks of 9/11, the President authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations without warrants.
	2. Does an administrative search always require randomness, discretion, and suspicion?
	3. Justification: inherent executive power (not exclusive though)
		1. 4th amendment limits what the president can do
		2. Must be special needs distinct from law enforcement
	4. DOJ position
		1. Special need: Primary purpose preventing another terrorist attack
	5. Test:
		1. Threshold: to qualify without PC and a warrant, must be that primary purpose is not criminal
		2. Balance: is it reasonable? Balance nature of intrusion with government need.
	6. Challenges to reasonableness:
		1. Is there a lesser intrusive alternative (LIA)?
		2. *Keith*: why can’t you just get prior approval of a judge (Constitution)?
		3. Doctrine: is it really the primary purpose, and even so, given LIA and privacy interests, is it reasonable?
		4. *Veronia*: in a school setting
3. FISA
	1. Lacks Title III’s safeguards
	2. Can FISA be upheld as an administrative search?
		1. Post-PATRIOT Act, just have to show that foreign intel significant purpose, not primary purpose
4. *US v. Duggan*
	1. **Holding:** FISA is constitutional.
	2. **Rationale**: procedures for applying for surveillance under Foreign Intelligence Surveillance Act adequately balanced defendants' Fourth Amendment rights against national security needs; (2) court's involvement in procedure for application for surveillance did not violate separation-of-powers doctrine; (3) Foreign Intelligence Surveillance Act's different treatment of United States persons from non-United States persons did not violate equal protection; (4) requirements of provisions of the Foreign Intelligence Surveillance Act were met.
	3. Moreover, an otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as evidence in a criminal trial.
5. *In re: Sealed Case*
	1. **Facts:** The PATRIOT Act amended FISA to require that gathering foreign intelligence only be a significant purpose. That means another purpose can be primary. One other legitimate purpose that could exist is to prosecute a target for a foreign intelligence crime.
	2. **Holding:** So long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution, it satisfies the significant purpose test. However, the FISA process cannot be used as a device to investigate wholly unrelated ordinary (non-foreign intelligence) crimes.
	3. **Rationale**: Before 2001, the Office of Intelligence Policy and Review (OIPR) was supposed to make sure the criminal division didn’t see what the intelligence people were looking at. But this came under fire for creating a “wall” between law enforcement and counterterrorism, leaving our government unable to connect the dots leading to 9/11. For terrorism, it makes sense for that wall to be more porous and allow criminal prosecutions based off of the fruits of FISA surveillance.
6. Civil Liberties v. National Security
	1. If you want to be safer, you have to roll back civil liberties
	2. Reducing liberty won’t necessarily make you more secure
	3. There are situations where more surveillance will make you better off
	4. If people know you might violate civil liberties, will be less likely to want to give you information (lack of trust in government)

# Fourth Amendment Remedies

## The Exclusionary Rule

* 1. Background: Exclusion of evidence obtained in violation of 4th amendment
		1. May pass 4th but violate state law or state constitution
	2. Test: Did violation significantly affect D's substantial rights?
	3. *Wolf v. Colorado*
		1. **Issue:** Does a conviction by a state court for a state offense deny due process required by the 14th because evidence admitted at trial was acquired under circumstances that would have rendered it inadmissible in a prosecution for violation of a federal law because would have violated 4th amendment?
		2. **In state court and state crime**: 14th doesn't forbid what would be inadmissible in federal court
		3. Exclusionary rule federally created rule of evidence, not part of 4th amendment
		4. **Holding:** States subject to the substantive provisions of the 4th amendment through the 14th amendment, but states not compelled to use the same mechanisms to follow it
		5. **Dissent**: in absence of exclusionary rule the amendment has no effective sanction
	4. *Mapp v. Ohio*
		1. **Facts**: Police denied entry, entered forcibly without warrant; gave her false warrant, wouldn't let her see her attorney, no warrant presented at trial, convicted on basis of evidence seized during that search
		2. **Holding**: (modified Weeks) evidence obtained in violation of the Fourth Amendment protection against “unreasonable searches and seizures” must be excluded from criminal prosecutions in state courts, as well as federal courts.
		3. **Rationales**:
			1. Deterrence for bad searches
				1. Problems: why punish society for law enforcement violations?
				2. Couldn’t we create a different system?
			2. Judicial integrity
				1. Only coherent explanation for rule as originally adopted (explains suppression and why remedies don’t go further)
			3. No other remedy is realistic (civil actions don’t really happen—no real damages to recover)
			4. Second rationale in Weeks is that other means of protection might serve the same purpose; this has come to be shown not to be true
			5. Purpose of rule to deter and remove incentive to disregard it
		4. **Dissent**: up to states to realize and decide this at their own pace
	5. Alternative remedies
		1. Remove the magistrate if improper warrant
		2. Tort suits (judicial officials have absolute immunity; prosecutors and police have qualified immunity)
		3. Effective damages system
	6. Costs
		1. Is it really a remedy? Puts LE back where they were before search (no punishment)
		2. Benefits of privacy outweigh individual costs of letting the guilty go free
		3. No incentives for lawyers to bring these cases: no contingency fees

## Exceptions to the Exclusionary Rule: Fruit of the poisonous tree doctrine: is derivative evidence tainted by an earlier Constitutional violation?

## Inevitable discovery

## Independent source (independent of the illegal search)

## Attenuation (*Wong Sun* rule)

## *Wong Sun*

## **Facts**: Made confession after illegal chase and arrest leading to second person, who confessed; all had to be suppressed

## **Holding**: Not “all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police”. Have to see whether the evidence was a result of “exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint”.

## **Test:** Did evidence come by using the illegality or by means sufficiently distinguishable to purge the taint?

## But for the illegal arrest, would not have gotten the evidence

## Independent source test: would evidence eventually have been discovered lawfully?

## Problems

## Standing: Seize A illegally, search A’s house, can use against B (no deterrence value; no-lose situation)

## Looks like protection of individual constitutional rights, but we’ve seen before this can’t be the rationale

## Use for impeachment purposes

## *Walder*:

## **Facts**: A prior case against petitioner was dismissed because evidence had been obtained though an unlawful search and seizure. At a subsequent trial for a separate drug offense, in response to petitioner's testimony that he had never possessed narcotics in his life, the government raised the prior case to impeach petitioner's credibility.

## **Holding**: government can use illegally obtained evidence to impeach a witness who by his own accord brings it up in direct testimony. While the government could not affirmatively use evidence unlawfully obtained, petitioner could not turn the illegal method by which the evidence in the government's possession was obtained to his own advantage and provide himself with a shield against contradictions of his untruths.

## *US v. Havens*: a D's statements made in response to proper cross-examination reasonably suggested by the D's direct examination are subject to otherwise proper impeachment by the gov't, albeit by evidence that has been illegally obtained

## Standing

## Must the person asserting the 4th amendment claim have been the victim of the illegal search/seizure?

## Two theories

## 4th amendment as atomistic and defending each individual person as an atom

## 4th amendment as regulatory and regulating the gov't--standing requirement and exclusionary rule act in opposition (evidence seized in violation of the 4th is excluded to deter, but requirements of standing to raise a 4th claim often undercuts this, as it limits the number of people who can bring misconduct to evidence of court so exclusionary rule can be applied)

## Test for 4th amendment standing: Did activity violate your reasonable expectation of privacy?

## *Linkletter*: having the violation not of your right might scrap standing

## *Alderman*: only those violated by the search itself can protest the evidence, not third parties also aggrieved by the evidence

## Exception (*Padilla*); co conspirator who had supervisory role or joint control over property where seizure took place

## Dissent: should be general prohibition

## *Payner*:

## **Facts**: IRS hired private investigator to enter bank official’s apartment, steal briefcase, photocopy, and return; sought to use evidence against Payner

## **Issue**: should the exclusionary rule be applied in serious illegality if D lacks standing (was not D’s individual rights violated)?

## **Holding**: In this court, no.

## **Problem**: atomistic standing rule worked as an incentive for government to act illegally

## Car passengers, guests, and visitors

## *Rakas* *v. Illinois*

## **Facts**: police stopped car, seized a sawed-off rifle and shells seized by the police during the search of a vehicle in which petitioners were passengers (locked glove compartment and under seat)

## **Issue**: Did the challenged search or seizure violate the 4th amendment rights of a D seeking to exclude the evidence seized during it? Did the disputed search or seizure infringe on an interest of the D which the 4th was designed to protect?

## **Test** for determining the scope of constitutional rights protected by the exclusionary rule: focused on the substantive question of whether petitioners had their own rights infringed by the police's search and seizure, rather than on the concept of standing, as previously decided.

## Appropriate measure of rights was no longer guided solely by whether petitioners were legitimately on the premises that the police searched. 4th amendment protects only those places in which petitioners themselves had a reasonable expectation of privacy.

## **Holding**: Petitioners' rights were not violated where they had no legitimate expectation of privacy in areas of a car in which they claimed no property or possessory interest.

## *Rawlings*:

## **Facts**: D put contraband in third party’s purse (maybe because he saw cops coming)

## **Holding**: failed to show that his legitimate expectations of privacy were violated by the search of her purse--can't challenge search of an area by claiming ownership of property seized.

## **Rationale**: Performed totality of the circumstances analysis of legitimate expectations of privacy (who had access, etc.)

Does looking inside Cox’s purse violate legitimate expectation of privacy of Rawlings? No.

Does seizure of property in the purse independently violate expectations or privacy? Raises a 4th amendment interest, but is reasonable (seems circular).

* + - 1. *Jones v. US*
				1. **Test**: was there a legitimate expectation of privacy (in items stored in a friend’s apartment)?
				2. **Holding**: Jones had complete dominion and control, could exclude others, and could legitimately expect privacy. An overnight guest may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not
			2. *Simmons*
				1. Testimony given on motion to suppress can’t be used against you at a trial on the merits
			3. *Brendlin*: when a LE officer makes a traffic stop he seizes the passenger as well as the driver and a passenger can then challenged the constitutionality of the stop
				1. Seizure: a reasonable person would not feel free to leave/decline requests of officer
			4. *Minnesota v. Carter*:
				1. **Facts**: informant tip, peeked through blinds, cocaine seizure of defendant who didn't stay overnight, was just a guest for a few house to package cocaine
				2. **Rationale**: Balancing test, use circumstances to conclude closer to one simply permitted on the premises and not due protection because:

the purely commercial nature of the transaction;

the relatively short period of time on the premises; and

the lack of any previous connection between the defendants and the householder (not like overnight guest)

* + - * 1. **Dissent**: remember Katz; 4th protects people not places
			1. *Minnesota v. Olson* (1990)- the Court held that defendant’s **“status as overnight guest”** showed that he had “an expectation of privacy in the home that society is prepared to recognize as reasonable”.

## Good faith

## *Leon*

* + - 1. **Issue**: Should the exclusionary rule be modified so as not to bar evidence obtained by officers acting in reasonable reliance on a search warrant issued by a magistrate, but ultimately found to be unsupported by PC?
			2. **Holding**: exclusionary rule doesn’t apply; the incentives are not present in a good faith violation
			3. **Rationale**: The marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant could not justify the substantial costs of exclusion.
				1. Exclusionary rule judicially created deterrent to enforce the 4th against police, not magistrates, not a personal constitutional right of the person aggrieved
			4. **Tests**:
				1. Were they dishonest or reckless in preparing the affidavit?
				2. Could they not have harbored an objectively reasonable belief in the existence of PC?
				3. Could it have created disagreement among thoughtful and competent judges?
			5. **Problems:**
				1. Encourages officers to stay ignorant of the law
		1. Does not apply to:
			1. Bad faith
			2. Recklessness
			3. Objectively unreasonable belief
		2. Magistrate exception to exclusionary rule?
			1. Cost of letting the guilty go free greater than the benefits?
			2. Magistrates won’t be deterred (accountable in other ways)
			3. Public scrutiny
			4. *Sheppard*: used wrong form, but objectively reasonable mistake for belief by the officer—falls under Leon and allowable
			5. *Herring v. US*
				1. **Facts**: Officer reasonably believes outstanding arrest warrant, but wrong because of bookkeeping by a different officer
				2. **Issue**: if the arrest violates the 4th, must the contraband found during the search incident to the arrest be excluded if the officers acted on a good-faith belief on the warrant?
				3. **Holding**: To trigger exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system

Here, magistrate error (Leon drew sharp distinction)—no not magistrate error, department error! So Leon should apply-but doesn’t (looks at what can actually be deterred, and mistakes like this cannot)

Deliberate and reckless conduct

Constitution will not be violated if police action is reasonable

* + 1. *Hudson v. Michigan*
			1. **Facts**: Police only waited 3-5 seconds after announcing their presence before entering
			2. **Holding**: Social costs outweigh deterrence value for suppression in knock and announce (not going to deter misconduct by suppressing here)
			3. **Rationale**
				1. Attenuated fruit
				2. Even if direct fruit, still admissible: worried about hiding evidence?
		2. Problems: rules serves other important purposes, including avoiding the taint, and is still police error, which is different from judicial error
			1. How to show recklessness without discovery?
			2. How to apply? Depends on underlying rationale—if worried about social costs, court might apply it broadly
			3. Remedies: if arrested wrong Herring, arresting officer did not do anything wrong and no pattern and practice = no remedies

## Inevitably, courts will try to find a way through these rules to make sure the murderer doesn’t walk, although the street corner dealer might

## Civil remedies

## *Robbins v. Chronister* (are private suits for damages really remedial?)

* + - 1. **Facts**: suit for damages
			2. **Holding**: $1.50 including attorney's fees (nominal damages)

# Identification Procedures

1. Problems with lineups
	1. Subconscious police signals, not discoverable later
2. *Wade*
	1. **Facts**: Lineup with Wade after arrest (no violation of privilege against self-incrimination), without notice and in absence of counsel
	2. **Holding**: A criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel at a critical stage without violating the Sixth Amendment.
		1. Critical stage: any stage of prosecution, in court or out, where counsel’s absence might derogate from right of a fair trial
		2. This is a critical stage
	3. **Rationale**: apply Wong Sun test for purged of primary taint
3. *Kirby v. Illinois*
	1. **Holding**: Right to counsel begins after adversary proceedings against him have started
	2. The Court refused to extend the right to counsel to lineups that took place *before* the defendant had been indicted or otherwise formally charged with any criminal offense.
	3. So like the other Sixth Amendment right to counsel cases, the right is triggered once adversarial proceedings begin whether by formal charge, preliminary hearing, indictment, or arraignment.
4. *US v. Ash*
	1. **Facts**: color photo display showed to witnesses
	2. **Holding**: No right to counsel at a witness interview: neither accused not his lawyers has a right to be there
	3. **Problem**: doesn’t eliminate the problem of impermissible suggestiveness
5. *Stovall v. Denno*
	1. **Facts:** Showing suspect to victim was imperative: she might die during surgery
	2. Holding: even when right to counsel attaches, a suspect may use the due process “backup”test to establish that identification procedures conducted in his case “was so unnecessarily suggestive and conducive to irreparable mistaken identification he was denied due process of law”.
6. *Manson v. Braithwaite*
	1. **Facts**: Sold to person, IDed a photo left on desk, no line up
	2. **Holding**: If ID is highly suggestive but still reliable, admissible
	3. **Rationale**: Reliability is the linchpin-factors:
		1. Opportunity to view
		2. Degree of attention
		3. Accuracy of description
		4. Witness's level of certainty (actually worthless indicator—no correlation between accuracy and certainty)
		5. Time between crime and ID
		6. *Henderson*: witnesses with police suggestion scored higher on each of these factors
7. *Henderson*
	1. **Facts**: Witness present at robbery, IDed D later, felt pressured by detective to choose D when down to two photo; Witness smoked 2 bags of crack a day between incident and identification, hallway was dark and he was drunk and high at the time
	2. Suggestions:
		1. Wider scope for pre-trial suppression
		2. More elaborate jury instructions
		3. Manson factors should be weighed against the corrupting effect of a suggestive ID itself
8. *State v. Perry*
	1. **Facts**: arrested only black man in parking lot and had witness ID him there
	2. **Holding**: Two step analysis for admission of identification:
		1. Whether the identification procedure was impermissible or unnecessarily suggestive
			1. Burden of proof on D
		2. Was the ID procedure so suggestive as to render the ID unreliable and hence inadmissible?
			1. Burden of proof on state
9. Wade-Kirby doctrine
	1. Entitled to counsel at all stages of a criminal proceeding (Wade)
	2. Right to counsel begins after adversary proceedings have begun (Kirby)
	3. Mere arrest is not enough (Kirby)
	4. If D is not present, his lawyer does not need to be (Ash)
	5. Backup: due process test
10. Best lineup procedures
11. Administering the lineup fairly
	1. Blind--officer doing it doesn't know who the suspect is
	2. Witness should be told suspect might not be in the lineup explicitly
	3. Suspect should be the same--not wearing clothes victim described, etc.
	4. Clear statement from witnesses regarding degree of certainty
	5. Better to show sequentially than all at once

# Police Interrogation

## Policy Concerns

## Police interrogation constitutional concerns:

## **Right against self-incrimination**- Fifth Amendment

## **Right to counsel**- Sixth Amendment

## **“Voluntariness”** requirement- Fourteenth Amendment

## *Doe v. US*

## **Facts**: Suspect was compelled to consent to let the Government access his offshore bank accounts.

## Seven factors underlying self-incrimination clause

* + - 1. Unwillingness to subject accused to self-incrimination, perjury, or contempt
			2. Accusatorial rather than inquisitorial system of justice
			3. Fear of torture
			4. Fair play and fair state-individual balance
			5. Suspect dignity
			6. Distrust of self-deprecatory statements
			7. Privilege as protecting the innocent
	1. Concerns
		1. Reliability: after being interrogated for eight hours, what a suspect says might no longer be reliable
		2. Abuse
		3. Privacy
		4. Cooperation
	2. Purpose of 5th amendment: People shouldn’t be compelled to cooperate in their own self-incrimination
	3. 14th: cannot admit involuntary statements

## The “Voluntariness” Requirement

## **Fifth Amendment:** “…nor shall [any Person] be compelled in any criminal case to be a witness against himself…”

## **Fourteenth Amendment:** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Due process/voluntariness/totality of the circumstances test barred used of confessions

* + 1. Of doubtful reliability because of methods used
		2. Produced by offensive methods
		3. Involuntary in fact
		4. Disadvantages of this test:
			1. No guidance to courts
			2. No police guidance or bright lines
			3. Allows pressure/even legitimates
			4. Can lead to brutality by legitimizing pressure
			5. Pressure can lead to false confessions
			6. Swearing contest (no record if D is tired or vulnerable)
	1. *Ashcraft*: coercion
	2. *Watts*: even though checked with external evidence confession believable, because coerced, reversed conviction
	3. *Mincey*: statements in the ER with tubes and needles in him = involuntary
	4. Subpoenas: 5th prohibits being a witness, aka testifying, against oneself
	5. *Stroble*
		1. **Facts**: Petitioner arrested for murder of 6 year old girl, made statements sounding like confessions to police
		2. **Issue**: voluntariness based not on threats, but in presence of 19 officers in DA's office and because of earlier events in park foreman's office = involuntary?
		3. **Holding**: No, no pressure of unrelenting interrogation; compelled not the same as involuntary—made five subsequent confessions and was willing to talk to anyone who would listen
		4. **Rationale**: doesn’t implicate the cruel trilemma of:
			1. Truth: convicted
			2. Lies: perjury
			3. Silence: contempt
		5. **Test**: did they overbear the will of the suspect through pressure?
	6. *Spano*
		1. **Facts**: turned self in, used friend, police officer in another district, to elicit a confession
		2. **Holding**: inadmissible, under totality of the circumstances:
			1. History of instability
			2. Questioned for 8 hours before confessed
			3. Persisted in questioning even after repeatedly asked for attorney
			4. Use of his friend
			5. Police not concerned with solving a crime, just concerned with a statement to convict him with
		3. **Rationale**: The ban on involuntary confessions turns not only on their reliability but on the notion that “the police must obey the law while enforcing the law: that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves”.
		4. **Legacy**: police must obey the law while enforcing the law

## Fifth and Sixth Amendment Rights

## *Massiah v. US*

* + 1. **Facts**: While on bail fed listened in to incriminating statements by him, used against him at trial
		2. **Issue**: were 5th and 6th rights violated by use of statements gov't agents elicited from him after indictment and counsel retention in absence of counsel (through informant and tape recording)?
		3. **Holding**: petitioner was denied the basic protections of U.S. Const. amend. VI when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately and secretly elicited from him after he had been indicted and in the absence of his counsel.
		4. **Rationale**: contravened the basic dictates of fairness in the conduct of the criminal cause and the fundamental rights of petitioner. Petitioner was as much entitled to aid of counsel during the critical period after arraignment and until the beginning of trial as at the trial itself. Here, petitioner was seriously imposed upon since he did not even know that he was under interrogation by a government agent.
		5. **Reach**: can’t use any statements he makes against HIM, but if he implicates another person, can use against that person
	1. *Escobedo*
		1. **Facts**: Arrested, released, another man named him, re-arrested, said he needs to talk to lawyer, lawyer went to HQ and was denied access to client; D confronted with other guy, denied he did it and said other guy did, implicated in murder, admitted into evidence and convicted
		2. **Holding**: Holding: very specific to facts of this case that denied assistance of counsel and violated 6th and 14th; police can still investigate, but once shifts to accusatory, adversary system kicks in and D must be allowed to talk to lawyer
		3. **Violated when**: investigation focuses on him, in custody, police interrogate him, he requests and is denied counsel, and police have not informed him of privilege against self-incrimination
		4. Right to counsel attaches on THOSE charges
	2. *Miranda v. Arizona*
		1. **Holding**: Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination
		2. **Rationale**: custody is inherently compelling; Miranda attempts to dissipate some of that compulsion
		3. What is compulsion?
			1. Custody🡪 less than voluntary
			2. Custodial = taken into custody or deprived of freedom in any way
			3. If breaking of will, *Miranda* is too far
			4. If it is pressured into talking without making a knowing and intelligent choice, *Miranda* will never be overinclusive
		4. **Minimum baseline**: Doesn't matter if he is ignorant or not, needs to be clear can exercise for at any time, continuing, and being silent can't be used against him
			1. Anything he says can and will be used against him in court
			2. Right to consult with a lawyer and to have the lawyer with him during interrogation
			3. If he is indigent a lawyer will be appointed to represent him
			4. If indicates at any time he wishes to remain silent, interrogation must cease
		5. **Waiver**: an individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.
		6. Bright lines
			1. Without warnings, irrebuttable presumption that any confession is inherently compelled
			2. To dispel, give warnings
			3. Once rights are invoked no more questions
			4. Custodial interrogation requires warnings
		7. Custody test replaces Escobedo’s focus and purpose test (Miranda FN 4)
	3. *US v. Mathis*
		1. **Facts**: prison inmate asked how he got stab wound (prison is home but also compelling)
		2. **Holding**: anywhere in custody is custody

## The Scope of *Miranda*

## Waiver: After the suspect is given his *Miranda* warnings, the defendant needs to **“knowingly and intelligently”** waive his rights before the police or prosecution can interrogate him and use any incriminating statements in court.

* + 1. *Johnson v. Zerbst:* 4th amendment consent is not waiver; waiver is a demonstration of intentional relinquishment or abandonment of a known right or privilege
		2. *North Carolina v. Butler* (1979) (implied waiver)

## The courts must presume that a defendant did not waive his rights; the prosecution’s burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the persons interrogated

## In this case, the defendant was informed of his *Miranda* rights, refused to sign a waiver, but still went on to volunteer information

## A suspect may refuse to sign a waiver but nonetheless indicate that he is willing to talk

* + 1. If ask a question before a chance to ask for a lawyer, not a waiver (*Miranda*)
		2. *State v. McKnight*
			1. Is it voluntary if a stupid person doesn’t understand what a lawyer is and waives his right?
			2. No: if given warnings, doesn’t mean less knowing and intelligent because he thought what he said couldn’t be used against him
		3. *Tague*: waiver not established merely by showing that a defendant was given complete Miranda warnings and made an incriminating statement after
		4. *Connecticut v. Barrett* (1987) (qualified waiver)

## **Facts:** Defendant was advised of *Miranda* rights three times and he signed an acknowledgement that he had been informed of his rights. The defendant said he would not make a written statement without his lawyer, but went on to orally admit his involvement in the crime. The police used the oral admission at trial.

## **Issue**: The defendant argued that his expressed desire for counsel before making a written statement served as an invocation of the right for all purposes.

## **Holding:** oral statement was admissible. “*Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak.”

## **Concurrence:** because Barrett testified at trial that he understood his *Miranda* rights. Without the testimony, Brennan would have dissented, because it’s odd for someone to be willing to talk yet not have anything written. Seems to suggest the waiver was not knowingly or intelligently made.

## In practice, it appears that as long as the warnings are given and the suspect exhibits no overt signs of a lack of capacity to understand them, his waiver will be upheld.

## Threshold requirements: is it custody:

## When are *Miranda* warnings necessary?

## The Court rejected the “focus” test from *Escobedo* and held that *Miranda* applies “after a person has been taken into *custody* or otherwise deprived of his freedom of action in any significant way”.

## Objective test: how would reasonable people in the suspect’s situation have perceived their circumstances?

## *Beckwith*

## **Facts:** interview by IRS agents not proceeded by Miranda warnings, because focus of criminal investigation

## **Holding:** not custodial/not deprived of freedom of action

## **Rationale:** In his own home, so not deprived of freedom of action

## *Stansbury*: officer's subjective view if person being interrogated irrelevant once in custody

* + 1. Absent special circumstances, questioning on the street not custodial
		2. *Quarles*: arrested at robbery site and questioned; public safety exception to Miranda
		3. *Mesa*: statements made over phone to hostage negotiator while barricaded in room admissible
		4. *Murphy*: incriminating statements made at probation interview did not require Miranda warning
		5. *Yarborough* *v. Alvarado*
			1. **Facts**: Alvarado’s parents brought him to the sheriff’s station to be questioned. The parents waited in the lobby. Alvarado and the detective went to a small room where only the two of them were present. The questioning lasted two hours and at no time was Alvarado given the *Miranda* warnings. Alvarado eventually admitted his involvement in the crime. The detective twice asked whether he wanted a break. After the questioning, Alvarado went home with his parents. Minor at time of crime, no Miranda warnings during first round of questioning.
			2. **Holding**: This is not custody. Custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances and if he would feel free to leave.
			3. **Dissent**: Proper question is if a reasonable person would feel free to leave—here, clearly no.
	1. Threshold requirements: is it interrogation?
		1. *Rhode Island v. Innis*
			1. **Facts**: Arrested, two different people advised him of Miranda rights, put in car with three officers to drive to station; two officers talking worried about missing murder weapon, all could hear about it; D jumped in and said he would tell them where gun was because worried about kids finding it
			2. **Holding**: on these facts, cannot be said officer knew of should have known this conversation likely to elicit incriminating response (not intent but objective what they would think would elicit a response
			3. **Rationale**: Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent
				1. A practice that the police know is likely to elicit an incriminating response from the accused amounts to interrogation--that they should know is reasonably likely to elicit an incriminating response.
				2. Direct questioning is considered interrogation while indirect action is considered interrogation if there is a greater than 50% chance of it resulting in incriminating statements.
			4. **Test:** objective
				1. Express questions = interrogation
				2. Words or actions on the part of police officers they should have known were reasonably likely to elicit an incriminating response (does likely really mean likely, or does likely mean possibly?)
				3. Intent by itself not enough (body cavity magazines example—if average person not aware of the tricks, not enough); on the flip side, indirect conduct, if likely to elicit a response, falls under the test
			5. **Dissents:**
				1. Marshall: agree with their analysis and the rule but not applied to these facts
				2. Stevens: statement understood by the listener as calling for a response is the functional equivalent to a question
		2. *Mauro*
			1. **Facts**: husband and wife, husband being questioned, wife tells him to answer
			2. **Holding**: not custodial interrogation to accede to allowing D's wife to come in and talk to him, recording it in the presence of officer
		3. *Illinois v. Perkins*
			1. **Fact**: undercover informant planted in cell block and gets incriminating information (intent clearly present)
			2. **Holding**: Miranda warnings not required when the suspect is unaware that that he is speaking to an LE officer and gives an incriminating statement (inherently compelling atmosphere Miranda designed to protect against no longer present)
		4. Idea of compulsion: requires that you know the state is trying to get information out of you
			1. Forcible stop: not free to leave, and statements inadmissible
			2. *McCarty:* roadside questioning at traffic stop is not custodial interrogation
		5. *NY v. Quarles*
			1. **Facts:** ask suspect during arrest for robbery where the gun is without Miranda warnings
			2. **Holding:** Public safety concerns overrode Miranda concerns
				1. Need for answers to questions in a situation posing a threat to the public safety outweighs the need to the prophylactic rule protecting 5th amendment protection against self-incrimination
				2. Public safety exception to Miranda
				3. But 5th amendment: public interest cannot trump 5th amendment rights (no cost-benefit analysis in the 5th)
		6. *Carillo*: can ask if drugs on person, and if replies with incriminating statement, can use
		7. *JDB v*. *NC*: age is relevant in determining is custody/if D thought he was in custody
		8. Custody test
			1. Was D deprived of freedom of action in a significant way? Objective test.
			2. Totality of the circumstances:
				1. Age: relevant, not dispositive
				2. Prior experience with LE: not relevant
				3. Arrest warrant: if suspect not aware it is exists, can’t be relevant
			3. Not really “was D free to leave” but was D free to decline the interaction (*Delgado*)
		9. Remember *Bostick*: “could have gotten off bus” (unreasonable, maybe, but the holding)
	2. Invocation of *Miranda* rights
		1. *Fare v. Michael C.*
			1. Request to see probation officer not a per se invocation of Miranda rights; admissibility on totality of the circumstances
			2. **Dissent**: young person might want to talk to parent or person of authority rather than attorney
		2. *Berghuis*
			1. **Facts**: Read Miranda, plus an extra warning that he can invoke the right at any time; remained silent for 3 hours. Invoked privilege to remain silent by not saying anything for a sufficient period of time
			2. **Issue**: Did he waive his right?
			3. **Test**: voluntary (free and deliberate choice) and made with full awareness
			4. **Holding**: Miranda not just a right to remain silent, but right to not be questioned🡨Berghuis turns this on its head and allows questions after a sufficient period of time
		3. *Beheler*: Miranda warnings were not required at respondent's first interview with the police. For Miranda purposes, "custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Respondent was neither taken into custody for the first interview nor significantly deprived of his freedom of action.
	3. After invocation of *Miranda* rights
		1. Minimal requirements for the resumption of questioning once a suspect asserts his right to remain silent:

## Immediately ceasing the interrogation;

## Suspending questioning entirely for a significant period;

## Giving a fresh set of *Miranda* warnings at the outset of the second interrogation.

* + - 1. Bright line: 14 days (Scalia)
		1. *Mosley*
			1. **Facts**: read warnings, says he doesn’t want to talk, questioning ceases, brought back two hours later for different charges, read warnings, agrees to talk
			2. **Test**: Admissibility of statements obtained after D has asserted the right to remain silent depends on whether his right to cut off questioning has been honored
			3. **Holding**: Subsequent questioning by a different detective about an unrelated homicide consistent with interpretation of earlier refusal to talk
			4. **Right invoked**: right to remain SILENT
		2. *Edwards*: if the individual states he wants an attorney, interrogation must cease until an attorney is present, unless he himself initiates further communication
			1. Right invoked: right to counsel
			2. Per se prohibition: cannot even be questioned about a different crime (unless D himself initiates)
		3. *Arizona v. Roberson*
			1. **Holding:** Once a suspect effectively asserts his Miranda-Edwards right to counsel, the police cannot even initiate interrogation about crimes other than the one for which the suspect has invoked his right to counsel.
			2. Presumption raised by request for counsel, that he is unable to deal with pressures without it, doesn't disappear because police approached suspect about separate investigation
		4. *Oregon v. Elstad*
			1. Because Miranda not a real constitutional right but a rule of evidence, fruit of the poisonous tree doctrine doesn't apply
			2. Differentiates unreasonable searches under fourth from unreasonable interrogations under the 5th
			3. A failure to administer Miranda warnings does not breed the same consequences as a police infringement of a constitutional right; evidence does not have to be suppressed as fruit of the poisonous tree
		5. *Patane*
			1. **Facts**: When arrested and given Miranda, D interrupted and said he knew his rights; no other warning given
			2. Core protection is against compelling a D to testify against himself at trial
			3. **Holding**: Police don't violate a suspect's constitutional rights or Miranda by negligent or deliberate failures to provide the suspect with full Miranda warning
				1. Introduction of non-testimonial fruit of a voluntary statement does not implicate the self-incrimination clause
				2. No reason to extend prophylactic rule of Miranda here--no deterrence value
				3. Word witness in the self-incrimination clause limited to testimonial evidence
			4. **Concurrence**: unnecessary to decide if agent's failure to give full Miranda warning violation of Miranda or fine as long as statements not introduced at trial
			5. **Dissent**: 5th amendment privilege extends to derivative evidence
		6. *Missouri v. Seibert*
			1. Give statement before Miranda, say Miranda, ask to repeat statement: second statement inadmissible
			2. Five factors to take into consideration
				1. Completeness and detail of answer is first round if interrogation
				2. Overlapping content of two statements
				3. Timing and setting of 1st and 2nd
				4. Continuity of personnel
				5. Degree to which interrogators treated the 2nd round as extension of 1st
			3. Question first tactic tries to thwart Miranda's purpose of reducing the risk of coerced confessions
			4. **Concurrence** (Breyer): should have two step test
				1. Courts should exclude fruits unless failure to warn in good faith
			5. **Concurrence** (Kennedy): would make narrower test: postwarning statements related to the substance of prewarning statements should be excluded unless curative measures taken before postwarning statement is made
				1. Passage of time or statement that prewarning statement not admissible
			6. **Dissent**
				1. This result does not follow Elstad
				2. Too subjective from officer's intent

## Assessing *Miranda*

## Title II of Crime control Act

## Balancing test to determine voluntariness (and, in essence, admissibility)

* + - 1. the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,
			2. whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession,
			3. whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him,
			4. whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and
			5. whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
	1. *Dickerson v. US*
		1. **Holding**: Miranda is a constitutional decision and covers admissibility in both state and federal courts; Congress can't overrule it through 18 USD 3501 (purely voluntariness test)
		2. 5th and 14th amendments require voluntariness
		3. Miranda: coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus risky under 5th that individual will be compelled to incriminate himself
		4. Congress has the ultimate authority to proscribe rules of procedure and evidence, but not if they are required by the Constitution
		5. **Dissent**: Miranda unconstitutional, no Constitutional right to not say something stupid
		6. Courts must exclude any confession elicited by questioning conducted without interruption after the suspect has indicated a desire to stand on his right to remain silent
	2. Problems with Miranda
		1. Internally inconsistent
		2. Depends on conception of free will that means freedom from the operation of reasons conditioning the choice
		3. Miranda by Shulhofer
			1. Informal pressure to speak can constitute compulsion under the 5th
			2. Present in any questioning of a suspect in custody
			3. Need precise warnings to dispel this pressure
			4. Allow custodial interrogations to continue
		4. Warnings: natural inference is that police have right to answers
			1. Either want to talk OR
			2. Now he doesn’t have to (give warnings to make sure of this)
		5. Why not allow police interrogation in front of a magistrate?
			1. Same pressures present
			2. Visible: less easy to stomach
		6. Has it made a difference?
			1. Protects people who have the most to hide, and incriminates those innocent—most likely to speak and incriminate
			2. Police loophole
			3. Congress has no incentive to replace with something better

## The Sixth Amendment Right to Counsel

## **Sixth Amendment:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## *Brewer v. Williams*

* + 1. **Facts**: Christian burial speech, after lawyer told the cops no interrogation of him on the drive; asked if they knew where shoes were; went, not there; same with blanket, then asked about body, directed them to body
		2. **Holding**: The right to counsel means that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him- whether by way of formal charge, preliminary hearing, indictment, or arraignment.
		3. **Rationale:** Williams denied constitutional right to counsel (limits to that issue and doesn’t speak to others)
			1. Cops purposely sought to get as much information from him as possible while he was isolated from his lawyers
			2. Indistinguishable from Massiah: once adversary proceedings have begun he has a right to legal representation when the gov't interrogates him
			3. In order to waive, need to prove an intentional relinquishment or abandonment of a known right or privilege
			4. Statements in car: Williams' constant reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right
		4. **Dissent**
			1. Burger: Punishing the public for the mistakes of law enforcement, not punishing the officers themselves
			2. White: waiver was present
			3. Blackmun: not intentional isolation and might have been looking for girl in case she was alive, statements might not have been interrogation
	1. *Fellers v. US*: an accused is denied the basic protections of the 6th amendment when there is used against him at his trial evidence of his own incriminating words, which police have elicited from him after he has been indicted and in the absence of counsel
		1. Fruits doctrine does not apply: would serve no deterrence or other 6th amendment goal
		2. Elstad applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel, notwithstanding earlier police questioning in violation of the 6th
	2. Miranda not implicated when suspect unaware speaking to LE ; but Massiah can be implicated if indicted and speaking freely with fellow inmate (elicitation by police)
	3. *US v. Henry*
		1. **Holding:** By intentionally creating a situation likely to induce Henry to make an incriminating statement without the assistance of counsel after indictment and counsel appointed, violated 6th right to counsel
		2. **Rationale:** the agent was **“stimulating” conversations** with the defendant in order to elicit incriminating statements. However, the Court held that a completely passive agent that does not speak to the defendant but is **“just merely listening” is permissible**.
		3. Powell concurrence: spontaneous statements not elicited are okay; passive listening device okay
	4. *Kuhlmann v. Wilson*
		1. **Facts:** Defendant told cellmate/informant that he was there but didn't participate; placed with informant, told same story, informant said didn't sound good, brother came to visit and said family upset, changed story and told informant they killed him
		2. **Holding:** statement by informant was not deliberate elicitation
		3. **Dissent**: encouraged respondent to talk about it, while brother may have been immediate catalyst, seems as though need to consider entire course of gov't behavior
	5. *Texas v. Cobb*
		1. **Facts**: burglary gone wrong; surprised; kills woman witness and her daughter
		2. **Test**: Blockburger test for two offenses or one: does each provision require proof of a fact which the other does not?
		3. **Holding:** When the 6th amendment right to counsel attached, it does encompass offenses that, even if not formally charged, would be considered the same offense under Blockburger
		4. **Kennedy concurrence**: difficult to understand utility of 6th rule that operates to invalidate a confession given by free choice of suspects who have gotten Miranda rights and waived them
		5. Right to remain silent under Miranda separate from right to counsel under 6th
		6. **Dissent**: Opens the door for LE to ask about the crime unless prosecution has charged every possible crime connected to the incident (assault during charge for robbery, etc.)
	6. *Michigan v. Jackson*
		1. **Facts:** Ds waived rights and agreed to talk to police without counsel before arraignments; requested counsel before magistrate. After arraignment, advised of rights, obtained written waivers, then confessions
		2. **Holding**: Edwards rule applies when accused requests counsel before arraigning magistrate. Because police initiated questioning, waivers invalid.
	7. *McNeil v. Wisconsin*
		1. Offense-specific: police can initiate questioning about crimes other than the one for which he was charged
	8. Pre- or post-initiation of judicial proceedings?
		1. Jail plant situation
		2. Miranda: interrogation (objective)+ custody
		3. Massiah: deliberate elicitation (subjective) and formal judicial proceedings commenced
		4. Message on radio: if ploy to get someone to confess, violation; if coincidence, doesn’t
	9. Values at stake
		1. Inherently compelling pressures of custodial police interrogation
		2. Interference with attorney-client relationship
1. Voluntariness Post-Miranda
	1. *Miller v. Fenton*
		1. **Facts**: woman followed man in car, disappeared, IDed vehicle description by her brothers, Miller was interrogated for approximately an hour when he confessed to the crime then fell of chair in catatonic state.
		2. **Holding**: Psychological ploys okay as long as part of D's own internal balancing test
		3. **Test**: were tactics used sufficiently manipulative or coercive to overbear the will of a person with D's characteristics and deprive the suspect of his ability to make a free choice to confess?
		4. **Limits**: weighing of circumstances of pressure applied by police against power of resistance by person confessing
		5. On these facts, were the use of tactics that not responsible for what he did?
			1. If Miller understood Boyce to say he wouldn't be prosecuted, could affect voluntariness
			2. *Bram*: To be voluntary, confession must not have been obtained by any direct or implied promises, however slight (no longer necessarily true)
		6. Not a but-for test, but question if confession a product of free choice
		7. **Dissent:** Boyce not acting in interest of Miller but of the state
	2. Promises
		1. *Bram:* if there is a promise, the confession is involuntary
		2. How manipulative was the promise?
		3. What would a reasonable person in Miller’s position likely have done?
		4. Misrepresentations (concocting evidence): approved after Miranda waiver (*Fraizer v. Cupp*)
		5. False promises: SCOTUS has never held per se invalidation (*Cayward*)
	3. *US v. Murphy (Kino)*
		1. Facts: dog tracks suspect to tree, don’t call dog off and allows dog to hurt suspect
		2. Holding: statements should have been excluded as inadmissible despite the notable absence of police misconduct
			1. Post-Connelly: would have to come out the other way
	4. *LeBrun*
		1. Promises not to prosecute don’t render confession involuntary per se: test is if authorities overbore the D's will and impaired capacity for self-determination
		2. Smart, saw potential loophole in gov't case and tried to exploit it
	5. *AZ v. Fulminante*: FBI informant in prison disguised as organized crime member persuaded D to confess; admitted, on appeal said coerced
		1. **Holding**: promise of protection in exchange for confession extremely coercive
		2. Credible threat of physical violence an offer to protect from = coercion
	6. *Colorado v. Connelly:*
		1. **Facts:** voices due to mental disorder commanded him to confess
		2. **Holding:** Absent police conduct causally related to confession, not basis for concluding state action deprived a D of process of law
			1. **Question of voluntariness:** not reliability, not will overborne, but if state’s action unlawful (if not unlawful, nothing to deter)
		3. **Dissent**: involuntary includes those not made by D's free will
	7. *Mahnke*: Mass sup ct. says private extraction of confession using coercion still not admissible
	8. *Chavez v. Martinez*
		1. **Facts**: 1983 suit alleging interrogator deprived Martinez of constitutional right, officer shot Martinez, not given Miranda warnings, Chavez questioned at hospital
		2. **Claim**: Never charged with a crime and answers never used against him; yet claimed 5th and 14th amendment rights violated
		3. **Holding**: 5th: not compelled in criminal case to be a witness against himself--never prosecuted or in criminal case
			1. Initiation of legal proceedings
			2. Compulsion okay if not being used against you
		4. Possible 14th amendment violation despite holding:
			1. Violation of self-incrimination clause the moment compulsion/torture happen, not when used against criminal suspect
			2. 14th amendment: nor shall any State deprive any person of life, liberty, or property, without due process of law (not limited to deprivations that affect trials)
			3. 5th requires: pressure not allowed to bring to make testify
			4. 14th requires: pressure not allowed under any circumstances
	9. **Test:** inadmissible if answer to both questions is yes:
		1. Was there pressure resulting from state action?
		2. Was the state action wrongful?
	10. Studies of case law indicate that police tactics like threatening harsh punishment for not confessing or leniency for confessing are coercive. The same study also indicates that misrepresenting evidence, especially scientific evidence (i.e. forensic evidence or lie detector results), are likely to result in an involuntary confession.
2. Assessing the Law of Interrogation
	1. Due Process post-Miranda
		1. 80% of suspects waive
		2. Can use fruits
		3. Can use for impeachment
	2. Central Park Jogger
	3. Innocence Project
		1. Innocent people most likely to waive rights to explain way out
		2. Social science narratives
		3. Data mining
		4. Police interrogations
			1. Releasing facts no one else could have known
			2. Can’t make promises, but trickery is okay
		5. Require recording?
	4. Prior to formal judicial proceedings: Miranda and 5th amendment rule; not Massiah and 6th
		1. *Kirby*: 6th doesn’t apply before start of formal judicial proceedings
	5. The dissent in *Miranda*, believed the thrust of the new rules was to “discourage any confession at all”. Justice White thought the new rules would increase the number of trials and lead to “a good many criminals” to “either not be tried at all or acquitted” minus these confessions.
	6. Very few suspects actually invoke their *Miranda* rights and the rate of confessions is similar to as it was before *Miranda*. A study found that the number of confessions only went down 3.8%. But that is still 28,000 criminals. Schulhofer’s study put the number at 0.7%.
	7. The New York Times article discusses several high profile cases in which innocent people falsely confessed during interrogations.
	8. As a result of these studies, does *Miranda* do any good? Does it have cultural significance?
	9. Do police even follow the guidelines? Baltimore police 7 steps for getting a waiver on page 676. Another study showed that police actually followed the spirit and letter of *Miranda* and suspects were still agreeing to talk and eventually confess (around 60-65%).
	10. Should *Miranda* be replaced by a statutory requirement to videotape interrogations?
	11. Justice Harlan believed the due process “voluntariness” test was sufficient. He didn’t believe the Fifth Amendment prohibited the use of all pressure to incriminate one’s self. Justice White argued that more flexible procedures should be adopted and not the “straightjacket” bright-line rule the majority adopted.
	12. Justice White in his dissent argues that “transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession”.
	13. In *Miranda*, the majority said “we encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.” The majority said that any new procedures would have to be at least as protective as the safeguards in *Miranda*.

# Exam Techniques

1. What is clear under existing law?
2. What are the gray areas?
3. Considerations pro and con in resolving these gray areas

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# Policy thoughts

1. Line between control of crime and police powers in free society
2. Warren court: develop rights of suspects
	1. But allow loopholes for effective law enforcement
3. Rehnquist court: cut back on civil liberties for effective law enforcement
4. Issues left open
	1. Effective assistance of counsel
	2. Resources of the system
	3. Race
	4. Flagrant violations of fundamental rights with no remedies
5. Potential solutions
	1. Have courts pull back and rely on the political process
	2. Try to keep issues of effective assistance and severity of punishments on the front burner
	3. Remember how too much police power can be corrosive to the community
6. Miranda: constitutionally required or too broad?

**Themes**

* Crime prevention versus civil liberties
* Searches
	+ Reasonable and unreasonable
* Warrants
* Probable cause
* Informants
	+ Veracity and reliability
	+ Basis of knowledge
* Lack of warrants
	+ Arrests
	+ Searches
	+ Exceptions
	+ Automobiles
		- Belton
		- Gant (temporal switch)
		- No arrest
		- Luggage
* Stop and frisks/seizures
	+ Not a seizure?
	+ Basis
	+ Extent
* Profiling
* Consent
	+ Voluntary
	+ Third Party
* Administrative searches
* Surveillance
* Counterterrorism
* Remedies for violations
	+ Exclusionary rule
	+ Fruits
		- Inevitable
		- Independent
		- Attenuated
	+ Standing
	+ Good faith
* Identification
* Interrogation
	+ Self-incrimination
	+ Miranda
		- Waiver
		- Custody
		- Interrogation
		- Public safety
		- After invocation
	+ Counsel
	+ Voluntariness