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1 Introduction

1.1 Police Discretion and Due Process

- *Gonzalez v. Castle Rock*: Does a restraining order create a constitutionally-protected property interest in police enforcement? No.
 - Gonzalez gets a restraining order against husband, requiring distance from woman and kids. Husband violates, kidnaps kids.
 - Police refuse to enforce, saying “let’s wait and see if he brings them back,” when woman calls.
 - Husband murders kids and commits suicide by cop.
 - Gonzalez sues the city of Castle Rock, claiming that the city police department violated her constitutional rights by not enforcing the law (in this case, enforcing the restraining order).
 - The Tenth Circuit held up the claim.
 - The Supreme Court found that discretion was the watchword: the police have a lot of discretion, both individual officers, and the department as a whole, in choosing how to focus their resources.
 - Colorado statutes *seem* to make arrest mandatory. The dissent looks at the “shall” language, suggesting it’s an instruction that officers must do something.

- The Court, however, says that the legislature should have used more than simply “shall” if it was suggesting a mandate.
 - Spouses tend to recant, there are limited police resources, and mandatory arrest policies might exacerbate problems. . .
 - The key of this case is that discretion is the defining characteristic of the police—to the point that the “shall” language got presumed meaningless, by a self-described textualist.
- The criminal justice system, however, is a system. It has more than just cops–legislators, prosecutors, district attorneys, judges. . . and a system can adjust.
 - Most crimes are handled at the state level, because of federalism.
 - About ten times as many people are incarcerated by the States as by the Federal government. The Feds have about as many people as California and Texas.
 - Roughly 87% of federal prisoners are felons, roughly half of those are drug-related.
 - Of 165K arrests in NY (in some year, number uncertain), 114K are convictions, and only 40K of those remain felony convictions.
 - The majority of the criminal justice system is trifling misdemeanors.
 - Most cases plead out—the maximum trial rate even in state courts is 8%, and fewer than half of those are jury trials.
 - And the system is overloaded.
 - Herbert Packer talks about the division between the Crime Control model (make policing fast and efficient) versus the Due Process model (protect individual rights, even if some criminals go free as a result).
 - Louis Seidman thinks that *Miranda* and the other criminal-protection amendments serve only to grease the wheel, to make us feel better about crime control.
 - Joseph Grano thinks those same due process concerns cloud the truth, and worry more about the entitlements and the minutiae of the law.
 - And Dorothy Roberts thinks the purpose of the criminal law is to control and subordinate black people.

2 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.

2.1 Background: The Rise and Fall of “Mere Evidence”

- *The core questions:*
 1. Does the amendment apply *at this moment*, and *in this situation*?
 2. Does the amendment *prohibit* the action in question? (*Was the amendment violated?*)
 3. If so, what *evidence* resulted, and what is the *remedy*?
- Always ask these questions, and continue to ask as circumstances change or evolve. Don't just ask once.
- *Boyd v. United States* (1886): Civil case. Boyd had smuggled in 35 cases of glass and didn't pay his customs fees; the US wanted to force him to produce his receipts and books to determine the amount of the fines.
 - Under §5 of the Act of June 22, 1874, the Court could issue a subpoena *duces tecum* (an order to produce documents) concerning the receipts.
 - Boyd objected to the constitutionality of that law.
 - The district court rejected both the Fourth and Fifth Amendment claims.
 - The Fourth Amendment protects against searches and seizures, of which there were neither; and there was no general warrant.
 - The Fifth Amendment applies to criminal cases, and besides, there was no compulsion, and no witness.
 - Earlier revisions of this amendment had allowed the issuance of a warrant for a marshal to search for and take the items in question, or even another private collector.
 - But the Court thinks that the “order to bring before the court” language of the Act of 1874 is functionally equivalent to a search.
 - “This is tantamount to compelling their production... compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property... is a material agreement, and effects the sole object and purpose of search and seizure.”

- The Miller concurrence disagrees on this point. It agrees with the judgment in the case, because it sees this case as effectively criminal, despite the claimed civil nature, and therefore a Fifth Amendment violation. It does not, however, see a Fourth Amendment violation.
 - So, was the Fourth Amendment violated?
 - The Court goes through the history of the Fourth Amendment, as descended from *Entick v. Carrington*, and the King’s Messengers (proto-cops) who were charged with trespass for breaking open a man’s desks and examining his papers.
 - The court discusses the difference between recovering one’s own property, and taking another’s.
 - As to general warrants and writs of assistance, which said in effect “we get to search your house for whatever we want to,” the Court again goes to Lord Camden, who said that “the great end for which men entered into society was to secure their property.”
 - James Otis, arguing that the home is the castle, said that the writs “placed the liberty of ever man in the hands of every petty officer.”
 - The Court believes that it needs to worry about the Fourth Amendment on property grounds, and this is also about privacy—papers are as private as they get.
 - Security, liberty and property. No wonder the Fourth Amendment was held to cover.
- The rest of the course is everything since then.
 - After *Boyd*, a distinction rose: “mere evidence” could not be seized even with a search warrant, while other objects including the instrumentalities of a crime, the fruits of a crime, weaponry, and the like, could be seized given a search warrant.
 - *Warden v. Hayden* (1967): Destroyed that distinction, and defined how the Fourth Amendment should be interpreted.
 - Hayden’s cap, jacket, and trousers, among others, were seized and entered as evidence.
 - The Court of Appeals, though, found that those items “had evidential value only” and as such couldn’t have been lawfully seized.
 - The Supreme Court looked at the language of the Fourth Amendment and said that nothing supported the “mere evidence” rule.
 - The Court also said that property rights were not the basis for the Fourth Amendment, but privacy was.
 - The Court read the Fourth Amendment as saying that there could be no unreasonable search, and a warrant defined reasonability. If you had a warrant, you were not making an unreasonable search.

- The Douglas dissent argued that the Amendment had two separate clauses, and there were two zones of privacy: that which you could not seize, no matter what (corresponding to the “secure in their papers” language), and that which could be reached through warrants, arrest incident to search, or hot pursuit (corresponding to “no Warrants shall issue”).
 - The Court also ducked the question whether there were items “whose very nature precludes them from being the object of a reasonable search and seizure,” a question that mostly comes up in the Fifth Amendment context these days.
- This shifted the understanding of the Fourth Amendment from a property rule to a privacy rule. (There are still overtones of property, though.)

2.2 Introduction to the Exclusionary Rule and Incorporation

- *Weeks v. United States* (1914) established the rule that the essence of the offense on liberty protected by the Fourth Amendment was the invasion of privacy, and that if evidence could still be used against the person, the entire rule was worthless.
- Therefore, *Weeks* established that any evidence gathered by the Federal Government in violation of the Fourth Amendment could not be used as evidence. It was excluded.
- In *Wolf v. Colorado* (1949), the Supreme Court considered incorporation of the exclusionary rule (using the Fourteenth Amendment to extend it to cover the actions of the States), but declined to do so because the states had such opposition to the rule, and besides, “the incidence of such conduct by the police [is] too slight to call for a deterrent remedy.”
- *Mapp v. Ohio* (1961): Incorporated the exclusionary rule.
 - Mapp ran a boarding house, and the police came in looking for a bomber. Lacking any real warrant (there was “some doubt” whether there ever was one), they broke in, and found nude sketches and “lascivious books.”
 - Mapp was tried in State court, the books were introduced as evidence, and she was convicted.
 - Clearly, the “too slight to call for a deterrent remedy” logic has been blown out of the water.
 - In addition, a lot more states were in favor of the rule, since more than half having adopted it legislatively or judicially.
 - So the Court decided to overrule *Wolf* and apply the exclusionary rule to the States.

- What is the price of the exclusionary rule? Besides the immediate one—letting someone who had clearly broken the law go free—there might be over-deterrence, with cops reluctant to undertake what might be reasonable, minor actions because the convictions wouldn't stick.
- On the other hand, the rule keeps the judicial system from being tainted by bad cops.
- In addition, the presence of these disputes in court lets the judges decide what is constitutional. This leads to the creation of our modern Fourth Amendment jurisprudence.
- But do we want to let criminals go free because cops make mistakes? Or will not punishing cops for breaking the law lead to a fraying of the fabric of society?
- One last question: is there a constitutional basis for the exclusionary rule?
- Justice Black, concurring in *Mapp*, suggests that when taken together with the Fifth Amendment, yes; but the Fifth Amendment has not been incorporated (yet).
- There would be other options instead of the exclusionary rule, but if it's mandated, those options—and the opportunity for the States to try them out—goes away. So some complained of the Court foisting its idea of the Fourth Amendment off on the states.

2.3 What Is a Search?

- “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated.”
- *Katz v. United States* (1967): Police bugged a public phone. Supreme Court eventually decided that the Amendment protects *people*, not places. (Not exactly a property rule, not exactly a privacy rule either.)
 - Does the Amendment apply?
 - *Olmstead v. US*: Under a *Boyd* analysis, no physical intrusion = no search.
 - However, *Warden v. Hayden* struck down the idea of property rights at the basis.
 - This conversation is also not tangible; the Amendment could have been written to cover conversations and arguably wasn't.
 - But the Supreme Court had ruled in *Silverman* that intangibles could be covered.
 - So, since property as a backdrop was gone, and privacy was replacing it, the question is, did one *intend to preserve something as private*? If so, it can be protected.

- However, the Amendment is not a general right to privacy; there must be a *reasonable* expectation of privacy. “What a person *knowingly exposes to the public*, even in his own home or office, is not a subject of Fourth Amendment protection.”
- Here, though, Katz had used a public phone booth.
- The Harlan concurrence lays out the test for a reasonable expectation of privacy:
 1. A person must have exhibited an actual (subjective) expectation of privacy.
 2. That expectation must be one that society is prepared to recognize as reasonable.
- Note also that the issue was a lack of a warrant. This doesn’t stand for “you may never bug a public phone,” but “you may not bug a public phone without a warrant.”
- Note also that the surveillance was not over-broad—the cops restrained themselves. But no matter: the Constitution requires a warrant.
- *Katz* led to the formation of “Title III” (of the Omnibus Crime Control and Safe Streets Act of 1968), which covers wiretapping.
- REP (reasonable expectation of privacy) or LEP (legitimate expectation of privacy): two-part (subjective, objective) test.
- *Florida v. Riley* (1989): Chopper 400 feet off the ground sees a greenhouse of pot.
 - Was this a search? **Was there a REP?**
 - First part of the test: **Actual expectation of privacy?** Well, Riley used opaque panels on his greenhouse, and he kept it in his backyard.
 - If the cops had not been flying, but had come onto his property, would it have been a problem?
- Brief digression: *Oliver v. United States* (1984): officers cannot trespass onto the curtilage of a house.
 - The space immediately surrounding a home is the curtilage. Within the curtilage (think the distance to an outhouse) is considered part of the home and inviolate. What is outside that—the “open fields”—is not protected.
 - There is no curtilage in the cities.
- Back to *Riley*.
 - This greenhouse was within the curtilage of Riley’s home. It was also blocked with opaque windows, wire fences, and DO NOT ENTER signs.

- So yes, there was an actual, subjective expectation of privacy.
 - Was that expectation objectively reasonable?
 - The plurality argues that no, since 400 feet up was legal airspace (any member of the public could have been flying at that altitude), the expectation was not reasonable. (*California v. Ciraolo* (1986) had already decided that 1,000 feet up was not protected by REP.)
 - O’Connor, the swing vote, believes that since Riley showed no evidence that 400 feet was not publicly used, he cannot argue for objectively reasonability.
 - The dissenters would put the burden on the government to show that 400 feet was a common altitude for the public.
- Of course, in *Riley*, there was no probable cause, so the cops’ hands were tied.
 - This was not a concern when the cops bugged the phone booth in *Katz*, since they had *Olmstead* to say they didn’t need probable cause.
 - *California v. Greenwood* (1988): Is there a REP in trash you put out for collection? Court: No.
 - Two-part test: **Was there a subjective expectation of privacy?**
 - No. Trash is given to third parties, and in fact put out on the curb where anybody can get at it.
 - The dissent argues that this is a Catch-22: since local laws demand that he put his trash out, Greenwood shouldn’t be punished for it.
 - Common theme: **There is no REP in what you abandon, or what you give to third parties.**
 - This includes health records, bank records, email... some of these things are protected by statutory schemes, but once you give it to a third party, you do not have Fourth Amendment protection.
 - Of course, in modern society, you need to have garbage collection, a bank account, &c. But they’re not protected by the Fourth Amendment.
 - *United States v. Karo* (1984): Cops put an electronic beeper inside a container of chemicals, with the consent of the owner, and gave it to someone who didn’t know and monitored it beyond what visual surveillance could have gotten them.
 - The initial act of placing the tracker did not create a Constitutional moment: the owner consented, and the buyer’s possessory interest in the contents of the container were not in any way damaged. It wasn’t a search, and it wasn’t a seizure.

- What about the monitoring of the tracker?
 - *Knotts*: the tracker substituted only for a full-time tailing, revealing no information visual surveillance couldn't have revealed—and no, evasive driving doesn't shake the public aspect of the driving. This was held not to be a Fourth Amendment violation.
 - However, here, the can went inside of a house, and using only the beeper (to a degree that visual surveillance in public couldn't have duplicated), the police got more information.
 - This is a problem.
 - However, that doesn't necessarily mean Karo goes free. The question is, discounting what the police got unconstitutionally, could their arrest warrant have stood?
 - The Court remands to determine whether the arrest warrant would have been supported by the constitutionally-gathered information alone.
 - Why didn't that happen in *Katz*? Because **judicial oversight is key. There always needs to be a neutral judge as a third party to evaluate the situation.**
 - The dissent believes that the first constitutional moment was putting the beeper in the can and giving it to Karo (infringing a property interest); then, when the cops make observations not physically possible, that's an unconstitutional seizure.
- The public-space issue is dispositive here. Is this good?
 - Lately, we have GPS tracking...
 - *Kyllo v. United States*: Kyllo was growing pot, and the cops used a thermal imager to prove it. They got a warrant on the electric bill, the informant, and the thermal image.
 - The police were far outside the curtilage, on a public street. (Had they been inside the curtilage, it would have been complicated.)
 - However, the Supreme Court found that the use of the imager clearly was a search.
 - Majority: “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.”
 - Important limitation: while the technology is not in public use. As here, this isn't something any member of the public would have access to.

- “Notice” argument: having notice that something can happen to you (as by the general public having access to the technology), you can (and therefore must) take steps to indicate your desire for privacy. However, if you don’t have that notice, you don’t have to.
 - There’s a divide about the burden here: recall in *Riley* that low-flying helicopters were just *assumed* to be common, but here, complains the dissent, thermal imagers are just assumed not to be common. And there’s nothing illegal about using a thermal imager.
 - There is also a pragmatic consideration: this reinforces the statement to cops to *always go to a judge*.
 - Stevens, in dissent, argues that the beeper case is different—that was giving “through-the-wall” surveillance; this is “off the wall” information, only measuring what’s coming out of the home.
 - He says that this is too broad (it sweeps in things that could be seen from the outside; why block those?), and also too narrow (if the use of the imager is per se problematic, why limit that only to houses? If the Fourth Amendment protects people, not places, why is the home so sacrosanct?).
 - This will also make white-collar crimes harder to detect, and protect the rich (with homes that are castles) over the poor.
 - And what about our need to track gases, or radioactivity?
- This brings up questions about the legislature versus the judiciary in regulating technology. Who is better placed? The Stored Communications Act suffers from legislative delay—it’s archaic.
 - But is a court better?
 - *Illinois v. Caballes* (2005): Drug-sniffing dog.
 - Is stopping a car that is traveling on the highway a constitutional moment? Yes. Was it legal here? Yes.
 - So what’s the problem?
 - **Once you’ve pulled over the car, is the dog sniff a search?**
 - (Once the dog sniffs, if that’s constitutional, opening the trunk is fine. See the automobile exception, later.)
 - Precedent from *Place* states that a dog sniff only determines whether there is contraband. And since there is no right to possess contraband, there is no constitutional moment. (Different from *Kyllo*; there, the imager would have detected lawful activity.)
 - The dissent argues that dog sniffs are not perfectly reliable (which was not known in *Place*); a false alert that leads to opening the trunk will lead to a search not for contraband, which will be a violation.

- The error rate is at issue. So, upon whom is the burden of proof?
- In addition, the majority doesn't care about—and the dissent is pre-occupied with—where the search is. Are dogs sniffing in places they should be—such as airports and government buildings—the same as, or different than, random sniffs on the street?

2.4 What Is a Seizure?

- Search and seizure are roughly the same—array of slightly different tests—but generally, “search” is for objects and “seizure” is for people. There are two tests—one is the REP test, and the other is here.
- *Florida v. Bostick* (1991): Cops board a bus.
 - The cops go on the bus, with badges, and with what are clearly guns, and without any suspicion, they single out Bostick, ask to search his bag, and find drugs. (Bostick was advised that he had the right to refuse this search, or at least, the Supreme Court will assume he was.)
 - The Court examines the traditional formulation of the test for a seizure, “whether, because of the cops’ physical force or show of authority, the reasonable person would not have felt free to leave.” The Florida Supreme Court had found that Bostick wasn’t free to leave—but he was on a bus.
 - The Court says that this wasn’t the cops’ fault; it would be better to say “free to decline” than “free to leave.”
 - The Court wants an ad hoc standard, not a bright-line rule.
 - The objective test **is whether, under the totality of the circumstances, the officer’s physical force or show of authority would make a reasonable person feel not free to leave.**
 - If the person didn’t feel free to leave for external reasons, the test becomes one of **free to decline.**
 - Argument: If Bostick had refused consent, wouldn’t that have raised reasonable suspicion?
 - And if it wasn’t coercive (and therefore a seizure), why did he say the cops could look through his bag when he knew it contained drugs?
 - Justice Marshall suggests that this was a dragnet, and the cops picked out Bostick for his race—their basis of decision wasn’t “inarticulable,” as they claimed, but merely “unspeakable,” that is, they wouldn’t admit it.
- Why does whether Bostick felt free to leave even matter?
- If there was a seizure, unsupported by probable cause or reasonableness, it violates the Constitution—and so the consent to search, and the results of that search, are excluded.

- *United States v. Drayton* (2002): Drayton lifts hands to “consent” to a search. Lower court reversed saying that officers had to advise Drayton of the right to refuse consent.
 - The Court discusses the informality of searches, and doesn’t want to put rules on the cops in advance.
 - The issue is the “cop as citizen”: if an ordinary person can get on the bus, and ask, “can I see your bag?” then the cop should as well.
 - The Court grounds its decision in supporting law enforcement (most people will comply because it’s easier, or they have nothing to hide), and any other rule would be unfeasible.
 - The dissent argues that with cops around, there’s no possible way someone would say no.
 - *Mendenhall* discusses the factors that are not irrelevant, but not decisive, including the race and education of the relative parties.
 - Arguably, neither Brown nor Drayton were advised of their right to refuse to consent. But did they actually consent? What was the scope of the consent, and the search?
 - Here, the consent was nonverbal.
- The Court does not want the Fourth Amendment to protect the guilty. It also wants to make sure the innocent are not intruded upon, as much as is possible.
- It’s a bit circular: “you have privacy where you expect it—when the Court says you don’t, you can’t expect it, so you don’t have it.”

2.5 Outside the Fourth Amendment: Consent and Community Caretaking

- *Schneckloth v. Bustamonte* (1973): Consent searches. What is “consent” in a search, and how does a prosecutor show it?
 - The Supreme Court rules that voluntariness, for consent purposes, is a question of fact, based on the totality of the circumstances.
 - Voluntariness in trial rights (plea bargains, lawyers, confrontation) require a “knowing and voluntary waiver.”
 - However, law enforcement needs should be considered in the Fourth Amendment context differently than the trial context.
 - “Voluntariness is an amphibian.”
 - There is a real interest, says the Supreme Court, in encouraging consent (tacitly approving the cops’ use of informal coercion), and the Court balances the needs of the individual for protection from intrusion into privacy against society’s need for the police.

- Weighing the race and economics of the community and the individuals and such factors should be done, but no one factor is determinative.
- *Ohio v. Robinette*: Must a defendant, once seized, be advised that he is “free to go” before he can give a consent for a search? No.
 - Robinette was speeding on the highway, stopped, given a warning, and then asked “do you have contraband?” He said no, the cop asked to search, and Robinette said sure. The cop found pot and MDMA.
 - The first seizure was stopping Robinette. It was absolutely justified. When did it end?
 - Arguably, when the cop returned Robinette’s license.
 - Some other elements could be moments of seizure: asking him to step out, asking about the contraband, or asking if the cop could search.
 - Certainly, finding the drugs was a moment of search. The issue is whether that search was supported by Robinette’s consent.
 - If Robinette didn’t understand that he had the freedom to leave, then he was unlawfully seized, and the search is the fruit of the seizure.
 - The Court rules that Robinette does *not have the right to be told he’s free to go*.
 - Same as above—totality of circumstances, no per se rules, defendant’s understanding is only one factor...and underneath it all, the need for cops to have leeway.
- Note that in *Robinette*, unlike *Bostick* or *Drayton*, the initial seizure was lawful.

2.6 Probable Cause and Warrants

2.6.1 Probable Cause

- So. Now that we know whether the Constitution was invoked at all—whether there was a search or seizure—we ask the next question:
- **Was the search/seizure legal?**
- Probable Cause: “where facts and circumstances are sufficient in themselves to warrant a man of reasonable caution (or an objectively reasonable police officer) in the belief that...
 - “... an offense has been or is being committed.” (for an arrest)
 - “... he will find evidence of a crime in the place being searched.” (for a search)

- *Illinois v. Gates* (1983): Informant mailed in an anonymous report that Gates was a drug dealer, with checkable facts. These facts checked out, and Gates was arrested.
 - The lower court used the *Spinelli* two-prong test, requiring that the tip satisfy two criteria:
 1. “Basis of knowledge”
 2. “Veracity” or “reliability”
 - The Supreme Court throws that out, requiring a totality-of-the-circumstances test that takes into account those issues among others.
 - This kind of determination is practical, nontechnical, and deals with probabilities. It can’t be reduced to a “neat set of legal rules.”
 - The letter wasn’t enough itself, but the detective work done corroborated the allegations in the letter.
 - Interestingly, the Court admits that “one determination [of probable cause] will seldom be a useful ‘precedent’ for another.” Each inquiry is based on the facts.
 - This suggests that *ex ante* clarity is impossible.
- *Maryland v. Pringle* (2003): Did not clarify probable cause; only applied it in the instant case. Three men in a car were stopped for speeding. Who could be arrested?
 - The initial seizure, pulling the car over for speeding, was clearly supported by PC.
 - Asking the driver to step out, as we’ll see later, was lawful.
 - Asking about the drugs arguably ends the first seizure, but starts a second—that’s legal under *Robinette*.
 - And the car search was consensual.
 - When the cop finds the drugs, he arrests all three men, with probable cause but a warrant (warrantless arrest being legal under Maryland state law). Pringle gives a confession later the next day.
 - Proving a Constitutional violation would only suppress the confession—you can’t suppress an arrest, or go free, and the drugs were legally obtained.
 - The Court compares *Ybarra v. Illinois*, where the Court determined that you can’t search everybody in a tavern when you have a warrant to search the bartender and tavern itself.
 - But a car is different: it was reasonable for the cop to “infer a common enterprise among the three men.”
 - In *United States v. Di Re*, an informant had specifically singled out one of the men as the owner of contraband; but nothing like that existed here, either.

2.6.2 Warrants

- The warrant requirement is pretty much spelled out in the Fourth Amendment: “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.”
- “Mere assertion” isn’t enough, and *Whiteley v. Warden* says that you can’t rehabilitate a bad warrant after the fact. Enough information must be given to the neutral and detached magistrate to justify the probable cause claimed.
- *Franks v. Delaware* says that “innocent” mistakes do not invalidate a warrant. But recklessly untrue statements, or perjured statements, do.
- The person issuing the warrant doesn’t even have to have a J.D.—he just needs to be neutral and detached.
- The particularity element means that, so far, you can’t investigate a half DNA profile—it’s not particular.
- Warrants will tend to be detailed with who, where, &c.
- However, they often have an “other fruits of the crime” or “instrumentalities unknown” clause.
- The procedure for execution of a warrant is not in the Constitution.
- *United States v. Banks* (2003): Cops knock, announce themselves, and twenty seconds later, break down the door.
 - Normally, the procedure is for knock-and-announce. Several exceptions can justify a “no-knock” warrant:
 - * Dangerous (belief of weapons in the house)
 - * Futile (there is no one home)
 - * Evidence could be destroyed
 - But the knock-and-announce procedure is to wait for direct refusal, or constructive refusal, and then there’s a question of reasonableness.
 - The Supreme Court, as usual, rejected the per se rules in favor of a totality test, and slammed the Ninth Circuit for not paying attention to that habit.
 - The cops here had to consider that the drugs they were searching for were probably about to be flushed. A piano, for example, would be harder to get rid of.
 - Note that there might always be the potential for danger/violence, but there needs to be more than just the theoretical possibility of violence. On the other hand, the potential of destruction of evidence is enough.

- It’s intuitive—it’s more dramatic to shoot at the cops than to flush evidence.
- *Hudson*: The exclusionary rule **does not apply to violates of knock-and-announce**. Technical violations, anyway. Egregious violations, it might apply still.
- There can be a civil remedy, but that’s it.
- “Sneak-and-peek” warrants: Special permission is required, and statutory procedural mechanisms can constrain them (like cause), and there’s a recording requirement. Other amendments might be violated, too.
- *Wilson v. Layne* (1999): Cops, with reporters in tow, subdue the father of the guy they’re looking for.
 - The Court says this was a Fourth Amendment violation, because there was insufficient reason to have the media.
 - Sometimes, there could be reasons—to document the process, for example, or to emphasize the PR nature of the police (though that alone isn’t enough).
 - Generalized law enforcement objectives are not enough to trump the Fourth Amendment. If they were we wouldn’t *have* a Fourth Amendment worth anything.

2.7 Exceptions to the Warrant Requirement (Dependent on Probable Cause)

- These are situations where the police have probable cause, but do not need a warrant. Probable cause is still a requirement.
- In many ways, these dwarf—even swallow—the requirement itself.

2.7.1 Exigent Circumstances

- *Mincey v. Arizona* (1978): Undercover cop arranges a drug buy, goes into the apartment, goes into the bedroom alone, shootout, cops hold the scene for homicide cops who search the apartment.
 - The AZ Supreme Court had held as a per se rule that no warrant was necessary for the search of a murder scene.
 - There is no doubt that there was exigency when the shots were fired.
 - Likewise, the original entry had consent.
 - The problem is, the search was a four-day search.
 - Exigent circumstances can cease to be exigent, and turn back into a warrant-requiring situation.

- It’s not like the evidence can disappear.
- “The scope of a search is strictly circumscribed by the exigencies which justify its initiation.”
- The government claimed that by shooting the cop, Mincey forfeited his right of privacy. That doesn’t fly.
- The government also argues that it could have gotten the warrant no trouble, but the Court says that respect for the rule of law means you actually have to get the warrant.
- “The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.”
- There are four types of exigency cases/circumstances:
 1. “Overstaying your welcome” as in *Mincey*: Exigency existed, but the cops exceeded the scope.
 2. Hot pursuit: “A suspect may not defeat an arrest set in motion in a public place by escaping to a private place.”
 3. Destruction of evidence: if the officers do not search immediately, evidence will be destroyed. (Applies to secreted evidence, as well. Strictly “destroyed” is not required.)
 4. Community caretaking: because people are concerned about neighbors, or the like.
- *Welsh v. Wisconsin* (1984): Welsh, drunk, drove erratically, crashed, and walked home. The cops went to his house to arrest him.
 - There was clearly probable cause to arrest, but no warrant.
 - The argument is that if Welsh wasn’t arrested immediately, the evidence would be lost—he’d no longer be drunk.
 - However, the Court holds that since this was a non-criminal arrest, it was too minor to justify overriding the privacy interest in home invasion.
 - *Payton* authorizes warrantless felony arrest with probable cause and exigency (namely, in this case, destruction of evidence).
 - Since Welsh was off the roads, there was no danger; and since he hadn’t been chased, there was no hot pursuit.
 - The dissent argues that it’s hard to know what’s serious, and drunk driving is hardly minor.
- Note that you can’t *create* your own exigency.
- If Jones believes X is in a hotel room with marijuana, he can’t bust in and avoid destruction of evidence, because there was no danger of destruction while X didn’t know the cops knew.

- Jones also can't knock-and-announce and then say he's preventing the destruction of evidence. That's creating exigency.
- If Jones knocks, the door opens, and Jones sees the pot, now it's exigency.
- Also, if you knock and someone is on the open doorstep, he is not considered inside.
- *Illinois v. McArthur* (2001): Cops, believing there to be weed, keep owner on the porch for two hours while they get a search warrant.
 - The temporary seizure was to prevent the destruction of evidence, so there was exigency.
 - The majority balanced the brief, and not harsh, seizure against the need for the police to stop the destruction of evidence.
 - The warrant only took two hours, and this was a jail-time offense. On the other hand, it was only a class C misdemeanor.
 - The deciding factor was that the intrusion was so much less severe. “For a petty offense, a petty intrusion is OK. For a petty offense, a grand intrusion is not.”
 - It's unclear whether, had McArthur not stepped outside, the police could have gone in.
- *Mincey* arguably prefigures *McArthur*. In the former, the line was “you overstepped your boundaries—you should have taken a break and gotten a warrant.”
- In the latter, that's exactly what the cops did—froze the scene (by keeping the drugs from being destroyed) and got a warrant.
- Remember: A search begun legally can *become* illegal because it's in the home, and the sanctity of the home can defeat any chance at prosecution.
- *Brigham City v. Stuart* (2006): Community caretaking exception.
 - Cops respond to a noise complaint, see kids drinking and a fight breaking out. They step inside the house, announce themselves, announce again in the kitchen, and arrest.
 - Stuart argues for suppression of everything after the cops entered the home.
 - The court *rejects a subjective test!* They say that they need to look at whether the action was objectively reasonable.
 - Under *Randolph*, you can enter a house to render emergency assistance.
 - The defendant wants to look at the gravity of the crime, a la *Welsh*, but the majority says there's a difference between preserving evidence and stopping violence.

- If two people were yelling and no punches had been thrown, it would depend whether the situation was objectively reasonable.
- If the cops had been summoned on a drug complaint, no matter. If the entry was effectuated for the objectively reasonable purpose of rendering aid, it's OK.
- The “we haven't seen or heard from them in days, check on them” scenario is valid too.
- There is some fear of cops tailoring what they said to claim they were intending to perform community caretaking.
- But the inverse fear—of cops who can't enter in an emergency—is worse.
- If the cops had responded to the noise complaint and saw a stolen painting, things would be more complicated.
- How would he know it was stolen? Is there a fear of destruction? This feels like it's better suited to a *McArthur* scenario.
- Not all evidence constitutes exigency. And drugs can be flushed, but paintings or pianos can't.
- Finally, note that community caretaking doesn't even require probable cause. It's a constitutional moment, but it's almost certainly justified every time.

2.7.2 Warrantless Arrest

- *Atwater v. Lago Vista* (2001): Warrantless arrest for a minor criminal offense, such as misdemeanor seat belt violation.
 - State law specifically authorized custodial arrest for non-jailable offenses. So, the question is, was that law unconstitutional?
 - The Court interprets the constitution, starting with the common law and historical meaning of the Amendment, while the dissent focuses on the balance and looks for reasonableness.
 - Historically, warrantless arrest was originally for disturbing the peace.
 - *United States v. Watson* (1976): Warrantless arrest for a felony is acceptable. Limited by exceptional circumstances such as “in the home,” of course. (Note that in *Watson*, the cops couldn't have searched the briefcase without permission, because there was no exigency.)
 - The dissent argues that felony doesn't mean what it used to, but no matter.
- Digression: If *Watson* had gone into a friend's house while the cops got an arrest warrant, they'd also have to get a search warrant for the house.

- If Watson was near a friend’s house, the cops approached him with an arrest warrant, and he ran inside, that would probably be hot pursuit.
 - Historically, some warrantless misdemeanor arrests were OK, and there’s no evidence that the Fourth Amendment was designed to protect against those arrests. It’s not determinative, though, and *Atwater* suggests a balancing test.
 - The Court considers line-drawing (jailable versus not, perhaps), but outright rejects a balancing test as a concept.
 - That’s an odd about-face from their usual mode of “totality of the circumstances” tests.
 - The Court also discusses how bad the problem is, and notes only one case on the books ever. Is that relevant?
 - Arguably not. “This never happens, so it’s not a violation when it does” is hardly a justification.
 - But the Court seems to not want to make a mountain out of a mole-hill.
 - The rule: **It does not offend the Constitution to effect a custodial arrest for a non-jailable misdemeanor.**
- Is the historical analysis appropriate? Technology has changed so much, and arguably the Fourth Amendment was designed to oppose the common law, not continue it. And besides, “Warrant” meant something specific back then.
- Note also that *Atwater* says that the state law is not unconstitutional, it doesn’t talk about what happens in absence of the state law. This is a choice, not a mandate.

2.7.3 Search Incident to Arrest

- You can be arrested without a warrant. But can the cops search you when they arrest you?
- *Chimel v. California* (1969): Burglary of a coin shop in LA, warrant for arrest, when arrested, the cops ask if they can look around and do so despite a negative answer.
 - What are the rationales for search incident to arrest?
 - * Prevention of the destruction of evidence
 - * Prevention of danger to cops (search for weapons)
 - * Gathering of new evidence (a form of exigency; the cops have tipped their hand)
 - There tend to be several “zones”: the person and clothing, the “immediate surroundings,” and the home at large.

- The Court says that the lawful scope of a search pursuant to an arrest is the zone the arrested party has access to, the “grabbable” or “wingspan” area. The person and clothing, as well as immediate surroundings.
 - It rejects the *Rabinowitz* doctrine that evidence gathering justifies searching the entire house.
 - “The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.”
 - The dissent argues that the warrant was assured, but the majority says if that was the case, they should have gotten the warrant.
- The *Chimel* rule is bright-line. When you arrest, you may do a search of the person and the grabbable area. That’s it.
 - However, for safety purposes, officers may also do a categorical *sweep* (not a search) of the places adjoining the place of arrest from where an attack could be immediately launched. (*Maryland v. Buie* (1990)).
 - To search areas not adjoining the scene of arrest, there must be a *Terry*-like reasonable suspicion that the area harbors an individual posing a danger.

2.7.4 Cars

- Conceptually, the spaces in cars include the passenger compartment, the trunk, and the containers therein. Cops can have different expectations of what each contains, and different probable causes to search.
- *Carroll v. United States* (1925): The Supreme Court finds that the warrant requirement is not well suited to searching an automobile, since it can just drive away while the cops are getting the warrant.
- The “automobile exception”: Searches are allowed upon a showing of probable cause, no warrant is required.
- Why is there less privacy in a car?
 - Cars are subject to regulation, such as licensing or traffic laws. Less of a privacy interest.
 - Cars are mobile and therefore a warrant is not feasible.
 - Cars are on the public roads and therefore dangerous.
 - Objects in cars are dangerous within the car itself—if they are loose and rattling around.
- *United States v. Chadwick* (1977) and *Arkansas v. Sanders* (1979) suggest that there is a difference between searching a case within a car and the car itself.

- The difference in those two had been whether the car was moving. The automobile exception isn't simply a touch test, but requires that a car be in motion or capable thereof.
- Interestingly, if a driver commits a violation and gets arrested, and the cops drive the car to impound, they can do an inventory search as long as it's standard procedure or policy (and not a written policy, either).
- *California v. Acevedo*: Straightens out a lot of the above. How does the automobile exception apply to containers within a car?
 - If the police had probable cause to believe a container a person was carrying had drugs in it, could they search the person or bag? No. No warrant.
 - But if the police arrested the person for possession of drugs, they *could* search the person and bag. Under *Payton*, warrantless arrest in public based on probable cause is not unconstitutional, and search incident to arrest is allowed for the person and immediate surroundings. (A rationale: There is an extra quantum of information in *knowing* possession, above the simple existence of the drugs.)
 - *Chadwick* and *Sanders* stand for the proposition that probable cause to believe there is contraband in a container in a car requires a warrant to search the container.
 - Meanwhile, *United States v. Ross* (1982) suggests that probable cause to believe there is contraband “somewhere in a car” authorizes a search of all containers within the car.
 - The Court here breaks down the distinction and announces a single rule for all probable-cause based automobile searches.
 - The new rule is that the police can search wherever their probable cause is. If they have probable cause that a container within a car has contraband, they can search the container without a warrant.
 - If they have probable cause that a car has contraband, they can search the entire car and all containers found within.
 - However, their search is limited to the probable cause. If they believe that a container within a car has contraband, *they may not search the entire car*.
 - Likewise, if they believe a car's trunk contains contraband, they may not search the passenger compartment.
 - This is based in large part about the idea that once there is a legitimate search, distinctions “give way to the interest in the prompt and efficient completion of the task at hand.” (Which is odd, because “the mere fact that law enforcement may be made more efficient” used to be no justification for tossing out the Fourth Amendment. *Mincey*.)

- *California v. Carney* (1985) suggests that a mobile home is a car: a “readily mobile vehicle” means reduced privacy expectations, period.
- *Wyoming v. Houghton* (1999): During a stop for a faulty brake light, a cop notices a syringe in the driver’s pocket. He pulls the driver out of the car, and searches the car. He also searches the purse one of the other passengers claims is hers, finding drugs.
 - There’s no question the cop had probable cause to believe there was contraband in the car.
 - The question is, how far does that extend the search authority?
 - * “If you know it’s the passenger’s, you can’t search it.”
 - * “If you know it’s the passenger’s, you need probable cause that something’s in it.”
 - * “You can search everything in the car.”
 - The Court goes through a two-step process, of the Amendment’s history and then balancing interests (over dissent arguing this had never been their methodology).
 - The Court concludes that ready mobility is not the only justification for the search exception; a lower expectation of privacy exists as well.
 - Of course, if the defendant’s belongings were on his or her person, there would be no search, under *Di Re*.
- *New York v. Belton* (1981) ruled that the “grabbable area” of a person arrested in a car is the passenger compartment and all of the containers therein.
- *Thornton v. United States* (2004): A “recent occupant” of a vehicle is still, in effect, considered to be in the car.
- The dissent there argued that this was unclear—what’s “recent?”—but it stood, briefly.
- *Knowles v. Iowa* (1998): If the police officer cites a driver, he cannot then search the car. This was also changed.
- A review of the automobile exception:
 - If there is probable cause to believe there is evidence in a car, an officer may search the car—including containers—for that evidence, limited by the scope of the probable cause.
 - *Chadwick*: The motion of the vehicle is important—a car must at least be potentially able to move.
 - *Belton*: You may search the passenger compartment and containers as a “wingspan search” upon arresting the car’s occupant.
 - *Thornton*: This applies to “recent occupants” of the car.

- *Arizona v. Gant* (2008): Gant was arrested for driving with a suspended license, cuffed, and locked in a patrol car. At which point, the police searched his car and found drugs.
 - “Searches conducted without a warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.”
 - In this case, the Court established two conditions justifying a search of a car incident to occupant arrest:
 - * If there really is a wingspan factor (“if the arrestee is within reaching distance of the passenger compartment”)
 - * If it is reasonable to believe there is evidence *of the offense* in the car.
 - It’s an open question whether “reason to believe” is the same thing as “reasonable suspicion.”
 - In a followup, though, this is arguably broader than *Belton*, because if a search is authorized, it’s authorized for the entire car in total, not just specific areas.
 - Scalia, in concurrence, suggests that seriously, the “danger” wingspan factor is insane, and they should allow search for any crimes the police has probable cause for. So, if Gant was speeding, but the cops had probable cause for homicide, they could search the car for homicide evidence. That’s a concurrence, though. But Scalia is the fifth vote.
- Hypothetical: Cop pulls someone over, arrests him, searches the car; if he finds something, he continues the arrest, otherwise he lets the man go.
- *Gant* would regulate this—the search would be limited to why the cop pulled the car over.
- Similarly, if they pull someone over for speeding and *know* there’s contraband in a car, they can’t do anything about it.
- Though, they could arrest, and process the car in a procedural inventory search, or tape off the car and bring a drug dog.

2.7.5 Plain View

- *Arizona v. Hicks* (1987): Bullet fired through floor of apartment, hitting someone below. Cops go in, find weapons; one also finds speakers, moves them to get the serial numbers, and runs them. They come back stolen.
 - The weapons the cops seized were functions of the exigency; they’re not at issue.
 - But moving the stereo was a search outside the exigency. And since the officer did not have probable cause to seize the stereo, he didn’t have probable cause to search it.

- The dissent tries to argue that moving the stereo was just a “cursory inspection” and not a full search, but that doesn’t fly.
- Remember, these are warrant exceptions—probable cause is still required for all of them.
- If the officer had seen, without touching the stereo, a sticker saying “display unit for Best Buy 444, do not remove,” he would have had probable cause to seize—and therefore probable cause to pick it up and get the serial number. But without that, he can’t.
- The plain view standard has three parts:
 1. The officer must lawfully be in a position to observe.
 2. The officer must lawfully be in a position to seize.
 3. The incriminating nature must be immediately apparent.
- This applies to both evidence and contraband.
- *Horton v. California* (1990): The subjective intent of the police doesn’t matter. If they are executing a search warrant for certain items, and find other items that satisfy the plain view doctrine (meaning, in this case, that their incriminating nature is immediately apparent), they can seize. . . even if this is exactly what they thought would happen.
- If a police officer sees a stolen bust on a counter through a window, he’s not in a position to seize and must get a warrant. There is no exigency. But if there becomes exigency (such as seeing drugs, and the person inside sees the cop too), that’s different.

2.7.6 Administrative Search

- There are three types under discussion.
- Inventory searches.
 - *Opperman* and *Florida v. Wells* have the same result for cars and for booking people.
 - Part of a lawful taking of inventory of possessions when someone or something is in lawful police custody will involve search-type behavior.
 - Therefore, the important question is, does the inventory subscribe to standardized rules and criteria and protocol? If so, the search is legal.
- Administrative searches of regulated businesses (where the regulations include a requirement of keeping records and making them available to police).

- *New York v. Burger* (1987): Where there is:
 - * A substantial government interest informing the regulatory scheme
 - * A necessity that the scheme include warrantless search
 - * A “constitutionally adequate substitute” for warrants in the scheme (regular inspections, appropriate limits on time, place, and scope)
- Then the searches will be upheld.
- Health and public safety exceptions
 - There must be a warrant, but it can be based on a standardized regime, instead of probable cause.

2.8 Suspicion-based, Non-PC Stops

- Remember, always ask these questions:
 1. Does the Fourth Amendment apply, *at this moment*, and *in this situation*?
 2. Was it *violated* here? (Does it prohibit the action in question?)
 3. If so, what *evidence* resulted, and what is the *remedy*?
- There are a number of interpretive options of the Amendment:
 - Absolute zones of privacy
 - Presumptive warrant and probable cause requirement
 - “Reasonableness” balancing (either the biggest exception, or a whole new way of conceptualizing the Amendment)
- Either something is not a constitutional moment, or it is. If it is:
 - Warrant and probable cause are required.
 - Warrant is not required, but probable cause is.
 - Warrant is not required, nor is probable cause, but some other individualized suspicion is.
 - Warrant is not required, suspicion is not required.

2.8.1 *Terry* “Reasonableness”: RAS Stops and RASAD Stop-and-Frisk

- *Terry v. Ohio* (1968): McFadden, a cop, pats down guys, and finds a gun on Terry.
 - If there was probable cause, this would be a search incident to arrest. But it’s not.
 - Was Terry seized? Yes. When McFadden stopped him.

- And he was searched when McFadden frisked him.
 - However, it was a search limited in scope to the outer garments (until he found the gun, of course).
 - Were the stop and the frisk lawful and justified? Yes. (They’re tied together. Until the frisk, there isn’t a seizure, really.)
 - In light of officer safety, crime prevention, and the minimal invasion of privacy, this is justified.
 - There was a racial backdrop to the whole mess. But Warren points out that all the Court can do is to exclude evidence, and that does not help. So it won’t.
 - “[The exclusionary rule, and therefore the Court] is powerless to deter invasions of rights where the police have no interest in prosecution, or are willing to forgo it.”
 - So the balance is reasonableness:
 - * Was the search justified at its inception?
 - * Was it a justified level of intrusion? (Lawful in scope?)
 - Here—justified at inception? Well, the officer had a “reasonable and articulable suspicion.”
 - That’s an objective test.
 - And McFadden didn’t go too far; he did a quick frisk.
- There can’t be a frisk for every stop, though. A *Terry* stop and a *Terry* frisk/search have different standards:
 - *Terry* Stop: Reasonable, Articulable Suspicion (RAS).
 - *Terry* Frisk: Reasonable, Articulable Suspicion of Armed and Dangerous (RASAD).
 - There isn’t room to seize and then run a name—once the suspicion has dissipated, without new suspicion, the stop must end.
 - *Dunaway v. New York* (1979) offers guidance on when a *Terry* stop becomes an arrest.
 - An arrest does not depend on the police saying “you’re under arrest.” The Court will objectively examine the circumstances and decide whether something feels like an arrest.
 - The line is hard to draw, of course.
 - *Florida v. Royer* (1983) rules also that something that starts as a *Terry* stop can become an arrest. “Investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” And the methods should be “the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”

- Police can *Terry* stop an object, such as by taping off a car.
- Likewise, they can stop a car: *Pennsylvania v. Mimms* (1977) says that cops can always order out a driver on a RAS. *Maryland v. Wilson* (1997) says the same for passengers.
- And *Gant* reminds us that you can protectively sweep a car the same way as a person and his surroundings.
- Police may *not* frisk for things other than weapons. RAS that someone is carrying drugs does not constitute RASAD. However, if a cop has RASAD, and feels what is “immediately apparent” (such as syringes), that’s sort of a “plain feel” analogue to “plain view” and is acceptable.
- *Florida v. J.L.* (2000): Police get an anonymous tip that a young black man has a gun at a bus stop. They go over, see someone who matches, and *Terry* frisk him.
 - Was this a lawful frisk? No. It required RASAD and that wasn’t present.
 - The tip was not enough to establish RASAD, because there was no verification.
 - A bomb would have been different, of course.
 - But there is no outright exception for firearms (though the Court admits the bomb part). There is “no automatic exception on the basis of the offense. Always a totality test, expansive and flexible.”
 - And an anonymous tip about a person with a gun is *not RASAD*.
- *Illinois v. Wardlow* (2000): Officers claim RASAD when someone bolts after making eye contact with a cop in a high-drug neighborhood.
 - Fleeing is different than just walking away—it’s more likely to indicate guilt.
 - (The dissent argues that flight does not mean guilt; it also discusses racial factors. But the majority dismisses those.)
 - In effect, one who flees after making eye contact with the police is suspicious, by nature; and in a high-drug area like this, with drugs and guns going together, RAS is effectively RASAD.
- *Terry* authorizes a stop on RAS, and a frisk on RASAD.
- RAS/RASAD is more than a hunch but less than probable cause.
- “It must warrant an officer in reasonable caution that a crime is about to be or has been committed.”
- The process is dynamic; stops can become either consensual encounters or arrests, and frisks can become searches.

- The stop or frisk must be **justified at inception** and **reasonable in scope**.
- Cars have their own rules: RAS can justify stopping the car, and ordering the occupants out. On RASAD, the police may pat down the occupants and sweep the car.
- Does a refusal to search create RAS? Debatable.
- This invests a lot of discretion in the cops, of course. And since gambling and narcotics don't often get reported, the police need to engage in proactive, preventative policing.

2.9 Police Discretion and Profiling

2.9.1 Views from the Court

- *Whren v. United States* (1996): Plainclothes in an unmarked car U-turned to examine a truck, which peels out and bolts away. The cops followed and found drugs. How does pretext play?
 - Officers argue that Whren was stopped for a bona fide traffic violation, and the drugs were in plain view.
 - Defendant argues that the stop was pretextual—there are so many regulations that there would *always* be a justification for stopping someone. There must not be arbitrary enforcement.
 - The Court doesn't deny this was pretextual.
 - But it doesn't care. The Court is being objective—as long as there was a valid reason to do what the cops did, pretext or not, it doesn't matter.
- *Brown v. Oneonta* (2000) discussed looking at the hands of every non-white person in town. The sweeping nature (*every* black person) is what made this case come out against the city.
- These days, profiles like this—or like drug courier profiles—are disfavored.
- Likewise, *Chicago v. Morales* and its vagueness-in-execution/arbitrary enforcement ruling. There is no minimum guideline for law enforcement.

2.9.2 Views from the Street

- The N.W.A. rap song as a trial, *NWA v. The Police*, swearing on race, racist police, black cops are race traitors.
- Pity, not sympathy, for cops.
- Justice as a joke.

- Cops who see themselves as glorified (and not even that!) hall monitors.
- Many *Terry* stops reveal no evidence, and most are supported by RAS. Does this mean it's too low of a standard, or that it's right because it deters?

2.10 Warrantless and Suspicionless Searches: “Special Needs”

- The first case to have a “special needs” doctrine was *New Jersey v. T.L.O* (1985), which decided that neither warrant nor probable cause were appropriate requirements for the “swift and informal disciplinary procedures” of the school.
- Further cases expanded the idea: some circumstances, often based on classes of people, do not have the same level of protection of the Fourth Amendment.

2.10.1 Random

- *Michigan v. Sitz* (1990): Warrantless, suspicionless searching of *all* cars at a roadblock for drunk driving is permissible.
- *Indianapolis v. Edmond* (2000): Civil case about police doing narcotics checks. It was a regimental program, with lots of protections to ensure randomness and no profiling.
 - The Court said it wasn't reasonable.
 - The *Brown v. Texas* interest-balancing test: the gravity of the problem is severe, but the degree to which the seizures here advance the public interest are not so much.
 - The primary purpose here was self-identified.
 - The Court says that the cops need to come up with a special need beyond “ordinary law enforcement.” Special needs are border security, or traffic safety... but drug interdiction is not special.
 - A law enforcement purpose can be OK for particular circumstances—fleeing felon, terrorist attack tip—but “general crime control” is not sufficiently tailored.
- *Sitz* and *Edmond* together: If there is a programmatic scheme, with a general purpose (other than ordinary law enforcement), the Court will balance the level of intrusion with the interest.
- If the purpose is ordinary law enforcement, it's unconstitutional.
- So what's a general law enforcement purpose, and what's not?
- The best the Court can do is examine how individualized the seizure feels, and if it feels general, create a presumption that can be rebutted.

- *Illinois v. Lidster* (2004): Checkpoint to ask about a hit-and-run victim; is the purpose general safety, or looking for the person who is the actual killer?
 - Under *Edmond*, a general crime-control purpose is no justification.
 - However, given the minimal intrusion, the non-investigative nature (they’re not trying to find something on the people they pull over, per se), and the redefinition of “general,” this isn’t “general” and is OK. Oy.
- *United States v. Arnold* (2008): customs and border patrol search a laptop and find child porn.
 - “Complex balancing tests... have no place in border searches.” Inherently, border searches are almost always acceptable.
 - The limit is when the searches are *so* intrusive, or of property, “so destructive” or “particularly offensive.” Short of that, border searches are OK period.
- Some of the categories where special needs applies:
 - Schools
 - Parolees
 - Near borders
 - For road safety
 - Government employees
 - Cops aren’t the ones searching

2.10.2 Non-random

- *Ferguson v. Charleston* (2001): Staff at hospital and cops come up with policy to test for crack babies.
 - The hospital argues for consent, and special needs.
 - The Court is concerned with the “primary purpose—as distinguished from the ultimate purpose.”
 - If the primary purpose is law enforcement (which it is here), that’s bad.
 - The majority examines the policy as written, which focus on the police, not the women.
 - Kennedy suggests that if the hospital had come up with the policy on its own, and then reported the results to the cops, it would be OK, which is a bit weird.
- *Samson v. California* (2006): Suspicionless search of parolee.

- Parolees could be searched or seized without anything. Does diminishing or eliminating a parolee’s REP to the point of allowing a suspicionless search offend the Fourth Amendment?
- The Supreme Court says this is not a special needs case—it’s totality of the circumstances.
- This is very weird.
- The Court cites to *Knights*, but there, there was suspicion.
- So even without suspicion, the totality applies.
- When does totality apply instead of special needs? Parolees? When the government’s interest is compelling? When one has notice and can opt out?
- It’s probable that the understanding is that because it’s parolees, the rules are different and there’s a “random island” in the Fourth Amendment.
- The dissent makes the point that this is radical, with no programmatic safeguards (such as recidivists only, or only parole officers can search suspicionless)—and so it’s totally at the discretion of the officer. Which normally only works with special needs.

2.11 Limits on the Exclusionary Rule

- On to the third question: What evidence resulted, and what is the remedy?
- Traditionally, described in *Boyd*, the remedy was a private civil action.
- Then, *Mapp* applied the exclusionary rule to the states.
- But what kinds of cases does the rule apply to? What defendants? What evidence (what if you use X to get Y)?

2.11.1 Good Faith

- *United States v. Leon* (1984): A search warrant was issued and approved by a judge. Turns out, the warrant was improperly issued, because there wasn’t actually. probable cause.
 - The “good faith exception” (badly named) says that if it was objectively reasonable to rely on the warrant—as here, where a judge approved it and everything—we’re not going to exclude.
 - The majority says that the purpose of the exclusionary rule is to deter the cops from not following the rules, and that’s it. So why punish the cops when it’s not their fault?
 - This is only for cops who follow a warrant that seems reasonable. If they lie to the judge, or the warrant is facially invalid, the good faith exception doesn’t help.

- Likewise, facially unconstitutional statutes, or warrantless situations, don't apply under the rule.
- *Herring v. United States* (2009): when an innocent mistake is made by a police clerk, that does not trigger the exclusionary rule.
 - Suggests that the deterrence benefits of the exclusionary rule do not outweigh the costs: to exclude would be to “let the criminal go free because the constable has blundered.”
 - “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.”
 - The dissent wants something grander, to avoid undermining trust of government, and a restitution idea. But no dice.
 - The *Evans* precedent applied to judicial clerks—back to the “not the cops' fault” angle.
 - So how do we distinguish police misconduct that triggers the rule from misconduct that doesn't?
 - Flagrant, reckless, deliberate, negligent when it recurs enough, perhaps.
 - Now, what gets excluded is *very bad* violations.
 - *Hudson*, which said that violations of knock-and-announce don't trigger exclusion, was a preview. Again, it's not a big deal, so why exclude?
 - The dissent argues that at the end, there is no remedy for violations, and this ruins the entire Amendment.
 - One of the incentives to monitor databases would be the danger of a lawsuit otherwise, also.

2.11.2 Standing

- *Minnesota v. Canter* (1998): Officers see people bagging cocaine through a window, but they're not owners of the house, and are only there briefly.
 - *Jones*, earlier, had suggested that people who might have been the object of a search can claim their rights were violated in a Fourth Amendment violation.
 - *Alderman* said that there is no possessory interest in recording somebody else talking about you, so if the cops bug A who talks to B about C, C cannot claim a violation.
 - *Rakas*: “A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.”

- And in a car, you have an interest in the stop and the items in the car that are yours.
 - But what about a home?
 - Fractured opinion. Breyer, concurring in the judgment, said no curtilage, so no violation.
 - But the majority says this is a REP idea—“did this invade a constitutional right?” No REP, no violation, no worry about a search.
 - Since Carter was only there for two hours, and had no REP, there was no search, so done.
 - Under *Olson*, an overnight guest has a REP—it’s the anticipated duration, one guesses.
 - So, ordinary social guests who stay for extended periods do have a REP, but others might not.
- Now, add onto question 1:
 - Does the Fourth Amendment apply at this moment, in this situation, *to this person*?

2.11.3 Fruits of the Poisonous Tree

- This is related to standing. You can only claim exclusion based on a violation of *your own* constitutional rights.
- *Wong Sun v. United States* (1963): Complicated case with three defendants.
 - Sequence of events:
 - Cops arrest Hom Way after observing him for a while; he ID’s “Blackie Toy” on Leavenworth Street.
 - They find James Wah Toy, ring the bell, “I’m a customer,” “come back later,” ID as agent, Toy flees, they follow, he’s arrested while reaching in a drawer.
 - Toy fingers Yee. “After a discussion,” Yee produces heroin, and fingers Toy and “Sea Dog.”
 - Toy IDs “Sea Dog” as Wong Sun.
 - They go to Wong Sun’s place, talk to the wife, go in, arrest, search, no drugs.
 - All three make statements but most don’t sign.
 - Evidence against *Toy*:
 - * Toy’s initial statements
 - * The heroin Yee surrendered
 - * Toy’s unsigned statement

- * Wong Sun's unsigned statement
- Evidence against *Yee*
 - * Toy's initial statements
 - * The heroin Yee surrendered
 - * Yee's unsigned statement
- Evidence against *Wong Sun*
 - * The heroin Yee surrendered
 - * Toy's unsigned statement
 - * Wong Sun's unsigned statement
 - * Yee's unsigned statement
- Toy's arrest is unconstitutional—no probable cause or warrant, as the cop mis-identifying himself and the vagueness of the ID from Hom Way throw that out.
- Yee was arrested after he revealed the drugs, so he's probably OK.
- Wong Sun: no probable cause or warrant.
- But what about how the evidence leads to evidence?
- *Silverthorne*: Knowledge gained by the government's own wrong can't be used to gain more evidence, unless the connection is so attenuated as to dissipate the taint.
- *Evidence Against Toy*
 - * At Toy's arrest, his initial statements are out (because of the "fruit" doctrine).
 - * Because Yee's heroin was a result of his statements and arrest, it was a fruit as well. That's out.
 - * Wong Sun's statement was made after the arrests, and there was attenuation. But it's hearsay.
 - * And Toy's statement is uncorroborated. That's out too.
 - * So Toy is free.
- *Evidence Against Wong Sun*
 - * Wong Sun's statements are sufficiently attenuated from the arrest that they can be used against him.
 - * And Wong Sun's rights were not violated in the process of getting Yee's heroin, so it's admissible against Wong Sun.
 - * Toy's statements against Wong Sun don't stand either, see above.
 - * So Wong Sun gets a new trial—and the evidence to consider is only the heroin and Wong Sun's statements.
- *Evidence Against Yee*
 - * Toy's statements that Yee sells the stuff have no standing for Yee.

- * And the drugs at Yee's aren't fruits, just unconstitutionally found flat-out.
- * Yee's statements are probably too attenuated.
- Hypothetical: Cops go to Freddy's house, find nothing but a name marked "Jason" with an address, and a note: "bring the hockey mask and chain-saw!" They get a search warrant for Jason's house, search it, and find dead teenagers and evidence implicating both Freddy and Jason.
 - Freddy has standing about his house's search. Jason doesn't. Freddy might have standing about Jason's house's search.
- Two-step process:
 1. The claimant must show that something illegal (unconstitutional) was done to plaintiff.
 2. The claimant must show that said illegality resulted in the police finding evidence, directly or as a fruit, that the claimant is entitled to have suppressed.

2.11.4 Independent Source/Inevitable Discovery

- *Murray v. United States* (1988): Cops go into a warehouse without a warrant, see pot; they leave, and get a warrant based only on what they had before they broke in.
 - The Court remands, for the trial court to determine whether the warrant-authorized search was an independent source: "that the agents would have sought a warrant if they had not earlier entered the warehouse."
 - Fears that cops will "peek first" every time? Court dismisses: cops would have to justify the warrant more to the magistrate every time. Except, they simply didn't mention it this time.
- Independent source and inevitable discovery: That which was obtained with an unconstitutional dimension, but which could have been gotten lawfully, is not suppressed. There is also an attenuation dimension—the deterrence factor is so attenuated that we don't have to worry about deterrence as a remedy or motivation.
- There is a "taint" dimension, but that isn't decisive.

2.11.5 Impeachment

- *United States v. Havens* (1980): Havens and McLeroth come across the border, McL has coke sewn into his shirt, and they warrantlessly search Havens and find a T-shirt with holes. Shirt is suppressed, but gets brought up on cross-examination.

- *Walder* says that evidence obtained illegally can be used to impeach the direct testimony of the defendant—a defendant can’t benefit from the suppression, because it’s about the cops.
- But now the *government* is trying to benefit—it’s the one that asked the question, so the options are lie and be impeached, or admit.
- Court: A defendant can’t lie on the stand, period. Suppression goes against finding truth, sure, but reinforcing that with “you can’t impeach lies on the stand” is not a policy the court wants to support.
- So, to recap. Evidence seized in violation of the Constitution is generally excludable with the following constraints:
 - Defendant needs standing to claim a violation of his or her rights directly.
 - Defendant can claim the fruits of a violation, unless there is independent source or inevitable discovery.
 - There is no suppression if the cops are reasonably relying, in good faith, on a warrant issued by a magistrate (unless facially defective), a statute (unless facially unconstitutional), or information in a database (unless the database is negligently maintained).
 - Evidence unlawfully obtained and excluded from the case-in-chief can still come in, to impeach the defendant’s testimony (and only the defendant’s) on direct or cross examination.
- Normally, the driving force is the deterrence rationale. And a bit of taint—except *Herring*, which killed taint.

2.12 Intersections: Bodily Evidence and DNA

- *Schmerber v. California* (1966): Drunk driver in accident gets his blood drawn by the hospital and cops.
 - The Court asks what the purpose is of the Amendment: to protect personal privacy and dignity against unwarranted intrusion.
 - Unwarranted intrusion is defined by either being not justified, or justified but done improperly.
 - Taking the blood is a search. (Testing might be, but the Court ducks.)
 - Was it justified?
 - Either a warrant or exigency is required. Exigency in the form of gathering evidence (metabolizing alcohol as we speak!) satisfies.
 - Was it properly done?
 - It was in a hospital, under medical supervision, and so on.
 - What about the Fifth Amendment?

- The Fifth only protects a person from incriminating himself. *Testimonially. Only testimonial evidence is protected by the Fifth.*
- This is not testimonial, though, or communicative.
- Other things not testimonial:
 - Fingerprints
 - Making people walk
 - Putting on a shirt
 - Reciting for voice recognition
- There is a cognitive aspect: only things that involve cognition, and therefore create the “trilemma” of “confess and be jailed, lie and perjure oneself, or stay silent and be in contempt,” are protected by the Fifth Amendment.
- The majority in *Schmerber* says it’s the difference between getting the key to a safe, and the combination.
- The dissent says this *is* the trilemma.
- The DNA cases are Fourth Amendment simply because of the testimonial divide. But they might develop into Fifth Amendment, someday.
- *Doe v. United States* (1988): Defendant forced to sign form to turn over foreign bank records. Testimonial?
 - Does it reveal Doe’s ownership? Isn’t it the cruel trilemma?
 - On the other hand, it was a hypothetical: “Any accounts I have, I release.” And the government agreed not to argue any inference from the signature. It wouldn’t introduce consent.
- *Pennsylvania v. Muniz*: “Slurred sixth birthday answer”: Is slurring a response, and being unable to answer when one’s sixth birthday was, testimonial?
 - Marshall thought it all was testimonial.
 - The plurality thought the slurring, like the “lisp” example, was not testimonial, but the sixth birthday was.
 - The dissent thought it was all coordination tests, because it was doing math, not cognitive.
- It’s a tricky distinction.
- What about an fMRI lie detector, or a polygraph?
- These seem like a BAC—collecting something from the body. But it’s also seeing, observing, and processing.
- And what about someone who claims to know when people are lying?

- Also this: *Schmerber* kills the thought that the body is inviolate. No longer is there a “nonphysical intrusion just examining the external is OK, but internal is not” bright-line.
- *United States v. Weikert* (2007): DNA. Does requiring a person on supervised release to give a DNA sample violate an Amendment?
 - The sample is junk DNA, which can only ID and not give any characteristics.
 - The Circuit examines with a totality test: it’s a search (they roll all the moments together into one taking of the sample, not each individual element), and they weigh the privacy and nature of the search against the government interest.
 - Government interest wins.
 - Weikert argues that supervised release isn’t parole, but the Circuit doesn’t care.
 - Drawing blood is not invasive, and the government’s interest in crime control is high—this means Weikert is less likely to commit another crime.
- What about people who apply for federal student loans?
- The privacy interests arguably change. No deterrence, no justifying putting people in a special category.
- But under *Sitz*, it’s random and indiscriminate, and arguably is useable for exoneration, too. It might stick
- But is junk DNA actually junk? So far, maybe. But better analysis might come along.
- Also, Weikert might have an argument about how long the sample stays, after the release is done. The Circuit ducks.
- *United States v. Pool* (2009): Now, same issue, but it’s a person on pretrial release, not convicted.
 - The district court says that the Ninth Circuit had said to use a totality test on suspicionless searches, not a special needs analysis.
 - So, once there is probable cause of a felony charge, privacy goes down—the government has an interest in identifying people indicted to see about clearing other crimes.
 - However, there must be a judicial/grand jury finding (not before then), and it must be a felony.
 - The cops normally can’t get DNA without an existing biological sample to compare to. “I want to run his DNA against the database without particularized suspicion” doesn’t cut it.

- Parts of the opinion suggest that since it's a law enforcement purpose, we go to totality. This is strange and troublesome. But totality has application to parolees, offenders, and the like—maybe here too.
- There is a mootness argument: the statute requires expungement on acquittal or dismissal, and if convicted, the DNA would be taken anyway.
- Underlying question: Is DNA like a fingerprint?
- It's probabilistic. Sensitive. Requires QC—contamination happens.
- But is that better than fingerprints?
- We want to guard against misuse—so we create criminal sanctions for screwing up. But what's a law enforcement purpose? What about examining a DNA strand to get the racial identity or phenotype?

3 Fifth Amendment

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

3.1 Justification and History

- This is a “doctrine in search of a theory.” We have theories about dignity, autonomy, incrimination, the government requirement to get its own evidence... and none of it fits exactly.
- The Amendment springs from the use of torture to make cases in the 16th/17th century.
- So. What's the line of a “criminal case”? Is it just an individual one?
- And what is compulsion? “Tell me or I kick you out of school/flunk you/fire you/get you thrown out of the bar”: are those compulsion?
- Plus, clearly, the doctrine is not absolute, as a grant of immunity defeats the privilege. So the dignity argument can't be it.
- *Bram v. United States* (1897): Sailor suspected of murder is stripped naked and then eventually confesses.
 - The Court throws out the confession, because a confession must be “voluntary.”
 - They define the standard broadly—“either hope, or fear, or both” was operating on the mind, which means the police can't deceive, or promise.

- The standard didn't really change, though. The common law already had used a standard for voluntariness, and besides, this was federal only.
- *Brown v. Mississippi* (1936): While the Fifth Amendment still doesn't apply against the states (it wasn't incorporated under 1964), the *due process clause* does.
 - The due process clause had a base level of a “voluntary” standard wrapped up within it.
 - However, because this case was so grossly out of line, we don't know where the line is between “voluntary” and not.
 - A big concern the court had was reliability of confessions.
- The *Brown* test is still live (sort of a *Bram* incorporation).
- *Ashcraft v. Tennessee* (1944): Third-degree interrogation, sleep deprivation, and the Court finds it compelled. But where is the line? Still unclear.
- *Watts v. Indiana* (1949): Similar, sustained pressure.
- Justice Jackson starts asking questions about the reliability of confessions gained by physical violence, and without confirmation, and the role of the lawyer.

3.2 Before *Miranda*

- *Massiah v. United States* (1964): The role of the lawyer writ large. Cops tipped about importing drugs, find the drugs, release Massiah on bail; Coulson, his compatriot, flips and wires his car, then talks to Massiah, who confesses.
 - The Court doesn't reach the Fourth Amendment claim—though it sounds like knowing exposure. Massiah knowingly talked to Coulson, who had the right to send it along.
 - But what about the Fifth and Sixth Amendment rights?
 - This doesn't feel like a Fifth Amendment right. No compulsion—just chatting with a buddy who narc'd him out.
 - But the Sixth Amendment fits best. Massiah had been indicted, so he should have had counsel.
 - We worry about laymen acting without lawyers. Laymen don't know what they should or shouldn't say. Lawyers can say “you don't have to answer that.”
 - If Coulson had just talked to Massiah, and then decided to go to the feds, there wouldn't be a problem; here, the issue is how the cops did an end run around trials and gathering evidence.

- Because this is about counsel, and not coercion, though, the cops simply can't use the recording against this defendant at trial.
- *Escobedo v. Illinois* (1964): Escobedo is arrested, his lawyer is at the station, he asks for his lawyer, and just gets interrogated.
 - *Massiah* doesn't apply; this is pre-indictment and charge.
 - The holding is messy. The Court says that if counsel is invoked, it must be honored; it doesn't decide, however, whether a suspect must be informed about the possibility of counsel.
 - The Court is frustrated. They object to what was done, but can't really outline what the right is and how it should be understood.
- The same tensions: on the one hand, we like confessions, but on the other, they're creepy and troubling.
- On the one hand, blocking a lawyer is bad, but on the other hand, so is everybody always having a lawyer.

3.3 *Miranda v. Arizona* (1966)

- The basic holding: “Prior to custodial interrogation, there must be certain procedural safeguards. We list these safeguards here.”
- What “custody” and “interrogation” mean will be discussed later.
- The underlying issue is that custodial interrogation is bad—it's police brutality, psychologically instead of physically, but brutality all the same.
- Warren was a line attorney, a district attorney, and Attorney-General. He knows about interrogation procedure. He doesn't quote transcripts (instead quoting interrogation manuals), but he knows how it works.
- The dissent, by White, says that the manuals aren't empirical evidence, and don't necessarily take into account recent changes in the law. (White was a transactional attorney, and never a DA. Yes, he was deputy A-G, but still.)
- The Court says that the source material, the manuals, are the best lead they have at understanding what happens in the black box of interrogation. (White disagrees.)
- The Court finds custodial interrogation to be inherently coercive. Physically, psychologically, through kindness and ingratiating oneself. . . a confession almost inherently suggests coercion.
- Harlan in dissent says the court is exaggerating; besides, the Fifth Amendment does allow pressure. Just not *undue* pressure.

- White also asks what the difference is between someone blurting something out at arrest, and the later interrogation. He accuses the Court of dismissing all confessions.
- Basic question: What is *wrong* with confessions?
 - They subvert the burden of proof: “we don’t need to gather evidence, just give me five minutes, the suspect, and a rubber hose, and I’ll get a confession.”
 - They carry more force than other evidence—they are incredibly persuasive at trial—and so should be regulated more. (The same has been said of scientific evidence.)
 - There is a feeling in the system that no one confesses falsely, when we know empirically that it does happen.
- Note a point out of *Escobedo*: We should be skeptical of a system set up hoping people won’t know, or exercise, their rights.
- The dissent argues that this isn’t what we have; the rights are a fallback, and if someone asserts them, they get them.
- This is still odd; these rules are about knowledge, awareness, and procedural safeguards, not a central rule.
- The dissent would also keep in reliable confessions; it’s worried about practicality. But the majority fears dignity and the *possibility* of coercion; not the actual coercion the dissent discusses.
- Harlan and the dissent also points out that “compelled” and “criminal case” are being marginalized. The inquisitorial model is trial, so maybe the Fifth Amendment should protect there; why apply it to interrogation?
- Warren responds that the Fifth Amendment always gets construed liberally; and the intimate connection between these interrogations and the privilege against self-incrimination, the dignity of the individual, justifies applying the Fifth Amendment protections to interrogation.
- So if custodial interrogation is a problem, solved through the Fifth Amendment, what particularly is required?
 - The suspect must be informed that he has the right to remain silent, and that if he chooses to speak, anything he says may be used against him in court.
 - The suspect must be told that he has the right to have a lawyer present, to have a lawyer if he can’t afford one, and so on.
- Specific words aren’t required per se; the Court leaves the door open for a polity to come up with something equally effective.

- This is totally policy, with no justification.
- The majority doesn't think this will change things, Harlan says it'll decrease confessions, and White thinks it'll slow down large investigations of organized crime or the like.
- Note that the four cases rolled into *Miranda* weren't rubber-hose. In most, the rights wouldn't have made a difference.
- The underlying question: What has *Miranda* regulated? Does the remedy, the Court's rule, actually address the problem?
- The Warren court wouldn't support the *Wire* photocopier shenanigans... but does the rule protect it? Probably not.
- Note that the Due Process requirement is still present. If a cop Mirandizes a suspect and then beats him up to confession, that's still unconstitutional under due process. Due process was silo'd, and then *Miranda* covers the field short of that.
- So, what's acceptable under this?
 - Warnings at the end? No.
 - General warnings? No.
 - What's the burden of proof to show the defendant intelligently waived his rights? High.
 - Can you presume a waiver? No. (*THIS CHANGES LATER.*)
 - Can you assume a defendant knows his rights? No.
- To recap: The prosecution may not introduce in its case-in-chief statements from a custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards to secure the privilege of self-incrimination.
- These safeguards are the four *Miranda* warnings.
- The reasoning for this rule is the disdain for interrogation and its "black box" status.
- There is a fundamental divide between the majority and the dissent about the role of confessions.
- The dissent would allow some manipulation, as long as it didn't undermine the reliability of the confession, as important and necessary.
- What is the footing of this? Dignity? Rights? Reliability? It matters, and it's not clear.

3.4 “Custody” and “Interrogation”

3.4.1 Custody

- *Berkemer v. McCarty* (1984): Cop pulls over erratic driver; cop said he’d charge the driver with a traffic offense, but did not say he’d take the driver into custody. Cop then had the driver do a field sobriety test—which he failed—and the driver said he’d both had beers and smoked pot.
 - The field sobriety test is nontestimonial, so there’s no Fifth Amendment issue.
 - What would *Miranda* do, if it applied? Block the speech, of course.
 - The rule is not concerned with what the officer thought.
 - It cares about what the suspect feels. If the officer intended custody and it wasn’t, or if the officer didn’t intend custody and it was, we go with what it was.
- The Fourth and Fifth Amendments’ seizure rules aren’t exactly coextensive.
- If you don’t even have a *Terry* stop, clearly there’s no custody; but if you do, there still might not be.
- On the continuum from “voluntary exchange” to “pedestrian *Terry* stop” to “pulling over a car” to “arrest,” custody is up near “arrest.” Not necessarily full arrest, but up on that end.
- *Minnesota v. Murphy* (1984): Defendant convicted of sex offense violated his probation by stopping treatment. PO learned that defendant had confessed to an earlier rap/murder. At what the PO said was a “routine meeting,” the PO told defendant to confess. He didn’t—so the PO told the cops, there was an arrest warrant, and defendant was convicted.
 - The Court grapples with this: Did the defendant need to be *Mirandized* when he met his PO?
 - Was the PO acting as a superior, turning him in when he was violating terms? That sounds custodial.
 - And then, this was private, not like a traffic stop.
 - But the Court finds no custody. There was no formal arrest, no restraint, no freedom of movement to the degree “associated with a formal arrest.”
 - In addition, this was a mutually-agreed-upon arrangement and time, a familiar atmosphere with no intimidation, and the defendant could have left. (There would have been consequences, but he could have left.)

- Note that custody can occur outside a stationhouse—it can even happen in a living room!
- And being at the station does not constitute custody. You can go down there voluntarily.
- Finally, *Seizure does not mean automatic custody*. It’s a totality test—examine the circumstances and decide whether it constitutes custody.

3.4.2 Interrogation

- *Rhode Island v. Innis* (1980): “It would be a shame if some handicapped kid found that gun.”
 - Innis was Mirandized—but he’d asserted his *Miranda* rights.-
 - There are two categories of interrogation—express, and functional.
 - “Would you like some water?” is probably not interrogation.
 - But fake lineups, or reverse fake lineups, are interrogation, even though they’re not expressly so.
 - The Court won’t say that custody is compulsive—maybe they want to reserve some space for the cops to work?
 - All of this seems at odds with the goals of *Miranda*. Implicit in that, it seems, was the idea that no one would waive...how wrong they were.
 - But the upshot: Interrogation is what is “reasonably likely to elicit and incriminating response.” If the cops think (or should have known) it was reasonably likely that what they were saying would produce an incriminating response, that’s interrogation.
 - And why the cops did it doesn’t matter, except as part of the “reasonably likely” factor. (If the cops thought something wasn’t likely, but tried it, and it worked, and they could show its being unlikely, that’s satisfactory.)
- *Illinois v. Perkins* (1990): Defendant in jail (on another charge) tells an undercover cop about committing a murder.
 - Perkins is clearly in custody—he’s in jail. (Though, it should be emphasized, he was acclimatized to the jail, and wasn’t in an interrogation room.)
 - And he’s asked questions, by a police officer, that he cop hopes will get incriminating responses.
 - But the Court holds that no *Miranda* warning is needed here! (Not willing to kill undercover cops in jail-type situations, for one thing.)

- This isn't a *Massiah* violation because the Sixth Amendment right to counsel is charge-dependant; it only attaches to a specific charge. See *Texas v. Cobb*.
 - Why doesn't the Court apply the *Miranda* rule to this case?
 - There isn't the requisite level of intimidation/compulsion.
 - This suggests that to the Court now, *Miranda* exists to prevent coercion, and overbearing the free will, and the incommunicado nature of interrogation.
 - Because Perkins didn't know he was talking to a police officer, the coercion isn't present.
 - Marshall, in dissent, calls jail inherently coercive; besides, people in jail might lie for ego or reputation.
 - Marshall sees a handful of rationales for *Miranda*:
 - * Rights
 - * Dignity
 - * Opposition to coercion and brutality
 - * Supporting the reliability of confession
 - * Regulating police deception
 - The majority focused on coercion and brutality, not reliability or regulation.
 - Brennan thinks that due process has a place here outside *Miranda*.
 - The majority, likewise, is OK with confession, and even deception (though Brennan wavers); the dissent doesn't like either.
 - Note also that confessions alone aren't enough to convict someone.
 - And there can be due process problems in jail—"there is a plot to assault you, I'll protect you if you confess" is a due process violation.
 - If the cop was undercover as a doctor, not a cellmate, *Perkins* seems to authorize, but it might be coercive because of the consequences of noncompliance (no treatment?) and the reliance on confidentiality.
 - That's more along the lines of Brennan's concurrence.
- Another area that isn't interrogation: "routine booking questions." (This is like the "sixth birthday" issue above.)
 - You don't need to *Mirandize* before asking name, DOB, &c. However, those questions can become incriminating, and it's complicated whether the *post hoc* use of the booking questions taints their acquisition.

3.5 False Confessions

- Leo: False confessions happen maybe 14-25% of the time, maybe higher. 14-25% is the provable set.
- There are four categories of provably false confession Leo outlines:
 1. The crime couldn't have happened ("she couldn't have killed her baby—she had a tubal ligation and couldn't have been pregnant")
 2. The suspect couldn't have committed the crime ("he was in jail at the time")
 3. Someone else comes forward
 4. DNA evidence exonerates
- Interrogation is not interview. Interview is when you try to figure out what happened and who did it, interrogation is when the police go in, believing you are guilty, and try to get a confession.
- There are two steps to interrogation: break down the belief that silence will help, and then build up the idea that confession will help. (Procedurally or morally.)
- Imagine the continuum—"no release until you confess" and "yeah, you say you didn't do it, dream on" through to "we'll take your kids," physical deprivation, violence, and Gitmoing.
- *Miranda* doesn't weigh in on any of it. Due process takes out the harsher stuff, but the *Miranda* warnings become routine and do not affect it.

3.6 Scope of the Remedy and Its Constitutional Status

- *Dickerson v. United States* (2000): Was *Miranda* a Constitutional decision?
 - Congress had passed 18 USC §3501: any criminal prosecution under federal law could accept a confession if "voluntary given," to be determined by the totality of the circumstances, not rigid *Miranda* rules. (Passed in 1968, not discussed until now.)
 - Con Law 101: To invalidate an Act of Congress, the Supreme Court must find it (under *Marbury*) to be "repugnant" to the Constitution, completely in opposition.
 - So, does §3501 violate the Constitution? The Court says yes. *Miranda* was a Constitutional rule, this opposes it, game over.
 - The majority ducks the (probably valid) argument that *Miranda*'s exceptions undermine its Constitutional status, and that there isn't real support for *Miranda* as a Constitutional rule.

- The majority instead focuses on the workability of the rule, its embedded status as *stare decisis* (it’s “super-precedent”), and how it actually does a decent job.
 - The language in *Miranda* saying “come up with something equally effective” is held to mean at least as broad, not less. §3501 would let in unwarned uncoerced statements; *Miranda* keeps those out.
 - Scalia’s dissent is the interesting part.
 - “The majority never says that §3501 violates the Constitution. In fact, it keeps out exactly what the Constitution would. Clearly, unwarned, uncoerced statements are not violative of the Constitution. *Elstad* (post-confession Mirandizing followed by repeat confession is fair, when in good faith) and *Quarles* (public safety exception means not coerced) stand for that principle.”
 - If *Miranda* was a Constitutional rule, warnings would always be required. So if statements made without *Miranda* warnings can be admitted as long as they weren’t coerced, how is *Miranda* a Constitutional rule?
 - The “Islands of Admission in the Sea of Inadmissibility”:
 - * Impeachment
 - * Fruits
 - * Public safety
 - We can’t allow those while saying *Miranda* is a Constitutional rule, right?
 - There is no independent right with a remedy, either; *Miranda* is both.
 - Scalia wants to figure out what the Fifth Amendment right is, and go from there.
 - Is *Miranda* hostile to confessions per se, not just confessions the Constitution frowns upon?
 - Either the Constitution must say that the warning is the right, or else the warning is how to implement the right and it can sweep some non-compelled confessions underneath it. Strange.
 - At the end, of course, Scalia goes off the rails by saying he will continue to apply §3501. What the hell?
- What happened next was going to be odd. Would the islands get struck down?
 - *Missouri v. Seibert*: Woman’s son dies; to cover up, they burn down a mobile home and put a mentally ill person in there to pin it on him. He dies, of course; she’s arrested, interrogated deliberately without *Miranda*, they get a confession, then Mirandize and repeat the question.

- The incident report is a play-by-play of the strategy, and the officer calls this common practice for which he was trained.
- Under *Elstad*, this would be admissible.
- But the plurality says this is wrong; a good-faith mistake is one thing, but a plan or plot is not. This is about subjective intent, now.
- If the warnings would have been effective, and were denied, that’s the problem with *Miranda*.
- Breyer wants to stick to a good-faith *Elstad* rule. Nobody likes deliberately ducking the rules.
- And Kennedy, the swing vote, is unclear. Narrow test, only applicable to the two-part questioning. All we need to worry about is deliberate evasion, and unless there is curative measures, anything after the evasion is out too.
- Breyer and Kennedy differ on the mental state of the officer—Breyer wants a good-faith exception, but Kennedy wants to examine bad faith.
- The dissent just focuses on voluntariness, back to start.
- This is post-*Dickerson*, but holds up the islands of inadmissibility.
- *United States v. Patane*: Nontestimonial fruits of unwarned custodial interrogation is admissible. Arguably, because reliability is not an issue.

3.7 Waiver, Invocation, and Waiver Without Invocation

- *Miranda* only applies when there is custody and interrogation. But when has someone invoked it? When has someone waived? What can the cops do in the initial moment, and what can they do later?
- The conception was that showing waiver was a burden on the government, and not easy.
- That may have changed. We start to see strong presumption of waiver in absence of explicit assertion.
- *Michigan v. Mosley* (1975): Arrested about a robbery, Mirandized, invoked right to silence. Then, a second cop came in about a homicide, re-Mirandized, he waived and confessed.
 - The Court ruled this admissible. Different officer, charges, new warnings and waiver, a break in time, a change in location.
 - Those factors make it so that the suspect doesn’t feel coerced.
- The assertion of the right to silence must be “scrupulously honored.” What is that? Well, what happened in *Mosley* applies, certainly. (Even if the line isn’t clear.)

- *Edwards v. Arizona* (1981): Arrested, warned, waived, gave alibi, wants to make a deal, right to counsel, break, pressure, re-warning, waiver, statement.
 - The invocation of the right to counsel is very, *very* strong.
 - The waiver standard is a “knowing, intelligent” waiver.
 - So the cops must ask if the suspect waives, and if not, he invokes.
 - Once the right to counsel is asserted, it is hard to waive. Either the police must provide counsel, or the *suspect* must initiate subsequent interrogation.
- The counsel right is much, much broader than silence.
- Silence says that you can start again later (not just re-read the rights, must be honored scrupulously), but counsel stops interrogation cold.
- Note that the other way to avoid giving counsel is to cease interrogation. The Fifth Amendment right to counsel applies to custodial interrogation, so if you’re no longer interrogated, that ends that.
- On the other hand, a Sixth Amendment right to counsel requires producing counsel.
- Suspect-initiated interrogations, of course, are not violations.
- *Oregon v. Bradshaw* (1983): The defendant asking “what’s next?” constituted suspect initiated. (On the other hand, the dissent thinks the question is philosophical, not substantive.)
- So the standard for suspect initiation is low.
- And the right must be unambiguously invoked. “Maybe I should talk to a lawyer” isn’t enough.
- Overview:
 - No custody or interrogation? Admissible.
 - Custody and interrogation, with valid waiver or fruit? Admissible.
 - Custody and interrogation with waiver? See below.
 - Clear invocation? Stop questioning. Then...
 - Right to silence, suspect initiating? OK.
 - Right to silence, police initiating? Sometimes OK—was the right “scrupulously honored” as in *Mosley*?
 - Right to counsel, suspect initiating? OK.
 - Right to counsel, police initiating? NEVER OK.

- Also note that standing exists, even given due process voluntariness. If your rights weren't violated, you're SOL.
- Also note *Moran v. Burbine* (1986): Only the defendant can assert the defendant's right to counsel. If the lawyer is outside yelling about the right, that doesn't matter. And the police bad action, giving false information to an attorney, is not a due process violation. (Subjective information doesn't matter.)

3.8 *Miranda* and the Sixth Amendment

- *Brewer v. Williams* (1977): "Christian burial" on the way from Davenport back to Des Moines.
 - Did the defendant waive his right to counsel during transport?
 - The right in question is the Sixth Amendment right. He was arraigned in Davenport.
 - It is possible to waive the Sixth Amendment right, but the government didn't show that here.
 - So, the presence of a lawyer with the defendant—by telephone and in person—before interrogation, and that the defendant knew about the lawyer's presence (unlike *Moran*), makes the difference.
- *Montejo v. Louisiana* (2009): M. kills a person, arrested, Mirandized, brought before a judge and M. says nothing when counsel is assigned. No assertion of the right.
 - Then, M. was taken back to jail, talked with cops, wrote a letter. So:
 1. Arrest
 2. *Miranda*
 3. Waiver
 4. Arraignment
 5. Counsel appointed
 6. Interrogation, initiated by cops
 7. *Miranda*
 8. Waiver
 9. Confession
 - *Jackson* would hold the second waiver invalid, because the Sixth Amendment right had attached.
 - *Jackson* applied the *Edwards* rule (no interrogation after the right to counsel has been invoked, without the attorney present!) to the Sixth Amendment.
 - But the Fifth Amendment is not automatic the way the Sixth is.

- So since the Sixth Amendment can assign a lawyer without the defendant’s knowledge, how do we apply the super-strong *Edwards* protection without the defendant even knowing it’s happened?
- While being interrogated, therefore, you must affirmatively ask for your Sixth Amendment lawyer.
- This also makes *Brewer* ambiguous. Was it sufficient for the lawyer to assert on the phone, or while right there?
- *Henry* (1980), *Coleman* (1986), and *Maine v. Molton* (?): If the Sixth Amendment right has kicked in, an informant cannot *deliberately elicit* information from the defendant pursuant to that charge.
- That is related to the “reasonably likely” language, but may be even broader.
- But if an informant just listens, that’s “luck and happenstance.”

Fifth Amendment	Sixth Amendment
Requires custody (only custodial interrogation)	Custody not required
Interrogation standard: must be interrogation	Interrogation not required, though “deliberately elicit” standard for informants
Invoked upon specific unambiguous request; not enough to invoke at arraignment for interrogation	Invoked upon specific unambiguous request; not enough to invoke at arraignment for interrogation
No vicarious assertion; lawyer can’t assert, only defendant (except maybe if present at the moment in a <i>Montejo</i> situation)	Vicarious assertion unclear
Covers all crimes, and all manners of interrogation	Specific only to the charges for which you have a lawyer appointed. (Robbery-murder, if only charged with robbery, the murder is fair game)
Indeterminate duration (<i>Green</i> : Six months)	Terminates on end of proceedings
Undercover officers allowed, not custodial interrogation	Undercover officers cannot deliberately elicit

4 Electronic Evidence

- In computers, everything we’ve been talking about doesn’t apply and might get thrown out as too cumbersome and too bad of a fit.
- *United States v. Payton* (2009) (9th Cir.): Warrant to look for drug sales evidence, search computer—wiggles the mouse, click through files, find child porn.
 - The basis of the warrant is weak, but the Circuit finds that OK.
 - What about the scope? The warrant didn’t say computer search was OK.

- But a computer was in the affidavit.
 - *Giberson* suggests that a computer is akin to a dresser drawer.
 - But the Circuit here backtracks, saying that computers aren't normal containers, and *Giberson* had special circumstances specifically pointing to computer storage.
 - Plus, in *Giberson*, the cops temporarily seized the computer and got a follow-up warrant.
 - So, computers are not automatically included in warrants. The policy and precedent agree.
 - The Circuit suggests that by adding computer to the warrant, they give the judge the option to write in restrictions on the warrant for computer search.
 - Of course, no judge does that.
- *United States v. Comprehensive Drug Testing* (2009) (9th Cir.): Baseball steroids.
 - Government wants records from a drug-test lab, get a subpoena, nothing—then they file two warrant requests, for the physical samples (D. Nev.) and the records (N.D. Cal.).
 - The underlying issue is “plain view”—the government wanted to look for a needle in a haystack, both of which could shapeshift. They needed to reliably search, so they had to take the directory.
 - The district court had limitations, which the government arguably didn't follow.
 - The Circuit gives guidance to the government going forward: To search electronic evidence, waive reliance on plain view.
 - And get segregation of evidence.
 - And disclose actual risks of concealment or destruction of evidence.
 - A lot of this picks up and runs with the Electronic Communications Privacy Act and the Stored Communications Act, which adapted Title III (the Wiretap Act).
 - Who should handle this, the legislature, or the courts?

5 The Grand Jury

- *United States v. Dionisio* (1973): Grand jury subpoenas 20 people to provide voice exemplars.
 - Dionisio claims unreasonable search/seizure, and that the compulsion and the direction to make a recording are seizures.

- SC says no—they asked him to appear, they didn’t demand; they could have changed the time; and there’s no social stigma. It’s an appointment—a mandatory one, sure, but still, just an appointment.
 - Besides, the public has a right to know, and the person has a duty to give the information.
 - *Davis v. Mississippi* gets distinguished, as there, the dragnet was a seizure, with cops, no warrant, and no probable cause. Here, this wasn’t a round-up, didn’t involve police—it was fellow citizens.
 - Grand juries do have limits; no private books (*Boyd*), and not overly sweeping—in what an individual is asked to do, not the scope of the investigation.
 - And the voice exemplar is publicly exposed, not a content test—so no Fifth Amendment.
- The government doesn’t rely on grand juries because a statute requires reasonability—but you have to show a lot to show unreasonability, and the proceedings are secret.
 - It’s resource-constrained, so used where the need to have a complex, wide-ranging investigation outweighs the resource constraints.