Note: This outline is a textbook-only outline of Prof. S's first syllabus. It does not cover in-class material (to any great degree) nor the second syllabus.

Crimpro Outline

I) Basic Principles – Police Discretion

A) NEW FEDERALISM IDEA. Courts make a *floor*; states can always give you more protection.

B) What is a criminal case? How far does the doctrine stretch?

1) Criminal cases do not always (and, indeed, do not *usually*) require jail and prison.
2) Having the state as a party does not always imply criminality in a case.
3) Basic definition: Something is criminal if the legislature has defined it as such.
4) This distinction can be incredibly important. Civil cases do not always carry the same rights and procedural safeguards as criminal cases.
   (a) ***US v. LO Ward** (US 1980, 2): Supreme Court holds that a penalty imposed upon persons discharging hazardous substances into navigable waters was a civil penalty, and thus reporting requirements attached thereto did not violate the Fifth Amendment.
5) Criminal/Civil distinction has two levels
   (a) Whether Congress/state actor, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label over the other.
   (b) Where the actor has indicated an intention, there is a further inquiry into to whether the statutory scheme is so punitive in effect or purpose to negate that intention. (US. v. Ward)
6) An example of judicial analysis: Commitment of Sex Offenders.
   (a) ***Allen v. Illinois** (US 1986, 2): Commitment proceedings under the Illinois Sexually Dangerous Persons Act were not criminal.
   (b) ***Kansas v. Hendricks** (US 1997): Involuntary civil commitment on sexual predators is civil rather than criminal (and thus does not trigger double jeopardy protection), as the state intended to label it as such and the state can only be refuted with "the clearest proof" that "the statutory scheme is so punitive either in purpose or effect as to negate the State's intention" to render it civil. Dissent argues that the statute is punitive and violates ex-post-facto laws.
7) Registration of Sex Offenders.
   (a) Sex offender registration is generally regarded as civil, not criminal, and thus does not violate the ex-post-facto clause; an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objection, especially without statutory intent to the contrary. **(*Smith v. Doe** (US 2003, 5))
8) Distinguishing between Civil and Criminal Contempt Proceedings.
   (a) ***United States Mine Workers of America v. Bagwell** (US 1994, 6): A Virginia trial court's decision to levy contempt fines for widespread violations of a complex injunction is a *criminal* contempt issue, as the sanctionable conduct did not occur in the court's presence nor otherwise affect its ability to hold its usual business.
9) Criminal Procedure in a Civil Context
   (a) § 1983 actions are civil actions arising out of criminal contexts, especially those involving violation of fundamental constitutional rights.

C) The Nature of the Procedural System and the Sources of Rules
   1) Constitutional Rules – These represent the *minimum* that must be afforded criminal defendants. States can build on these through statutes and court rules.
   2) Criminal Procedure is essentially a course in tension, with the need to protect criminal defendants pitted against society's interest in law and order.

D) Two Special Aspects of Con-Law: Incorporation and Retroactivity

E) Incorporation
   1) The Basics
      (a) Long story short: while many rights are incorporate in the pre-Warren Court era (but not all, such as the privilege against self-incrimination, which is not incorporate in Twining v. New Jersey), several are incorporated during on the basis of their "fundamentality" to the American system of justice.
      (b) ***Duncan v. Louisiana** (US 1968, 10): Court asks whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Because it believes trial by jury to be fundamental, it holds that the 14th amendment incorporates a guarantee of jury trial in all criminal cases which would come within the Sixth Amendment's guarantee.
      (c) The Court has *never* accepted Justice Black's view that the 14th amendment incorporates the entirety of the Bill of Rights. The right to indictment by grand jury is *not* binding on the states, for example.
   2) The Relationship Between Due Process and Incorporated Rights
      (a) Basic idea: does the fourteenth amendment guarantee protections beyond those incorporate through it? E.g. does due process grant rights beyond those of, say, the incorporate 4th? The court has not been consistent on this front.
      (b) ***Graham v. Connor** (US 1989, 16): Court holds that constitutional claims against police officers for excessive force could not fall under substantive due process.
      (c) ***Gerstein v. Pugh** (US 1975, 16): Court applies 4th Amendment standards, rather than due process standards, to determine when and whether an arrestee is entitled to a judicial determination of PC.
      (d) ***US v. James Daniel Good Real Property** (US 1993, 16): Compliance with the 4th is *not* sufficient when the government seizes property for purposes of a civil forfeiture. **The Due Process Clause *is* applicable to civil forfeiture proceedings.**
      (e) ***Albright v. Oliver** (US 1994, 17): Plurality asserts that there is no substantive right under the DPC to be free from criminal prosecution except upon probable cause.
      (f) Recap
         (i) A citizenship cannot rely on a right to due process if a specific bill of rights guarantee would provide the same Constitutional protection.
         (ii) Where a specific BOR protection has traditionally regulated an area of criminal investigation or prosecution, yet does not cover a specific fact pattern, finding a broader protection under a general constitutional provision is unlikely to occur.
         (iii) Independent protection under the DPC remains viable where governmental activity has some purpose other than enforcement of the criminal law.

(iv) Independent protection under the DPC remains viable even in criminal cases where no specific BOR guarantee applies.

3) Note on State Constitutional Protections
   (a) If a state court explicitly relies on state constitutional law to provide more protection to citizens than the federal constitution does, the state court's decision is unreviewable by the Supreme Court.

F) Retroactivity
1) – Which cases does a new legal rule apply to?
   (a) Old policy: Decisions apply only to police conduct following the establishment of a new rule, and not to pending cases (e.g. **Stovall v. Denno and Desist v. US**)
   (b) New, current policy: New rules of criminal procedure are applied retroactively to all cases still pending on direct review when the decision is announced. Direct review is defined as the time during which a case is under court review, up to the time that a petition for cert has been denied or the time to file such a petition has expired. **(Griffith v. Kentucky**, US 1987, 20)
      (i) Exceptions: A new rule should apply retroactively (other than on direct appeal) if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.
      (ii) A new rule should be applied retroactively if it requires the observance of those procedures that are implicit in the concept of ordered liberty, so long as they are limited to procedures without which the likelihood of an accurate conviction is seriously diminished.
   (c) ***Teague v. Lane**, US 1989 (21): Court tackles whether the fair cross-section requirement of Taylor v. Louisiana should be extended to the petit jury. Court adopts Justice Harlan's rule, and decides that the rule urged by petitioner should not apply retroactively to collateral attacks. It holds that implicit in the retroactively approach is the principle that HC cannot be used as a vehicle to create new constitutional rules of Crimpro unless those rules would be applied retroactively to all defendants on collateral review.
      (i) In Teague and subsequent cases, the United States Supreme Court has laid out the framework to be used in determining whether a rule announced in one of the Court's opinions should be applied retroactively to judgments in criminal cases that are already final on direct review. Under the Teague framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.
      (ii) Criticism of the Harlan rule: this seems to favor defendants who are in states with slower, less efficient court systems, as their cases are more likely to still be on direct review when a new rule is handed down.

2) Retroactivity – What is a New Rule?
   (a) Generally, a case announces a "new rule" when it breaks new ground or imposes a new obligation on the States or the Federal Government (***Teague**).
   (b) When a court merely applies settled precedent, it is not a "new" rule and is thus completely retroactive. (**Yates v. Aiken**) Thus, if a constitutional rule is not

"new," the state court should have applied it correctly and the failure to do so is grounds for habeas relief.

(c) Rehnquist's definition: a rule is "new" if reasonable minds could've differed about the outcome before it was rendered. (***Butler v. McKellar**, US 1990 27)

3) What is a "Watershed" rule?
   (a) In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding. (Whorton)
4) Special Retroactivity Situations
   (a) ***Johnson v. Texas** (US 1993, 28): The Court considers a question of the constitutionality of a capital sentencing statute on direct review. The Court had previously refused to consider the same question on habeas review. Court rejects the constitutional claim on the merits and applies much of the same reasoning adopted in the prior case (i.e. a proxy stare decisis).
5) Codification of Teague:
   (a) The results mandated in Teague and Butler have been codified as part of the Antiterrorism and Effective Death Penalty act. Wrinkle: apparently, this closes the loophole of the "Settled law" doctrine. See pg. 29.
   (b) Teague remains applicable where AEDPA doesn't apply.
6) Retroactivity Against the Defendant?
   (a) Detrimental changes in the law must be applied retroactively against the defendant on habeas review. (**Lockhart v. Fretwell**, US 1993, 30)
7) Overruling creates a new rule, and new "Watershed" rules are extremely unlikely
   (a) ***Whorton v. Bocking** (US 2007, S.1): The Court held that the Crawford rule did not fall within the Teague exception for watershed rules because: (1) it was not one without which the likelihood of an accurate conviction was seriously diminished; and (2) neither did it alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding. As the Crawford rule was new and did not fall within an exception to the Teague rule, it should not have been applied retroactively to the stepfather's case that was being collaterally attacked. (Lexis)
8) **Important note**: Federal constraints on habeas proceeding do not necessarily constrain state courts from allowing "new rules" to apply in *state* collateral attacks. (***Danforth v. Minnesota**, US 2008, S.7).

G) Screening By the Police
   1) The Decision Not to Arrest
      (a) Such decisions are essentially unreviewable.

II) Search and Seizure

A) An Introduction to the Fourth Amendment
   (a) The Basics of the Fourth Amendment
      (i) The language ascribes the right to the *people*, not to one person (as in the 5th) or to an accused (under the 6th). The Supreme Court has invoked this language to cabin, not expand, the class of those protected
         01) ***US v. Verdugo-Urquidez** (US 1990, 33): Fourth Amendment does not apply to a search of property that is owned by a non-resident alien and

located in a foreign county. "The people" is intended to refer only to a class of persons "who are part of a national community." In this case, D lacked a sufficient connection. The 4th therefore does not apply to limit action against aliens taken outside of the US.
- At the time, five justices indicated that they would hold the 4th applicable to searches of aliens conducted within the US, but this might change after Sept 11.

(ii) Reasonableness and Warrant clauses
01) The Court has stated that searches and seizures are presumed to be unreasonable unless carried out pursuant to a warrant.
02) (Of course, we have many exceptions to this doctrine)

(iii) Probable Cause
01) PC defines the minimum showing necessary to support a warrant application, and is distinct from reasonableness.
02) PC can be a limitation on a search even if no warrant is deemed necessary.

(iv) State Action Requirement
01) Fourth amendment only provides protection against state actors, e.g. police and their contracted associates.

(v) The Purpose of the Amendment
01) The 4th Amendment grew out of offensive British procedures prior to the revolution.
02) It is *not* an expression or codification of black-letter law.

B) Threshold Requirements for Fourth Amendment Protections: What are "Searches" and "Seizures?" What limits them?
1) Old/Pre-Katz test: "Penetration" was a required element, and trespass also was frequently required (Olmstead).
2) The "Reasonable Expectation" test: The Fourth Amendment protects people, not areas, against unreasonable searches and seizures: the correct standard is whether a person had a reasonable expectation of privacy (REOP) in the area searched. (***Katz v. United States, US 1967, 37)**
(a) Notably, electronic surveillance can constitute a search, nor did it in *Katz,* which found against the government.
(b) **Katz Two-Pronged Test** (this comes out of Harlan's concurrence in Katz; he later expressed misgivings about this test):
(i) The government conduct must offend the citizen's subjective manifestation of a privacy interest.
(ii) The privacy interest invaded must be one that society is prepared to accept as legitimate
01) Problem: The government can control the privacy interest by announcing that all areas are under surveillance!
3) Interests Protected by the 4th Amendment After Katz
(a) **Illegal Activity** draws no privacy interest (***US v. Place**).
(i) (the illegality exception may not attach if the government is not "sure" the activity is illegal, which is why Katz skates by)
(b) **Three major legitimate interests**
(i) Interest in being free from physical disruption and inconvenience

(ii) Legitimate interest in keeping private information (of a potentially revealing nature) private.
(iii) Citizen has a legitimate interest in control over his property.

(c) Different interests implicated by searches versus seizures.
  (i) From Stevens' opinion in ***Texas v. Brown**: a seizure threatens the property interest, a search threatens the privacy interest.
  (ii) ***Soldal v. Cook County** (US 1992, 43): A family's trailer on a rented lot is removed by the owner prior to an eviction hearing. Lower courts dismissed based on the lack of implication of privact concerns. The Court (White) concludes that "seizure" of property occurs whenever "there is some meaningful interference with an individual's posessory interests." As this has happened, the fourth amendment protection against seizure is activated, regardless of privacy or formalism concerns.
    01) (Seizures of *people* are different, and are discussed under Stop & Frisk)

(d) Applications of *Katz* rule.
  (i) **Just because there is a search and/or seizure does not mean that the Fourth Amendment is violated**; the police activity will still be OK if it satisfies the requirements of the amendment. **On the other hand, if there is no search/seizure,** the fourth is inapplicable.
  (ii) Subjective Manifestation Prong
    01) Individuals must take *affirmative steps* to protect privacy interests; otherwise, a police investigation will not constitute a search.
      - ***US v. Bellina** (4th Cir 1981, 44): No search where officer used a step ladder to peer into the interior of a plane, where the plane's windows were not closed
    02) Abandoned property, including real property, can generally not have a privacy interest associated with it. (**US v. Cofield**)
  (iii) Access by Members of the Public
    01) **Basic Idea**: If an aspect of a person's life is subject to scrutiny by other members of society, then that person has no legitimate expectation in denying equivalent access to police
      - ***US v. White** (US 1971, 49): Government informer's eavesdropping on a public radio transmission is OK, as its public nature implies no REOP. Dissenting judges worry about citizens needing to constantly fear government surveillance.
        - The above has been extended to public-space video surveillance. (**US v. Gonzalez**)
    02) Financial Records – Bank records, including obligatory, government-mandated records, are not subject to REOP. (***California Bankers Association v. Shultz; *US v. Miller**)
      - This was expanded by the USA PATRIOT act.
    03) Pen Registers (Telephone-company keyloggers) have been held to not violate the Fourth, as a person has no REOP in information he voluntarily turns over to third parties…which he does each time he dials a phone. **(*Smith v. Maryland**).
      - Statutory limitations exist on this, however.

- This has been extended to the internet through the USA PATRIOT act; specifically, to the "pen collection" (read: which addresses visited?) mode of Carnivore.

04) Pagers – Doctrine is conflicted. The person in possession of a pager has a legitimate privacy interest in the pager, **US v. Chan**, but a case exists where a pager seized in the "on" position was found to not implicate a search. Note that even in the more restrictive case, the action was adjudged to be reasonable.

05) Trash – Inspection of trash is not a search and is therefore permissible without a warrant or PC. **(*California v. Greenwood**, US 1988, 43) This follows from the "public access" doctrine.
- This holding has been expanded to nominally *private* trash receptacles, including those located on private property and/or holding shredded materials.

06) Public Areas
- ***Connecticut v. Mooney** (Conn 1991, 55): A homeless person has a REOP in the contents of a duffel bag and box kept on private property.
- ***US v. White** (8th Cir. 1989): A person in a public bathroom stall does not have a REOP, at least in the areas observable by general members of the public (e.g. door hinges).

07) Aerial Surveillance – Generally conclusion is that it's hunky dory.
- ***California v. Ciraolo** (US 1986, 55): Fourth Amendment not violated by aerial surveillance of a *very* fenced-in backyard (this was narrowly decided).
  - Minority dissents vehemently, accusing the majority of misunderstanding the nature of the privacy interest.
  - ***Dow Chemical Co** (US 1986, 55) comes to a similar conclusion.
- ***Florida v. Riley** (US 1989, 56): Cops hover in a helicopter to peer into someone's backyard. Court reasons that, since the public could do this as well without violating any laws, that this cannot be a search. O'Connor concurs in the judgment and stresses that the test should be what members of the public *ordinarily* do; she upholds the judgment because D has failed to meet a BoP on this point.

08) Dog Sniff of a Car During a Routine Traffic Stop
- ***Illinois v. Caballes** (US 2005, 62): D is stopped for speeding; officer brings by a drug-sniffing dog (no RS exists). It alerts. Court upholds the sniff, reasoning that the use of a well-trained dog during a lawful traffic stop does not implicate a reasonable privacy interest and thus no RS is required, so long as the stop is not excessive; dissent contends that error rates render the sniffs invasive.

09) Chemical Tests for Drugs
- Generally OK. In Jacobson, the Court approved of the warrantless chemical field-testing of a powder that a Federal Agent obtained from a package opened by FedEx. (**US v. Jacobsen**, US 1984, 64).

10) Urine/body-matter-testing for drugs

- As these processes can reveal innocent secret information, like epilepsy and so on—and as the process itself is quite intrusive—this will usually count as a search. ***Skinner v. Railway Labor Executives' Ass'n**, (US 1989, 65):

(iv) Use of Technology to Enhance Inspection

01) ***Kyllo v. United States** (US, 2001 65): The use of sense-enhancing technology to inspect the interior of the home that could not otherwise been obtained without physical "intrusion into a constitutionally protected area" constitutes a search, at least where the technology in question is not in general use. (in this case, **thermal imaging** was the culprit) This is ***presumptively unreasonable*** without a warrant.
- Professor Maclin: *Kyllo* is really just about houses and homes. Future cases might see a distinction within the target of the technology
- (At least one court has dodged the question: **US v. Elkins** (6th Cir 2002, 71).
- At this to this point, *Kyllo* puts an end to thermal image searches of homes, as if the officer has enough cause to search with the imager, he or she can get a warrant.

02) Tracking Devices
- ***United States v. Knotts** (US 1983, 72): Police use a surreptitious tracking device to monitor D's movements. Court rules that this monitoring of location does not constitute a search (D did not challenge the introduction of the tracking device into his property).
- ***United States v. Karo** (US 1984): Government gets a court order to install a tracking device, but the order was later found to be invalid. Court holds that this is irrelevant; as the tracking device **conveyed no private information** (and was, in fact, incapable of doing so), it did not violate his REOP. White stresses that it is the exploitation of technology, and not the presence of it, is what constitutes a search. **However, the monitoring of the tracking device while it was in a private home could have implicated 4th amendment concerns**…but enough independent info was available to later secure a warrant.
  - O'Connor's addendum: A home owner might not be able to claim that his privacy rights were violated if he permits a third person to enter his home with property that contains a tracking device.
- ***United States v. Jones (4th Cir.** 1994): The use of a tracking device to catch a suspect mail thief is distinguished from Karo, as the government placed the device into its own property, which was then stolen by D.

03) Other Sensory Enhancements
- ***US v. Taborda** (2d Cir. 1980): Agents using a telescope invaded a person's REOP when the same things could not be seen with the naked eye.
- ***US v. Mankani** (2d Cir. 1984): No Constitutional violation when an agent manages to overhear a conversation through a hole in the wall.

- ***Texas v. Brown** (US 1983, 76): The use of artificial illumination (e.g. a flashlight) is *not* a search.

04) Reactions to Katz limitations
- Sundby: The Court is limiting freedoms under *Katz* due to the perceived reality of the drug threat.
- Bookspan: How could law enforcement be effective if we followed the ironclad prescriptions of Katz?

C) The Tension Between the Reasonableness and Warrant Clauses

1) The reason for the warrant requirement

(a) ***Johnson v. United States** (US 86, 1948): Court holds that officers, who smelled opium in a hotel room, knocked on the door, and said "I want to talk to you" when a person answered, did not have probable cause *until* the room was entered; as such, the search prior to the arrest was presumptively unreasonable. The woman who admitted them was submitting to authority rather than intelligently waiving her rights.

(b) Basic interpretation of the above: there was certainly enough information to get a warrant, yet the police failed to do so. Obviously, this is hardly universally followed.

2) The Function of the Warrant Requirement

(a) By placing a magistrate between the citizen and the police, the Amendment establishes that a neutral observer is to decide whether the PC and specificity requirements have been satisfied.

(b) PC is shown by *oath or affirmation* to these magistrates.

(c) By imposing a limitation on searches, a magistrate may prevent excessive governmental intrusions.

(d) **Reality check**: Magistrates are generally "rubber stamps" for the warrant process.

D) Demonstrating Probable Cause

1) Source on which PC is based

(a) General rule: Probable cause is established by *probability***,** not a prima-facie showing of evidence; affidavits for PC are tested by a far less rigorous standard than those at trial; magistrates should use common sense; and that the determination of PC is generally paid deference by reviewing courts. (Spinnelli)

(b) ***Aguillar v. US** (US 1964, 91): A search warrant issues under an affidavit in which the officer swears only that he had "received reliable information from a credible person and do so believe" that illegal narcotics were being stored. Court holds the affidavit inadequate: 1) the application failed to set forth any of the underlying circumstances necessary to give the magistrate some basis of judgment; 2) and the affiant-officers did not attempt to support their claim. **Warrant quashed**.

(i) **Aguilar Two-Pronged Test**: The informant must declare either
01) That he has himself seen or perceived the fact or facts asserted, or
02) That his information is hearsay, but there is a good reason for believing it.

(c) ***Spinelli v. US** (US 1969, 91): Affidavit contains the following info: tracking log of D's activities, other investigatory materials, and a report from a CI. Court holds that PC could not have been satisfied without the info from the informant; thus, it is a necessary part of the warrant. However, the Court finds that the tip, which

contains a dearth of specific information, was not sufficient to provide the basis for a finding of probable cause; at the very least, it needed further support from the other parts of the warrant application, which were found to be lacking in specificity.

(i) **Spinnelli test**:
  01) **Basis of knowledge**
  02) **Provide facts sufficiently establishing either the veracity of the affiant's informant or the reliability of the informant's report in the particular case**.

(ii) Lexis
  01) (1) revealing the informant's "basis of knowledge" and
  02) (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's report

(iii) Police officers *hated* Spinelli when it came down.

(iv) Note that Massachusetts, New York, an Tennessee retain the Spinelli test.

(d) **Rejection of a Rigid Two-Pronged Test – Illinois v. Gates (US 1983, 98)**

(i) Gates embraces a *totality of the circumstances* analysis, viewing the two-pronged Aguilar/Spinnelli test as needlessly restrictive. WHITE concurs in the judgment, finding Aguilar/Spinnelli to be a "sliding scale" test, where deficiencies in one department can be remedied in the other. Dissents worry about the quality of info presented to the magistrate and associated issues of credibility.

(ii) **Remember, this expansion to totality *has not been embraced* in all jurisdictions**.

(iii) The book seems to suggest that the Aguilar/Spinnelli factors still exist, but are not dispositive.

(iv) E.g. **United States v. Morales:** Gates is a four-factor test
  01) Nature of the info
  02) Whether there has been an opportunity for the police to see or hear the matter reported
  03) Veracity and the basis of knowledge
  04) Whether there has been any independent investigation.

(e) Aftermath of Gates

(i) Tips can be "mutually corroborative" and pass muster. (**US v. Peyko**, 2d cir 108: Corroboration of innocent activity "lends color"—and credence—to tip).

(ii) Insufficient Corroboration
  01) ***US v. Leake** (6th Cir 1993, 108): Anonymous informant claims that he worked on a house, and while doing so smelled marijuana. Surveillance reveals nothing out of the ordinary, but a warrant issues anyway and contraband is found. Court finds that the warrant lacked PC: no detail from informant, nor sufficient corroboration.

2) The Citizen Informant

(a) Courts have distinguished "ordinary citizens" from police informants, as paid informants are presumptively unreliable given their dubious character and potential financial arrangements and anonymous informants may have ulterior motives. Ordinary citizens, however, tend to be presumed reliable. (112)

(b) **Accomplices** can be presumed reliable without corroboration. **US v. Patterson** (4th Cir. 1998, 112): The confession of a co-participant is itself sufficient to establish PC, and no corroboration is required.

3) Probabilities with Multiple Suspects
   (a) ***Maryland v. Pringle (US 2003, 120)**: Three men get arrested, no one admits to ownership of the drugs. Court holds that the officer had probable cause to arrest the occupants without a warrant even without knowledge of who possessed the drugs.
4) PC for arrest is different from the charge on which D was arrested
   (a) ***Devenpeck v. Alford** (US 2004, 123): Court emphasizes the officer subjective intent is irrelevant in holding that for purposes of determining whether a warrantless arrest is lawful under the Fourth Amendment, the criminal offense for which there is probable cause to arrest does not have to be "closely related" to the offense stated by the arresting officer at the time of arrest (Lexis).
5) Collective Knowledge
   (a) ***Whittley v. Warden** (US 1971, 125): Court holds that "police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support a judicial assessment of PC." In other words, A demonstrates PC to the magistrate, and any other officer can arrest based on the presumptive validity of the warrant. An arresting officer **need not have personal knowledge** of the arrestee's activity.

E) Probable Cause, Specificity, and Reasonableness
1) Things That Can Be Seized
   (a) Up until 1967, the Court had consistently held that the 4th prohibited the government from searching for or seizing anything other than the fruits and instrumentalities of a crime. "Mere evidence" was considered beyond the scope of a permissible search.
      (i) Ex: Police have a warrant to search for narcotics. They can seize narcotics, but not phone records or storage-locker rental agreements.
   (b) This status quo was shattered by ***Warden v. Hayden** (US 1967, 128), which held that 'mere evidence' did not attract a greater privacy interest than did the actual elements of the crime. As such, **the fourth amendment now allowed no distinction here between "mere evidence" and instrumentalities of the crime**.
      (i) The search power is *dramatically* expanded by this.
2) Probable Cause as to Location of Evidence
   (a) Probable cause does *not* automatically exist to search a person's home just because that person has been involved in a crime.
   (b) ***Zurcher v. Stanford Daily** (US 1978, 130): "The critical element is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought."
   (c) ***United States v. Lalor** (**4th Cir. 1993, 131**): Court holds that a warrant to search Lalor's residence was invalid, as he only sold drugs on the street and this was insufficient (without any other showing) to support the idea that he kept evidence at home.
      (i) (something tells me that this isn't frequently followed)

3) Searches of Non-Suspects' Premises
   (a) ***Zurcher** (see above): Officers have PC to believe that a Stanford Daily photog had taken pictures of demonstrators who attacked a group of officers. A warrant is obtained to search the office, despite there being no allegation that members of the staff were engaged in unlawful acts. Supreme Court (White) holds the warrant valid; there is "nothing special" about the search of a third party's premises, so long as **there is probable cause to believe that evidence of a crime will be found in the place to be searched**.
      (i) White is reacting is a practical problem: as warrants are often executed early on in an investigation, it would throw roadblocks in the path of the police if they were bright-line denied an ability to search third-party premises, especially for parties who may not be as innocent as they seem.
      (ii) Stevens dissents, and worries about the slippery slope problem of targeting multiple innocents who may be connected to a crime, but not the perpetrators thereof.
   (b) Law-Office Searches: Special protections may apply due to confidentiality concerns (see O'Connor v. Johnson, in Minnesota). However, these protections vanish if the lawyer is believed to be involved in criminal activity.
4) Describing the Place to be Searched
   (a) The particularity requirement is designed to protect against the abuses of a general warrant. It provides three main protections.
      (i) First, if the executing officer has no knowledge of the underlying facts, the particular description of the premises operates as a check on his discretion.
      (ii) If the executing officer knows the place she wants to search, the particular description establishes a record of PC as to the location.
      (iii) The particularity requirement prevents the officers from using the warrant as an expansive blank check.
   (b) Reasonable Particularity
      (i) Technical precision is *not* required.
      (ii) Generally: Two or more apartments in the same building count as entirely different residences. (**Moore v. US**)
         01) Exception: In ***Maryland v. Garrison** (US 1987, 135), a warrant was upheld that authorized the search of a "third floor apartment," even though there were two on the third floor. Here, however, there was a genuine mistake of fact in this case—officers thought there was only one apartment—and so Stevens holds that while the search *turned out* to be ambiguous in scope, it was *valid when it issued*.
         02) Exception Pt. 2: **US v. Johnson** (7th Cir. 1994): Particularization by dwelling is not needed when the officer knows that there are multiple units and believes there is PC to search each unit, and the targets of investigation have access to the entire structure.
      (iii) Wrong address on warrant
         01) ***Lyons v. Robinson** (8th 1985, 136): Wrong address, though inaccurate, is sufficiently particular because it made it unlikely that another premises might be mistakenly searched.

02) ***United States v. Ellis** (11th 1992, 136): Court holds that an address that merely said "search the third mobile home in this street" (an address that turned out to be defective; the residents of that mobile home pointed the cops to the correct one) and offered no information rendered the warrant defective.
    - A policy rationale of encouraging the officers to undergird their investigation in facts may be at play here.

(c) Breadth of the Place to be Searched
  (i) Basic Principle: **The police may search anywhere within the building or cartilage that is large enough to contain the evidence that the police are looking for**.
  (ii) A warrant that allows police to search "the premises" at a particular location can covered a detached garage, etc. (***US v. Earls**, 10th 1994, 138)
  (iii) Most courts have held that any person's property on the premises at the time of the search is subject to search so long as the property could contain the items described in the warrant. (**US v. Gonzalez**, 11th 1991, 138)

(d) Particularity for Arrest Warrants
  (i) An arrest warrant must describe the person to be seized with sufficient particularity.
  (ii) A warrant that merely authorizes arrest of "John Doe aka Ed" is not necessarily specific enough. (***US v. Doe**, 3d cir. 1988).

5) Describing the Things to be Seized
(a) ***Andresen v. Maryland**: Police apply for warrants to search D's law office, and specified that they wished to search for info pertaining to the sale of a certain lot. D contends that the warrants were overbroad, as the list of things sought concluded with "other fruits, instrumentalities, and evidence of crime at this time unknown." The Court concludes that the clause in question must be read as only pertaining to the particular lot in question, and that it did not authorize the executing officers to search for evidence of other crimes. Brennan dissents, stressing that the warrant should not have its validity judged by hindsight but, instead, should look at the facts as they were viewed by those executing the warrant.

(b) Special Circumstances – Computers
  (i) In general, if an officer has a warrant to search for child pornography on a computer, he can search things that would not immediately appear to be germane. **As such, computer searches tend to be wide in scope, as one cannot "trust" the defendant or suspect's self-labeling**.

(c) Reasonable Particularity
  (i) **The reasonableness inquiry takes into account how much an officer would be expected to know about the property in the course of obtaining PC to seize it**.
  (ii) "While a search warrant must describe items to be seized with reasonable particularity sufficient to prevent a general, exploratory rummaging, it needs only be reasonably specific, rather than elaborately detailed. (**US v. Bridges**, 9th Cir 2003, 142)

(d) Severability – In general, if a warrant is overbroad, the defect will not ordinarily taint the entire search so long as the defective portion can be severed. (**US v. Brown**, 10th Cir 1993, 143)

6) Reasonableness and Warrants - There are a few cases in which searches have been found unreasonable even though conducted with a warrant and PC.
   (a) ***Winston v. Lee** (US 1985, 144): A court order forces D (who had been wounded) to remove a bullet lodged beneath his skin. Court (via Brennan) agrees that this is violative of the 4th amendment; moreover, the state had failed to show that it even needed the evidence in question.
7) Details of the Warrant – Federal Rule of Criminal Procedure 41(e)(2).
   (a) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:
      (i) (i) execute the warrant within a specified time no longer than 10 days;
      (ii) (ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and
      (iii)(iii) return the warrant to the magistrate judge designated in the warrant.
   (b) (B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:
      (i) (i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;
      (ii) (ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and
      (iii)(iii) return the warrant to the judge designated in the warrant.
8) Anticipatory Warrants
   (a) A warrant is *not* invalid simply because it is contingent on a future occurrence.
   (b) ***US v. Grubbs** (US 2006, 145): Cops get a warrant that will be executed after the controlled delivery of contraband to a location. Court (Scalia) holds that this is permissible, as the triggering function still limits the scope of the warrant. Moreover, the magistrate is still required to make the same distinctions: for a conditioned anticipatory warrant to comply with the fourth amendment, two prerequisites of probability must be satisfied.
      (i) It must be true that if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place
      (ii) There must be probable cause to believe that the triggering condition *will occur*.
9) "Sneak and Peek" warrants
   (a) Originally, secret searches were generally prohibited via FRCP 41(f)(1)(C), which required delivery to the person whose premises are being searched.

(b) However, the Patriot Act authorizes the covert entry of a home or office if the government can show reasonable cause to believe that providing immediate notification will have an adverse result, defined as endangering physical safety, flight, destruction of evidence, etc. (147).

F) Executing the Warrant

1) Knock and Announce requirement

(a) Basic idea: officers give notice of their authority and purpose prior to forcing entry. This serves three purposes: it protects citizens and law enforcement officials, it protects privacy rights, and it protects against needless destruction of private property.

(b) ***Wilson v. Arkansas** (US 1995, 147): Considers the Constitutional basis of knock-and-announce, and concludes that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment."

(i) **This is not a rigid Constitutional requirement, but is instead a component of the 4A reasonableness inquiry**.

(c) "Refused admittance"

(i) An officer can break open premises if he has announced his authority and purpose and is refused admittance.

(ii) Refusal can be implied from the circumstances and need not be affirmative. In **US v. Knapp** (10th Cir 1993, 148), officers break down the door after announcing and waiting twelve seconds with no response from D, whom they knew to be inside.

01) Modification: It has been held that citizens should be allowed more time to answer in the nighttime hours. (US v. Jenkens, 10th Cir. 1999, 149)

2) Exceptions to the Notice Rule

(a) No "Breaking" needed – If the door is already open (US v. Remigio, 10th Cir 1985) or the officer can trick the homeowner into opening the door (US v. Contreras-Ceballos, 8th Cir. 2002), this is not a "breaking" and is not a violation of knock-and-announce.

(i) Big-time example: US v. Mendoza (8th Cir. 2002, 149): Police officers were not required to knock on the front door of the duplex, as it opened to a common hallway where D had no REOP; moreover, they were not required to knock before entering D's apartment, as it did not have a door on it. Kay.

(b) Emergency Circumstances

(i) ***Richards v. Wisconsin** (US 1997, 149): Wisconsin Supreme Court had held that the K&A rule was automagically excused in felony drug crime cases. SCOTUS doesn't like bright-line exceptions, finding this to be significantly overbroad. The no-knock entry here was justified, however.

(ii) **Richards Exigency Rule**: In order to justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing would be dangerous or futile, or that it would inhibit the effective investigation of the crime by allowing the destruction of evidence.

01) (Shorter: Reasonable suspicion is all that is needed to justify this exigency)

(c) No-Knock Warrants

(i) If officers make an advance showing that conditions would justify a no-knock warrant, one may be issued. See **US v. Banks** (US 2003, 152).
(ii) "If politce obtain a no-knock warrant prior to the search, the defendant bears the burden to show that the entry method was not justified. If police execute a general warrant without knocking and announcing, then the government is required to justify the use of the no-knock entry." (152)

(d) No-Knock Entries and Destruction of Property
(i) ***US v. Ramirez** (US 1998, 153): No heightened degree of exigent circumstances required when a no-knock entry results in the destruction of property.

(e) Exigent Circumstances After Knocking
(i) ***US v. Banks** (US 2003, 153): Police knock, wait twenty seconds, and bash the door in; D is in the shower. Court holds that after twenty seconds without a response, police could fairly suspect that the cocaine they were looking for would be gone if they were reticent any longer.

(f) Violation of knock-and-announce does *not* trigger the exclusionary rule.
(i) ***Hudson v. Michigan** (US, 155): Scalia sez that the K&A rule protects life, limb, and property; it gives individuals the opportunity to comply and preserves elements of privacy. It does not protect one's interest in preventing the government from seeing or taking evidence.

3) Timing and Scope of Execution
(a) Destruction and Excessiveness
(i) Generally, wanton destruction of property in a search for evidence will be deemed excessive and unreasonable. **Buckley v. Bueaulieu** (Maine 1908, 156)
(ii) Contrast: ***US v. Weinbender** (8th Cir 1997, 156): Police were reasonable in ripping out a piece of drywall to search for evidence, due to significant additional information leading to this as a reasonable act.

(b) Use of Distraction and Intimidation Devices
(i) ***US v. Myers** (10th Cir. 1997, 157): Use of a flashbang device not unreasonable, even though it was employed in a house with several innocent children. Court finds the police's justification for its use to be reasonable.
(ii) The use of these devices generally does not trigger the exclusionary rule, even when their implementation was unjustified. (**US v. Jones**, 7 2000, 157).

(c) Unnecessarily Intrusive Searches
(i) A search, even one conducted pursuant to a warrant, can be so excessive as to be unreasonable. See ***Hummel-Jones v. Strope** (8 1994, 158) (pre-dawn raid of a birthing clinic, culminating in seizing tapes of a mother's afterbirth experience, deemed unreasonable despite the presence of a warrant. "Mothers and newborns as a birthing clinic are not items of evidence.")

(d) What is the endpoint of the search?
(i) Basic, but uncommon, idea: officers must terminate a search when the materials scribed in the warrant have been found.
(ii) However, the courts do not seem interested in imposing temporal or spatial limitations on searches for narcotics and related evidence. Moreover, officers are not required to read warrants narrowly.

4) Presence of the Warrant at Time of Search
   (a) The officer is **not** required to have the warrant in possession at the time of the search. Service afterwards is enough. However, courts do not necessarily smile upon this practice. (US v. Hepperle, 161).
5) Enlisting Private Citizens to Help Search
   (a) Unwilling Participants
      (i) ***US v. New York Telco** (US 1977, 161): Court holds that, upon a showing of PC, a district judge had power to order an unwilling telephone company to assist the government in installing pen registers. (this is related to the All Writs act)
         01) Dissent: Congress did not empower the federal courts to compel private parties to carry out surveillance!
   (b) Willing Participants
      (i) Apparent rule: As long as the citizens are assisting the officers in a capacity beyond that of the officers' ability, and they are not pursuing their own personal ends, this tends towards the side of reasonableness. If they are extraneous, however, the 4th amendment privacy interest may be implicated.
      (ii) ***Bellville v. Town of Northboro** (1st Cir. 2004, 161): No 4th violation when officer asks two corporate employees to assist him in a search of the premises. Here, the employees were assisting the officer in technical matters beyond his expertise.
      (iii)***Bills v. Aseltine** (6th Cir. 1992, 162): GM official who comes along to take photographs is there for his "own purposes," and officers may exceed the scope of the authority when they permit unauthorized invasions of privacy by third parties.
6) Media Ride-Alongs
   (a) ***Wilson v. Layne** (US 1999, 162): Media observation of the execution of an arrest warrant in a home constituted a Fourth Amendment violation. The media's presence was unrelated to the objectives of the authorized intrusion and was thus in violation. (However, officers don't get dinged; they get qualified immunity due to the unsettled nature of the law before their case, and this was merely a civil action for damages.)
   (b) Violations of the media ride-along type probably don't result in the exclusionary rule, so long as the media does not participate in the search. (**US v. Hendrixson**, 11th Cir. 2000, 163).

G) The Screening Magistrate
1) "Neutral and Detached"
   (a) Sad reality: most magistrates are not neutral and detached; moreover, they're frequently *elected*, which the book makes sound even worse.
   (b) ***Coolidge v. New Hampshire** (US 1971, 164): The state's attorney general, as head of law enforcement, cannot be neutral and detached. There's a dissent, unbelievably.
      (i) (thankfully, there's no dissent in Connally v. Georgia, where a magistrate who was paid a fee if he issued a warrant was not neutral/detached)

(c) ***US v. McKeever** (5th 1990, 164): A magistrate who used to be involved in law enforcement, retained reserve officer status, and had a deputy husband has "troubling" issues of neutrality, but none enough to kill the warrant.

(d) **Rubber Stamp**: A judge who has not actually read the warrant cannot be found neutral and detached. (US v. Decker, 8th Cir 1992, 165). However, this is generally quite difficult to prove.

2) Legal Training

(a) ***Shadwick v. City of Tampa** (US 1972, 165): Tampa's municipal clerks, who could issue arrest warrants for minor offenses despite not being lawyers, were still "neutral" and "competent" enough to satisfy warrant standards. (Note, however, that the arrest warrants they were issuing were for breaches of municipal ordinances; the Court declined to make a categorical rule)

3) Magistrates need not give reasons for upholding or declining an application.

H) To Apply or Not Apply the Warrant Clause – Arrests in Public and in the Home

1) Standards for warrantless arrests

(a) **AN OFFICER MUST ALWAYS HAVE PROBABLE CAUSE TO ARREST A SUSPECT. PERIOD.**

(b) ∇Model Code of Pre-Arraignment Procedure 120.1 Arrest Without a Warrant

(i) A law-enforcement officer may arrest a person without a warrant if the officer has **reasonable cause** to believe that such person has committed

01) A felony

02) A misdemeanor, and the officer has reasonable cause to believe that such person

- Will not be apprehended unless immediately arrested, or
- May cause injury to himself or others unless immediately arrested

03) A misdeameanor or petty disdemeanor in the officer's presence.

2) Arrest versus summons

(a) ***Atwater v. City of Lago Vista** (US 2001, 167): The Court establishes a ***bright-line rule*** that a *custodial arrest is always reasonable if the officer has probable cause of a criminal violation*. (In this case, a minor traffic violation)

3) Arrests in Public: Constitutional Rule

(a) Usual rule: A police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony. Also, the common-law rule was that a peace officer could arrest without a warrant for a felony or misdemeanor committed in his view (this is from Watson).

(b) ***US v. Watson** (US 1976, 169): Watson is arrested without a warrant; he claims a violation of the fourth amendment, as there were no exigent circumstances. Court holds that exigent circumstances are not necessary for a warrantless arrest, and thus that D's arrest did not violate the fourth amendment. DISSENT emphasizes that there is no need to arrest the moment that PC ripens and, in the absence of exigency, there should be enough time to obtain a warrant.

4) Excessive Force in Arrests

(a) ***Tennessee v. Garner** (US 1985, 172): Under the 4th Amendment, **deadly force may not be used to prevent the escape of a felon unless it is necessary to prevent the escape *and* the officer has PC to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others.**

(in this case, the felon was not violent) This departs from the common-law variant of this rule, notably.

(b) All claims of excessive force in the making of an arrest are to be governed by the fourth-amendment standard of reasonableness. (**Graham v. Connor**, US 1989, 172)
   (i) Factors: Severity of the crime, whether the suspect poses an immediate threat, and whether he is actively resisting arrest.
   (ii) For example, if an officer fails to give a proper warning before letting a police dog loose, he might be engaging in an unreasonable use of force. See Vathekan v. Prince George's County.

(c) ***Scott v. Harris** (US 2007, S.17): High-speed chase case. Cop rams the guy off of the road; chasee files suit, claiming violation of his constitutional rights through excessive force. Court (Scalia) adopts the intriguing technique of using the version of the facts not relied upon by the CoA, saying that P's version of events is "so discredited that no reasonable jury could have believed him," thanks to the existence of a tape. Scalia distinguishes *Garner* by casting it merely as an application of the Fourth Amendment's reasonableness standards. He notes that the officer's action was *certain* to eliminate the threat posed by P; moreover, laying down a rule requiring police to let suspects get away would be awful public policy. Thus, he holds that, given the risks posed by P's conduct, the officer's conduct was reasonable under the totality, and he is thus entitled to summary judgment. Dissent dislikes Scalia's essentially de-novo review, and notes that P's crime was not serious enough to amount to what injuries he received by the cop's actions. It views the majority as setting down a per-se rule that a police officer's attempt to terminate a dangerous high-speed chase does not violate the 4th, even when it places the fleeting motorist at risk for serious injury or death.

5) Excessive Force and Public Protest

(a) ***Forrester v. City of San Diego** (9th Cir. 1994): Use of "police nunchakus" on anti-abortion protestors (through pain compliance) to get them to move is not an excessive use of force in executing arrests. Note that the police in this case were absolutely prohibited from using the "Drag and carry" method to remove protestors. Court: **Police officers are not required to use the least intrusive degree of force possible; rather, the force must simply be reasonable**.
   (i) Dissent: "Reasonable" force would have gotten the protestors to move. This force was to *punish* them for not moving.

(b) ***Headwaters Forest Defense v. Humboldt** (9th Cir 2000): Environmentalists chain themselves together in a lumber lobby, get pepper sprayed. Court: this is unreasonable use of force, as pepper spray continues to hurt after it is employed and the protestors posed no safety threat.

6) Arrests in the Home

(a) ***Payton** rule: **Arrests made in the home require an arrest warrant unless exigent circumstances exist.** This all traces back to the privacy interest, and the idea that the home is where the REOP is strongest.
   (i) **IMPORTANT: ARRESTS MADE IN VIOLATION OF PAYTON ARE *NOT ILLEGAL ARRESTS*; THEY MERELY BAR EVIDENCE**

OBTAINED FROM THE HOME. D IS STILL ARRESTED. See NY v. Harris, 535.

01) (However, fruit of the poisonous tree might apply)

(ii) **Stevens:** Absent exigent circumstances, the threshold of the home may not reasonably be crossed without a warrant. For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

(iii) Payton leaves it to the officer executing the arrest warrant to determine whether there is reason to believe the suspect is within

01) 11th Cir (US v. Magluta): The totality of the circumstances must warrant a reasonable belief that the location to be searched is the suspect's dwelling and that the suspect is within the residence at time of entry.

02) Some courts have held that "reason to believe" is less than probable cause, as the court in Peyton could have said "PC" if it meant to.

(b) Narrowing and defining ***Peyton**

(i) Arrest in a common halfway in a multiple-apartment building is not an arrest in the home. **(US v. Holland**, 2d Cir. 1985)

(ii) Courts have split on whether the defendant who is arrested after opening the door pursuant to a lawful claim of authority is arrested in the home or otherwise. Generally, the standard seems to be that as long as the officer does not enter the home, **Peyton** is avoided.

(iii) An officer can easily wait for the suspect to *exit* the home before arresting him, at which point no violation of ***Peyton** occurs.

(iv) Homeless persons: some courts have held that the arrest of a homeless person cannot violate Peyton; others have applied the privacy interest to the homeless person's living space, so long as the person isn't trespassing (185).

(v) **Hotels and Motels**: The protections against warrantless intrusion announced in Payton apply with equal force to a **properly rented** hotel or motel room. (US v. Morales, 8th Cir. 1984, 185).

01) If any irregularity attaches—if, for example, the rental period has expired—then this presumption drops.

7) Arrests in the Home of a Third Party

(a) ***Steagald v. United States** (US 1981, 186): **A search warrant** must be obtained to *look* for a suspect in the home of a third party, absent exigency or consent.

(i) Majority is concerned that a third party might be the victim of a search where there is no PC to believe that the arrestee is on the premises; remember, arrest warrants are not place-specific, and in Steagald, the contraband discovered was used against the owner of the house.

(ii) Distinguishing Steagald: in US v. Litteral (9th Cir. 1990, 186), the court held that if a person lives with a third party, only an arrest warrant is needed…but this would seem to implicate the privacy interest as well.

(iii) **Important**: This attaches to the privacy rights *of the homeowner*. It can be squared with Payton if one remembers that the warrant is for the protection of the third party, not for the protection of the arrestee. If police have an arrest

warrant and troop through someone's home and actually *find* the arrestee, he does not have standing to challenge the warrant.

(b) After **Steagald**, it is important for the officer to determine whether the suspect lives in the premises (in which case an arrest warrant is sufficient) or is merely a visitor (in which case a search warrant is required).

(i) However, courts may be lenient in determining the "good faith" of an officer who believes that D has either multiple residences or whose residency at the address is enough to raise it to **Peyton** levels. See U.S. v. Risse (8th Cir. 1996, 187), where an officer entered D's home with an arrest warrant to arrest D's girlfriend, even though he knew that the girlfriend had her own apartment.

(c) Standing concerns

(i) **Steagald** is concerned with the privacy rights of the homeowner, not those of the arrestee. Consequently, if the police only have an arrest warrant and *actually find* the suspect, ***he does not have his own fourth amendment claim***. US. v. Underwood (9th Cir. 1983). **THIS LACK OF A FOURTH AMENDMENT CLAIM EXTENDS TO THINGS FOUND IN PLAIN VIEW**, so long as they're only being used against him (although he might have other claims against these, namely claiming that they're not his).

01) (this makes sense, as otherwise it creates the perverse incentive of requiring a *greater level* of warrant preclearance when *not* in one's own home)

(d) The Rights of Overnight Guests – Steagald to the extreme.

(i) ***Minnesota v. Olson** (US 1990, 187): An arrest warrant is required under *Payton* to arrest a person who is an overnight guest in the home of a third party.

01) Again, though: what happens if Olson is violated?

(ii) Rationale: Even an overnight guest has a REOP in the premises.

(e) Temporary visitors - ***Minnesota v. Carter** (US 1998, 188)

(i) A temporary visitor does *not* have a REOP sufficient to trigger the 4th-amendment protection.

(ii) Rehnquist: "The purely commercial nature of the transaction, the relatively short period of time on the premises, and the lack of any previous connection all lead us to conclude that D's situation is closer to that of one simply permitted on the premises."

(iii) Scalia's concurrence: Olson is the absolute limit of what tradition permits.

(iv) Ginsburg's dissent: When a homeowner or lessor personally invites a guest into the home, there should be a basic REOP against unreasonable searches and seizures.

8) Material Witness

(a) Basic: The police have the power to detain an arrest a material witness to a crime under certain circumstances.

(i) 18 USC § 3144: If it appears from an affidavit that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person like an arrestee for a crime.

(ii) Every state provides for detention of material witnesses, as ratified by the Supreme Court.
(iii) **There is no constitutional right for monetary compensation for time spent in confinement as a material witness**.

(b) Example: ***US v. Awadallah** (2d Cir. 2003, 189): Suspected 9/11 cohort detained as a material witness for 20 days. Court upholds the detention as reasonable.

(c) Dangers: This can be used as a pretext to detain people who are *actually* suspected of criminal activity, before there exists enough evidence to arrest them for the crime.
(i) Studnicki and Apol: This is *carte blanche* to the government.

I) Stop and Frisk

1) ***Terry v. Ohio** (US 1968, 191): The Origin

(a) While patrolling, a cop becomes suspicious of two men who seem to be, in the vernacular, "casing a joint." After watching them for a while, he confronts them, asks for their names, and frisks Terry, finding a pistol; the officer emphasizes that he merely patted them down.

(b) The Court's first task is to decide when the Fourth Amendment became relevant in the encounter. It notes that **whenever a police officer accosts an individual and restrains his freedom, he has "seized" that person**. Thus, the stop of Terry in this case was clearly a seizure, and the pat-down was clearly a search. The inquiry then proceeds to whether or not this action was reasonable, as this is an area of police conduct generally unaddressed by the warrant clause.

(c) The court develops the doctrine of *reasonable suspicion* to guide the inquiry here. It further holds that, pursuant to the **sole rationale** of *protection* and *security*, an officer may "take necessary measures to determine whether the person is in fact carrying a weapon."
(i) Test: Can the officer point to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience?

(d) Sum part 1: **When a police officer observes unusual conduct which leads him reasonable to conclude in light of his experience that criminal activity may be afoot, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him**.

(e) Sum part 2: **Reasonable suspicion does not require that a crime be committed, or that suspicion thereof attach. Suspicion of *potential* criminal activity is enough**.

(f) **Douglas's Dissent**: Goes for the strict doctrinal approach, noting that search and seizure is unconstitutional without PC, period.

(g) Aftermath: The Supreme Court explicitly invoked the reasonableness clause over the warrant clause. The scope and effect of Terry have been broad.

(h) Maclin: Terry fundamentally changed 4th amendment law; it gives *enormous* discretion to the police, thus expanding police powers and diminishing individual freedom. This, in turn, led to racial targeting for discretionary intrusions.

2) Applications of Terry

(a) ***Adams v. Williams** (US 1972, 199): In upholding the use of an informant's tip in a stop-and-frisk-like situation that led to a gun being discovered, the **Court**

emphasizes that reasonable suspicion need not be based on personal observation, and can be based eon information supplied by another person.

(i) Marshall's dissent: informant had no track record of providing reliable info!

3) Bright-line rules under Terry
   (a) Officers in the course of a legal stop of an automobile **have an *automatic* right under Terry to order the driver out of the vehicle**. (**Pennsylvania v. Mimms**, US 1977, 202)
      (i) Rationale predicated on the safety of the officer, who can better observe the stoppee if he is out of the car.
      (ii) **Note: No particularized reasonable suspicion is needed**.
      (iii) Marshall's dissent: Terry requires a nexus between the reason for the stop and the need for self-protection. Here, the reason for the stop was an **expired license plate**; such a nexus does not exist!
   (b) Officers in the course of a legal stop of an automobile **have an automatic right to order passengers out of the vehicle**. (***Maryland v. Wilson**, US 1997, 204)
      (i) Again, no particularized reasonable suspicion is needed.
   (c) Officers may open the door of a vehicle with **tinted windows** and conduct a visual inspection of the interior to discern whether the occupants of the vehicle present a danger. (**US v. Stanfield**, 4th Cir. 1997, 205).
   (d) In order to observe a VIN generally visible from outside an automobile, a police officer may reach into the passenger compartment of a car to move papers obscuring the VIN after its driver has been stopped for a traffic violation and has exited the car. (**New York v. Class**, US 1986, 205)
      (i) (in this case, the officer discovered a gun while doing so)
      (ii) (SDOC justified this on the protection rationale, which extended to not having to ask Class to enter the car to remove his papers)

4) Detention of Occupants of a Residence During Legal Law Enforcement Activity
   (a) ***Michigan v. Summers** (US 1981, 206): Court holds that police with a search warrant for a home can require occupants of the premises to remain while the search is executed; such a seizure would always be reasonable, given the state's interest in preventing flight and the risk that those departing would destroy evidence.
   (b) ***Muehler v. Mena** (US 2005, 206): Cops use a SWAT team to search a house, place D in handcuffs in her bed at gunpoint, and guard people in the garage during a search; moreover, INS agents ask for the detainees' documentation. D files a § 1983 suit. Court relies on Summers to conclude that D's fourth amendment rights were not violated; **inherent in Summers' authorization to detain is the authority to use reasonable force to effectuate the detention**. The detention in handcuffs was more intrusive than the scenario in Summers, but was reasonable given the risk to officer safety involved.
   (c) ***Los Angeles v. Rettele** (US 2007, S25): Really awful case in which cops accidentally search a residence that had changed ownership in the time since the warrant was procured. Deputies engage in fun activity like forcing an undressed couple to get out bed and then detaining them in their home. The Court *really* abuses the officer safety rationale to find this reasonable, including indulging in

the vomit-inducing line, "it is not uncommon in our society for people of different races to live together."

5) The line between "stop" and "encounter": when does a seizure occur?
   (a) ***US v. Mendenhall** (US 1980, 209): A **person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.**
      (i) Examples: Threatening presence of several officers, display of a weapon by an officer, physical touching, or compelling tone of voice.
      (ii) Mendenhall is the "suspected drug courier in the airport" case; here, the police were very nonconfrontational, and D seems to acquiesce to their requests enough to dispel the idea of a seizure occurring; when she was initially approached, no seizure occurred.
   (b) ***Florida v. Royer** (US 1983, 210): Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and was freely and voluntarily given.
      (i) Similar fact-pattern to the Mendenhall, but this time, the agents **do *not* return Royer's stuff** (tickets, etc). He seems to consent to various searches (follows officers without speaking, etc.), but does *not* consent to others, in particular an officer retrieving the luggage using the confiscated ticket stubs. Drugs found.
      (ii) The Court notes that it is unquestioned that the validity of the search (in the absence of the warrant/PC/exigent circumstances) depended on Royer's consent, and in this situation, the State has the burden of proving that the consent was obtained and freely/voluntarily given. They go on to say that if there's no seizure, then no Constitutional rights have been violated. **However, the court holds that this *was* a seizure; the totality suggests that Royer did not feel free to leave.** Dissent acknowledges that he was seized, but seems to be OK with it on reasonable suspicion/consent grounds.
   (c) Lower court's decisions after Royer
      (i) ***Wilson v. Superior Court** (California, 212, 1983): Court finds that a seizure has taken place when an officer approaches a suspected drug courier and asks to search his luggage.
      (ii) **Morgan case**: Operative language: "When a citizen expresses his or her desire *not* to cooperate, continued questioning cannot be deemed consensual." (213)

6) Factory Sweeps
   (a) ***INS v. Delgado** (US 1984, 213): INS does an immigration sweep of a factory, posting guards at the entrance and interrogating the workers about their citizenship status. Employees file suit seeking declaratory judgment and injunctive relief. **Court, characteristically, holds that the sweep was just dandy; guards were merely stationed at the exits to ensure that questions were put to all employees, employees were at work and shouldn't leave the factory anyway, and consequently there's no coercive/custodial effect**. Dissent calls bullshit. I agree.

7) Street Encounters

(a) ***United States v. Cardoza*** (1st Cir. 1997, 214): Uses the **coercive conduct** test, in which the court says that it **"must determine whether the officer's conduct indicated that he was interfering with D's liberty to such an extent that he was not free to leave."** This is a big departure from Terry; it switches the calculus from "whether the person feel free to leave" to "whether the police officer is acting coercively."

(i) Slightly complicated fact pattern; basically, a cop notices two younger guys acting suspiciously, and approaches them from behind in the car, which includes going the wrong way down a one-way street. Cop calls out to one of the guys and starts talking to him; the dude gestures while responding, cop sees ammunition, and pat-frisks the dudes, finding more INCRIMINATIONNESS. D argues that the evidence should be suppressed because, by the time the cop saw the ammo, he had been stopped without RS. Court uses the "free to leave" test to position this as a fairly benign encounter, noting that the cop's language ("What are you doing out this time of night?") does not imply an attempt to restrain the guy's liberty. The court responds to the usual "*who feels free to walk away*" criticism by clarifying the standard, noting that the police conduct must objectively communicate that the officer is exercising his authority to restrain before a seizure can occur.

8) Bus Sweeps

(a) ***Florida v. Bostick*** (US 219, 1991): **The Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to refuse.**

(i) The officer carries no gun and advises the passenger that he can refuse to consent to the search. He agrees, drugs are found. Florida Supreme Court adopts a *per se* rule: due to the cramped confines of a bus, the act of questioning deprives people of freedom of movement and thus constitutes a seizure. SCOTUS reverses. Firstly, the Court hates the idea of per se rules in 4th amendment contexts. Secondly, the Court notes that the cramped confines and limited freedom of movement (and inability to disembark due to fear of being left behind) are part and parcel of the greyhound experience. Finally, it rejects the idea that no reasonable person would have consented to this search, noting that the RP standard here is objective and presupposes an innocent person.

(b) ***US v. Drayton*** (US 2002, 217): Greyhound bus makes a scheduled stop; driver leaves the bus to do paperwork. Three plainclothes officers board; one watches the entire bus from the driver's seat, one stations himself in the rear, and one proceeds down the bus checking passengers and attempting to match 'em to bags. Sum: with his face very close to two passengers, cop asks to check their bags/people, they agree, drugs are found. TC denies Ds motions to suppress; CoA reverses, based on caselaw that compels cops to announce "some positive indication that consent could have been refused" during bus searches, in effect announcing a per-se rule that this sort of announcement is required. *At issue: is this announcement required in bus searches?* Court notes that there was no force, no intimidating movement, no exit-blocking (I doubt this), and that badge-

showing doesn't rise to a seizure level. There's an awful safety rationale, to boot, arguing that most passengers know that "their participation enhances their own safety." Court also disregards the co-passenger's argument that no reasonable person would feel free to not consent to a search after his friend had been arrested.

(i) **Holding**: Although Lang did not inform respondents of their right to refuse the search, he did request permission and the totality suggests that the consent was voluntary; thus, the searches were reasonable.

(ii) **Dissent**: This is ridiculous. The officers took control of the *entire passenger compartment*. Most people probably thought that this "interdiction" exercise was one they had no control over.

(c) ***United States v. Jackson** (5th Cir 2004): Officers board bus, announce a drug-sniffing dog will be on board, allows passengers to stay or leave. All passengers leave. Dog alerts to an empty seat; officers find the passenger in the terminal, he consents to a search, drugs are found. D argues that he *had* to disembark in order to avoid the encounter with the dog, and that this should constitute a seizure. Court rejects this, noting that his need to leave says nothing about whether police conduct is coercive. Absent police conduct leading him to believe that he had to stay onboard, there's no seizure; the inconvenience of leaving can't justify a finding of one.

(d) Professor Nadler on bus sweeps: The assertion that bus passengers feel free to ignore police is absolutely implausible. It would be far more honest for the Court to elucidate its social-policy reasons for allowing these to go forward.

9) State of Mind Required for a Stop

(a) Scalia: A Fourth amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, nor even whenever there is a governmentally *desired* termination of an individual's freedom of movement, **but only when there is a governmental termination of freedom of movement through means intentionally applied**. (***Brower v. Inyo**, US 1989, 224; this is the "blind roadblock" case)

(i) Stevens: I disagree with this intentionality standard.

(b) Applications

(i) ***Medeiros v. O'Connell** (2d Cir 1998, 224): Police standoff. Officer fires into a bus in an attempt to kill the gunman, but hits a student instead. Court follows Inyo in holding that there was no seizure, because the student was not the intended recipient of the action.

(ii) Both a driver **and** a passenger in a car are "seized" when a police officer makes a traffic stop, and thus both have standing to challenge the constitutionality of the stop. (***Brendlin v. California**, US 2007, S.28)

10) Suspects who Don't Submit – How does Mendenhall apply to situations where the show of authority is refused?

(a) ***California v. Hodari** (US 1991, 225):

(i) Youths flee when they see officers; one throw a crack rock at the officer before he's caught. But yet, caught he be. He claims that the chase itself was a seizure. Court distinguishes between two kinds of seizures: physically touching and show of authority (see below). Court decides that the Medenhall free-to-leave test in nonphysical encounters is necessary, but not sufficient

(again, see below). There's also a public-policy concern here, as officers expect compliance and it "would not do" to reward suspects for noncompliance.

(ii) **Dissent** hates this, and notes that it seems to support the idea that an officer can fire his weapon at a suspect and not have engaged in a seizure, so long as he misses. Dissent also notes that this creates an anomaly where an officer can use reactions to assertions of authority to justify a search. "A police officer may now fire his weapon at an innocent citizen and not implicat ehte Fourth Amendment, as long as he misses his target."

(b) **Hodari Categories**

(i) Physical Touching

01) Pretty much anything is sufficient here, although there is not a continuing arrest during the fugivity.

(ii) Non-physical, e.g. pursuit (at issue in Hodari)

01) Narrowed to be that a person is only seized when there's a show-of-authority and the person doesn't feel free to leave *and* actually submits. Non-submission does not a seizure make, apparently, as the mere show of authority is not enough

(c) Under **Hodari**, it is unsurprisingly difficult to tell when a suspect has submitted to a non-physical show of authority. In ***US v. Lender** (4th Cir. 1993, 227), a fleeing suspect's momentary stop in response to police instructions did **not** count as a submission.

(d) **Horadi's Impact on Civil-Rights Actions**

(i) ***Carter v. Buscher** (7th Cir 1992, 228): Hilarious highway shootout/contract killing case. Short form: suspect who is shot and killed was not complying, and thus was not "seized" until he was *actually shot*, by which point the seizure was reasonable…because he was firing back.

11) Defining Reasonable Suspicion

(a) Reasonable suspicion is *less stringent* than PC, and is thus more amenable to the occasional error.

(b) The "frisk" rationale of Terry does **not** extend to the stop. **Officer danger is not a necessary element of a stop**.

(c) Step I: Source of the information

(i) Anonymous Tips

01) ***Alabama v. White** (US 1990, 230): **<u>An anonymous informant's tip that was "significantly corroborated" by an officer's investigation provided reasonable suspicion for a stop</u>**. Corroboration need not be complete nor flawless, as reasonable suspicion is a less demanding standard.

- Cop receives anonymous tip that White would be leaving a particular apartment in a brown wagon, etc, and that he'd have cocaine. Events transpire, but they aren't exactly as the tip describes. There's a stop and consent to a search; cocaine and pot are found. D argues that the stop was illegal as there was no reasonable suspicion. Court uses the Gates totality test to hold that there was reasonable suspicion, based on the tip and the partial (emphatically, not complete) corroboration

thereof; however, the Court acknowledges that the tip itself would not have been sufficient. On that specific subject of partial corroboration, the court makes a great deal of the fact that there was partial prediction of D's behavior. Dissent argues that the corroborated behavior was completely innocent.

02) ***Florida v. J.L.*** (US 2000, 232): Totally anonymous tip is used to justify the stop-and-frisking of a random black guy standing at a stop, who—it turns out—does indeed have a gun. **Rule**: **Anonymous tips can occasionally support reasonable suspicion, but only if there's an indicia of reliability (e.g. the prediction of not-easily-forecast movements).** This tip, it turns out, doesn't quite make it; it's *completely* anonymous, and really doesn't have much in the way of concealed-criminal-activity description going on; court none-too-subtly implies that it doesn't help that there's no audio recording of the tip. **Florida also argues for a firearms exception to the indicia rule, which the Court, amazingly, declines to impose**.
    - Concurrence notes that some "anonymous" tips might still fulfill the indicia, e.g. a "repeat" anonymous tip.

03) Reckless driving tips: Anonymous tips reporting on reckless driving **are OK**, as reckless driving is an imminent and ongoing risk to public safety. **Inference: Anonymous tips dealing with flagrant, ongoing, and somewhat uncontrollable behavior may be exempt from the J.L. indicia requirement**. (***United States v. Wheat**, 8th Cir. 2001, 236)

04) Exceptions to the classification of "anonymity": **a face-to-face tip is less-than-totally anonymous, giving the officer to judge the demeanor and credibility of the informant, and is such not governed by J.L** (and, in fact, may support RS). It does not matter if the informant then disappears. (***United States v. Heard**, 11th Cir. 236).

(d) Step II: Quantum of Suspicion

(i) Definition: particularized suspicion, an assessment based on **1) the totality of the circumstances (including police experience) and 2) the totality analysis must yield a particularized suspicion that the particular individual being stopped is engaged in wrongdoing.** (***United States v. Cortez**, US 1981, 237)

(ii) Comparison to Probable Cause: reasonable suspicion frequently occurs when probable cause does not. A court will **undertake a common-sense analysis of the facts presented and will give deference to the expertise of law enforcement officers**.

01) Frequently, reasonable suspicion is characterized as dealing in **possibilities** instead of **probabilities**.

02) ***US v. Windsor** (9th Cir 1988, 238): Officers search a hotel for suspects. The hotel as 40 guest rooms. Court holds that there is not PC to search each room for the suspects, as a 1/40 probability is too small to amount to probable cause…although it can amount to reasonable suspicion.

(iii) Assessment of Probabilities: ***US v. Arvizu** (US 2002, 239)

01) Complex fact pattern involving a van that evades border checkpoints in a totally suspicious way. D's argument asserts that the cop didn't have reasonable suspicion for his eventual stop. CoA had reinstated the suppression, noting that many of the factors elucidated to support RS were very grey-area; importantly, it analyzes these factors in isolation. **The SCOTUS spanks the CoA, noting that the correct test is *totality*—as in "in-tandem"—and holding that the cop's professional background seemed to entitle him to a RS standard.**

(iv) Reasonable Suspicion of a Completed Crime

01) **Terry is not confined to prospective crimes; the power granted by Terry may also be exercised to investigate completed crimes.** When police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, the may conduct a stop. (***US v. Hensley**, US 1985, 249).

(v) Relevance of the Race of the Suspect

01) General rule: in the absence of other elements of the quantum, race **cannot** be used to create reasonable suspicion (***St Paul v. Uber**, Minn 1990, 250: Nobody needs to justify his or her lawful presence on a public street in the twin cities).
    - Also: ***Brown v. Texas** (US 1979, 251): D's mere presence in a neighborhood where drug transactions happen is insufficient to justify a stop.

02) However, some courts have held that race can be a **part** of the quantum of suspicion.
    - ***US v. Weaver** (8th Cir. 1992, 251): Ugly case in which the only black guy on an LA/Kansas City flight is stopped for drugs; court finds "additional" suspicions, all of which are extraordinarily vague, in order to uphold this race-based stop on that basis.

03) Race in encounters versus stops: in ***United States v. Avery** (6th Cir. 252), the court held that the EPC provides citizens a degree of protection independent of the 4th amendment, which becomes relevant even before a seizure occurs.
    - Unfortunately, winning on this ground is notoriously tough. **Avery** goes against D in the end, as the court adopts a "balancing test," where the existence of other factors were **enough to rebut the assertion that the encounter was based on race**.

04) Racial/Other Profiles
    - Aside: Drug courier profile: 1) arrival from or departure to an identified source city, 2) carrying little to no luggage 3) unusual itinerary 4) use of an alias 5) carrying large quantities of cash 6) purchasing airline tickets with a large amount of small-denomination currency 7) nervousness
    - ***United States v. Malone** (9th Cir. 1989): Gang member profile used to justify a stop **is nothing more than an administrative tool of the police**.

- 1) A match between certain characteristics of the profile and those of the defendant does not automatically establish RS.
- 2) However, this match also does not preclude its use as part of the justification for reasonable suspicion for the stop.

- **Rule**: **A court sitting to determine the existence of RS must require the agent to articulate the factors leading to that conclusion, but the fact that they stem from a profile does not somehow detract from their evidentiary significance as seen by a trained agent**. (***US v. Sokolow**, US 1989, 254)
  - Dissent: Relying on these profiles runs a great risk of subjecting the innocent to unwarranted police harassment and detention!
- Overbroad profile factors—like "driving through Arkansas in a car from California, which is a source state for drugs"—can defeat their use. ***US v. Beck** (8th 1998, 255) (sole use of the test above would not have justified the stop, although it could have been used in tandem)

(vi) Reasonable Suspicion and Flight from Police

01) Basic Rule: **Flight from the police can justify enough reasonable suspicion to effect a stop.**

- ***Illinois v. Wardlow** (US 2000, 256): D flees when he sees police approaching in an area of Chicago known for heavy narcotics trafficking. An officer catches him and conducts a pat-down, discovering weapons. REHNQUIST notes that flight is not "going about one's business"; it is, in fact, the opposite. Consequently, this unusual behavior can justify the formation of reasonable suspicion, although not necessarily PC.
  - STEVENS partial dissent: D's flight in a high crime area should not have been enough to justify RS, especially as contact with the police can be viewed as dangerous in these areas.

12) Limited Searches for Police Protection under the Terry doctrine

(a) **Frisks cannot be used to search for evidence**

(i) ***Minnesota v. Dickerson** (US 1993, 258): During a pat-down, officer discovers an object that is not a weapon; he comes to the conclusion that it is crack cocaine and pulls it out of D's pocket. Court (White) holds that this oversteps the boundaries of Terry, which needs to be predicated on the safety rationale.

(ii) ***People v. Russ** (NY 1984, 258): Anonymous informant states that a woman sitting in a car in a high-crime area had passed a handgun to a man, also in the car. Police order her out of the car and frisked her. NYCA found no RS basis for the frisk, as there was no predicate that indicated that D was still armed and dangerous.

01) (Most courts give more deference than this. See 259)

02) Professor Harris: Courts have generally more toward one goal: allowing police to make more frisks by assuming that more and more crimes, persons, and situations could present danger to officers.

13) Protective Searches Beyond the Suspect's Person

(a) ***Michigan v. Long (US 1983, 261)**: Long is driving erratically and eventually swerves into a ditch. After getting out, he is confronted by cops; he begins to walk back towards the car, at which point an officer flashes a light into the car and sees a hunting knife. A protective search is conducted and marijuana is seized. Court: **Terry permits a limited examination of an area from which a person, who police reasonably believe is dangerous, might gain control of a weapon**. SDOC justifies this by pointing out that even if D couldn't get the weapon ***during*** the stop, he could certainly get to it the instant the stop was over.
   (i) **NOTE: NEW YORK REJECTS THIS RATIONALE UNDER STATE CONSTITUTIONAL LAW**. ***People v. Torres** (NY 1989, 261): Such a far-fetched scenario is an insufficient basis upon which to predicate an intrusion.

(b) Applying **Long**
   (i) The Guns/Drugs connection: courts frequently allow for expansive Terry searches of drug offenders on the assumption that drugs and weapons travel together. (262: courts allow for the searches of cars, including a locked glove compartment, based on drug activity)
   (ii) ***US v. Johnson** (5th Cir 1991): Court allows police to cursorily inspect a pair of overalls located a few feet away from a suspect who appeared to be attempting to burglarize a home.

(c) Prospective Searches of Persons Other than the Suspect
   (i) ***Ybarra v. Illinois** (US 1979, 262): Police search a bar pursuant to a valid search warrant, and in the process of doing so frisk a patron. **Court refuses to uphold this**, based on the reasoning that the patron's mere presence was not enough to provide a reasonable suspicion that he posed a risk of harm.

(d) Inspecting Objects During the Course of a Prospective Search
   (i) Basic problem: If an officer is inspecting someone and discovers an object, **Dickerson** seems to suggest that he can only pull it out if he reasonably believes it to be a weapon. Obviously, however, there are several gray areas in play.
   (ii) ***US v. Swan** (4th Cir. 1998): While conducting a Terry frisk, officers find a hard object in a sock; they pull it out and it turns out to be evidence. Court concludes that a reasonable officer "could justifiably have believed that the item was a weapon."

(e) Protective sweeps:
   (i) A protective sweep is a **relatively limited intrusion**, **extending only to a cursory inspection of those spaces where a person may be found; it may last "no longer than is necessary to dispel the reasonable suspicion of danger**."
      01) Protective sweeps are **not limited to the context of arrest**. For example, officers allowed into the home by consent are still allowed to do a protective sweep (US v. Gould, 265).
   (ii) ***Maryland v. Buie** (US 1990, 264): Cops arrest a suspect in his home and conduct a protective sweep of the premises; during this sweep, they discover evidence.

01) A protective sweep is justified by an officer's reasonable suspicion that the area being swept harbored an individual posing danger to the officer or others.
02) Reasonable suspicion bdalances the arrestee's remaining privacy interest in the home and the officer's interest in safety.

(iii) ***United States v. Colbert** (6th Cir 1996, 264): Strikes down a protective sweep where the officers had no indication that there was anyone else other than the arrestee on the premises.

14) The line between "stop" and "arrest"

(a) White in Florida v. Royer: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion. It is the State's burden to demonstrate that the seizure it seeks to justify was sufficiently limited in scope and duration to satisfy these conditions.

(b) Factors

(i) Forced Movement to a Custodial Area (this is Royer)

01) White: While some forced movements of a suspect in a stop might be justified, PC is required if the officer forces the suspect to move in order to further the investigation or to put more pressure on the suspect.

(ii) Forced Movement for ID purposes

01) **Many courts have found that if RS exists, it is permissible to transport the suspect a short distance for purposes of ID by witnesses**.
- ***People v. Hicks** (NY 1986, 267): The coercive movement to the crime scene for purposes of ID was within the confines of Terry.

(iii) Investigative Techniques that are permissible within the Terry confines

01) Preliminary investigation of the suspect's identify and questioning concerning the circumstances giving rise to the stop.
- Examples: drivers license request; canine sniff; etc.

02) ***US v. Washington** (9th Cir. 2004, 268): A stop became an arrest where officers extended a detention to obtain consent of the suspect to search the premises for drugs. "If the stop proceeds beyond the Terry limitations, an arrest occurs"

03) ***Hibbel v. Nevada** (US 2004, 269): Hibbel is stopped on RS of being involved in a domestic assault. He refuses to provide ID. He contests a statute criminalizing his refusal to provide ID during the stop. Court: **an officer has the right to demand ID as part of an investigation during a Terry stop**.
- Kennedy: ID requests are routine and accepted, and they serve an important governmental interest. The Nevada statute is thus reasonable within the confines of the 4th amendment. Kennedy stresses that this does not allow an officer to randomly ask for someone's name and arrest him if he refuses: "an officer may not arrest a suspect for failure to identify himself if the request was not reasonably related to the circumstances justifying the stop.

(iv) Overly Intrusive Investigation Techniques

01) Searches for evidence go beyond Terry.
02) Courts are divided on whether PC is required before a suspect can be subjected to a series of demanding physical tests to determine intoxication.

(v) Investigation of Matters Other Than the RS that Supported the Stop: Stop After Stop

01) **Many courts have held that a Terry stop must end when the reason for the stop has ended**
- For example, an officer who stops someone for a traffic violation may not continue the stop in order to investigate for gun crimes. (US v. Salzano, 271)
- **US v. Santiago** (5th Cir. 2002, 271): Continued detention after a valid traffic stop has ended is impermissible!
- ***US v. Millan-Diaz** (10 1992, 271): Cops stop a car under suspicion that it is transporting illegal aliens. It ain't, but cops do a subsequent investigation and find drugs. Court suppresses this, as the purpose of the stop was satisfied as soon as the agents determined that there were no illegal aliens hiding in the car.

02) **However, if in the course of a stop for crime A, the officer obtains RS to investigate crime B, the detention can be extended to investigate crime B.**
- **United States v. Erwin** (6th Cir. 1998, 272): While investigating a suspected drunk-driver, cops suspect that he is a drug dealer. Court upholds the totality of "suspicion-causing" evidence as enough to justify RS for the second crime.

03) Consensual encounter after a stop has ended
- ***Ohio v. Robinette** (US 1996, 272): Suspect **need not be told that the stop is over and that he is free to go**. Thus, the cop's decision to ask a few more questions after the stop was over—and D's unbelievable decision to let him search his car—was OK.

(vi) Interrogation

01) ***Dunaway v. New York** (US 1979, 273): Cabins Terry, somewhat. **Police cannot detain a suspect and transport him to the stationhouse for questioning without probable cause, even if the detention is not deemed to be an arrest under state law**.

02) ***Kaupp v. Texas** (US 2003, 273): Officers suspect a kid of involvement in a murder. They enter his home at 3am, wake up him, place him in handcuffs and transport him to a patrol car. The car stops briefly at the site where the victim's body was found, then proceed to the stationhouse, where D partially confesses. The Court holds that it was **clear** that D had been arrested without PC; the kid's utterance of "OK" when asked if he wanted to go with the officers cannot provide an independent basis for justification.

(vii) Fingerprinting

01) ***Davis v. Mississippi** (US 1969, 274): Court holds that a round-up of 25 black youths for questioning and fingerprinting violated the 4th amendment. However, in so holding, the Court emphasizes that

fingerprinting is less serious an intrusion on liberty than other searches; under some circumstances, detention fingerprinting may be found to comply with the 4th amendment even though there is no PC.

- **IF THIS COMES UP ON THE TEST, BRING UP DATABASES TO DISTINGUISH**.

02) **Hayes v. Florida** (US 1985, 275): Officers take a suspect (RS only; no PC) to a stationhouse to be fingerprinted. Court holds that this was an arrest; **when police forcibly remove a person to the stationhouse, they are making an arrest**. White takes pains to distinguish this from a "brief detention in the field" for fingerprinting, which may be permissible.

(viii) Time Limits on Terry Stops

01) **The Supreme Court has rejected an absolute time limit on Terry Stops**, emphasizing that it is instead "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly"; unacceptable delay, however, might be questionable. (***United States v. Sharpe**, US 1985, 275)

- **Marshall** concurs in the judgment, emphasizing that Terry stops must be brief.

(ix) Show of Force During a Terry Stop

01) **Courts have routinely relied on Terry and Adams to uphold the use of handcuffs and guns where there is RS to believe that they are necessary to protect the officer from harm** (People v. Allen, 277)

02) ***US v. Alexander** (2d Cir. 1990, 277): Court holds that officers acted properly when they unholstered heir guns to detain two men suspected of purchasing drugs…this gets connected, as always, to the officer safety rationale.

03) ***Oliveira v. Mayer** (2d Cir. 1994, 277): Civil rights action against the cops for use of a "high risk" intervention procedure in response to a suspected robberty. Court holds that, as a matter of law, that Ps were subject to a degree of restraint that was too intrusive to be classified as investigative detention.

04) ***Washington v. Lambert** (9th Cir. 1996, 278): Another civil rights action. Ps had been stopped because they fit a general description of two blacks wanted for a burglary. Or something. Anyway, the court holds that the use of handguns, etc., elevated the Terry stop into an arrest in absence of PC.

15) Detention of Property under Terry

(a) Basic idea: Terry principles can be extended to property.

(b) ***US v. Van Leeuwen** (US 1970, 280): Officers, acting on RS, detain a package for more than a day. Given the prompness and diligence of the exercise, the Court holds that this was a proper property detention under RS.

(i) Court: no privacy interest invaded.

(ii) Note no safety rationale: this is a stop, not a frisk, and thus does not require the "safety" prong.

(c) ***United States v. Place (US 1983, 281)**: Police officers search D's luggage as he arrived at La Guardia. They detain his luggage for 90 minutes. Court finds that the 90-minute delay was unreasonable in the absence of PC; the officers, the Court

decides, had not diligently pursued the investigation. They also failed to tell D the details of the scheme, making the detention of his luggage the equivalent of the detention of D.

(i) Implication: swiftness can probably be a factor. See US v. Currency, where similarly laggardly treatment of detained luggage also gets knocked down

(d) ***United States v. LaFrance** (1st Cir. 1989): Detention of an en-route FedEx package does not violate D's liberty interest, and is thus slightly more flexible; a slightly longer detention was permissible so long as the police were acting diligently.

16) Limited Searches for Evidence by Officers under Terry

(a) ***Arizona v. Hicks** (US 1987, 283): Police lawfully entered premises from which a weapon had been fired and noticed two expensive stereo components in an otherwise squalid apartment. They move a turntable in order to read the serial numbers on the units. **Scalia, of all people, emphasizes that a "search is a search," and that even this cursory movement such as this is not justified by the circumstances without PC**.

(i) O'Connor dissents, arguing that officers who have a RS that an object they come across in a lawful search is evidence of a crime, they may make a cursory inspection to verify this suspicion.

(b) ***United States v. Coyler** (D.C. Cir. 1989, 284): Court found it difficult to reconcile Terry with Hicks. Bleh.

(c) **Other courts have taken the view that a minimally intrusive search for evidence is permissible if supported by RS**. (Some use an "info was more private" rationale; see US v. Concepcion on 284).

17) Application of Terry Reasonableness Outside of Stop-and-Frisk

(a) ***United States v. Knights (US 2001, 285):** Probationer agrees to a condition that allows him to be searched at any time. It is searched, contraband is found, and he attempts to exclude the evidence at trial. Court holds that the balance of considerations more than satisfied the reasonableness prong of the 4th amendment, and that the search need not have been for "probationary purposes." Reasonable suspicion was therefore enough to justify the search.

(b) **Samson v. California** (US 2006, 288): Clarifies ***Knights*** by holding that **suspicionless searches of probationers are reasonable**. Rationale (Thomas): probationers have a DEOP, and the state's interest in conducting the search is likely substantial.

J) Search Incident to Arrest: The Arrest Power Rule

1) Spatial limitations

(a) ***Chimel v. California** (US 1969, 289): **Holds that searches incident to arrest may be of the arrestee's person and the area within his immediate control, meaning the area from within which he might gain possession of a weapon or destructable evidence**.

(i) (safety rationale is in play)

(ii) For all other searches, however, the Court emphasized (at the time) that a search warrant was required.

(b) Applying Chimel:

(i) ***US v. Lucas** (8th Cir 1990, 292): Police attempt to arrest a guy in his house. He struggles while attempting to reach a cabinet. They subdue him, arrest him, and then open the cabinet, finding a pistol. Court upholds this, despite D's incapacitated/controlled state when the search occurs, as some of D's friends were still in the vicinity and…err, hindsight and somesuch.

(ii) ***US v. Currence** (4th Cir 2006, 293): Search inside of a drug dealer's bicycle handlebars justified under Chimel.

(c) Timing of Grab Area Determination

(i) ***David v. Robbs** (6th Cir. 1986, 293): Court upholds the seizure of a rifle that had been in close proximity at the time of his arrest…but was actually *seized* after he was put in a squad car.

01) Dissent: The rationale justifying SITA is *exigency*, and there was clearly none here. The danger had passed.

(ii) ***US v. Abdul-Saboor** (DC Cir 1996, 294): Grab area should be determined as of the time of the arrest, not the search. Thus, an officer's search of an area after the arrestee had been taken out of the room was permissible.

(iii) Sunspot: ***US v. Perea** (2d Cir 1993, 294): Emphasizes that cops are not supposed to (but, err, probably can) manipulate arrest circumstances in order to generate an "artificial" SITA.

(d) Scope of permissible arrests

(i) ***Washington v. Chrisman** (US 1982, 294): Court holds that **the absence of an affirmative indication that an arrested person might have a weapon available or might attempt to escape does not diminish the arresting officer's authority to maintain custody over the arrested person**.

01) Subtext: All arrests present danger, and a finding beyond that is not necessary.

02) Interpretation: Officer can follow arrestee around and, y'know, grab stuff he finds.

03) Facts: Officer tags along with someone he suspects of underage drinking, finds marijuana in the dorm room. Very unpleasant. Burger wrote this one; are we surprised?

(e) Post-arrest movements ordered by officer

(i) ***US v. Butler** (10th Cir. 1992, 295): Officers arrest a guy outside, but he's barefoot, so they order him into his trailer to get shoes. They follow him as he does and seize illegal weapons from the trailer. **Court holds this proper under Chrisman**, although it weakly cabins it in the area of "health and safety of the arrestee" (the cops were worried about broken glass. Allegedly.)

(f) Arrest Leading to Exigent Circumstances

(i) The **Court requires a showing of exigency on the particular facts of the case; the arrest of a person is not dispositive of whether there is a risk for the destruction of evidence**.

01) ***Vale v. Louisiana** (US 1970, 296): D is arrested while walking towards his house; officers search the house and find narcotics. Court: The warrantless search violated the 4th, as the State did not meet its burden of showing that exigent circumstances existed.

(ii) **US v. Socey** exigency standard: A police officer can show exigency if he can show
01) A reasonable belief that third persons are inside a private dwelling, and
02) A reasonable belief that these third persons are aware of an arrest so that they might see a need to destroy evidence.

(g) Protective Sweep After an Arrest
(i) ***Maryland v. Buie** redux: A protective sweep is a quick and limited search of a premises incident to arrest.
(ii) Distinction from a SITA: the sweep goes **beyond** the Chimel spatial limitations, and is **limited to areas where persons may be hidden**.
01) Additionally, the **protective sweep is pegged to Terry-like risk of danger**; it ***cannot*** be used to look for people who might destroy evidence.

2) Temporal Limitations
(a) **Generally, the arrest comes first and the search follows; however, courts will not concern themselves over the exact temporal order**.
(i) However, while a search can precede the arrest, a search *cannot* be used to provide PC necessary for arrest. ***Smith v. Ohio** (US 1990, 298)

(b) ***Chambers v. Maroney** (US 1970, 298): Officers search an automobile that had been impounded after the arrest of its occupants. Court holds that this search could not be justified as incident to the arrests, as the displacement of time and space from the arrest is simply too great.

(c) ***US v. Edwards** (US 1974, 298): **Court holds that a suspect could be searched incident to arrest the next morning, after having been jailed close to midnight**.
(i) White: Searches and seizures that could be made on the spot may legally be conducted later when the accused arrives at the place of detention.
(ii) Rationale: he still has the same stuff on him (or less). Most searches of things that the arrestee had with him at the time of the arrest may be done automagically.

3) Searches of a Person Incident to Arrest.
(a) ***US v. Robinson** (US 1973, 299): Officer arrests a guy for a traffic offense, pats him down, finds heroin; continues searching, although he doesn't find anything else. Court holds that this did not violate the fourth amendment; **a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the 4th amendment; that intrusion being lawful, a SITA requires no additional justification**.
(i) Powell's concurrence: I believe that an arrested individual retains no significant 4A interest in the privacy of his person.
(ii) Marshall's dissent: Worries that an officer, lacking PC to obtain a search warrant, will use a traffic arrest as a pretext to conduct a SITA.

(b) ***Gustafson v. Florida** (US 1973, 303): Substantially similar to Robinson. The decision whether to arrest for a traffic offense and whether to conduct a full-scale search were left to the officer on the scene.

(c) Arrests for Minor Offenses

(i) ***Atwater v. City of Lago Vista** (US 2001, 303): **Court holds that *all* crimes, even misdemeanors with small fines attached, can justify a custodial arrest without a warrant**.

01) Souter: A bright-line rule restricting arrest to jailable offenses sounds good, but it would be impossible to work in practice: would a police officer even know the likely outcome of the case?

02) O'Connor's dissent rule: I would require that where there is PC to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is able to point to specific and articulable facts which, taken together with rational inference therefrom, reasonably warrant the additional intrusion of a full custodial arrest.

(ii) ***Hedgepeth v. WMATA** (D.C. Cir 2004, 310): Fry-on-the-metro case. Then-Judge Roberts holds that while the arrest was really, really stupid, it did not violate the 4th. Thanks, Judge Roberts!

(d) ***United States v. Chadwick**: Distinguishes Robinson by disallowing a search of a footlocker at the police station, because it occurred long after D was in custody.

(i) **Searches of possessions within an arrestee's immediate control cannot be justified by any DEOP.**

(ii) (So, locked stuff or closed containers seem to be OK?)

(iii)**(Despite this distinction, most lower courts have expanded Robinson to searches of briefcases and the like in the arrestee's grab area**)

4) The Arrest Power Applied to Automobiles

(a) ***New York v. Belton** (US 1981, 311): Holds that objects within the passenger compartment of an automobile are generally within the Chimel "grab area." **Thus, when the police have made a lawful arrest of the occupant of an automobile, they may as a SITA inspect the passenger compartment of the automobile and the contents of any containers therein** (containers include the glove compartment). (This has been severely modified by Gant, infra)

(b) ***Thornton v. United States** (US 2004, 315): Before a city police officer had an opportunity to pull over an automobile that had license tags that had been issued for another vehicle, the driver drove into a parking lot, parked, and left the automobile. The officer then accosted the driver, and, after finding marijuana and cocaine in the driver's pocket, arrested him. Incident to the arrest, the officer searched the automobile and found a handgun under the driver's seat. **The Court holds that the Belton rule applied even when the officer first made contact with the arrestee after the arrestee had left the vehicle. So long as an arrestee was the sort of "recent occupant" of a vehicle such as the arrestee in the instant case, officers could search the vehicle incident to the arrest (Lexis)**.

(i) Stevens' dissent: The only rationale for extending Belton is to allow searches for evidence…which should be countered by a more powerful citizen privacy rationale.

(c) ***Arizona v. Gant** (US 2009): Court *greatly* cabins Belton/Thornton, **holding that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle**; moreover, via Thornton, it holds that circumstances unique to the automobile context justify a search incident to arrest when it is

reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Otherwise, a search is *per se* unreasonable without a warrant or another exception.

5) The Arrest Power where No Arrest Takes Place
   (a) Basic idea: what if the officers in Belton and Robinson had simply issued a ticket? Would the arrest-power rule still apply?
   (b) ***Knowles v. Iowa** (US 1998, 324): **Searches incident to arrest do *not* extend to situations where no arrest has occurred**.
      (i) Partial rationale: the risk to officer safety in issuing a traffic citation is far less than that involved in arresting.
6) The Arrest Power when the Arrest Violates State Law
   (a) ***Virginia v. Moore** (US 2008, S.33): Officers arrest a suspect for the misdemeanor of driving on a suspended license, conduct a SITA, and find contraband; however, under state law, they should've issued D a summons. Court holds that **warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and t hat while States are free to regulate such arrests, state restrictions do not alter this result**.

K) Pretextual Stops and Arrests
1) ***Whren v. United States** (US 1996, 326): Officers notice a Pathfinder that they find suspicious; upon vehicular approach, the Pathfinder takes off at "unreasonable speed." The officers initiate a traffic stop and, in the course of the stop, they find drugs. D's argue that the officers had no reasonable suspicion of drug activity; the officers' actions were pretextual! **Court holds that the officer's state-of-mind does not matter; what matters, rather, is whether the circumstances, viewed objectively, justify the action**. As there is no question as to the existence of probable cause to arrest once the crack had been spotted, and as the original traffic stop was legitimate, Ds are SOL.
2) Testilying aside: it is, of course, doubtful that the police actually discovered the drugs in the fashion claimed.
3) **Extraordinary Pretext**
   (a) ***United States v. Ibarra** (9th Cir. 2003, 332): A *sinister plot* is laid that *happens* to look like a regular traffic stop, but is actually a DEA sting. There's a cute dog named Beeper involved, too. In any case, the court upholds the traffic stop and the search, even though the pretext was extraordinary. It founds that Whren's "run of the mine" language referred to the intrusiveness of the search, not the egregiousness of the pretext.
4) Equal Protection Issues
   (a) ***United States v. Scopo** (2d Cir. 1994, 333): Court upholds a firearms conviction based on evidence discovered during a traffic stop.
      (i) Concurrence: "Though the Fourth permits a pretextual arrest, the EPC still imposes restraint on impermissibly class-based discriminations."

L) Plain View and Plain Touch Seizures
1) ***Coolidge v. New Hampshire** (US 1971, 338): If officers have a right to be in a particular place and come upon evidence that they have PC to believe is subject to seizure, they may seize it.

2) *__Horton v. California__ (US 1990, 338): Officer gets a warrant to search a premise, but the warrant does not mention the weapons he wants to find. He conducts the search anyway and finds the weapons in plain view. Court: **__Inadvertence is *not* a prerequisite to a valid plain-view seizure of evidence__**.
3) ***Arizona v. Hicks redux**: Probable cause is necessary to justify a search that precedes a plain-view seizure.
4) *__Minnesota v. Dickerson Redux__ (US 1993, 342): **__If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour makes its identity immediately apparent, there has been no additional invasion of the suspect's privacy__**; if the object is contraband, its warrantless seizure would be analogous to a plain-view seizure.
   (a) (this did not happen in Dickerson, as the officer was not able to ascertain the identity of the object, and continued to prod at the motherfucker)
   (b) Me: I think this is astonishingly vague and unworkable.

M) Automobile and Other Movable Objects
1) "Automobile Exception": **__Police may search an automobile without a warrant so long as they have PC to believe it contains evidence of criminal activity.__**
   (a) This comes from **Carroll v. Untied States**, and is thus sometimes called the Carroll doctrine.
   (b) Rationale: Cars can be moved, and warrants take time to obtain.
2) Distinguishing **Carroll** from SITA
   (a) Under Carroll, an officer must have PC to believe that evidence will be found in the area of the car searched. In contrast, all that is needed for SITA is PC to arrest…which can be for something as minor as a traffic violation
3) The Progeny of Carroll
   (a) ***Chambers v. Maroney** (US 1970, 345): D is arrested in an automobile; the car is taking to the police station and was there thoroughly searched without a warrant. This can't be justified as a SITA, as the car was too removed from the arrest for that doctrine to apply. However, the police had PC to search the vehicle at the time of the arrest; consequently, the car could've been searched at the time of the arrest on those doctrinal grounds, and since the police could've easily gotten a warrant once the car was in the stationhouse, the question is somewhat moot. HARLAN, concurring in part and dissenting in part, would've preferred that the police temporarily seize the car while a warrant was prepared.
   (b) ***Coolidge v. New Hampshire** (US 1971, 348): Police seize D's car from his driveway shortly after his arrest, search it two days later in the police station and twice more in the following months. Plurality holds Carroll to be inapplicable because of the absence of exigency (**this is the first and last time this happens**).
   (c) ***Cardwell v. Lewis** (US 1974, 348): A plurality explicitly rejects the contention that mobility of the car before it is seized makes a difference.
   (d) ***Texas v. White** (US 1975, 348): Court upholds the warrantless search of an automobile that had been towed to the police department's impound lot.
   (e) **Et cetera. Whew. Basic idea: __Courts have interpreted Coolidge to mean that a warrant is required only if the officers had a clear opportunity to obtain a warrant before seizing the car__**.
4) The DEOP rationale

(a) ***California v. Carney** (US 1985, 349): Court reboots its warrantless vehicle inspection rationales. **Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's car is significantly less than that relating to one's home or office**.
   (i) Justification: This isn't really based on plain view, but is instead pegged to the *regulation* of cars on public roadways.

(b) ***Pennsylvania v. Labron** (US 1996, 350): Court reaffirms that exigent circumstances are not required to justify the warrantless search of an automobile.

5) Motor Homes
   (a) **The court declines to distinguish between "worthy" and "unworthy" vehicles**, noting that motor homes can be used as an instrument of illicit drug traffic and other illegal activity. It does, however, allow for the possibility that certain factors (like connections to utilities, etc.) might elevate the situation into requiring a warrant.
6) Movable Containers – In and Out of Cars
   (a) ***United States v. Chadwick Redux** (US 1977, 351): The mobility of a footlocker justified its seizure upon PC, but a warrant is required to search it.
7) Mobile Containers in the Car
   (a) ***Arkansas v. Sanders** (US 1979, 352): Court holds that a warrant is needed to search a suitcase that had been placed in the trunk of a taxi. Officers had PC to search the passenger's suitcase, but no PC to search anywhere else in the taxi. (**Overruled by Acevedo**)
   (b) Refined: ***US v. Ross** (US 1982, 352): Court upholds a warrantless search of a paper bag and pouch found during the search of a car. Here, officers had PC to search the *entire car* for drugs.
      (i) Anomaly: If officers are informed that a person has drugs in a bag in the trunk, PC is localized in the bag and hence Sanders would apply. But if they are more generally informed that there are drugs in the trunk, Ross would apply.
   (c) ***California v. Acevedo** (US 1991, 353): Addresses the "container in car" paradox elucidated above. Overrules **Sanders**, noting that the Chadwick/Sanders rule is meaninglessly confusing and serves no actual privacy rationale (as police can simply seize something and wait until a warrant issues). Court holds that **the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle**.
      (i) Dissent finds this a perpetuation of anomalous holdings: "surely it is anomalous to prohibit a search of a briefcase while the owner is carrying it exposed on a public street yet permit a search once the owner has placed the briefcase in the locked trunk of his car,:
   (d) After Acevedo: Note that issues relating to whether there is PC to search certain areas of the car still exist.
8) Delayed Search of Containers
   (a) ***US v. Johns** (US 1985, 359): Customs agents removed packages from a trunk, placed them in a DEA warehouse, and searched the packages 3 days thereafter. They had PC, but no warrant. SDOC reasons that, if Ross is combined with Chambers and Texas, there is the implication that delayed searches of this

material is acceptable. However, the Court emphasizes that indefinite delays are *not* acceptable, and leaves open the possibility that D might challenge the delay as unreasonable based on its effect on a privacy or posessory interest.

9) Search of a Passenger's Property
   (a) ***Wyoming v. Houghton** (US 1999, 360): **The search of a passenger's purse was permissible because there was PC to believe that drugs were in the car in which the purse was located.** Relies partially on Zurcher v. Stanford Daily in noting that the standard is not whether the owner of the property is suspected of a crime, but whether the police reasonably believe that the specific things to be searched for are located on the property. Thus, **police officers with PC to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search**.
      (i) (this is distinguished from US v. Di Re, which prohibited the search the body of a passenger, by emphasizing the classical distinction between body searches and possessory searches)
      (ii) Scalia: The REOP in property placed in a car is minimal, while the governmental interests at stake are substantial.

N) Exigent Circumstances
   1) Basic definition: State must show that immediate action was reasonably necessary to prevent flight, or to safeguard the police or public, or to protect against loss of evidence.
      (a) **Exigent circumstance excuses the officer from having to obtain a magistrate's determination that PC exists, but does not negate the probable cause requirement**.
      (b) Exigent circumstances apply equally to arrests and to searches.
   2) Hot Pursuit
      (a) If officers are in hot pursuit, an arrest warrant will be excused where one would otherwise be required and a search warrant will be excused if one is needed to find and apprehend the suspect.
      (b) **Hot pursuit (and, indeed, most exigency) is based on the premise that the suspect might seek to escape, destroy evidence, or threaten public safety. Consequently, this doctrine does not apply when the suspect is unaware he is being pursued**. (***Welsh v. Wisconsin**, US 1984, 364: drunk guy into a ditch, wanders home, officers arrest him in his home without a warrant, Court throws out the arrest)
      (c) ***Warden v. Hayden** (US 364, 1967): Officers pursue a robbery suspect into his house. His wife answers the door, and the police entered the house to search for the suspect; they also looked for weapons he might have concealed. They find incriminating clothing in a washing machine. Court upholds this, as the officers had the right in this exigency to search the washing machine (???) and thus the seizure of the clothing was permissible under plain view (???).
      (d) ***US v. Santana** (US 1976, 364): Officers approach D, who is standing near her home. Upon seeing the officers, she retreats back into her house. Officers told her she was under arrest and pursued her into the house to effectuate the arrest.
      Court: This was hot pursuit; a suspect may not defeat an arrest which has been set into motion in a public place merely by retreating into a private one.

3) Police and Public Safety
   (a) **A warrant is excused if the delay in obtaining a warrant would result in a significant risk of harm to the police or to members of the public** (US v. Salava).
   (b) ***Brigham City v. Stewart** (US 1943, 365): Police officers respond to a party call at 3am; they hear shouting from inside, and quickly loop around to the backyard. They witness an altercation in progress in the kitchen, enter the home and announce their presence, which eventually causes the fighting to cease. **Court holds that the officers had a clear and objectively reasonable basis for believing that an emergency situation was in progress**; reasonableness, combined with this exigency, negates the warrant requirement.
4) Risk of Destruction of Evidence
   (a) **The essential question in determining whether exigent circumstances exist is whether law enforcement agents were confronted by an urgent need to render aid or taken action.** (US v. Dorman, D.C. Cir 1970)
   (b) **Dorman Factors**
      (i) The gravity or violent nature of the offense with which the suspect is to be charged
      (ii) Whether the suspect is reasonably believed to be armed
      (iii) A clear showing of PC to believe that the suspect committed the crime
      (iv) Strong reason to believe that the suspect is on the premises
      (v) A likelihood that the suspect will escape if not swiftly apprehended, and
      (vi) The peaceful circumstances of the entry
   (c) Application of Dorman
      (i) ***US v. MacDonald** (2d Cir. 1990, 368): After participation in a set-up drug buy, agents knock on the door in order to effect arrests; after they do, they receive a radio comm. informing them that the occupants are attempting to escape through the bathroom window. They ram down the door and apprehend them, and acquire great quantities of evidence during the security sweep. The court upholds the entry, applying the Dorman factors to hold that the totality—including the drugs, guns, and imminent escape—all pointed towards exigency.
         01) Dissent: Government did not adequately show the possibility of imminent destruction of evidence, as the suspects were totally unaware of their danger until the actual bust-in occurred.
      (ii) ***Vale v. Louisiana** (US 1970, 370): In Vale, the Court emphasized the fact-based nature of the exigency inquiry in holding that circumstances did not exist to search D's home, when D was arrested outside for engaging in a drug transaction and there was no indication that anybody was inside destroying evidence.
   (d) ***Richards v. Wisconsin** (US 385, 371): Court rejects the government's proffered bright-line rule ("exigent circumstances *always* exist in a large-scale drug bust, thus obviating the need for knock-and-announce") in favor of a case-by-case evaluation.
      (i) **Casebook, however, implies very strongly that—in practical fact—exigency will *almost always* exist in a large-scale drug bust**.

5) Crime Severity as an Exigency Factors
   (a) Severe crime: ***Mincey v. Arizona*** (US 1978, 372): **Court flatly rejects a "scene of the homicide" exception to the warrant requirement and stated that the government must make a factual showing if exigent circumstances**
      (i) (Stewart worries about the potentially slippery slope here(
   (b) Crime so minor that exigency might not exist even if evidence is in danger of being destroyed: ***Welsh v. Wisconsin*** (US 1984, 373): Police arrest D in his home for driving under the influence. State argues that the warrantless arrest was legal because the delay in obtaining the warrant would have resulted in the loss of usable breathalyzer evidence. Court: **The application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is PC to believe that only a minor offense has been committed**.
6) Impermissibly Created Exigency
   (a) Courts split on this. Some hold that "created" exigency is meaningless, so long as exigency exists; others hold that police activity that is not illegal can nonetheless constitute impermissible creation of exigency.
      (i) ***US v. Timberlake*** (D.C.Cir 1990, 375): Court takes police intent into account in ruling that officers, when they knocked on a door and then entered warrantless when they heard persons scurrying about, *intended* to perform a warrantless search.
   (b) **However, all courts realize that not all police-created exigencies are impermissible; that is, police are not required to actively *avoid* creating exigency.**
7) Prior Opportunity to Obtain a Warrant
   (a) Basic idea: **Wasting a clear opportunity to obtain a warrant disentitles later reliance on exigent circumstances**.
      (i) This is rarely clear, however. In the typical case, the state argues that PC arose close to the wire, with the defendant making the (bizarre) argument that the cop had PC long before that.
   (b) ***US v. Miles*** (2d Cir. 1989, 377): Court notes that officers *can* delay obtaining a warrant until the situation is so that the agents could be reasonably certain the evidence would support a conviction (in this case, the instance in question was a set-up drug deal that transpired over a long-ish period of time, but with no "preemptive" warrant issued).
8) Electronic Warrants
   (a) ∇Fed.R.Crim.P 41(d)(3)(A): A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.
   (b) Some courts have held that the ability to obtain *electronic* warrants provides the proper benchmark for exigency (See 378).
9) Seizing Premises in the Absence of Exigency – Can officers take steps to preserve the status quo while a warrant is being obtained?
   (a) ***Segura v. US*** (US 1984, 378): Complex fact pattern, but the Court eventually decides that while an initial warrantless entry of the premises was illegal, a later search conducted pursuant to a warrant was based on an independent soure.

(b) ***Murray v. US** (US 1988, 378): **Court holds that the seizure of premises for a reasonable period of time pending the obtaining of a warrant is kosher**.
   (i) Seizing = occupants are kept out of the premises in order to protect against the possible destruction of evidence.

(c) ***Illinois v. McArthur** (US 2001, 379): Officers prevent a dude from entering his home for *two hours* because they had PC to believe that he had marijuana in his home…the two-hour delay was to obtain a warrant. **Court finds that the totality supports this restraint as a "limited" and "reasonably tailored" one, which met Fourth Amendment demands**.
   (i) Court distinguishes *Welsh* by pointing out that the offense there was not jailable. This one was!

O) Administrative Searches

1) Overview: Administrative searches are generally found in realms outside of the purely criminal. They tend to dispense with the particularized probable cause requirement, justified by standards designed to "ensure evenhandedness and avoid arbitrary or selective enforcement." Of course, this area of doctrine is *very expansive*, and the lines between administrative and criminal searches has been thoroughly blurred.
   (a) **Posner**: The difference between criminal searches and administrative searches is that the former are assessed at the level of the individual search, whereas the latter are evaluated programmatically.

2) Safety Inspections of Homes
   (a) ***Camera v. Municipal Court** (US 1967, 383): Homeowner claims the right to refuse a warrantless entry by a health inspector. Court holds that the 4th amendment covers these searches; **however, government safety inspectors were not required to have PC that a particular dwelling was in violation. Rather, the warrant can be based upon a finding that a search is in compliance with a reasonable administrative scheme**.
      (i) Thus, the warrant is based on some objective standard that is *not* probable cause.
   (b) ***Griffin v. Wisconsin** (US 1987, 384): Probation officer can conduct a warrantless search of a probationer's house. No warrant is needed; in fact, a warrant is *proscribed* by the Fourth Amendment, which allows for warrants issuing only for PC and not a lesser standard.

3) Administrative Searches of Businesses
   (a) These implicate complex regulatory concerns: the state has an administrative interest in whether the business is being safely and properly conducted.
   (b) Some rules:
      (i) **closely regulated industries have a DEOP**
      (ii) **A warrantless inspection must meet three criteria**
         01) There must be a substantial government interest that informs the regulatory scheme
         02) The warrantless inspections must be necessary to further the regulatory scheme
         03) The statute's inspection program must provide a constitutionally adequate substitute for a warrant: advising the owner of the regulated business that

the inspection is being made pursuant to law, and impose some meaningful limitation on the officer's discretion to search (e.g. time/place/manner).

(c) ***New York v. Burger*** (US 1987, 385): Auto junkyard case. The Court dismisses Ds' attempts to argue that, in allowing police officers to carry out a search and in failing to exclude ancillary evidence seized during the course of the search, that the regulatory scheme has risen to the level of a search for criminal law purposes. Balancing the state's articulated interests viz. the three-pronged test above, the Court upholds the statute and its use of administrative searches.

(i) **Brennan** dissents, finding that if junkyards count as "closely regulated," few businesses could escape this categorization. He funds a fundamental defect in the statute, as it authorizes searches intended solely to uncover evidence of criminal acts.

(ii) Aftermath of Burger

01) ***US v. Hernandez** (5th 1990, 392): FBI agent suspects that a commercial truck is carrying drugs. He calls the Department of Public Safety, which stops the truck and demands to see various papers. The officer arrests the driver for driving without license plates and searches the back of the truck, finding marijuana. CoA would have killed this under every doctrine known to man—Chimel, Terry, SITA—***except*** that it passes under administrative searches under ***Burger***, as the DPS can inspect any load of commodities being transported.

(d) The Element of Surprise

(i) Basic question: why couldn't the officer simply get a warrant *before* inspecting the business? This would seem to preserve the element of surprise.

(ii) Potential explanation: A warrant requirement for the most routine inspection would interfere with the Department's ability to function and unnecessarily increase the cost of its operations without a significant increase in privacy, especially since most people who run a closely regulated business expect a couple of inspections a year. (***Lesser v. Espy**, 7th Cir 1994, 393)

(iii) **Thus, "surprise" isn't a real issue; the real question is whether the courts feel like imposing additional burdens, which they apparently do not**.

(e) Administrative Inspections by Law Enforcement Officers

(i) **Courts after Burger have applied a stricter scrutiny to administrative searches conducted by law-enforcement officers.**

(ii) ***United States v. Johnson** (10th Cir. 1993, 394): FBI agent receives info about a taxidermist who may be smuggling animals. He calls a state agent to do a search (the state statute authorizes searches, but only when performed by state agents). The FBI guy drives multiple hundreds of miles to participate in the search. **Court: the administrative search was employed solely as an instrument of criminal law enforcement**, and is thus impermissible (*this*, of all things, was held to rise to the level of pretext. Note to self: become a taxidermist).

4) Searches and Seizures of Individuals Pursuant to **Special Needs**

(a) Basic idea: in some cases, administrative needs can justify searches of persons based on a standard less than probable cause.

(b) Searches based on Reasonable Suspicion
  (i) ***New Jersey v. TLO** (US 1985, 395): School official searches a student's handbag on RS of there being cigarettes. Court upholds the search based on "special needs" beyond law enforcement—here, the need to assure a safe and healthy learning environment. **The reasonable suspicion standard was sufficient to protect the student's DEOP in the school environment while allowing the school the proper degree of leeway** (moreover, school officials could not be expected to obtain a judicial warrant).
  (ii) ***Cornfield by Lewis v. School Dist.** (7th Cir 1993, 395): Best case ever! Crotching drugs. Glorious. Court goes out of its way to justify the propriety of the search, noting that it could've been…y'know, *way worse*, and they didn't *jam a finger into him or anything*, so it's OK.
  (iii) ***Beard v. Whitmore Lake School Dist** (6th 2005, 396): Really awful, exploitative search of students by administrators. Court finds the searches to be unreasonable, but denies a remedy based on qualified immunity and the hitherto unclear state of the law.

(c) Suspicionless Searches of Persons on the Basis of Special Needs
  (i) ***Skinner v. RLEA** (US 1989, 397): Court upholds a program mandating drug tests for all railway personnel involved in certain train accidents. Kennedy elucidates an eight-part analysis (see 397-98), but basically concludes that the balancing test, combined with closely regulated inquiries, render this reasonable; moreover, it does not look like a law-enforcement pretext.
  (ii) ***NTEU v. Von Raab** (US 1989, 399): Court partially upholds a compelled urinalysis of certain Customs Service employees (notably, those involving drug interdiction, those involving classified documents, and those involving firearms). Testing results could not be turned over to law enforcement without consent. Court finds a well-articulated special need with regard to the drug interdiction and firearms category (along with a DEOP based on judgment and dexterity), but remands for the category of classified document inspection, worrying that it may sweep too broadly.
    01) Intriguingly, Scalia dissents here, emphasizing that while railway personnel have a demonstrated history of drug use and there is a demonstrated connection between such use and harm, he cannot see how frequency or connection to harm is demonstrated or even likely here. He says that "the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."
  (iii) ***Ferguson v. City of Charleston** (US 2001, 415): Hospital sets up a drug-testing-of-pregnant-mothers policy, which boiled down had trappings that provided for the turning over of evidence to law enforcement after a recidivist episode (it also explicitly mandated chain-of-custody provisions so that the "stick" in the plan would be effective). Court finds that the purpose of the program was to use the threat of arrest in order to force women into treatment; given the uncomfortable blurring of lines between law enforcement and administration, this cannot be justified as a special-needs search.
    01) Scalia dissents, finding that "urine" is not an "Effect" protected by the Fourth Amendment.

(d) Airport searches
  (i) Magnetometer: **Presumptively reasonable: minimally intrusive, with an expansive state interest in scanning *everyone*** (As some might pose a risk and not recognize it).
  (ii) More intrusive: Not entirely clear, but probably reasonable. *Davis* rule: an airport screening is reasonable if
    01) It is no more extensive and intensive than necessary, in light of current technology, to detect weapons or explosive
    02) It is confined in good faith to that purpose, and
    03) Passengers may avoid the search by electing not to fly.
      - (this is justified by emphasizing the "voluntariness" of air travel, which is kind of laughable)

(e) Subway Bag Searches
  (i) ***Macwade v. Kelley** (2d. Cir 2006, 422): Court finds that preventing terrorist attacks is a recognizable "special need." The government interest is immediate and substantial; the searches are minimally intrusive, because passengers can leave the subway, searches and conducted in the open, etc.
    01) Oddly, the court finds that the ease of evading the checkpoints is a *plus* to its validity: striking narrowly tailored programs would seem to incentivize broader, more intrusive programs

5) Roadblocks, Checkpoints, and Suspicionless Seizures
(a) Individual Stops Without Suspicion
  (i) ***Delaware v. Prouse** (US 1979, 423): **Court holds that an officer cannot, in the absence of RS, stop an automobile and detain the driver in order to check his license and registration. Full stop**.

(b) Permanent Checkpoints:
  (i) Suspicionsless stops removed from the border made by *permanent checkpoints* are OK.
    01) ***US v. Martinez-Fuerte** (US 1976, 424): These are necessary to implement the state interest in regulating the flow of illegal aliens. No surprise! Very effective!

(c) Temporary DUI Checkpoints
  (i) ***MDSP v. Sitz** (US 1990, 424): **Court upholds suspicionless stops at temporary sobriety checkpoints**, following the Terry line of doctrine and concluding that this extremely limited intrusion is more than compensated for by the compelling state interest.

(d) Drug checkpoints
  (i) ***City of Indianapolis v. Edmond** (US 2000, 424): **Court strikes down drug checkpoints**. It distinguishes prior cases by pointing out that Sitz, for example, had the more immediate purpose of getting dangerous drivers off of the road or Martinez Fuerte's goal of reducing the flow of illegal aliens; here, however, the checkpoint's *primary purpose* was related to criminal law enforcement, and thus required some individualized suspicion.
  (ii) **After Edmond, courts have upheld checkpoints whose primary purpose effectuates a special need, even if there is also a secondary purpose of drug interdiction**. See 434.

(iii) Also: If the implementing entity can make an argument that drug dealers are, in fact, driving dangerously, they may vault the limitations of Edmond and end up in Sitz territory. See 434, again.

(e) Terrorism-related Checkpoints

(i) **In general, terrorism-related checkpoints have been upheld**. See, e.g., US v. Green (433).

(f) Suspicionless Checkpoints to Obtain Info About a Crime

(i) ***Illinois v. Lidster** (US 2004, 434): Police stopped motorists to ask for info about a recent hit-and-run accident. A drunk driver manages to get arrested at one of the info checkpoints; he challenges his arrest on the ground that the state had obtained much of the relevant evidence through use of an illegal checkpoint stop. Court reasons that the intrusiveness of these stops is small and the public concern is great in upholding their validity. STEVENS partially dissents, noting that motorists who confront a roadblock are required to stop; they don't have the option of walking away. Also, the likelihood of success is speculative at best.

6) Inventory Searches

(a) Police can conduct inventory searches without a warrant and without suspicion.

(b) **Gov't must show that the officer was operating pursuant to standard inventory procedures promulgated by the department.**

P) Consent Searches

1) Voluntary Consent

(a) **A search based upon voluntary consent is reasonable even in the absence of a warrant or any articulable suspicion**.

(b) ***Schneckloth v. Bustamonte** (US 1973, 457): Cops stop a car at 2:40AM, ask to search, and the guy says "go ahead." They search, and voila! Stolen checks! Court uses a totality analysis to try to discern the validity of consent, and finds that it was voluntarily granted. **Court holds that the 4th and 14th do not require citizens be warned that they can refuse to consent to a search**; consequently, the search was kosher.

(c) ***United States v. Drayton** (US 2002, 458): Basically reaffirms Schneckloth: notification that consent can be denied is not the sine non qua that makes consent voluntary.

(d) The Consequences of Refusing Consent

(i) ***US v. Prescott** (9th Cir. 1978, 459): **Court holds that a person cannot be penalized for exercising the right to refuse to permit a search**.

01) Scheknoth would probably extend here; if a person consents believing that his nonconsent can be held against him, this is probably irrelevant re. voluntariness under the totality.

(e) The impact of custody on consent

(i) ***United States v. Watson** (US 1976, 459): Court finds that the absence of consent warning or of proof that D knew he could withhold consent was not controlling where the defendant had been arrested and was in custody, but his consent was given while on a public street. (Relies on Schneckloth)

(ii) **Watson has been extended to uphold consent obtained in all types of custodial situations, and while the person's custodial status is relevant to the totality, it is not dispositive.**

01) Great example: US v. Hidalgo (consent voluntary even though D was arrested by SWAT team members who broke into his home and forced him to the ground at gunpoint)

(f) The Totality Analysis

(i) **Gonzalez-Basulto Totality Factors:**

01) Voluntariness of D's custodial status
02) Presence of coercive police procedures
03) The extent and level of D's cooperation with police
04) D's awareness of his right to refuse consent
05) D's education and intelligence
06) D's belief that no evidence will be found.

(ii) ***Bumper v. NC** (US 1968, 460): **Government has the burden of proving that consent was freely and voluntarily given.**

(iii) ***US v. Isiofia** (2d Cir. 2004): Consent not voluntary when agents demanded consent, yelled/used abusive language, and threatened him.

(g) Threats of Action if Consent is Refused

(i) ***United States v. Duran** (7th Cir. 1992, 461): If D is told that if she doesn't consent, a warrant will be procured, this is not *automatically* coercive…**at least as long as the statement is not a lie.**

01) Subtext: Empty threats may render the consent involuntary.

(ii) ***United States v. Ivy** (6th 1998, 462): Cop tells a guy that if he doesn't consent, a search warrant would be sought, he and his GF would be arrested, and that the child would be placed in foster care. Court holds that this goes too far; statements implying that the child would be taken if no consent was granted were blatantly coercive.

(h) Must a person who is stopped be told that he is free to leave?

(i) **No**. (US v. Robinette, again, 463).

01) Stevens' Robinette dissent: Look, the officer was continuing the detention post-rationale-expiring by asking further questions. This should be thought of as an illegal seizure.

(i) Subjective Attitudes Towards Authority

(i) ***US v. Zapata** (10th Cir 1993, 464): Mexican national on a train consents to being searched, apparently believing (based on tales told of Mexican police) that he would be abused if he declined. Court rejects this as a dispositive factor: **the notion that his attitude toward police can constitute such a relevant subject characteristic is irrelevant**.

(j) Did the Person Actually Consent at All?

(i) ***United States v. Price** (7th Cir. 1995, 464): Very, very stupid case, in which the controversy is over whether D's "sure" means "sure, go ahead" or "sure, I mind that you search my car, officer, as I have narcotics." Court finds against D, unsurprisingly.

(ii) ***US v. Rivas** (5th Cir. 1996, 465): D's attempt to consent "reluctantly" did not vitiate his consent.

2) Third-Party Consent.
   (a) ***Frazier v. Cupp** (US 1969, 465): **Court upholds the search of D's duffel bag when his cousin, a joint user, voluntarily consented.**
   (b) Actual Authority to Consent
      (i) **General Rule: It is reasonable to recognize that any cohabitants has a right to permit the inspection in his own right; other cohabitants have assumed the risk that one of their number might permit the common area to be searched**.
      (ii) ***United States v. Matlock** (US 1974, 465): Matlock shares a house with Graff. Graff consents to a search of the house. **Court holds that the search is reasonable because Mrs. Graff had actual authority to consent to the search.**
   (c) Apparent/Presumed Authority
      (i) (note: this is *not agency* apparent authority)
      (ii) General rule: **Entry pursuant to apparent, but not actual, authority is valid if officers had reasonable belief that the friend/entity/character has the authority to consent.** (***Illinois v. Rodriguez**, US 1990 466).
         01) Elaboration: This is not a third-party waiver of Constitutional rights, but rather a constitutional search under the reasonableness prong of the 4th.
         02) Scalia: The standard of reasonableness here should be governed by the same criteria that govern other standards of reasonableness, such as warrants, etc.
   (d) Mistakes of Law
      (i) ***Stoner v. California** (US 1964, 467): Squibbed in an unsatisfying fashion, but it seems to say that ironclad mistakes of law (e.g. assuming that a hotel desk-clerk can authorize a search) don't rise to the Rodriguez standard of deference/reasonableness.
   (e) The Duty to Investigate
      (i) ***US v. Dearing** (9th Cir. 1993, 467): Court holds that a live-in babysitter lacked apparent authority to consent to a search of his employer's bedroom. **Police are not allowed to proceed on the theory that ignorance is bliss**.
      (ii) Rule seems essentially to be that police cannot be willfully ignorant, and if they encounter an area of ambiguity, they cannot proceed without making further inquiry (US v. Kimoana, 10th Cir 2004).
   (f) Three Kinds of Apparent Authority Questions – US v. Jenkins (6th Cir. 1996, 467)
      (i) In the first class of situations, an officer would never be justified in believing that the consenter has authority. Ex. Asking a mailman if he can consent to a search of a premise.
      (ii) In the second, a reasonable officer would usually think that the consented does not have authority, but the officer may be justified in thinking otherwise if he provides additional info. In this situation, an "elaborate" yes is helpful.
      (iii) In the third category, a reasonable officer would assume that the person in the position of the consenter does have authority over the space. E.g. rig drivers, pelicans.
   (g) Consent among family members.

(i) **Courts generally allow parents with control over entire premises to consent to the search of an entire house; however, consent will not be valid if it is clear that a part of the premises is exclusively reserved for a child**.

01) (I have *no idea* what this means, especially as a child's bedroom is specifically not in the above category, so…)

(ii) Spouses generally have the ability to co-consent, but at least one court had rejected the government's urging for a bright-line *always*-consent rule. (***US v. Duran**, 7th Cir. 1992, 469)

(h) Third-Party Consent Where the Defendant is Present and Objecting

(i) ***Georgia v. Randolph** (US 2006, 470): Fighting-spouses-co-consent case. **Court holds that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident**.

01) Bright-line: If the cotenant is merely in the proximity, however, and does not take part in the colloquy, he loses.

02) Dissent: Majority merely protects the good luck of a co-owner. Domestic dispute slippery slope.

3) Scope of Consent

(a) ***US v. Blake** (11th Cir. 1989, 478): Guy gives consent to a search of his person. Cop immediately goes for the crotch. Court holds that the frontal touching was a search beyond the scope of Blake's consent.

(b) Scope Defined by the Object of the Search:

(i) ***Florida v. Jimeno** (US 1991, 478): D consents to a search of his car, but the cop places no explicit limitations on the scope. Court holds that it is reasonable to conclude that the scope of the search included containers within the car. **The scope of a consent is determined by a standard of objective reasonableness**.

01) Rehnquist: The cop didn't ask to search the car and then pry open a locked suitcase in the trunk. This was eminently reasonable.

02) Marshall's dissent: general consent is ambiguous at *best*!

(ii) Ambiguity Construed Against the Citizen

01) **After Jimeno, it is up to the citizen rather than the officer to clarify ambiguity** (see 479).

- Of course, if you limit the scope of the search, you run the risk of directing the officer's attention to sensitive areas.

(iii) It is likely that a search will be beyond consent if it involves destructive activity.

4) Withdrawing Consent

(a) **Consent cannot be revoked retroactively after the officer has found incriminating information**.

(b) In general, the revocation of consent cannot, in and of itself, be used as a part of the "suspicion" calculus that would lead to a search of that area.

(i) **Limiting the above: *United States v. Carter** (D.C. Cir. 1993, 481): D's "peculiar" mode of withdrawing consent could have been considered suspicious above and beyond the withdrawal itself.

(c) ***US v. Wilson** (4th Cir. 1991, 481): Angry withdrawal of consent to search a coat—after consenting to search of luggage—should not have counted as a factor in the analysis of reasonable suspicion; except in extraordinary circumstances, officers must have evidence independent of the withdrawal of consent and the manner in which it is executed.

5) Credibility Determinations

(a) If there's a split in factual recollection and the court believes the cops…well, D's SOL. **"A district Court's decision to credit a witness's testimony over that of another can almost never be clear error unless there is extrinsic evidence contradicting the witness's story or it is so implausible on its face that a reasonable fact-finder would not credit it**." (US v. Health, 8th Cir. 1995, 482)

(i) Example where this might be a problem: US v. Forbes (1st Cir 1999, 483): Court remands for further factfinding when officer's account conflicted with a whole buncha facts.

Q) Wiretapping, Undercover Activity, and the Outer Reaches of the Fourth Amendment

1) Constitutional Limitations on Electronic Surveillance

(a) Pre-Katz: Physical Trespass was required

(i) ***Olmstead/Goldman/On Lee**: No trespass, thus no 4th violation. (484)

(b) Katz overrules this old line of cases, holding that **electronic surveillance would be covered under the 4th whenever it violated a person's justifiable expectation of privacy.**

2) Undercover Agents

(a) Surreptitious Recording

(i) ***Lopez v. United States** (US 1963, 485): The use of a wire recorder in confronting someone who has offered a bribe imposes no 4th Amd. Violation.

(b) Undercover Agents in the Home

(i) ***Lewis v. US** (US 1966, 485): Undercover agent partakes in a drug deal in D's home. Because D inviting the agent into his home, no extended 4th amendment protection attaches.

(c) Limits on the Scope of Undercover Activity

(i) ***Gouled v. US** (US 1921, 486): Business associate of D obtains entry into D's office by pretending that he was paying a social visit, whereas in fact (acting under orders from federal officers) he rummages through papers in the office while Gouled was temporarily absent. Court invalidates the search, because the search went well beyond the scope of Gouled's invitation into the home.

(d) Misplaced Confidence

(i) ***Hoffa v. US** (US 1966, 486): Comes to a similar result to Lewis: **what the Fourth Amendment protects is the security a man relies upon when he place shimsefl or his property within a constitutionally protected area**.

(e) **Sum: A person has no reasonable expectation of privacy from undercover activity when he assumes the risk that his friends or associates would disclose his guilty secrets.**

R) Wiretapping and Eavesdropping Statutes
1) Procedural protections
(a) ***Burger v. NY** (US 1967, 487): An eavesdropping order is obtained pursuant to a NY statute, which is fairly lenient. Court finds *major* problems with the NY statute, which he views as a "blanket grant" without any supervision. Flaws:
(i) Conspicuous absence of any requirement that a particular crime be named
(ii) No requirement of a particular description of convos sought
(iii) Length of time permitted was too extensive (60 days)
(iv) Extensions of the time period were granted on an insufficient showing that such extensions were in the public interest
(v) No provision for terminating the convo once the evidence sought was found
(vi) Statute lacked notice and return procedures.
2) Congress responds to **Burger v. NY** by enacting the 1968 Omnibus Crime Control and Safe Streets Act. The relevant portion is known as **Title III**. Info on this, and on domestic video surveillance (and the different rules that apply thereto) is on 488-489.
(a) Major provision: Minimization! All orders must contain a provision that makes the officers stop monitoring a convo as soon as it becomes apparent that it is not about the criminal activity that justified the court's order.
(i) (As usual, subject intent to not comply with this is irrelevant. ***Scott v. US**, US 1978, 490).

S) (FISA NOTES HERE?)

III) The Exclusionary Rule

A) Basic idea: Once the Fourth Amendment has been violated, the usual remedy is the exclusion of any evidence gathered as a result of that violation (directly and via the "fruits" of the search).
B) Deterrent effect. This is the **principal rationale**.
C) Exclusionary Rule: Progressive Expansion of Coverage
1) ***Weeks v. US** (US 1914, 493): Establishes modern exclusionary rule for federal courts only.
2) ***Wolf v. Colorado** (US 1949, 494): Holds that a prosecution in a State court for a State crime need not be governed by the exclusionary rule; the 14th amendment does not prohibit the admission of evidence obtained by an unreasonable search and seizure. (overruled by Mapp)
(a) Wolf creates the "silver platter" doctrine; because the exclusionary rule did not affect state officials, federal officials would allow state officers to obtain evidence illegally and then serve it to the federal officers on a "silver platter."
3) ***Rochin v. California** (US 1952, 496): Shocking methods used by the State to obtain incriminating evidence were held to so offend justice as to require exclusion.
4) ***Mapp v. Ohio** (US 1961, 496): Court switches course and **holds that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court.**
D) Arguments for and against the rule
1) (I don't care)
E) Evidenced Seized Illegally, but Constitutionally
1) **Generally speaking, a violation of state law that is not itself a violation of the 4th will not result in exclusion of evidence in federal court**.

(a) (some states require this, others do not)
(b) ***United States v. Bell** (8th Cir 1995, 504): Arrest by state officers, in violation of state law, does not require exclusion.

2) Cases generally hold also that in federal courts, state law need not be followed by either Federal or state officers. **So if a state statute would normally mandate exclusion, federal courts—following federal criminal procedure—are free to ignore it and admit the evidence.**
   (a) Rationale: Federal law governs the admissibility of evidence in a federal criminal action, so it is irrelevant that ht evidence might be inadmissible under state law.
   (b) Result: Reverse "Silver platter" paradox. ***United States v. Appelquist** (8th Cir 1998, 504): State officers enter D's house and obtained evidence in violation of a state law restricting nighttime searches. After he files a motion to suppress, a parallel prosecution began in federal court, where the material could not be suppressed.
3) If state standards are *incorporated into federal law*, however, the violation of the state law is actually a violation of the 4th amendment.
   (a) ***United States v. Wanless** (9th Cir. 1989, 505): Court holds that evidence obtained in an inventory search was improperly admitted, because…inventory searches are incorporate somehow? This makes little sense, but eh.
4) State Ethical Standards
   (a) **McDade Amendment: A federal lawyer is subject to state laws and rules (+applicable federal rules) governing attorneys in each state.**
   (b) Courts have held that the McDade amendment does not authorize exclusion of evidence obtained in violation of state standards of professional responsibility; it simply provides that state laws and rules governing attorney conduct shall apply to the feds in equal magnitude as they apply to state lawyers. Thus, if state misconduct would not lead to exclusion, not would federal misconduct under those laws.
5) Violations of Federal Statutes, Regulations, and FRCP
   (a) Courts have been reluctant to impose exclusion as a judicial remedy for these violations.
   (b) ***US v. Schoenheit** (8th Cir. 1988): "Exclusion is not required unless the search would not have otherwise occurred or would not have been so abrasive if the Rule had been followed, or there was evidence of an intentional and deliberate disregard."

F) The Exclusionary Rule in Detail; Procedures, Scope, and Problems
1) Procedures for Return of Property and Motion to Suppress
   (a) FRCP 41(g): Motion to return evidence.
   (b) FRCP 41(h): Motion to suppress is directed to the evidence's use rather than its return.
2) Attacking the Warrant
   (a) Challenging the truth of the warrant
      (i) ***Franks v. Delaware** (US 1978, 507): Court holds that **a defendant has a limited right to attack the truthfulness of statements made in a warrant application. However, D has a difficult bar to surmount, as he must show**

<u>that the officesr preparing the application engaged in deliberate falsification or reckless disregard for truth</u>.

(ii) Limitation: Franks only extends to "first persons" and affiants in the affidavit. The fact that someone lied to the officer, who included those lies in the affidavit, does not in and of itself violate Franks.

01) A Franks violation occurs in this situation only if the affiant knew the third party was lying.

(b) Scienter Requirement

(i) ***US v. Johns** (9th Cir. 1988, 508): D challenges a warrant successfully by showing that the officer *could not have* smelled the meth he claimed to smell.

(ii) ***US v. Mueller** (5th Cir. 1990, 508): D *fails* to challenge a warrant by showing that an officer *was not likely* to have smelled the meth he claimed to smell.

(iii)(Get the picture)?

(c) Materiality Requirement

(i) **Defendant must show that the deliberate falsehood or reckless disregard had a material effect on the issuance of the warrant.**

(ii) **An officer's misstatement is not material under *Franks* if PC would exist even without the misstatement**.

01) (e.g. US v. Campbell, 6th Cir. 1989, 509)

3) Challenging a Warrantless Search

(a) Burden is different here

(b) **Once it is established that no warrant was obtained, the government must justify the search by a preponderance of the evidence that an exception to the warrant requirement was satisfied.** (US v. Matlock, US 1974, 509)

4) The Suppression Hearing and Judicial Review

(a) At the hearing on the motion to suppress evidence, the government will have a privilege to protect the identity of informants (McCray v. Illinois, US 1967, 509, holding that it is Constitutional to withhold informant's identity on PC issue).

(b) However, the judge can require the government to reveal the informant's identity if it is necessary o judge his credibility.

(c) **Ordinary rules of evidence are not applicable (except for privilege)**

(i) A judge can rely on hearsay.

(ii) ***US v. Matlock**: "in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable."

(iii)***US v. Brewer** (9th Cir. 1991, 510): **<u>Procedural rules designed to protect the integrity of the fact-finding process are *not* inapplicable in a suppression hearing.</u>**

01) (This came up when D wanted to sequester testifying police officers)

(d) Limitation on Use of Suppression Hearing Testimony At Trial

(i) ***Simmons v. US** (US 1969, 510): **<u>When D testifies on the question of standing at a suppression hearing, the government may not use his testimony against him on the question of guilt or innocence</u>**.

01) Example: D can testified that the briefcase searched by police was his, and the state cannot use this against him at trial.

02) Opinion is written broadly enough to suggest it applies beyond standing.

(ii) Lower courts: **Simmons** does not prevent the use of suppression-hearing testimony for impeachment purposes.

(e) Appellate Review

(i) 18 USC § 3731 provides that three conditions must be satisfied before the government can appeal from a suppression order

01) The government cannot appeal if D has been put in jeopardy

02) An appeal must not be taken for the purpose of delay, and

03) The suppressed evidence must be substantial proof of a fact material to the proceedings.

(ii) Most jurisdictions do not allow D to immediately appeal a denial of suppression, but instead postpone it to a post-conviction appeal.

01) However, D can plead "provisionally guilty" in some jurisdictions, and take the matter up on appeal; if he wins, he can withdraw his plea.

5) Establishing a Violation of a Personal 4th Amendment Right

(a) ***Rakas v. Illinois** (US 1978, 512): Officers stop a getaway car; they search the passenger compartment and find shells. Petitioners are passengers in the car; TC denied their motion to suppress, reasoning that they lacked standing. Court rejects the old Jones test, which allowed standing challenges by anybody "legitimately on the premises" at the time of a search. Instead, the Court holds that **one can have a legally sufficient interest in a place**, but that this must be governed by the Katz REOP standard. The Court applies this to the situation at hand and finds that Ds failed to meet their BOP, as they did not demonstrate a property nor a possessory interest, nor an interest in the property seized.

(b) ***United States v. Salvucci** (US 1980, 517): Kills Jones's automatic standing test once and for all by applying the Katz REOP test to hold that defendants in a criminal prosecution who are charged with crimes of possession do not have "automatic standing" to challenge the legality of the search which produced the evidence against them without regard to whether they had an expectation of privacy with respect to the search. (Lexis)

(c) ***Rawlings v. Kentucky** (US 1980, 517): D is with a woman who, along with D, is visiting the premises. Evidence is seized from her purse that is used against Rawlings. **Court holds that D had no right to object to the search because he had no REOP in the purse. Ownership of the contraband is not enough to transfer a right to object to the search.**

(d) ***US v. Payner** (US 1980, 518): An official of a bank visits the US. The IRS steals his briefcase and photocopied hundreds of documents to obtain evidence against D. Under Rakas, D has no right to object to the search (as the briefcase isn't his), even though he's the target. Court holds that "the supervisory power does not authorize a federal court to suppress otherwise lawful evidence on the ground that it was seized unlawfully from a third party not before the court." (TC had found for Payner, agreeing with him based on officers' bad intent)

(e) Presence in the Home of Another

(i) Big question: do you have a REOP in the premises?

(ii) ***Minnesota v. Carter*** redux (US 1998, 518): Ds, who were at a person's house for a business transaction (all drug-like), did not have a REOP in the premises and thus lacked standing to challenge the search.
01) Scalia would limit the 4th amendment to cover only searches of one's own stuff and/or one's own house. Kay.

6) Limitations on Exclusion: The Requirement of Causation and the Exception for Attenuation
(a) **The exclusionary rule does not apply unless there is a substantial causal connection between the illegal activity and the evidence offered at trial**.
(b) Searches and Seizures that Produce No Evidence
(i) Basic idea: **The exclusionary rule is not applicable unless evidence is seized as a result of a search**
(ii) ***Frisbie v. Collins*** (US 1952, 529): The illegal arrest of a person did not deprive a court of jurisdiction to try that person, as a person is not evidence.
(iii)(this doctrine has been invoked to uphold the abduction of suspects from foreign countries so they can be tried in the US)
(c) Evidence Found after a 4th Amendment Violation
(i) ***Wong Sun v. US*** (US 1963, 529): Establishes the "fruit if the poisonous tree" doctrine. Court asks "**whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint**."
(ii) ***Brown v. Illinois*** (US 1975, 530): Court declines to adopt a "per se" rule for the fruit of the poisonous tree doctrine (which Illinois had requested, as they wished to argue that a Miranda warning "breaks the chain" of the poisonous tree, to mix some metaphors). Instead, it emphasizes adherence to the totality in ruling that the State failed to sustain the burden of showing that the evidence in question was admissible under Wong Sun.
(d) Statements tainted by illegal arrest
(i) ***Dunaway v. NY*** (US 1979, 533): D is arrested without PC, taken down to the station, and Mirandized, after which he confesses. Held for D, as this is basically a replication of Brown.
(ii) ***Taylor v. Alabama*** (US 1982, 533): Court holds that multiple Mirandizings and the passage of several hours are insufficient to cure the ill of D's original illegal arrest, especially as D had no access to counsel and was in police custody.
(iii)***Kaupp v. Texas*** (US 2003, 534); The little-boy-arresting case. Redux. Very much a fruit and a poisonous tree.
(e) Statements *not* tainted by an Illegal Arrest.
(i) ***Rawlings v. Kentucky*** (US 1980, 534): In grand contrast to the above: detention takes place in a congenial atmosphere, D spontaneously confesses…all is good and golden and nothing need be suppressed.
(f) Warrantless In-Home Arrest is Not Casually Connected to a Subsequent Confession
(i) ***NY v. Harris*** (US 1990, 535): D confesses in the station after police make a warrantless in-home arrest in violation of Payton. **Court holds that while**

Payton violations constitute an illegal search of a home, they do not result in illegal arrests so long as there is PC; and while evidence acquired in a search is subject to be exclusion, there is no automatic connection between the search and a subsequent confession.

(ii) But see: ***US v. Beltran** (1st Cir 1990, 535): Police arrest D in her home without a warrant, during which they see cocaine in plain view. She confesses. The court finds that motivation predicated upon what the police saw might be relevant and remands. Interesting!

(g) Insufficient Connection between a Knock-And-Announce Violation and Evidence Found in the Home

(i) ***Hudson v. Michigan** (US 2006, 536): Police wait only a short time between knocking and entering. D moves to suppress all of the evidence, arguing that the premature entry violated his 4th Amd rights. **Scalia derides the causation here, noting that evidence-hiding is not one of the rights granted by the knock and announce rule, and essentially ruling out the exclusionary rule as a remedy here**. Many dissent.

01) Kennedy's concurrence: Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently to the later discovery of evidence to justify suppression.

02) Dissent: This destroys the deterrence rationale for knock-and-announce!

(h) Consent as Breaking the Chain of Causation

(i) Three-factor test: **1) temporal proximity of the illegal conduct and the consent; 2) the presence of intervening circumstances, and 3) the purpose and flagrancy of the original misconduct**. (US v. Hernandez, 5th Cir 2002, 544)

(i) Witness Testimony After Illegal Arrests and Searches

(i) **Courts are reluctant to suppress testimony from a live witness that is alleged to be the product of an illegal search or arrest; the witness's decision to testify is ordinarily enough to break any causal connection**.

(ii) ***US v. Ceccolini** (544): Flower shop case. Facts are largely unimportant: the holding is that the exclusionary rule should be tempered when illegal searches find a live witness as opposed to inanimate evidence.

7) Independent Source Doctrine

(a) Basic idea: **evidence will not be excluded if it is obtained independently and without reliance on any illegal police activity**. The key here is *reliance*…the rediscovery has to be separated from the taint. (US v. Markling, 7th Cir. 1993, 545)

(b) ***Segura v. US** (US 1984, 545): Court holds that police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of info wholly unconnected with the official entry.

(c) ***Murray v. US** (US 1988, 545): Complex fact pattern involving agents breaking into a warehouse, noticing contraband, and applying for a warrant for a legal re-entry (but not relying upon info they discovered in the illegal entry). **Scalia reframes the question into an analysis of whether the warrant's info was truly independent; he remands on that basis**.

(i) The dissent *hates* this, noting (for example) that the very idea that officers will tread lightly for risk of getting evidence excluded is absurd…especially as this is a case about officers not disclosing a prior intrusion!

(d) Mixed/Problematic Warrant applications

(i) **Many lower courts take the view that a search warrant procured in part on the basis of illegally obtained info will still support a search if the untainted info supporting the warrant, considered alone, is sufficient to establish PC.** (US v. Markling, 7th Cir 1993, 551)

01) (this follows from Franks, which established that *nefariously introduced* info still did not invalidate a warrant if it could be excised without affecting PC)

(e) Relationship Between Independent Source and Standing

(i) Basic idea: **warrantless searches of A cannot be used to gain evidence against person B**. **Officers can rely on an independent source *only if it is a legal source*.**

(ii) ***US v. Johnson** (7th Cir 2004, 551): Posner: Two illegal searches would make two legal searches. Bad! The government's argument is that the violation is cancelled by the fact that the evidence would have been discovered as a consequence of the illegal search of the passenger, but this is a senseless misapplication of the exclusionary rule.

8) Inevitable Discovery, aka "Hypothetical Independent Source."

(a) **For this to apply, the State must show that the illegally obtained evidence would have been discovered through legitimate means independent of the official misconduct.**

(b) Establishing the Exception

(i) ***Nix v. Williams**, (US 1984 553): This is the "proper Christian burial" case. Court declines to limit inevitable discovery doctrine to situations where an officer acts in good faith (this doesn't enhance deterrence viz. violation of constitutional rules, apparently). Court **holds that to invoke the inevitable discover exception, the government must prove by a preponderance that the challenged evidence would have been discovered through independent legal means ←rule**

(c) Inevitable Discovery through a Hypothetical Inventory Search

(i) Works**: *US v. Andrade** (9th Cir 1986, 554): Officers search D's bag and find cocaine after he was arrested for a drug violation. Search did not occur until an hour after the arrest. Court holds that this could not be justified as a SITA and would be unlawful..*except* that it would have inevitably been discovered through a routine inventory search.

(ii) Fails to Work: ***US v. Currency** (D.C. Cir. 1992): Declined to use the Andrade rule, reasoning that there would be no incentive of getting a warrant if all personal possessions could merely be opened in expectation of inventory.

(d) "We Would Have Obtained a Warrant"

(i) **Most courts have rejected government arguments that the inevitable discovery exception is met on the simple assertion that officers had PC and would have obtained a warrant**.

01) (See, e.g., US v. Brown on 556: **<u>What makes discovery inevitable is not probable cause alone, but PC plus a chain of events</u>**).

(ii) Some cases trend uncomfortably in the other direction

(e) Establishing inevitability

(i) ***United States v. Feldhacker** (8th Cir. 1988): Court cautions that in deciding whether ID exception applies, courts must focus on what the officers actually would have done, not on what they could possibly have done.

(ii) ***US v. Allen** (4th Cir. 1998, 557): Officer claims that if she hadn't performed the illegal search, she would've called the on-hand K9 unit and had the dog sniff the bag for drugs. Court is doubtful that this would have occurred and does not allow it.

(f) Active Pursuit Requirement

(i) **<u>A few courts have held that in order to invoke ID, the police must be actively pursuing the independent lawful means at the time the illegal search is conducted</u>**.

01) ***US v. Khoury** (11th Cir. 1990): Court rejects argument that evidence obtained in an illegal search inevitably would have been discovered, as at the time of the illegal search, an inventory had not begun.

(ii) NOTE: NOT ALL COURTS USE THIS, SO DO NOT RELY ON IT.

9) Use of Illegally Seized Evidence Outside the Criminal Trial Context

(a) Basic idea: **<u>Court has held that the exclusionary rule generally does not apply outside the context of a criminal trial</u>**.

(b) Grand Jury Proceedings:

(i) ***US v. Calandra** (US 1974, 558): Agents illegally seize certain documents located at Calandra's place of business. D moved to suppress the documents and refused to answer the GJ's questions. **<u>Court holds that the exclusionary rule does not apply to grand jury proceedings, as the marginal deterrent effect of allowing a witness to raise a 4th A claim before the grand jury was outweighed by the disruption of investigations that exclusion of evidence would produce</u>**.

(c) Sentencing Proceedings

(i) SCOTUS has not dealt with this, but lower courts have found the exclusionary rule inapplicable to sentencing hearings.

(ii) ***US v. Tejada** (2d Cir. 1992, 563) test: Absent a showing that officers obtained evidence expressly to enhance a sentence, a district judge may not refuse to consider relevant evidence at sentencing, even if that evidence has been seized in violation of the 4th.

(d) Forfeiture Proceedings

(i) **<u>This is one of the few exceptions to the "no exclusionary rule outside of trial" paradigm. However, the rule only applies when the property is not intrinsically illegal in character.</u>**

(ii) **Plymouth v. Pennsylvania** (US 1965, 563): Court holds that if the exclusionary rule were inapplicable, the government would be obtaining a reward for carrying out an illegal search or seizure.

(iii) **However, if the government seizes contraband, there is no obligation to return it simply because it was illegally obtained**.

(e) Other proceedings
(i) Exclusionary rule does not apply to child protective proceedings.

10) Use of Illegally Obtained Evidence for Impeachment Purposes
(a) Opening the Door on Direct Exam
(i) ***Walder v. US** (US 1954, 564): D testifies on DE that he had never possessed or sold narcotics. **Court holds that he was properly impeached with evidence of heroin that had been illegally seized; he had "opened the door" to this evidence**.
(b) Opening the Door on Cross
(i) ***US v. Havens** (US 1980, 564): D takes the stand and testifies on DE that he had not been involved with cocaine; he doesn't mention some illegally seized evidence. On cross, he is asked about illegally seized evidence, and when he answers in the negative is impeached. **COURT HOLDS THAT ILLEGALLY OBTAINED EVIDENCE CAN BE USED TO IMPEACH D'S TESTIMONY NO MATTER WHEN IT IS ELICITED**.
01) Rationale: No difference in Constitutional magnitude between direct and cross examination. Not enough deterrence rationale.
02) Dissent: This is awful! It keeps victims of illegal searches from taking the stand.
(c) Impeachment of a Defense Witness
(i) ***James v. Illinois** (US 1990, 565): **Impeachment does not extend to defense witnesses.**
01) Rationale: When applied to D, the Havens rule sort of makes sense, as it penalizes impeachment. But with witnesses, Ds might reasonable fear that one or more of their witnesses would also make some statement in sufficient tension with the tainted evidence to allow the prosecutor to introduce that evidence for impeachment.

G) Good Faith – Reasonable Reliance on Decisions of Magistrates and Others Without a Stake in Criminal Investigations and Prosecutions
(a) **Good-faith exception to the exclusionary rule *has been rejected* by New York. New York v. Bigelow.**
(b) ***Leon test**: was there a 4th amendment violation? Was there good faith reliance? (???where did this come from?)
(c) ***US v. Leon** (US 1984, 567): What happens when an officer relies on a warrant issued by a detached and neutral magistrate, but the warrant actually lacks PC? Majority adopts a cost/benefit analysis test, predicated somewhat on the assumption of objective good faith; additionally, it starts a trend of noting that the exclusionary principle here would *not* deter officers, who are the traditional focus of the rule (and would also not be likely to deter the magistrates, for that matter). **An officer's reliance on the magistrate's PC determination must be objectively reasonable**, but if it is, he passes.
(i) (Leon also manages to say that the exclusionary rule is not constitutionally required, which seems to contradict Mapp)
(ii) Good Faith expansiveness: Courts have construed the reasonableness in favor of the "reasonable minds could differ" conclusion.

(d) ***Mass v. Sheppard** (US 1984, 576): Odd case in which an officer uses the wrong form to prep a warrant and relies on the judge's assurances that it's OK before searching. **Court finds that the officer's reliance was reasonable, and if a Constitutional error was made, it was the judge's; it declines to suppress the evidence**.

(e) Also: Clerical errors and the like are also generally excused.

(f) Three kinds of errors after Leon:

(i) Reasonable mistakes that are not a violation of the fourth amendment at all, such as mistake of fact

(ii) Unreasonable mistakes that in fact violate the fourth amendment, but at the time of the conduct reasonable minds could have differed about whether the officer was acting lawfully

(iii) Unreasonable mistakes where the officer violated clearly established law, so that no reasonable argument could be made that the action was lawful.

2) Leon, Gates, and Warrants Clearly Lacking in PC

(a) Gates and Good Faith have not been held to be coterminous by lower courts: some hold that there is a grey area between Gates and a warrant that clearly lacks PC. See 579.

(b) ***United States v. Johnson** (8th Cir. 1996, 579): Officer was objectively reasonable in relying on a warrant even though the warrant was based on a tip from an anonymous called that was largely uncorroborated—this was close enough to provide a reasonable argument that Gates was satisfied)

(c) ***United States v. Weaver** (6th Cir 1996, 580): Barebones affidavit using boilerplate language with no corroboration cannot be relied upon in objective good faith.

(d) ***US v. Carpenter** (6th Cir 2004, 580): Oblique conclusion, but the court seems to suggest that while the warrant lacked PC (because it lacked a proper "nexus" between illegal activity and location), it was not *so* bereft of info as to be unreasonable to rely on once the warrant had issued.

3) Leon and Overbroad Warrants

(a) **The good faith exception would apply to a search pursuant to an overbroad warrant, so long as reasonable minds could differ about whether the warrant is in fact overbroad. By extension, however, if reasonable minds *could not* differ, then the officer cannot reasonably rely on it.**

(b) ***US v. Dahlman** (10th Cir. 1993, 581): Officers obtain a warrant to search two lots in a subdivision; the search encompasses a camping trailer and cabin, as well as the lots themselves. The court finds the warrant overbroad with regard to the cabin, but admits the evidence anyway under the good-faith exception.

(c) ***US v. Fuccillo** (1st Cir. 1987, 581): Officers search a clothing warehouse and retail clothing store with search warrants authorizing the seizure of "women's clothing." Court holds that the warrants are insufficiently particular, especially because the officers *had* details and had neglected to include them. Bad officers! Recklessly overbroad, and thus not admissible.

4) Reasonable Reliance on a Warrant That Failed to Include a Description of things to be seized

(a) ***Groh v. Ramirez*** (US 2005, 581): Officer obtains a warrant to search a residence; because of a clerical mistake, the property seized was not listed on the warrant. The exclusionary rule is not in play (no evidence was found), but a civil rights action transpires—and, as it turns out, § 1983 qualified immunity runs on the same continuum as does Leon. Stevens found that the warrant was **clearly and glaringly Constitutionally fatal**, as it obviously lacked particularity and, moreover, the officer had prepared it and thus had no excuse for his reliance.

5) Leon and Untrue or Omitted Statements in the Warrant Application
   (a) **An exception to the good faith exception arises if the officer includes material information that he knew was false or would have known was false except for his reckless disregard of the truth**.
      (i) Nice standard, but difficult to maneuver in practice.
   (b) ***US v. Johnson*** (8th Cir. 1996, 582): Police officer receives a call from an anonymous informant who stated that he had been present when marijuana had been delivered to Johnson's residence. Officer does manage to corroborate somewhat, but checks a box on the warrant application saying "the informant has not given false info in the past"—technically true, but more than a little misleading. Court holds that it will not "subject law enforcement officers to absolute syllogistic precision," and refuses to invalidate the warrant.
      (i) Arnold's Dissent: A statement that an informant had not previously given false info is clearly calculated to influence the magistrate to whom the application for warrant was to be submitted!
   (c) ***US v. Vigeant*** (1st Cir. 1999, 583): Officer implies that D has purchased material with unsavory funds…but D's transactions are actually entirely above board. Court declines to find good faith in the warrant.
6) Leon and the Abdicating Magistrate
   (a) ***McCommon v. Mississippi*** (US 1985, 585): Judge admits that he is happy to approve search warrant for…basically anything. Court denies review; Brennan dissents vigorously, finding this in clear violation of all sorts of good faith.
   (b) ***US v. Breckenridge*** (5th Cir. 1986, 585): Court holds that the good faith exception applies even thought he judge who issued the warrant never read it.
   (c) ***US v. Decker*** (8th Cir 1992, 585): Rare counterexample. Magistrate acts as a rubber stamp; evidence suppres.
   (d) **GOOD FAITH EXCEPTION DOES NOT APPLY IF THE MAGISTRATE IS AFFILIATED WITH LAW ENFORCEMENT, E.G. THE DIRECTOR OF CORRECTIONS** (see, e.g., US v. Lucas, 8th Cir 2006, 585).
7) Teaching Function
   (a) **Concern: The appellate courts will routinely refuse to decide 4th Amendment questions about the validity of the warrant, preferring instead of reach the easier holding that the officer was not totally unreasonable in relying on a magistrate's determination that the warrant was valid**. This, then, removes the "teaching function," or the ability of the courts to delineate what a valid warrant would be.
      (i) ***US v. Henderson*** (9th Cir. 1984, 586): Court dodges beeper order by relying on the good faith of the agents.

(ii) Fifth Circuit states that a court *must first* decide whether the good faith exception applies, thus negating any questions of substantive 4th law.

(b) Purpose of the teaching principle: without it, 4th amendment jurisprudence becomes "set in stone." With it, officers who conduct themselves in a manner contrary to established caselaw can no longer be said to be acting reasonably.

8) Exclusion for Bad-Faith Searches

(a) Professor Burkoff: Proposes exclusion of evidence if the officer intended to violate the Fourth Amendment, even though the officer's conduct turned out to be objectively reasonable.

H) The Good-Faith Exception and Warrantless Searches

1) **The Court has extended the good faith exception to certainly warrantless searches, but has *not* extended it to situations in which the officer was relying on his *own* judgment in conducting a warrantless search**.

2) Reasonable Reliance on Legislative Acts

(a) ***Illinois v. Krull** (US 1987, 589): Officer relies on a statute authorizing a warrantless search, but the statute is later found to be unconstitutional. Court: The legislature cannot be deterred by the imposition of the exclusionary rule; nor would a reasonable officer have known that the law was unconstitutional.

(i) SDOC's dissent: The legislature *absolutely* knew what it was doing! This basically enacts a grace period in which violations are smiled upon.

3) Clerical Errors and Reliance on Court Clerical Personnel

(a) ***Arizona v. Evans** (US 1995, 590): D is stopped for a traffic violation; a computer indicates that there is an outstanding warrant that had been erroneously left in the computer well after being quashed, and a SITA reveals marijuana. **The Court holds that the entities who made the mistake could not be deterred by the imposition of the exclusionary rule, and nor could the officers.**

(i) SDOC's Concurrence: Look, we're not holding whether this framework could attach if the computer error was caused by police, or if they relied on a recordkeeping system they knew to be rife with error.

(ii) Stevens dissent: We're not worried enough about the danger posed by computer errors.

4) Good-faith Reliance on Court Decisions

(a) This is unsettled. Some courts hold that the good faith rule applies if Officers follow a then-reining precedent that is later found to be unconstitutional, which causes *tons of problems* with Griffin.

5) Good Faith where the Officer is At Fault

(a) Fifth Circuit applies the good-faith exception to all searches and seizures, including those where the officer himself screws up (see US v. De Leon Reyna, 5th Cir 1991, 593, where an officer screws up a radio transmission…the CoA finds his error reasonable).

(b) Contrary result: ***US v. Lopez-Soto** (9th Cir. 2000, 594): Officer stops a car from Baja under a mistaken belief of where the registration should be located; during the stop, the officer discovers marijuana. Court rejects the officer's good-faith argument in holding that the exclusionary rule applies, as there's obviously a deterrence principle in play.

I) Alternatives to Exclusion

1) *__Bivens v. Federal Bureau of Narcotics__ (US 1971, 595): SCOTUS creates a federal common-law counterpart to § 1983 for violations by federal officials.
   (a) Burger dissents vigorously and proposes a replacement of the exclusionary rule with civil remedies.
2) Problems with civil replacements: winning and collecting.
3) Amar: Damage multipliers! Government liability! All of this would stop violations of the 4th.
   (a) Me: Sure.

IV) Self Incrimination and Confessions – **__5th Amendment__** Privilege Against Compelled Self-Incrimination

A) **__The Fifth Amendment Protects Against CTSI. Compelled Testimonial Self Incrimination.__**

B) The Policies of the Privilege Against Compelled Self-Incrimination
   1) Fifth Amendment: "No person shall be compelled in any criminal case to be a witness against himself."
   2) Does it serve to protect the innocent?
      (a) No; in fact, the Supreme Court has explicitly disclaimed this rationale. Tehan v. US, US 1966, 603.
   3) **__The Cruel Trilemma__**: Self-accusation, perjury, contempt.
      (a) Supreme Court ridicules this in Brogan

C) Scope of the Privilege
   1) **Remember, the privilege only protects against the __use__ of material in a criminal context; however, the privilege __applies to material gathered__ in far broader contexts**.
   2) Proceedings in Which the Privilege Applies
      (a) **__The Supreme Court has consistently held that the privilege protects during formal criminal proceedings *and* in any other proceeding, civil or criminal, formal or informal, where his answers might incriminate him in future criminal proceedings__** (Lefkowitz v. Turley, US 1973, 607)
      (b) Application to Non-Criminal Cases
         (i) ***Boyd* and *Counselman* established that a person called as a witness in any federal proceeding could invoke the privilege against self-incrimination to avoid testifying to matters that could possibly be damaging in subsequent criminal prosecution**.
   3) Criminal Cases
      (a) Again: **the use of compelled testimony other than in a criminal case does not itself implicate the 5th Amendment**.
         (i) ***Minnesota v. Murphy** (US 1984, 608): Court holds that a person has no right to refuse to answer questions on the ground that they might be used against him in subsequent probation proceedings, because thos are civil and not criminal.
      (b) What counts as "criminal?"
         (i) Detention for "Treatment"
            01) ***Allen v. Illinois** (US 1986, 609): The **__Supreme Court holds that proceedings under the Illinois Sexually Dangerous Persons Act were not criminal for self-incrimination purposes; thus, the state court__**

properly relied upon statements made by Allen to psychiatrists who subjected him to compulsory examination. It emphasizes that the Illinois Legislature expressly provided that these proceedings are civil in nature, notwithstanding several trappings that would imply its nature as closer to criminal in scope.

- Stevens' dissent: The treatment goal isn't enough to render the privilege inapplicable; you're allowing the State to create a shadow criminal law!

(ii) In other words: criminal can be fairly narrowly defined. This is definitely an area about which to quibble on the exam.

4) Compulsion of Statements Never Admitted at a Criminal Trial
   (a) What happens if statements are compelled, but they are never used at trial (and/or no trial transpires?)
   (b) ***Chavez v. Martinez** (US 2003, 612): D makes compelled statements. Court assumes for purposes of the appeal that they would've been excluded at trial…but no trial ever transpired. **A majority finds that the Fifth does not protect against statements compelled during interrogation but not used as a criminal case**; ← however, there is no majority opinion. The court did remand, however, to determine whether the interrogation so "shocked the conscience" to be violative of SDP.
      (i) THOMAS: A "criminal case" requires the commencement of legal proceedings.
      (ii) SOUTER: I am concerned that there is absolutely no limiting principle in play.
      (iii)KENNEDY dissents: This is a bizarre outcome. The idea that there's no "inherent" violation seems to dilute the 5th; do we mean that police can elicit statements by torture and not violate the 5th inherently?

D) What is compulsion?
   1) Use of the contempt power
      (a) This is *classic compulsion*, because it imposes substantial punishment on the witness who is exercising the right to remain silent. Thus, a witness cannot be subjected to contempt for refusing to testify if this refusal could create a risk of self-incrimination in a criminal case.
   2) Other State-Imposed Sanctions
      (a) Garrity rule: Protection of the individual under the 14th amendment against coerced statements prohibits use in subsequent criminal proceedings obtained under threat of removal from office, and that it extends to all…
      (b) ***Lefkowitz v. Turley** (US 1973, 614): NYS requires public contracts to provide that if a contractor refuses to waive immunity or to testify concerning state contracts, existing contracts would be canceled contracts and future contracts could be denied. Q: is this compulsion? Court: **Yes, this is compulsory; the better thing to do is to *give* immunity and compel testimony**.
      (c) A lawyer cannot be disbarred for invoking the privilege during a bar investigation. ***Spevack v. Klein** (US 1967, 616).
      (d) The Function of Immunity

(i) **Basic: A grant of immunity kills the right to refuse to testify under the 5th amendment (depending on scope)**.

01) ***FE v. Greenberg** (D.C. Cir. 1993, 616): The government may fire employees who refuse to answer questions concerning their performance of their duties, so long as the answer cannot be used against them in a criminal prosecution.

(e) Benefit/Penalty Distinction

(i) **Basic: A *benefit* structure for testimony is far less violative than a penalty structure**.

(ii) ***US v. Cruz** (2d Cir 1998, 616): Sentencing guidelines provide for safety valve relief if D admits to more evidence/conspiracies. This is judged to be OK.

(f) Self-Incrimination and Clemency Proceedings

(i) ***Ohio Adult Parole Authority v. Woodward** (US 1998, 617): The inmate argues that Ohio's voluntary interview as part of the clemency proceeding violated his Fifth Amendment privilege against self-incrimination. **The Court responded that the Fifth Amendment protection only extended to compelled self-incrimination. The Court did not think that the inmate's testimony at a voluntary clemency interview could amount to compelling him to speak. Thus, the Court held that Ohio's clemency proceedings did not violate the Fifth Amendment or the Due Process Clause**. (Lexis, mostly)

3) Comment on the Invocation of the Privilege

(a) Griffin series

(i) The Griffin Rule: **Adverse comments to the jury, by either the judge or the prosecutor, on the defendant's election not to testify constitutes punishment for the invocation of silence, which is tantamount to compulsion and thus violates the 5th. *Griffin v. California,** (US 1965, 625)

(ii) The Carter rule: **A judge is required to give a "do not draw inferences to the fact that D has not testified" instruction when requested (by the defense?).** (Carter v. Kentucky, US 1981, 626)

(iii) ***Lakeside v. Oregon** (US 1978, 626): Judge gives the adverse-inference instruction, and D *objects*. Court holds that Griffin was concerned with adverse comments, and this is *not one*.

(iv) ***US v. Robinson** (US 1988, 626): D's closing argument includes a line about "not being able to tell his side of the story." **Court holds that prosecutor's decision to point out that he could have testified is proper under Griffin**.

01) (note to self: **think of this as "opening the door."**)

(b) Indirect References to D's Failure to Testify

(i) Sometimes it is difficult to tell whether P is commenting on the silence of the defendant (impermissible) or on the totality of the evidence in the case (permissible).

(ii) ***US v. Monaghan** (D.C. Cir. 1984, 626): Court holds that prosecutors did not impermissibly comment on D's silence when they referred to their evidence as "uncontradicted."

01) Dissent: The witness is the only one who could've contradicted the alleged victim!

(iii) Counterexample: ***Lent v. Wells** (6th Cir. 1988, 627): "Uncontradicted" remark violates Griffin where D was the only person who could rebut complaintant's assertion that a sexual attack occurred.

(c) Adverse Inferences at Sentencing

(i) ***Mitchell v. US** (US 1999, 627): Fact-pattern condensed: D's decision to remain silent at a sentencing hearing is noted by the sentencing court, which relies upon the testimony of her co-conspirators. **Court holds that D cannot be subject to an adverse inference upon invoking the 5th right to silence at a sentencing proceeding**, and reverses.

01) Justice Kennedy, however, "took pains to note that the 5th's protection against an adverse inference applied only to the underlying facts of the crime"…and not, for example, to the judge's decision over whether D had expressed remorse.

(d) Adverse Inferences Drawn in Civil Cases

(i) **The Fifth Amendment does not forbid inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment does not preclude the inference where the privilege is claimed by a party to a civil cause**. (***Baxter v. Palmigiano**, US 1976, 629)

01) Rationale: There's no way to avoid this in civil cases, as by offering immunity. As such, this is a strike to retain balance in civil proceedings.

(e) Adverse Inferences Against Non-Parties

(i) **Generally: The rules of evidence prevent calling a witness who will invoke his privilege on the stand**.

(ii) Idea: Calling a witness who will invoke the privilege repeatedly is high courtroom drama, but has little probative value.

4) Compulsion and the "Exculpatory No" Doctrine

(a) ***Brogan v. US** (US 1998, 631): **Court rejects the "exculpatory no" doctrine as senseless under the 5th amendment; the proper course under the 5th is to remain silent when a question like this is asked, or to affirmatively invoke the privilege** (Dealing with prosecutions under 18 USC § 1001).

(i) D's argument: This provokes the cruel Trilemma! Admitting guilt, remaining silent, or committing a violation of § 1001. Scalia: So? You did this to yourself by being guilty! Besides, the cruel trilemma here is not applicable; you've ratcheted it up so that the right to remain silent has replaced contempt. Nothin' doing.

E) To Whom Does the Privilege Belong?

1) **The privilege is personal, belonging only to the person who is himself incriminated by his own testimony. It cannot be invoked vicariously**.

(a) (for example, an attorney may not claim the privilege on the ground that his testimony might incriminate his client)

(b) ***Fisher v. United States** (US 1976, 633): Attorneys hold documents relating to their clients' tax returns; they claim privilege and refuse to produce the records. **Court: The fifth amendment doesn't cover this, although the fourth might.**

The fifth amendment protects against compelled self-incrimination, not the disclosure of private information.

2) Note on the Collective Entity Rule
   (a) The Bellis rule: **Court had applied the personal compulsion limitation to exclude partnership from 5th Amendment protection**. (***Bellis v. US**, US 1974, 635).
   (b) Distinguishing Bellis:
      (i) **BELLIS INCLUDES LANGUAGE ABOUT "NATURAL INDIVIDUALS." FAMILIES AND PARTNERSHIPS WITH PREEXISTING RELATIONSHIPS MAY BE DIFFERENT**.
      (ii) "**This might be a different case if it involved a small family partnership**, see United States v. Slutsky, 352 F.Supp. 1105 (SDNY 1972); In re Subpoena Duces Tecum, 81 F.Supp., at 421, or, as the Solicitor General suggests, Brief for United States 22-23, if there were some other pre-existing relationship of confidentiality among the partners"
      (iii) Also, sole proprietorships have 5th Amendment protection (US v. Doe, US 1984, 635) whereas corporations owned by a single person do not (Braswell v. US, US 1988, 635).
         01) Corporations have fourth, first, and due process rights, but they do not have fifth amendment rights.

F) What is Protected?
   1) Non-Testimonial Evidence
      (a) Non-testimonial evidence seems to be predicated on the idea of content/story. A voiceprint, a handwriting sample, and so on are just exemplars; you're not *saying* anything, which is why it isn't testimonial.
      (b) From Muniz: ***To be testimonial, communication must be an express or implied assertion of fact that can be true or false; otherwise, there is no risk of perjury and no cruel trilemma is presented***
      (c) ***Schmerber v. California** (US 1966, 636): D, drunk driving, gets into an accident; at the hospital, a blood sample is drawn, and the analysis deriving therefrom is used at trial. **Court holds that the blood sample is compelled and incriminating, but not testimonial**; thus, the evidence is kosher.
         (i) Subtext: Court goes this way because it can't figure out how to distinguish fingerprinting…this is why Brennan goes along with the majority.
      (d) Testimonial versus Non-Testimonial Evidence
         (i) **Requiring a suspect to participate in a police line-up did not violate the fifth**. (***US v. Wade**, US 1967, 637)
            01) Dissent: Having someone speak at a line-up is over the line.
            02) Fortas dissent: This is *active participation*, distinguishing its testimonial weight from Schmerber.
         (ii) ***Gilbert v. California** (US 1967, 638): **Court holds that handwriting exemplars may be compelled from an unwilling defendant**.
         (iii) (Presumably this is non-testimonial)
         (iv) ***US v. Dionisio** (US 1973, 638): Applies the above to voice prints.
      (e) Testimonial Evidence and the Cruel Trilemma

(i) ***Pennsylvania v. Muniz*** (US 1990, 638): D is pulled over on RS of drunk driving. He is put under arrest. Without giving Miranda warnings, the cops ask for the date of his sixth birthday. He says he doesn't know, while slurring and stumbling over his words. The manner of speech and the content of the answer were admitted at trial. **Court holds that while the manner of Muniz's answer was not testimonial (and thus properly admitted), the actual content *was*, and use of it at trial was an error.**
01) (the court split more narrowly on the second issue)
02) Brenann: Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the trilemma of truth, falsity, or silence and hence the response contains a testimonial element.

(f) Express or Implied Assertions of Fact
(i) ***Doe v. United States** (US 1988, 641): Court holds that a person's compelled signature on a bank consent form was not testimonial because there was no assertion that the records did or did not exist (and such a release is nonfalsifiable).

(g) Psychological Evaluations
(i) ***Estelle v. Smith** (US 1981, 641): Court held that a defendant who is to be interviewed by a government psychiatrist who will testify at sentencing has a right to be warned that what he says may be used against him in the sentencing proceeding.
01) Rationale: Doctor based his statements at least partly on the defendant's statements about the crime.
(ii) ***Jones v. Dugger** (11th Cir 1988, 641): Jones is arrested for sexually assaulting two women. At his trial, a detective who interviewed him (without Miranda warnings) testifies as to his demeanor. **Court finds that the Fifth was not violated because no testimonial information had been used**.

(h) Drawing an Adverse Inference as to Non-Testimonial Evidence
(i) ***South Dakota v. Neville** (US 1983, 643): **An adverse inference may be drawn from the refusal to provide non-testimonial evidence** (i.e. evidence that would not implicate the fifth).
01) SDOC: A defendant's refusal to take a breathalyzer is within his right, but it may be used against him at trial.

2) Documents and Other Information Existing Before Compulsion
(a) Re-affirming third-party rule
(i) ***Andreson v. Maryland** (US 1976, 642): Court holds that the use at trial of D's business records, seized pursuant to a valid warrant, did not violate the 5th: petitioner was not asked to say or do anything, and therefore the targeted compulsion was absent.
(ii) ***Fisher v. US Redux**: Compelling a taxpayer to produce an accountant's workpapers does not violate the 5th, as the taxpayer is necessarily unable to communicate their testimonial value…or something. Basically, this is the third-party rule again. The question is not of testimony but of surrender.
01) **Emphasis: The accountant's workpapers are not the taxpayer's!**

(b) Application of the Fisher analysis

(i) ***United States v. Doe** (US 1984, 644): D, the owner of several sole proprietorships, refuses to respond to a grand-jury subpoena for documents and records, citing the 5th. **The Court holds that this was proper, because the act of producing the documents involved "testimonial self-incrimination," even if the content of the documents was *not* protected.**
  01) Production is testimonial "in that the act of production would compel the owner to admit that the records existed, that they were in his possession, and that they were authentic."
  02) The content could not be deemed "compelled," thus the non-fifth-violative status of the contents.

(c) Private Papers
  (i) **Both Fischer and Doe hold that the Fifth Amendment does not protect the content of documents that were voluntarily prepared; even if production of these documents is compelled and the content would be incriminating, the Fifth is inapplicable because the government did not compel the preparation (as opposed to the production) of the documents**.
  (ii) Moreover, **most courts agree with SDOC in Doe that the contents of voluntarily prepared documents are never protected by the Fifth**.
    01) (some courts, however, draw a business/personal distinction, and hold that the contents of personal records are protected, which obviously creates problems in determining which records are business and which are personal) US v. Stone, 4th 1992, 645

(d) When is the Act of Production Incriminating?
  (i) **By producing documents in response to a subpoena, the individual admits that the documents exist; that he has custody of the documents; and that the documents are those described in the subpoena**
  (ii) Remember, however, that the Fifth applies only when this compelled testimonial act of production could *incriminate* the person responding to the subpoena.
  (iii) **A simple admission of the mere existence of documents is rarely incriminating**
    01) **US v. Stone** (4th Cir 1992): Court holds that the act of producing utility records for a beach house was not privileged, because there was nothing incriminating about the existence of such records.
    02) Exception: If, say, a corporation has a second set of books, its existence is incriminating independent of contend or authenticity.
      - **Example: In Re Doe** (2d. Cir 1983, 646): Doc is under suspicion for dispensing Quaaludes without a proper medical purpose. He's subpoenaed, which reveals tons and tons of records; the very existence of so many files could potentially be incriminating, and so this violates the 5th.
  (iv) Custody of documents is also not generally incriminating; it is ordinarily not incriminating to control documents, independent of their content.
    01) Exception: In some limited cases the admission of control creates an inference of affiliation with another person or business that itself tends to incriminate.

- ***In Re Sealed Case** (D.C. Cir 1987, 646): Court finds that by producing Iran Contra records, the person admits custody and thus, by extension, that he was intimately involved with various unsavory corporations.

(v) **REMEMBER THAT EVEN IN THE LIMITED CASES WHERE PRODUCTION IS INCRIMINATING, THE FIFTH WILL NOT APPLY IF EXISTENCE, CONTROL, AND AUTHENTICATION ARE A FOREGONE CONCLUSION** (Fisher).

01) This will be the case when the government has substantial independent evidence that the records exist, that the witness controls them, and that the records are authentic.

02) Example: Existence and control can be shown through other witnesses, when the records have either been prepared by or shown to them. **(US v. Clark, 10th Cir. 1988, 647)**.

(e) **Act of Production as a Roadmap for Government**

(i) ***United States v. Hubbell** (US 2000, 648): The Court held that the Fifth Amendment privilege against self-incrimination protects a witness from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity. **The Court also ruled that if the witness produces such documents, pursuant to a grant of immunity, the government may not use them to prepare criminal charges against him** (the "Chain of Evidence" idea). (Wiki)

(ii) Broad Subpoenas after Hubbell

01) Hubbell's subpoena was so broad that he had to make witness-like decisions in determining which documents complied with the subpoena; the production of records could show what those decisions were.

02) Example: **A subpoena calling for "all documents in your possession" necessarily calls for culling, which in turn has a testimonial aspect and is thus potentially violative of the 5th**

(f) Production of Corporate Documents

(i) Idea: If the act of production of a business entity's documents would be personally incriminating to an agent of the entity, can the agent invoke his personal Fifth Amendment privilege?

(ii) Collective Entity Rule: The records and documents of the organization that are held by the agent in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though the records might incriminate the agent personally.

(iii)***Braswell v. United States** (US 1988, 653): Braswell is the sole shareholder of two corporations. He is subpoenaed in his capacity as an agent to produce records. He invokes his personal privilege against self-incrimination. **Court denies the privilege using the collective entity rule.**

01) Rationale: Agent holds these records in a representative capacity, and it would be awful public policy to let agents screen these records based on personal liability.

02) Distinguishes Curcio, which held that a secretary-treasurer could not be compelled to give oral testimony when it might incriminate him

personally, by noting that a corporate agents assumes the risk of producing documents as part of his job, but not the risk of being compelled to give incriminating oral testimony.

03) Also: Corporation's act of production may be used as evidence against the custodian in a future criminal action, **although the custodian's part in this production may not be**.

(g) The difference between a corporate agent's compelled oral testimony and compelled document production

(i) Judge Kravich: In drawing a line between acts of production and oral testimony, the Court appears to have relied on one fact that distinguishes these two types of testimony: **the corporation owns the documents**. By contrast, oral testimony belongs to the witness himself.

(h) Production of a Person in Response to a Court Order

(i) ***Baltimore City Dept of Social Services v. Bouknight** (US 1990, 656): Court holds that a mother who refuses to produce her child (in violation of an already-underway PINS structure) cannot claim the fifth, reasoning that she "has assumed custodial duties related to production" as part of a noncriminal regulatory regime, i.e. as analogous to collective entities.

3) Required Records

(a) **Even if documents are not voluntarily prepared, t heir contents as well as the act of production will be unprotected by the Fifth if the government requires the documents to be kept for a legitimate administrative purpose that is not focused on solely on those inherently suspected of criminal activity**.

(i) This is the "required records" exception to the 5th.

(ii) Under this exception, the government can require records to be kept, punish those who do not keep the records, punish those who keep false records, and punish those who truthfully admit criminal activity in the compelled records.

(b) ***Shapiro v. US** (US 1948, 657): **Court holds that the compelled production of D's customary business records, which were required to be kept under the EPCA, did not implicate the 5th**.

(c) Limitations on the Exception

(i) ***Marcetti v. United States** (US 1968, 657): D had been convicted for willfully failing to register and pay an occupational tax for engaging in the business of accepting wagers. D claimed that he failed to register and pay because to do so would provide an incriminating admission that he was involved in gambling. Court holds that **those who properly assert their constitutional privileges may not be criminally punished for failure to comply with these requirements**

01) Court: The regulations here are clearly directed at criminal activity, as opposed to legitimate regulatory activity.

(ii) ***Haynes v. US** (US 1968, 658): Court reverses a conviction for failing to register a sawed-off shotgun as required by the National Firearms Act, as possessing one is defined as a criminal offense. Same rationale applies.

(d) Compelled Reporting of an Accident

(i) ***California v. Byers** (US 1971, 658): D is convicted for failing to stop at the scene of an accident and to leave his name and address as required by Cali's

hit-and-run statute. **Court holds (in a plurality opinion) that the statutory scheme was essentially regulatory and noncriminal; it was directed at the motoring public at large and not to the criminals only**.

(e) Is the Target Group Inherently Suspect?

(i) When not: Statute requires those traveling by air to declare their firearms. This falls under the required records exception and is not inherently criminal in nature, and thus nobody has the right to not declare, even if it would be incriminating.

G) Procedural Aspects of Self-Incrimination Claims

1) Determining the Risk of Incrimination

(a) Basic Test for Proper Invocation of Privilege: **Whether the information request of a witness might possibly tend to incriminate the witness in the future; this determination must be made without compelling the witness to divulge the information that the witness claims is protected**

(b) Refined test for determining risk of incrimination: Whether it is **perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possible have such tendency to incriminate. (US v. Hoffman, 661**)

(c) Compelled Self-Identification and the Tendency to Incriminate

(i) ***Hibel v. Nevada** redux (US 2004, 661): D is convicted for refusing to give his name to a cop during a Terry stop. Court invalidates the fifth amendment question by noting that D did not feel that disclosing his name would incriminate him, and as such the invocation of the Fifth was in error.

(d) The Risk of Incrimination and Denial of Guilt

(i) ***Ohio v. Reiner** (US 2001, 663): D is charged with involuntary manslaughter in connection with the death of his infant son. He blames it on the babysitter, who refuses to testify and claims the fifth. She's granted immunity, but she testifies that she did nothing wrong. Supreme **Court upholds her grant of immunity, holding that invocation of the Fifth Amendment is not predicated on participation in actual wrongdoing; rather, its function is to protect innocent men who otherwise might be ensnared by ambiguous circumstances**.

01) Book asks, but fails to answer, the obvious question: how could repeating "I didn't do it" be construed as ambiguous circumstances?

2) Immunity

(a) **If a witness is guaranteed that no criminal prosecution having anything to do with statements given to the government will take place, then there is no possibility of incrimination and no right to refuse to testify.**

(b) Two types of immunity

(i) **Broad: Transactional immunity**: No transaction about which a witness testifies can be the subject of future prosecution against the witness

01) This is immunity that transcends merely the things spoken about in testimony, but instead applies to the *entire controversy in play*.

(ii) **More Limited: Use Immunity:** an exemption that displaces the privilege against self-incrimination; neither compelled testimony or any fruits of it can

be used against the witness who therefore can no longer fear self-incrimination (online)

01) I.e. nothing that the person says can be used against him, nor can the fruits, but he might be prosecuted for something that comes up independently that does not bear on his testimony.

(c) The Constitutionality of Use Immunity

(i) ***Kastigar v. US** (US 1972, 665): Court states that **use-fruits immunity was a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify**." This immunity is coextensive with the privilege and is sufficient to supplant it, as it puts the prosecutor and witness in the same position as if the fifth had been successfully claimed, at least viz. each other.

01) **NOTE: STATES MAY STILL REQUIRE TRANSACTIONAL IMMUNITY AS PART OF STATE LAW (New York may be one of them)**

02) (if this is the case, use-fruits still applies in federal courts, so the person can be prosecuted there)

(ii) Proving that Immunized Testimony was Not Used

01) If a witness gives immunized testimony and is later prosecuted, the question of whether the government has used the fruits of the immunized testimony inevitably arises.

02) Government can erect a "wall of silence" between the prosecutors exposed to the testimony.

(iii) Tainted Witnesses

01) ***US v. North** (D.C. Cir. 1990, 666): D gives immunized testimony and a "wall of silence" is erected; however, many of the prosecution's *witnesses* had seen D's testimony on their own. **Court holds that Kastigar is violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony**.

- (Memories would be impermissibly refreshed by their exposure to the immunized testimony)

(iv) Independent Source, Inevitably Discovery

01) ***US v. Gallo** (2d Cir 1988, 666): D's immunized testimony is used along with other info to obtain a wiretap; convos are intercepted that implicate D, and this info is used at trial. **Court holds that Kastigar is not violated because the affidavit upon which the wiretap was based contained sufficient information to support a wiretap even without the immunized testimony**.

(v) Impeachment/Perjury

01) **Once immunity is granted, information extracted is coerced and cannot be used as evidence in a subsequent case against the witness, even for impeachment purposes** (New Jersey v. Portash)

02) **However, evidence of lying under a grant of immunity can be used in a subsequent prosecution for perjury, false statements, or obstruction of justice** (US v. Apfelbaum, US 1980, 667)

(vi) Subsequent Statements

01) **Summary: <u>A witness who is granted immunity can claim the fifth later regarding the same statement</u>** (***Pillsbury Co. v. Conboy**, US 1983, 667)

- Rationale: Something said in a later deposition that matches earlier, immunized testimony is not sufficiently protected to assure D that nothing he said at the deposition could be used against him in later proceedings.

(vii) Informal Immunity

01) Short: Immunity does not exist in the absence of a formal grant. Do not try this; the Court will not like it.

3) Waiver of the Privilege

(a) Determining the Scope of a Waiver

(i) **<u>Rule: A witness who elects to take the stand waives the privilege as to any subject matter within the scope of the direct examination. The witness is subject to cross only to the extent necessary to fairly test the statements made upon direct examination and the inferences drawable from those statements</u>**

(ii) ***US v. Hearst** (9th Cir. 1977, 668): D testifies that at the time of her participation in a robbery, she was under control of the SLA. **<u>The court held that by so testifying on direct she waived the privilege with respect to questions on cross-examination concerning a later period in which she lived with the SLA voluntarily. These questions were "Reasonably related" to the subjects covered in direct.</u>**

(b) Waiver of Privilege at a Guilty Plea Hearing

(i) ***Mitchell v. US** (US 1999, 669): Long fact pattern. Court rules that D has not waived her Fifth right by partially allocuting to facts at a plea hearing. Or something. Read the fucking case if this comes up.

V) Confessions and Due Process

A) Introduction

1) Three main Constitutional provisions in play

(a) DPC of Fifth and 14th have been used to exclude involuntary confessions

(b) 6A Right to Counsel has been applied in determining the admissibility of a defendant

(c) Fifth Amendment's privilege against self-incrimination has been applied to statements made during custodial interrogation, focusing on a waiver analysis (Miranda)

2) ***Hopt v. Utah** (US 1884, 671): Recognizes a comma-law rule prohibiting the use of confessions obtained by inducements, promises, and threats.

3) ***Bram v. US** (US 1897, 672): Court abruptly departs from an emphasis on the reliability of confessions, reorienting on the 5th's self-incrimination clause.

(a) Although it never overruled **Bram**, for 2/3 of the century the Court never explicitly and exclusively relied on the privilege against self-incrimination to suppress the use of confession in another federal case.

B) The Due-Process Cases

1) ***Brown v. Mississippi** (US 1936, 672): Very, very unpleasant case in which torture/lynching elicits confessions. **Court holds that this violates due process**, thank God.
2) Pre-Miranda Cases on Involuntariness
   (a) Catalog: Youthfulness/intelligence/mental deficiency/hardened criminals/etc.
   (b) Court also disapproved of denial of food, sleep, etc.
3) **Voluntariness Test – Must show that (THIS IS NOT MERELY HISTORICAL. THIS IS STILL USED. THIS IS THE MODERN DPC TEST.) (Colorado v. Connelly)**
   (a) The police subjected the suspect to coercive conduct, and
   (b) The conduct was sufficient to overcome the will of the suspect (given particular vulnerabilities and the conditions of the interrogations), thus inducing an involuntary statement.
      (i) This is a *totality of the circumstances* analysis.
      (ii) It is also *exceptionally vague*.
4) Increasing Emphasis on Assistance of Counsel
   (a) ***Spano v. NY** (US 1969, 676): Long fact pattern, but the **Court holds that petitioner's will was overborne by official pressure that was totally unjustified**. Concurrence emphasizes police's decision to not provide D with counsel, despite his request.
      (i) **Concurring opinion believes that right to counsel under the 6th begins at the time a person is formally charged. ←**
      (ii) Spano is a "doctrinal bridge" from DPC.
5) **Note: Because 6A doesn't attach until charging and Miranda only applies during custodial interrogation, the totality test is in some cases a suspect's only protection from police coercion**.
   (a) Also: Miranda can be waived, whereas the right to be free from coercion cannot.
   (b) Thus, if D has waived Miranda, his only protection from police pressure is the DPC involuntariness test.
   (c) Only rarely, however, will a court find that a suspect confessed involuntarily.
      (i) **E.g. *US v. Astello** (8th Cir. 2001, 680): Cops use all sorts of coercive techniques; analyzing the totality, the court holds that the tough interrogation techniques were will within acceptable boundaries.
6) Deception and False Promises by the Police
   (a) ***Green v. Scully** (2d Cir. 1988, 681): Cops use a panoply of interrogation techniques, including promises of psychiatric help and lots of lies about the state of the evidence. Court holds that the confession is voluntary; given D's above-average intelligence and the short length of the interrogation, the totality does not mandate exclusion.
   (b) **Cases permitting deceptive techniques under the voluntariness test are numerous**. See 683.
7) False Documentary Evidence
   (a) ***Florida v. Cayward** (Florida 1989, 683): Police fabricate a scientific report for use as an interrogation ploy. This is a **pretty intricate fabrication**, using stationery and so on. Court holds that this was an involuntary confession.
8) Honesty Promises versus False Promises

(a) False promises of lenience are a forbidden tactic, as it affects the suspect's ability to make an informed choice; however, honest promises of consideration are hunky dory.
    (i) In other words: when specific promises are made that are not kept, things get ugly. See US v. Walton, 684 (promise to keep something off the record is not kept).
(b) E.g. ***US v. Fraction** (3d Cir. 1986, 684): Officer promises to relate the fact of the suspect's cooperation to the prosecutor, but does not represent that he has the authority to affect the outcome; confession voluntary!

9) Threats of Physical Violence
    (a) ***Arizona v. Fulminante** (US 1991, 684): D is suspected of murdering his stepdaughter, but is incarcerated before charge on an unrelated conviction. His cellmate is an FBI informant masquerading as a crime boss who tells him that he can offer protection, but only if D comes clean. **Court holds that the totality test indicates that a credible threat of violence existed; accordingly, D had confessed to avoid the violence, and his confession was thus involuntary**.
10) Focus on Police Misconduct
    (a) ***Colorado v. Connelly** (US 1986, 685): D confesses to murder (pursuant to proper Mirandization, etc), but the next morning seems disoriented and claims that voices told him to confess. A psychiatrist claims that D is experiencing "command hallucinations," and the state court reverses because D didn't confess of his own free will. **Court re-reverses, holding that, since the police applied absolutely no pressure, the free-will analysis was inapposite; coercive police activity is a necessary predicate to the finding that a confession is not voluntary within DPC. ←**
        (i) THIS IS A PHENOMENALLY IMPORTANT HOLDING.

C) **(taking a jump to the Sixth briefly)**
1) ***Massiah v. United States** (US 1964, 783): In Massiah, the defendant had been indicted on a federal narcotics charge. He retained a lawyer, pled not guilty, and was released on bail. A co-defendant, after deciding to cooperate with the government, invited Massiah to sit in his car and discuss the crime he was indicted on, during which the government listened in via a radio transmitter. During the conversation, Massiah made several incriminating statements, and those statements were introduced at trial to be used against him. **Court held that the Sixth Amendment to the United States Constitution prohibits the government from eliciting statements about the defendant from him or herself after the point at which the Sixth Amendment right to counsel attaches. (Wiki)**
    (a) In arriving at this conclusion, the Court focuses on Spano's concurrence dealing with when the 6th attaches.
    (b) Massiah can be thought of as a Sixth Amendment version of the **no-contact rule**.
    (c) This will get broadly expanded in the 6th Context.
2) ***Escobedo v. Illinois** (US 1964, 785): Court undertakes a short-lived experiment to extend the Sixth to those who have not yet been formally charged. D is chained, denied access to a lawyer, and promised (falsely) that he can go home if he confesses. Instead of relying on the DPC totality analysis to hold this involuntary, the Court briefly extends the Sixth back, holding that D became "functionally accused" when

denied access to a lawyer. Accordingly, the Sixth requires the presence of a lawyer at interrogations. (NO LONGER RELEVANT)

(a) No longer applicable. Recent decisions (e.g. Moran v. Burbine, 786) have re-classified Escobedo as a Fifth-in-Disguise case.

VI) Fifth Amendment Limitations on Confessions

A) ***Miranda v. Arizona** (US 1966, 688): **Court holds that prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination**

1) **Custodial Interrogation = questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.**
2) **Warnings**
   (a) Right to remain silent
   (b) Any statement made may be used as evidence against him
   (c) Right to an attorney, either retained or appointed.
3) Waiver
   (a) Waiver must be made VOLUNTARILY, KNOWINGLY, and INTELLIGENTLY (VKI).
   (b) If he does ask for an attorney, police may not question him; if he indicates that he does not want to be interrogated, he may not be.
      (i) (these get modified later on)

B) Congress attempts to "overrule" Miranda in the Crime Control Act of 1968, reinstating the voluntariness standard. This is ignored for years until Dickerson, infra, where it is briefly revived and then dies a quick death.

1) ***Dickerson v. United States** (US 2000, 708): **Court holds that Miranda is a *constitutional* decision, and thus cannot be overruled by an Act of Congress**.
   (a) (However, the Court **declines to overrule subsequent cases cabining Miranda**, such as Quarles, Harris, and so).
2) Can a Miranda Violation Occur if the Statement is Never Admitted?
   (a) ***Chavez v. Martinez** (US 2003, 714): **A person's Miranda rights are not violated if his confession is never admitted at trial**.
      (i) Thomas gives a really weird dissent where he seems to ignore Dickerson by saying that this is a prophylactic rule. Buh?

C) Exceptions to the Miranda rule of exclusion

1) Impeaching the Defendant/Witness
   (a) **Miranda-defective statements can be admitted for the purposes of impeaching credibility. (*New York v. Harris**, US 1971, 715)
      (i) The above was predicated on Miranda not being a Constitutional safeguard; even though this has changed, the rationale is upheld, potentially under a cost-benefit analysis
      (ii) ***Oregon v. Hass** (US 1975, 715): D gets Mirandized, asks to call a lawyer, is told that he can't 'til they get to the police station. Before they get there, D makes incriminating statements. **Court affirms that this can be used to impeach D.**

(iii) These holdings leave D with a problem: if he takes the stand, the jury might learn about the confession, which—even with cabining by a judge—is a hard prejudice to surmount.
01) Police tapes apparently advocate using these statements (if voluntary, of course) against him.

(b) Involuntary Confessions with Impeachment
(i) ***Mincey v. Arizona** (US 1978, 716): Court distinguishes *Harris* from *Hass* and **held that if a confession is involuntary, as opposed to merely Miranda-defective, it cannot be admitted even for impeachment purposes.**

(c) Impeachment with Prior Silence
(i) ***Doyle v. Ohio** (US 1976, 717): **Court holds that after Miranda warnings are given, DPC prohibits the government from using D's silence against him.**
(ii) A footnote also suggests that silence may not be used to rebut an insanity defense?

(d) Pre-Arrest Silence
(i) ***Jenkins v. Anderson** (US 1980, 718): D is at large for two weeks: on cross, P emphasized that D's two-week waiting period was inconsistent with his later claim of self defense. **Court finds Doyle inapplicable** and allows this.

(e) Post-arrest, pre-Miranda silence
(i) ***Fletcher v. Weir** (US 1982, 718): **Court holds that impeachment with post-arrest, pre-Miranda silence is constitutionally permissible**.
01) (I think this is *really weird*. What if D knows his rights before Miranda is given?)

2) Admitting the Fruits of a Miranda Violation
(a) Thanks to Dickerson, this is a really muddled area of doctrine, as Miranda violations were not previously constitutional violations and, as such, fruits of Miranda violations were not always excluded.
(b) PRE-DICKERSON EXCEPTIONS
(c) Leads to Witnesses
(i) ***Michigan v. Tucker** (US 1974, 719): D is incompletely Mirandized, and tells the cops he was with his friend. The friend gives info incriminating D. D moves to exclude because his Miranda-defective statement had led them to the friend. **Court holds that D's confession is excluded, but not the friend's testimony**.
01) Rehnquist's majority: Miranda's a procedural safeguard! And besides, the deterrent effect is minimal.

(d) Subsequent Confessions
(i) ***Oregon v. Elstad** (US 1985, 719): D gives a second confession after a Miranda-defective first confession. SDOC holds that **since there are no actual infringement of the suspect's constitutional rights, Wong Sun doesn't control**.
01) (as we see, this is clearly pre-Dickerson)
02) SDOC's clarification: if his first confession was involuntary, then the second would be excluded under the DPC.

03) This is still good law, though: statements that are the fruit of a Miranda-defective confession are not excluded.

(ii) ***Missouri v. Seibert*** (US 2004, 721): Second best fact pattern ever. D is questioned without Miranda warnings, confesses, is Mirandized and reconfesses. Court holds that this fundamentally undermines the purpose of Miranda; moreover, it is impossible to see these two confessions as fundamentally "separate." Distinguishes Elstad, where the original failure to Mirandize was an "oversight." **Because the question-first tactic effective threatens to thwart Miranda's purpose of reducing the risk that a coerced confession would be admitted, Seibert's postwarning statements are inadmissible**.

01) (Seibert has no majority opinion)

02) (Thus, lower courts have held that Justice Kennedy's opinion is controlling: **thus, a confession made after a *Miranda*-defective confession will be admissible unless the officers were in bad faith in not giving the warnings before the first confession, and the second proceeded directly from the first**)

(e) Physical Evidence Derived from Miranda-Defective Confessions

(i) ***US v. Patane*** (US 2004, 730): In a decision without a majority opinion, three justices wrote that the Miranda warnings were merely intended to prevent violations of the Constitution; **physical evidence obtained from un-Mirandized statements, as long as those statement were not forced by police, were constitutionally admissible**. Two other justices also held that the physical evidence was constitutionally admissible, but did so with the understanding that the Miranda warnings must be accommodated to other objectives of the criminal justice system. (Wiki)

01) Thomas: the Miranda rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. **The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement**. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the Miranda rule. The Miranda rule is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as Wong Sun does not apply. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings.

02) Kennedy's Concurrence: Prefers to use the balancing test alone, and does not address whether the cop's failure to warn should be characterized as "a violation of the Miranda rule itself."←Controlling opinion

- Sum: "I still believe in Miranda, but fruits are not excluded."

3) An Emergency Exception

(a) ***New York v. Quarles*** (US 1984, 735): **Court concludes that overriding considerations of public safety can justify an officer's failure to provide Miranda warnings and that a confession obtained thereunder is admissible**.

(i) (This is now justified as a constitutional exigency)

(b) The Scope of the Public Safety Exception – Defining Exigency
(i) ***United States v. Mobley*** (4th Cir. 1994, 737): Court holds that an officer's question about a gun, where the officers knew nobody else was in the house and D was naked at the time of arrest, was **not sufficient** to create an exigency; thus, D's statement was not admissible.
(c) Categorical Application of the Public Safety Exception
(i) ***US v. Carrillo*** (9th Cir. 1994, 738): Cop asks D if he has any drugs on him before a search; D replies "I don't use drugs, I sell them." Court holds that this was properly admitted under the public safety exception, as the cop had been poked with needles during a search before.
01) Court is convinced by officer's conduct that this was a "narrowly tailored attempt by a police officer to ensure his personal safety."

D) Open Questions After Miranda
1) What is Custody?
(a) If the defendant who confesses is not in custody, Miranda does not apply.
(b) Miranda test: **Custody is whether a person is deprived of his freedom of action in any significant way**.
(c) ***Orozco v. Texas** (US 1969, 739): **IF DEFENDANT IS ARRESTED, HE IS IN CUSTODY**.
(d) ***Beckwith v. US** (US 1976, 739): D not in custody when his interactions with IRS agents were very cordial.
(e) Objective Test
(i) ***Stansbury v. CA** (US 1994, 739): The officer's subjective and undisclosed view concerning whether the person is being interrogated is a suspect is irrelevant to the assessment of whether the person is in custody. **In other words, an officer's undisclosed suspicions do not matter**.
(f) Personal Characteristics Irrelevant
(i) ***Yarborough v. Alvarado** (US 2004, 740): **Court holds that a suspect's youth is irrelevant in determining whether a suspect is in custody**. Objective factors matter only. He was free to leave! Etc.
01) Dissent: This was a kid in an interrogation room for two hours. C'mon! The reasonable person standard should take into account his ignorance of the system!
(g) Prisoners in Custody
(i) ***Mathis v. US** (US 1968, 742): D is in jail and is interrogated while so by IRS agents about tax evasion. **Court holds that although D was in jail for reasons unrelated to the tax investigation, he was still in custody, and the failure to give him his Miranda warnings violated his Constitutional rights.**
01) Mathis does not mean that prisoners are always in custody for Miranda purposes. Rather, the question is whether officials' conduct would cause a reasonable person to believe his freedom of movement had been further diminished.
(h) Interrogation at a Police Station

(i) ***Oregon v. Mathiason** (US 1977, 742): Very casual convo in a police statement, with D being told that he is not under arrest. **Court holds that an individual questioned at the station is not necessarily in custody**.
01) ***California v. Beheler** (US 1983, 743) extends this to hold that a suspect is not necessarily in custody when he agrees to accompany officers down to the station for questioning.

(i) Meetings with a probation officer
(i) ***Minnesota v. Murphy** (US 1984, 743): Probation meetings != custody, necessarily. Dissent vigorously disagrees.

(j) Terry Stops
(i) ***Berkemer v. McCarty** (US 1984, 743): Terry stops are **not custodial for Miranda purposes**.
01) Thus, the Terry vs. Arrest doctrine is similar to the Terry v. Miranda doctrine.

(k) Summary of Custody Factors
(i) Whether the suspect was informed that the questioning was voluntary/he was free to leave
(ii) Whether the suspect possessed unrestrained freedom of movement
(iii) Whether the suspect initiated contact with authorities or voluntarily acquiesced to a meeting.
(iv) Whether strong-arm tactics were in play
(v) Whether the atmosphere was police-dominated
(vi) Whether the suspect was arrested at the end of the questioning
(vii) (US v. Brown)

2) What is interrogation?
(a) Innis rule: Interrogation not only refers to express questioning, **but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should have known are reasonably likely to elicit an incriminating response from the suspect.**
(i) However, since the police cannot be held liable for unforeseeable results, *should have known* is emphasized.
(ii) (however, specialized knowledge/intent *can* come into play here, at least via the footnote)

(b) ***Rhode Island v. Innis** (US 1980, 745): This is the missing shotgun/handicapped children case. Court holds that this isn't interrogation; colloquy between officers is not the "functional equivalent" of questioning.

(c) ***Arizona v. Mauro** (US 1987, 749): D invokes right to counsel. His wife asks to speak to him. Police reluctantly agree, and put a recorder on the table to show they're listening. D makes inculpatory statements and the tape is played at trial to rebut the insanity defense. **Court holds that there is no evidence that the officers sent the wife in for the purpose of eliciting statements, and thus this outcome was not foreseeable**. (dissent objects, obviously)

(d) Appeals to the Welfare of Others as Interrogation?
(i) ***US v. Calisto** (3d Cir 1988, 750): D invokes right to silence; one officer says to another officer that they'll have to get an arrest warrant for the daughter, at which point D confesses. Court finds that this is not interrogation, given as it

wasn't directed at D, and because while a response was not unexpected, an *inculpatory* response is above and beyond.

(e) Confronting the Suspect with Incriminating Evidence
  (i) ***Edwards v. Arizona** (US 1981, 751): **Court finds that Edwards had been interrogated when officers played for him a recorded state of an associate implicating him in a crime**.
    01) Lower courts have not necessarily been uniform in finding interrogation whenever a suspect in custody is confronted with incriminating evidence.

(f) Direct v. Indirect Statements
  (i) **Basically: A comment directed at a suspect is more likely to produce an incriminating response.**
  (ii) ***US v. Soto** (6th Cir 1992, 752): Cop is stupid enough to direct a question towards a guy who's already invoked his Miranda rights. Voila, it's interrogation!

(g) Questions Attendant to Custody
  (i) ***Pennsylvania v. Muniz** (US 1990, 752): D gets asked things like name, address, height, weight, etc. He stumbles because he's all drunk and stuff. His responses are admitted at trial. Plurality holds that **routine booking questions are exempt from Miranda**.
  (ii) Scope of Booking Questions
    01) Factors: can there be a proper administrative purpose? Is the question asked by an officer who routinely books suspects? ***Name is always within the booking exception***. See 753.
  (iii) **After Muniz, explanations concerning custodial procedures such as fingerprinting, etc. will not be considered interrogation even though D may make incriminating statements**.
    01) I.e. "here's a sobriety test" ! = interrogation.

3) Does Miranda apply to undercover activity?
  (a) ***Illinois v. Perkins** (US 1990, 754): Undercover officer is D's cellmate when he is in prison on an unrelated charge. Officer asks D if he's ever killed someone and he responds by talking about the current crime. **Court held that D's statement was admissible because Miranda does not apply to suspects boasting about their criminal activities in front of persons they believe to be their cellmates**.
    (i) Kennedy: If D doesn't know he's in a police-dominated atmosphere, Miranda problems don't even exist!

4) Does Miranda depend on the nature of the offense?
  (a) ***Berkemer v. McCarty** (US 1984, 755): **No distinction between felonies and misdemeanors as far as Miranda is concerned.**

5) Completeness and accuracy of the warnings
  (a) ***California v. Prysock** (US 1981, 756): Police need not be verbatim, so long as they communicate the gist of the warnings.
    (i) ***Duckworth v. Egan** (US 1989, 756): No Miranda violation in an officer's reading a printed waiver form to a suspect that does not repeat things verbatim.
    (ii) (some exceptions on 757)

6) Does Miranda apply to custodial interrogation of foreigners interrogated abroad?

(a) Short answer: Yeeess? (757)

E) Waiver of Miranda Rights
1) Miranda: VKI standard.
2) Basic: Neither an express statement nor a written waiver is required, so long as there is sufficient evidence to show that the suspect understood his rights and voluntarily waived them. (**NC v. Butler**, US 1979, 758)
3) Waiver and the Role of Counsel
(a) **Knowing and Voluntary:**
(i) ***Moran v. Burbine (US 1986, 758) rule**: The relinquishment must have been voluntary in the sense that it was free from coercion; second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.
(ii) ***Tague v. Louisiana** (US 1980, 758): **Court held that a waiver of Miranda was not proven by an officer's testimony that he read a suspect his rights from a card and the suspect then confessed. He never attempted to discern whether the suspect understood the rights.**
(iii) On the other hand, a waiver can be found if it seems apparent from the suspect's reaction that the suspect understood his Miranda rights and freely waived them (US v. Frankson, 4th Cir. 1996, 759)
(b) Relationship of Waiver to Test for Voluntary Confession
(i) A confession can still be coerced under DPC even if the suspect is Mirandized.
(c) Understanding Miranda
(i) **Several courts have held that persons who are deranged or mentally defective cannot knowingly and intelligently waive their Miranda rights**. (Smith v. Zant, 11th Cir 1989, 760)
(ii) US v. Garibay (9th Cir 1998, 760): Suspect is Mirandized in English and says he understood them. However, lots of extrinsic evidence shows that D actually speaks terrible English and was borderline retarded. Court says, however, that this would've taken had he signed a consent form or been given the warnings in Spanish.
01) Subtext: The standard for "knowing" here is "whether the suspect *actually understood the warnings*."
(d) Conditional Waivers
(i) ***Connecticut v. Barrett** (US 1987, 761): D says he has no problem talking about the assault, but will not give a written statement. Court holds that he had knowingly and voluntarily waived his Miranda rights; police complied with his conditions. The illogical nature of his request was irrelevant.
(ii) ***US v. Soliz** (9th Cir. 1997, 761): D is arrested on immigration and smuggling violations. He says he will only talk about the immigration issue, but cops ask him about the smuggling. Court rules that those answers have to be excluded.
4) Information Needed for Intelligent Waiver
(a) Scope
(i) ***Colorado v. Spring** (US 1987, 762): D is arrested for crime A. Cops have info that implicates him in crime B. D waives his Miranda rights, and is eventually questioned about crime B, which surprises D. He confesses. **Court**

holds that a suspect's awareness of all the possible subjects of questioning in advance is not relevant to determining whether he has waived according to VKI.

(b) Inadmissibility of Previous Confessions
  (i) ***Oregon v. Elstad redux**: No extra warning needed re. inadmissibility of pre-Miranda confession.

(c) Effort of Lawyer to Contact Suspect
  (i) **Moran v. Burbine** (US 1986, 763): While D is in custody (after executing written waivers), his sister gets an attorney, who telephones the police station and receives assurances that D will not be interrogated until the next day. Lie! **SDOC holds that events occurring outside of the presence of the suspect are irrelevant to his knowingness inquiry; moreover, misleading an attorney (whether intentionally or unintentionally) also did not affect the validity of the waivers (police state of mind was irrelevant).**

(d) Role of Counsel Under Miranda
  (i) **Burbine: It is the suspect who has the right to counsel, and that right does not come into effect until the suspect invokes that right**

(e) No requirement to inform the suspect of counsel's efforts
  (i) **Burbine: This is unworkable, and inconsistent with Miranda's bright-line approach**

(f) Distinguishing Burbine
  (i) **People v. Griggs** (Ill 1992, 766): Sister retains attorney. D knows this has happened, but cops never tell him he's at the station. Waiver is not KI.

(g) **BURBINE HAS BEEN REJECTED AS A MATTER OF STATE CONSTITUTIONAL LAW IN SOME STATES**

5) Waiver after Invocation of Miranda Rights

(a) Government must show that this change of mind came from the suspect and not from police harassment.

(b) Invocation of Right to Silence
  (i) ***Michigan v. Mosley** (US 1975, 767): D is Mirandized, asks to remain silent. Two hours later, a different detective regives the Miranda warnings and is questioned about a different crime. **Court holds that this does not violate Miranda; it reads Miranda to hold that interrogation is not forever barred after the right to silence, only that it must be "scululously honored."**
    01) (Significant passage of time matters here)
  (ii) Scrupulously Honoring Silence
    01) "Cooling Off" period (US v. Rambo; 768).
    02) Multiple attempts to get D to speak are problematic.
  (iii) When is the right to silence invoked?
    01) ***Davis v. US** (US 1994, 769): **Court holds that police questioning a suspect can continue the interrogation when the suspect has made an ambiguous or equivocal invocation of Miranda right to *counsel* (book attempts to connect this to right to silence)**
    02) ***US v. Banks** (7th Cir 1996, 769) relies on Davis to hold that officers are not required to scrupulously honor silence if the right is equivocal.

03) **SCRUPULOUS HONOR ONLY APPLIES IF THE RIGHT TO SILENCE HAS BEEN INVOKED IN CUSTODIAL INTERROGATION; invocation pre-custody doesn't count** (770).

6) Invocation of Right to Counsel
   (a) ***Edwards v. Arizona** (US 1981, 770): **Court holds that when an accused has invoked his right to have counsel present, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused having expressed his desire to deal with police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or convos with the police**.
      (i) Clarification: If suspect invokes right to counsel, officers cannot *interrogate* him, but they can have contact with him (See Innis).
   (b) Defining "initiation"
      (i) ***Oregon v. Bradshaw** (US 1983, 772): D invokes his right to an attorney, but eventually says "what's gonna happen now?" and talks a bit with the cops, who advise him later to take a lie detector test. He confesses the next day with no attorney after the test. **Plurality holds that Edwards was satisfied because D initiated the contact, and then later made a knowing and voluntary waiver.**
      (ii) Two step analysis
         01) Bright-line prophylactic safeguard of the suspect-initiation requirement
         02) Totality of the circumstances of K/V.
         03) (there's a concurrence, but the lower courts follow this view)
      (iii)(not every situation involving general statements by D doesn't pose problems, however. US v. Soto: desire to keep belongings separate from those of co-defendant is not initiation, for example)
   (c) Ambiguous Invocation of Right to Counsel
      (i) ***Davis v US** (US 1994, 774): **Suspect must clearly and unequivocally invoke the right to counsel in order to trigger Edwards. Note that ambiguity and the lack thereof are construed broadly here**
   (d) Consequences of an explicit invocation
      (i) ***Smith v. Illinois** (US 1984, 777): D is asked whether he wants counsel. He says "yeah, I'd like that." **Court holds that this is in no way vague**; it also does not like the idea of using post-invocation responses to cast aspersions on the ambiguity of the invocation.
   (e) Unrelated Crimes
      (i) ***Arizona v. Roberson** (US 1988, 777): **Court holds that an invocation of the right to counsel under Edwards is not offense-specific; such invocation prevents interrogation on any crime**.
   (f) Which Right to Counsel is Invoked?
      (i) ***McNeil v. Wisconsin** (US 1991, 778): **Court holds that at arraignment, a formally-charged defendant is invoking the Sixth Amendment right to counsel**. Scalia writes that his invocation of the offense-specific right at his

arraignment does not constitute an invocation of the non-specific Miranda/Edwards right.
01) Why this matter: 6th Amd right is offense specific.

(g) Can Miranda/Edwards be triggered in advance of interrogation?
(i) Scalia in McNeil: NO!
01) (lower courts have followed this. See 780)

(h) Waiver After Suspect has Consulted with Counsel
(i) ***Minnick v. Mississippi** (US 1990, 781): **The protection of Edwards continues even after the suspect has consulted with an attorney. Police-initiated interrogation after an invocation of counsel may occur only if counsel is actually present during the interrogation**.
01) Bright-line Edwards rule provides clarity and certainty!
02) The rule guarantees that suspects will not be badgered by officers.

(i) Continuous Custody Requirement
(i) Lower courts have unanimously held that Edwards does not apply if the suspect is released from custody..

VII) Confessions and the Sixth Amendment Right to Counsel

A) The Massiah Rule

1) ***Massiah v. United States** (US 1964, 783): In Massiah, the defendant had been indicted on a federal narcotics charge. He retained a lawyer, pled not guilty, and was released on bail. A co-defendant, after deciding to cooperate with the government, invited Massiah to sit in his car and discuss the crime he was indicted on, during which the government listened in via a radio transmitter. During the conversation, Massiah made several incriminating statements, and those statements were introduced at trial to be used against him. **Court held that the Sixth Amendment to the United States Constitution prohibits the government from eliciting statements about the defendant from him or herself after the point at which the Sixth Amendment right to counsel attaches. (Wiki)**

2) ***Escobedo v. Illinois** (US 1964, 785): Court undertakes a short-lived experiment to extend the Sixth to those who have not yet been formally charged. D is chained, denied access to a lawyer, and promised (falsely) that he can go home if he confesses. Instead of relying on the DPC totality analysis to hold this involuntary, the Court briefly extends the Sixth back, holding that D became "functionally accused" when denied access to a lawyer. Accordingly, the Sixth requires the presence of a lawyer at interrogations. (NO LONGER RELEVANT)
(a) No longer applicable. Recent decisions (e.g. Moran v. Burbine, 786) have re-classified Escobedo as a Fifth-in-Disguise case.

B) Obtaining Info from Formally Charged Defendants

1) ***Brewer v. Williams** (US 1977, 787): D is arrested and booked on a charge. His lawyer advises him to not talk during his trip back home. Cop gives the "Christian burial speech" on the way home. **Court holds that this was a deliberate attempt to elicit info in violation of the 6th's right to counsel**.

2) Sixth Amendment Attaches at Formal Charge
(a) ***US v. Gouveia** (US 1984, 793): **Prison officials did not violate the right to counsel of inmates when the officials placed them in administrative detention for a seriously long time prior to their being charged**.

3) Right to Counsel Attaches at Arraignment Even if Prosecutor is Not Involved
   (a) ***Rothgery v. Gillespie County** (US 2008, S.39): **Court holds that Sixth Amendment was triggered by the initial appearance before the magistrate, even though the prosecutor was not involved in the proceeding.**
4) "Deliberate" Elicitation
   (a) ***Bey v. Morton** (3d Cir. 1997, 794): D, on death row, strikes up a relationship with an officer. He eventually confesses to the murders for which he was sitting on death row. His convictions are reversed, he's retried, and the cop testifies against him. **Court holds that the cop was not a state actor deliberately engaged in trying to secure into**.
5) Application of the deliberate elicitation standard
   (a) ***Fellers v. US** (US 2004, 795): D is indicted; while being arrested in his home, officers allegedly deliberately elicit inculpatory statements (and that those and the fruits thereof should not be admitted). **Court holds that the CoA improperly used a 5th-based analysis; this was clear elicitation under the 6th.**

C) Use of Undercover Officers and State Agents
1) Jailhouse Plant
   (a) ***US v. Henry** (US 1980, 797): **Court finds deliberate elicitation from a paid informant who was supposed to just listen. Court notes that he did not just listen; additionally, "knowing and voluntary" cannot apply in convos with undercover agents**. **By intentionally creating a situation likely to induce D to make incriminating statements, gov't violated his right to counsel**.
2) Listening Post
   (a) ***Kuhlmann v. Wilson** (US 1986, 798): **Distinguishes Henry by holding that the Sixth is not violated when police put a jailhouse informant in close proximity to D and D made statements without any effort on the informant's part to elicit information**.
3) Is the informant a state agent?
   (a) See 799 if this actually comes up.

D) Continuing Investigations – Does the 6th Prevent an Officer from Obtaining Info on uncharged crimes?
1) ***Maine v. Moulton** (US 1985, 800): Brennan: **Knowing exploitation by the State of the opportunity to confront the accused without counsel being present is as much of a breach of the state's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity**.
2) **Also: Incriminating statements pertaining to pending charges are inadmissible at the trial of those charges if, in obtaining the evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to assistance of counsel.**
   (a) Standard: Foreseeability! Will the convo likely turn to the crime at hand?
   (b) Deliberate elicitation is found whenever the officers should have known that their investigative tactic would lead to incriminating info from a charged D in the absence of counsel.

E) Waiver of the 6th
1) Waiving the Sixth After Receiving Miranda Warnings

(a) Evidence of relinquishment can be found in myriad ways: waiver signing, answering some questions but not others, etc.
(b) **Standard is higher than "receiving warnings and electing to speak**."
(c) **The defendant also must be sufficiently informed of his rights to make a knowing waiver**.
(d) ***Patterson v. Illinois** (US 1988, 802): D is indicted, receives Miranda, signed waiver and confessed. HE never invoked right to counsel. **Court holds that the Miranda warnings are sufficient to convey the totality of the Sixth protections**.
(i) Exceptions: The Burbine situation in which the lawyer was trying to reach D but D was not told would *not* be valid in the 6th.
(ii) A surreptitious convo between an undercover cop and D would not give rise to a Miranda violation, but would implicate the 6th.
(e) An "indictment warning" is not required.

2) Waiving the 6th After Invoking Right to Counsel
(a) ***Michigan v. Jackson** (US 1986, 804): D requests counsel at arraignment. He later gets interrogated about his crime (does not initiate), signs a waiver form, and confesses. **Court holds that his waiver was not VK; Edwards governs, and thus he could only have waived had he initiated and waived.**
(i) Implciit herein: Edwards protections are not applicable unless D unequivocally invokes right to counsel.

3) Waivers as to Crimes Unrelated to Crime Charged
(a) ***McNeil v. Wisconsin** (US 1991, 805): **Sixth amendment right to counsel is offence specific; this gives Jackson/Edwards protection only as to the crime charged.**

F) Sixth Amendment Exclusionary Rule
1) **Undecided**
2) Lower courts have held that a Massiah-defective confession cannot be used for impeachment purposes