I. BASIC PRINCIPLES

A. What is a Criminal Case?

1. Is the Penalty Civil or Criminal?[1]

a. Did Congress give an express or implied preference for one label or the other?

b. Is the statutory scheme so punitive in purpose or effect as to negate that intention?

Requires the "clearest proof."

2. Commitment of Sex Offenders

Kansas v. Hendricks (1997) (statute imposing involuntary civil commitment on sex offenders challenged for double jeopardy, upheld as "civil")

b. No Requirement of Showing Criminal Responsibility Suggests No Retributive Aims

c. No Clear Deterrent or Punitive Aims

Confinement's duration linked to purposes of commitment, and such purposes properly included keeping him from posing a danger to others.

3. Registration of Sex Offenders

Smith v. Doe (2003) (Megan's law statutory scheme is civil, rather than punitive. Ex post facto clause does not apply).

- Legitimate, non punitive, government objective
- Face of statute does not suggest any purpose other than a civil scheme designed to protect the public from harm

a. Stevens' Dissent

A sanction that is imposed on everyone who commits a criminal offense, and only those people, and impairs their liberty, is punishment.

4. Distinguishing Civil and Criminal Contempt Proceedings

UMWA v. Bagwell (1994) (fines held to be criminal sanctions because they were based on widespread, ongoing conduct violating the courts complex code of conduct, occurring outside of the courts presence, and imposing serious fines).

B. Incorporation Doctrine

Debate between Justices views of selective incorporation (those protections that are "implicit in the concept of ordered liberty") and that the PI Clause in the 14th Amendment incorporated all Amendments.

1. Relationship Between Due Process and Incorporated Rights

Graham v. Connor (1989) (police excessive force claims in an arrest must be

[1] *United States v. L.O. Ward* (1980)

analyzed under 4A rather than SDP, because it is an explicit textual source of constitutional protection); *but see United States v. James Daniel Good Real Property* (1993)(compliance with 4A not sufficient when the government seizes property for civil forfeiture).

- Citizen cannot rely on "due process" if a more specific guarantee would traditionally provide the same constitutional protection, even if it doesn't provide protection in that particular case.
- Due process protection remains viable where the government activity has some purpose other than enforcement of the criminal law.

2. Not Incorporated:

Indictment by grand jury, jury trial in civil cases and 8A bail clause.

3. New Federalism

State can provide more constitutional protections *under their own constitutions* (not when interpreting the federal constitution).

C. Retroactivity

Decision generally applies to the defendant who brought the case and cases on direct review.[2]

Must consider finality, reliance and burden interests.

1. Presumption of Nonretroactivity of *New Rules* in HC Cases

Can be overcome when:

a) the new rule is so fundamental that the procedure is "implicit in the concept of ordered liberty" (and it seriously diminishes the likelihood of an accurate trial result) or

b) when petitioner relied on the new rule to demonstrate his conduct for which he was tried was constitutional in the first place.

Teague v. Lane

a. AEDPA

Severely restricts Habeas review even more.

b. Detrimental changes in law should be applied retroactively against petitioners on Habeas review.

Lockhart v.Fretwell (1993)

D. Discretion

Good policing won't arrest at every opportunity.

2. Statutes Cannot Give Police Too Much Discretion

"No apparent purpose." *Chicago v. Morales*

[2] In NY (Mitchell case), it only applies to the defendant himself.

II. SEARCH AND SEIZURE

E. The Basics of the Fourth Amendment

1. A Right of "The People"

Does not apply to a search of property located in a foreign country, owned by a non-resident alien, *United States v. Verdugo-Urquidez* (1990), but would apply to illegal aliens in the U.S.

2. "Reasonableness" and "Warrant" Clauses

Some think reading the warrant clause as the controlling clause (presuming searches to be unreasonable when made without a warrant[3]) has turned the Amendment on its head and muddied 4A jurisprudence.

a. Probable Cause

A minimum showing to get a warrant, but usually required in non-warrant situations.

3. Only Protects Against State Action.

Bordeau v. McDonald (1921) (Could have a private right of action against the thieves, but the government can still use the evidence so long as they didn't put the bastards up to it).

4. If the Government Activity Is Not a "Search" or "Seizure" the 4A is Inapplicable (and thus reasonableness is not required)

F. What is a "Search," "Seizure"

1. *Katz* REOP Test (1967) (Replaces Previous CPA Test)

- Did the person exhibit an actual (subjective) expectation of privacy?
- Is society prepared to recognize that expectation as reasonable?

a. Danger with the Circularity of the Test

Government can condition us with what to expect as reasonable. Problem magnified with technological advances. And "reasonableness" could be seen as including the need for effective law enforcement.

b. Katz had a REOP in his words

Black dissent: this is stretching the language of the 4A.

c. Subjective Manifestations

Cases of abandonment or denying ownership would fail to satisfy the subjective prong of *Katz*.

2. Searches and Seizures Implicate Different Interests (Possessory and Privacy)

3. Access by Members of the Public

a. Third Party Bugging is Not a Search

[3] "Procedure of antecedent justification is central to the 4A" *Katz*.

United States v. White (1971) (assumption of risk approach allows frustration of actual expectations of privacy)

b. No REOP in Bank Records *California Bankers v. Shultz* (1974)
(ACLU challenge of Bank Secrecy Act. Banks were parties to the transaction, this precluded any REOP)

c. Pen Registers: No REOP in Numbers Dialed. *Smith v. MD* (1979)
(AOR rationale again. No REOP, thus no warrant or PC is required. The content of the call is protected, not the number)

d. No REOP in #s Transmitted to a Pager but Pager Owner Has REOP in Pager Memory

Lower court cases – in the first, the pager was seized in the on position (AOR Rationale) in the second, switching the pager on was seen to constitute a search

e. No REOP in Trash Put Out For Collection: *CA v. Greenwood* (1988)
(Public could have easily accessed it. No REOP (not abandonment), thus not a search. Highlights the doctrinal confusion of 4A. Dissent: the possibility of exposure should not be equated with no REOP) "Accessible to public" rationale opens door quite wide.

f. No REOP against Ariel Surveillance
4A not violated by aerial observation, without a warrant or PC, of a fenced in backyard, *California v. Ciraolo* (1986) (it was a public vantage point where the officer had a right to be), or by aerial photography of an industrial plant. *Dow Chemical Co.* (1986).

Florida v. Riley (1989) upheld surveillance from a helicopter hovering 400 ft. above the backyard because the public could have gained access in the same way. SOC Concurrence suggested test should be ordinariness not legal possibility but the burden was on the petitioner to show not ordinary. Brennan dissent suggested burden should be on government to show ordinariness.

g. No REOP From Dog Sniff (Solely Detecting Illegal Activity)
No legitimate privacy interest against government conduct that only reveals possession of contraband (the sniff was not a search). The car was lawfully seized for a traffic offense and the duration of the stop did not exceed that purpose. *Illinois v. Caballes* (2005).

See also *Jacobsen* (1984) (that chemical testing that only reveals whether a substance is cocaine is not a search, the fact that the test destroyed that cocaine made it a seizure, but the seizure was reasonable).

4. Use of Technology to Enhance Investigations

a. Shining a Flashlight in a Car is Not a Search. *Texas v. Brown* (1983)

But using a telescope to look into an apartment to see things not visible by the naked eye is. (*Taborda*, 2d. Cir.)

b. *Kyllo v. United States* (2001): Sensory Enhancement into Home

Obtaining by sense-enhancing technology (thermal imaging scan) any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion is a search, at least where the technology is not in ordinary public use (drawing on SOC's *Riley* concurrence). REOP may disappear as technology advances. Rejects distinction between intimate and non-intimate details (all details of the home are intimate) and off-the-wall and through-the-wall surveillance.

Businesses may not have the same REOP. (*Elkins*, 6th Cir.)

c. Sensory Enhancement: Beepers to Track Public Movements Okay *U.S. v. Knotts* (1983)

(Beeper placed in a container to track its movements is okay. It was just sensory enhancement of things that could have been revealed by visual surveillance anyway).

d. Beepers Revealing Details Inside Your Home- Not Okay. *Karo* (1984)

(Installing the beeper in the ether was okay but using it to monitor the property once it had been withdrawn from public view, info it could not have otherwise obtained without a warrant, was a no-no.)

But placing the beeper in the government's own property (like mail that was going to be stolen) would probably be okay. *Jones* 4th Cir.

G. Tension Between the Reasonableness and Warrant Clauses

1. The Reason For the Warrant Requirement

a. The Neutral and Detached Magistrate

The importance is not in denying law enforcement officers reasonable inferences from evidence, but in ensuring those inferences are drawn from a neutral and detached magistrate and not the officer engaged in the often competitive enterprise of ferreting out crime.

When the right of privacy must yield to the right of search, it should be decided by a judge and not a law enforcement officer. *Johnson v. United States* (1948).

b. The Need for Antecedent Justification

It would be too easy for officers to manufacture PC ex-post.

c. The Need for the Particularity Requirement

Government should only be allowed to interfere with things they have a valid interest in.

H. Demonstrating Probable Cause

1. The Credibility of the Officer

Never really to be questioned by the judge, but a later attack on the warrant could include a *Franks* hearing (discussed infra).

2. Source of Information: Informants

When the information demonstrating probable cause does not come first hand from the officer, it must be demonstrated that the source of the information was credible (veracity) and the information was reliable (basis of knowledge).

a. Should Look at the Totality of the Circumstances

Illinois v. Gates (1983) (at least in federal court) (a deficiency in one prong can be compensated by a strong showing in the other. Otherwise the utility of anonymous tips, even when supplemented by independent police investigation, would almost totally be defeated.

b. Sometimes statement has self-verifying detail

Or statement says what the basis of knowledge is.

c. Anonymous Informant = Veracity Problems

d. Corroboration of Innocent Details

Could still contribute to reliability of the source because if he was right about some things he is more likely right about others.
Does it suggest inside information? Does it predict future behavior of third parties not easily known?

e. Does the statement purport to be first-hand observation?

f. Corroboration Can Support Either Prong

g. New York Still Follows Aguilar-Spinelli's Two-Pronger

h. Applies to "Informants" Not Crime Victims/Witnesses

Identified citizens are also considered to be more reliable. As are accomplices.

3. Does it Weigh Enough

- PC analysis tends to vary with the severity of the crime.
- In any given case with PC, still more likely wrong than right.
- Not a question of accuracy, but fair probability.

4. Probable Cause with Multiple Suspects

a. Inferring Common Enterprise in Cars: *Maryland v. Pringle* (2003)

When officer has PC a (drug) crime is committed, reasonable to infer passengers in car engaged in a common enterprise (when nothing singles out any particular individual) and has sufficient PC to arrest all passengers for the crime. *But see Ybarra*.

5. Probable Cause for a Crime Different from the Charge of the Arrest

Devenpeck v. Alford (2004) (Officer's state of mind is irrelevant to the existence of probable cause. The offense need not even be "closely related" to that identified by the officer. It would make constitutionality of an arrest on the same facts vary and there would be perverse incentives because constitution does not require an officer inform a person of the reason for his arrest.

6. Collective Knowledge. W*hiteley v. Warden* (1971)

(officers can assume another officer's warrant/pc is valid).

7. Staleness of Information

A case-by-case determination

8. Deferential Review as Opposed to De Novo Review

Whether a magistrate could have reasonably issued the warrant (probable cause is an immensely fact bound determination and reversing does not teach a lower court very much)

I. Probable Cause, Specificity, and Reasonableness

1. Can Seize Fruits/Instrumentalities and "Mere Evidence." *Warden v. Hayden* (1967)

(degree of invasion of privacy no different and 4A can offer the same protection. Dissent Douglas: This will lead to rummaging!)

2. Probable Cause for Location of Evidence. *Zurcher v. Stanford Daily* (1978)

Must show reasonable cause to believe that the specific things to be searched for are located on the property to which entry is sought.

a. Must show a nexus between the evidence and place to be searched

Disagreement about whether it should be fact-specific or just logical.

b. No Special Protection for Third Party Premises

Zurcher (But see Stevens Dissent: coupled with Warden v. Hayden this is very dangerous. No telling how many law-abiding citizens have info relevant to ongoing criminal investigations).

3. Describing the Place to Be Searched

a. Function of Particularity Requirement

1) Controls officer discretion
2) Establishes a specific, ex-ante record of prob. cause as to location
3) Prevents blank check expansive searches that would be possible with general descriptions
4) Helps avoid the evil of rummaging

b. Reasonable Particularity

Cannot describe an entire building when cause is just shown for one apartment. *Maryland v. Garrison* (1987) (affirms particularity of "third floor apartment" – where it reasonably appeared to be only one

apartment on the floor, even though there turned out to be two[4]). Whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort and there is no reasonable probability another place might be mistakenly searched.

i. Reasonableness takes into account how much an officer would be expected to know about the item in the course of his investigation.

c. Mistakes

A wrong address may be okay if still meets *Garrison* test, but probably not where the only information in the warrant is erroneous.

d. The Breadth of the Search

"Premises" could include all vehicles and structures located within it, and all containers so long as they are large enough to contain the items described in the warrant.

4. Particularity for Arrest Warrants

5. Describing the Things to Be Seized. *Andresen v. Maryland* (1976)

(additional, overly broad, catch-all phrase in warrant for other unknown fruits, instrumentalities and evidence of crime. Question of interpretation. Should be read in context of the whole warrant. Brennan Dissent: don't look at it in hindsight but as how the executing officers would have read them)

i. Overly broad clauses are severable (and thus would not taint seized items that were particularly described).

6. Validly Issued Warrants Can Still Be Unreasonable *Winston v. Lee* (1985)

(Court order forcing defendant to have surgery to remove a bullet , which would be redundant evidence)

7. Execution of Warrant Must Also Be Reasonable

8. Anticipatory Warrants

Warrants can still be valid if contingent on a future occurrence, if you show probable cause of that future triggering event occurring. *U.S. v. Grubbs* (2006).

9. "Sneak and Peek" Warrants

Notice of search can be delayed if authorized by statute (such as Patriot Act)

J. Executing the Warrant

1. The Knock and Announce Requirement

a. "Refused Admittance

[4] If they had known there were two apartments on that floor, the lack of specificity would have prevented issuance of the warrant.

b. Exceptions when "No Breaking" is Required

c. Also Emergency Circumstances Exceptions

2. No-Knock Warrants

3. Enlisting Private Citizens to Help Search

a. Unwilling Assistance

b. Willing Assistance

4. Media Ride Alongs

Generally a no-no.

K. The Screening Magistrate

1. Neutral and Detached

2. Legal Training not Required (in Minor Offenses)

Shadwick v. City of Tampa (1972)

L. Arrests: Applying the Warrant Clause

1. Arrest Without a Warrant

May arrest without a warrant with reasonable cause (probable cause) to believe that person committed:

a) a felony
b) a misdemeanor in the officer's presence
c) a misdemeanor *and* reasonable cause that unless arrested immediately the person will not be apprehended or may cause injury to himself or others or damage to property

2. Arrest Versus Summons

The decision to proceed by arrest or summons is totally within the officer's discretion. A custodial arrest is always reasonable with probable cause of a criminal violation. *Atwater*.

3. Warrantless Arrests in Public: *U.S. v. Watson* (1976)

While there is a strong preference for warrants, the constitutional rule embraces the common law authorization of warrantless arrests in public.

a. Marshall's Dissent

Less need for warrantless arrests than for warrantless searches, and we don't allow warrantless searches.

4. Excessive Force

a. Deadly Force. *Tennessee v. Garner* (1985)

Deadly force may not be used to prevent the escape of a felon unless it is necessary to prevent escape *and* the officer has probable cause to believe the suspect poses a significant threat of death or serious injury to others. (Rejecting the common law rule as inapplicable today).

b. Non-Deadly Force. *Graham v. Connor* (1989)

All claims of excessive force are governed by Fourth Amendment standards of reasonableness, looking at the totality of circumstances (including severity of the crime, threat posed by the suspect, degree of resistance).

5. Arrests in the Home. *Payton* (1980).

The exception to the warrant requirement for public arrests does not extend into the suspect's home.

a. Only Requires Arrest Warrant, Not Search Warrant

A valid arrest warrant carries authority to enter the suspect's dwelling when there is "reason to believe" the suspect is within. Less protective than a search warrant, but sufficient interposition of magistrate's judgment.

b. A Payton Violation is an Illegal *Search. New York v. Harris* (1990)

The arrest itself is still legal, but fruits of the search must be suppressed.

c. "Reason to Believe" May or May Not Mean Probable Cause

d. What is a Home?

A common hallway; homeless persons (sometimes); hotels (when arrestee has rightful possession); multiple residences (yes).

6. Arrests in Home of Third Party

a. Search Warrant Required to Search for Suspect in Home of Third Party. *Steagald* (1981)

(Arrest warrant obtained; arrestee not found; evidence obtained against third party; court suppresses). Arrest warrant not sufficiently protective of privacy interests of third party.

i. Only the third party has standing for a *Steagald* violation. Arrest would still be proper.

b. Arrest Warrant Required to Arrest an Overnight Guest of Third Party. *Olson* (1990)

(Hold suspect has a REOP sufficient to trigger *Payton* but no search warrant is required. This reduces Steagald[5] but stays true to Payton(need warrant to be lawfully on premises)).

c. Temporary Visitors: *Minnesota v. Carter* (1998)

Temporary guests had no REOP, and thus no standing to object to a warrantless search. Court did not reach question of whether peeking through the blinds was a search. Court opinions debate which types of guests (business, social, invited, etc.) would have a REOP on third party premises.

[5] Third party's REOP is distinguished when guest becomes virtual coinhabitant, but Steagald protections to may still apply when owner has a more temporary guest.

7. Material Witnesses

Police can arrest and detain a material witness when they have probable cause that witness is material and it is shown that it would be impracticable to secure their presence by subpoena.

Code section cannot be used for other ends, such as detaining a suspect when they don't yet have probable cause. *Awadallah* (2d. Cir. 2003)

M. Stop and Frisk

1. Terry v. Ohio (1968)

A stop is a search and a frisk is a seizure.
But the warrant clause does not apply (and has not traditionally been applied), so we turn to reasonableness, balancing the need against the invasion.
Must be able to point to specific, articulable facts, supported by reasonable inferences in the light of his experience.
A stop is justified by the need for effective crime prevention and detection.
A frisk is justified by the police officer's need to neutralize any threat of physical harm (when he has reasonable suspicion to believe that his safety or that of others is in danger).
A frisk is not a SITA. The sole justification is the safety of the officer and others.
The right to frisk is immediate and automatic when the reason for the stop is a crime of violence (Harlan concurrence).

a. Douglas Dissent

All forcible police intrusions require probable cause to be reasonable(even if we don't require a warrant).

2. Impact/Critique of Terry

Application of balancing has spread to other areas of searches and seizures.
Poor and minorities get screwed.
But without Terry there was the danger in either stops and frisks continuing to happen without court supervision or in the standard of probable cause being watered down in all areas to allow them.

3. *Adams v. Williams* (1972)

a. Reasonable Suspicion for Stops/Frisks Extended to Allow For Tips from Informants

Must still satisfy the *Gates*, veracity and basis of knowledge tests but to a lesser degree than that required for probable cause.

b. Terry Stops Extended to Drug Cases (not Inherently Dangerous)

Brennan's dissent: danger that now we are allowing stops for the purpose of being able to frisk.

4. Bright Line Rules Under *Terry*

a. In the Course of a Legal Auto Stop, Officers Have an Automatic Right to Order the Driver Out of the Vehicle. *PA v. Mimms* (1977)

Despite the even lesser degree of danger posed by a routine traffic stop, the court balanced the safety interests embodied in the precautionary policy against the *de minimis* additional intrusion).

Marshall Dissent: Terry requires a nexus between the reason for the stop and the need for self-protection requiring further intrusion.

b. *Mimms* Rule Also Applies to Passengers. *Maryland v. Wilson* (1997)

Passenger has greater liberty interest but they pose a greater potential danger to the officer and the intrusion is still *de minimis*).

i. *New York v. Class* (1986): Frisking the Dashboard
No REOP in VIN (a significant thread in web of auto regulation)

c. Can Detain and Restrain Occupants of Home When Executing a Search Warrant

Michigan v. Summers (1981); *Muehler v. Mena* (2005) (handcuffing[6])
De minimis to the intrusiveness of the search itself and supports police interest in 1) preventing flight, 2) minimizing risk of harm to officer and 3) facilitating the orderly completion of the search.

5. The Line Between a Stop and an Encounter

a. An Encounter: Presumed Consensual

Merely approaching an individual in a public place, asking for ID, asking questions, and using his voluntary answers as evidence is not a seizure. But he may not be detained without reasonable, objective grounds and a refusal to listen or answer cannot furnish those grounds. *Florida v. Royer* (1983). When a citizen expresses his desire not to cooperate, continued questioning cannot be deemed consensual.

b. Factory Sweeps as Encounters. *INS v. Delgado* (1984)

INS officers did not seize workers when they conducted factory surveys in search of illegal aliens with guards posted at the doors. The fact that people answer police questions without being told they are free not to, does not alter the consensual nature of their response.

c. The "Free To Leave" Test

Seized only if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, *Mendenhall* (1980) (Ct. did not reach issue in that case),[7] and only if the officer uses a show of authority. *Hodari* (1991).

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[6] Also noted that questioning the handcuffed suspect was okay, even without reasonable suspicion as to the subject matter of the questions.

[7] *Cardoza* (1st Cir. 1997) (suggests test should focus on whether officer was acting coercively) (like in 5A context).

i. Presupposes a Reasonable *Innocent* Person[8]
ii. Should look at the totality of the circumstances
iii. Passengers on bus not given reason to believe they were required to answer the questions. *Drayton*.
iv. The arrest of another should put you on notice of consequences of continuing to consensually answer questions in the encounter. *Drayton*.
v. Guns and uniforms and badges are comforting, not coercive. *Drayton*.

d. Officer's Action Must Be Intended as Seizure. *Brower v. Inyo* (1989)

Roadblock case (Stevens' concurrence noted that state of mind was not at issue in the case and so possible an unintentional act could violate the 4A)

e. Suspects Who Do Not Submit Without Force. *Hodari* (1991)

Two types of stops:
i. *Physical:* seizure occurs on slightest application of physical force but does not continue during fugitivity.
ii. *Non-physical* show of authority: Seizure does not occur if suspect does not yield.
iii. Stevens Dissent: Should focus on officers conduct, not citizen's reaction.
iv. Result: Officers may automatically chase non-complying suspects.
v. You can attempt to seize without Reasonable Suspicion.[9]
vi. Pre-seizure conduct is not subject to 4A Scrutiny.[10]

f. Reasonable Suspicion from Anonymous Tips. *Ala. v. White* (1990)

Anonymous informant's tip that is significantly corroborated by a police officer's investigation can provide reasonable suspicion for a stop. (only readily knowable info was corroborated but informant's additional prediction of future behavior demonstrated inside information).

g. Factors to Scrutinize Anonymous Tips. *Florida v. J.L.* (2000)

Anonymous tip alone seldom demonstrates informants V/BK. An accurate description of a readily observable location and appearance does not show that tipster has knowledge of concealed criminal activity. An automatic firearm exception could lead to more harassment and a per se drug exception.

Indicia of Reliability for Anonymous Tips (Kennedy Concurrence):
- Predicting future behavior
- Experience with that "anonymous" informant

[8] U.S. v. Drayton (2002) (bus sweep) (Souter's dissent looked at the immensely coercive atmosphere of the sweep)
[9] U.S. v. Lender (4th Cir. 1993).
[10] Carter v. Buscher (7th Cir. 1992) (gunfight case, seizure occurred when he was shot dead)

- A face to face anonymous tip (informant puts his anonymity at risk and officer can judge demeanor and credibility[11])
- Ability to trace anonymous phone calls.
- Could depend on the offense at issue, risk and dangerousness involved. *See Wheat* (8th Cir. 2001) (stop for DUI on anonymous tip upheld).

h. Reasonable Suspicion Need Not Rule Out Innocent Explanations. *Arvizu* (2002)

And should not go about a divide and conquer analysis, looking at each circumstance alone and finding an innocent explanation.

i. Reasonable Suspicion is Like "Possible Cause"

Doesn't have to be better than even a 1 in 40 chance. *Winsor* (9th Cir. 1988) (bank robbers in one of the hotel rooms).

j. Reasonable Suspicion of a Completed Crime

Terry power can also be used to investigate completed crimes (but might still need potential danger rationale of *Terry*). *Hensley* (1985).

k. Race or Presence in High Crime Neighborhood Cannot Be Sole Factor for Reasonable Suspicion

Brown v. Texas (1979) (but it can be considered together with other suspicious factors[12] -- facts should not be ignored simply because they are unpleasant and it is clearly relevant with already completed crimes where a suspect description is available).

l. Using Race as a Factor in Encounters and the EPC

An officer cannot engage in racial discrimination in deciding who to encounter, but this is impossible to prove. Cannot just show disparate impact, must show intent to discriminate. *Avery* (6th Cir. 1997).

m. Profiles for Reasonable Suspicion are Acceptable as an Administrative Tool

But it cannot automatically establish reasonable suspicion, an officer must establish why it was relevant in the particular circumstances at issue. But a sequence of innocent facts in their aggregate can create reasonable suspicion. *Sokolow* (1989) (drug courier profile) (also rejecting notion that officer must employ least intrusive means available to dispel suspicions).

Marshall Dissent: A profile has a chameleon-like way of adapting to any particular set of observations.

n. Overly Broad Profile Factors, By Themselves, Cannot Create RS

E.g. "the entire state of California."

[11] *Heard* (11th Cir. 2004) (also, in TOC, the anonymous lady obviously knew the dude she was informing on)
[12] *Weaver* (8th Cir. 1992)

o. Unprovoked Flight Can Create RS in the Totality of Circumstances

Illinois v. Wardlow (2000) (other circumstance was just "high crime neighborhood") (Ct. distinguished it from a "mere refusal to cooperate").

6. Terry Frisks Cannot Be Used to Search For Evidence

Terry frisks are justified only for protective purposes. *Minnesota v. Dickerson* (1993) (officer determined object in pocket was not a weapon, but continued to squeeze and prod it)

a. Most Courts Give Lots of Deference to Police Concerns about Risks of Harm in a Stop

And perceived rising levels of societal violence will lead to the justification of more frisks.

b. Reasonable Suspicion for a Frisk Depends in Part on the Nature of the Crime for Which the Citizen is Suspected

c. Can Inspect Object During a Frisk if it is Reasonably Likely to Be a Weapon

Swann (4th Cir. 1998) (Credit cards hidden in a sock)

7. Protective Terry Searches Beyond the Suspect's Person

An officer may make a limited search of suspects grab area with reasonable suspicion of danger. *Michigan v. Long* (1983) (anywhere in the entire passenger compartment of the car where there might be a weapon).

a. Has Allowed for Expansive Searches in Drug Cases

Lower circuits relied on *Long* to allow for a search of a locked glove compartment[13] or frisking all the passengers of a car[14] when the suspicion was of drug activity, because drugs equal guns.

b. Protective Searches of Persons Other Than the Suspect Require Independent Reasonable Suspicion. *Ybarra v. Illinois* (1979)

(frisking a bar patron in course of executing a valid search warrant) (look at the connection between the person and the place being searched)

c. Protective Sweeps ("Frisks with the Eyes")

Can be justified by an officer's reasonable suspicion that the area swept harbored an individual (other than the arrestee) posing danger to others. Can only be a cursory inspection and cannot last longer than necessary to dispel suspicion of danger. *MD v. Buie* (1990).

i. *Permissible even when no arrest is involved if the officers are acting in the course of legal activity.*

ii. *Not an Automatic Right (Distinguished from SITA).*

[13] *Brown* (8th Cir. 1990)

[14] *Sakyi* (4th 1998)

8. The Line Between "Stop" and "Arrest": Brief and Limited Detention

a. Forced Movement of a Suspect to a Custodial Area Constitutes Arrest

Some forced movement of a suspect might be justified, but not if its to further the investigation or place more pressure on the suspect. *Florida v. Royer*.

b. Forced Movement is Okay for Identification Purposes

Cannot unduly prolong the detention.

9. Permissible Investigation Under a Terry Stop

a. Preliminary Investigation to Clear Up or Further Develop Reasonable Suspicion

Overly intrusive investigative techniques (demanding physical DUI tests vs. simple roadside sobriety screenings) are not okay, absent probable cause.

b. Investigation of Suspect's Identity

It is an officer's right to demand ID as part of a *Terry* stop and a state may even criminalize a suspect's refusal to do so. *Hiibel* (2004) (but cannot arrest for failure to do so unless it is reasonably related to circumstances justifying the stop). Dissent: Stoppee is not obligated to answer an officer's questions.

c. Questioning Concerning Circumstances Giving Rise to the Stop

You do not have to answer the questions, but you do have to stop.

d. Communicating With Others to Verify Information Obtained from Suspect

e. Cannot Extend the Duration of a Stop in Order to Obtain Consent

f. Stop after a Stop: No Fishing Expeditions

An officer stopping somebody for one thing (traffic violation) cannot extend the stop to investigate something else (drugs) without independent reasonable suspicion.

g. Encounters after a Stop. *Ohio v. Robinette* (1996)

(Robinson validly consented to a search after his traffic stop was ended, there is no bright line rule that suspect must first be told the stop is over and he's free to go, look at the TOC).

h. Interrogations beyond *Terry*

Forced transportation, detention, and interrogation of a suspect constitutes an arrest requiring probable cause. *Dunaway* (1979); *Kaupp* (2003).

i. Fingerprinting

Might be okay, but not if its overly intrusive. *Davis v. Mississippi* (1969) (two sets of prints and interrogated); *Hayes v. Florida* (1985) (forcibly taken to station house for prints)

j. Time Limits on Terry Stops

Tough to draw a line, but look at whether the police were diligent, whether the suspects contributed to the delay, etc. *Sharpe* (1985).

k. Show of Force During a Terry Stop

Handcuffs and guns are okay, but look at the magnitude of the crime and the magnitude of force used.

10. Detention of Property Under Terry

a. Person Traveling With the Property. *United States v. Place* (1983).

A seizure of the property intrudes on the suspect's possessory interest and their liberty interest. It can be seized but investigation must be diligently pursued.

b. Detention of Property Alone with Reasonable Suspicion. *Van Leeuwen* (1970)

For example a mailed package, is only a de minimis invasion of possessory interest, and privacy interest in the package is not disturbed until probable cause and a warrant is obtained.

11. "Cursory Search" for Evidence Exception Rejected. *AZ v. Hicks* (1987)

Probable cause was required to search the turntable, even though it was cursory and minimally intrusive.

a. But See *Concepcion* (7th Cir. 1991)

Distinguished *Hicks* as being more private, whereas here, there was no REOP in the keyhole.

12. Reasonableness Beyond the Stop and Frisk Context: Parollees and Probationers

a. Probationers: *Knights* (2001)

Allowed investigatory search on reasonable suspicion of the house of a probationer, subject to a search condition after balancing the interests of the state and the probabtioner.

b. Parolees: *Samson v. California* (2006)

Balanced parolees DEOP versus the state substantial interest in monitoring parolees. A brand of special needs search.

N. Searches Incident to Arrest

1. *Chimel v. California* (1969): Area of Immediate Control

a. Rejects Allowing Search of Area of Constructive Possession

b. SITA Justified to Prevent Destruction of Evidence and Safely Effectuate the Arrest

c. White's Dissent

Wants a bright line rule to search whenever there is probable cause of evidence on the premises.

d. May Search the Grab Area After the Arrestee is Removed

e. Grab Area Determined at the Time of Arrest (Not Time of Search)

To hold otherwise might create perverse incentives.

f. Cannot Create Grab Areas

Perea (2d Cir. 1993) (moving the duffel bag)

g. Grab Area Can Be Moved if Not Manipulated. *Chrisman* (1982)

Movement can maybe even be ordered, if justified. *Butler* (8th Cir)

2. Temporal Limitations

A search can precede the arrest but the search cannot be used to provide the probable cause for the arrest.

a. Removal of Possessions from the Arrest Scene

Possessions cannot be searched after removed from the arrest scene because the arrestee still has a privacy interest in these possessions. *Chambers v. Maroney* (1970) (impounded car, but upheld under automobile exception); *Chadwick* (footlocker).

b. Removal of Persons from the Arrest Scene

Can still be searched, because the arrestee has no REOP.

3. Automatic Right to SITA with any Arrest. *Robinson* (1973)

No need to show either of the justifications is present in that particular case.[15]

(Powell's concurrence: an arrestee has no more REOP).

(Marshall's Dissent: Once the officer removed the cigarette package, he should not have opened it without a warrant)

4. Discretion to Arrest for Any Offense

If an officer has probable cause to believe an individual has committed even a minor criminal offence in his presence, he may arrest the offender. *Atwater* (2001) (O'Connor dissent: Probable cause is necessary but not sufficient, must also be reasonable).

5. Bright Line SITA Rules With Automobiles

a. May Search an Automobile and all Containers Therein After Removing and Arresting its Occupants. *New York v. Belton* (1981)

b. May Search the Automobile Even When Officer First Makes Contact Outside of the Auto. *Thornton v. United States* (2004)

(so long as they are a "recent occupant"… a custodial arrest is a fluid thing)

Scalia's Concurrence (*Belton* searches should only be justified where it is reasonable to believe relevant evidence will be found)

[15] Was department policy to SITA in every case, but same principle has been upheld even where discretionary. *Gustafson* (1973).

6. Search Incident to a Summons is Not Allowed

The traditional justifications for SITA are not present and so SCOTUS declined to extend *Robinson's* bright line SITA to cases where police choose to issue a summons. *Knowles* (1998)

a. Police Still May Exercise Traditional *Terry* Powers

O. Pretextual Stops

Whren v. United States (1996)

- Court Declines to Adopt Test of Whether a Reasonable Police Officer Would Have Made the Stop for the Same Reasons
  - Otherwise it would lead to inconsistent application of the 4A
- The Question is One of Authority (What the Officer Could Have Done) Not Empiricism
- *Whren* + *Atwater* + *Robinson* = Wow!

1. Proper Remedy for Subjective Intentions is the EPC not the 4A

Problem is it is extremely difficult to prove an EPC violation with regards to officer conduct – getting discovery is very difficult and then you must show specific intent. *Armstrong; Scopo.* Then even when you win, there is probably no exclusionary remedy.

2. Even Extraordinary Pretext Is Okay if there Was Objective Authority to Stop

Ibarra (9th Cir. 2003)

P. Plain View Seizures

Coolidge v. New Hampshire (1971)

1. Must Be Lawfully in the Place

Thus the plain view search implicates seizure, rather than search, concerns.

a. Search Preceding the Seizure Must Be Justified by Probable Cause

Arizona v. Hicks (1987)

2. The Incriminating Nature of the Item Must Be Readily Apparent

This helps prevent rummaging.

3. The Discovery Need not Be Inadvertent. *Horton v. California* (1990)

Inadvertence would insert an unnecessary subjective test and there is no reason why only having a suspicion an item is there (rather than PC) should immunize that item from seizure if lawfully found. The particularity requirement provides sufficient (and superior) protection (Brennan dissent: inadvertence requirement protects possessory interests).

4. Plain Touch Seizures are Also Okay

Minnesota v. Dickerson (1993) (not upheld in that case because further unlawful searching/prodding took place before incriminating nature of the item was apparent).

Q. Automobiles and Other Movable Objects

1. The Automobile Warrant Exception: The Carroll Doctrine (1925)

Police may search an automobile without a warrant if they have probable cause that it contains evidence of criminal activity.

a. Different from a SITA but Essentially Redundant Powers

b. Doctrine Began on Theory of Exigency But Evolved to Theory of DEOPs

Though some state courts have maintained an exigency requirement for warrantless automobile searches. And see *Coolidge* (1971) where the Court required exigency, but that case has mostly been distinguished away to just mean a warrant should be obtained when officers had a clear opportunity before seizing the car.

California v. Carney (1985): Auto exception can rest on either an exigency or DEOP rationale. But exigency is not required. *MD v. Dyson* (1999).

c. Probable Cause to Search Car Does Not Justify Search of Passengers. *Di Re* (1948)

d. Can Be Invoked Even When Car is Immobile. *Chambers v. Maroney* (1970)

(car had already been impounded by the police) (Harlan's Dissent: a temporary immobilization of the car affecting possessory interests would be better than an immediate de facto invasion of privacy interests).

e. Auto Exception Applies to Motor Homes

California v. Carney (1985) (but did not consider a home situated in a way that objectively indicated its use as a residence).

2. Movable Containers

Mobility of footlocker justifies a warrantless seizure with probable cause, but not a warrantless search (absent additional exigency). *United States v. Chadwick* (1977).

a. Movable Containers in Cars

If probable cause is to search the entire car, may search all containers in the car. *Ross* (1982) (paper bag while searching for drugs).[16]

b. *California v. Acevedo* (1991):

Overruling *Sanders*, says that you can search a container in a car (with probable cause but no warrant) even if you do not have probable cause to search the entire car.

[16] Previously if probable cause is only for that container may only seize the container. *Arkansas v. Sanders* (1979) (briefcase in trunk of taxi). Problem is it creates a perverse incentive to be more generic with your probable cause.

Scalia Concurrence: Our 4A jurisprudence of REOPs and DEOPs and exceptions has become twisted. We should return to a focus on the reasonableness requirement, only requiring a warrant where required at common law.

c. Container Searches Not Subject to Additional Temporal Restrictions

U.S. v. Johns (1985) (containers discovered in course of vehicle search are only subject to temporal restrictions applicable to the vehicle)

d. Passenger's Also Have a DEOP. Their Property is Subject to the *Ross* Rule *WY v. Houghton* (1999)

Probable cause justifies the search of every part of the vehicle and its contents that may conceal the object of the search, even if it clearly belongs to the passenger.[17]

Dissent: Whether or not he needed a warrant, at the very least he needed probable cause to search the purse.

R. Exigent Circumstances

1. Generally

- Fact specific situations. *Vale v. Louisiana*
- Excuses a search without a warrant, but not without probable cause (to search and that the exigency is present)
- Search must be strictly circumscribed by exigencies that justify its initiation. *Mincey v. Arizona* (rejecting a murder scene exception)

2. Hot Pursuit. W*arden v. Hayden* (1967)[18]

- Ensures that a suspect may not defeat an arrest in public by simply retreating into a private place. *Santana* (1976).
- Doctrine cannot apply where suspect is unaware he is being pursued. *Welsh v. Wisconsin* (1984) (and consider the gravity of the underlying offense… drunk driving)

3. Police and Public Safety

Evaluate risk to safety from the point of view of the officer at the time of the search.

Brigham City v. Stuart (2006) (motive of officers irrelevant if circumstances objectively justify the exigency).

4. Risk of Destruction of Evidence

High likelihood that this will be found in investigation of a drug case[19], but Supreme Court rejected a bright line exigency rule for searches of large-scale drug operations. *Richards v. Wisconsin* (1997).

5. Impermissibly Created Exigency

Two views:

[17] Relied on *Zurcher* for notion that you only need probable cause that evidence is in a location, not that it is associated with a particular person.

[18] also ended up allowing for a plain view seizure.

[19] Look at "*Dorman* factors."

- When law enforcement agents act lawfully, they do not impermissibly create exigencies (even in bad faith, knowing the suspects will respond in a certain way). *McDonald* (2d Cir.)
- Police officers cannot deliberately create exigent circumstances, but they are not required to go out of their way to avoid doing so. *Timberlake* (D.C. Cir.)

6. Prior Opportunity to Obtain a Warrant

Officers do not have to obtain a warrant at first sign of probable cause, they may continue building their investigation to strengthen probable cause and gather evidence to support a conviction (but some say this disentitles them from relying on subsequent exigencies)

7. Electronic Warrants

Exist.

8. Seizing Premises in the Absence of Exigent Circumstances

Seizing the premises pending a warrant is reasonable, even in the absence of exigent circumstances. *Murray* (1988) (drawing from *Segura* concurrence)

a. Need PC and Reasonable Restrictions, *IL v. McArthur* (2001)

Restriction should be reasonable, and should have probable cause that there is evidence there and that evidence would be destroyed otherwise.

S. Administrative and Other Special Needs Searches

Generally involve purposes beyond criminal law enforcement where warrants based on probable cause are not well suited. Extensive balancing is employed.

1. *Camara v. Municipal Court* (1967) (Safety Inspections of Homes)

Administrative warrants were issued[20] with no individualized suspicion, but in compliance with a reasonable administrative scheme. The inspections were upheld (and balancing later used to justify *Terry*).

2. *New York v. Burger* (1987) (Inspecting Junkyards for Stolen Auto Parts)

Warrantless, suspicionless inspections whose ultimate purpose was deterrence of criminal behavior was nevertheless upheld.

a. DEOP in Pervasively Regulated Industries

b. States Can Address Societal Ills through both Administrative and Penal Means

And so long as the scheme is proper, it is not invalidated by the fact that the inspecting officer (police) has the power to arrest individuals for other violations.

c. Met Three Criteria For Warrantless Searches to Be Held Reasonable

1) Substantial Government Interest Informs the Scheme (preventing auto theft)

[20] *Griffin v. Wisconsin* (1987) (4A language does not allow warrants to be issued on anything less than probable cause).

2) Warrantless Searches Were Necessary to Further the Regulatory Scheme
3) The scheme provided a constitutionally adequate substitute for a warrant,
    a) It advised the owner that the search was being made pursuant to law and with a defined scope, and
    b) It limited the discretion of the inspecting officer

d. Brennan's Dissent

The "pervasively regulated business" argument will really touch every business. And this is impermissible because it is authorizing searches solely to uncover evidence of criminal acts.

e. Pretextual Administrative Searches: *Hernandez* (5th Cir. 1990)

Scheme regulating truck cargo allowed for clearly pretextual search (FBI officer's drug hunch passed on to inspector) to uncover evidence of drug activity. Under *Whren*, motives could not defeat a lawfully executed search.

f. Warrant Requirement Weighed Against Administrative Convenience

While the element of surprise could easily be maintained with ex parte warrants, *Lesser* (7th Cir. 1994) (upholding warrantless inspection scheme of rabbit farms) balanced the minimal privacy interested protected by a warrant against the inconvenience of having to obtain a warrant for every single administrative inspection.

3. Special Needs Doctrine

Searches and seizures pursuant to needs other than ordinary law enforcement

a. *New Jersey v. T.L.O.* (1985)

Authorized teacher searches of students on reasonable suspicion for the purpose of effectuating the state's need to assure a safe and healthy learning environment. Reasonable suspicion standard sufficient to protect student's DEOPs at school.

b. *Skinner v. Railway Labor* (1989) (Mandatory drug tests after accidents)

Upheld with the following observations:
1) Administered by private employer, but required by federal regulation so it is action subject to 4A scrutiny.
2) Drug testing of urine is a 4A search.
3) Regulating conduct of railroad employees is a "special need" justifying departure from warrant and PC requirements.
4) Warrant not required because virtually no facts for a neutral magistrate to evaluate (standardized tests administered with minimal discretion)
5) No individualized suspicion is required given the minimal privacy interests (employee DEOPs in pervasively regulated industry) balanced against the substantial government interests furthered by the intrusion (that would not be accommodated by individualized suspicion).

6) State's interest in plan strengthened by data documenting a serious drug problem among employees.
7) No indication that the suspicionless testing was a pretext for enforcing the criminal law.

c. *National Treasury Employees v. Von Raab* (1989)

Upheld (by a smaller 5-4 margin) the compelled urinalysis for Customs Service Employees as a condition for appointment to three types of positions.

1) Warrant not required because the employee's choice to apply for the position was the event that triggered the testing.
2) These classes of employees had DEOPs because positions required "judgment and dexterity"
3) Absence of a documented drug problem among Customs employees lost two votes that the majority had in *Skinner*
4) Compared to suspicionless searches at airport where the danger alone meets the reasonableness requirement when conducted with notice and in good faith

d. *Ferguson* (2001): Drug Testing of Pregnant Mothers

Struck down because:

1) Earlier "special needs" justifying warrantless, suspicionless searches was divorced from State's general interest in law enforcement
2) Here law enforcement (arrest and prosecution of drug abusing mothers) was a central and continuing focus, seen as indispensable means to achieve the program's ends
3) The gravity of the threat cannot justify the means they use to pursue their goal.
4) Kennedy's concurrence: A use restriction might save the program (like in *Von Raab*)(but then how would it achieve its' goal?) And consider how this interacts with mandatory reporting laws…
5) Scalia dissent: Testing of lawfully obtained urine is not a 4A search (AOR: they are voluntarily entrusting it to somebody else).

e. Distinguishing Ferguson and Burger

Criminal law objectives can be pursued through civil-based means, but civil law objectives cannot be pursued through criminal-based means.

f. Safety Searches in Airports (lower courts)

Regularly upheld because of:

1) A high state interest
2) That could not be accommodated by requiring individualized suspicion

3) And the notice, freedom to refuse, and universality of the searches made them minimally intrusive[21]

g. Questions of effectiveness should be left for the political process to decide

Sitz; McWade[22]

4. Roadblocks, Checkpoints and Suspicionless Seizures

a. Individual Stops

An officer cannot, absent reasonable suspicion, stop a car and detain the driver to check his license and registration. *Prouse* (1979) ("misery loves company")

b. Permanent Checkpoints for Immigration: *Martinez-Fuerte* (1976)

Upheld as minimally intrusive because there was notice and the discretion of the officers was limited.

c. *Sitz* (1990): Temporary Sobriety Checkpoints Upheld

- Employed reasonableness balancing under *Terry* rather than special needs.
- Balanced the limited intrusion against the state's heavy interest in eradicating drunk driving
- Effectiveness of the strategy was for politically accountable officials to decide.

d. *City of Indianapolis v. Edmond* (2000): Drug Checkpoints Struckdown

- While they were just as minimally intrusive, the Court would not uphold a program whose primary purpose was to detect evidence of criminal wrongdoing.
- *Sitz* was distinguished for the obvious hazard posed by drunk driving and the obvious connection between highway safety and the enforcement technique.
- The gravity of the threat alone cannot be dispositive.
- Can validly inquire into programmatic purposes when a scheme calls for intrusions absent individualized suspicion (*Whren* does not apply)

Dissent: Police could have just assigned a different primary purpose and it would have been seen as valid. Or if they had justified the purpose as a vehicle related safety interest (Drug DUI).

e. *Lidster* (2004): Suspicionless Checkpoints to Obtain Information Upheld

Primary purpose was law enforcement but to obtain information to apprehend other individuals, not to investigate stopped individuals of criminal activity. Individualized suspicion, by definition, would have little role. It was a reasonable means to find the perpetrator of a

[21] In *McWade v. Kelly* the fact that the search was limited to containers capable of concealing explosives and conducted in the open by uniformed officers was also seen as important.

[22] Also, striking a program on account of its narrow tailoring would create a perverse result.

specific, known crime and not very intrusive because it was just information seeking (won't cause anxiety).

f. Also consider the Parolee/Probationer cases (Samson, Knights)

T. Consent Searches

1. Voluntary Consent

a. Test of 4A Consent is Voluntariness, Not Constitutional Waiver Test

Schneckloth v. Bustamonte (1973) (look at the totality of the circumstances, where the person never being told they had the right to refuse is not dispositive… 4A does not require discouraging citizens from cooperating with the police)
Marshall Dissent: Consent cannot be considered a meaningful choice unless he knew he had the option to refuse.

b. Person Cannot be Penalized for Not Giving Consent

Prescott (9th Cir. 1978) (passive refusal cannot be taken as evidence of wrongdoing)

c. Person Being in Custody When Consenting is Relevant, Not Dispositive. *Watson* (1976)

(had been arrested and put in custody, but consented while still on a public street)

Also, a detainee at a stop need not be told he is free to go before consent can be deemed voluntary. *Ohio v. Robinette* (1996)

d. Burden of Proving Voluntary Consent is on the Government. *Bumper v. North Carolina* (1968)

(must show more than acquiescence to a claim of lawful authority)

e. Threats to Obtain Consent

Empty threats may render consent involuntary; firmly grounded threats (such as to obtain a warrant) may be proper); threats calculated to induce fear and apply pressure (even if firmly grounded) will not be. *Ivy* (6th Cir. 1998).

f. Subjective Attitudes Towards Authority are Irrelevant

Zapata (10th Cir. 1993) (Mexican police will strike you…)

g. Relevant Factors (from *Gonzalez-Basulto* (5th Cir. 1990))

1) Voluntariness of Δ's custodial status
2) Presence of coercive police procedures
3) Extent and level of Δ's cooperation with police
4) Δ's awareness of right to refuse consent
5) Δ's education and intelligence
6) Δ's belief that no evidence will be found

h. Can Arguably Lie to Obtain Consent Since Key is Voluntariness

But what if you did use the Rutledge test?

2. Third Party Consent

a. Assumption of Risk Rationale

Frazier v. Cupp (1969) (Δ who allowed his cousin to use the bag, must has assumed the risk he would consent to let others inside)

b. Actual Authority: *Matlock* (1974)

Authority justifying third-party consent comes from *joint access or control for most purposes*, so that it is reasonable to recognize any co-inhabitant has the right to permit inspection and the others have assumed the risk. (FN7)

c. Apparent Authority: *Illinois v. Rodriguez* (1990)

Entry is valid if officers had a reasonable belief that the friend had the authority to consent. Fourth Amendment assures no *unreasonable* search, not no search without actual consent.

d. Unreasonable Beliefs in Authority: *Stoner v. CA* (1964)

Unrealistic doctrines of apparent authority will not justify a consent search (hotel clerk giving permission to search a guest's room).

e. Duty to Investigate

Some situations do not give enough information for police to presume apparent authority and where that is clear they must inquire further, rather than assuming ignorance is bliss. *Dearing* (9th Cir. 1993).

f. Consent among Family Members

Spouses are presumed to have joint control over the premises; minors can permit searches except for areas where they don't have control.

g. Third Party Consent with Defendant Present and Objecting

A physically present co-occupants unequivocal refusal to permit entry prevails over the consent of the other occupant and renders the warrantless search invalid as to him. *Georgia v. Randolph* (2006)

- Gives officer no better claim to reasonableness than having no consent at all (and there are some things a cotenant could obviously not give consent to anyway)
- May not apply where co-tenants fall into some recognized hierarchy
- And would not apply where police simply do not ask a potentially objecting cotenant who can be found nearby (too limiting to require police to seek out all potential objectors)
- Exigent circumstances may overcome this refusal in certain situations

Roberts Dissent: What about assumption of risk? Oh, and by the way, thanks for encouraging domestic violence.

3. Scope of Consent

"A reasonable individual would [not] understand that a search of one's person would entail an officer touching his or her genitals." *Blake* (11th Cir. 1989).

a. Scope of Consent Defined by Object of Search: *FA v. Jimeno* (1991)

General consent to search the car for drugs included consent to search containers in the car that might contain drugs. A container by container requirement would lead to fewer consents and not promote the community interest in encouraging police cooperation.

b. Ambiguity Concerning Scope is Construed against the Citizen

c. Destructive Activity Will Likely Be Seen as Being Beyond the Scope of the Search

4. Withdrawing Consent

- Withdrawals must be made by unequivocal act or statement
- Withdrawing consent cannot be used as a basis of finding reasonable suspicion, but the manner of withdrawal can be probative (so once you consent, you're screwed)

5. Credibility Determinations

Will often come down to swearing contests and testilying when there is no extrinsic evidence.[23]

U. Wiretapping and Eavesdropping

It was originally justified on a trespass rationale and later on a rationale related to Constitutionally Protected Areas.

1. Secret Recording by Undercover Agents

Upheld on a rationale of assumption of risk and the fact that a person has no REOP in the evanescence of their words. *Lopez* (1963).

a. Privacy Interests in the Home do Not Require Heightened Protection *Lewis* (1966)

2. Wiretapping and Eavesdropping Statutes

a. *Berger v. New York* (1967)

Court found *six problems* with the NY statute authorizing wires upon a reasonable ground that evidence of a crime might be obtained:

1) Particularity crime need not be named
2) No description of conversations sought
3) Too lengthy and extensions too easily granted
4) No minimization
5) No notice and return procedures

b. Federal Response (Title III: Omnibus Crime Control Act)

Fixes these problems, also requiring:

[23] Professor Lassiter thinks the entire concept of voluntary consent should be rejected because it strains faith in the law to think citizens would voluntarily consent to a search that uncovers evidence against them.

- the inadequacy of traditional investigative methods is shown
- conversations are minimized. *Scott v. U.S.* (subjective intent irrelevant)
- exception to warrant requirement with severe exigencies
- eventual notice of conversations seized given to parties

c. FISA and Patriot Act

III. THE EXCLUSIONARY RULE

A. Early Doctrine and Background

1. *Weeks v. United States* (1914)

Applied exclusionary rule to searches conducted by federal officers where the evidence was to be used in federal criminal proceedings because

a) it was the only effective means of protecting Fourth Amendment rights

b) interest in judicial integrity requires the courts not to sanction illegal activity

2. Silver Platter Problem Abolished by Elkins v. United States

3. *Wolf v. Colorado* (1949)

Court refused to extend the Exclusionary Rule to the States because:

a) The exclusionary remedy is not required by the Fourth Amendment

b) This leaves states free to experiment with other remedies

c) Part of exclusionary rules value was protecting localities from federal action, whereas communities can restrain local police more organically

4. *Mapp v. Ohio* (1961)

Exclusionary rule is extended to the states.

a) Experience has shown other remedies are ineffective.

b) The exclusionary rule is an essential part of the Fourth Amendment

c) The government needs to follow its own laws.

Dissenting: The coerced confession analogy works against what the court has just done.

5. Reasons for the Exclusionary Rule

- The Fourth Amendment is not a law/right if we cannot enforce it with a remedy
- It preserves judicial integrity by insulating courts from tainted evidence
- The government should not profit from its own wrong
- Not costly, because it only excludes what should never have been obtained in the first place
- Necessary to deter police misconduct

6. Reasons against the Exclusionary Rule

- Integrity and fairness are also threatened by excluding evidence that would help courts reach a true verdict
- Civil suits would better ensure integrity
- A regime directly sanctioning officers for their conduct would be more effective

- Our society profits when truly guilty criminals do not prosper and criminals should not benefit from the government's mistake
- The rule does not forgive mistakes of law
- Costs – criminals escaping conviction and subtle psychic and systemic costs from routine police perjury and damage to courts and government from public outrage
- Results in judicial cutbacks on Fourth Amendment protections in order to allow for police crime fighting.
- We should commend, not penalize, the police

B. Evidence Seized Illegally But Constitutionally

1. Violations of State Law

If it is not in itself a violation of the Fourth Amendment, no exclusion of evidence in federal court. State exclusion is a matter of state law.

a. State Standards for Inventory Searches are Incorporated into the Fourth Amendment

b. State Ethical Standards

McDade Amendment (binding federal prosecutors to state ethical standards) does not authorize exclusion of evidence obtained in violation of state standards of professional responsibility

2. Violations of Federal Statutes, Regulations, and Rules

No exclusion unless the search would not have otherwise occurred or it was so abrasive to rise to intentional disregard of the rules. With respect to statutes, Congress can supply the remedy.

C. Exclusionary Rule in Detail: Procedures, Scope, and Problems

1. Procedures for Return of Property and Motions to Suppress

2. Attacking the Warrant

a. Challenging the Truthfulness of Warrant Application: *Franks* (1978)

1) Must allege deliberate falsehood or reckless disregard for the truth (not mere negligence) (must show impossibility, not just unlikeliness, of the cops story)
2) Must come with offer of proof (cannot just rely on conclusory statements or cross examination)
3) THEN: evidence still won't be suppressed unless the false testimony was material to the finding of probable cause (remaining pieces must not weigh enough anymore)

b. Informants

Can challenge under *Gates*. But if alleging a *Franks* violation must show the affiant knew the third party was lying or proceeded in reckless disregard for the truth.

3. Challenging a Warrantless Search

Generally, state must prove by a preponderance of the evidence that an exception to the warrant requirement was satisfied.

4. The Suppression Hearing and Judicial Review

Ordinary rules of evidence (except rules of privilege) are not applicable.

a. Can Sequester Police Officers Under FRE 615

Brewer (9th Cir. 1991) (a procedural rule designed to guarantee a fair proceeding)

b. Use of Defendant Testimony

A defendant's testimony at a suppression hearing cannot be used against him at his criminal trial, *Simmons* (1968), but it may be used to impeach him. And the testimony of other witnesses he may call at that hearing can be used against him.

c. Prosecution Can Generally Appeal Immediately, Defendant Cannot

5. Establishing a Violation of a Personal Fourth Amendment Right

He must establish that his own personal rights were affected by the government's search or seizure. *Rakas v. Illinois* (1978)

a. No Standing if Your Fourth Amendment Rights Were Not Violated

A person aggrieved by a 4A violation only through the introduction of damaging evidence secured from a third party, has not had his rights infringed. Rejects "target theory" of standing.

b. A Person Must Have Had a REOP to Challenge a 4A Violation

These passengers had no REOP in the car that was illegally searched.

c. *Salvucci* (1980)

A person in legal possession of a good seized during an illegal search has not necessarily been subject to a 4A deprivation.

d. Ownership of Seized Property May Confer Standing. *Rawlings v. KY* (1980)

But if it is illegal drugs, you cannot have a legitimate possessory interest in contraband.

e. Targeting Illegal Searches On Those Without Standing. *Payner* (1980)

Enormous government misconduct in obtaining evidence, but cannot suppress otherwise admissible evidence on the ground it was unlawfully seized from a party not before the court.

f. *Minnesota v. Carter* (1998)

Reaffirms *Rakas* rule. No standing for temporary visitors, because they had no REOP.

Ginsburg dissent: how can we have a REOP when we call a private residence from a public phone, *Katz*, but not when we enter into their house to engage in a common endeavor.

6. Limitations on Exclusion: Causation, Exploitation, and Attenuation

Exclusionary rule does not apply unless there is a substantial causal connection (more than "but-for") between the illegal activity and the evidence offered. Look for exploitation and attenuation.

a. Illegal Arrests and Searches Producing no Evidence are not a Problem

b. *Wong Sun v. United States* (1963)

Evidence obtained as the fruit of their illegal action was suppressed, since it came from the police exploiting their illegality and not as an intervening act of free will. Other evidence was admitted because it was so attenuated from the illegality that it dissipated the primary taint.

c. *Brown v. Illinois* (1975)

Statement obtained from the illegal arrest was inadmissible. The arrest was investigatory, designed to gather evidence and the police can not be allowed to exploit that illegality.

- The State has the burden of showing that the evidence in question is admissible under *Wong Sun*.

d. Consent as a Break in the Causal Chain under *Brown*

Consider

1) Temporal proximity of illegal conduct/consent/confession
2) Presence of intervening circumstances
3) Purpose and flagrancy of the official misconduct

e. *New York v. Harris* (1990)

Payton violation – first in home confession was suppressed, but second confession made at the station house an hour later was admitted because it was too causally attenuated from the *Payton* violation (lawful custodial statements did not relate to the sorts of actions that *Payton* was trying to protect against).

f. *Hudson v. Michigan* (2006): Insufficient Connection Between Knock-and-Announce Violation and Evidence Found in Home

- Constitutional violation of an illegal manner of entry was not even a but-for cause of obtaining the evidence.
- The knock-and-announce rule does not protect the same interests as the exclusionary rule.

Exclusionary rule has only been applied where deterrence benefits outweigh its substantial social costs (here deterrence not worth a lot)
Suppression of evidence has always been our last resort.
Other remedies are now available (1983 strengthened by *Monell*, attorney's fees and brutality bar, internal police discipline, citizen review).
Kennedy concurrence: May be bigger concern if a wide spread pattern of these violations were shown

Breyer dissent: Previously we have only made exceptions where there would not be appreciable deterrence or it was for use in proceedings other than criminal trials.

g. Live Witness Testimony will Generally Break Causation From Free Will

D. Exceptions to the Exclusionary Rule

1. Independent Source

Allows the introduction of evidence discovered initially during an unlawful search if the evidence is discovered later through a source that is untainted by the initial legality.

a. *Murray v. United States* (1988): Confirmatory Searches

Illegal confirmatory search of a warehouse, followed by a search supported by a warrant not mentioning the prior entry or relying on any of the observations made therein.

i. Intent is Relevant

Case remanded for determination of whether officers would have sought a warrant without the earlier entry.

ii. Marshall's Dissent

"Uh, hello, confirmatory searches need to be deterred. And now we've made it turn entirely on the intent of the officer? Smooth move, buddies."

b. Mixed Warrant Applications

If illegal information is mixed with untainted, independent source information, *does the warrant still weigh enough* to establish probable cause without the illegal information?

c. Requires a Legal Independent Source (to prevent manipulating standing rules

Officers can rely on an independent source only if it is a legal source, they cannot inject misplaced concepts of standing to expand the independent source rule to excuse one illegal search with another. *Johnson* (7th Cir. 2004, Posner) (drugs found in illegal search of passenger arguably provided an 'independent source' to search the entire car, including the trunk and use that evidence against the driver).

2. Inevitable Discovery Doctrine

Since the tainted evidence would be admissible if discovered through an independent source, it should be admitted if it inevitably would have been discovered.

a. Nix v. Williams (1984)

Search party would have inevitably found the girl's body regardless of Williams' illegal statement.

b. Must prove by a *Preponderance* that the challenged evidence would have been discovered through independent, legal means.

c. Focus on What Officers WOULD HAVE done, NOT what they COULD HAVE done

Most courts reject claim that exception is met on claim that they had probable cause and *could have* obtained a warrant. It also cannot just be a theoretical possibility that the discovery would have occurred.

d. Active Pursuit Requirement

e. Some Courts will Allow Inevitable Discovery through Hypothetical Inventory Search, some Will Not

3. Use of Illegally Seized Evidence Outside of Criminal Trial Context

a. Grand Jury Proceedings: *Calandra* (1974)

Exclusionary rule does not apply, there is sufficient deterrence in trial suppression.

b. Civil Tax Proceedings: *Janis* (1976)

Exclusionary rule does not apply (even when conducted by the same sovereign).

4. Use of Illegally Seized Evidence for Impeachment

a. Can Be Used to Impeach the Defendant's Testimony (on direct or cross)

Havens (1980) (noting the incremental deterrence which occurs and the salutary purpose using it serves by penalizing defendants for perjury while still allowing them to testify truthfully).

b. Cannot Be Used to Impeach Defense Witnesses

James v. Illinois (1990) (defense witnesses are sufficiently deterred by threat of a perjury prosecution).

5. Good Faith Exception for Reasonable Reliance on Magistrates and Others without a Stake in Criminal Prosecution and Investigation

a. *United States v. Leon* (1984)

A search was conducted in reasonable, good-faith reliance on a facially valid warrant, but a reviewing court later determined there was not sufficient evidence in the application for probable cause.

- noted ER was a judicially created remedy to safeguard 4A through deterrence, not a constitutional right or command and it has not been imposed for all 4A violations
    - Designed to deter police misconduct, not punish the errors of magistrates[24]
    - No evidence judges are trying to subvert the 4A

[24] We normally accord great deference to magistrate's PC determinations

    - No basis to think exclusion will have a deterrent role on the magistrate
- Suppression of evidence obtained pursuant to a warrant should only be ordered on a case-by-case basis where it will further the purposes of the exclusionary rule
    - Either where magistrate abandoned detached and neutral role.[25]
    - Or officers were dishonest or reckless in preparing the warrant, or objectively unreasonable in believing in probable cause

Brennan's Dissent: Admitting illegally obtained evidence implicates the same concerns as its seizure (we need judicial integrity). It is the Fourth Amendment itself and not the Exclusionary Rule that exacts the cost of not gaining certain evidence.

Stevens Dissent: No longer will officers hesitate and seek more evidence in doubtful cases.

b. Reasonable Reliance on Unreasonable Warrants

Good faith exception will apply so long as reasonable minds could have differed on the point (even if most would have found the warrant invalid)

c. Reasonable Reliance on Facially Deficient Warrants

Groh v. Ramirez (2004) (a clerical mistake by the officer preparing the warrant led to the omission of the things to be seized from the warrant, since it clearly lacked particularity, the good faith exception did not apply. A warrant may be so facially deficient that officers cannot reasonably presume it to be valid).

d. Untrue or Omitted Statements and Misrepresentations in Warrant Applications

Exception cannot apply because the error is the officer's (who can be deterred) and not the magistrate.

e. Freezing Fourth Amendment Law

Leon instructed reviewing courts to provide guidance to future law enforcement action by resolving the Fourth Amendment issue, before turning to the question of whether the good faith exception applies. But there is some sad indication that some courts have abandoned their teaching function to rule on easier good faith issues.

f. Good Faith Exception and Warrantless Searches

Court has *not held* that an officer can rely on his own invalid but "reasonable" assessment that his search or seizure is legal.

g. Reasonable Reliance on Legislative Acts: *Illinois v. Krull* (1987)

[25] Like where the judge is just a rubber stamp, or plainly biased.

A statute authorizing warrantless searches was later found to be unconstitutional, but actions of officers in reasonable reliance on the statute were sustained. However, if the legislature or officer should have known the statute was unconstitutional, it may have come out differently.

h. Clerical Errors and Reliance on Court Clerical Personnel: *Arizona v. Evans* (1995)

Court considered (under the *Leon* framework)

1) Whether the government official who made the mistake leading to the 4A violation was deterrable, and court clerks are not deterrable.
2) It then concluded that applying the exclusionary rule would not deter misconduct of police officers.
3) Court did not consider what would result if the clerical error was from police personnel or from reliance by police on a court recordkeeping system known to be full of errors.

Ginsburg dissented: In light of the enormity and relative recency of illegal searches from clerical error, Court should have dismissed cert. to let the lower courts develop the issue more.

i. No Good Faith Protection where the Officer is at Fault

Even if it is because they are mistaken as to the law.

E. Alternatives to Exclusion

1. Civil Remedies

a. Limitations on Current Civil Damages Remodies

Two main problems: 1) winning and 2) collecting.
Damages are too nominal to incentivize aggrieved citizens to sue and to hold the government entity liable under *Monell* they must show the injury resulted from custom or policy.

b. Amar's Proposal for a Fortified Civil Damages Remedy

Five steps to freedom (p. 597)

c. Hatch's Fortified Tort Remedy

Problem: unlikely budgetary authorities can put meaningful pressure on law enforcement officers to comply with the Fourth Amendment

2. Criminal Prosecutions

First, prosecutors are reluctant to prosecute police. Second, problem of over deterrence leading to police second guessing.

3. Police Rulemaking and Other Administrative Solutions

Regulation, education, training and discipline.

IV. Self-Incrimination and Confessions

A. Policies Behind Privilege Against Self-Incrimination

p. 602-606

B. Scope of the Privilege

1. Criminal Cases

Privilege is available whenever the compelled testimony might be used against the witness in a later criminal proceeding. Use of compelled testimony in other than criminal cases does not implicate the Fifth Amendment.

a. Detention for "Treatment"

Proceedings for commitment for treatment under a Sexually Dangerous Persons Act were construed not to be criminal for self-incrimination purposes and thus CTSI statements could be used. *Allen v. Illinois* (1986). Would this have been subject to a use restriction???

Stevens Dissent: Treatment goal was insufficient. The state was being allowed to create a shadow criminal law without 5A protections.

2. Compulsion of Statements Never Admitted at Criminal Trial

Does not violate the Fifth Amendment. *Chavez v. Martinez* (2003) (dismissing the 1983 action). The Fifth Amendment is violated when the statement is used in a criminal proceeding. Similarly, *Miranda* is not violated when the statement is not admitted at trial.

C. What is Compulsion?

1. Use of the Contempt Power

Presents the witness with the cruel trilemma (remain silent and face prison; tell the truth and face imprisonment; or tell a lie and face imprisonment for perjury) and thus a witness cannot be subjected to contempt for refusing to testify if the testimony could create a risk of criminal self-incrimination.

2. Other State Imposed Sanctions

a. Compelling State Employees: *Lefkowitz v. Turley* (1973)

Employees of the State do not forfeit their self-incrimination privilege. Still, they can be compelled to answer questions related to performance of their duties, but only if their answers cannot be used against them in subsequent criminal prosecutions. Use immunity creates the sufficient balance to realize this goal.

And employees can still be fired or subject to sanction for failing to go along with this scheme.

b. Offering benefits does not amount to compulsion

Considered in the sentencing context, where a defendant is required to provide incriminating information to receive a sentence reduction. Threatening a sentence enhancement would be compulsion, but such cases involve some kind of loss or reduction from the status quo.

c. *Ohio Parole Authority v. Woodard* (1998): Clemency Proceedings

Not everything bringing pressure on a defendant to make a choice (even what is almost a "Hobson's choice") is Fifth Amendment compulsion. The clemency proceeding required a voluntary interview that could either help or hurt him, akin to making a defendant making a decision to testify.

3. Comment on the Invocation of the Privilege

a. Inviting an Adverse Inference on Defendant's Decision not to Testify is Compulsion

Griffin v. California (1965) (characterized as punishing the defendant for exercising his Fifth Amendment rights).[26]

b. Jury Instructions

A defendant can request a jury instruction that no adverse inference should be made, *Carter v. Kentucky* (1981), but a court does not need a defendant's consent to make such an instruction on their own. *Lakeside v. Oregon* (1978).

c. Adverse Inference May be Okay Where Defendant Opens the Door

Robinson (1988) (defense closing argument said that defendant was not permitted to tell his side of the story).

d. Tough to Distinguish Comments on the Accused's Failure to Testify from Permissible Argument

"Evidence was uncontradicted"; "we never heard evidence" from the defense on a certain point—have been held as okay.

e. Adverse Inferences at Sentencing: *Mitchell v. United States* (1999)

Fifth Amendment protections are the same at the sentencing stage of a criminal proceedings, and so no adverse inference can be made (here silence was used against her in determining underlying facts of the offense). Court did not consider whether silence could be used as evidence of lack of remorse or not accepting responsibility.

Scalia dissent: The threat of an adverse inference does not compel anyone to testify, it is one of the natural consequences of failing to testify. Any pressure imposed is just from the strength of the government's case.

Thomas dissent: This can be no greater compulsion than a prosecutor adding charges to an indictment if a defendant chooses not to enter a plea bargain.

f. Adverse Inferences May Be Drawn When Invoked in a Civil Case

Baxter v. Palmigiano (1976) (lower stakes and immunity is not available in civil cases to elicit necessary testimony).

g. Adverse Inferences Against Non-Parties

[26] May be violated whenever jury hears defendant's invocation of the privilege????? (See *Hearst* case, p. 668)

Open question, but arguably probative value is outweighed by risk of confusion and prejudice to the jury.

h. Adverse Inferences Can Be Drawn for Failure to Give Non-Testimonial Evidence

South Dakota v. Neville (1983)

4. Compulsion and the "Exculpatory No" Doctrine: No Privilege to Lie

Brogan v. United States (1998) (Exculpatory No Doctrine for false statement prosecutions was rejected. Defendant could simply remain silent, the Fifth Amendment does not confer a privilege to lie).

D. To Whom Does the Privilege Belong

It is personal, belonging only to the person who is himself incriminated by his own testimony.

1. Compulsion Against Third Parties.

Fisher II (1976) (the taxpayers Fifth Amendment privilege would not excuse the attorney from producing the documents. The Fifth does not protect against the simple disclosure of private information, those protections come from the Fourth Amendment or evidentiary privileges.

2. Collective Entity Rule

Artificial entities (corporations, partnerships, etc.) are not persons protected by Fifth Amendment Self-Incrimination clause. *Bellis* (1974). Sole proprietorships are an exception. *Doe* (1984).

E. What is Protected

1. Non-Testimonial Evidence (Is Not Protected)

a. *Schmerber v. California* (1966)

Blood sample for DUI test found to be compelled and incriminating but non-testimonial – compulsion making a suspect a source of real or physical evidence does not violate the Fourth Amendment.

Black's dissent: finds it testimonial because ultimate purpose was to obtain testimony from some person about the alcohol content of his blood.

b. Compelling to Exhibit Physical Characteristics is Not Testimonial

Saves fingerprinting, line-ups, voice identifications, etc.

c. The Line Between Testimonial and non-Testimonial: *Pennsylvania v. Muniz* (1990)

Should be determined by whether the witness faces the "cruel trilemma" in disclosing evidence. Thus the style of Muniz's answer to the question of the date of his sixth birthday (slurred speech) was not testimonial, but the substance of the response itself was testimonial and protected by the "core meaning" of the self-incrimination clause.

d. Must be An Express or Implied Assertion of Fact that Can Be True or False

Doe (1988) (signature not testimonial)

e. Psychological Evaluations and Demeanor Evidence

Psychological evaluations for use in criminal proceedings are testimonial, *Estelle v. Smith* (1981), but observations of defendant's demeanor that bare on sanity are not testimonial. *Jones v. Dugger* (11th Cir. 1988)

2. Documents and Other Information Existing Before Compulsion

Old *Boyd* rule was that a subpoena of private documents that contained incriminating information triggered the Fifth Amendment. This is no longer true.

a. No Fifth Amendment Protection Against Compelled Production of Voluntarily Created Incriminating Document

Andresen (1976) (but if the production itself is communicative in a way that tends to incriminating the party producing it, it may be protected). Most courts hold the contents of voluntarily prepared documents are never protected (but some maintain a distinction between business and personal records).

b. Foregone Conclusion Test: *Fisher IV* (1976)

The AOP in *Fisher* was not testimonial self-incrimination because the existence and possession of the documents was a foregone conclusion (the AOP was unnecessary to authenticate the documents). Even if the AOP was testimonial, it could not be considered incriminating.

c. The AOP Must Be Incriminating (and not a Foregone Conclusion) for the 5A to Apply

AOP can be incriminating via admitting 1) existence, 2) possession, or 3) authenticating them.

d. A Simple Admission of the Existence of Documents is Rarely Incriminating

But it can be (second set of books)

e. Admitting Control Over Documents Could Be Incriminating If it Affiliates You with Somebody Else

f. AOP Cannot Provide A Roadmap For the Government. *Hubbel* (2000)

The use immunity of the AOP spread to immunize the contents of the documents because it involved making witness like decisions ("the contents of his own mind") in determining what to produce. The foregone conclusion test does not apply, this was a fishing expedition (and not in the fun way).

Thomas Dissent: We should return to the days of *Boyd*, because that's when my dictionary was written.

g. Overly Broad Subpoenas Suggest Government Is Going Fishing

Like seeking all documents with a category, but failing to describe those documents with any specificity.

h. Production of Corporate Documents: *Braswell* (1988)

A corporate custodian of records must produce corporate records, even if the AOP would be personally incriminating to him. The government may not disclose which custodian produced the documents to the jury, but the AOP can still be used against him as a corporate act.

i. Compelled Oral Testimony of a Corporate Agent Is Subject to 5A

When it is personally incriminating ("I destroyed the documents").

j. Production of a Person in Response to a Court Order: *Bouknight* (1990)

Fifth Amendment inapplicable to the AOP of a child. She voluntarily assumed custodial duties subject to a noncriminal regulatory regime, any "compulsion" came from a choice she made.

k. Compelled Created Documents are a Different Story

3. Required Records Exception

Government can require records to be kept; punish those who do not keep them; punish those who keep false records; and punish those who disclose criminal activity in those compelled records.

a. *Shapiro* (1948):Compelled Production of Customary Business Records

Does not implicate Fifth Amendment. Records have a public dimension and are part of a regulatory scheme.

b. *Marchetti* (1968): Privilege Properly Asserted Against Record Provision

Records scheme (gambling records) was distinguished because:

1) Records it required were not customarily kept such that it would not be much different from simply providing oral testimony
2) No real public aspects to these records other than government's desire for information
3) Requirements here directed at a selective group inherently suspect of criminal activities[27]

c. Hit-and-Run Statute Okay Without Use Restriction: *CA v. Byers* (1971)

Statutory scheme was essentially regulatory and non-criminal, directed to the motoring public at large and self-reporting was indispensable to its purpose. And even if incrimination was a danger,

[27] *Haynes* (1968) found the National Firearms Act (register your sawed-off shotgun) to also fit the exception because it was directed at persons immediately threatened by prosecution under other sections of the act and were not records customarily kept.

it was non-testimonial because disclosure of identity is an essentially neutral act.

F. Procedural Aspects of Self-Incrimination Claims

1. Determining Risk of Incrimination: Privilege Basically Self-Executing

Whether the information *might possibly tend* to incriminate the witness in the future.

- Determination must be made without compelling witness to divulge the information the witness claims is protected
- It need only be evident from the implications of the question and the context that disclosure might be injurious
- Claim is generally *sustained*, unless the answers *cannot possibly* have such tendency to incriminate. *Hoffman* (1951)
- If a person cannot possibly be prosecuted in the future, the privilege cannot be relied on
- Could be only a link in the chain of evidence. *Malloy v. Hogan* (1964) (like names of associates that could connect petitioner with more recent crimes)

a. Compelled Self-Identification: *Hiibel* (2004)

Disclosure of name at a lawful Terry stop did not fall under privilege because in this case there was no reasonable danger based on an articulated real and appreciable fear, that his name could be used to incriminate him.

b. Can Invoke Privilege Even While Denying Guilt: *Ohio v. Reiner* (2001)

Babysitter faced a risk of incrimination (for involuntary manslaughter) even though she denied any wrongdoing. Of course the privilege is available to those claiming innocence, one of the Fifth Amendment's basic functions is protecting innocent men.

2. Immunity

a. Transactional Immunity and Use/Fruits Immunity

b. A Person Given Immunity (even involuntarily) Cannot Refuse to Testify and Can Be Punished for Refusing or Lying

Kastigar (1972) (Use-fruits immunity is enough, seen as a rational accommodation between the imperatives of the privilege and the government's need to compel testimony)

c. Use-fruits Immunity and the Independent Source Problem

Once a witness is compelled to talk, burden is on the government to show evidence it seeks to use against that witness is derived from a wholly independent, legitimate source.

Possible ways to do this include building a "wall of silence" between teams of prosecutors or "canning" established evidence before the testimony is compelled.

d. *Kastigar* and Witness Testimony: *U.S. v. North* (D.C. Cir. 1990)

Kastigar is violated whenever the prosecution puts on a witness whose testimony was shaped, directly or indirectly, by compelled testimony, *regardless of how or by whom* he was exposed to that compelled testimony.

e. Same Rule for Mixed Warrants as in Exclusionary Rule Context

Warrant must be sufficient without the compelled testimony.

f. The Compelled Testimony Cannot Even Be Used to Impeach

New Jersey v. Portash (1979)

g. Can Still Be Prosecuted for Perjury, False Statements, Obstruction of Justice

Apfelbaum (1980).

h. Can Reclaim the Privilege in Subsequent Statements after Immunity Grant

Pillsbury v. Conboy (1983)

3. Waiving the Privilege

A witness taking the stand waives the privilege as to any subject matter within the scope of the direct examination.

a. Statements in a Plea Colloquy Cannot Amount to a 5A S-I Waiver

That'd be turning shields into swords and making the defendant choose between Constitutional rights. *Mitchell* (1999).

b. Failing to Invoke the Privilege is a Waiver

Garner v. United States (1976).

V. CONFESSIONS AND DUE PROCESS

A. Introduction

Based in Due Process Clauses of Fifth and Fourteenth Amendment; Sixth Amendment Right to Counsel; and Fifth Amendment Self-Incrimination Privilege

B. Due Process Cases and Coerced Confessions

At common law, the inadmissibility of coerced confessions was based on evidence rules finding such confessions unreliable.

1. *Bram v. United States* (1897)

Relied in part on S-I Clause to find a coerced confession inadmissible.

2. *Brown v. Mississippi* (1936): Voluntariness Standard

State coerced confessions, assessed through the totality of the circumstances, violate due process. No clear guidance to "voluntariness" and it had to be relitigated in each case

Cases considered:

a) Personal characteristics of the accused
b) Circumstances of physical deprivation or mistreatment
c) Psychological influences
d) Awareness of Constitutional Rights

3. *Spano v. New York* (1959): Denial of Assistance of Counsel

Spano had already been indicted and was refused permission to see his attorney despite repeated requests, which was seen as one of the factors reflecting the confession's involuntariness. The concurrences provided a key doctrinal bridge to *Massaiah*.

4. Modern Due Process Cases

a. Rarely Find Involuntariness in Interrogations

Allows for direct or implied promises (but not false promises) and lies (but not false documents)

b. Threats of Physical Violence from a Paid Prison Informant

Arizona v. Fulminante (1991) (made the confession to the informant involuntary)

c. *Colorado v. Connelly* (1986): Link to Coercive Police Conduct

Due process focuses on police misconduct rather than the suspect's state of mind (command hallucinations). There must be a link between the coercive activity of the State and the resulting confession by the defendant.

Brennan's Dissent: Wants a free-will test, but is this workable?

d. Rational Decision Test: *Rutledge* (7th Cir. 1990, Posner)

Used by most courts – has the government made it impossible for the defendant to make a rational choice:

1) Is the confession reliable?
2) What is the nature of the police conduct?
3) How did that interact with personal characteristics of the defendant?

(can play on a suspects fears, ignorance, anxieties, etc. but may not magnify them to a point that rational decision becomes impossible)

C. Sixth Amendment Limitations on Confessions

1. *Massiah v. United States* (1964)

Incriminating words deliberately elicited by federal agents (through a wired informant) after he had been indicted and in the absence of counsel violated Massiah's Sixth Amendment rights and could not be used by the prosecution as evidence *against him*.

a. White's Dissent:

This is a very expansive view of the right to counsel. Massiah was never prevented from consulting with counsel as often as he wished.

2. Timeline Test Rather than Functional Test for Sixth Amendment Right

Once the government brings charges against an individual, the adversary relationship between the parties and Sixth Amendment requires parity. Right attaches at indictment (in New York, it attaches at arrest warrant).

3. *Escobedo v. Illinois* (1964)

Escobedo was not indicted, but only focused on by the police as a potential criminal target. No continuing relevance as a Sixth Amendment case. But as a Fifth Amendment case it helps vindicate the full effectuation of the privilege against self-incrimination.

D. Fifth Amendment Limitations on Confessions

1. *Miranda v. Arizona* (1966)

May not use statements (exculpatory or inculpatory) stemming from custodial interrogation unless certain procedural safeguards are followed to secure the privilege against self-incrimination.

a. Custodial interrogations

- Custodial interrogations are inherently coercive and at minimum, a warning is necessary to overcome its pressures
- Not applicable outside of custodial situations

b. Waivers

- A statement in custody is presumed to be compulsively obtained unless there has been a valid waiver (or W-I-I-W)
- The burden rests on the government to show defendant waived his privilege against self-incrimination and right to counsel
- Silence is not a waiver

c. Harlan's Dissent

The Fifth Amendment prohibits compulsion, not all pressures. This new rule will become an obstacle to truthfinding.

d. White's Dissent

Why the deep seated distrust of all confessions? Give people a chance.

2. *Dickerson v. United States* (2000)

Congress immediately tried to overrule Miranda and return to the TOC voluntariness test alone, in 2000 the Court finally found this act to be unconstitutional.

- Miranda is a Constitutional Rule, with many exceptions, but no Constitutional Rule is Immutable
- We know it is Constitutional because we have applied it against state court decisions and we do not want to disrupt stare decisis.

a. Scalia's Dissent

Not all Miranda-violating statements are compelled (and the majority does not disagree)

And also, reread those "exceptions," they hold that Miranda is not a constitutional rule. There's some stare decisis for you

E. Exceptions to the Miranda Rule of Exclusion

1. Impeaching the Defendant Witness

a. Miranda Defective Statements Can Be Used to Impeach the Defendant's Credibility: *New York v. Harris* (1971)

Miranda-defective statements can be admitted to impeach the defendant's credibility.

The marginal added deterrence was outweighed by the need to prevent giving the accused a license to perjure themselves.

b. Multiple Defendants: *Bruton* (1968)

Trials of multiple defendants should be severed or confessions redacted in the case that a confession is used to impeach one of the codefendants.

c. Involuntary Confessions Cannot Be Used for Impeachment *Mincey v. AZ* (1978)

d. Silence and Impeachment

1) Post-warning silence cannot be used to impeach the defendant. *Doyle v. Ohio* (1976)
2) Pre-arrest silence can be used to impeach. *Jenkins v. Anderson* (1980)
3) Post-arrest, pre-warning silence can also be used. *Fletcher v. Weir* (1982) (the arrest itself does not implicitly induce a suspect to remain silent).

2. Admitting the Fruits of a Miranda Violation

Pre-*Dickerson* exceptions to exclusion were based on the notion that *Miranda* was not a Constitutional rule. All have weighed the costs of exclusion against its marginal deterrent benefits.

a. Leads to Witnesses: *Michigan v. Tucker* (1974)

The fruit of the violation was a lead to another witness. This witness' testimony did not carry the reliability concern that comes with a *Miranda* violating statement and their would be minimal deterrent benefit.

b. Good Faith Miranda Violations and Subsequent Confessions: *Oregon v. Elstad* (1985)

The second confession resulted from a *Miranda* defective confession obtained in the living room upon arrest as a result of a good faith *Miranda* mistake (an oversight or confusion about whether the exchange qualified as custodial interrogation). Since the first confession was still voluntary, the second confession was admissible.

c. Question First Interrogation and Subsequent Confessions: *Missouri v. Seibert* (2004)

[C]ennedy's Controlling Concurrence:
When an interrogator uses this *deliberate* two-step strategy to subvert *Miranda*, postwarning statements related to substance of prewarning statements must be excluded absent specific, curative steps.
Curative measures should be designed to ensure a reasonable person in that situation would understand the import and effect of a Miranda warning and waiver. A warning that explains the likely inadmissibility of the prewarning statement may be sufficient.[28]
O'Connor's Dissent
The officer's intent has no bearing on voluntariness, we shouldn't start focusing our constitutional analysis on an officer's subjective intent.

d. Physical Evidence from Miranda-Defective Confession: *Patane* (2004)

Physical fruits of a voluntary, Miranda-violating confession are admissible because their introduction does not implicate Miranda's purpose of protecting the privilege against self-incrimination. The *Miranda* rule is a trial right, not a code of police conduct.
Closest possible fit must be maintained between the self-incrimination clause and any rule designed to protect it.[29]

Souter Dissent: A Miranda violation raises a presumption of coercion and the Fifth Amendment extends to exclusion of derivative evidence under *Kastigar*. That is the heart of Miranda. End of story.

3. Emergency Exception: *New York v. Quarles* (1984)

Overriding considerations of public safety can justify an officer's failure to provide *Miranda* warnings (gun left in store by robber). *Miranda* will bear the cost of fewer convictions, but not of the risk of further harm to the public. We shouldn't make officer's have to make that choice between protecting the public or rendering probative evidence inadmissible.

O'Connor's Dissent: The state should bear the cost of protecting the public by risking that the statement may be inadmissible, not the defendant.

a. Questions Must Be Addressed to the Public Safety Risk

b. Categorical Application: "Any Drugs or Needles on Your Person"

Narrowly tailored question, requiring only a non-testimonial "yes" or "no" should be okay, is a reasonable attempt by the officer to insure his personal safety. *Carillo* (9th Cir. 1994).

F. Open Questions After *Miranda*

1. What is Custody?[30]

Whether a person is deprived of his freedom of action in any significant way. *Orozco v. Texas* (1969).

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[28] But look at change in time, place, circumstances between statements.
[29] And no or little deterrent benefit???
[30] Custody triggers the inherently coercive atmosphere making Miranda necessary.

a. Objective Test: *Stansbury v. California* (1994)

The officer's subjective view of whether the person interviewed is a suspect or not is irrelevant to whether that person is in custody (but may be relevant if they are objectively manifested).

b. Personal Characteristics Irrelevant: *Yarborough v. Alvarado* (2004)

Suspect's youth is irrelevant. It is an objective test.

c. Prisoners are not always in Custody

Mathis (1968) found that the inmate was in "custody" even though he was questioned on an unrelated matter, but some look to whether the conduct led the inmate to believe his freedom was "further diminished."

d. Interrogation at the Police Station: *Oregon v. Mathiason* (1977)

Not necessarily in custody – look at whether they came to the station voluntarily, what they were told, and if they were able to leave without hindrance.

e. Meetings with a Probation Officer: *Minnesota v. Murphy* (1984)

Not arrested or in custody just because he was required to meet with the officer and the officer sought incriminating information.

f. Terry Stops are Not Custodial: *Berkemer v. McCarty* (1984)

But can escalate to become custodial.

g. An arrest is custody

h. Relevant Factors on p. 744

2. What is Interrogation?

Look for custody and interrogation, but in the end they are just proxies for compulsion.

a. *Rhode Island v. Innis* (1980)

Express questioning or its functional equivalent is interrogation – any words or actions by the police that they should know are reasonably likely to elicit an incriminating response from the suspect.

- Must reflect a measure of compulsion beyond that inherent in custody itself
- Miranda was concerned with the interrogation environment, not just questioning
- Yet bizarrely, they found that Innis was not interrogated because of no finding that he was peculiarly susceptible to appeals to his conscience regarding the safety of little handicapped girls.

b. Statements Made by a Suspect to His Wife. *Arizona v. Mauro* (1987)

Not interrogation, even though they brought her in and anticipated that he might incriminate himself. Simply hoping a suspect will incriminate himself is not interrogation.

c. Confronting the Suspect with Incriminating Evidence

Edwards v. Arizona (1981) (Edwards was interrogated when officers played a recording of his associate that implicated him). But courts do not always find it to be interrogation.

d. Indirect Statements Less Likely to Be Found to Be Interrogation

e. Booking Exception for Questions Attendant to Custody

Muniz (1990) Does not apply if questions are designed to elicit incriminatory statements.

Look to whether there could be a properly administrative purpose for the question; whether the officer asking routinely books suspects; etc. "What's your name?" is always within the booking exception, even when Δ gives a false exculpatory answer. *Carmona* (1989)

3. Miranda And Undercover Activity

If the suspect does not even know he is talking to the police, the problems the Court was concerned with do not exist. *Illinois v. Perkins* (1990).

4. Miranda Applies to Any Offence, Felony or Misdemeanor

Berkemer (1984)

5. How Complete and Accurate Must the Warnings Be?

Police have flexibility, so long as they get in the gist of the warnings. *Prysock* (1981)

G. Waiver of Miranda Rights

1. Must Be Knowing and Voluntary: *Moran v. Bourbine* (1986)

a. Voluntary: The Product of a Free and Deliberate Choice

b. Knowing: Full Awareness of the Nature of the Right and the Consequences of Abandoning it

c. An Implied Waiver Could Be Enough

Willingness to answer questions after acknowledging his *Miranda* rights. But a valid waiver cannot be found simply because the suspect confesses after receiving warnings. *Tague* (1980).

d. Understanding the Miranda Warnings

A suspect must actually understand the warnings (*Garibay* 9th Cir. 1998)[31] (poor English abilities)

e. Conditional/Limited Waivers Can Be Valid if Police Honor Conditions

Connecticut v. Barrett (1987)

2. Information Needed for an Intelligent Waiver

a. Scope of Interrogation: *Colorado v. Spring* (1987)

[31] The opposite of the *Connely* "voluntariness" inquiry.

VKI does not require that suspect understand every possible consequence of a waiver or be aware of all possible subjects of questioning in advance of interrogation.

b. Inadmissibility of a Previous Confession

Suspect need not be told of the inadmissibility of a previous confession, *Elstadt*, though such information may be highly relevant. *Seibert*.

c. Efforts of a Lawyer to Contact the Suspect: *Moran v. Bourbine* (1986)

Outside events are irrelevant to the VKI of a suspect's waiver. The suspect need not be provided a flow of information to help calibrate his self interest.

- State of mind of police is irrelevant to the question of respondents VKI.
- Declined to extend Mirada to require the police to inform a suspect of the attorney's attempts to reach him
- Highlights paradox that we allow a suspect to waive his rights without counsel in an environment acknowledged to be "inherently coercive"
- Waiver issue may come out different in the Sixth Amendment context (if he had already been indicted)

3. Waiver after Invocation of Miranda Rights (W-I-I-W)

Far tougher burden for government to show waiver here than when there was never an invocation to begin with. Must show that change of mind came from suspect and not police harassment.

a. Invocation of Right to Silence Must Be Scrupulously Honored

Michigan v. Mosley (1975) (the passage of time, number of attempts, and reissuing of warnings are seen as relevant[32])

b. Invocation must Be Clear and Unequivocal: *Davis v. United States* (1994)

Police can continue questioning in the face of an ambiguous or equivocal invocation and the questioning need not even be to clarify suspect's wishes re: invocation. (Court recognizes that this might disadvantage certain fearful, intimidated, or questionably competent suspects, but thinks warnings provide sufficient protection).

c. Police Cannot Try and Create Ambiguities after any Invocation: *Smith v. Illinois* (1984)

d. Suspect Must Initiate After an Invocation: *Edwards v. Arizona* (1981)

Police cannot initiate after an invocation, even if the suspect is cooperative.

e. Defining Initiation: *Oregon v. Bradshaw* (1983)

[32] Though, does this even matter after *Edwards*?? (No, because W-I-I-W, Edwards applies to invoking right to counsel)

Inquiries or statements relating to routine incidents of the custodial relationship will generally not initiate.

1) Did the suspect initiate (a bright-line safeguard)?
2) Totality of circumstances test for knowing and voluntary waiver.

f. Unrelated Crimes and Fifth Amendment: *Arizona v. Roberson* (1988)

An invocation of the Fifth Amendment right to counsel is not offense specific, so under *Edwards* the police cannot then seek a waiver to question with regards to a second, unrelated crime.

g. Unrelated Crimes and Sixth Amendment Invocation: *McNeal v. Wisconsin* (1991)

An accused who is indicted and asks for counsel (which has attached anyway) is invoking the Sixth Amendment right to counsel, which is offense specific, so the police can seek a waiver to interrogate with regards to another unrelated crime.

h. The Miranda Right to Counsel Cannot be Invoked in Advance of Police Interrogation

McNeil footnote and see *Fletcher v. Weir*.

i. Waiver after Suspect Consults with Counsel: *Minnick* (1990)

Police-initiated interrogation after an invocation of counsel may occur only if counsel is *actually present* during the interrogation (protection of *Edwards* continues even after suspect has consulted with an attorney).

Scalia Dissent: Attacked premise underlying *Miranda* cases that an honest confession is a foolish mistake that ought to be rejected as evidence.

H. Confessions and the Sixth Amendment: Obtaining Information from Formally Charged Defendants

1. Deliberate Elicitation Standard: *Brewer v. Williams* (1977)

The "Christian Burial Speech" by the policeman on the drive back to the jail after Williams' arraignment in another town deprived Williams of his Sixth Amendment right to the assistance of counsel. He deliberately and designedly set out to elicit information as if he had formally interrogated him (and perhaps more effectively). Like in *Massiah*. He could have waived, if police sought it, but they did not.

(What about evidence of the body as physical fruits under *Patane* (rather than *Nix v. Williams*)

Burger's dissent: Williams was not threatened or coerced, he was prompted by a statement to speak voluntarily in full awareness of his constitutional rights. White's dissent: This statement was not coercive, it was delivered hours before Williams even "responded." This rule is far too broad.

j. Standard is Focused on the Intent of the Officer

k. Sixth Amendment Attaches at the Start of Adversarial Judicial Proceedings

Fellers (2004) (formal charge, preliminary hearing, information, indictment, arraignment, etc.) (reiterating the deliberate elicitation standard)

2. Use of Undercover Officers and State Agents

a. Jailhouse Plants: *United States v. Henry* (1980)

A cellmate was a paid government informant, told to listen to anything Henry may say (but not initiate conversation) (but Henry was not just a passive listener). By "intentionally creating a situation likely to induce" Henry to make incriminating statements without counsel, the government violated Henry's Sixth Amendment right.
Rehnquist Dissent: Any available protection should come from the self-incrimination clause, not the Sixth Amendment right to a ever-present guru.

b. Passive Jailhouse Plants: *Kuhlmann v. Wilson* (1986)

Informant placed nearby defendant and defendant made statements to the informant without any effort on the informants part to elicit those statements (but made a few arguably "neutral" statements). Defense must show police took some action beyond merely listening.

3. Continuing Investigations: *Maine v. Moulton* (1985)

May investigate different offenses but cannot use incriminating statements pertaining to the pending charges at the trial of those charges. No analogy to plain view exception here (though maybe there should have been).

4. Waiver of Sixth Amendment Protections

a. Can Waive Sixth Amendment Rights after Receiving Miranda Warnings

Patterson v. Illinois (1988): Miranda warnings are enough to inform a defendant of his Fifth and Sixth Amendment rights, and when he waived, he waived them both with respect to police questioning.

b. Need not Additionally Warn Suspect He Has Been Indicted, Miranda is Enough

c. Waiver after Invocation: *Michigan v. Jackson* (1986)

Once a defendant invokes his Sixth Amendment right to counsel, the *Edwards* initiation standard governs future waivers. But defendant must actually invoke (even though it automatically attaches).

d. Waiver as to Crimes Unrelated to the Crime Charged: *McNeil* (1991)

May seek waiver to question regarding unrelated crimes.

VI. THE GRAND JURY

A. Background

Fifth Amendment right to grand jury has not been incorporated against the states.

Procedure:
Standard to indict is probable cause. 12 out of 23 must vote to indict.

1. Charge of the Grand Jury

- Grand Jury Prosecutor should act impartially.

B. The Procedures of the Grand Jury

1. Discriminatory Selection of Grand Jurors. *Rose v. Mitchell* (1979)

Discrimination in the selection of grand jurors is valid ground for setting aside a criminal conviction (structural error[33]) (even where defendant has been found guilty beyond a reasonable doubt by properly formed petit jury in a trial on the merits).

a. Discrimination in Selection of Grand Jury Forepersons

If the foreperson is chosen from among already constituted grand jury it does not require reversal because foreperson's role is largely ministerial. *Hobby* (1984). But if the grand juror is discriminatorily picked from the venire, it does, because this is a *Rose* violation. *Campbell v. Louisiana* (1998).

2. Secrecy of Grand Jury Proceedings

a. Reasons for Secrecy

b. No obligation of secrecy for grand jury witnesses (would be impractical)

Butterworth v. Smith (On First Amendment grounds… underlying concern that evil P would put all people with knowledge before grand jury to silence them)

c. Civil Discovery by Government of Grand Jury Evidence

No automatic discovery, must make a strong showing of a particularized need for disclosure for use in another proceeding that is greater than the need for grand jury secrecy and requests should be strictly tailored. *Sells Engineering* (1983).

3. Other

No right to counsel inside grand jury room. *Conn v. Gabbert* (1999) (but may consult with lawyer outside of the Grand Jury room, according to DOJ Manual).
Leading questions can be asked.
Under DOJUSA guidelines, known targets of the investigation should be notified and invited to testify voluntarily.
Do not need *Miranda* warnings (not custodial interrogation)

[33] Note how introduction of perjured testimony, later discovered, could still be harmless error.

C. Relationship of Grand Jury to the Prosecutor and the Court

1. Court's Supervisory Power

Should not be used in a way that encroaches on the constitutional independence and prerogatives of the prosecutor and the grand jury, unless there is a clear fact/legal basis for doing so. *Chanen* (9th Cir. 1977).

2. Prosecutor Has Broad Discretion

D. Grand Jury as a Protection Against Unjust Prosecution

The traditional function of the grand jury is to stand between the government and the person being investigated by the government. Today principal function is probably not to refuse indictment but to force the prosecutor to gather and offer evidence in a systematic way before a charge is brought. If they find the case is weak, they will either not ask for an indictment or seek indictments on lesser offenses.

E. The Evidence Before the Grand Jury

1. Grand Jury's Function is Investigative not Adjudicative/Adversarial

- Inadmissible evidence still has probative value
- Investigations would be greatly burdened if rules of evidence were applicable to them.
- Evidence rules meant to ensure fairness of adversarial proceedings
- Any misleading effect of inapplicable evidence will be remedied at trial.

Costello (1956)

2. Permitted to offer a lot of evidence that could not be offered at trials

Can use illegally seized evidence. *Calandra* (1974).

But in New York, PC for the indictment must be based on trial admissible evidence.

3. No Prosecutorial Duty to Present Exculpatory Evidence

U.S. v. Williams (1992) (rejecting 10th Circuit rule requiring presentation, would alter grand jury's historic role, it is an ex parte proceeding)

Stevens dissent: Government has a duty not to indict where it would be inappropriate.

DOJUSA Manual requires prosecutor to present known exculpatory evidence, but no right of action, or way to enforce.

F. Grand Jury's Powers of Investigation

1. No First Amendment Privilege or Executive Privileges

Branzburg v. Hayes (1972) (First Amendment, even without a significant need for answers); *Nixon* (1974) (Other FRE privileges, such as attorney-client, stay intact, also some states prohibit subpoenaing defense attorneys)

2. Broad Grounds of Relevance to Call Anyone Before It

On even a hint of suspicion or prosecutorial speculation about criminal activity.

a. Grand Jury May Not Know What is Truly Relevant until the end

Dionisio (1973) (investigation not complete until every clue is run down and every witness examined)

b. No Need to Show Probable Cause of Relevance

United States v. R. Enterprises (1991) (Unreasonable only where there is *no reasonable possibility* that the *category* of materials the government seeks will produce information *relevant* to the *general subject* of the grand jury's investigation.

VII. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A. Government Interference Creating an IAC Claim

When it interferes with ability of counsel to make independent decisions about how to conduct the defense.

B. The Strickland Test

1. *Strickland v. Washington* (1984)

Failed to 1) request a psychiatric report and 2) investigate and present character witnesses in a capital case. Benchmark for judging any claim of IAC is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Respondent made no showing that justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance.

a. Performance

Did counsel's representation fall below an objective standard of reasonableness, given a wide range of reasonable professional assistance, considering all the circumstances?
A test highly deferential to counsel that must eliminate distortive view of hindsight. Strategic choices are basically unchallengeable.

b. Prejudice

Is there a reasonable probability (a probability sufficient to undermine the outcome) that but for counsel's unprofessional errors, the result of the proceeding would have been different.[34]

c. Marshall's Dissent: IAC as Structural Error

EAC is not just about trial outcomes, it is about ensuring that the outcomes are obtained through fundamentally fair procedures. Also, very hard to assess either prong in hindsight.

2. Persons who retain counsel are entitled to same IAC Standards

Cuyler v. Sullivan (1980)

3. EAC Right on First Appeal of Right (When State Institutes One)

Evitts v. Lucey (1985)

[34] Rejected higher "more likely than not" standard used for newly discovered evidence.

a. No Right to EAC Where there is No Right to Counsel

4. Failure to File Appeal without Defendant's Consent is Automatic IAC

Roe v. Flores-Ortega (2000) (need not show appeal would likely be successful)

a. Appeals without Merit

Counsel should file *Anders* brief outlining reasons for not appealing

C. Assessing Counsel's Performance

1. Ignorance of the Law: *Kimmelman v. Morrison* (1986)

Ignorance of the law (or a mistaken knowledge) is ineffective performance (leading to inability to challenge admission of evidence and test prosecution's case). Remanded for prejudice prong.

2. High Deference To Justify Counsel's Actions as Strategy

- Not objecting is fine, having a policy of never objecting is ridiculous.
- Not having an autopsy performed can be a good strategic decision
- Easy for counsel to explain a mistake ex-post as "strategy"
- If counsel cannot come up with a reason at all, courts will find it ineffective
- Calculated risks
- Crazy closing arguments. *Yarborough v. Gentry* (2003)
- Conceding client's guilt in a capital prosecution, even without client's consent (Δ's resistance sort of waived that right). *Florida v. Nixon* (2004) (preserves credibility at sentencing phase, which may have been the only reasonable choice)

3. *Strickland* plus Habeas Review is Doubly Deferential

4. Prejudice in Death Penalty Cases is Easier "One Juror" Standard

5. Duty to Investigate

a. A complete failure to investigate cannot be strategic

But you can never investigate everything

b. *Wiggins v. Smith* (2003)

- Failure to investigate social history and background met both prongs.
- They should have known to investigate from certain signals
- Record underscores failure to investigate was from inattentiveness, not strategic judgment

c. *Rompilla v. Beard* (2005) Duty to Investigate Case File of Prior Criminal Record

- Expansive reading of duty to investigate (failed to look in case file that may have revealed a single document in a case file for a past conviction that was to be introduced at sentencing)
- The similarity of the prior offense, the easy availability of the file, and the great risk that testimony about that crime would pose as an aggravating factor all weighed on the decision.

- Would have been prejudicial because it was good mitigating evidence, not in the least redundant
    - But it was different from what the defendant himself was telling them
- SOC Concurrence: Not a bright line rule about looking at all past case files, three factors made this unreasonable performance:
    1) Counsel knew that prior conviction would be at the heart of prosecution's aggravation case
    2) Threatened to eviscerate one of the defense's primary mitigation arguments
    3) Attorney's decision not to get the file was not a tactical decision, but the result of inattention.

D. Assessing Prejudice

1. Strength of the Case Against the Defendant

Atkins v. A.G. of Alabama (11th Cir. 1991) (failure to object to admission of a fingerprint card revealing a prior conviction was prejudicial where prosecution case was "not overwhelming")

2. Strength of Evidence Not Presented

Was the evidence strong? Persuasive? Was it redundant?

3. Prejudice Assessed at Time of Review

Lockhart v. Fretwell (1993) (case counsel should have relied on to win was overruled by the time of the claim, could not constitute prejudice since the failure did not render the trial unreliable or fundamentally unfair)

Stevens Dissent: This was an erroneous imposition of the death penalty, that although invalid when imposed, will stick because of IAC and good timing.

4. Increased Sentence (Even By a Day) is Obvious Prejudice

Glover v. United States (2001).

5. Prejudice and Pleading Guilty

Must show that but for counsel's errors, he would not have pled guilty but insisted on going to trial (not that he probably would have been acquitted or given a shorter sentence). *Hill v. Lockhart* (1985).

a. Prejudice and Failing to Plead

Show that but for counsel's bad advice, he would have accepted the plea and not gone to trial. *Toro* (7th Cir. 1991). Argument for per se prejudice though if trial sentence imposed is longer than that in plea agreement.

E. Per Se Ineffectiveness and Prejudice: *Cronic* (1984)[35]

- Complete denial of counsel
- Failure to subject prosecution case to any meaningful adversarial testing
- Trial counsel did not pass bar exam. *Solina* (2d Cir. 1983)

[35] But inexperience does not mean IAC.

- Sometimes sleeping defense counsel.

VIII. DISCOVERY ON BEHALF OF THE DEFENDANT

A. General Issues

1. Arguments Against Criminal Discovery:

- Defendant has many advantages already
- Prosecutor already has just as great a duty to protect the innocent as to prosecute the guilty, while defense lawyer has no duty to reveal the truth
- Will lead to perjury and suppression of evidence, not honest factfinding
- There's always a risk of danger to witnesses, in every case

2. Arguments For:

- Liberty and reputation interests at stake in criminal cases
- It works in many jurisdictions using it

B. The State of the Law

1. Seven Categories of Information that Must Be Disclosed On Request Under Rule 16

a. The Defendants Own Oral Statements from Official Interrogation that is Intended to Be Used at Trial

Can avoid disclosure by not taking down statements verbatim.
Statements to those not government agents or to undercover agents are not subject to disclosure.

b. Defendant's Own Written or Recorded Statements in Government's Custody

c. For Organizational Defendants, Statements Attributable to the Defendant

d. Defendant's Prior Criminal Record

e. Documents or Other Tangible Objects *Material* to the Defense or Intended for Use in Case in Chief or Obtained from the Defendant

f. Reports of Physical or Mental Examinations or Scientific Tests *Material* to the Defense or Intended for Use in Case in Chief

Need time with it if they are to test or rebut it. And *Daubert* stuff.

g. Summary of Testimony of Expert Witnesses

2. Information Not Discoverable Under Rule 16

Codefendant's statements.
Work product.
"Material to preparing the defense" only covers defenses going to the merits. *Armstrong* (1996).
Overly broad discovery requests fishing for "anything exculpatory" need not be heeded at all.

a. Names, Addresses and Statements of Witnesses: *Jencks Act*

Need not be disclosed until after the witness testifies on direct, and only statements relating to the subject matter of his testimony

b. Grand Jury Minutes and Transcripts

Except for 1) Defendant's testimony, 2) Jencks Material, 3) Brady Material.

C. Constitutional Duty to Disclose

1. The Brady Rule

Constitutional duty to disclose materially exculpatory information to the defendant in advance of trial.

a. Material: would tend to exculpate or reduce the sentence

b. May Require Reversal When Prosecutor Should Have Known

Giglio (1972) (false testimony).

2. *United States v. Agur* (1976)

Failure to disclose victim character evidence relevant to an affirmative defense.

a. Rejected Test Re What "Might Have Affected the Jury Verdict"

b. It is the character of the evidence, not the prosecutor that matters

c. Three Types of Brady Situations

1) Evidence of knowing use (or should have known) of perjured testimony by prosecution: -- Fundamentally unfair, requires reversal with reasonable likelihood that false testimony could have affected judgment of jury.
2) Suppression of material statements that were requested by the defense where it might have affected the outcome
3) Where there is a duty to voluntarily disclose exculpatory material

d. Reversible Error if Omitted Evidence Creates a Reasonable Doubt that Did Not Otherwise Exist

Here, the evidence was cumulative (But look whether though it might be cumulative, is it of a different character and quality?)

e. Marshall's Dissent

Should consider what would have induced a reasonable doubt in enough jurors to avoid a conviction.

f. The More Specific the Request, the More Likely the Materiality

Bagley (1985) (uses a "reasonable probability" it might have affected judgment of the trier of fact test)

g. Test is less than a preponderance?

Could the favorable evidence reasonably be taken to put the whole case in a different light? *Kyles v. Whitley* (1995) (Dissenters agree with

test but still find it not materially exculpatory because of the implausibility of the defense)

h. Brady Rights are Implicated Even if Suppression is By Police Officer and Prosecutor is Unaware

Kyles v. Whitley (1995)

i. Suppressed Evidence Inadmissible at the Trial

Wood v. Bartholemew (1995) (polygraph tests would not implicate Brady at all because they are not evidence and could have no direct effect)

3. Posner's *Boyd* Test for Prejudice for Nondisclosure of Impeachment Evidence

1) Is there reasonable probability jury would have acquitted on at least some of the grounds if it disbelieved the witness testimony?
2) Might the jury have disbelieved that testimony if the witnesses hadn't perjured themselves?

4. Materiality Judgments Reviewed Deferentially to Trial Judge

D. Duty to Preserve Exculpatory Evidence?

Must show bad faith on failure to preserve potentially useful evidence for it to create a Due Process violation. *Youngblood* (1988) (was at worst, negligent).

IX. GUILTY PLEAS AND BARGAINING

A. The General Issues

1. Overview of the System

- Essentially creates a marketplace for sentencing (or black market to the guidelines) among defendants and prosecutors that is largely unregulated by legal standards beyond principles of contract.
- Defendant waives the privilege against self incrimination and the right to a trial
- Charge bargaining and sentence bargaining

a. Support for the System

- Without the system, little reason for criminal associates to flip and cooperate with prosecution.[36] Prosecutions of major criminals would become virtually impossible.
- If the conviction/crime ratio gets too small, it will undermine and destroy the criminal justice system
- Autonomy and efficiency support the creation of compromises
- Our system cannot survive the strain without plea bargaining
- To improve plea bargaining, improve the process for deciding cases on the merits

b. Criticisms

[36] "Flip" side though is that often the ones you get to plea and take lesser sentences are those more culpable because they have more useful information to testify about.

- By offering reduced sentences, it unconstitutionally penalizes people for going to trial.
- Giving an innocent defendant an (attractive) choice to plead guilty undermines confidence in the system
- The system can conceal a lot of bad lawyering, disguises any otherwise valid IAC claims
- Abolition will allow better monitoring of the A-C relationship, especially for the poor.
- Abolition will force prosecutors to screen charges more carefully to deal with resources.
- Or, replace the plea bargain with some automatic, non-negotiable concessions for a guilty plea

c. Mutuality of Advantage

Allows the choice of certainty in result over spinning the wheel of justice. *Brady v. United States* (1970)

2. Rewarding a Guilty Plea or Punishing the Decision to Go To Trial

Judge cannot impose a more severe punishment on an accused simply because he exercised his trial right. *Medina-Cervantes* (9th Cir. 1982) (imposing a fine intended to reimburse government for trial costs).

a. Often Tough to Tell

"Lack of remorse" and "acceptance of responsibility" can often be factors influenced by plea stance.

3. Guilty Pleas, Charging Decisions, and Mandatory Minimum Sentences

- Mandatory minimum penalties can be very powerful incentives for bargaining.
- Prosecutors have enormous coercive sentencing powers here.

4. Efficiency at What Price

- Need and eagerness to compromise could force creation and acceptance of a distorted version of the facts (to make it fit into a different, lesser offense)

5. Problems of Overcharging

a. Prosecutor Can Threaten to Bring a New Indictment with Greater Charges in Bargaining Process: *Bordenkircher v. Hayes* (1978)

A hugely coercive result. Prosecutor could have just overcharged to begin with, so let's not invite unhealthy subterfuge and force the bargaining system back into the shadows.

B. The Requirements for a Valid Guilty Plea

1. Requirement of Some Kind of Record

Boykin v. Alabama (1969) (Need some sort of record to reflect a VKI relinquishment of a known right or privilege)

2. Voluntariness in Pleas

No state coercion "overbearing the will of the defendant.

a. Package (Wired) Deals

No *per se* state coercion to make a plea deal conditional on a codefendants plea, *Pollard* (D.C. Cir. 1992) (sick wife), but since an additional risk of coercion is posed the judge should be informed about it so he could accurately test the voluntariness in the colloquy. *Caro* (9th Cir. 1993).

b. No Disclosure of Impeachment Information. *U.S. v. Ruiz* (2002)

- Constitution does not require preguilty plea disclosure of impeachment information
- Impeachment information relates to fairness of a trial, not the voluntariness of a plea
- Due process considerations require weighing the value of the safeguard against the interests on the two sides. The impeachment is not needed for an accurate result because the defendant is admitting guilt. But the government has an interest in efficiency and concealing the identity of informants.
- The prosecutor does not have to give a defendant all possible information in order for a plea to be knowing.

3. A Knowing and Intelligent Plea

a. Should Know All Elements of the Crime: *Henderson v. Morgan* (1976)

Normally presumed that counsel will explain it to the defendant, and that can be reflected in the record.

b. Pleading to Something that Is Not a Crime: *Bousley* (1998)

A plea to a violation of a criminal statute later held not to cover his conduct should be reexamined. There could be no factual basis for the appeal.

c. When Inducement (Possible Sentencing) Later Held Constitutionally Invalid

Brady (1970) (Ct. says does not affect voluntariness, but how can that be a *knowing* plea?).

4. Competency to Plead Guilty

Same as competency to stand trial, rational understanding test. *Godinez v. Moran* (1993).

- Rejecting the "reasoned choice" test.
- Kennedy concurrence: tough to distinguish standards based on slight word variations.

5. Waiver of Counsel at Plea Hearing

Iowa v. Tovar (2004): Iowa required additional warnings under the Sixth Amendment to make a plea more knowing, but Court held they were not constitutionally required (and could be counterproductive by misleading and creating confusion).

6. Secret Promises

Blackledge v. Allison (1977) (Colloquy could have saved faulty plea caused by defendant's misimpressions about the secrecy of the agreement)

C. Regulating Guilty Pleas Under Rule 11

- Must have a factual basis (judge should make prosecutor give a proffer)
- Three types of plea agreements, two are binding on the courts (take it or leave it), one does not bind the court.

1. The Role of the Court

The judge should not intrude into plea negotiations (huge coercive danger and neutrality for trial could be compromised).

2. Harmless Error and Plain Error

If a defendant does not object to a Rule 11 error they have the burden of showing a plain error (plain on the record that error affected substantial rights). *Vonn* (2002) (and the court may look outside of the record of the plea proceeding).

a. Must Also Show Prejudice

Also must show a reasonable probability that but for the error, he would not have entered into the plea. *Dominguez-Benitez* (2004)

D. Claims of Innocence: Must still be a factual basis.

It may be reasonable in certain circumstances, where there is a strong factual basis, for a defendant to enter into a plea while still professing belief in his innocence. *Alford* (1970).

E. Factual Basis for Pleas

1. Factual Basis not Required for Forfeiture Agreements

Libretti (1995)

F. Finality of Guilty Pleas

Absent a VKI claim, a plea cannot be withdrawn without a fair and just reason, a pretty strict standard. After the sentence, the only recourse is an appeal or a collateral attack. p. 1073!!!!!!!!!!!!!!!!!??????????????

1. Strong State Interest in Finality. *Hyde* (1997)

Allowing withdrawals demeans admissions of factual guilt and the plea process in general. But enforced like a contract, so if state does not deliver promised performance, defendant can back out.

2. Breach of a Plea Agreement

a. Inadvertent Breach by Prosecution: *Santobello v. New York* (1971)

Still unacceptable, no possibility for good-faith breach.

b. Remedies

Court's choice between allowing the plea to be withdrawn or order specific performance. *Santobello*.

c. Ambiguity in Terms is Construed against the Defendant

d. Often Very Tough to Tell if There's Been a Breach

e. Prosecutors will Put Vague Standards in Their Cooperation Agreements

f. Breach by the Defendant: *Ricketts v. Adamson* (1987)

When breach is after finality of the verdict (testifying again in retrial of codefendants), can try the defendant again without implicating double jeopardy.

3. Appeal and Collateral Attack

No clear standards in inconsistent cases, but often a plea will bar a collateral attack.

4. Conditional Pleas

Need not go to trial just to preserve a suppression claim.

X. TRIAL BY JURY

A. The Fundamental Right

1. Incorporated Against the States

a. All Serious Crimes: *Duncan v. Louisiana* (1968)

For all serious crimes. Later defined in *Baldwin v New York* (1970), to be an offense authorizing imprisonment for more than six months.

b. Aggregating Petty Offenses Does Not Qualify

Lewis v. United States (1996)

- Government could still just get around this by charging and trying each crime separately.
- Kennedy Concurrence: Upheld based on judge's declared, self-imposed limitation to not impose a sentence of more than six months. Otherwise, the broad discretion of prosecutors will allow them to manipulate charges to defeat jury trials in many cases.

c. Penalties Other Than Incarceration. *Blanton v. North Las Vegas* (1989)

- Rejected claim of DUI Defendant that numerous penalties constituted serious offense entitling him to a jury trial.
- Absent imprisonment, Δ must show legislative determination that it was a serious offense.

B. What the Jury Decides

1. All Elements of Crime Must Be Left for the Jury: *U.S. v. Gaudin* (1995)

Judge inappropriately instructed jury that offenses were "material" for purposes of the False Statement Act. Sixth Amendment does not permit judges to decide questions of mixed law and facts.

2. Jury Must Determine All Facts Affecting Sentencing: *Apprendi* (2000)

3. Judges Can Decide "Collateral" Issues

Such as the admissibility of illegally obtained evidence or evidence in general (FRE 104).

C. Requisite Features of the Jury

Must examine what function that particular feature performs in relation to the purposes of a jury trial. *Williams*.

1. Purposes of the Jury Trial

- Prevent oppression by the government by:
    - Providing safeguard against corrupt or overzealous prosecutor and compliant, biased, or eccentric judge
    - Judgment of the community as a hedge
- Critical for public confidence in fairness of criminal justice system

2. Size

Should be large enough to:

- promote group deliberation (progressively smaller makes it less likely)
- fair possibility to obtain a representative cross-section of the community
    - Also, minorities less likely to be represented
- saying larger numbers gives better odds of acquittal/conviction cuts both ways (but not w/ burden on prosecution, hung jury, etc.)
- Enough memory among the people (especially absent note taking)
- Risk of conviction increases as size diminishes
- Group decision-making advantages:
    - Increased motivation and self criticism
    - Increasing inconsistency in smaller groups

a. Six is big enough, *Williams v. FA* (1970), five is too small. *Ballew v. GA* (1978)

3. Unanimity Not Required. *Apodaca v. Oregon* (1972)

- Does not materially contribute to exercise of commonsense judgment needed to interpose hedge
- Not a necessary precondition for application of cross-section requirement
    - Constitution only forbids systematic exclusion
    - Minority voices can still be heard
- Compromise verdicts are bad.
- Still required in federal courts and used in most states, but not constitutionally required
- Douglas Dissent:
    - Less than unanimous juries overwhelmingly favor the state
    - And this will keep minority views from ever being heard by halting deliberation immediately.
    - Will prevent compromise verdicts

a. But Unanimity Generally Cannot Be Waived

Would appear to be less reliable verdict (as opposed to a total waiver of jury right where there is just a bench trial)

b. Should Be Unanimous as to All the Elements of the Crime

Of course this is tough to tell with general verdicts.

c. Unanimity is Constitutionally Required with a Six Person Jury for a Serious Criminal Offense

Burch v. Louisiana (1979)

D. Jury Selection and Composition

1. The Jury Pool

Should be a fair cross section, and concerns of juror competency cannot trump the need for a fair cross-section.

2. The Fair Cross-Section Requirement and the EPC

There can be two different violations here, with two different rights involved.

a. Fair Cross-Section Requirement Only Applies to Jury Pool (Venire)

A defendant cannot challenge a particular jury (otherwise there could be a claim in every case), only the selection procedure as *systematically excluding* a particular group. *Holland v. Illinois* (1990) (But see *Batson*)

b. Standing for a Fair Cross-Section Claim. *Taylor v. Louisiana* (1975)

- Defendant need not be a member of the excluded group (part of the whole community interest in jury trial right)
- Women are sufficiently numerous and distinct from men.

c. Standards for Prima Facie Violation. *Duren v. Missouri* (1979)

1) Group excluded is a "distinctive" group in the community
    a. Defined and limited by some factor
    b. A common thread or basic similarity in attitude, ideas, or experience runs through the group
    c. Community of interests among members of the group such that it cannot be adequately represented if excluded from the jury. *Fletcher* (9th Cir.) ("College students" not distinctive)
2) The representation of the group in the venire is not fair and reasonable in relation to representation in the community
3) This under representation is the result of systematic exclusion

- A truly random selection process from a source including most members of the community is likely to survive a challenge
- Good faith mistakes creating systematic exclusion are still likely to make a valid challenge (Everybody is dead in Hartford)

3. Voir Dire and Court Control

a. Broad discretion and authority is given to the trial judge.

Counsel generally proposes questions, but judge is (generally) free to reject them (judge determines relevance, fact-specific).

b. Must Ask Questions Concerning Prejudice When Racial Issues Key to Trial. *Ham v. South Carolina* (1973)

Black civil rights activist defendant. Petitioner proposed the question. No need to ask question regarding beard because not a constitutionally recognized prejudice.

c. Defendant and Victims Being of Different Races is Not Enough to Require a Question: *Ristaino v. Ross* (1976)

But federal courts generally require such questions *when the defendant requests it*. *Rosales-Lopez* (1981) (Δ did not request it).

d. Must Ask Questions Concerning Prejudice With Interracial Capital Crimes

Turner v. Murray (1986) (But defendant must still request it, and trial judge retains discretion regarding form and number).

e. Screening for Prejudice From Pretrial Publicity

- Trial judge has vast discretion. *Mu'Min v. Virginia* (1991)
- Would need to question defendants individually in order to assess the nature of their exposure.
- An onerous burden that is federally, but not constitutionally, required.
- Marshall's Dissent: You cannot assess a juror's impartiality without first establishing what the juror already knows about the case.
- Kennedy's Dissent: En masse questions cannot possibly find impartiality.

f. Allowing Voir Dire Concerning Juror's Feelings on the Death Penalty *Morgan v. Illinois* (1992)

- Prosecutor allowed to "death qualify" jurors but Δ not allowed his question of whether jurors would faithfully consider mitigating circumstances. Uneven!
- Jurors swearing they'd follow the law is not enough to uncover unconscious biases.
- Insufficient to satisfy the Due Process Clause.

g. Voir Dire Required Under Federal Supervisory Power

1) Where a case has racial overtones
2) Case concerns matters where local community is known to harbor strong feelings
3) Where testimony from law enforcement is important and likely to be overvalued

4. Challenges for Cause

Specific biases permitting a challenge are defined by statute.

a. *Whitherspoon v. Illinois* (1968)

- Whitherspoon Excludable: those expressing an absolute refusal to impose the death penalty.

- Cannot exclude those who simply express reservations about the death penalty if they say they will still be able to honor their oath as a juror (Would produce a juror uncommonly willing to condemn a man to die).
- Invalidated death sentence, but did not reverse the guilty verdict

b. *Lockhart v. McCree* (1986)

- Witherspoon excludables are not a cognizable group.
- No showing that any of the jurors were not impartial, just cuz they were death qualified
- Marshall's Dissent: Creates prosecutor incentive to seek death penalty to increase likelihood of guilty verdict.

c. *Wainwright v. Witt* (1985)

- Conviction affirmed even though juror excluded for cause
- Would the juror's views prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath?
- Court gives deference to the record and the decision of the trial judge. Δ Counsel should have tried to rehabilitate the juror, tried to build a record

d. Effect of Witherspoon Violation: *Gray v. Illinois* (1987)

- Juror improperly excused for cause, appears to call for per se reversal, even though prosecutor had unused peremptory challenges he said he would have used.
- But failure to excuse juror for cause (would automatically vote for capital punishment) when it is corrected by a peremptory challenge is harmless error. *Ross v. Oklahoma* (1988) (no constitutional right to a peremptory challenge and no evidence that leftover jurors were not impartial).

e. Jurors Who Must Be Excused for Cause

Not whether a disability exists (no presumed bias, e.g. government employees), but whether juror can fairly assess the evidence in spite of it (do they show bias and equivocate about ability to overcome it?)

1) Bias
2) Taint from pretrial publicity
3) Preconceived notions inconsistent with presumption of innocence
4) Inability or refusal to follow instructions from the court

f. Trial Judge Can Dismiss a Juror For Cause During the Deliberations

E. The Use of Peremptory Challenge

1. Preliminaries

a. Function of Peremptories

- Eliminates extremes of partiality on both sides
- Assures jurors will decide based on the evidence before them

- Facilitates exercise of challenges for cause
- Safety valve when judge fails to dismiss for cause

b. Procedure for Peremptories

Strike system or challenge system. Know what procedures your court uses.

c. No Constitutional Right to Peremptory

U.S. v. Martinez-Salazar (2000) (Δ wasted peremptory on juror who should have been dismissed for cause) (faced with a hard choice between using a peremptory or waiting to appeal, but not the same as no choice) (Scalia concurrence: may not have been able to appeal because of default if he did not use the peremptory to correct the error).

2. Constitutional Limits on Peremptory Challenges

Under *Swain* (overruled) a defendant would have to show that a prosecutor improperly excluded jurors with peremptories in case after case without regard to the circumstances, with the result that no negroes ever served on petit juries.

a. *Batson v. Kentucky* (1986)

- Racial discrimination in selection of jurors harms 1) the accused, 2) the excluded juror and 3) the entire community, whose public confidence in the fairness of our system is undermined.
- Forbidden by the EPC to challenge jurors soley because of race or an assumption that black jurors as a group will be unable to impartially consider the case against a black defendant.
- Marshall's Concurrence: Abolish the peremptory challenge. Prima facie cases will be too hard to show in subtle cases and neutral explanations too easy to offer (and tough to assess motives). And all parties must look past conscious intentions to unconscious biases, which they will not do.
- Burger's dissent: There is no analytical middle ground between for-cause and no-cause.
-Rehnquist's Dissent: Let people select the jury they want. Instincts may be stereotypical, but so long as they discriminate both ways, it'll be fine.

b. Three Part Test to Establish a *Batson* Violation:

1) Opponent of strike makes out a prima facie case of racial discrimination
    a. All jurors from a protective group struck
    b. A disproportionate number of jurors struck from proportion in the venire
    c. Disproportionate number of strikes used against protected group
    d. Perfunctory voir dire
    e. Frequent charges of systematic exclusion in district may be relevant

f. Just need an inference of discriminatory intent from a wide variety of evidence. *Johnson v. California* (2005) ("More likely than not" is too onerous of a standard).

2) Burden shifts to proponent to advance a race neutral explanation
   a. Does not have to be persuasive or plausible, just neutral. *Purkett v. Elem* (1995) (persuasiveness becomes relevant in step 3)
   b. Discriminatory intent should be inherent in prosecutor's explanation. *Hernandez v. New York* (1991) (Bilingual challenge survives over interpreter issue)
   c. A rebuttal of "good faith" is not enough
   d. Relies on judge's experience with the case, prosecutor
3) Judge determines whether opponent has shown purposeful discrimination
   a. Ultimate burden of persuasion is with opponent of the strike. *Purkett*.
   b. Is the reason for striking consistent with jurors he did not strike? *Snyder*.
   c. Pattern of strikes by prosecutor is relevant.
   d. Disproportionate impact is relevant (but not conclusive). *Hernandez*.

c. Third Party Standing for a Batson Violation: *Powers v. Ohio* (1991)

Batson was not just designed to address harm to the accused (white defendant challenging exclusion of blacks), a third party must show:
1) An injury in fact (places fairness of proceedings in doubt)
2) A close relation to the third party (formed during voir dire)
3) Some hindrance to the third parties ability to protect his own best interests (dismissed juror has little incentive to challenge)

d. *Batson* Violation w/ Civil Litigants: *Edmonson v. Leesville Concrete* (1991)

Can make a *Batson* challenge to a private actors racially discriminatory challenge. State action is in enforcing the challenge, arguably a ministerial act but action is likely to be attributed to the state.

SOC Dissent: The peremptory is by design an enclave of private action. This is illogical.

e. *Batson* Violation by Criminal Defense Counsel: *GA v. McCollum* (1992)

A criminal defendant's racially discriminatory use of challenges inflicts the same harms implicated in *Batson*. Perception and reality will be that the court dismissed the juror's because of their race. The prosecutor has third party standing to assert EPC rights of excluded jurors. And a defendant has no constitutional right to peremptories, or to discriminate, and voir dire sufficiently protects right to impartial jury.

Thomas concurrence: We have exalted the right to sit on a jury over the rights of the defendant. This will be damaging to black criminal defendants.

SOC Dissent: Now the action of a person being prosecuted by the state is attributed to the state? Ok, crazies.

f. Denying a strike under *Batson* will still result in harmless error

It is just a peremptory, after all.

g. You Cannot Make Your Own *Batson* violation

h. *Batson* Beyond Racial Exclusions: *J.E.B. v. Alabama* (1994)

EPC prohibits exercise of peremptories on the basis of a prospective juror's gender. Under intermediate scrutiny, there is no substantial correlation between sex and impartiality to justify exclusion. Gender cannot serve as a proxy for bias

SOC Concurrence: This has limited the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes. This rule should be limited to government's use of peremptories.

Rehnquist: The two sexes differ.

i. *Batson* Arguably Should Apply to Any Group Protected Under the EPC (religion case)

F. Preserving the Integrity of Jury Deliberations

1. Anonymous Juries

- An extraordinary remedy (Defendant has a right to a jury of known individuals, a verdict from people he can hold responsible for their actions)
- Risk of prejudice (of course, the proof will be just as prejudical)
- Factors to show:
    - Defendant engaged in acts of violence, intimidation
    - Past corruption acts by defendant
    - Ties to organized crime
    - Extensive publicity in the case

2. Protecting against Judicial Influence on Jury Deliberations

Judges should be careful about answering juror's questions, especially regarding facts, and especially regarding facts not in evidence.

a. Modified Allen Charge

Starting over is inefficient and expensive and breaking a deadlock is not inevitably destructive (and coercion does not necessarily mean verdict is tainted).

1) Don't assume which way jury is leaning.
2) Remind of government's burden
3) Majority *and* minority should reexamine their views

4) Don't abandon your conscientiously held views
5) Free to deliberate as long as necessary
6) Successive Allen charges may be seen to have affect of wearing down dissenting jurors.
7) Appropriate even in sentencing phase of a capital case. *Lowenfield v. Phelps* (1988) (But see Marshall's dissent: noting the costs of a deadlock were not so substantial, cuz verdict still finalized and this was too coercive since two polls were taken by name and numbers of dissenters were whittled down)

3. Protecting Against Jury Misconduct and Outside Influence

- May be disqualified when exposed to highly inflammatory information that will not be brought out in evidence, effecting their impartiality
- But trial court has discretion in determining whether juror is actually biased. *Smith v. Phillips* (1982) (juror has employment application submitted to prosecutor's office).

a. Limitations on Showing Juror Misconduct: *Tanner* (1987)

Court rules based on technical interpretation of FRE, drunken internal misconduct does not come within scope of rule's "extraneous prejudicial information" or "outside influence improperly brought to bear."
- Would disturb finality of verdicts.
- We generally don't scrutinize jury deliberations or verdicts with post-trial information. Let's not open the door here.
- Marshall's Dissent: Defendants have the right to be tried by competent jurors.

b. Lies on Voir Dire

Lying to avoid dismissal definitely suggests partiality, but there may also be harmless lies (such as to avoid embarrassment about your past as a prostitute).

4. Alternate Jurors Exist

G. The Trial Judge and the Right to a Jury Trial

1. Role of the Judge Generally

Crucial. Heavily influential.

2. Selection of Judges

Elected judges suck.

3. Challenges Against the Judge: *Bracy v. Gramley* (1997)

If judge is biased, verdict is subject to a reversal. But must show bias in your particular case, and make a prima facie showing in order to get discovery.

4. Limitations on Judicial Powers

a. Jury Nullification: "Be judges of the law, as well as of the facts."

- Can be wielded for good and for bad

- Enforces jury's role as conscience of the community and shield against abuse of power.
- "Completes the law" with a moral dimension otherwise lacking
- A power, but not a right, of the jury.
- Judges have duty to prevent a disregard of the law but they can't delve too deeply into juror motivations (though they can delve into conduct). This is impossible.
- Racially based nullification: "Immoral and self-destructive for black people." – Randall Kennedy

b. Commenting on the Evidence and Questioning Witnesses

Judges must be very careful here.

c. Instructing the Jury is So Important

H. The Jury Verdict

1. Polling the Jury

2. Verdicts Valid Even if Inherently Inconsistent

Dunn v. United States (1932) (Unclear "whose ox has been gored.)

3. Defendants Can Use Inconsistent Defenses

Mathews (1988)

4. Interrogatories not Generally Used But Necessary and Appropriate in Some Cases

5. Lesser Included Offense Instructions

Each statutory element should be present in the more serious offense. *Schmuck* (1989)

I. Waiver of Jury Trial

Singer (1965) (subject to consent of judge and prosecutor).

XI. CRIM PRO CAR CASES

XII.

XIII. NON FOURTH AMENDMENT EVENTS

A. Individual Stops Absent Particularized Suspicion

An officer cannot, absent reasonable suspicion, stop a car and detain the driver to check his license and registration. *Prouse* (1979) ("misery loves company" rationale that helped birth suspicionless checkpoints)

B. No REOP From Drug Dog Sniff During Car Stop. *Illinois v. Caballes* (2005).

No legitimate privacy interest against government conduct that only reveals possession of contraband (the sniff was not a search). The car was lawfully seized for a traffic offense and the duration of the stop did not exceed that purpose.

C. Encounters after a Traffic Stop. *Ohio v. Robinette* (1996)

Robinson validly consented to a search after his traffic stop was ended, there is no bright line rule that suspect must first be told the stop is over and he's free to go, look at the TOC.

XIV. THE CAR *TERRY* STOP

A. Bright Line Rules Under *Terry*

1. In the Course of a Legal Auto Stop, Officers Have an Automatic Right to Order the Driver Out of the Vehicle

Mimms (1977) (despite the even lesser degree of danger posed by a routine traffic stop, the court balanced the safety interests embodied in the precautionary policy against the *de minimis* additional intrusion).[i]

2. *Mimms* Rule Also Applies to Passengers

Maryland v. Wilson (1997) (passenger has greater liberty interest but they pose a greater potential danger to the officer and the intrusion is still *de minimis*).

a. May Make a Limited "Frisk" of Dashboard to Obtain the VIN when Not Visible

New York v. Class (1986) (No REOP in VIN (a significant thread in web of auto regulation)

3. Protective Terry Searches Beyond the Suspect's Person

a. An officer may make a protective search of the entire passenger compartment of a car with reasonable suspicion of danger.

Michigan v. Long (1983) (where there might reasonably be a weapon).

b. Has Allowed for Expansive Searches in Drug Cases

Lower circuits relied on *Long* to allow for a search of a locked glove compartment[ii] or frisking all the passengers of a car[iii] when the suspicion was of drug activity, because drugs equal guns.

XV. THE ARREST

A. Can Arrest with Probable Cause that Any Offense Was Committed. *Atwater.*

1. Common Enterprise in Cars: *Maryland v. Pringle* (2003)

When officer has PC a (drug) crime is committed, reasonable to infer passengers in car engaged in a common enterprise (when nothing singles out any particular individual) and has sufficient PC to arrest all passengers for the crime. *But see Ybarra*.

B. Bright Line SITA Rules With Automobiles

1. May Search an Automobile and all Containers Therein After Removing and Arresting its Occupants. *New York v. Belton* (1981)

2. May Search the Automobile Even When Officer First Makes Contact with Suspect Outside of the Auto. *Thornton v. United States* (2004)

(so long as they are a "recent occupant"… a custodial arrest is a fluid thing).[iv]

C. Search Incident to a Summons is Not Allowed

Knowles (1998) (but may still exercise traditional *Terry* powers).

D. Consent Searches: Scope Defined by Object of Search: *FA v. Jimeno* (1991)

General consent to search the car for drugs included consent to search containers in the car that might contain drugs.

XVI. SEARCHES OF AUTOMOBILES AND OTHER MOVABLE OBJECTS

A. The Automobile Warrant Exception: The Carroll Doctrine (1925)

Police may search an automobile without a warrant if they have probable cause that it contains evidence of criminal activity.

1. Different from a SITA but Essentially Redundant Powers[v]

2. Doctrine Began on Theory of Exigency, Evolved to Theory of DEOPs

California v. Carney (1985): Auto exception can rest on either an exigency or DEOP rationale. But exigency is not required.[vi] *MD v. Dyson* (1999). Though some state courts have maintained an exigency requirement for warrantless automobile searches.

3. Exception Can Be Invoked Even When Car is Immobile

Chambers v. Maroney (1970) (car had already been impounded by the police)[vii]

B. PC to Search Car Doesn't Allow Search of Passengers. *Di Re* (1948)

C. Movable Containers and Cars

Mobility of footlocker justifies a warrantless seizure with probable cause, but not a warrantless search (absent additional exigency). *United States v. Chadwick* (1977).

1. Movable Containers Found in Cars. *Ross.*

If probable cause is to search the entire car, may search all containers in the car. *Ross* (1982) (paper bag while searching for drugs).[viii]

2. Movable Containers Placed in Cars. *California v. Acevedo* (1991)

Overruling *Sanders*, says that you can search a container in a car (with probable cause but no warrant) even if you do not have probable cause to search the entire car.

3. Property of Passengers in the Car. *WY v. Houghton* (1999)

Probable cause justifies the search of every part of the vehicle and its contents that may conceal the object of the search, even if it clearly belongs to the passenger.[ix] Passengers also have a DEOP and their property is subject to the *Ross* rule Dissent: Whether or not he needed a warrant, at the very least he needed probable cause to search the purse.

4. Container Searches Not Subject to Additional Temporal Restrictions

U.S. v. Johns (1985) (containers discovered in course of vehicle search are only subject to temporal restrictions also applicable to the vehicle, unlike a *Chadwick* footlocker)

D. Standing: A Person Must Have Had a REOP to Challenge a 4A Violation

Rakas (Passengers had no REOP in the car that was illegally searched).

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[i] Marshall Dissent: Terry requires a nexus between the reason for the stop and the need for self-protection requiring further intrusion.
[ii] *Brown* (8th Cir. 1990)
[iii] *Sakyi* (4th 1998)
[iv] Scalia's Concurrence (*Belton* searches should only be justified where reasonable to believe relevant evidence will be found in the car).
[v] Especially given *Atwater* and *Robinson*.
[vi] And see *Coolidge* (1971) where the Court required exigency, but that case has mostly been distinguished away to just mean a warrant should be obtained when officers had a clear opportunity to do so before seizing the car.
[vii] (Harlan's Dissent: a temporary immobilization of the car affecting possessory interests would be better than an immediate de facto invasion of privacy interests).
[viii] Previously if probable cause is only for that container in a car, may only seize the container. *Arkansas v. Sanders* (1979) (briefcase in trunk of taxi). Problem is it creates a perverse incentive to be more generic with your probable cause.
[ix] Relied on *Zurcher* for notion that you only need probable cause that evidence is in a location, not that it is associated with a particular person.