

Introduction

Investigative criminal procedure - rules that govern police conduct

Accusatory criminal procedure - rules that govern as you go through court system from "bail to jail"

Powell v. Alabama - Scottsboro trial

- Nine young black men were riding a train, got in a fight with two white men, later when they got off, they were accused of raping two white women (prostitutes). Almost got lynched.
- Fast trial, no lawyers until morning of trial (attorney was someone who didn't know anything about the case), sentenced to death.
- Attorney created a record for the appeal.

THE CRIMINAL PROCESS

There is a lot of discretion!

- Crime
- Pre-arrest investigation (this often doesn't happen) - police use a lot of discretion
- Arrest
- Complaint - evaluated on paper, there is no hearing. Judge determines by probable cause if there was enough grounds for arrest.
- First appearance - advised of rights, opportunity to post bail, told what your charged with
- Preliminary hearing or grand jury -
 - Preliminary hearing - required in CA
 - Judge has to decide that there is probable cause that D is responsible. No jury. Witnesses.
 - Grand jury - required in federal
 - 23 community members. Jury determines if there is probable cause. If there is, they indict.
 - Prosecutor presents evidence. No defense attorney and no judge.
- Arraignment/set trial date
- Plea bargain - 90% end in a plea bargain
- Pretrial motions - most common is to suppress evidence
- Trial
- Sentencing
- Appeals
- Collateral challenges (habeas corpus)

Procedure:

Trial court --> state appeals --> state supreme court --> USSC

- cert

OR

Trial court --> federal court --> circuit court --> USSC

- Habeas corpus - have to have federal Constitutional issue

INCORPORATION DOCTRINE

- **Selective incorporation** - but could have incorporated all or none of the Bill of Rights.
- ★ Jot for jot? Yes. State protection must be interpreted the same way as federal. State can give more rights though.
- **Standard** to determine if right will be incorporated: fundamental principles of liberty and justice; basic in our system of jurisprudence

Duncan

- Black kid slapped arm of white kid. Wanted a right to a jury trial.
- Does 6th amendment right apply to state
- **Holding: jury trial is fundamental to scheme of justice and therefore it's good enough for incorporation.**
- Concurrence: argued for incorporation of all of the Bill of Rights; Dissent: leave the states alone

Rights that aren't incorporated

- Right to not quarter soldiers
- ★ No right to grand jury - this is the most common exception
- No right to jury in civil cases
- No rule against excessive fines

Right to bear arms was just incorporated.

RETROACTIVITY

General rule: new constitutional rights are NOT retroactive. Appeal has already been decided, don't get benefit of new rule.

Exceptions:

1. **Narrows government's power to punish**
 - i.e. Lawrence
 - i.e. Loving - government didn't have the power to punish people in cross racial relationships
2. **Watershed rule of procedure - fundamental fairness**
 - i.e. Gideon - right to counsel - the only time in history this has happened

Searches & seizures - 4th amendment

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause."

QUESTIONS:

- Was it a search?
- Was there probable cause?
- Was there a valid warrant?
- Was there a valid exception?

A. Introduction

B. What is a "search"?

- i. Legit. privacy interests
- ii. "Non-searches vs. Searches"
 1. Open fields vs. curtilage
 2. Aerial searches
 3. Thermal imaging
 4. Trash searches
 5. Monitoring public behavior
 6. Beepers & tracking devices
 7. Consensually monitored calls
 8. Dog sniffs
 9. Manipulating bags
 10. Field tests
 11. Private searches
 12. Foreign searches

C. Probable Cause Requirement

D. Warrant Requirement

i. Required information

1. Probable cause
2. Specificity of things to be seized
3. Describing place to be searched
4. Anticipatory warrants

ii. Executing Search Warrants

1. Timing
2. Third-party warrants
3. Conduct during search
4. Knock & Announce req.
5. Wrong addresses
6. Private assistance & media ride-alongs
7. Sneak & Peek warrants

iii. Role of Magistrate

E. Exceptions to warrant requirement

- i. Search incident to arrest
- ii. Hot pursuit
- iii. Plain view
- iv. Plain touch

- v. Automobile searches
- vi. Inventory searches
- vii. Border crossings
- viii. Checkpoints
- ix. Consent searches
- x. Probation and parole searches
- xi. Administrative searches
- xii. Drug testing
- xiii. Govt. Employment context
- xiv. Exigent circumstances
- xv. Community caretaking

F. Seizures and Arrests

- i. Is arrest warrant required?
- ii. When is a person seized?
- iii. Stop & Frisk ("Terry Stops")
 - 1. Rationale
 - 2. Scope of search
 - 3. Reasonable suspicion
 - 4. Automobile stops
 - 5. Informant tips
 - 6. Evading officers
 - 7. Profiling suspects

G. Electronic Surveillance

History: Redcoats did random searches of entire neighborhoods.

What location is covered?

- 4th Amendment doesn't apply to searches outside of U.S. even if conducted by American law enforcement.

What people are covered?

- Citizens
- Legal aliens
- Not sure about illegal aliens - right now it seems to cover them

Whose conduct is covered?

- Only government action
- Does not cover searches by private individuals or private employers (unless they are working for the government)

Two approaches to the 4th Amendment:

1. Searches only need to be "reasonable" and if there is a warrant, it must be based upon probable cause
2. Presumption that searches must have a warrant to be reasonable, but there will be exceptions - COURT TENDS THIS WAY.

What is a Search?

Need a search to trigger 4th amendment.

Pre-Katz - Concept of search = physical trespass; Eavesdropping wasn't a search

Was there a search:

- Was there a subjective expectation of privacy?
- Was this expectation of privacy reasonable?
- Problem: the more they take away your rights, the more they can argue that people don't have a reasonable expectation of privacy.

i.e. **Katz - listening in on phone call without physical trespass is a search.** Man in public telephone booth making illegal deals. Police put a listening device near phone booth to apprehend him. This was a search.

- Purpose of 4th amendment is to protect privacy of people, not just places

NON-SEARCHES VS. SEARCHES

Open fields are not searches b/c no legitimate expectation of privacy in an open field.

Exception: **Curtilage**

What is a curtilage?

Four factors:

1. How close to home?
2. Within an enclosure surrounding the home?
3. Nature of use?
4. Steps taken to protect area from observation by passers-by

Hypo:

- Cops get information that pot is growing in a man's field
- No trespass sign, a fence, and someone yelled at them to not trespass
- Open fields are ok, therefore what officers did wasn't even a search

Hypo:

- Police suspected that a guy had a drug factory in his barn.
- Entered barn - could smell the chemicals
- Holding: barn outside curtilage of house

Aerial surveillance not considered a search.

- When you can see something without invading the property, it's not a search.
i.e. if there is a big hole in the fence.

Hypo:

- Man has really good fences, so cops use an airplane to fly over house and can spot MJ plants from plane.
- Holding: no search -- Use Katz test
 - Subjective expectation of privacy - yes - 10 ft fence
 - Reasonable expectation of privacy - no - anyone can fly over at anytime, cops weren't doing anything illegal

Case

- Aerial flyover - 400 ft to inspect a backyard
- There were a few panels missing on the roof of the marijuana greenhouse
- Katz test
 - Subjective expectation of privacy - yes, there was a roof and fence and a sign
 - Reasonable expectation of privacy - no, the helicopter didn't violate FAA regulations
- Concurrence:
 - We should ask if we expect people to fly at that height

What about **drones**? Reasonable expectation of privacy?

1. Argument that it's a search
 - Not accessible to public
 - Not technology accessible by all departments
 - Common for people to go on leisurely flights. Not common for people to ride on a drone.
2. Not a search
 - Drone is flying within its legal height
 - The expectation of privacy is getting lower and lower

Thermal imaging

Kyllo

- Cop suspected that home had indoor marijuana farm. High-intensity lamps. Used thermal imager.
- Katz
 - Expectation of privacy? yes
 - Was expectation of privacy reasonable?
- Government's argument
 - Off the wall technology. We're seeing what's going on outside.
 - Didn't see private activities, just heat waves
 - But could reveal that woman goes to her sauna every night at 10pm
- Holding: was a search
 - Essence of privacy is in the home, fear of new technology, capable of showing intimate activities
- Limitations on expanding searches:
 - Have to involve home
 - Has to involve technology not in general use
 - Capable of showing intimate activities

What about other types of technology?

- Binoculars
 - Wouldn't be considered a search b/c already open for public viewing and they are in general use.
- Night vision scope
- Retinal scanning at an airport
 - Not a search - people don't expect privacy at airports anymore. Not in a home. This is key.
 - Search - very different to seeing someone's face. Retina is deep with the eye/brain
- Flashlights, powerful camera lenses, telescopes, face-recognition technology, retinal scanning, scanning license plates, etc.

Trash searches

- Trash is readily available to animals, children, scavengers, snoops, etc. - therefore, no reasonable expectation of privacy.

Hypo:

- *Officers suspected drug use & dealing*
- *Officer asked trash collector to hand over trash*
- *Found items indicative of narcotics use.*
- *Holding: not a search*
- *Dissent:*
 - *Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior*
 - *Public could also burglarize your house*

Public areas

- Does public have access?
- Is there a reasonable expectation of privacy?

Little gaps on a bathroom door - police can look b/c open to the public

Homeless people: Can police search any homeless person since they are always in public spaces?

- Privacy in the person, not the place
- Phone booth which is a public place is considered private, so why not the homeless persons space?
- Courts have held both ways
 - It's their sacred home, so it's a search
 - It's a public space, so it's not a search

Beepers and tracking devices

Hypo:

- Beeper put in container of chloroform. It gave officers info about location of a cabin.
- **No search b/c only following to location** - could have accomplished same thing by following on public highways.

Hypo:

- Beeper went within a locker into a home.
 - Analogized to sending an officer inside the home.
 - Even though didn't get information about the inside of the home, just learned where home was.
- **search b/c following inside location**
- Concurrence - don't focus on if going in a house, focus on whether they have an interest in the container that is going into the house

Now, all cops have to do is turn off the beeper before it enters the house.

Consensual electronic surveillance

- In person or by telephone
- Not a search - No reasonable expectation of privacy

Hypo:

- *Phone conversation, a police listens in and records it*
- *An individual might have an expectation of privacy, but not reasonable to society, therefore not a search*



It's not a wiretap as long as one side of the conversation agrees

- i.e. Scott Peterson calling mistress to tell her that he killed his wife. She can give that to police.
- But, state laws might cover this, even though Constitutional

Financial records

- Bank records - Other people besides government see records, therefore gov can see records without it being a search.
 - The legislators have responded by making a federal law. Still Constitutional, but illegal under federal law.

Hypo:

- *Woman was robbed and stalked*
- *Police got telephone company to install a pen register (caller ID) at its offices to record the numbers dialed from the suspect's home.*
 - *Couldn't record his words. (If they listened in, they would need a warrant)*
- *Not a search b/c telephone companies can get this information at anytime*
- *Dissent: even telephone conversation itself is transmitted by telephone company equipment*

Congressional statute: need a court order (don't need a warrant) to install pen register

Carnivore and computers

Carnivore - within every computer, can provide info on all emails sent and websites visited
This is treated like a pen register. Just need to get the same court order.

- Rationale: if ISP people can know, so can the government

Beeper hypo: cops seize a beeper, see a phone number, they can use it.

- What about when they search the history of phone numbers? It's a search.

Cell phone text: police seize a cell phone, text comes up, police can look at it

- What about prior texts? It's a search.

What if you rent a hotel or storage space with a false name and then overstay?

- Reasonable expectation of privacy depends on how you got that expectation.
- Not a search.

Dog sniffs

- Considered sui generis b/c they only alert on contraband - **Don't have a reasonable expectation of privacy in contraband.**

Dogs sniffing bags: not a search

Caballes

- Officer 1 pulled over respondent for speeding.
- Officer 2 heard over the radio about the pull over and brought K9.
- Not a search
- Was this an illegal **seizure**? O1 did hold the car until O2 got there, but didn't hold the car any longer than they needed to, so no seizure.
- Was dog sniffing a **search**?
 - You have a reasonable expectation of privacy in your car. But, dog only showed existence or non-existence of contraband. Not a search.
 - Distinguished from Kyllo thermal imaging
- Dissent: Dogs aren't infallible. Really was a seizure b/c held for too long.

hypo: if we had dogs that were able to alert on multiple types of scents that aren't contraband, would be a search b/c can distinguish more than just presence or absence of contraband.



If they held suspect longer than they needed to get the dog, it would be a seizure.

Manipulation of bags in public transit

- Undue fondling of luggage is a search.
- If the squeeze is the same as what others in public do, not a search.

Hypo:

- Border patrol agent checked immigration statuses of people on board. Squeezed the luggage.
- Unlike dog sniffing b/c can sense both contraband and non-contraband
- Katz analysis.
 - Subjective expectation of privacy? Yes
 - Is it reasonable?
 - Yes. The level of squeezing was too much and it was therefore a search.

Field testing of drugs

Look at how much the government's testing exceeded the scope of the private testing.

Hypo:

- Under company policy, private freight carrier inspects damaged packages
- Employees examined a damaged package and saw cocaine. Placed substance back in the box.
- Federal agent chemically tested it and confirmed that it was cocaine
- Two steps:
 1. Removed powder from the bags within the tube - not a search
 - ★ No privacy interest here b/c private employees had examined it and made it available for inspection
 2. Chemical test of powder - not a search
 - ★ Only discovers whether it's contraband.
 - Compared to dog sniffing.

Urine testing is considered a search b/c has to come out of body.

Private searches

Not covered by 4th amendment unless at behest of government.

Rule: search by a private citizen becomes a governmental search if the gov coerces, dominates or directs the actions of a private person.

Hypo:

- D, mechanical engineer, charged with attempted statutory rape & interstate commerce porn
- FBI got D's private employer to investigate the computer he was using. Found sexually explicit emails.
- This was violation of 4th A. rights

Hypo: What if employer conducted search on his own initiative? If he had run into these files and turned them over to the police, no 4th Amend violation.

Foreign searches

- Surveillance conducted in foreign countries is not a search.

?

Castrillon

- Conspiracy to import cocaine
- Issue: is wiretap evidence admissible?
- 4th A doesn't apply to searches outside of the US of aliens who do not have a previous significant voluntary connection to the US

Summary & review

Law can factor in to show reasonable expectation of privacy. i.e. if a behavior is illegal, tends to show that there shouldn't be an expectation of privacy.

Theories as to why "no search"

- Conduct or remarks are open to the public (i.e. fly overs, trash, bank records, etc.)
- Test only determines whether substance is contraband - no reasonable expectation of privacy in contraband (i.e. dog cases, field tests)
- Home?
- Legality?

REVIEW QUESTIONS:

Which of the following constitutes a "search" under the 4th Amendment?

1. Police take a DNA swab of the inside of your mouth.

- Search. If they don't go inside my mouth...
- 2. **Undercover police ask you to seal an envelope so they can get a DNA sample.**
 - No. Subjective intent doesn't count.
- 3. **Police peer into your backyard through a hole in your fence.**
 - No.
- 4. **Police climb over your fence to inspect plants you have been growing 100 feet from your home.**
- 5. **Police peer into your windows from the street.**
 - No search
- 6. **Police sneak into your backyard and peek into your windows.**
 - Search b/c curtilage
- 7. **Police hang glide over your home to see plants growing right outside your backyard.**
 - No search - not common
- 8. **Police photograph through your windows with a telephoto lens.**
 - No search. Common technology
- 9. **Police pose as a child in a chat room discussion and read your chat room communications.**
 - No search b/c info out in public
- 10. **Police request records from your utility company to determine if you are using an amount of electricity that would indicate you are growing marijuana.**
 - No search.
- 11. **Police open your mail, read it, and then reseal it and put it back in your mailbox.**
 - Search b/c can reasonably expect that mail comes in tact.
- 12. **Police hold your mail up to the sun to see if they can read its contents.**
 - No search b/c anyone can do it.
- 13. **A police officer poses as a bellhop at a hotel so he can carry your luggage and determine from its weight whether your luggage is likely to contain missing, stolen objects.**
 - No search b/c not uncommon fondling of luggage. No reasonable expectation of privacy.
- 14. **Police smell your hands to determine whether you have been handling marijuana.**
 - No search b/c anyone can smell your hands.
- 15. **Police plant a tracking device on your car and follow your driving patterns.**
 - No search b/c driving out where public is.
- 16. **Police plant a tracking device in your coat pocket to follow your movements.**
 - If they are just following you, no search. If they follow into your home, search.
- 17. **Defendant's car is parked in the school parking lot. Police officers have a dog sniff the car for drugs.**
 - No search.
- 18. **Defendant's car is parked in the school parking lot. Dean Gold has campus security dogs sniff the car for drugs.**
 - No search. Private individual.
- 19. **Bradley is seen at the beach with an open jar of white powder on his towel. The county lifeguard chemically tests the powder for drugs.**
 - No search b/c exposed to public --> lawful search; testing it --> ok b/c only tests contraband or not contraband
- 20. **Suzanne takes the train to San Diego for a job interview. A police officer is also on the train. Because Suzanne is hogging the luggage rack, the officer starts squeezing Suzanne's bag so he can share the rack with his luggage. When he squeezes the bag, the officer feels a brick of heroin.**
 - No search b/c normal squeezing.
- 21. **Jenna visits friends in New Mexico. Unbeknownst to her, her friends have become DEA formants. They are wearing concealed tape recorders and tape a conversation in which Jenna says she will sell drugs to pay her law school tuition.**
 - Not a search b/c consensual.
- 22. **Police plant a tracking device on Harbik's car. It tracks Harbik to his house.**
 - No search.
- 23. **Police plant a tracking device in Harbik's shoe. It shows every room Harbik goes into in his home.**
 - Search b/c going through home.
- 24. **Police suspect Max of child molestation. They plant a tracking device on the camera Max uses to take photos of children. The camera tracks Max through city streets and every room of the preschool in which Max works.**
 - No search.
- 25. **Private security guards call the police and say they have seized a plastic baggie from Molly's purse. They put the baggie back in the purse before the police arrive. The security guards give the police the purse. The police open the purse and test the contents of the bag for drugs.**
 - No search.
- 26. **Spencer is an inmate in jail. Prison officials enter his cell and read his personal journal.**
 - No search.

Probable Cause Requirement

If there is a search, there must be probable cause in order for the search to be valid under the 4th Amendment.

- There are a few types of searches where probable cause isn't the standard. (Terry Stops, border patrol - don't need any cause, and random drug testing & sobriety tests - don't need any cause)
- When a cop wants a warrant for a search, they fill out an affidavit laying out their credentials and why they believe there's probable cause.

Standard is the same for arrests.

Aguilar-Spinelli Standard - original standard, some cts still use it

- Show that informant is credible
- Show source of information

Hypo:

Police get lots of anonymous sources.

Had to corroborate on all legal aspects as well as all illegal aspects.

Gates

- Anonymous tip about couple who dealt drugs. Very factual, specific tip. Flying from IL to FL. Driving back. dates, amount of drugs they have, etc.
- Police put in surveillance that corroborates a lot of the info.
- Under Aguilar-Spinelli Standard, don't know if source is credible.
- **New rule: Totality of the circumstances** - used in CA & Fed
 - Looking at all circumstances, is it reasonable to think that you will find crime
 - **Corroboration** of innocent facts is enough to suffice with totality of circumstances.
 - Corroboration is the #1 factor to determine totality of circumstances.
 - Aguilar-Spinelli standards are part of totality of circumstances
 - This standard is more practical for officers.
- Totality:
 - Source of info
 - Amount of detail
 - Corroboration - police or others
 - Officer's opinions/experience
 - Nature of information - uniqueness helps. (i.e. unusual to fly to FL and drive back a day later)
 - *Mostly impressed by their ability to predict.*
 - Can't be conclusory.

How does corroboration work?

Hypo - PC was found

- *This was a per curiam "no duh" decision*
- *Phone call from suspect's spurned girlfriend. Says there's more loot behind his home.*
- *Only thing they are able to corroborate is that the motor home is exactly where she said it would be*
- *There was tip, detail, some corroboration, officer's experience, and common sense.*
- **Holding:** *there was probable cause*

Hypo - no PC

- *Citizen call re: stash of MJ in basement of home*

- Citizen recognized odor
- Police confirmed address and cars in driveway
- Probable case?
 - Argument for not:
 - No corroboration on illegal parts, but under Gates you can corroborate on legal parts only.
 - However, here not as much detail, so therefore no probable cause
 - Argument for probable cause:
 - Upstanding citizen who really knew his MJ
- Holding: not enough for PC

Probable cause hypops

1. Police are trying to solve a hit-and-run homicide. They set up a hotline for people to call who have information regarding the incident. One unidentified caller leaves a message that he saw the accident at 6:00 p.m. at the corner of Albany and Olympic. The caller describes the car as a 2006 blue Toyota Corolla with an out-of-state license plate. He also says the car had a fender that was hanging off in the back. He says the driver was 6'2" tall, white, bald and wearing a Dodgers' t-shirt. Police check local garages to see if any cars with that description have come in for repairs lately. The local Toyota dealership says they have had two cars with that description. The owner of one of them was about 5'11", white and bald. Police ask the dealership for that owner's address. They now seek a search warrant for the home and garage of the owner of that car.
 - a. Under the Aguilar-Spinelli test, would there be enough information for probable cause?
 - Don't know this informant at all.
 - No b/c informant doesn't seem particularly credible b/c off.
 - b. Under the Illinois v. Gates "totality of the circumstances" test, is there enough information for probable cause?
 - Most facts were pretty correct. Police corroborated most of the info.
 - What are the odds that this isn't the guy?
2. Police hear that a guy named "Mike" is running a cocaine operation. They stop several known addicts in the area and ask them who sells them their cocaine. All of them say, "Mike." Then, police receive information from one of their long-time informants (who has helped them apprehend at least three other drug dealers) that Mike received a new shipment of cocaine from his source on January 15, 2011. The informant gives the police Mike's home address. Based upon this information, on January 22, 2011, police seek a search warrant for Mike's house. In the application for the warrant, the attesting police officers states that in his experience, it takes at least several days for cocaine to be sold once it is delivered to the drop house.
 - a. Under the Aguilar-Spinelli test, would there be enough information for probable cause?
 - Informant has given info several times before. There is corroborating info.
 - b. Under the Illinois v. Gates "totality of the circumstances" test, is there enough information for probable cause?
 - Staleness problem? No. There is still PC.
3. You are a magistrate. A special agent of the Bureau of Criminal Investigations, with six years of law enforcement experience including drug investigations and training, comes to you for a warrant to search a residence for drugs. The agent provides you with the following information, under oath: two weeks ago, she discovered items associated with methamphetamine production (such as small pieces of plastic and tin foil) in garbage bags taken from the curb of the suspect's home; an informant has said that the suspects are generally known as one of the best "meth" makers in town; a check of state records show that the owners of the house have two prior convictions for marijuana sales.
 - a. Under the Aguilar-Spinelli test, would this be enough information for probable cause?
 - Not with regard to informant. Don't know enough about informant.
 - b. Under the Illinois v. Gates "totality of the circumstances" test, is there enough information for probable cause?
 - Arguable both ways
 - Previously convicted. Info from trash ok to use, of course, and indicates meth production. Reputation helps as well.
 - Meth and mj are different drugs. Foil and plastic are commonly in trashes. Don't know anything about informant.
4. You are a magistrate. A special agent of the fraud bureau with ten years of experience in fraud investigation comes to you for a warrant. He states under oath: he crept into the suspect's yard and looked into the suspect's open windows where he saw the suspect's dining room table covered with checkbooks with different people's names; he has heard that the suspect's neighbors had been complaining that their mail, including checks from the bank, had been recently stolen; he observed a brand, new expensive car in the driveway of the suspects. Based upon this information, and his expert opinion that the suspect's were operating a fraud scheme out of their home, he requests a search warrant for the house.
 - a. Is there enough for probable cause?
5. Police see a group of kids huddling on the playground of a school. When police investigate what is going on, they find a gun and some cocaine. Police seek to arrest and search all of the kids on that part of the playground at that time.
 - a. Is there enough for probable cause?
 - No, too many kids. i.e. Pringle

Staleness and probable cause:

- If the info is old, could kill PC. PC should be relatively fresh.
- Can extend time if the evidence is of ongoing criminal activity.
 - i.e. case with ongoing criminal conspiracy. Affidavit should say, we have this info from a while ago, but show how conspiracies are ongoing, so info is still good.

Pringle - PC for multiple suspects. There is PC to arrest everyone in a car.

- Routine traffic stop for speeding. Found cocaine. Arrested whole car, including Pringle who was a passenger.
- Issue: Was there PC to arrest everyone in car?
- Holding: yes, there was PC.
 - A person's nearness to others independently suspected of criminal activity doesn't, without more, give rise to PC.
 - Chances of any person in the car owning drugs = 1/3
 - Chances of any person in a bar owning drugs = chances were 1/50 or so -- not enough for PC

Hypo: What if there's an 80 year old and a 3 year old and a 20s year old? Can discriminate. Have to arrest all or none.

In determining PC, do not take the officer's motive into consideration. Objective standard.

Whren

- Undercover cops see a suspicious car with temporary license plates. Doing nothing illegal.
- When car notices cops, they speed away.
- They pull them over for minor traffic infraction.
- Issue: Does it matter what police's true motives were?
- Holding: objective standard. Only look at if there were reasonable grounds to stop the car.
 - Don't look at whether other cops would have stopped.
 - Why? Hard to get inside cops' minds to guess their subjective state of mind.
- Problem: encourages racial profiling.

Searches or arrests for the wrong offense

only need PC for any arrest, even arrest was wrong.

- i.e. A man got stopped by an officer for posing as a cop. Good officer. Then got arrested for taping their conversation. Bad officer. Not illegal to tape a conversation with a cop. Even though cop didn't have PC for arrest for recording conversation, there would have been PC for arrest for posing as cop, so that's good enough.

Probable cause for arrest

- Same as PC to search
- Not exact science (i.e. cop can say, in my experience, criminals don't look me in the eye)
- Description can be wrong

- "fair probability"
- PC can be based upon collection of different officers' observations.

Warrant Requirement

Rule:

If warrant --> search, presumptively reasonable

If no warrant --> search, presumptively unreasonable

Required information

- Warrant issued by magistrate
- ★ • Identify person or property to be searched
- ★ • Identify person or property to be seized
 - Specificity: Andresen

Specificity of things to be seized:

Particularity of description - catchall language not good, but not fatal. Officers write these, so often not super technical.

i.e. **Andresen** - Attorney committed fraud. Cops got warrants to search. Included phrase, "together with other evidence of crime at this time unknown." They seized a lot of stuff, but only used about 2% of it in court. Was description of items to be seized particular enough? Holding: Description was specific enough. Search upheld.

- Clear within context of search warrant that it was actually limited.
- Dissent: operated like a general warrant. Didn't use 98% of stuff they got.

Warrant that doesn't describe items to be seized *at all* is invalid. Even if it references a valid affidavit.

i.e. **Groh** - Informant said that petitioner had large number of weapons including grenades, grenade launchers, rocket launchers, etc. Officer put specificity in the affidavit. Magistrate merely incorporated the affidavit by referencing it in the warrant. Holding: warrant was invalid.

- Dissent: they got the functional equivalent of an authorized warrant. The protection was there.

What can be seized?

- Fruits and instrumentalities of a crime
- i.e. bank robbery. Fruits = chedda'; instrumentalities = ski mask, gun, etc.
- i.e. soliciting illicit sex online. Can seize computer. USSC hasn't sorted out how much of the computer can be used.

Describing place to be searched:

Must be with reasonable particularity. Can make mistakes.

Stanford newspaper case - Police can search anywhere to find evidence of a crime

- Police searched Stanford newspaper office to find negatives of photos of a fight in a protest for higher wages for campus workers. Got their search warrant.
- Problem: 1st A. holding: Could search newspaper office.
- But then, legislature responded with Privacy Protection Act of 1900.

Computer searches:

- What is reasonable particularity for items on a computer? Can you rummage through all the files?
- ★ • MUST BE REASONABLE!!! As technology changes, reasonableness must be used.

Anticipatory warrants are permissible.

Hypo: Sting operation - police know that there is going to be a delivery. They are undercover cops, so they have all the PC they need. When the delivery of drugs happens, won't have time to get a warrant. Holding: permissible. Standard for warrant is PC.

This is just a different basis to analyze PC.

Executing a warrant

Timing:

- Warrant generally good for 10 days
- Should be served during daytime (6am - 10pm)
 - Exception: drug cases - depends on facts
 - Only have to start between 6 and 10. Don't have to finish.

Reasonableness in **scope** of search is determined by what they are looking for.

- Hypo: search warrant for an elephant. Can search wherever it would be reasonable to find it.
- Hypo: search warrant for a stolen ring. Could search anywhere b/c it could reasonably be anywhere.

3rd party warrants - balance intrusiveness vs. safety needs

i.e. **Muehlerv. Mena** - Cops believe a gang member occupies a house. Investigating a drive by shooting. Woman detained in handcuffs. Confined to garage for 2-3 hrs. Ask about her immigration status. Issue: Was this an impermissible search? Holding: No. Case by case basis. Balance how intrusive vs. safety needs.

Knock and announce

- **4th amendment requires knocking and announcing.**
 - Knock & announce was a CL notion when 4th A was drafted.
 - Don't need permission to enter.
- **Exceptions:**
 - Threat of violence
 - Suspect might flee
 - Evidence might be destroyed
 - i.e. Suspect was in the shower. Police K&A and waited 15-20 seconds. 15-20 sec wait is enough if they had reason to believe that waiting longer would provide the opportunity for the suspects to destroy contraband.
- If magistrate orders K&A, cops can override this if circumstances are as above.
- There must be a case-by-case analysis
 - i.e. Legislature made a blanket exception to K&A requirement for drug cases. Holding: no blanket exceptions. Must do case by case analysis. There was enough for an exception in this particular case. Two concerns with blanket analysis:
 - Exception over-generalizes
 - Creating exception in one category can be extended to others.

Exclusionary rule doesn't apply to evidence obtained when knock and announce rule was violated.

Mistakes made while executing warrants

- **Honest, reliable mistakes are tolerated**
 - i.e. Cops executing search warrant for a 3rd floor apartment. Didn't realize that the 3rd floor had two apartments. Accidentally went in the wrong apartment. This was ok.
 - i.e. Officers entered home with warrant for arrest of African Americans. Found Caucasian residents naked in bed. Made them stand at gunpoint for 2-3 minutes. Realized mistake, apologized, and left. This was ok.

- Very possible that people they were looking for were elsewhere in the house.
- When they realized they were wrong, they left immediately and they apologized.

Media ride-alongs & private assistance

- Media ride-alongs violate the 4th A. Have to have a reason to go along with the cops.
 - i.e. **Wilson v. Layne** - Cops brought along media for arrest. Wanted the good publicity of the arrest. Just there to report, not to help in any way. Suspects were in bed and not wearing much. Violation of 4th A.
 - Media cop shows - can show that cops acted well.
- Private assistance with searches is Constitutionally permissible.

Use of force

- Any force that is reasonable is allowed
- Battering rams allowed
- ? • Stungrenades allowed - even when they force entry into residence and a child is present.

Sneak and peek warrants

- ? • When suspect isn't home and a search is executed, don't need to leave behind any notice of search.
- Under Fed Rules of Crim P - can delay, almost indefinitely, leaving warrant after full search.

Role of Magistrate

- Doesn't have to be a lawyer (b/c based on common sense)
- Must be neutral
- Cannot be a prosecutor
- Magistrate cannot be paid per warrant issued

Exceptions to Warrant Requirement

Burden shifting:

Warrant --> it's presumed a good search. D has burden of showing that the warrant is invalid.

No warrant --> it's presumed invalid. Gov has burden of showing that an exception to the warrant requirement applies.

Multiple exceptions can apply in one fact pattern.

Exceptions to warrant requirement:

1. Search incident to arrest
2. Hot pursuit
3. Plain view
4. Plain touch
5. Auto searches
6. Inventory searches
7. Border crossings
8. Checkpoints
9. Consent searches
10. Probation and parole searches
11. Admin searches
12. Drug testing
13. Government employment
14. Exigent circumstances
15. Community caretaking

No PC	PC
Inventory searches	Search incident to arrest
Border crossings	Hot pursuit
Roadblocks and checkpoints	Plain view
Consent	Plain touch
Probation & parole	Automobile search
Administrative searches	Exigent circumstances
Drug testing	
School searches	
Community caretaking	

Why don't we just ask what was reasonable to the officers? Don't want officer to have to discern every time. Want them to have concrete exceptions.

Search incident to arrest

Analysis:

- Do you have lawful arrest?
 - Is it a search of person and grab area?
 - If not in grab area, need another exception: protective sweep (reasonable suspicion).
-

- **Once an arrest has occurred, can search**
 - **The person AND**
 - Can search person and all containers on them:
 - Hypo: find cigarette box in pocket. Can look inside.
 - Hypo: find iPhone in pocket. Can they search texts and stuff?
 - **The grab area** (including purses, passenger compartment)
 - Grab area = within immediate control and he might gain it.
- Rationale = safety
- i.e. **Chimel** - D burglarized coin shop. Went to home to arrest and searched entire home for 45min-1hr after suspect was handcuffed. Issue: whether arrest could justify a search of the whole home. How far does the "grab rule" go?
 - Person? Yes
 - Cupboard? Yes even though realistically can't access it
 - Bag next to him? Yes
 - Entire home? No doesn't extend to entire home.
 - Entire room suspect is in? Yes
- Hypo: what if arrestee wanted to go to another room? Police can follow and search each room he enters.

Search incident to arrest applies even when its safety rationale doesn't apply.

i.e. D was arrested for driving with an expired license. Officer searched him and found heroin. Arrest for an expired license doesn't pose safety risks. But, can still search person or car grab area (passenger compartment).

There must be an actual arrest in order to have a search incident to arrest.

i.e. Stopped D for speeding, but didn't arrest him even though they could have. Did full search of car. Found drug stuff. Invalid b/c no arrest. Problem: now cops will arrest more often.

- Though, even without arrest, can order out of car and pat down.

Hypo: They arrest you in kitchen, take you to squad car, go back in and search kitchen. Is this allowed? Courts are split:

- Can do it: If primary concern is officer safety, encourage them to remove arrestee before searching.
- Can't do it: Not the theory. People locked in squad car aren't going to pose safety issue or destroy evidence.

Pretext stops are ok if there is probable cause to arrest. Focus on objective facts, not officer's state of mind.

Timing: Can start search before saying, "you're under arrest." Timing of search is flexible.

Protective sweep: Can conduct a protective sweep when there is reasonable suspicion of danger (person could be there). Must be a quick inspection.

i.e. Cops got arrest warrant for a bank robber who had worn a red jogging suit while robbing. Found him and arrested him. Did a protective sweep of the basement where he had emerged from to make sure no one else was down there. This was definitely not within his grab area.

★ What if they are at a home b/c of a domestic dispute, but haven't made an arrest and aren't planning on making one? Can still do a protective sweep if there is reasonable suspicion of others in the home or other danger.

Plain view: Can seize items in plain view

i.e. same red jogging suit case. While doing protective sweep, saw jogging suit sitting out and seized it b/c of plain view doctrine.

Hypos

1. Police arrest Kate for stealing Girl Scout cookies. They arrest Kate in her kitchen. After they have handcuffed her, they search cabinets (4 ft away) find thin mints and mj.
 - Search incident to arrest exception applies
 - Lawful arrest
 - Therefore allowed to search anything within immediate control & grab area
 - Cabinets were in grab area
 - Thin mints are evidence of crime
 - Saw contraband in plain view - can seize it as well.
2. Hear noises in attic while arresting her. Find lots of rats and mj plants
 - Protective sweep
 - Reasonable suspicion that a person would be there. Rat noises sounded like people.
 - Mj was in plain view
3. Kate asks for change of clothes. Goes to bedroom. Open drawers and closets while she's in bedroom. Find more mj.
 - Grab area - Police can grab from where she moved from
4. Driving Kate to station. Elvis drives by with car windows tinted in violation of vehicle code. Deciding whether to arrest him, conduct a full search of the car. Found mj.
 - Police are claiming search incident to arrest.
 - There was no arrest.

Hot pursuit exception

- Balance: police needs vs. privacy interests.
- PC that person being pursued committed crime + speed is necessary (don't want to lose the evidence or safety concern) --> Can search without warrant for suspect or evidence.
 - If you had time to get a warrant, it's not hot pursuit.

Can pursue suspect into home without a warrant

- i.e. **Warden v. Hayden** - Armed robber robbed a cab company. Two cab drivers pursued him, told dispatch, dispatch alerted police, no warrant b/c no time. Police K&A, Mrs. Hayden let them in. Found suspect pretending to sleep. Searched all over home. Protective sweep doesn't work here b/c looking within places where no one could hide. Court created hot pursuit exception.

But, an arrest in and of itself isn't enough for exigent circumstances

- i.e. **Payton** - Suspected of murdering owner of gas station. After 2 days had passed, they had enough evidence to establish PC, but had no warrant. K&A, heard music inside, broke in. Found shell casing and seized it.
 - Hot pursuit? 2 days had passed, arrest in and of itself isn't exigent circumstances.
 - Searches incident to arrest? Illegal unless arrest is legal. Arrest without warrant.

Plain view & plain touch exception

- There is no expectation of privacy in what can be plainly seen and touched.

Plain view/touch standard:

- **Officers lawfully present in location**
- **Contraband nature immediately apparent. Have PC to believe that it's incriminating.**
 - Cannot manipulate objects to see evidentiary value.
 - i.e. **Hicks** - Bullet went through floor of apartment. Police searched due to exigent circumstances.

Saw stereo equipment that they thought might be stolen merchandise. Found product ID number underneath. This is not plain view.

- Hypo: What if they tripped and unintentionally knocked over stereo? It would now be plain view.
- Hypo: What if police enter a house and see MJ capsules in CA? Legal for medicinal purposes in CA, therefore not plainly contraband.

- **No strict "inadvertence" requirement**

- i.e. P convicted of armed robbery of the treasurer of the coin club.
 - Affidavit = wanted weapons
 - Magistrate = only authorized search for proceeds of robbery
- During search, weapons in plain view. Took them. Completely advertent. This is ok.

Hypo: invite cops over for tea. I've decorated with MJ plants. Cops can seize them.

Plain touch

Same as plain view

- i.e. Individual behaved suspiciously after exiting "crack house." Was evasive of cops. Pat down search. Felt small lump in jacket. USSC applied plain view doctrine and created a plain touch doctrine.
- Hypo: cop manipulated the small lump in jacket b/c not immediately apparent that it was contraband. Not allowed!

Automobile

Anytime there is PC that a vehicle has contraband, can search the entire vehicle.

- Can open trunk and open containers.

Why is there a car exception?

- Cars can get away. Therefore, different standard.
- In public, therefore lower expectation of privacy.
- Constantly being regulated by government.

Mobile homes: mobility rationale. The exception extends to mobile homes as long as they are capable of moving around.

- Young person left motor home. Told agent that he had received mj in return sex.
- Agent entered home without warrant. Saw mj & drug stuff in plain view. Arrested him and seized motor home.
- Problem: People who don't have house/apartment have lower privacy.

Immobile car: lower expectation of privacy rationale. Even though immobility rationale doesn't apply, can still search.

i.e. Auto impounded at police station after an arrest.

Hypo: Car up on blocks while working on it in your yard. Cops come by and do a warrantless search.

- Auto exception applies: Lesser expectation of privacy
- Auto exception doesn't apply: Immobile

★- Depends on what rationale you emphasize.

Containers in a car: If PC to search car (even if related to a particular container), can search entire car & containers in car.

i.e. **Acevedo** - Agent knew incoming package was full of drugs. Posed as mail person. Gave it to the drug dealer. Suspect drove it home.

- A third party showed up at the home and then left with a bag. Placed bag in the trunk. Officers stopped him and searched trunk.
- When the bag entered the car, they had PC to search whole car.

Passenger's property: When there is PC that there is contraband in the car, can search passenger's property b/c it's in the car.

i.e. Pull over car for speeding and faulty light. See syringe in driver's pocket --> therefore PC to search all of car, including passengers.

Taking apart car: Any place that's accessible to suspect that they can put back together can be searched.

Searches incident to arrest involving cars

Rule: Search of grab area (passenger compartment) permitted if:

- Arrestee unsecured and **within reach** of car (Chimel) OR
- Reasonable to believe **evidence of crime of arrest** in car (Gant)
 - Why not probable cause? b/c would just be auto exception.

Passenger compartment and anything in it including glove compartment and jackets/purses found in area. Need PC to get into the trunk. But, hatchbacks are generally searchable (can argue that isn't grab-able)

If suspect is arrested, can search grab area. *This appeared to be a per se rule in Belton.*

i.e. **Belton** - Cops pulled over speeding car. Discovered that no one owned the vehicle after checking driver's licenses. Saw envelope on the floor that had branding associated with mj. Ordered them all out of the car. Picked up envelope. Had mj. Checked glove compartment and found coke. Lawful arrest. Then, applied grab rule to search surrounding area.

Can search if there is reason to believe evidence of crime of arrest is in the car.

i.e. **Gant** - backed away from Belton rule. Arrested for driving with suspended license. Handcuffed and locked in back of police car. Searched car and found drugs. Not justified b/c arrest for driving with suspended license has nothing to do with searching a car for contraband.

Arrested outside of car: Still can search passenger compartment.

i.e. **Thornton** - Undercover cop. A car was avoiding him. Checked plates and saw that they were on the wrong car. By the time the cop caught up to the car, it was parked and suspect was away from car.

- Stopped suspected, pat down search, found narcotics, arrested him, then searched car.
- Claims search incident to an arrest.
- As long as recent occupant, grab rule applies.

Questions left open:

- How expansive is evidence of crime?
 - Hypo: arrested for speaking on cell phone. Could search car for evidence of crime like a cell phone charger.
- How much reason to believe?
- Will this narrow Chimel in home cases just as it narrowed it in car cases?
- Why is it limited to passenger compartment? Shouldn't it allow entire car if there is reason to believe?
- Problem: officers may take more risks.
 - i.e. placing arrestee on curb instead of in car so that they can do search incident to arrest without reason to believe.

Auto Search Hypos:

1. *Police think there is a blue duffel bag in the car where Katherine keeps drugs.*
 - *Have they established PC? If so, we use auto exception and can search everything.*
 - *Searches incident to arrest.*
 - *Doesn't work under grab rule b/c in back of patrol car*
 - *Works under evidence of crime of arrest theory - crime of arrest was drugs, expect drugs to be found in car, therefore can search passenger compartment*
 - *To search trunk, can only use auto exception*
2. *Arrested for driving with expired tags. Ordered to sit on curb. Find drugs in passenger area and in trunk.*
 - *Search of passenger compartment - searches incident to arrest grab area - not restrained in back of car*
 - *What if police had guns pointed to her? Might no longer be within grab area.*
 - *Pass. Comp. search cannot be allowed under Scalia theory b/c there is nothing to search related to the crime.*
 - *Trunk search*
 - *Since they found drugs in passenger compartment, had PC for the rest of car and could search rest of car under auto exception*
 - *What if she was in back of patrol car? Would have never been able to search passenger compartment and wouldn't have gotten PC for trunk*
3. *Working on car up on blocks at home. Identified as man who robbed jewelry store. Someone saw him put bulging sacks into car.*
 - *Can't use search incident to arrest.*
 - *Can use auto search. But, can argue that car couldn't be moved. Rationale for auto exception is not there.*

More Auto search hypos:

1. *Arrested for speeding. Put in squad car. Find cocaine under front seat.*
 - *Was search permissible? No.*
 - *Auto search - no PC*
 - *Search incident to arrest*
 - *Grab area theory - doesn't work b/c already secured in back of car*
 - *Evidence of crime of arrest - doesn't work b/c arrested for speeding*
 - *If not in squad car, can do grab area theory*
2. *Arrested for driving under influence. In back of squad car. Search passenger compartment. Find baggie of cocaine.*
 - *Search incident to arrest - search for evidence of crime of arrest. Permissible.*
 - *What if not in back of squad car? Might be able to use grab area as well.*
 - *Since they found drugs in passenger compartment, can search trunk b/c of PC.*
3. *Suspect runs and police think that there is counterfeit money in car.*
 - *Auto search exception - there was PC that there was contraband in car.*

Auto inventory searches

Don't need a warrant or PC to do an inventory search. Why?

- Not technically a "search" for evidence
- Caretaking function: Protection of owner's property, protection of police against claims or disputes, & protection of police from potential danger

If they happen to find contraband during inventory search, it can be used.

The inventory search must be **routine**.

Hypo: Can you vacuum floor for drug residue? No. Goes beyond the concerns of destruction of property or safety.

Inventory of people: Permissible if routine/standardized procedure

Hypo: police search a man's shoulder bag at a police station after lawful arrest. No PC that they were going to find something in bag. Possibility of dangerous stuff & it was routine to check arrestees' bags. Permissible.

Phones: What about search of a seized phone?

CA saw it as a search just like any other container. Main concern = destruction of evidence

- Levenson wants to argue that should treat containers differently.
- Levenson also not sure if law enforcement need outweighs privacy of cell phones

Border searches

Includes:

- Fixed checkpoints not at actual border
- International mail
- Ingoing and outgoing searches
- Containers
- Laptops?

Rationale

- Protect borders
- Right of sovereign
- We've always done it

What is a border?

- Physical border - Mexico, Canada
- Fixed checkpoints that aren't on the actual border
- International airports

Routine vs. non-routine

- Length of time (1-2 hours is short enough to be routine)
- Amount of intrusion (i.e. alimentary canal, serious damage to parts of car that are needed)
- Person vs. things
- Frequency of inspections

Defense wants non-routine. Gov wants routine.

Routine searches - no suspicion needed

- In suspicionless searches, balancing:
 - Right of people being searched with
 - Government interest
- Government interest is at its zenith at the borders.

Non-routine searches - reasonable suspicion needed

- Balloon swallowers

Routine can include: (Therefore, don't need suspicion to remove gas tank, remove car door panels, or slash a spare tire)

- Removing gas tank
 - **Flores Montano** - Drove up to border. Had to go to secondary checkpoint. To send to secondary checkpoint, can use racist means or anything they want. Don't need suspicion. The gas tank sounded solid when they tapped it, so a mechanic took it apart. Took 1-2 hours. Customs officials seized lots of mj from a gas tank.
 - Didn't need reasonable suspicion. Was a routine search.
- Removing car door panels
 - No permanent damage, therefore it's routine.
- Slashing spare tire
 - The spare tire isn't needed. Therefore routine.

Hypo #1:

Routine: car put back together

Non-routine: passed two hour limit, much more intrusive

We need reasonable suspicion to search people.

International mail - no suspicion or PC needed to open

- i.e. Americans were mailing in heroin from Thailand. Postal inspector - opened envelopes. Suspected b/c weighed a lot, from Thailand. Don't need reasonable suspicion b/c protecting sovereignty.
- Hypo: GWB monitoring international phone calls.

People - can detain with no suspicion; when crosses to non-routine, need reasonable suspicion.

- i.e. Woman flew in from Bogota. Suspicious for various reasons. Female pat down, stomach is firm. Ends up getting detained all night while they wait for her to poop.
 - o Initial stop & pat down: Don't need any suspicion.
 - o Xray, rectal exam, strip search, etc.: Need suspicion. They had suspicion here.
- Hypo: making a woman lift her skirt. Non-routine. Need reasonable suspicion.

Laptop - reasonable suspicion is not required to search a laptop at a border.

- i.e. **Arnold** - American flying in from Philippines. Inspected luggage. Open his laptop to inspect it and find child pornography. He argues that the computer is like your mind. Holding: allowed to search.

Checkpoints & roadblocks

Is it Constitutional?

Search for aliens	Yes
DUI sobriety stops	Yes
Drug interdiction	No
Witnesses	Yes
Terrorist stops	Likely yes
Child abductions	Likely yes

1. Consider if public safety, exigent circumstances, finding witnesses OR if trying to catch criminal.
 - Problem: can argue that anything's primary purpose is safety.
2. If concern is the former: balance public safety vs. level of intrusion.
 - Hypo: stopping people before entering LA County to inspect if they have H1N1.
 - i. What is the primary purpose? Primary purpose = public safety
 - ii. Still balance - perhaps the invasion outweighs the public safety

Sobriety checkpoints

No suspicion needed.

- i.e. **Sitz** - Stop cars for 25 seconds. If there is suspicion, they direct them toward a secondary check. People sought an injunction.
 - Holding: permissible, no suspicion needed
 - Balance public safety vs. minimal intrusion - purpose is safety, not crime discovery
 - Dissent: don't disagree with balancing test, just argue that sobriety checkpoints aren't very effective.

Primary purpose must be safety. If primary purpose is law enforcement, need reasonable suspicion.

- i.e. **Edmond** - Stopping drivers at a checkpoint to run drug sniff dogs around cars to find evidence

of drugs. Holding: violates 4th Amendment.

exigent circumstances - You can stop cars.

i.e. Osama Bin Laden on the road - can stop cars because primary purpose is public safety, not finding evidence of crimes

Witnesses to a crime - can have a checkpoint

i.e. Checkpoint where police stopped drivers to ask them for info about a recent hit and run accident. Purpose = information gathering, looking for witnesses. Happened to stop someone who was obviously drunk. Checkpoint was permissible.

Hypo: stopped cars instead of doing Amber Alerts.

- Impermissible. Looking for crime. Primary purpose = catch criminal
- Permissible. Exigent circumstances. Primary purpose = rescue kid

Hypo: Bin Laden in LA.

- Impermissible. Primary purpose = catch #1 FBI most wanted, evidence against him
- Permissible. Primary purpose = protect the US from this very dangerous man

Consent searches

If you get consent, you need *nothing* else.

- No suspicion required
- Consent must be voluntary in order for the search to be reasonable.
 - Totality of the circumstances test to determine if voluntary.
 - Told right to refuse
 - Time of day
 - Location, in custody
 - Show gun
 - Tone of voice
 - Held incommunicado
 - How invasive the search was
 - Age and gender of suspect
 - Impairment, intoxicated, intelligence
 - Language barrier
 - Number of requests
 - Prior arrests and knowledge
 - Reluctance of suspect
 - Person doesn't have to know that they can rebuke the search.
 - Consent is NOT the same as a waiver. Waiver is given when you know you have the right.

i.e. Cop stopped a vehicle fully of Hispanic guys b/c the back light was off. Asked if he could search car. Said, "yes." Cop found three checks that had been stolen from a car wash. Issue: what must prosecution do to prove that consent was voluntarily given? Holding: Totality of circumstances. This was enough.

i.e. Three police boarded a bus as part of a drug enforcement effort. Asked individuals about travel plans and to identify their luggage. Saw guy with baggy clothing. Asked for permission to check him. He said ok. Issue: was this voluntary consent?

- Argument for voluntary: officer spoke quietly, no gun
- Argument for involuntary: guy felt stuck in the bus, physical proximity of the officer's face, never told him that he could say no

What if you don't give consent?

- Cops make you wait two hours while they get a warrant. Not coercion. Need extreme psych pressure or coercion.
- Cops can't use exercise of right as a way to establish suspicion against you.

- But, if you give consent, they begin searching, and in the middle you say, "stop," they can use that to establish suspicion.

Scope of search

- Generally, burden on suspect to limit scope of search
- Reasonableness test
 - When consent was for a "quick search," unscrewing panel was beyond the scope.
 - Includes container
- Difficult to withdraw consent once officers are in middle of search

Hypo: police stop car and ask to search. Has two kids in the back. Cop says that if he arrested her, her kids would go in foster care. Coercive?

Who can consent?

- Suspect
- 3rd party
 - Actual authority - housemate/roommate actually had permission to give consent to search
 - i.e. **Randolph** - co-occupants can generally give consent as long as other co-occupant who is physically present doesn't object. Wife gave consent to search of home even though husband was there and withheld his consent. Holding: wife's consent invalid.
 - Rule is arbitrary. If present, can't do it. If out back, can do it. Now timing is everything. Police wait until person is not there.
 - Domestic violence concerns. Could possibly get around it with exigent circumstances.
 - *Hypo: Suspect not there. She gives permission, police know he would say no. Still a valid consent.*
 - Apparent authority - person didn't have authority, they were posing - still enough for consent as long as *reasonable officer* would believe that that person had authority.

Probation & parole searches

Probation - for those who didn't go to jail. Put on probation instead.

Parole - those who are out of jail and transitioning back into society.

Balancing: Government interests (These are people who have already violated law.) vs. Privacy interests of individuals.

Level of suspicion needed:

- Average person = probable cause
- Probation = reasonable suspicion (though unclear today)
 - i.e. **Knights** - do NOT need a warrant with PC. Part of probation agreement: agreed that he could be searched anytime. Suspected him of breaking into Electric Company. Instead of getting warrant, searched apartment. Found everything related to break in and arrested him. Search was proper. Didn't need a warrant.
 - 4th Amendment doesn't limit it to probationary purposes
 - Balanced government interests vs. intrusion on privacy. Need to protect society. Probationers' freedom is necessarily curtailed. That's the whole point of probation.
- Parolee = no suspicion
 - i.e. **Samson** - can search at anytime as long as you know they are on parole. Officer thought that there was a warrant for D's arrest. D said no. Radioed someone. Found out he was on parole. Started searching him and found meth. Search was Constitutional.

- Dissent: need to rehabilitate people, but treating them like they are in prison. This is removing certain people from 4th Amendment protection.
- In jail = no suspicion

Administrative searches

Special needs search.

Special needs - on its face, the purpose is to protect health & safety, not to discover evidence of a crime.

Administrative search - government entity search to determine if you are complying with fire code, housing code, etc.

- They are there for health & safety purposes, not to criminalize.
- Problem: still a government search.
- If they inspect and find contraband, plain view doctrine allows them to bring criminal charges.

There needs to be a **reasonable administrative scheme**.

Elements to determine if reasonable:

- Substantial government interest
- Inspections are necessary to ensure compliance.
- Statutory scheme must be constitutionally adequate to substitute for a warrant
 - Provides notice - let business owners know that they will be inspected
 - Limits discretion - not up to individual inspector - time, place, & manner limitations

i.e. **Camara** - Inspector came. Resident turned him away multiple times. Do not need traditional probable cause, only need a reasonable administrative scheme (cannot have the inspector just decide on a whim who and when to inspect) Can get an administrative warrant by complying with statutory scheme. (elements not delineated yet)

i.e. **Burger** - delineated above elements. Downed junkyard. Officers entered junkyard to conduct an inspection to determine if there are stolen vehicles. (*Strange b/c sounds like a criminal search where you need probable cause & a warrant.*) Complies with 4th Amendment. Balancing: this is an inspection of a closely regulated business, therefore low privacy expectation.

- Dissent: everyone will be subjected to this if a junkyard is. Junkyards aren't very regulated.

Hypos:

1. *Tyler and Jonathan own and operate a gun store. Pursuant to federal regulation, officers of the Bureau of Alcohol, Tobacco & Firearms regularly inspect such stores to make sure they are keeping required registration records for all gun sales they make. The inspections are made without notice and include the ATF officers looking through the store's books, as well as looking through the store to see if there are any unregistered weapons. Tyler and Jonathan want to challenge the searches as violating their 4th Amendment rights. Are they likely to be successful with their challenge?*
 - **Heavily regulated business**
 - ★ ○ **If scheme itself provides notice that they do searches without notice, it's ok.**
2. *Todd runs a health club and spa. The club is licensed to provide exercise and spa facilities. On Saturday night, right before the club closes, uniform police officers show up at the club, demanding its records and searching the exercise rooms and locker room areas. They claim to be doing a search under the Health and Safety Code which provides that health clubs and spas may be searched "on a regular basis to determine if there is compliance with licensing requirements and health standards." During the search, police find illegal steroids and way too many dirty towels. Should the evidence be suppressed?*
 - **Problem: quoted words - what does "on a regular basis" mean?**
 - **Have power to do search, question is if the statutory scheme is ok.**

Drug testing

Special needs search.

- Drugs are a special needs search b/c people then drive or use weapons. Not trying to prove criminal case. Trying to promote safety.
- **Government employees** - No suspicion needed. Just ask if there's a special need.
 - o i.e. **Skinner - railroad workers** case. Expectation of privacy is diminished b/c everyone has to do it. Government interest - safety. Drug testing of railroad workers was upheld.
 - o i.e. **Von Raab - Customs employees working against drug trafficking**. Struck down drug testing for customs employees working with paperwork, but everyone else had to be drug tested.

Politicians - drug testing not necessary

- i.e. *Drug testing of state office candidates. Struck down drug tests b/c no evidence of drug problem among elected officials. Not high risk or safety sensitive tasks.*

Hypo: Government officials are concerned about the growing drug problem in the United States. Accordingly, they order drug testing for every person who uses the state and local parks. Noting that a number of accidents occur each year in these parks, and that families need safe places to visit, government officials require each driver to give a urine test when entering a state or federal park. The results of the drug test are automatically forwarded to the police. Mr. and Mrs. Coe Kain challenge the policy as violating the Fourth Amendment. How should the court rule?

- o *Problem: reported to police - this shows that it's not just for public safety*
- o *Hypo: not forwarding it to police. Debatable.*
 - *Balance government need versus level of intrusion*

School searches:

Random drug testing - no suspicion, all extracurricular activities

Search of backpacks (not intrusive) - reasonable suspicion

Strip searches - PC or reasonable suspicion of a dangerous drug

Drug testing

i.e. **NJ v. TLO** - Reduced 4th A. rights for students to protect kids in public schools. Backpack search.

- **Balancing**: Greater government needs versus reduced expectations of privacy for students
- **Ordinary searches of individual students**: Reasonable suspicion, not probable cause required.

i.e. **Vernonia** - Random drug testing of athletes without any reasonable suspicion is reasonable. Student athletes were labeled as the big druggies of the school. Did random drug testing.

- **Balancing**: Privacy interests (less privacy in school sports) vs. government interests (detering drug epidemic, prevent injuries)
- Also consider how they do the test.
- **Important facts**:
 - Parents voted for testing.
 - Safety: Could be physical injury to wrestlers.
 - Kids had volunteered for the activity. Don't *have* to do it.
 - Testing was random.
 - Privacy intrusion (men fully clothed, someone stands behind them listening; women in stall and heard not observed)

i.e. **Earls** - extends random drug testing to all extracurricular activities.

- Privacy interests vs. government interests - Focus on risk of drugs to everyone - ignored Vernonia's concern with safety
- Problems with individualized suspicion
 - Burdens teachers
 - Targets suspicious looking groups
 - Fear of lawsuits chilling enforcement of program

Natalya attends the local public high school. Concerned with a growing alcohol problem, school officials have announced that they will randomly test all students who attend school dances to determine whether they have alcohol in their system. The results of these alcohol tests are reported to the students' parents and their principal. If a student is found to have alcohol in his or her system, he or she is held back a year in school and forced to go through additional health education classes.

- Is the punishment excessive? However, can argue that it's up to the schools to decide how they want to punish. Courts only intervene if it's a criminal punishment.

Strip search - all about balancing (again). When the search is super invasive, the contraband isn't too bad - need more than reasonable suspicion.

i.e. **Redding** - Took 13 year old to nurse's office. She had to take off all her clothes and pull out her underwear so they could look for prescription ibuprofen. They had reasonable suspicion. Individualized reasonable suspicion was not enough for the more intrusive search that didn't have a strong government interest.

- More intrusive - quite invasive of privacy interest
- Government interest (only ibuprofen) - very low government interest

Special needs: whenever I see a search whose primary purpose isn't criminal, could fall under special needs search.

i.e.

- HIV testing
- Sars testing
- West nile virus
- Checkpoints near airports
- Searches in subways and trains
- Searches on ferries

i.e. TSA - special need - safety interest of planes

i.e. Pregnant women - A nurse, who was offended by pregnant women using drugs, convinced the hospital to turn over positive for drugs urine samples to the police. Women consented to urine testing, but didn't consent to it being given to police.

- Issue: is this a special needs search?
- Holding: no. primary purpose of policy was law enforcement. Therefore, not a special need. Testing of women is unconstitutional.
- Policy - sending urine to police would prevent pregnant women from getting prenatal care.

i.e. SWAT officer had a text message machine of sorts. He used it to send illicit sexual messages. City had auditing policy so they didn't have to pay overage charges. Is this policy a search? Weren't trying to criminalize. Were trying to meet special need of not going over on messages

Exigent circumstances

Hot pursuit

- Must actually be in hot pursuit. Immediately after crime.
- Must be to protect others or preserve evidence.
- i.e. Lone witness saw drunk driver. Reported it to police. Police figured out where driver lived and went to residence. Entered home without warrant and found him drunk and arrested him. Argued hot pursuit. Holding: no! not immediately after crime; not protecting people or evidence (not about to drive drunk, saving BAC isn't enough)

Serious threat of safety

- Officer's actual motive is irrelevant.
- Courts are willing to look more broadly at this.

i.e. **Stuart** - Officers went to house due to complaint about noisy party. Officers heard loud noise behind house and went there. Saw fight in house, so they went in without warrant. Holding: this was ok b/c

worried that someone would get hurt.

i.e. Officers responded to complaint about domestic disturbance. Truck windows smashed and blood on the truck. Knock on door and individual says, "go away, get a warrant." Officers walked in. Saw D with gun. Is it still exigent circumstances even if the person in home says they don't want help? Yes.

Hypos:

Police are driving through a neighborhood when they see a group of kids partying on Cheyenne's lawn. The police approach the kids to see what they are doing. When they do so, they hear someone inside the house scream, "And here's another kick for dating my girl!" They then hear someone moan. Police rush inside where they find Armando and Brock have a minor fight. While they are inside, they also see drugs and drug paraphernalia. The police arrest Armando and Brock for illegal possession of drugs. Should the evidence be suppressed?

- **Sounds like exigent circumstances. PC, concerned that someone will get hurt**

Police hear a scream and see a robber running from his victim. The victim is yelling, "He stole my new bracelet. Be careful, he has a gun!" The police follow the robber as he runs into a nearby home. When the police charge into the home, they see several marijuana plants, a pile of envelopes, and an illegal automatic rifle. The home belongs to Min Song. Police open some of the sealed envelopes and discover tax refunds in the names of different people. The police seize all of the items and charge Min with possession of narcotics, tax fraud, and possession of an illegal weapon. Is the seized evidence admissible?

- **Entering house = exigent circumstances**
- **Problem: can only get things in plain view. Not sealed envelopes**

Community caretaking exception

- Want to allow police to help people without having to get a warrant.
- Community caretaking recognized:
 - Officers entered home that appeared to be burglarized. Wanted to see if anyone was hurt.
- Community caretaking not recognized:
 - Stumbling man got in passenger side of car. Officers blocked the car. Exception applies to vehicle stops, but info available to the officer in this case was insufficient to justify the detention. He had a friend in the driver's seat who could take care of him.

Hypos:

The police are walking past Yolanda's house when they hear a big explosion. They rush inside and see a meth lab in full operation. The officers seize evidence from the lab. They do not have a warrant for the search. Have they violated Yolanda's Fourth Amendment rights?

- **Community caretaking. They had PC that someone would get hurt.**
- **Exigent circumstances is only for PC of criminal behavior**

Laurie Flevinson leaves the door of her home open while she runs around the neighborhood trying to find her cat. While she is down the block, the police cruise by and see Flevinson's front door ajar. No one answers when the police knock on the door. Inside, the police see a house that it a complete shambles. They go in and find stolen jewelry in Flevinson's house. Flevinson moves to suppress the evidence. How should the court rule?

Seizures & Arrests

Seizure: Arrest	Seizure: Temporary detention	Consensual encounters
PC	RS	No suspicion (b/c not covered by the 4th A.)

Approach

1. Was it a seizure?
2. What kind of a seizure was it?
3. Who was seized?
4. Was there the proper level of suspicion?
5. What can the police do during that type of seizure?

#1 Was it a seizure?

Consensual encounter - not a seizure, no suspicion needed

- **Standard**: reasonable person feel free to leave? Objective standard considering all factors:
 - Threatening presence?
 - Display of weapon?
 - Physical touching?
 - Language/tone of voice?
 - Don't need to be told that you are free to leave.

i.e. **Mendenhall** - D arrived at LAX from Detroit. D is 22, high school dropout, female, African American. She was acting suspiciously. Did a search & found heroin. Was she seized? No. After she was searched, they gave everything back to her before asking her to accompany. This contributes to the concept that she knew she was free to leave.

Hypo: people's things aren't given back before asked to accompany. Seizure.

Not detained - not a seizure, no suspicion needed

- i.e. police chases

Factory sweeps: cops can go through garment factory and ask for immigration status. No suspicion needed. Not a seizure.

Street encounters: no suspicion needed. Not a seizure.

Bus sweeps: no suspicion needed as long as free to leave, not a seizure.

Police chases: NOT seizures. Need some kind of physical restraint.

Car passengers: Passengers are usually seized along with drivers. Can't argue that passenger can just get out and leave. Therefore, passenger has a right to contest if seized along with car.

i.e. Police see "young hoodlums" sitting around. The kids run & toss the illegal drugs while running. The cops chase them. If seizure was when they were chasing, they would have to articulate reasonable suspicion for the seizure and if unable to, they would lose the coke that got tossed. Police chase didn't count.

#2 What kind of seizure was it?

Arrests:

- Long-time detention
 - Look at all circumstances
 - Show of force
 - Handcuffs (not required)
 - Length of detention
 - Don't feel free to leave
 - Must have PC - look at totality of circumstances.
 - Public arrests - no warrant needed
 - Misdemeanors witnessed by officers
 - *i.e. woman driving with children. Cop saw that she & her children weren't wearing a seatbelt. Under law, wasn't punishable by jail time. They arrested her and put her in jail. Cop personally knew her and didn't like her. Arrest was Constitutional.*
 - *Subjective intent of officer irrelevant.*
 - *i.e. can arrest you if driving while on cell phone.*
 - Felonies where officers witnessed it or know of PC - *don't have to see felony committed*
 - Arrests in home - warrant needed
- If there is a state law saying that you cannot arrest for X offense and an officer arrests for X offense, it still complies with the 4th Amendment. Only need PC.
 - States can add exclusionary rules (i.e. if you violate state law, we'll exclude the evidence)

Gerstein review - present complaint of unlawful arrest to judge within 48 hours of arrest (absent extraordinary circumstances)

Terry stops/Investigative stops/"stops & frisks" - temporary stops

- Requires reasonable suspicion, not PC
 - Specific & articulable facts - more than a hunch

i.e. **Terry** - 4th A. allows stop & frisks - Police was patrolling around downtown Cleveland. Noticed two men walking back and forth. Based on 30 yrs experience, he thought they were casing the place for a robbery. He should have approached them to ask questions, but instead temporarily detained them and did a pat down for safety. Issue: Whether it is always unreasonable to subject person to limited search for weapons unless there is probable cause for arrest

i.e. Missing front license plate, Baggy clothes. Pats down & finds weapon. Was there reasonable suspicion for the patdown? Yes. Reasoning: Not going to second judge while officers are getting shot on the street.

Detention can become an arrest. Factors:

- On street or station house?
- D free to leave?
- Fingerprinting?
- Length of time of detention?
- Handcuffs?
- Told under arrest?

#3 Who was seized?

Street seizure - individual

Car seizure - driver & passenger - this gives both standing to sue for improper seizure of car

#4 Was there enough suspicion?

Arrest - PC

Temporary detention - reasonable suspicion

(Consensual encounter - need nothing)

What is reasonable suspicion? (for a Terry stop)

- Specific articulate-able facts that go toward suspicion. More than a hunch.
- Totality of circumstances
 - Suspicious activity
 - Common sense inferences
 - Officer's experience
 - Anonymous tips (predictive)
 - Flight of suspect
 - Profiling
 - Driving behavior
 - Location of suspect
 - Suspect's clothing

RS for stopping cars:

- Totality of circumstances, don't look at each factor separately
 - Common sense inferences
 - Officer's experience
 - Unnatural way of driving
 - Unnatural conduct of passengers
 - Location of car
- i.e. **Arvizu** - Have sensors at the border. Sensors went off that a car on a route used for smuggling drugs. They see children, uncomfortable, waving in a car. See driver look in rear view mirror. Enough for reasonable suspicion? Together it was.
- i.e. other similar cases have said that similar facts are not enough.

RS & informant's tips

- Less information than PC and less reliability than PC.
- Anonymous tips allowed if they predict future action. Corroborates the evidence. Corroboration doesn't have to be of guilty behavior.
- i.e. anonymous tip and only corroboration was the kind of car and the taillight being out. This was enough.
- i.e. Leaving hotel with briefcase. Facts are not exactly like what informant says. They called this RS b/c predicted future activity. This was a close case.
- i.e. **FLv. J.L.** - Anonymous tip that young, black male wearing a plaid shirt was standing at bus stop and carrying a gun. Officers went. Saw three young, black males. One was wearing a plaid shirt. Corroboration = plaid shirt, particular bus stop, young, black, male. Holding: not enough for RS. Police argued that they wanted a firearm exception. When there is a tip for firearm possession, don't need reasonable suspicion. Court rejected this.

★- BUT, possibly lower suspicion if someone is carrying a bomb.

Hypo: anonymous call: there is an Arab man standing outside federal building carrying a knapsack with a bomb in it. Is this enough for RS? May be the same. But it's a bomb case.

RS based on suspect's flight

- Can be enough for RS. No per se rule for or against fleeing being enough for RS. Look at totality of circumstances.
- i.e. **Wardlow** - Police patrolling area known for drug trafficking. When D sees officers, he runs away. He's carrying an opaque bag. Bright line rule rejected, totality of circumstances adopted. Circumstances in this case: Location in high drug area; ran after seeing the cops.

RS based on profiling

- It's ok.
i.e. "never buy a plane ticket with \$20 bills" Facts - independently, these are all very innocent behavior: Bought ticket with cash, wore black jumpsuit and gold jewelry, only stayed in Miami for 48 hours, name didn't match phone number, acted nervously, didn't check luggage. Taken together, these facts fit the profile of a drug smuggler.
- Race can even be a factor. Have to look at totality.
- i.e. guy fit profile of gang member: young, black, baggy clothing, from a town in AZ known to have Crips presence, carrying a police scanner. This was enough.

#5 What can police do incident to seizure?

Arrest - search incident to arrest, search person & car

Terry stop

- Can stop you, can stop car -- brief detention
- Can ask questions
- Can be removed from car
- Can pat down - outer clothing where weapons can be found, can look inside purses/backpacks if it can hold a weapon and if it's close enough to person to get used
 - o Need reasonable suspicion of criminal act & fear of danger to cops
- Ask for IDs (according to Hiibel)
 - o i.e. **Hiibel** - asking for ID is a limited intrusion and it's reasonably related to purpose of Terry stop. Police received phone call about assault. Saw the truck on the side of the road and saw man standing next to truck and woman inside. Saw skid marks and believed sudden stop. Man appeared intoxicated. Police asked for identification. Refused to comply. Man started taunting police. Police arrested him.
Back to Hiibel
 - Leave open possibility of violation of 5th A. if police walking from person to person asking for Mr. X.
- If at your house, they can handcuff you temporarily, do a protective sweep

Consensual encounter - anything you agree to

How much force for an arrest?

- Totality of circumstances
 - Severity of crime
 - Threat to police or others
 - Police can use lethal force when there is danger to officers or others.
 - Whether or not they are resisting

Electronic Surveillance

Wiretapping - Neither party aware that government is listening

- This is different from consensual monitoring: No 4th amendment violation when I am listening to my friend and unbeknownst to me, my friend is recording it.
- Governed by statute - Title III - Need a special type of warrant
- Foreign Intelligence Surveillance (FISA) court - secret court that authorizes surveillance when related to national security. National security only has to be one of the reasons. Doesn't have to be primary reason for wiretapping.
- Bush administration just allowed wiretapping

Exclusionary Rule

Purpose: punishment, deterrence, not wanting to use illegal evidence

Concerns: cost of litigation, criminals go free

remedies for a constitutional violation

- Sue police - problem: have qualified immunity, also jury wouldn't be very sympathetic
- Disciplinary action against police by police department - problem: not usually done b/c primary concern is getting criminals off the streets
- Criminal action against police
- Not do anything
- **Exclusionary rule** - material obtained in violation of the Constitution cannot be introduced at trial against a criminal defendant.
 - Feds set minimum exclusionary rule applicable to states
 - States can have their own exclusionary rules - CA's is the same as federal
 - Violations of Fed Rules of Crim Pro do not trigger exclusionary rule
 - Violations of international law do not trigger exclusionary rule

Knock & announce - exclusionary rule doesn't apply

i.e. **Hudson** - Court decides not to apply the exclusionary rule to when police fail to knock and announce. Why? Generates substantial social costs; Not much deterrent; No longer need b/c of improved police professionalism

Policy: Should we have the exclusionary rule?

Arguments in favor	Arguments against
<ul style="list-style-type: none"> • Need deterrent to promote Constitutional right. Rule gives 4th A. meaning. • Don't have good alternative remedies. • Judicial integrity • Part of American tradition • Costs are exaggerated, benefits are waved away 	<ul style="list-style-type: none"> • Should have an alternative to punish cops. • Doesn't remedy actual Constitutional violation of privacy. Just prevents evidence from being used. • Isn't an actual deterrent. No clear stats on deterrent effect. • Rule benefits scofflaws. • Don't really need it to protect Constitutional rights b/c cops are so good.

History of Exclusionary Rule:

- Judicially created rule that applied to federal courts
- Until Mapp, didn't apply to states

Mapp - Black woman (Mapp) had daughter. Lived on top floor of dwelling. Police got info that suspect of recent bombing might be in that home. Police showed up, Mapp asked them where their warrant was. Eventually police burst in and searched. Found "obscene" pamphlets upstairs.

- Held that exclusionary rule applied to states.
- "silver platter" doctrine - cops taking case across the street to state court rather than federal

Standing

- Can only bring exclusionary rule if your rights were violated
- Have standing if you have ownership or control over an item that is searched. This doesn't include ownership or control over contraband.

i.e. **Rakas** - Who had legitimate expectation of privacy violated? Facts: armed robbery; Cops had probable cause to stop car b/c of description of car that had been at robbery; Cops searched a box of rifle shells in glove compartment and sawed-off rifle under the front passenger seat.

- This search was illegal at the time b/c search incident to arrest doctrine hadn't developed yet.
- Do passengers have standing? Only people whose rights are violated can have standing. The passengers didn't have a legitimate expectation of privacy.

Hypo: what if cops searched Rakas' backpack which was on the ground? He would have standing b/c he has privacy interest in the bag.

Hypo: what if the guns belonged to Rakas? There would be no reasonable expectation of privacy b/c it's contraband.

Hypo:

Police stop Tess as she is driving away from K-Mart. Armineh and Cheyenne are in the car with Tess. Police search everything in the car, including Armineh's bag. Inside the bag, the police find cocaine. Armineh tells the officers that the cocaine belongs to Cheyenne. The police charge Tess, Armineh and Cheyenne with possession of the cocaine. Which one of the defendants has standing to challenge the seizure of the cocaine and under what theory?

- Tess? Has standing b/c has a privacy interest in her car
- Cheyenne? Not her car, not her bag, no standing
- Armineh? Has reasonable expectation of privacy in her bag even though that's where they found contraband.

Standing & home searches

- Owner of home has standing
- Person who has been living in house for six months has standing. Don't own it, but have reasonable expectation of privacy.

Guests/visitors:

- Length of time that they were there (Not determinative alone)
 - i.e. overnight guests can challenge a search.
- Amount of previous connection to the place. Prior visits.
- How well do they know owner.
- How much of the house do they use
- Commercial visitor has no legitimate expectation of privacy
 - i.e. **Carter** - Person who lives in apartment bags cocaine with two guests who have never been there before. Within 2-3 hours, they were done. Officer got tip that they were doing this. He peaked through blinds and saw it. Stopped car when they drove away and found drug paraphernalia in car. Visitors didn't have standing b/c they were commercial visitors.
- Any other indication of expectation of privacy.

- *Hypo: what if he had slept over instead of just spending a few hours? Would have had standing b/c he was an overnight guest.*
- *Hypo: person comes over for sex. Probably has standing b/c not commercial activity.*

Hypo: Mark and Megan both live in a trailer park. Megan has told Mark that he is welcome to hang out at her house any time. She even gives him a key. Mark regularly uses Megan's house to do his laundry because he does not have a washing machine. He also comes over when he wants to watch Megan's satellite television. Police get an anonymous call that there are drugs in Megan's house. Without a warrant, they enter Megan's house and find Mark sitting on the couch, eating popcorn, watching the television and smoking marijuana. They arrest Mark and seize the marijuana. Does Mark have standing to challenge the search?

- Not a commercial activity, has a definite connection to homeowner
- Wasn't there overnight, can argue that it's commercial b/c he goes there to use it, he doesn't actually stay there

Standing & cars

- When a car is seized, everything within it is seized as well. Therefore, passengers can contest seizure of a car and the search of self after the illegal seizure of the car.
- i.e. **Brendlin** - Police did a stop and it turned out that the stop was illegal b/c the car had temporary tags. Saw that it was an infamous parolee. Made him get out and did a search.
 - Why? When the car is stopped, it's not just the car itself that is seized. Everyone within the car is seized as well.
- ★ • Taxis: In footnote, court says that the question is whether a reasonable person in passenger's position

would feel free to terminate the encounter.

Hypos:

Christie, Justin and Bradley are driving in Bradley's car. The police pull over the car without any reasonable suspicion. They look inside the car and see Christie and Justin in the backseat. They order them out, pat them down and find drugs in their pockets. Do Christie and Justin have standing to challenge the illegal seizure of the car and the subsequent discovery of drugs on their persons?

- Seizure of car - have standing b/c they were passengers. (Brendlin)

Bonnie and Clyde are involved in a conspiracy to rob banks. An anonymous informant tips off the police to the scheme. Accordingly, the police immediately search Bonnie's home without a warrant. Inside Bonnie's home, the police find detailed plans of the bank and a demand note written by Clyde. Clyde is arrested at his own home down the block from Bonnie's house. He moves to suppress the evidence found in Bonnie's home. Does Clyde have standing to challenge the search?

- No b/c it's not his house. He wasn't even a guest.
- It's not who the evidence belongs to that is found that creates standing, it's the place that is searched.

Exceptions to exclusionary rule

Exceptions:

1. Independent source
2. Inevitable discovery
3. Attenuated taint
4. Good faith exception

Independent source

Rule: If evidence is obtained through a source independent of the police misconduct and is untainted by the illegal actions of the police, it's admissible.

- Deterrence factor isn't there since they did something right.
- Social cost of letting evidence go is high.

Burden on police to show by preponderance of evidence.

i.e. **Murray** - Police illegally enter warehouse and see bales of marijuana. They left without disturbing it. They got a warrant and didn't tell magistrate that they had seen contraband, reentered, and got the evidence. Remanded to see if second search truly independent of first search.

i.e. Police illegally entered apartment. Didn't see anything. Remained there until search warrant was obtained. Found evidence when they searched legally. Evidence allowed b/c came from legal activity. Legitimate warrant was independent source for search and seizure.

Hypos:

1. Officer Steve conducts a warrantless arrest of Luke for gambling. Luke then tells Officer Steve that he has cocaine in a storage locker. Using this information, Officer Steve gets a warrant to search the storage locker and seizes the cocaine. As it turns out Officer Steve does not have PC for the arrest. Luke moves to suppress the cocaine found in the storage locker. How should the court rule?
 - Application for warrant based on illegally obtained info (illegal arrest).
 - Tree = illegal arrest; fruit = info used for warrant
2. Officer suspects Andy of receiving stolen goods. Without a warrant, Officer enters Andy's house and sees stolen goods. Officer then leaves some of his fellow officers in Andy's house and he goes and gets a warrant. Officer doesn't use any of the info from what he saw in Andy's house to get the warrant. When the warrant is issued, Officer comes back and seizes the goods. Andy moves to suppress the stolen goods found in his house. How should the court rule?
 - Argue not really independent - all based on what he illegally saw, it was a **confirmatory search** b/c he decided to pursue the warrant due to illegally viewed evidence.
 - Other side can argue that he didn't use the info obtained illegally and Murray never said it had to be separate officers also say **too big of a cost to pay to suppress the evidence**. (throw in balancing as well)

Inevitable discovery

Rule: When police would have inevitably found evidence, it cannot be excluded.

Why?

- **Social costs** of the exclusionary rule outweigh any possible benefits to deterrence. We shouldn't deter mistakes that ultimately make no difference.
- **Burden** of showing inevitable discovery on the police.

i.e. **Nix** - D escaped mental institute, kidnapped 10 year old, murdered her, dumped body. Gave himself to police after getting that advice from his lawyer. Police promised that they wouldn't question him when his lawyer wasn't around. An officer guilting info about where the girl's body is out of Williams.

- Independent source? No. evidence found directly through illegal conduct.
- Inevitable discovery? Yes.

3/8 hypos:

3. *Inevitable discovery. The cocaine would have been discovered by Officer Megee, so it cannot be excluded.*
4. *This is a classic inevitable discovery case.*



Inevitable discovery cannot be used to argue that cops are inevitably going to get a warrant. Only applies to when there is a warrant in hand, but it hasn't been executed yet.

Attenuation of the Taint

Rule: The more attenuated the connection between the evidence and the illegal behavior is, the less effective the deterrent will be.

Factors:

- Miranda warnings
- Temporal proximity
- Presence of intervening circumstances
 - Did they talk to lawyer?
 - Other acts of free will?
- Purpose and flagrancy of the official misconduct
- Voluntariness of the statement/coercive atmosphere
- Spontaneity of statements
- Where statement was given
- Any other factors you can think of.

Burden on prosecution.



i.e. **Brown** - connection wasn't too attenuated and evidence inadmissible. D entering apartment and was arrested at gunpoint. Illegal. Later given Miranda rights. However, this was insufficient to separate it from illegal conduct.

i.e. Police broke in without warrant and coerced confession at gunpoint. Then, he was released. Later was questioned after given Miranda rights. Later confession not product of initial illegal seizure and statement. Exclusionary rule doesn't apply.

3/8 Hypos:

#5 - *Illegal statement led directly to evidence.*

#6 -

- *Prosecutor's argument. Evidence should not be suppressed.*
 - *The evidence is not directly linked to illegal act. Distant enough.*
 - *Intervening circumstance of speaking with lawyer. Some time passed. She took initiative to send note. Police had a warrant.*
- *Defense argument.*
 - .

Good faith exception

Rule: exclusionary rule does not apply if police rely in good faith on facially valid warrant, even though court later finds insufficient PC for a warrant.

- Good faith = objective - Can't just be stupid cops.

i.e. **Leon - warrant & pretty good police work.** Police got a tip of unproven reliability. Wasn't enough at the time of the search to get a warrant. However, magistrate gave a warrant despite lack of PC. Court later found that there was insufficient PC. Allowed anyway.

- Balancing: Exclusionary rule never designed to deter magistrates. If there isn't someone we want to deter, no point to the exclusionary rule.

i.e. **Herring - no warrant & sloppy police work.** D goes to police department to recover some impounded stuff. Cop checks to see if there is a warrant for his arrest. Someone in a neighboring county mistakenly told them that there was a warrant. Arrested, search incident to arrest, find meth and illegal gun. 15 minutes later, found out that there was no valid warrant. Holding: shouldn't be repressed b/c exclusionary rule does not apply in deterring negligence situations.

i.e. Sloppy warrant - pre-filled form. Just authorized to get evidence of drugs. Officers weren't authorized in warrant to get evidence of the murder, which they got. Court held that this mistake was objectively reasonable. Good faith exception applied.

Extension of good faith doctrine

- Administrative searches under statutory scheme that turns out to be illegal - don't use exclusionary rule
- Clerical errors by court personnel - don't use exclusionary rule
- Knock & announce

3/8 Hypos:

#7 - allow it b/c using it to impeach.

#8 -

- This isn't objectively reasonable good faith b/c no corroboration.
- Use Leon as the point and then argue from there.

- **Now more focused on cost of exclusionary rule vs. deterrent effect.**

Suppression Hearings

- Suppression decided by judge
- Motion before trial
- No warrant? Burden on government
- Warrant? Burden on D to show that it's a bad warrant
 - Have to show that it was recklessly or intentionally false
 - Not enough evidence without struck info

Exclusionary rule doesn't apply:

- Impeachment
- Other proceedings
 - Grand jury
 - Civil proceedings
 - Sentencing
 - Parole and probation revocation
 - Forfeiture

Upcoming USSC case (*and possible exam question?*) - Can you argue good faith exception when there was a change in the law and the police officer didn't know or forgot.

3/15 hypos:

1. This is like Leon.
 - Was there a search? Yes b/c reas expec of priv that noone will go to her office.
 - PC?
 - Yes: anonymous tip, cash, empty cookie containers
 - No:
 - Won't use exclusionary rule.
2. This is like Herring.
 - Mistakes by court personnel: exclusionary rule doesn't apply to those mistakes
 - Mistake by police in their records: have to ask if it was negligent OR reckless/intentional. This is the second time police records were wrong. Might be enough to show a repeated mistake that doesn't allow good faith.

Police interrogation & 5th A. privilege against self incrimination

Step #1: voluntary (DP)

Step #2: comply with other reqs (Miranda and 6th A right to counsel)

Remedy for 6th A violations:

- Statement in violation of Miranda
 - Impeachment
- Statements in violation of 6th A.
 - Impeachment
- Involuntary statements (i.e. police coerce or beat suspect)
 - No impeachments

A. Due Process Voluntariness

B. Miranda

1. The Miranda rule
2. Is Miranda desirable?
3. Miranda requirements:
 - a. In custody
 - b. Interrogation
4. Miranda warnings
5. Consequences of Miranda violation
6. Miranda exceptions
 - a. Impeachment
 - b. Emergencies
 - c. Booking exceptions
 - d. Waiver
7. Invoking Miranda rights - reinitiated interrogation

C. 6th A. Right to Counsel & Police Interrogations

D. Privilege Against Self-Incrimination in Other Contexts

Due Process Voluntariness

An involuntary confession is not admissible for any purpose including impeachment.

5th A: No person shall be compelled in any criminal case to be a witness against himself.

- Only criminal cases. In civil case, can call P or D onto stand.
- Looks, fingerprints, voice, etc. are not testimonial. Don't count as witness against self.

Rule: Was D's will overborne/was it voluntary? Totality of the circumstances approach.

Not voluntary:

- Use of physical force
- Lengthy interrogations; deprivation of needs
- Threat of force
 - *i.e. D called PD reporting that his 11 year old stepdaughter was missing. In jail on some random charge, made friends with an undercover officer posing as a prisoner who offers protection in prison in exchange for details of stepdaughter's death. He confesses to killing her. This threat of force held his confession out of court.*
- Psychological pressure
 - *i.e. Suspect was a young, Italian man who hadn't completed high school. Man at a bar attacked him. D later shot the man who attacked him. Called childhood friend Bruno who is a cop. Bruno tells him that he's in trouble and might lose his job due to the phone call. Said this four times. Finally D caved and confessed. Factors:*
 - Young
 - No history of interrogation
 - Low education - Hadn't finished high school
 - Foreign born
 - History of emotional instability
 - 8 hrs of questioning - leading questions
- Deception
- Age, education level, mental condition of suspect
 - We don't look at age or mental condition unless there was coercion
 - Don't look at D to consider coercion, look at police conduct.
 - *i.e. D approached police officer, confessed to murder, and showed him scene of murder. Later found out that he suffered from chronic schizophrenia and was in a psychotic state. Court thinks that this confession was voluntary regardless of mental condition.*
 - Court was reluctant b/c there was no government misconduct.
 - So many people who commit crimes have a mental condition, so this exception would swallow the rule.
- *i.e. Buddhist monk murder case. Confession not let in. 13 hours, isolation, intensity, juvenile, uncomfortable chair, adults had already falsely confessed.*

Still voluntary

- False promises
 - *i.e. "if you confess, you'll get 50 years off your sentence" or "if you confess, you won't get death penalty.*
- False sympathy
- Exaggerating
- Faking results
 - *i.e. "here are the DNA results. That's your DNA."*

Is voluntariness test desirable?

- Case by case method

- Not enough guidance for lower cts
- Police needed more guidance
- Inconsistency in ct's decisions

Miranda

- **Miranda rights**
 - Right to remain silent - 5th A.
 - Anything you say can and will be used against you
 - Right to counsel - read into 5th A.
 - If you can't afford counsel, you will be given one - 6th A.
- Applies to *everyone* in custody. (non-citizens, supreme court justice, etc.)
- **Miranda case** - Woman kidnapped, taken to desert, and raped. Witness saw license plate. Police went to Miranda's house. Lengthy interrogation resulting in confession. Prosecuted based solely on confession. Until someone shows a better way to protect from involuntariness, we will tell them their rights.

Is Miranda desirable?

Arguments in favor of Miranda	Arguments against Miranda
<ul style="list-style-type: none"> • Easy to understand rule • Need some way to protect 5th A. right • Public education • Clear rule cuts down on court's work • Should have standard higher than just "voluntariness" 	<ul style="list-style-type: none"> • Warnings not required by Constitution • Justices acting like legislators • DP is enough protection • There is nothing wrong with confessions • Procedure won't work - officers will just lie about providing rights • Will create more litigation about details of Miranda rights • <u>Criminals will go free</u>

Confession Hypos:

1. *Natalya is arrested for suspected counterfeiting. She is taken to the station and left in a room by herself for 16 hours. There are no restroom facilities or food for her to eat. The temperature in the room is near freezing. In fact, Natalya develops a chronic nosebleed as she sits there. During the 16 hours, the police periodically play the music, "It's a Small World," at an extremely high volume. They also tell Natalya over the loudspeakers that her kids would love for her to come home, but she won't be seeing them until she is ready to cooperate. Finally, the police come in to interview Natalya. She is surrounded by six officers. They take turns asking her questions. After about 45 minutes, Natalya confesses to counterfeiting. Natalya moves to suppress the confession as involuntary. Assuming Natalya did receive her Miranda rights, how should the court rule?*
 Going to argue:
 - *Involuntary*
 - *Kept in a room for 16 hours*
 - *Playing the music*
 - *Got a nose bleed*
 - *She can argue it's involuntary even though they gave her Miranda rights*
 - *Usually involuntary is the harder part to prove*
2. *Clarence Darrow is arrested for cheating on his income tax. When the police arrest him, Darrow is in the middle of giving a lecture on the Miranda rules and how they should be applied. Darrow is handcuffed and transported to the police station. Along the way, the police start asking him about his tax scheme. Darrow eagerly shares with him exactly how he cheated the IRS. At trial, Darrow moves to suppress his statement to the police. How should the court rule?*
 - *Court should suppress because did not give Miranda rights and clear they arrested him because they put him in hand cuffs and took him to station*
 - *Whole point was to administratively have a set std, does not matter whether he knew he had these Miranda rights or not (because he was giving the lecture on them)*

Dickerson - USSC turned over Congressional statute that was trying to trump Miranda. Declared that Miranda was a Constitutional rule, not just under supervisory power.

- Alternatives have not been found sufficient and Dickerson suggests that they won't ever be.
- Dissent though that court was acting like legislature in creating Miranda.

Alternatives to Miranda

- Video tape everything
 - Problem: Unrealistic. How do you videotape every second? Costly.
 - Problem: We can edit those tapes. Start and end it at different times.
- Make people learn their rights
- Have a stationhouse attorney, if it's all about having protection, have atty there - objective witnesses
 - Problem: Expensive
- Broaden DP standard
- Lawsuits for damages
 - Don't work – no one would vote for the criminal

How it works:

Custodial interrogation

CUSTODIAL:

Rule: Reasonable person doesn't feel free to leave. i.e. arrest - can even be for a misdemeanor

- May be in custody in your own home if you are not free to leave.

Factors

- Physically free to leave?
- Use of force? Show of guns?
- Informed that free to leave?
- D initiating contact?
- Atmosphere of questioning
- When placed under arrest?
- Experience of suspect

Not custodial

- Terry stop & traffic stops
 - *i.e. Cop pulled over D and asked if he had been drinking without Mirandizing. Said he had consumed 2 beers and smoked several joints. Placed under arrest. Taken to jail. This was ok.*
 - But, could become custodial.
- Voluntarily agreeing to interview at police station
 - *i.e. Burglary. They didn't drag him in, he came in on his own. Not under arrest. Sitting out by desk, not in interrogation room. Confessed.*
- Interview with IRS agent
 - *i.e. IRS agent investigating potential criminal income tax violation, in an interview with taxpayer not in custody*
- Meeting with PO

Reasonable person: Use objective standard for Miranda standards - Do not consider suspect's age

- *i.e. kid accused of felony murder as an accomplice. They take him in for questioning, he's accompanied by parents, but they wait in the lobby. After he confesses, he goes back to the lobby, and goes home. Court doesn't consider age and let's in confession.*

INTERROGATION

- Express questioning
- Tactics reasonably likely to elicit an incriminating statement
 - *i.e. D had shot a taxi driver and no one knows where the shotgun is. Cop says off-hand comment, "There are disabled children in the area" which leads D to elicit incriminating statement. This was not considered interrogation.*
- Doesn't cover
 - Discussions with third parties b/c not coercive - police can use ploys
 - *i.e. Cops appealed to D by bringing in his wife. Wife rails into him. Confesses to his wife. Caught on a tape*

recorder in plain sight. This is ok.

- Undercover agent b/c not police dominated environment

Confession Hypos

1. *Trixie, a well-known prostitute, is stopped on the street. A couple of officers start asking her questions about where she spent the night. Trixie ends up telling her about the three tricks she had that night. She is then arrested and charged with three acts of prostitution. Will the prosecution be able to use Trixie's statement against her?*
Prosecution will be able to use it, but we ask 2 questions since she was not given Miranda rights:
 1. *Is she in custody? No, this is like a temp. stop*
 2. *Was she being interrogated? Yes, being interrogated, but since no on #1, it's ok.*
2. *Police are called to the scene of a murder. They ask Colin to accompany them down to the police station to answer some questions. Colin tells them that he needs to catch a plane for Hawaii. However, the police grab him by the arm and tell him that it really is important that he answer some questions. Colin then agrees to come down to the station, but he insists on driving his own car. Colin then drives to the station. He is put in an interrogation room. Two officers enter the room. One starts twirling his gun. The two officers then tell Colin that he is in a "heap load of trouble" and that he'd better come clean. Colin says nothing. One officer then tells the other officer that Colin will be put in the hardcore section of the prison unless he starts cooperating. At that point, Colin confesses to being the lookout for the murderer. Colin is arrested and charged as an accomplice to the murder. The police want to use Colin's statement against him. He moves to suppress the statement. How should the court rule?*
 1. *Is he in custody? Likely. He's there, officers twirling guns, looks like he's not free to leave.*
 - *But, he drove by himself. He's got his car. Not told he's under arrest yet.*
 2. *Was she being interrogated?*
 - *Facts don't show that they are really asking him questions, more hinting that he better confess. One argument – not direct interrogation. Could argue that it's designed to illicit a response when you say guys in heapload of trouble and if don't hear from him soon, going to have to put him in the part of the prison where bad things happen.*

What is required of the police?

No magic words are required.

Statements that passed as Miranda warnings in real cases:

- Miranda rights made it sound like *he could have a lawyer and he would have to pay for it*, not that his parents wouldn't have to pay for it.
- Cop said suspect *would be given lawyer if and when he went to court*. Sounds as if he cannot have one now.
- Forgot to say "before or during" the interrogation he could access any of his Miranda rights.

Consequences of a Miranda violation

- Can't sue for violation of Miranda rights
- Violation doesn't occur until un-Mirandized statement is introduced in criminal case
- Remedy = exclude illegally obtained confession - but, not full "fruit of the poisonous tree" doctrine.

Can still use:

- Witnesses found through un-Mirandized statement
- Physical evidence found through un-Mirandized statement
 - i.e. **Patane** - Suspect started talking before they finished Miranda rights. He said he already knew his rights. Cops allow him to keep talking rather than finishing rights. Says that he has a pistol in his bedroom. Allow gun in.

- Hypo: What if he just spilled without any questions asked? Wouldn't be an interrogation.
- Subsequent Mirandized statements - unless deliberate tactic (Elstad, Seibert)
 - i.e. **Elstad** - 2nd statement admissible. Two cops went to home of suspected teen burglar. One officer took mom to kitchen to speak with her privately. Other officer with kid in family room. In custody b/c had come to arrest him. Don't tell him Miranda rights, confesses. (This statement is definitely inadmissible.) Then, taken to station, informed of Miranda rights completely and accurately. He confesses. This statement is admissible.
 - If statement is a continuation, it is a tainted statement. Factors:
 - Prior statement coerced?
 - Time that passes
 - Change in place
 - Change in identity of interrogators
 - i.e. **Seibert** - 2nd statement inadmissible. Respondent's son had cerebral palsy. Died in his sleep. She was concerned the police would arrest her for negligence b/c he had bedsores. Decided to burn down family mobile home to destroy body. Put Rector (mentally ill teenager) in mobile home to make it appear that he had been watching son. He was killed.
 - Police took her to station and deliberately questioned her without Miranda warnings.
 - Got a confession, gave a 20 minute cigarette break, gave the M warnings, got a waiver, told her "we've been talking, repeat what you said," and she re-confessed.
 - Inadmissible b/c deliberate attempt to evade Miranda - Was one continuous interrogation:
 - Same location
 - Same time of day
 - *Referring back to same statement*
 - Not a long time break
 - Same officers
 - Concurrence: KNOW THESE
 - Breyer - focus on good faith of officers
 - ★ ○ Kennedy - If deliberative bypass of Miranda, second statement inadmissible unless curative steps made - THIS IS THE LAW.
 - i.e. saying, "we can't use what you just told us. We should have said... do you still want to talk to us?"
 - i.e. waiting a day and allowing person to talk to their lawyer

3/22 hypos

1. .
 - a. *Incomplete Miranda. Statements shouldn't be allowed.*
 - b. *Yes, can use it to impeach.*
 - c. *No, it's unreliable. Violates DP and is involuntary. Involuntary statements can't be used for any reason at all.*
2. .
 - a. *K's initial statement is not allowed. Miranda violation.*
 - b. *Have to consider factors. Not much time passed and appears to be same officers. Continuous. Counteroffer - signed waiver, new location, given Miranda rights. Not continuous.*
 - c. .
 - i. *Souter - inadmissible b/c continuous.*
 - ii. *Breyer -*
 - iii. *Kennedy - no curative steps, but was it deliberate?*
3. *Miranda doesn't apply to the physical evidence (loot or witnesses) - further confession, have to argue whether or not it was continuous*

Miranda Exceptions

- Impeachment
 - **Harris** - blatantly lied on stand about heroin sales. Impeaching statements were presented. The

statements were given without Miranda warnings. Allowed anyway.)

- Emergencies
 - **Quarles** - Woman who had been raped told cops that the offender was at a grocery store nearby. Found him, arrested him, asked him where gun was. Then, read Miranda. Holding: Let in statement, let in gun.)
- Booking exception
 - i.e. Arrested for drunk driving and taken to station. Asked routine, admin questions. This doesn't violate Miranda. However, the question, "what was the date of your 6th birthday?" violated Miranda b/c trying to get evidence of his drunkenness
 - Hypo: if police asked, "do you have health problems because of your drinking?" it would not be allowed.
- Waiver

Waiver of Miranda rights:

- Written, verbal, or implicit
 - i.e. implicit waiver found when D said "I will talk to you, but I'm not signing any form."
- Must be knowing, intelligent, and voluntary. Look at totality of circumstances
 - Age, experience, education, capacity to understand warnings, background, etc.
 - Mental conditions & psychological motivating factors, like schizophrenia, don't factor in
- Waiver still voluntary if:
 - Police don't tell suspect that attorney wants to speak to him
 - Police don't tell nature of crime he is suspected of committing

Waiver after D has invoked Miranda rights:

- If D invoked right to remain silent
 - Police can reinitiate questioning - **Mosley**: 2 hour break; fresh warnings; different subject of interrogation different identity of officers
 - Must be clear invocation of right (more than just remaining silent)
 - i.e. **Berguis** - Sitting silent for 3 hours, not invocation of right. Whenever you answer a question, you have explicitly waived your right to remain silent. Any speaking is a valid waiver of the right. Can argue that this occurred in a procedural posture where great deference is given to state courts.
- If D invoked 5th A right to counsel
 - Only D can reinitiate questioning (**Edwards**) unless 14 day break in custody (**Shatzer**)
 - Cannot "use up" your right to counsel by meeting with a lawyer. If you meet with lawyer and go back to cops, they cannot question you.
 - Sending D back into general jail population constitutes a "break" in custody if that was their normal environment.
 - Must be unequivocal invocation of rights
 - **Davis**: "Maybe I should talk to my lawyer" is not enough
 - "If for anything you guys are going to charge me, I want to talk to a public defender" is not enough.

Hypo #4

- Under Quarles, would be allowed

Hypo #5

- Address - still a valid booking question, so allowed
- Significant others - can argue both ways
 - Trying to get contact info
 - Trying to find evidence of prostitution house
 - Would want to know if they ask everyone else that question.

3/24 hypos:

#1

- P - don't suppress. 30 min, different subject, D understood he could assert rights b/c said he wouldn't speak about gambling, fresh warnings
- D - suppress - only 30 min, same cops, similar subject

#2 would be excluded. 30 min isn't long enough, must be two weeks

- If 14 days and was sitting in jail, not a break in custody.*

#3 - did he assert rights? No, not clear & unequivocal. Has he waived rights? Yes, by answering questions.

6th A Right to Counsel & Police Interrogations

6th A right to counsel

- Right to counsel in all criminal prosecutions
- Right does not trigger until formal charges - Look for: filing of indictment, prelim hearing, arraignment
 - If D hires a lawyer before formal charges, 6th A applies.
- These act in addition to 5th A. Miranda rights
- Prohibits officers from deliberately eliciting info in absence of counsel once formal charges are filed.
 - *i.e. Christian burial case*
 - Prison snitches:
 - **Henry** - jailhouse snitch cannot initiate conversation or ask questions. (unless you haven't been formally charged) Arrested, indicted, counsel appointed. Instructions to cell-mate: "Don't initiate any conversation regarding the robbery." He initiated a conversation about it, Henry confessed.
 - **Wilson** - Jailhouse snitch can "keep his ears open." Police informant asked no questions and didn't engage in conversation related to crimes. Made incriminating statements to informant.

Massiah

- Darrested for cocaine conspiracy. Retained an attorney, pleaded not guilty, released on bail.
- Government asked co-conspirator to put a recording device in his car. Chatted with Massiah and recorded the incriminating statements.
 - 4th Amendment - no problem b/c consensual monitoring
 - 5th Amendment - no problem b/c not in custody
 - 6th Amendment - prohibits police or informant from "deliberately eliciting" incriminating statements. Problem was the government going around the lawyer.

Miranda Rights	Massiah Rights
Only for custodial interrogations <i>i.e. in jail and interrogated by undercover officer, not covered by Miranda</i>	Custody irrelevant
Applies before and after formal charges	6th A right automatically applies after formal charges
Prohibits interrogation without warning/waiver.	Prohibits questioning on formally charged offense, but can question on unrelated offense.

Same offense:

Cobb - Different offense decided by **Blockburger** (separate elements) test. Same offense are those crimes that have the same legal elements. If a single element is different (i.e. murder & manslaughter difference of intent), can question.

3/24 3rd set confession hypos:

#3

- Doesn't matter whether or not police interrogated him in jail.
- Got Miranda rights, so that's fine.
- Separate elements, so admissible.
- What if the arraignment was for a separate burglary.
 - Different offense, but same elements.
 - ★ Lesser included offense: Has to be same elements for same facts, so this is admissible.

Waiver

- Lawyers themselves can waive
- Can voluntarily waive 6th A. right

- Not valid if police initiated
- 5th A waiver is enough to cover 6th A as well
 - i.e. **Montejo** - Police sought to question Montejo b/c friends with suspect. Montejo confessed. Preliminary hearing & given a public defender. Took him to lake where murder weapon was supposed to be. He confessed again.
 - Rationale:
 - 6th A, like 5th A, all we are worried about is coercion. Miranda takes care of coercion.
 - Only time you don't get Miranda is when you are out of custody, but not really worried about coercion when D is out of custody.
 - Montejo overruled **Jackson** - Participated in conspiracy to kill a woman's husband at her request. Made lots of pre-arraignment statements. Got counsel. Police asked him to confirm statements. Mirandized and he agreed to proceed without lawyer. Invalid.

★ Attorneys try to protect clients by doing the following: Public defenders go on the record at the time of appointment and say that my client will never feel free enough or not coerced enough to voluntarily waive 6th A. right. Client agrees saying yes, my waiver will never be voluntary.

Hypos:

#4 - 6th A doesn't apply; Miranda only applies to police interrogation

#5 - 6th A violation b/c deliberately eliciting statements

#6 - Just a listening post. No 6th A violation.

Requirements for privilege against self-incrimination to apply

- Only individuals can invoke
 - i.e. a corporation can't invoke it
- "testimonial" evidence only
 - i.e. blood, DNA, fingerprints, photos, lineup, hair, etc. doesn't work - if you're in hospital b/c of drunk driving accident, police can get blood samples from hospital staff to do a BAC check
- Must be compulsion
- Must be possibility of incrimination

3/29 hypo

- I. Not ok.*
- II. Ok.*
- III. Not ok. Testimonial can be at any type of proceeding.*
- IV. Ok b/c not that much compulsion.*

Compel

1. Includes adverse inferences at trial and at sentencing
 - Can't punish D for asserting constitutional right. i.e. prosecutor can't say that the D didn't get on the stand b/c he's guilty.
 - Can do this in a civil case.
2. Hard choices do not = compulsion
 - Loss of benefit is not compulsion
 - i.e. if you admit to all your sex crimes, you can be in the nicer prison with all of the rehab programs.
 - Torture or adverse inferences is compulsion

3/29 hypo

2. .
 - a. No*
 - b. No*
 - c. Yes b/c involves thought process*

d. No

When may government require production of documents?

- Hypo: police seize my diary. It says I killed Prof. Allowed b/c police didn't compel me to write it.
- When D has documents, can government subpoena incriminating documents? No. Act of producing the document is incriminating. You are acknowledging what you wrote and it's being linked to you.
 - Have to get it by search warrant or via giving immunity to the author of the document. Immunity = we won't use the fact that you produced it as evidence at trial, we will just use the document.

Immunity

Two types

1. Transactional immunity - will not get prosecuted at all for the crime
2. Use immunity - protection against use of evidence or anything derived from it in future prosecution

Hypo #3

- *This is testimonial. Production of the docs is testimonial.*

Line-ups & IDs

Why are there problems with lineups and IDs?

- Stress, brief opportunity to observe, suggestiveness of ID procedure, police feedback, cross-racial IDs

Different types of ID methods

- Line-up
- Show-up - just one person, they ask if that's the guy
- Photospread
- Single photo ID
- In-court ID

Rights protecting against bad IDs

- Right to counsel (6th A.)
 - Only post-formal charges
 - Trial like IDs - line ups
 - Remedies: per se exclusion of out of court IDs; allow in court ID if not tainted
- Due process (5th A. & 14th A.)
 - At any state
 - Was ID unduly suggestive (but can still get it in if you can show that it's reliable)
 - "totality of the circumstances"
 - Remedies: not excludable if reliable; goes to weight of evidence

6th A.

- Right to counsel for **post-indictment lineups**. Out of court ID suppressed per se.
- Can **refer to ID in court** as long as P presents clear & convincing evidence that it wasn't tainted by the lineup. There must be an independent source for the ID.
 - i.e. **Wade** - Bank robbery, Indictment, arrested, counsel was appointed, Lineup without notifying lawyer, both bank employees identified Wade. At trial, they testified toward ID.
 - Look at how much lineup affected court ID: discrepancies, lapse of time, prior correct ID, etc.
- No 6th A. right to counsel for **pre-indictment lineup**. If the lineup was really bad, can still challenge on DP grounds.
- **Photospreads, single photo IDs** - No right to counsel (even post formal charge)

Due Process

Standard:

1. Were ID procedures unnecessarily suggestive?
 - How suggestive was it?
 - Was suggestiveness necessary?
2. Nonetheless, is it reliable enough?
 - Witness's opportunity to view at time of the crime
 - Degree of attention

- Accuracy and detail of description
- Level of certainty
- Length of time from crime to identification

- *i.e. Doctor and his wife were stabbed - doctor died. Murderer was a black male. Brought black male suspect to hospital bed of wife by handcuff - she identifies him as the murderer. No violation.*
- *i.e. Only one case has overturned a case based on a DP violation. Bank robbery by a man wearing a leather jacket. Lineup: bank worker said he wasn't sure - D was way taller and only one wearing a leather jacket. Second lineup - the only person in the second lineup who was the same as the first was D. This was unnecessarily suggestive.*
- *i.e. Two people robbed a bank. All five employees identified D. Issue: photo IDs containing only pictures of suspect. Held to be reliable b/c: All id'd D at trial, had 5 min to view robber during robbery, suspect at large, witness alone during ID, didn't ID other suspect*
- *i.e. Woman was raped. With him for 30 min. For 7 months, she was shown 30-40 photographs. D ordered to walk past victim and say, "shut up or I'll kill you" - she identifies him with no doubt. This was certainly suggestive, but it wasn't held to be unnecessarily suggestive.*
- *i.e. Cop was an undercover purchaser of narcotics & got one good look at suspect. Shown one picture of D. Unnecessarily suggestive? Probably. But, court said that the ID is admissible b/c reliable. Here the cop knew he would have to identify the suspect, so he looked at him with that in mind.*

Hypos:

3/29 ID hypos

3. .
 - a. No, no formal charges
 - b. Was suggestive. Was it unnecessarily so? Was it still reliable enough?
 - c. Was in court ID based on independent factors or was it tainted?
4. .
 - a. Post-indictment, no lawyer - therefore excluded
 - b. In court ID can be used if independent source. Independent source is that he went to school with him.
5. .
 - a. No violation regardless of if charges have happened b/c it's a photo ID.
 - b. It is unnecessarily suggestive. Is it reliable? No. didn't get a good look.

Initiating Prosecution

Possibility #1 - blue collar

Crime --> complaint --> first appearance --> prelim hearing or grand jury

Possibility #2 - white collar

Crime --> pre-arrest investigation --> prelim hearing or grand jury --> formal charges --> arrest

Gerstein review

If there is an arrest before formal charges, within 24 hours of arrest, must have arraignment. Judge decides whether probable cause for arrest. Ex parte process

Prosecutorial discretion

- Very broad
- Executive branch power - judge cannot order a prosecutor to prosecute b/c violation of separation of powers. Judge = judicial, prosecutor = executive

Limits on prosecutorial discretion:

- Statutory limits - can only charge what the legislature has decided is a crime
- Administrative limits - guidelines within the office
- Ethical limits - prosecutor only needs probable cause
- Constitutional limits
 - Bill of Attainder - targeting a particular group by making their action illegal, law has to be equal, can't do this
 - Ex post facto law - law that punishes acts that were legal at the time they were committed
 - *i.e. Short SoL for prosecution of child molestation cases. Made it longer. Can they bring a trial against someone whose SoL had expired before it was extended. No, violates ex post facto. Hypo: if it hadn't expired and they extended it, it would be ok.*
 - Equal protection clause - we presume P hasn't violated this. D has to show:
 - Discriminatory effect - compare to others similarly situated OR
 - Discriminatory purpose
 - **Armstrong** - Indicted on charges of possess/distribute cocaine. Argued that they were selected for federal prosecution because they were black. Presumption that a prosecutor hasn't violated equal protection. For disc effect, doesn't matter if everyone charged was black. Have to show that similarly situated white people weren't prosecuted. This could be a black crime.
 - DP clause
- **Wayte** - War protestor who refused to register and was warned that he would be prosecuted. He wrote a letter saying that he would never register. D argued that he was punished b/c he was exercising his 1st amendment rights. Holding: Government's purpose wasn't to take away 1st A rights

Vindictive prosecution

- Cannot retaliate against D for exercising constitutional right.
- Plea bargaining is not considered vindictive
- Pretrial decisions by Ps are generally not considered to be vindictive
- Additional charges are added after a D requests a jury trial, no presumption of vindictiveness when
- *i.e. exceptional case, this rarely happens: D charged with a misdemeanor. Appealed his conviction. P took exact same crime and charged it as a felony. Holding: vindictive. Not bargaining. Cannot retaliate against D for exercising constitutional right. Rebuttable presumption.*

Charging mechanisms

- **Grand jury**
 - Constitution gives the right if charged with serious federal offense
 - Buffer to protect citizens
 - Right not incorporated to states
 - Prosecutors run the show, no defense counsel
 - no right to exculpatory evidence - argument: not an adjudicatory body. Problem: how is it fair if P can mislead?
 - hearsay and inadmissible evidence are allowed
 - *i.e. D Indicted for willfully attempting to evade payment of income taxes. Had hundreds of witnesses b/c had to prove hundreds of tax items. Only three of the witnesses were called before grand jury. That meant that all of the evidence in grand jury was hearsay. This was ok.*
 - No judge, prosecutor trains grand jurors
 - Grand jury secrecy
 - No PC requirement
 - Basic screening process
- **Preliminary hearing** - most DAs use this
 - Mini trial before judge used in place of a grand jury.
 - No jury, defense present, witnesses cross-examined.
 - Judge decides if there is enough evidence for PC.

Why do we do this? Trial is very costly to a D.

Detention

Why is bail so important?

- Prepare defense
- Not being incarcerated
- Impact on job, family, etc.
- Stigma

Constitution: excessive bail shall not be required.

- This doesn't mean that you have a right to bail.

Should D get bail?

- Flight risk
- Danger to community
 - i.e. **Salerno** - D charged with tons of stuff. D argued that "danger to community" was unconstitutional b/c punishing for a crime you haven't been convicted of (5th A.) Holding: jail is regulatory, not punishment.

Factors to examine:

- Seriousness of case
- Strength of evidence
- Prior record
- Ties to community
- Other factors

Other types of preventative detention

Material witnesses

Sexually violent predator acts

- i.e. individual has finished sentence, can be held longer under an act that holds him/her civilly b/c still a danger to society.

Immigration detentions

Detention & the war on terrorism - i.e. Guantanamo

HANDOUT 29 HAS A BAIL HYPO: argue both sides for flight and danger to community.

Discovery

Statutory discovery - goes both ways: prosecution discloses to defense, defense discloses to prosecution
Constitutional discovery - just prosecution disclosing to defense

Statutory discovery

- **FRCP 16** - covers inculpatory, not exculpatory, evidence
- Prosecution must give over only upon request:
 - Any D oral statement
 - D's written or recorded statement
 - Rap sheet
 - Tangible evidence
 - Reports of examination and tests
 - Expert reports
 - Don't have to give over - witness statements or exculpatory evidence
- If D requests something from P, Defense must give over:
 - Tangible evidence
 - Reports & examinations
 - No witness statements
- CA's version: includes Constitutional requirement of giving exculpatory evidence and witness statements
 - Names & addresses of witnesses
 - Felony records of witnesses
 - Exculpatory evidence
 - Witness statements
 - Reciprocal discovery
- Sanctions for non-disclosure
 - Order inspection
 - Continuance - give other side more time
 - Exclude evidence (for both P & D)
 - Other sanctions, jury instructions, etc.

Constitutional requirements

- **Brady/Giglio Rule**
- Prosecutor has duty to disclose - D doesn't have to ask for it.
 - Exculpatory evidence or impeachment evidence
 - Relevant to guilt or sentencing AND
 - Material - reasonable probability outcome would have been different (**Bagley**)
- Remedy: If it turns out that this was violated, retry with proper evidence.
- Good or bad faith of prosecutor doesn't matter. (A bad faith prosecutor may help D show that the evidence was so material that they were trying to suppress it.)
- **Brady** - Found guilty of murder and sentenced to death. Eventually co-D told police that he had done the actual strangling. Prosecutors didn't reveal this confession. Holding: should have revealed confession. Have to turn over exculpatory evidence that's material and related to guilt or sentencing.
- **Giglio** - applied to impeachment evidence. D convicted of forging checks. P's whole argument pivoted on one key witness. P withheld evidence that would have impeached this W. Government had promised that if W testified, he wouldn't be prosecuted.
- ★ **Bagley** - D indicted on multiple charges of firearm and drug violations. Found guilty on narcotics charges, but not on firearms. Later requested documents via Freedom of Info Act - finds out that the witnesses

were paid \$300 to testify and prosecution withheld this evidence. This was not material to the case b/c D was acquitted on the charges that the witnesses testified on. Material only if there is a reasonable probability that, had the evidence been disclosed to the D, the result of the proceeding would have been different.

Remedy: If P cheats in discovery, can't sue DA's office b/c they are immune

Args in favor of discovery	Args against discovery
<ul style="list-style-type: none">• Fair trial• Leads to pleading - saves resources• Shouldn't be trial by ambush• Search for truth• Can protect witnesses• Some offices use open file and don't have a lower conviction rate	<ul style="list-style-type: none">• Fishing expedition to keep P busy• D knows best what happened• Threat to witnesses• Perjury or tailoring D

Plea bargaining and guilty pleas

Three types of guilty pleas:

- Guilty - admission and waive right to trial
- No lo contendere - doesn't admit guilt and may be sentenced the same as if he pled guilty
- Not guilty - doesn't mean "I didn't do it" - just "Prosecutor, bring it on"

Why do people plea bargain?

- Reduced punishment
- Certainty
- Avoid a long, scary trial
- Less exposure
- Avoid judge hearing details of case
- Limited resources and efficiency concerns
- Need for cooperating Ds
- Individualizing justice
- Police: they made a mistake and don't want it brought up in court

Criticisms of plea bargaining

- Innocent Ds plead guilty - esp. with 3 strike system
- Behind-the-scenes negotiations
- Hides police misconduct
- Insufficient victim involvement
- Disparity in treatment - which DA and what mood they are in can widely change the result

Tough bargains

- Are not unconstitutional. They are still voluntary.
- Prohibited bargaining tactics:
 - Threats (I'll hurt you and your family)
 - Misrepresentation
 - Improper behavior (taking bribes)

i.e. D Charged with kidnapping. Choice under statute at the time: face the death penalty OR plead guilty or waive jury trial. Judge unwilling to try without jury. So, choice between facing death penalty or pleading guilty. Guilty plea was valid.

Hypo: can Pros charge someone and then say if they don't plead guilty, they'll give 20 more charges? Yes, this is fine. Pros can load up charges and offer reduction for a plea OR they can give a charge and threaten more if there is no plea.

Parts of a guilty plea

- Reading of and waiver of rights AND
 - Waiver must be "knowing, intelligent, and voluntary"
 - Advise of rights
 - Advise nature of charges (Henderson - elements)
 - Advise of consequences (including deportation)
 - Plea agreement
 - Threat
 - Factual basis
- Admission of facts that D committed crime

Remedy for violation of plea bargain

- Defense remedies: withdraw plea or specific performance
- Prosecution remedies: agreement null and void

- *Hypo: deal - D won't get death penalty if he testifies against co-D. Decides to not follow through with deal. Agreement null & void.*

Consequences of guilty plea

- Difficult to withdraw
- Guilty plea effectively ends case except sentencing
- Waives most issues for appeal. (If you guilty plea, can't challenge 4th A) - Exceptions and conditional pleas

Right to Counsel

6th A. - In all criminal prosecutions, the accused shall enjoy the right to have the assistance of Counsel for his defense.

Doesn't apply to

- Civil cases
- Habeas proceedings b/c it's civil
- Parole or probation hearings
- DOES apply to enemy combatants

Scope of right to counsel

- Misdemeanors without jail, no right to lawyer - can still go hire a lawyer
- Misdemeanors with jail time attached
 - Therefore, prosecutors have to decide sentencing first.
 - If you're charged with a misdemeanor and aren't given an attorney, you're not going to jail.
- felonies - applicable to states
 - **Gideon** - Tried for breaking and entering a poolroom. Denied counsel b/c not a death penalty case. Gideon did the best he could representing himself. Lawyers in criminal courts are necessities, not luxuries. Retried with lawyer and found innocent. Retroactive. Only case ever to be found to fall under watershed rule. So fundamental to criminal justice system.
- death penalty - you get right to counsel

How good does counsel have to be?

- **Benchmark:** Fairness. Ineffectiveness so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
- Two components:
 1. **Specific errors?** Lawyer was deficient in some way. Made mistakes.
 - A mistake must be below professional level of representation
 - Defer to strategic decisions - we assume the lawyer didn't err. Can look at MRs for guidance.
 - *i.e. D kidnapped and burned girl alive. Didn't cooperate with lawyer. Had outbursts in court. Attorney's strategy: admit guilt to preserve credibility in urging leniency during sentencing. Sentenced to death. Court gave deference to trial lawyer's strategy.*
 - Counsel's performance may be affected by D's actions
 2. **Prejudice?** These mistakes prejudiced the result. Prejudiced not usually assumed.
 - Prejudice presumed when:
 - person denied a lawyer altogether
 - lawyer just sits there and doesn't do anything
 - state interferes with right to counsel
 - conflict of interest
 - "reasonable probability that but for error, outcome would have been different"
 - Prejudice alone is enough. Don't have to go to specific errors.

Strickland - Three brutal stabbing murders, torture, etc. in a 10-day period. Confessed to the third of the offenses. Court appointed an experienced criminal lawyer. Went against lawyer's advice on multiple things. "client from hell" Hoping to impress judge by being repentant, but gets death penalty. Holding: counsel was good enough. Counsel was within reasonable discretion and didn't prejudice the case.

- Dissent: this rule is too malleable.
 - Court's main point: reduce the chance of innocent people getting convicted.
 - Marshall's main point: getting a fundamentally fair procedure.
 - Even guilty Ds should get a fair trial.

i.e. Very new lawyer had 30 days to prepare defense in an area of law he wasn't practiced in. Holding: counsel was good enough.

★ There is also a right to an expert. (i.e. psychiatric expert)

Right to counsel hypo:

- *Defense lawyer arguing ineffective assistance of counsel - REALLY HARD FOR D TO WIN.*
 - *Point out all errors, say it was prejudicial*
- *Prosecution arguing effective assistance of counsel*

Self representation

- There is a right to self-rep; must be a knowing and voluntary waiver.
- Colloquy with D by judge to make sure that they understand rights they are giving up and that it's not a good idea.
- i.e. **Faretta** - Charged with grand theft and wants to represent himself because he doesn't think he'll get a very good public defender. Allowed right to self-representation.
- Court can decide if you're mentally competent enough to waive 6th A. right to counsel

Jury Trial

Found in two places in Constitution.

Vicinage - community where crime was committed. Set up to address the victim as the entire community.

Jury nullification - nobody can second guess the jury

When right to jury kicks in

- **Duncan** - The black kids sad that he merely touched a white boy's arm; The white kids said that he hit the white boy's arm. Convicted of simple battery. Misdemeanor which carries a possible two year sentence. Law only gave jury trial for capital cases. Is this Constitutional? No!
- Can waive the right (unless government wants a jury)
- Don't get jury trial when the penalty is for a petty offense with punishment of less than six months.
 - Right to lawyer was based on actual time you got.
 - Right to jury based on time you face.
 - Can't aggregate cases. If a bunch of petty offenses add to more than 6 months, still don't have right to jury trial.
- No right when driver's license, large fine, or having to register as a sex offender.
 - But, one lower court has held that if punishment includes registering as a sex offender, there is a right to a jury trial b/c important to community to have input.

Composition of Jury

- 6 person minimum
- CA and federal have 12 person juries.

Unanimity required?

- No. 11-1, 10-2, and maybe even 9-3 are ok splits - viewed as outliers
- May need unanimous jury if small (i.e. 6 people)

Jury selection

- Select a venire/panel
 - **Taylor** - in Louisiana, women could only sit on juries if they expressed their desire to be considered for juries and said that it wouldn't interfere with homemaking abilities. D challenged this claiming that 6th A. gives right to cross-section of community. Holding: violates 6th A.
 - But, can exclude some groups. (i.e. convicted felons) There must be a compelling reason for excluding these groups.
- Selecting petite (trial) jury - Unpick people using challenges for cause and peremptory challenges
 - Challenges for cause
 - Juror cannot be objective and fair
 - Judge has to decide that there is actual bias
 - Peremptory challenges
 - Discretionary challenges
 - Attorneys can use this to challenge whatever they want. They ask relatively few questions, size people up, and choose who to knock off.

Peremptory challenges

- **Batson/Wheeler challenge** - Person challenging the peremptory challenge shows that there is a pattern

of discriminatory challenges. Only need evidence from one case to show that.

- Once the pattern is shown, burden shifts to state to show that they were kicking jurors off for race-neutral reasons.
- Court then decides on credibility of explanation.
- **Remedy**: If Batson challenge is successful, the remedy is to
 - Start all over with a new venire OR
 - Invite excluded jurors back on
- **Batson** - D was black. Prosecutor used peremptory challenges on all the black members of the jury leaving no black people on the jury. D brought a 14th A equal protection claim. Swain standard - had already held that you can't intentionally kick people off b/c of their race. This case modified that standard. May be enough to show that there was discrimination in one case alone.
 - Dissent:
 - Decision won't end discrimination b/c can still use peremptory challenges to discriminate and get away with it. Also, subtle racial discrimination.
 - Only true solution is to eliminate peremptory challenges.
- **Batson extended**:
 - Equal protection rights apply to jurors, D has the standing. Therefore, anyone can bring the challenge. i.e. a white person challenge when black jurors are excused.
 - Batson applies to civil cases.
 - Batson applies to defense peremptory challenges as well as prosecutorial peremptory challenges.
 - Batson prohibits discrimination on basis of: Gender, ethnicity
 - language - don't know (i.e. Armenian speaking defendant, take off all Armenian speaking jurors b/c they will listen to D through translator)
 - A neutral explanation is anything that the judge accepts. In death penalty cases, they will actually look to see if the explanation holds water.

Pretrial publicity

Rule

- Requires prejudicial effect on jurors
- More than just knowing of case, have to show actual bias
 - i.e. **Skilling** - Enron case. All jurors knew about it. This didn't matter. Trial just had to be fair. Houston is a really large place, a lot of time had passed since crime. Also, 21st century. Everybody knows about everything.
- Must actually bias

Remedies

- Delay trial
- Voir dire
- Sequester
- Jury instructions
- Change of venue

Media access to courtroom

- Media has 1st A right to courts
- Includes jury selection and pretrial motions
- Must be balancing 1st A interests vs. 6th A interests

Sentencing & Double Jeopardy

Sentencing options: incarceration, semi-incarceration, private jails, probation, fines, community service, forfeiture, restitution, diversion

Reasons for sentencing: retribution, deterrence (general & specific), incapacitation, rehabilitation

Sentencing models

- Discretionary/indeterminate
- Determinate/guideline

Constitutional limits on sentencing:

- Equal protection - treat races equally
- Ex post facto - can't sentence someone and then add to it
- Due process - right to speak & be present for sentencing
- 8th A. - Is the punishment disproportionate to the crime? Very difficult to bring a successful 8th A violation.

Three factors:

1. Gravity of offense.
 2. Compared to penalty for *other* crimes in *same* jurisdiction
 3. Compared to penalty for *same* crime in *other* jurisdictions
- *i.e.* LWOP for 672 grams of cocaine; no prior record; Key factor: gravity of offense according to legislature; Holding: not disproportionate

Double Jeopardy

- 5th A - can't be subject for the same offense to be twice put in liberty of life or limb.

Basic rules:

- No second prosecution after conviction
- No second prosecution after acquittal
- No multiple punishment
- ALL FOR SAME OFFENSE.
 - Same offense = two tests
 - Blockburger - same elements test - if one element is different, no double jeopardy. If killing is felony murder, the robbery is considered a lesser included offense, not a separate offense.
 - Grady - same conduct test - original test

Can there be a retrial?

Yes	No
<ul style="list-style-type: none"> • Judgment notwithstanding verdict (judge appeals jury's guilty verdict) • Pretrial dismissal • Hung jury • Successful appeal - but if you win b/c of insufficient evidence can't be retried • Different jurisdiction/separate sovereign - even if same elements, but CA prohibits state from following federal - i.e. state charges with crime 	<ul style="list-style-type: none"> • Acquittal by jury - doesn't matter if there was prejudice • Acquittal by judge

and they mess up, can federal retry you? Yes. But, not in CA.

- Mistrial - depends "manifest necessity" - have to have a really good reason to have a retrial