

To understand case reading in Criminal Procedure:

1. **Text/Plain meaning**
2. **Originalism** (Framer's intent) **v.** the **Evolving Constitution**
3. **Rules v. Standards** – a definitive rule or a guideline
4. **Crime Control v. Due Process Model**
 - CC (Crime Control) is responsibility of executive and legislative
 - Goal is efficient/quick adjudication
 - Role is to ferret out few innocent remaining - Ds are guilty and should be sanctioned
 - Judiciary should limit technical rules on police and ability to use evidence to convict

v.

 - DP (Due Process) stresses judiciary role in patrolling exercises of other two branch
 - Respect for Constitutional values requires slowing down of process
 - Greater worry about accuracy police misconduct so system should tolerate some guilty going free
 - Courts chief concern is its own integrity which is tainted when illegally obtained evidence is introduced
5. **Precedent**
6. **Federalism**
7. **Judicial Role** – how courts see role in relation to other branches, states, and itself
8. **Pathos Arguments**
 - Slippery Slope
 - The Parade of Horribles

I. 4th A

A . Introduction to the 4th Amendment – Search & Seizure

1. When Does the 4th Amendment Apply

a. Governmental Action versus Private Search

- 4th A doesn't control the action of citizens – only applies to government action
 - Gov employee does something in the course of their duties
 - When there is significant Gov endorsement, encouragement or participation
 - Acquiescence is typically not significant Gov action,
 - Also looked at is the intention of the party who searched/seized
- An **off duty cop is still a cop** – 24 hours a day (in DC by statute) – off duty or not, probable cause is needed to search / seize
- **Private security guards are not police** and the 4th is not applicable to them
 - Minority view: if there is **statutory power for security guards to arrest** – **4 applies** but state statutes can determine (guard can handcuff until police come w/ no 4th violation)

- Work for government and perform a search, you must abide by 4th
 - Minority rule: not Gov activity if normal agency duties do not include law enforcement
- If **private party performs search and turns over, it's not 4th**, but if gov does any further search, it's likely 4th

Government Action:

- Gov't employee in performance of duties, OR significant government encouragement, endorsement, or participation"
 - **Factors:**
 - **Degree of Gov involvement:** acquiescence, encouragement, endorsement
 - **Participation: Private parties purpose**, additional searches
 - **Types of Actors:**
 - Security guards – usually not
 - Off duty cops – Usually are
 - Non law enforcement gov employees –
 - minority rule - not gov action if: Normal agency duties do not include law enforcement, parallel companies in private sector

b. Reasonable Expectation of Privacy

Katz v. U.S. (1967) - Guy in **phone booth** recorded making bets w/ surveillance

- **4th A protects people, not places**
- What a person knowingly exposes to the public, even in his own home or office, is not a subject of 4th A protection
- The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of booth can have no constitutional significance
- Katz reflect a **suspicion of Technology** and a rejection of property rights – but reasoning was tied to property (coin in the phone booth made it yours for the call)
- “The government’s activities violated the privacy upon which he justifiably relied while using the booth and thus constituted a search & seizure”

TEST:

- Concurrence –J. Harlan:
 - “Twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and , second, that the expectation be one that society is prepared to recognize as “reasonable”
- What you knowingly expose to the public – **can be anywhere**
 - Look to the facts – the “subjective” becomes a close analysis of the facts because anyone can say they were expecting privacy
 - The objective calls for an analysis of public policy
- What you knowingly expose to the public, **including conversations to private individuals**, you lose 4th A protection
 - Falls under the subjective portion – they no longer desire to keep it private
- **What is abandonment** in terms of the 4th A?
 - Simple **lack of attendance is not adequate – requires analysis of their subjective belief**

California v. Greenwood (1988) – Objective Prong Case - Police have **garbage** man bring garbage to them to go through it

- **Where people can go and get at the material, objectively, there is not expectation of privacy**
 - The material was “abandoned”
- Subjectively, one cannot expect privacy where dogs, people, anyone, can go through the garbage
- **A curtilage problem would allow the Defendant to win** – part of the area of the home – but the argument occurs where the garbage is seen as abandoned

Florida v. Riley (1989) – Objective Prong Case - **Surveillance of covered greenhouse** in a residential backyard from the vantage point of a helicopter located 400 feet above

- Subjectively, D has a reasonable expectation of privacy in such an area, specifically because it was illegal substances
- Objectively, it is not reasonable to believe that there is a Reasonable Expectation of Privacy
- Any member of public could legally have been flying over D’s property in a helicopter and could have observed the greenhouse
- **RULE: Over-flight takes into account Vantage Point and Setting** (200’ was held a search)
- Fell back to Property Rights: where it was legal to be, D had no Reasonable expectation

Rules:

- Guy dumps waste on his property and puts barbed wire fence up
 - Subjective – D was clearly trying to keep property private
 - Objective – as an open field w/ no one on the premises, under Oliver “when Police trespass upon posted and fenced private land did not violate the 4th Amendment” – Interests vindicated by 4th were not identical w/ those served by the common law of trespass”
 - **RULE: Open fields have NO PROTECTION (Oliver v. U.S. 1984)**
- Police see weed through the window in a populated area
 - Plain view, no protection neither subjectively nor objectively
 - What if a breeze blew the blinds open and a cop saw it
 - Subjectively, there’s still a R.E.P.
 - **Objectively, cop was where he was legally entitled to be, no objective expectation**
 - For plain view, cop must be legally present and able to view from where he is w/out changing anything
 - **RULE: Court does not care about the motivations of the Police** – what is reasonable that could happen in society removes the R.E.P. from D from an objective standard

B. Technology and the 4th Amendment

United States v. White (1971) - Informer, carrying a **concealed radio transmitter**, engaged D in conversations which were electronically overheard by federal narcotics agents

- Katz does not control because “Recorded conversations” in Katz referred to a cop directly recording (eaves-dropping) whereas here, D gave up his subjective expectation by engaging in conversation w/ informant
- The court says that Technology here is to be expected – you never know who will be working w/ police

Kyllo v. United States (2001) – **Thermal imager** used to find heat lamps from street in the home where marijuana would be growing

- Must protect inside of the home and this heat and image is a private issue within the home – Scalia scared of this technology
 - Watching the public, when more people have these imagers, you would lose the expectation – Problem – this leaves our reasonable expectation of privacy up to the stores/prices of such pieces of technology
- Addressed the “routine” issue in *Ciraolo* and because imagers are not routine, there is no expectation
- **RULE: Obtaining by some sense enhancing equipment, information that could not be obtained w/o physical intrusion into a constitutionally protected area is a search at least where the technology is not in the general public area**
- Dissent by Stephens
 - Not troubled by the technology
 - Police can measure the heat because the owner left it to be found – PoPo shouldn’t have to avert their eyes
 - Countervailing privacy interest is trivial
 - It’s an issue of quality or content (picking up volume doesn’t matter – picking up words does)

U.S. v. Karo (1984) - installation of a **beeper in a container of chemicals** w/ the consent of the original owner constitutes a search or seizure when delivered to one w/ no knowledge of the beeper

- The use of the beeper to monitor the chemical to inside of the house violated 4th where it was used to accomplish something that alone, they could not have done
- The majority protection only begins in the home
- The monitoring prior to the entrance into the home amounted to probable cause to get a warrant and the search was permissible after they did so
- **RULE: Monitoring is not permitted inside of a house if it could not have been visually tracked w/o the device (monitoring the beeper must be done visually)**

TEST for 4th Amendment Reasonable Expectation of Privacy:

➤ **D has manifested a subjective expectation of Privacy AND that expectation is one that society (according to the Supreme Court) accepts as objectively reasonable**

- Examples:
 - **Speaking** about the issue removes an expectation of privacy

- Calling someone removes the expectation of privacy regarding the **phone number dialed** as you gave it to the phone company
- **Dog sniffing** cases are cutting both ways – jurisdictions are even split as to the use of random house searches
 - SC allowed based on the notion that the sole function of the dog is the sniff – Dog sniffing only discloses what is illegal and there is No expectation of privacy in illegal activity
- Locker – if PC exists to search the locker and you find key on D – courts go both ways when cops stick key into various lockers trying to find out which one belongs to D (is a search – paid for locker (unlikely because you pay to protect inside, not keyhole); or is not a search (most), / is a technical search but not covered by 4th)
- **Factors:**
 - **Physical Setting** (home = most privacy, open field = no privacy)
 - Open fields/public streets (least)
 - Curtilage (proximity, fencing/enclosure, use, other protective acts)
 - Commercial spaces
 - Home (most)
 - **Vantage Point** (question arises when the vantage point of the police is not one normally entered by public – test is unclear – Brennan in dissent says that the majority is saying “if a single person can go there, no privacy)
 - **Sensory Enhancement & Technology** (interacts w/ vantage point – did the police use some technology to see what they see =
 - Questions are 1. is it expensive/used by the public; and
 - 2. offensiveness, invasiveness of the technology
 - **Privacy** (people, not places) **v. Resurgent Property Rights** concepts
 - Most malleable
- Greenwood (garbage) – objective or subjective prong?
- Riley (greenhouse) – Vantage Point/Technology/Property rights
- White (radio transmitter) – Technology/Privacy
- Kyllo (thermal) – Setting/Technology/Vantage Point
- Karo (beeper) – Setting/Technology/Property Rights

C. What Does the 4th Amendment Require? - The Doctrine of Justification

1. Probable Cause - The Standard for Search and Arrest

“No warrants shall issue, but upon probable cause”. . . right of people to be “secure against unreasonable searches and seizures.”

- PC is required for full search/arrest/seizure:
 - **Facts and circumstances** within police knowledge that would lead a **Reasonable person (evolving into a reasonable officer)** to conclude there is a **fair probability** that a particular individual has **committed a crime** (pc for arrest) or that **specific items** related to **criminal activity** will be found at a **particular location** (pc for a search)
 - **Articulable facts** – suspicious-implausible-ambiguous-innocent

- Look to answers and situations
- **Judge must look to “totality”** – not as high as beyond a reasonable doubt, not even as high as clear and convincing – Judge uses “preponderance of the evidence” but most judges say it’s below 50%
 - Probable cause should probably equate to a preponderance of the evidence but the **SC has never defined**

Rules:

- Cops can use their **intuition and prior experience to establish probable cause** and pass that info to officers w/o experience – **what one officer knows, all officers know who “touch tentacles”**
- **Flight cannot establish probable cause** – it’s a factor
 - What if it’s a high crime area? – some courts say it’s RS for a Terry Stop
 - Probable **cause to search is like bread – It can go stale**
 - Probable cause to **arrest NEVER goes stale**
- **Don’t include a refusal to speak to police when calculating the establishment of PC** – we throw everything into the “totality” but we exclude certain issues which remain separate values (against self incrimination)
- **Police talking to one another grants probable cause** – assumed as fact
- **Can base probable cause in a single innocent victim or witness** – problem arises w/ informants and anonymous tipsters

Spinelli v. United States (1969) – information from an informant (hearsay) satisfy the necessary evidence to reach probable cause?

- The test for reaching probable cause w/ Informant tips under Spinelli:
 - 1. Establish the veracity/reliability of the informant (track record of tips)
 - 2. Basis of knowledge of the informant – direct assertions or self-verifying details – how detailed the info was to avoid personal motivations playing a role in the reason for the information – is it just hearsay?
 - Need a sense of personal knowledge greater than that of hearsay
 - With a lack of reliability, corroboration is only acceptable if more than a simple detail to establish veracity (which may never occur)
- With anonymous tips, it is unclear whether they could ever reach the necessary 2 prongs for probable cause

Illinois v. Gates (1983) – Spinelli OVERRULED – CITE TO GATES – **Info from informant** – anonymous letter

- A deficiency in reliability may be compensated by an increase in demonstrated knowledge base (corroboration) and vice versa
- **Totality of the Circumstances** rather than the 2 prong specifics
 - Although credibility of present behavior would satisfy the requirement, the court was really sold by the corroboration of future facts (even if innocent)
 - **Corroboration is based on a continuum of innocent v. suspicious details and present v. future behavior**
 - Informants statements are typically validated through:
 - Establishing a track record
 - Corroboration
 - Practice uses the Spinelli test factors to arrive at the Gates totality

Requirement Examples for Informant/Tip:

- **Bare bones facts won't work**
- **Anonymous claims require a significant number of facts to be corroboration – preferably future facts** rather than present ones as there is no reliability w/ anonymity
 - Supreme court said that **w/ no credibility/reliability and only corroboration of present facts, probable cause isn't reached**
 - Requires stronger basis of knowledge (accurate conclusions) to remedy a weak showing of credibility
 - **Face to face anonymity is more compelling** than phone, letter, etc., and therefore carries more weight
- **Flight from the scene can be used in a determination of probable cause totality even though refusal to speak is not.**
- **The opportunity to corroborate and the failure to do so did not play a role** in the DC case – face to face anonymity, suspicious activity

2. Reasonable Suspicion - Standard for "Stop and Frisk"

- **Terry Stop – limited stop for a brief period of time requiring “reasonable suspicion” – less than probable cause, more than a hunch**
 - Line b/w Encounter & Terry Stop
 - Line b/w Terry Stop & Arrest

Terry v. Ohio (1967) - no Constitutional clause allowing for Terry Stops – found judicially in the 4th Amendment “Reasonableness”

- **Balance Test:** Interest in Preventing crime (government) with a limited intrusion on the personal security of an individual (public)
- Terry may be used upon suspicion of past criminal activity, but the scope is incredibly limited
- Requires **“reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection w/ criminal activity**
- 2 Part Test:
 - **Justified to stop the individual** – Whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger – **Modified objective test** (reasonable person under those circumstances)
 - **Actions are reasonably related to circumstances which justified the stop**

Examples:

- **Suspicious activity of a known drug doer/dealer** typically will rise to reasonable suspicion **only w/ an exchange of objects witnessed**
- **Lying to police can be an ingredient**, but itself isn't sufficient - lying after suspicious activity may allow for reasonable suspicion
- **A refusal to speak to police by itself isn't sufficient**

Florida v. J.L. (2000) – Credibility of anonymous tip could not be tested and SC would not permit a Terry stop based exclusively on such an anonymous tip

- Will **NOT allow Terry stops automatically for suspicion of having guns** – you could falsely accuse anyone of having a gun, additionally, you could say that people w/ drugs often have guns and search for drugs
- Court infers that they will be **more willing to relax the Terry rules for mass deaths** – bombs

Illinois v. Wardlow (2000) - Individual was in a high crime area, holding bag, and runs in a high narcotics area

- Reasonable Suspicion for Terry Stop Permitted
- Flight + high crime seems to be enough – but it is a totality of the circumstances determination
 - Including: location, identifiable police officers, appearance of individual
 - Individual was in a high crime and narcotics area, holding bag, and runs

Florida v. Royer (1983) – AIRPORT – BIG CASE FOR WHEN TERRY TURNS TO ARREST

- For the purposes of Terry, the suspect was seized when the police held onto plane ticket and the license – reasonable person would not have felt they could leave = Permissible
 - They had reasonable suspicion to stop and question under the circumstances
- The **problem occurred where D was taken to a small room and had luggage searched** – This amounted to an arrest or the functional equivalent thereof
 - For purposes of 4th A, moving D into a private area was the functional **equivalent of an arrest, and there must have been probable cause or consent** – Neither of which existed
 - Consent to having the bags searched was insufficient because D didn't feel as though he could leave – was already in the room and barely gave consent
 - D was never told he could leave and was essentially arrested, and because of an initial illegality, the consent was tainted
- Went from Consensual – Terry – Impermissible Arrest
- **The Terry stop must be:**
 - **stop for only enough time to confirm or dispel the suspicion – then there must be probable cause to continue or let them**
 - **To confirm or dispel: must use the least intrusive means possible**
 - **Question is not of another possible alternative, but was it a reasonable method**
- Police Alternatives:
 - Could have given the ticket back - wouldn't have been a Terry Stop and would have been consensual
 - Could have not been an arrest if they didn't take him to the small room
 - If he refused the search of the bags (as if refusing to speak w/ nothing more), they could have gotten a dog – least intrusive means possible

United States v. Drayton (2002) – 3 officers **enter bus**, ask if they can search, 2 agree and are arrested for drugs

- Badge, officer stationed at front of bus, only few refuse to cooperate = NO seizure
- When moving, the test is whether a reasonable person **could refuse to speak** and walk away (or were they detained)
- When a citizen is stationary, the test is whether a reasonable person would feel **free to decline the request** to be searched and look straight ahead
- **Rule:** Would a reasonable person Feel free to terminate the encounter or decline the request (Florida v. Bostick)

United States v. Place (1983) – Unreasonable seizure at airport when delaying luggage for 90 minutes for dog search at another location when they knew before and could have arranged for additional investigation

- The limitations “applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person’s luggage on less than probable cause”
- Either a pure liberty interest (high), Pure property interest (medium), and a Person w/ Property detained (hybrid – somewhere between)
- **Should have:** had a dog ready, give person info about when the property would have been available and how much time in order to detach the person from the property, and arrangements for retrieving luggage – least intrusive

FRISKS

There are 2 parts to Terry stop: is there **reasonable suspicion to stop** the person, and 2nd – if there is additional reasonable suspicion that **person is armed & dangerous**, a person can do a pat-down. **Focus on Rationale = officer safety**

- Initial search
- **Plain touch doctrine** – Originally, scope was limited to pat-down for weapons, but has been expanded to allow an officer, who during a pat-down feels object immediately recognized as contraband, to seize it (Minnesota v. Dickerson)

Factors:

- sudden movement
 - bulge
 - area
 - time of day
 - # of suspects vs. # of police
-
- Harlan, in Terry, says that generally, courts generous in approving frisks in crimes of violence. **Frisk will be almost automatic** - if there is reasonable suspicion of a stop
 - Kids drinking and cops called – likely not, but argue # of kids, tendency to be violent when drunk
 - Most cases allow **frisks of a drug dealer**
 - **High crime area can contribute** to factor in reasonableness (Adams v. Williams)
 - **Informant’s tip can go to reasonableness** of terry stop – requires indicia of reliability, but less so than for probable cause (Adams v. Williams)

Factors:

- **Articulate suspicion for stop and a frisk**
 - Ex: Officer feels soft bag in person's pocket-They take it out and look at it = NO
 - Doing a frisk, if they think it COULD be drugs, the purpose of frisk it to reveal WEAPONS = They cannot search the person – you can only search on PROBABLE CAUSE, not on reasonable suspicion.
 - Feel something hard, might be weapon, but turns out to be the stolen camera we were looking for all along – OKAY
 - Stems from Plain View Doctrine – officer was **legally present and saw something – seized it**
 - **Jury must believe** that the officer reasonably believed that the object was a gun
 - Reasonable suspicion to do a FRISK = It's all about how the officer testifies

Rationale for Terry stop: Protection of officer. Keep coming back to that!!

- **RULE:** If in the course of a Frisk, **officer develops Probable Cause**, they can arrest (RS to stop and frisk guy exiting known drug house, during search, feel what feels like crack – Now have PC to arrest –search incident to arrest)
- **RULE:** In course of frisk, **manipulates it in his fingers** – Just supposed to be a Pat down – Officer manipulates, Government loses (MN v. Dickerson)
 - **Rule:** Officer must have **PC upon first touch** (no manipulation) – tricky w/ soft package that may have a razor blade in it – comes down to what judge believes

2 ways govt can win:

- **Weapons search:** they believe object is weapon and that belief is reasonable, but upon view, they see it's contraband - Can continue frisk and turn it into search.
- **Plain touch cases** –(from plain view) Officer, who during a pat-down search feels an object that is immediately recognized as contraband, may seize the object = Object has to fall w/in plain touch

From People, To Cars:

- Police can **Terry frisk a car** – Where officer has at least an articulable and reasonable suspicion that the motorist is violating the law – including infractions – may stop and briefly detain motorist (Delaware v. Prouse)
 - May order the occupants out of the car (MD v. Wilson)
 - Officer has reason to believe that the driver or occupant is armed and dangerous, officer may frisk and conduct limited search of car w/in occupant's control
 - Find evidence by frisking the car and it's apparent it's contraband - back to plain view
 - Cannot open containers.

3. What Constitutes a Stop?

For a stop = Seizure of person

- **RULE:** In Hodari D - Seizure of the person occurs in the context of a pursuit only where there is either an actual application of force on the subject or a submission to police authority
 - Seems to say that physical restraint is necessary for submission (because throwing the drugs down and stopping running did not qualify for submission– cops picked up thrown drugs and then seized – if held onto drugs and cops grabbed, likely would've been an illegal seizure...?)
- In Mendenhall, (earlier case) “A person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a **reasonable person would have believed that he was not free to leave**” – **this is the closest the court comes to defining what a show of authority is** – Use this test for Terry Stop analysis

Use the Mendenhall/Hodari reasonable person analysis – Matter of degree b/w Terry & Arrest

- **FACTORS: More likely a (Terry) stop when:**
 - Physically obstruct movement
 - Show of force (# of cops, weapons displayed)
 - Retain ID or property
 - Threatening tone or threaten detention/prosecution
 - Length of encounter
 - Coercive surrounding
- **Factors: Less likely a stop when:**
 - Police are polite
 - Inform of right to terminate
 - Least intrusive means of resolving suspicion
- **Factors: More likely to be functional equivalent of Arrest when:**
 - Tell D under arrest
 - Not diligently pursuing investigation
 - Obviously less intrusive means to confirm/dispel
 - Forced movement to custodial area (even police car)
 - Use of force/handcuffs
 - Extended interrogation beyond scope of initial inquiry
 - Extended period of time
- **Factors: Less likely an arrest if:**
 - Diligently pursue investigation
 - Forced movement necessary to procure ID, safety, D's actions

Race:

- **Description (black girl stole jeans) – acceptable use of race** - Quantum of proof meets reasonable suspicion standard
- **Propensity** - Knowledge of x people as alcoholics is factor that to include in reasonable suspicion calculus - use of race as propensity -**Generally, propensity evidence on the face of the law has NOT been allowed** - Problem is: other facts bend it a little
- **Incongruity** - more accepted in past - **Now, less accepted** by the court and less often - More travel/more integration
- **RULE:** Arguing racial congruity is not just the propensity of the group in general, but a particular location, AGE, specific behavior, coupled with race... **race alone cannot be enough, but racial congruity PLUS is enough**
 - Courts said you can use racial congruity as long as it's couple w/ v specific facts - **makes them uncomfortable b/c it starts to sound like propensity**
 - Propensity becomes incongruity w/ specific facts couples w/ percentages gets closer = Argue that you have specific facts AND “the chances are even greater because they’re all Italians”

State v. Ruiz (AZ 1973)

- Race is the entirety of the justification for the stop = Racial incongruity
 - Likely would not be permitted today – back then, the law allowed racial incongruity stops and so the cop was truthful
 - Today, the cop would likely not be honest
- Aside: Search for balloons in mouth CANNOT be based on RS – not reasonable to believe that one has balloons in their mouth – Once seen, there is PC

City of St. Paul v. Uber (MN 1990)

- Profile used:
 - Out-of-towner looking for prostitution late at night alone in car – talking to people or slowing down
- Analysis:
 - D did not fit the profile – wasn't stopping or slowing
 - This case has more than Ruiz as far as fitting a common profile (rather than a minority in a predominantly black area buying cigarettes in Ruiz) – but still **not enough under today's law to allow the stop – no racial incongruity**

US v. Obiwevbi (IL 1991)

- Nigerian man flying to Nigeria staring at the customs official
- Racial congruity (which begins to be similar to propensity, but congruity is one factor in the whole of the circumstances, whereas propensity uses race as the sole factor)
- BORDERS ARE DIFFERENT – 4th is out the window – dumb that the Judge went on the tangent, it needed no justification

- Formerly, the Test was aimed to discover when the motivations were wrong because cops aren't going to admit to the racial pretext
- **CURRENTLY, in 2003, in Wren, SC said that they will not look behind the reasoning** – the Federal Law lies at the objective reason for pulling the individual over (but the court may have said that the Terry stop took too long in the drug investigation after originally pulling individual over for weaving)
 - **Terry Test:** Whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place
- **RULE TODAY:** Race is not outlawed if it is shown as a factor – Just a profile of race is out – but race may be a factor in a profile once shown (statistically or otherwise) that it is valid
 - Race can be used but not alone
 - No strictly racial profiling except for terrorism investigations
 - Back to the way things were in the 70's w/ many hijackings
- **Racial incongruity** – Less accepted by the court – Diversity, do not want to proscribe access to certain areas
- **Racial Congruity** – May be used w/ very specific facts
- **Propensity** – Likelihood of a certain race – Not permitted on its face

4. Administrative Searches

- 2 Kinds of Administrative/Regulatory searches:
 - **No Justification** – regulatory searches = **Balance test**
 - Balance test (Governments need w/ intrusion on individual privacy) met b/c in heavily regulated industries
 - **Look to the program used for standardized, neutral criteria w/ little or no discretion – NOT PERSONAL**
 - Did the search performed follow the program
 - **Reasonable Suspicion** – regulatory/**special needs searches:**
 - Balance test met b/c of a special need by the government allowing a search that regular law enforcement would not have
 - Warrant and Probable cause are not practicable
 - Look to **individual circumstances to see if special needs apply**
 - **Primary purpose must be non-criminal**
 - **Rule: Requires some form of individualized suspicion, but not probable cause** = “In certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches w/out any measure of individualized suspicion serious drug problem, too burdensome to impose suspicion – school (Earls)

Test in Regulatory/Special Need cases:

- What is the **primary purpose** of the government – Law enforcement or non law enforcement/Regulatory

- Then **Balance test w/ Regulatory** – government v. private
 - No justification
 - Reasonable suspicion

Examples:

- Good arguments against in Earls (Special Needs) Dissent:
 - This was a limited problem
 - Determination could have the opposite effect – targeting groups is likely to stop the extra-curricular activities which likely prevent many students from doing drugs
 - *TLO* – student has a reasonable subjective expectation of privacy in the personal items she brings to school – same w/ the chemical composition of her urine?
 - *Chandler* – Georgia requirement that candidates for state office pass a drug test – unconstitutional
 - The policy here was not to advance “special needs” in public school context

- Statute **tracks guns** for illegal purchase and gun violence – Withstand 4th? (US v. Biswell)
 - Balance test – Gov. Interest v. Individual intrusion = **Important government need in heavily regulated industry BUT – what is the program?**
 - Need to know how the officials are determining who is searched
 - **Must use neutral and random criteria w/o discretion**
 - **Decreased expectation of privacy for individuals who work in a highly regulated industry or workplace**

- **RULE:** “The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect” (NY v. Burger)

- **Public Schools** = Special Needs:
 - Public school students, particularly athletes, have less privacy expectation; urine taking was not intrusive (Vernonia v. Acton)
 - Reasonable suspicion = Special Needs (school environment) searches in public schools calls for safety of students – but for individual testing or locker searches, probable cause is needed
 - (TLO – Balance test allowed reasonable suspicion rather than Probable Cause that student was smoking in school allowed principle to search purse to “maintain environment in which learning can take place” = less than normal law enforcement under circumstances)
 - Could go either way – Earls and Vernonia – targeted group that opens itself up to the search – lowered expectation of privacy
 - Generally, if the principle does the search, it protects the school and is a special need, but if the **cops are summoned, the necessary cause (reasonable or probable) increases**
 - **On the person is a greater level of intrusion compared to the government need – probably to the level of probable cause**
 - **Individual testing or locker searches**, probable cause is needed

- **Government** office = Special need under the circumstances

- Treasury Employees – court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing
- Chandler – invalidated drug screening due to lack of special need in nonsafety context
- **Blurring the Administrative “Special Needs” Line** – NY v. Burger = P make warrantless searches of junkyards, despite close connection to criminal justice process
- **Federal Inmates** – NOT permissible “special need” for taking blood
- **Airports**
 - **No justification search** so – what is the program
 - If it’s metal, always search
 - Special Need is safety, not ordinary law enforcement
 - The special need leads to the heavy regulation and thus, the no justification search
 - Once the search starts to depart from the need, you’re not protecting the people
 - **Cannot use individual, subjective reasons – must maintain the program and eliminate any discretion**
 - This is a limited intrusion w/ notice to people entering airport (regulated) so there is **“no justification” – everyone is subject to the search**
 - **Once something is found, the level rises to outside of an administrative search and issues of reasonable suspicion and probable cause come back into play**
- **Borders**
 - **No justification searches** and heavily regulated
 - Strip searches in schools – probable cause, on borders – reasonable suspicion
 - Dry Rooms - Detentions up to 16 hours at borders to make individual poop is permissible – borders are different
 - Within a reasonable **distance from the border** and enough facts (reasonable suspicion) that the occupants are illegal immigrants, can pull them over (US v. Brignoni-Ponce – roving patrols)
 - On the road - Flying into airport and taking off immediately, pulled over on the highway – **some courts have said the border is wherever you make it**
- **Cars**
 - No Justification - Police get to inventory the cars seized because they don’t want to be accused of stealing, helping owner, etc. – DWI resulting in seized car permits car to be “inventoried” (Colorado v. Bertine)
 - Inventory must occur as it would under any other circumstances – cannot allow discretion to slip back in
- **Parole/Probation officer search of home**
 - Gov has high interest in preventing drug use/sale/recidivism and that criminal is being watched (lesser expectation like a student or consent (court hasn’t ruled on the consent issue) v. private interest in privacy
 - Court held that reasonable suspicion is okay for a search of parolees and probationers
- **Fixed checkpoints** are permissible (Almeida-Sanchez v. US)

D. Search and Arrest Warrants

1. The Search Warrant Requirement

- Valid **Warrant Requires**:
 - Neutral and detached magistrate
 - PC by oath or affirmation (severability – if you throw out certain parts, the warrant is still valid)
 - Particularity (places and items)
- **Execution** of Search Warrant
 - Knock & Announce
 - Detention of Person on Scene of SW
 - Search of Persons on Scene of SW
- SW for evidence – D’s home or 3rd Party
- SW for Person – for D in 3rd party’s home
- Arrest W for D – in D’s home

Factors:

- **Challenge “behind the affidavit”** – Truthfulness of facts
 - Must prove **cop lied or recklessly disregarded** whether truth was told or lied
 - Frank’s Hearing to challenge a warrant
 - Cop didn’t mention that informant was wrong as many times as correct (4/8)
 - With Informant – cop’s affidavit must support reliance on informant’s credibility and accuracy – Gates totality
 - Close – lie by omission?
 - Lie in regard to reliability?
- **MD v. Garrison**
 - “We must judge the constitutionality of their conduct in light of **the information available to them at the time they acted**”
 - Clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant
 - The warrant, insofar as it authorized a **search that turned out to be ambiguous in scope, was valid when issued**
 - **Sufficient probability, not certainty, is the touchstone for reasonableness** under the 4th – on the record the officers’ mistake was understandable and the arrest a reasonable response to the situation facing them at the time
 - Police can make **mistakes before the warrant and during their execution and the evidence may be acceptable – good faith**, reasonable mistake
- **Particularity Language –RULE:** Place and items must be specifically and accurately described or mistake must be objectively reasonable
 - Include as much as possible to “scoop up” as much as you can
 - Doctrine of permeated by Fraud – when it’s a “sham business” set up to launder money, you can be over broad – “all documents”
 - Must at least specify a crime
 - **Evidence found** under valid warrant while in the permissible scope of such warrant is permissible

- Probable cause attaches to the place the evidence could be – doesn't matter where it is or what else is there
- **Anticipatory warrants** are becoming more and more acceptable where there is a likelihood that the items will disappear when there (Delivery of Contraband soon)
 - Telephone warrants – over the phone
- Cannot search **persons found inside place** described in warrant unless specified (Ybarra)
 - Police can **detain for a reasonable period of time anyone in a place that they have a SW for**, can frisk w/ reasonable suspicion, but search/arrest w/ probable cause

3. Execution of a Search Warrant

- **Knock and Announce** (Wilson v. Arkansas)
 - **RULE:** “It is the duty of a court confronted w/ the question to determine whether the facts and circumstances of the particular entry justified dispensing w/ the knock-and-announce requirement”
 - NO blanket drug exception = Must have “**reasonable suspicion that knocking and announcing would be dangerous or futile or would inhibit effective investigation** – destruction of evidence (Richards v. Wisconsin)
 - **RULE:** Entry obtained by ruse – case by case - does not violate because it was not forcible (DC CT APP), but more readily accepted when situation is dangerous
 - **RULE:** No media ride along (Wilson v. Layne), - but okay for 3rd party to help
 - **Factors for time to wait:** nature of evidence they want to seize, size of the house, time of day; – 20 seconds sufficient w/ drug case (Banks)

4. Arrest Warrant

- Authority to enter suspect's own dwelling and search for him anywhere in the house that he may be found
- **Need search warrant to arrest someone when not in their own home**
- **Requires;**
 - Neutral Magistrate
 - Probable cause
 - Particularly identified
- **RULE:** Standard of probable cause applies to all arrests without the need to balance interests – if there is probable cause to believe that an individual has committed even a minor criminal offense, the offender may be arrested (Atwater v. Lago Vista)
- **Warrantless Arrest:**
 - Arrested **w/o warrant**- Judicial determine probable cause after 48 hours (Gerstein)
 - **Public Place and Probable cause** – warrantless arrest permitted even if there is sufficient time to seek an arrest warrant and no impediment to doing so (Watson)
 - In **Home** – warrant required (Payton v. NY)
 - **RULE:** Does not violate 4th to arrest for a **minor criminal offense**, punishable only by fine (Atwater v. Lago Vista)

- **RULE:** Standard of **probable cause applies to all arrests** without the need to balance interests – if there is probable cause to believe that an individual has committed even a minor criminal offense, the offender may be arrested (Atwater v. Lago Vista)

E. Warrantless Searches and Seizures

2. Probable Cause Exceptions - Search Incident to Arrest

- **Search incident to arrest** constitutional – exception to warrant requirement and reasonable (US v. Robinson)
 - **RULE: Substantially contemporaneous & Immediate Vicinity**
 - **Search Person**
 - **Search Grab Area**
 - Most cases are allowing wingspan to be searched as if it was person (including what is in hands – briefcase)
 - **Search Passenger compartment of vehicle** Car – proximity of person to car is issue (for searching car after arresting person)
 - Includes Containers, if w/in proper scope (NY v. Belton)
 - Cannot search if you don't arrest (issue citation) (Knowles v. Iowa)
 - **Search prior to arrest** - Police have probable cause for arrest- OK(Rollins v KY)
 - Includes fingernail scrapings (Cupp v. Murphy)

3. The Expansion of *Terry*: Vehicle Stops, Detention of Effects, Protective Sweeps, and Plain Feel

- **Protective sweep = Search incident to arrest based on principles of Terry = of premises** when police make arrest in home = **Protecting Officer**
 - **RULE:** Search areas (including closets and other spaces) in immediate vicinity of arrest; reasonable suspicion that accomplices are lurking = cursory inspection of other spaces – only as long as necessary to dispel reasonable suspicion of danger (MD v. Buie)
 - **RULE:** Permitted regardless of how entered the home (exigent circumstances)
- **Probable cause to arrest in Home DOES NOT entail search** (Vale v. LA)
 - Premises may be secured while police wait for a search warrant
 - Illinois v. McArthur – **restriction of man** while police stood outside and waited for warrant was permissible – unless restrained, D would destroy evidence, had probable cause, only took 2 hours – Balance TEST

4. Exceptions that Require Probable Cause: Exigent Circumstance

Arrest in Home w/o Warrant =

PC for crime + probable cause D in home + exigent circumstances + W impracticable

Search of Home w/o Warrant =

PC evidence of crime in home + exigent circumstances + W impracticable

- Domestic violence - Public safety issue allows for probable cause to enter home

- Issue of continuing search for wife when husband says “Noth’n here” – analyze facts w/ public safety concern

Exigent Circumstances =

- Hot pursuit/escape of suspect
- Destruction of evidence
- Public safety/emergency = Domestic violence

Factors for Exigent Circumstances

Degree of urgency = Reasonableness of belief in exigency

Degree of danger = Type of crime - awareness of suspects

Issues/Alternatives

- Impact of Police “creation” of exigency
 - When police create an exigency, the exigent circumstances do not create permissible warrantless entries – rule in some jurisdictions
 - Punish the police is when it looks like they’re trying to bootstrap = create the exigency = to walk around the warrant requirement – rule in other jurisdictions
- Reheated pursuit
 - Warrantless entry of **home** is permissible but **pursuit must be VERY hot**
 - Warrantless entry of **home w/ reheated hot pursuit is permissible** (Santana – see suspect later going into home) – Ex: D got away once, could take hostage, could shoot at them – **underlying reasons** for exigent circumstances allowing warrantless arrest **MUST PERSIST**

Seizure of Premises/Exclusion of others

Telephonic warrants

5. Exceptions that Require Probable Cause: Automobile & Container

- **Original Rationale:** Ready mobility of the automobile justifies exigency
- **Modern Rationale:** Lesser expectation of privacy w/ cars - a lesser degree of protection and Expectation of privacy – can look in, heavily regulated
- Examples:

Carney – Auto exception/Mobile Homes

Acevedo – Auto Exception/Containers into cars

Belton – Search Incident to Arrest – Cars

Knowles – No Custodial Arrest / No Search incident to citation of car

Houghton – Auto Exception/ Passenger Possessions

Bertine – Admin. Searches/Inventory of seized cars

- **RULE:** Warrantless Probable cause search of motor home is permissible (CA v. Carney)
- **RULE:** Police may search an automobile and any containers w/in it when they have probable cause to believe contraband or evidence of crime is present anywhere inside – May only search where such items may be hidden (Acevedo)

- Overruled Chadwick-Sanders relating to cars – still need warrant relating to package someone is carrying, unless package is in owner’s hands and you arrest him (search incident to arrest)
 - Old rule was confusing because it distinguished b/w searches w/ PC for entire car or just package w/in car
 - RULE: Policeman has made a lawful custodial arrest of the occupant of an automobile, he may as a contemporaneous incident of that arrest, search the passenger compartment of that automobile (Belton)
 - Police may also examine the contents of any containers w/in the compartment as they would be in D’s reach
 - RULE: No search incident to citation (Knowles)
 - RULE: Police officers w/ probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search (Houghton)
 - Issue: When passenger and driver do not have a relationship – know the possessions of passenger would not contain the driver’s possessions
 - RULE: Inventory searches are not subject to the warrant requirement because they are conducted by the government as part of “community caretaking” (Bertine)
 - If statute allows for more intrusive administrative searches – discretion is eliminated
 - Otherwise, must be reasonable – don’t inventory behind door

GO to Office and Review Car/Container

6. Exceptions that Require Administrative Justification: Administrative and Inventory Searches

7. Warrantless Intrusion Requiring No Justification: The Consent Doctrine

- RULE: Use a totality of the circumstances to determine whether the waiver of consent is voluntary – a diluted form of waiver is acceptable (Bustamonte)
- A custodial questioning (arrest) is inherently coercive – away from home, in a questioning room, totally uncomfortable, new environment – This is completely different from consent where you are in a comfortable environment w/ other people around and doesn’t require the waiver of rights explicitly as w/ Miranda
 - This voluntariness test stems from the 14th amendment Due Process Clause (Courts look to tactics used by Police and vulnerabilities of the subject = **NO DURESS OR COERCION**)
- Factors: Custodial, Location, Level of police coercion, awareness of right to refuse, D’s education/intelligence, D’s belief nothing incriminating will be found
- Look to location/duration, revocation
- **Actual Authority** – Mutual use and access against non-present party (Beware of limited access and family issues)
- Rules:
 - **Misrepresenting Authority** – “I have a warrant” = coercion

- **Misrepresenting having a reason to search w/o a warrant** = Probably coercion – “Leave people feeling like they don’t have an alternative” – **Would a reasonable person have felt free to decline the officers’ request (Bostick)**
- **Saying they will “just go get a warrant”** – If objectively sounds as though it will be automatic = Coercion
- **Non-verbal Consent** – High bar for government – Would reasonable person believe that he was consenting
- **Promising Benefits** may be equally as bad as Threatening – depends on circumstances
- **CAN negotiate** w/ police at beginning of search as to parameters and **MAY revoke at any time** – UNTIL police develop probable cause or exigent circumstances (will be destroyed)
- People do not expect **things to be taken apart** during search (although it may be intrusive – must reasonably have been able to find what you’re looking for (under spare tire)
- **Apparent Authority** – Reasonable belief that 3rd party has actual authority (Reasonable mistakes allowed, Further inquiry might be necessary)
 - 4th amendment only protects from “Unreasonable” searches – police acting in good faith is not unreasonable
 - Burden on state to show that cops were acting reasonably
 - You’re relying on a 3rd party – cops should have asked more questions somewhere – what would a curious cop ask?
- **RULES:**
 - **3rd party occupancy** – Dorm Room – Can only search where 3rd party has authority (their room and spaces)
 - **Spouses** are presumed to have authority over each other’s space – an office would require a showing of exclusivity on the part of the absent party
 - **Unmarried** but staying together frequently – right in the middle
 - **Kids living at home** – toss up – younger is bad, some say until 18, most look to the mutual use and access
 - **Minor children** have no rights to their own stuff - kid probably could never give consent for parent’s room
 - **Legal authority to enter premises** – not sufficient alone

8. The Plain View Doctrine

- Does Not permit a search – Only a seizure of something already discovered
- Must be w/in the scope of their permissible search
- **Requires:**
 - Original intrusion is lawful
 - Observed while officer is confining her activities to the permissible scope of that intrusion
 - Immediately apparent that the item is contraband or evidence of a crime
- **Rules:**
 - Inspection of objects (touching – what is not immediately apparent) removes plain view - **Can’t do any further examination (Hicks** – lifting stereo components)
 - **Cannot be manipulated (Bont)**

- Always builds off of police actions in some other way
- **Must be legally present to SEE and SEIZE**
- See gun through window – must go get a warrant to go into the house
 - Not seeing - it's where the police were lawfully allowed to be to “grab it”

9. The Problem of Pretext

- In US v. Robinson - traffic-violation arrest would not be rendered invalid by the fact that it was a “mere pretext for a narcotics search”
- Scott v. US – “Subjective intent alone does not make otherwise lawful conduct illegal or unconstitutional”
- **Whren v. US** - “the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action”
 - Pretext only matters in administrative, not probable cause

II. Interrogation and Confession

- Can be inadmissible under the 14th(DP/Voluntariness), 5th(self incrimination/miranda), and 6th(right to counsel)
 - Originally, rationale was that beating someone to the point of confession is unreliable – coerced
 - Later, movement in 30’s, 40’s, 50’s – **not just eliminate unreliable confessions, we want to deter police from inappropriate behavior** – we have an accusatorial no inquisitorial

A. The Voluntariness Standard

- DP Test for involuntary confessions: Objective test – Reasonable person in D’s Shoes -
 - **Coercive police conduct that is**
 - **Sufficient to overcome the will of the suspect**
- **TEST:** Evaluate the actions of the police and any special characteristics of D
- **RULES:** - This is often an issue where Miranda doesn’t apply – D is not in custody or subject to Interrogation
 - **Mental Illness:** Court does not care – Only looks for inappropriate action of the police
 - **Medication** – It is coercion to take advantage of individual’s mental or physical condition
 - If police know that they are dealing w/ a fragile individual – if just questioning would make an individual break, then they can’t question
 - Once D mentions psychiatric or medical issues are there, police must ask a fair number of questions to avoid coercion
 - **Threats** – Against D’s family are more likely coercive than against D himself – there’s more latitude w/ the D
 - **Promises** – “things being easier if you confess” is not sufficiently coercive, “only charge you for 2 out of 10” is an inducement that is likely coercive
 - **Lying about consequences** is likely coercive

- **Specific Guarantees of treatment** cross the line into coercion
- **BUT:** Talking about possible punishments or saying they'd try to help is likely not coercive
- **Deception – CoD ratted on them is not enough** to overcome D's will while deception involving **more personal situations** (yo momma is dieing) – susceptibility of D is an underlying issue in these cases
- **Cell-mates** – if gov actor - coerced by a state actor - then it's coercion (Fulminante)

B. The Sixth Amendment "Right to Counsel" Approach

1. The *Massiah* Doctrine

- **Rule:** Right to counsel attaches when D is charged w/ the crime (indicted, arrested and arraigned, preliminary hearing) – whenever adversary proceedings have been initiated against you (Messiah)
 - Deliberate Elicitation requires 6th amendment protection
 - Opposed to a system of confessions because of police abuses/coercion; people not aware of their constitutional rights
- Problem w/ Escobedo – wasn't made aware of his attorney being present and asked for one – court said that his right to counsel began when the investigation was “focused” –Pre-Miranda

C. The *Miranda* Approach

1. The *Miranda* Decision - Components

a. Custody

- **Custodial Interrogation Defined:** refers to questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way
 - **Reason:** Custodial Interrogation is inherently coercive and must be balanced under the constitution by these warnings
 - **Justification:** 5th is pointless unless you're protected before making a confession which will be used against you (right says there's a right not to testify – but this can't just apply to “in court” because the 5th would be useless during interrogation)
 - the standard for waiver?
- **Express Waiver** – Knowing, Intelligent, Voluntary
- This is a **giant step back** from the possible parameters of Escobedo (E looked like lawyers in the PD or no interrogation)
- **RULES:**
 - Convicted Felon – knows rights and cops forgot to say them this time –
 - **MUST GIVE IT REGARDLESS OF SUBJECTIVITY**
 - Guy arrested and **blew off the Miranda** reading – preemptive “whatever” = **Miranda violation**
 - **THIS IS A VERY BRIGHT LINE TEST**
 - Does it protect all types of questioning?
 - **Necessary during a Custodial Interrogation**

- D received Miranda, waived it, and **changed mind** – permissible?
 - YES – **can invoke 5th at any point** of interrogation
- Once rights invoked, can **Police start again?**
 - **Questioning must cease once D invokes – about any matter at any time** (court will back off of this as time goes on)
- Voluntary for 14th but Compelled under the 5th??
 - Sometimes facts suggest alternative possibilities – this comes down to balance
- **Failure of police to allow lawyer** to see suspect or **failure to inform suspect that attorney is trying to reach** - Vitiates an otherwise valid waive of Miranda? – NO (Burbine)
 - **5th doesn't deal w/ the bad police business – concerned w/ D's waiver**
 - You get NOTHING w/ your warnings – nothing more, regardless of Police conduct
 - **Basically overruling Escobedo** - D can only rely on 5th unless the particular facts of Escobedo arise – cannot use it in pre-adversarial proceedings
- **“In Custody”** – Formal arrest or **function equivalent of arrest** = “the substantial deprivation of liberty normally associated w/ arrest”
 - Factors – location, duration
 - Issues – Terry stops, traffic stops
 - **TEST:** Reasonable person believe they were not free to go
- **“Interrogation”** – Questioning initiated by police or functional equivalent of interrogation
 - **Functional equivalent** – words or deeds likely to elicit an incriminating response (Innis)
 - where the functional equivalent is an interrogation – don't direct your attention to the defendant or direct your statements – do this little trick before asking any booking questions or anything that clues you into weaknesses – the less you know, the better - RI v. Innis
 - **Modified Objective test** – R police officer, average suspect – unless police know of D's susceptibilities
 - **TEST:** – Incriminating response was the product of words or actions on the part of police that they know or should have known were reasonably likely to elicit an incriminating response
- **Waiver** – Must be knowing, intelligent and Voluntary
 - Knowing – aware of nature of right and consequence of abandoning
 - Voluntary – Free/deliberate choice, not coerced (14th) by preponderance of evidence (even though Miranda says heavy burden)
- **Invocation**
 - **Must be unambiguous**
 - Clarification?
- **Re-initiation**
 - Right to silence
 - Scrupulously honor
 - **Police CAN reinitiate after reasonable period of time**
 - Factors (time, fresh warning, etc.)
 - Followed by K, I & V waiver

- Right to Counsel
 - Scrupulously honor
 - **No re-initiation during THAT period of custody** (under 6th, it's for the duration of the case)
 - Re-initiation By SUSPECT
 - **Suspect indicates desire to talk about investigation – beware of ambiguity: Requires:**
 - Counsel was made available to him OR
 - Suspect initiated the further communication AND
 - A knowing, intelligent, and voluntary waiver subsequently occurred
- **Test for 5th v. 14th:** = It's a chronological issue
 - Getting the Waiver from coercion is a 5th amendment issue,
 - Getting the Confession from a coercive act is a 14th amendment issue (shocks the conscience)
- **Test for 5th v. 6th:**
 - Is D in custody for purposes of THAT crime for 5th
 - Were adversarial proceedings beginning for 6th
- **RULES:**
 - **Inadequate information provided to D** (not told he would be provided an attorney when he said he couldn't afford one) – defeats entire underlying purpose of warnings
 - “we have **no way of giving you a lawyer but one will be given at court**” – Violation? = NO (by court's holding) – BUT – this is really close to the line because it seems coercive
 - You don't have to get the words perfect but the substance must be there
 - P arrest and **do not inform D of indictment** – waives Miranda = VALID – You get Miranda AND THAT'S IT
 - Miranda, waiver, and interrogation - **D confesses to another crime –Waiver adequate = Do not have to tell the subject matter of interrogation** (Spring) – **NOT OFFENSE SPECIFIC**
 - Different in military – Must tell subject of interrogation in military
 - **“Before Gov can introduce any statement produced during interrogation, must have been given Miranda”** (Miranda)
 - **D caught standing over victim w/ knife – Police say “what happened”** – No Miranda and D is silent = This is not custody (D reasonably does not believe he is free to leave) – but Silence is admissible – **This is closer to a Terry Stop**
 - **Post arrest, Pre-Miranda silence** is Admissible – There is custody but no interrogation (cops couldn't have asked questions)
 - **Traffic stops are not custody** for Miranda purposes = Terry (Berkemer)
 - Includes road blocks/sobriety checks
 - **Can have interrogation w/o custody** (Police call D) – No Violation
 - **Police going to arrest – ask questions first** = OKAY, unless functional equivalent = “Would a reasonable person believe that they are not free to go”
 - **Need arrest AND interrogation**

- Some circuits have said that Miranda doesn't = custody – most have – go to reasonable person test
 - Enter house w/ warrant - interrogate = Violation – not feel free to go (Orozco)
 - **Grand Jury trial** would NOT require Miranda – Not police dominated
 - Cops record a **conversation between suspect and wife at PD** – NOT interrogation (Mauro) – would be different if police set up interrogation or altered situation
 - **Look to whether police action is designed to elicit a confession**
 - **Booking questions** - excluded from Miranda
 - **Acquiescence to a voluntary statement** okay – “I wanna talk and cop says okay” – no interrogation
 - **Individual doesn't know he's talking to the police** - Miranda doesn't apply – D “isn't under the hot lights” (Perkins) – 6th would if adversarial started
 - After Miranda waived, D is lied to about witness seeing him = **Deception is okay to an extent: – TEST: was this the kind of deception that would overbear the reasonable person's mind?**
 - D refuses to sign: **Not about written v. oral** – must show that he understands his rights – show of rationality –(Barrett)
 - **Mental retardation** – analyze level of Knowing and Intelligent
 - **Minors** - look to capacity and authority to consent (with Miranda, you'd still look to knowing and intelligent but it's about capacity – some require parental supervision)
 - **External Threats: Question of Voluntary** - if D is aware of threats in jail (rival gang) and talks - not police action – tricky when police make him aware of them
 - Police have **no duty to verify request for attorney** (ambiguity) –(Davis)
 - **Forceful tone** – would go to voluntariness
 - **Request only goes to Attorney** (not doctor) – but, D could argue that there was a direct promise of benefit (seeing doctor) that can only be received if rights were waived (violation of 14th)
 - **Invoked his right to an attorney anytime and must be scrupulously honored** by the police – this is not decided by court – stems from faithful read of Miranda
 - **Reinitiation Silence** - Fresh warnings and the passage of time are the key issues (Mosely says asking about different crime after fresh warning and passage of time is okay, jurisdictions split about questioning same crime)
 - **D invokes right to counsel**, during that period of custody, police cannot reinitiate questioning = Only D can step through the force field of the 6th amendment
 - **D released on Bond:**
 - 6th – asking about crime B, adversary proceedings began for A, can ask about B
 - 5th – People who have been arrested and not released – can argue that custody is defined by what you are arrested for
 - Edwards rule is that you can't initiate questioning during that period of custody
- b. Interrogation**
c. The Substance and Adequacy of the Warnings
d. Waiver of Miranda Rights

e. Waiver After Invocation of the Right to Silence or to Counsel

3. Limitations of the Scope of the *Miranda* Exclusionary Rule

a. Public Safety Exception

- Public Safety Exception
 - Objective test that evaluates immediacy of threat
 - Limited to Quarles = related to emergency
- Miranda violation - statements can be used against you if questions were asked out of concern for the public safety
 - availability of the exception does not depend upon the motivation of the individual officers involved
 - Where spontaneity rather than adherence to a police manual is necessarily the order of the day – not depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer (Quarles)
- Decision was pretty weak – guy was cuffed and arrested – could’ve blocked off and searched
- RULES:
 - **Can remove certain statements** from the questioning situation – Those not related to the public safety = “Where is gun, is it loaded (questionable whether related), was it used to kill?”
 - **Incriminating statements in response to public safety questions leaves the answer admissible** – doesn’t advance public safety, but the question did
 - As for public places, protecting other criminals, = looks like they’ve **looked to totality**, including officers, bad guys, and future problems, in light of Terry, courts defer to police trying to protect themselves
 - Sometime courts have held that a statement may not be admissible because of a lack of public safety involved

b. Use of Statement for Impeachment

- **Impeachment:** Incriminating statements preceded by defective Miranda warnings, (but otherwise voluntary and un-coerced) and thus inadmissible for the purposes of establishing the prosecution’s case-in-chief, could nevertheless be used to impeach - once you take the stand, which you don’t have to do, the truth seeking function of the trial is undermined by allowing D to perjure himself if you don’t impeach him (Harris) (Havens)
 - (This does not apply when the overall confession is coerced – under 14th)
 - NO matter how egregious Miranda violation - can use for impeachment
 - Evidence cannot be used to impeach any witness besides D (James)

c. Suppression of the Fruits of a Statement Obtained in Violation of *Miranda*

- Rule: Initial unmirandized but voluntary confession does not bar the admission of a subsequent confession, so long as it is uncoerced and voluntary (Elstad)
 - **“Evidence derived from the statement (either Physical or testimonial) will be admissible as long as the statement was not coerced and involuntary”**
 - don’t know why he chose to speak so we’re not going to assume that it’s due to coercion or ignorance
 - but look for situations where police are implying that the first confession is admissible

- Rule: the initial taint has dissipated, the secondary evidence should be admissible, UNLESS the second taint is flagrant –
 - This is due to a need for the courts to deter improper police conduct
- **There seems to be this underlying distinction b/w coerced confessions (14th) and confessions merely in violation of Miranda (5th) which allows for the evidence to be used as impeachment, in public safety against the D, and secondary evidence**

4. Summary - What's Left of *Miranda*

Suppressed, unless public emergency, secondary evidence (voluntary and not coerced), or impeachment

D. The Exclusionary Rule: Rationale, Operation, and Limitations

1. The Derivative Evidence (Fruit of the Poisonous Tree) Doctrine

- **TEST:** – but for the illegal 14th amendment violation, the X wouldn't have been admissible
 - **DOES NOT CARRY TO 5th VIOLATIONS** – Where Miranda is violated but the statements were not coerced, secondary evidence is okay (Elstad)
 - The “But For” test is overcome w/ exceptions to the FPT doctrine
- **TEST:** Whether the secondary evidence was discovered by exploitation of the initial illegality OR was it discovered by means sufficiently attenuated to purge the original taint
 - **Factors:**
 - Time passed b/w initial illegal and secondary evidence
 - Intervening events (including reading of Miranda rights)
 - Initial illegality - Flagrancy
 - Impact of illegality on D's actions
 - **Rules:**
- **No PC but arrest**, but Miranda, D invokes and later waives - D would not have in custody but for the initial flagrancy, nothing intervening (Brown)
- Police **had PC but didn't get warrant** –would have been able to get to D anyways – not so flagrant and permissible (Harris)
- D drops secondary evidence immediately - likely not admissible
 - On the way to the station, closer to admissible;
 - Found at the station –it's out
 - **TEST:** When it was D's actions and decisions that led to the discovery of the evidence -
- **Live witnesses** are rarely fruit of the poisonous tree because they have free will
 - If the fruit is a live witness who doesn't want to testify but is forced (illegal immigrant) – tough argument
- **If D is illegally arrested and a show up** is done - If the show up is fruit of the poisonous tree - the eye witness ID out

➤ **Independent Source**

- **Test:** Evidence was found by a legal means unrelated to the original illegal conduct
 - Applies to:
 - Secondary
 - Primary
- **Rules:**
 - Murray =(Independent Source = bales of weed found would be admissible at trial if the **warrant affidavit was based on sources independent of the illegal entry** – Confirmatory Searches followed by W and search – Court seemed to encourage a subjective test of the officer’s mind
 - P have hunch, illegal confirmatory search, 3 months of investigation, get W and search –
 - Fruit –Time and intervening events=ask “But for...nevertheless...”
 - **No independent legal means pre-existing the illegal** – but good argument that the tint has dissipated

➤ **Inevitable Discovery**

- **Test:** Evidence would’ve been discovered anyway by a legal means
 - Applies to Secondary,
 - Primary??
- **Factors:**
 - Basis in fact v. hypothetical police investigation
 - Would’ve been discovered w/in short time
 - Completely independent avenue
 - Actively pursuing independent investigation (minority)
- **Rules:**

➤ **Forced Enema** - P must show (under inevitable discovery) that they **normally, regularly would have left D alone and waited naturally** –**But for someone’s dumb decision** to rush the issue and violate 4th, would’ve occurred anyways

➤ It is not “coulda, woulda, shoulda,” but were actively in process or, in a more relaxed jurisdiction, show that they regularly pursue a legal means of getting the evidence

➤ **Inevitable Disc (second train track); Independent Source (second trip)**

➤

2. Limitations on the Exclusionary Rule

a. Standing

➤ **Movement to a deterrence rationale**, court has severely restricted who has standing – D must have at least a property interest or a legitimate expectation of privacy in the place searched

- Property interest alone may not be enough – no expectation of privacy when you forfeit your property to a place you no longer have privacy

➤ There must be some initial violation against your rights – violating your reasonable expectation of privacy

b. Limitations to Criminal Trial versus Other Proceedings

- **Exclusionary rule does not apply at Grand Jury proceedings** (Calandra)
- **Exclusionary rule does not apply in parole violations – whether violation was intentional or not** – (Scott – broke into home and searched – evidence okay)

c. The Good Faith Exception

- **TEST:** Absence of probable cause will not result in exclusion if Officers' reliance on the magistrate's determination of probable cause was objectively reasonable, unless facially invalid or officer knowingly or recklessly made false statements (Leon)
 - Absence of an allegation that magistrate abandoned his detached and neutral role
 - Officers were dishonest or reckless in preparing affidavit
 - Thus, so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable
- Cop relies on law professor, state judge, etc. – does not fall w/in good faith - **The good faith exception only can be used when an officer is making a direct action without outside thought or decision making process**
- **3 circumstances from Leon:**
 - The officers get a warrant
 - Reasonably rely on a statute (Krull)
 - Court record issue – (Evans) will apply to clerical error, but not the officer's own
- If **officers are acting outside of the exception** (above), it will not be considered good faith
- Where **police realize that their current warrant is no longer valid** in good faith
 - Just because the warrant is signed but no longer believe it to be true it should not be able to be executed because they no longer have probable cause
- If evidence is gotten illegally leading to further evidence – if police tell judge how they got it and he still signs the warrant, evidence is admissible
 - If they leave out the info about how it was gotten – likely inadmissible (Franks)

d. The Impeachment Exception

e. Harmless Error

E. The Sixth Amendment "Right to Counsel" Approach cont'd

2. The "Deliberately Elicit" Standard

- **Massiah Doctrine** – P deliberately elicited info w/o affording D the opportunity to consult w/ his attorney after the initiation of judicial proceedings
- Informant is a listening post – (Kuhlman v. Wilson – passive listener)
- Informant was a catalyst –
 - **RULE: D must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks (US v. Henry)**
 - Massiah Test seems to go to officer's mind
 - Reasonable relationship b/w subject started and likelihood of outcome – Not sure if it's an objective or subjective test
 - Under Massiah - irrelevant whether the informant asks pointed questions about the crime or merely engages in general conversation about it

- Kuhlmann v. Wilson – D began convo and informant continued – admissible
 - Taking advantage of a situation is as good as setting it up
 - **RULE:** Tells wired coD he needs to kill a witness – Post-adverarial
 - 6th amendment **right for that crime – not admissible**
 - **New crime for conspiracy to murder is admissible – Offense Specific**
 - Court looks at **Blockburger test** – Does each crime have an element the other one does not (even if they share the majority of elements) you can question regarding the crime
 - **Rule:** there's a **window b/w formal adversary and attachment** – (indicted, whether or not you know it, 6th has attached) – must be given Miranda and then waive; once invoked (Miranda or going to court) police can't reinitiate questioning
- For a valid **Waiver under 6th – D MUST INITIATE**
 - Brewer = There seems to be a subjective vein to this – the cops motivations alter the situation, but the court maintains an objective totality to the “Deliberately elicit” test
- FTPT applies to 6th amendment
- There is no public safety exception w/ 6th
- Begins: Adversary Judicial Criminal Proceedings – indictment, information, arraignment, or preliminary hearing – Window occurs b/w where proceedings begin and D invokes

3. At What Point Does the *Massiah* Doctrine Apply? - The Initiation of Judicial Proceedings

4. Waiver under the *Massiah* Doctrine

5. Overview of Interrogation and Confessions

F. Other Investigative Procedures - Eye Witness Identification,

1. Eyewitness Identification

- 6th – Attorney must be present for out-of-court, post critical (post indictment) “In Person” id
 - Out-of-court ID Photo = no right to counsel
 - No person, no 6th
 - If 6th is violated, in court ID (fruit) is still admissible if it is reliable
 - Factors for an “independent source” of the identification
 - Observe at time of crime, degree of attention, accuracy of prior description, level of certainty, time b/w crime and observation
- 14th – ANY out of court ID inadmissible if:
 - “unnecessarily suggestive and likely to lead to MisID”
 - Show-up's (one person) are suggestive, but given the need to show someone the suspect w/ impending circumstances, they will allow it (witness dieing, D going to hospital, etc)
 - If 14th is violated: In court ID allowed if reliable:
 - Factors: Same as above