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BOP = burden of proof PVD = plain view doctrine FOTPT = Fruit of the Poisonous Tree

1. FACTS
2. BLACK LETTER LAW (Ex: if you have custody & interrogation you have to read Miranda),
3. RATIONALES THAT UNDERLIE BLACK LETTER LAW/ Policy (how did the law shape, what are the rationales that get the law in that case- often balancing needs of police & people /privacy)

**Seizure**: **Reasonable person** believe **not feel free to leave** **or** not feel free to **decline** officer’s requests or terminate encounter; under the totality of circumstances.

**SEARCH**: (test)

1. **Is there a societally accepted expectation of privacy (objective)?**
2. **Does the individual subjectively hold on expectation of privacy?**

**SEIZURE**:

1. **STOP 🡪 Requires reasonable suspicion** (*Terry v. Ohio*)
2. **ARREST 🡪 Requires probable cause**

*Reasonable suspicion or probable cause that:*

“Crime has been, or is about to be, committed, an person seized has, or is about to, commit the crime.”

**Physical Contact/Detention or**

**Show of Authority & Submission to it:**

What is submission?

1. It is not flight
2. It is being an auto passenger & remaining in car or following order to exit



# Fourth Amendment: Search & Seizure

4A: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

# Searches

1. SEARCH = “Katz Test” aka “Reasonable Expectation of Privacy” test
   1. 4A protects people not places (Unlike old *Olmstead* property based approach.)
   2. Reasonable Expectation of Privacy (REP): Subjective expectation coupled with society's recognition of what is reasonable.
2. **Location**
   1. Open Fields: unoccupied & undeveloped open areas (even those w/ no trespassing signs) have NO 4A amend protection
   2. Curtilage: Must be area that is intimately connected w/ the house. Whether an area is curtilage or not depends on how close it is to the house, what it is used for and steps taken by owner to protect it.
      1. S.Ct. has never accepted the notion of business curtilage.
      2. Factors for curtilage: close Proximity to home, Included w/in an enclosure that surrounds the home; Nature of its use; Steps taken by resident to protect the area from observation by people
3. **Assumption of Risk**
   1. whether an individual “assumed the risk” that certain info will not be kept private
   2. *US v White* – govt wired an informant & listened to the conversation; ct said there was no violation despite the fact that the agents were wearing a wire. Case is in synch w/ Katz test
4. **Electronic Tracking Devices**
   1. use of electronic devises used to gain a view of the D’s property under the plain view doctrine allowed only if 2 conditions are met:
   2. the view takes place from a lawful vantage point
   3. the info obtained could have been gotten from “plain view” surveillance executed w/o the special device
      1. *US V Knotts* –Ct held that the use of such a beeper to follow a car on the public roads does NOT violate the drivers reasonable expectation of privacy.
   4. Aerial Surveillance – *Dowell Chemical v US –* expectations of privacy are reduced when the prop is commercial rather than residential; there is protection from highly sophisticated surveillance equip penetrating walls & windows, there is no such protection from lawful surveys from the air that doesn’t reveal intimate domestic affairs
   5. Thermal Imaging Devices – *Kyllo v US* – 4A amend search takes place when govt agents use a device that is not in general public use in order to explore details of a home that would previously have been unknowable w/o physical intrusion.
5. **Container Searchers**
   1. REP of Garbage left in an opaque can?
      1. trash/abandoned prop will normally NOT be material owner has objectively reasonable expectation of privacy; when a person puts trash out on curb to be collected, police may search that trash w/o a warrant
   2. *Cali v Greenwood* – no REP for the garbage bags on a public street
6. **Property Interests**
   1. where an individual has legally “abandoned” his property interest:
      1. during a police chase the suspect throws an object away while fleeing = cts usually hold that where items are abandoned voluntarily during a chase, they no longer belong to the person
      2. Cali v Hodari – even if the police weren’t justified in chasing the D, the coke he threw away could be admitted into evidence b/c he had not been captured at the time he tossed it
7. **Social Customs**
   1. *social* guest at a private home has REP in that home
      1. *MN v Olsen* – police arrested Olsen on suspicion that he was a getaway driver of a gas station murder; an overnight social guest clearly has a legit expect of privacy in the home where they are staying. Police may not normally make a warrantless arrest/search of the premise where the D is staying
   2. a *business* guest may not have REP
      1. *MN v Carter*- where a person visits a house only briefly, & does so for a purely business purpose, Ct holds that NO legit expect of privacy exists; in Carter- D spent 2 hours in a 3rd persons apt bagging coke for resale
   3. REP in a conversation? 
      1. Depends on the participants to the conversation. If one of them agrees to wear a wire, then its not a search for police to listen to the transmission b/c no REP b/c anytime you tell anybody anything, you accept the risk that you may be talking to a police informant.
   4. REP in Bank records? *U.S. v. Miller*: No b/c you voluntarily gave the records to the bank.
8. **Vantage Point**
   1. NO privacy in areas open to public observation
   2. Police can observe from public vantage points using enhancement devices (flashlights, etc)
      1. so long as those devices simply enable police to see more clearly something that they could otherwise see w/o the devices
      2. where enhancement device reveals what would otherwise not be exposed to public view, a reasonable expect of privacy exists

# Seizure

1. seizure of a person: when a govt actor significantly interferes w/ a persons freedom of movement
   1. protected interest is liberty
   2. A person is seized when he submits to an officer’s authority, by:
      1. Allowing actually submitting
      2. Being physically forced to submit
   3. *CA v Hodari*
2. seizure of a thing: when the govt works “some meaningful interference w/ an individuals possessory interests in that property”
3. Like a search, a seizure does not occur for 4A purposes unless the *govt* has invaded a reasonable expect

**If no to either S/S, then 4A is not implicated and evidence comes in.**

# Standing

1. Did D have REP in the place being searched or a possessory interest in the item seized?
2. **4A amend rights are personal rights that may not be asserted by 3rd person**
   1. **Can be argued only by those whose rights were violated by the S/S itself**
      1. D’s who can NOT establish they were legit on the premises searched likewise can NOT establish that they reasonably & legit expect privacy
   2. **Cannot be argued by those who are aggrieved solely by the damaging evidence**
3. *Rakas v IL* – *D’s were passengers in a car that was stopped & searched; cops found saw-off rifle & shells. When that evidence was intro at trial against D, they objected on grounds that the S/S violated their 4A; though they both claimed that they neither owned the auto or the things seized.* Hold: D’s had not made a sufficient showing that they had a legit expect in the areas in which the items were found b/c they failed to demonstrate that they had exercised complete dominion & control over, & right to exclude others from, those areas

## Government Action Requirement

1. S/S must have been done by a *govt actor*, as opposed to a private party, to be illegal under the 4A
   1. Why: Constitution does not limit the conduct of purely private actors
2. Govt invovement w/ the private party
   1. *US v Jacobsen* – FedEx employee opened a package that was damaged during shipping; ct Held: if a govt agent performs a S/S of the same material which has already been subjected to a private S/S, govt willl be deemed to have intruded upon the owners privacy interests *only to the extent that the govt S/S exceeds the scope of the private one*.

**“Familiar Proof Standards”**

**Proof beyond any doubt** *not a legal standard*

**Proof beyond a reasonable doubt** criminal standard of proof (*highest standard*)

**Clear & convincing proof** used in niche contexts, often statutory, sometimes in evidence law

Proof to a preponderance of evidence *civil standard of proof (50.5%+)*

**Probable Cause** this is where it goes in the hierarchy of proof (40-50%)

**Reasonable Suspicion** *(lowest standard)*

**PROBABLE CAUSE (def): exists where**

**the facts and circumstances**

**within the arresting officers knowledge &**

**of which they had reasonably trustworthy information**

**are sufficient**

**in themselves**

**to warrant a man of reasonable caution**

**in the belief that**

**an offence has been**

**or is being**

**committed.**

## Probable Cause

4A: “no warrant, whether for search of arrest, be issued unless there is “probable cause”

1. Probable Cause = fair probability
2. **When is there Probable Cause?**
   1. ***Aguilar-Spinelli* 2 part test for informant tips:**
      1. was the informant credible (likely to be telling the truth) **+**
      2. was the informant reliable? (likely that he had a sound basis of knowledge)
   2. Credibility Factors:
      1. whether tip was against interest - if it implicated the informant in criminal activity;
      2. whether the informant had given prior accurate tips;
      3. whether informant had a reputation for truthfulness;
      4. whether he is a citizen informant or a criminal;
      5. does informant have something to gain – diverting attention from himself;
      6. corroboration helps w/ credibility b/c informant hasn’t just made stuff up
   3. Reliability Factors:
      1. whether informant *personally observed or participated in the activities* reported in the tip; 1st person basis of knowledge
      2. whether tip was so detailed that informant must have 1st-hand knowledge; &
      3. whether the nature of the info contained in the tip, or the manner in which it was gathered, indicate that it could have come only from personal knowledge or a highly reliable source
      4. reputation for prior reliable tips
      5. anonymous tips –reliability can only be established by proving facts
   4. **Totality of the Circumstances**
      1. *Gates v IL* 1983: Abandoned Aguilar-Spinelli approach in favor of a “totality of the circumstances” approach
      2. strong showing on 1 of the prongs can in effect make up for an inadequate showing on the other one.

## Suppression Motions

1. Suppression Motion: written request (of what D wants suppressed), filed pretrial, that unconstitutionally obtained evidence be excluded (“exclusionary rule”) from trial, never to be heard/seen by the jury
   1. seized physical evid, like drugs, $$, stolen prop, blood, results of line-ups & confessions are the many types of evidence that can be suppressed
   2. also, evidence that is the “fruit” of a const violation may often be suppressed
2. Prosecution has BOP: for warrantless searches, proving exceptions to FoPT
3. Defense almost always has BOP for the following: whether D has standing, whether the govt engaged in a S/S, whether there was govt action, whether evidence sought to be suppressed is FoPT

# Warrant Requirement

4A: ...warrants shall not be issued “but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

1. **Warrant Preference Theory – Presumption that warrant is required**
   1. Required before search:
      1. warrant before you search (or exception to the warrant requirement)
      2. probable cause (or exception: maybe something less –reasonable suspicion- in limited contexts, differing standards)
      3. originally drew brightlines (must do x, y, and z).
2. Why Warrant?
   1. forces cops to rationalize & articulate the grounds for the search, encourages cops to think thru the bases for the search before deciding to search a suspects property or person;
   2. process helps to prevent precipitous actions by the police & helps to dissuade officers from acting on vague impressions, hunches, or stereotypes
3. **Reasonableness Theory- No presumption that a warrant is required**
   1. Required before search:
      1. Probable Cause
      2. Balance of interests (in tension):
         1. reasonableness of the govt conduct evaluated by balancing the govt/societal interests against the individuals interests (law enforcement, public safety)
      3. Determines if a search is proper by whether the search was reasonable.
   2. Makes the warrant clause more flexible
4. Why Reasonableness/Balancing?
   1. judges may be able to define & weigh interests by relying on sources other than their own values (ex: history, empirical proof, & economics)
   2. may be no more subjective than other analytical methods (ex: reasoning by analogy to precedent also reqs judges to implement value choices)
   3. may ensure that the constitution remains flexible & adaptable to modern circumstances

**CHECKLIST: Was the warrant properly issues & executed?**

1. **Was the warrant application sufficient?**
   1. Was the application accompanied by an affidavit made under oath?
   2. Did the affidavit establish probable cause?
2. **Was the warrant proper?**
   1. Was the warrant issued by a neutral & detached magistrate ?
   2. Did the warrant describe the places to be searched, & the items or person to be seized, w/ reasonable particularity, based on the facts learned after reasonable investigation?
3. **Was the warrant execution reasonable?**
   1. Did the officers knock & announce their presence, or if not, were there objectively reasonable grounds for their failure to do so?
4. **Did the officers act reasonably in dealing w/ individuals encountered during the warrant execution?**
   1. Did the officers end the S/S immediately after the item was found or after they realized they had made an error?

## Particularity

4A prohibits warrants that do not “particularly describe the place to be searched, & the persons/things to be seized”

1. **Particularity = Whether the warrant contains sufficient particularities so that the officer can be *reasonably* certain of executing it correctly**
   1. Warrant for search of a *person*: must state persons name, or at least a detailed description, & things to be seized must, like the premises to be searched, be specifically ID’d in the warrant
2. *Maryland v Garrison* – warrant is to be evaluated at the time it was issued & according to the info the officers disclosed, or should have disclosed, to the issuing judge.
3. *Andresen v. Maryland* – the whole warrant must be sufficiently particular.
4. Why particularity: in response to the “general warrants” created by the colonists; to limit authority

## Neutral & Detached Magistrate

1. Warrants may be issued by law people who are neither judges nor lawyers (at lease for minor offenses)
   1. magistrate must have the intellectual competence to determine whether PC exists
   2. *Shadwick v Tampa* – a statutorily authorized municipal court clerk could const issue arrest warrants for municipal misdemeanor traffic ordinance violations
2. Neutral magistrate: must be a neutral party detached from the law enforcement side of govt; neutrality increases the probability that a correct decision as to the existence of PC will be reached before an arrest or search is made, & unconstitutional arrest/searches will be kept to a minimum
   1. A magistrate who not only accompanies the police to the scene of a search, but *actively participates in the search*, is not “neutral & detached”.
3. Why: so that there is no bias & so that there is a separation

## Executing the Warrant

1. Law enforcement mistakes in executing warrants:
   1. Un-disclosed info can’t be retroactively used to validate a warrant
   2. If police reasonably & honestly believed the info they gave, prob. valid
   3. *Maryland v Garrison* 1987 (third floor): A search is reasonable so long as the police were in good faith that they were lawfully searching.
2. “Knock & Announce”
   1. *Wilson v AK* (1995): Execution of a warrant on a home, requires knock & announce.
   2. Exigent circumstances will justify a no-knock entry
3. Treatment of Individuals during Warrant Executions
   1. where a person simply happens to be on the premises to be searched, & appears not to have any connection w/ the criminal activity which gave rise to issuance of the warrant, that person *may not be searched* (case where entire bar was searched)

## Terry Stop

1. *Terry v Ohio (1969)***:** stop & frisk ok w/reasonable suspicion that suspect is armed/dangerous
   1. Balancing test: need to intrude (to prevent/detect crime & protect cop from harm) against the severity of the intrusion
   2. Frisk is justified only if the officer reasonably suspects that the person is armed & dangerous
2. Frisk: a patdown of a person, limited in scope & intensity to its justification (to discover weapons)
3. Stop: brief on the scene detention (seizure), that is strictly limited in time

**CHECKLIST: STOP & FRISK (TERRY STOP)**

1. **Was there a Stop?**
   1. Did the officer act in a way that would permit an individual reasonably to believe that his freedom of movement was significantly restricted?
   2. If so, as the restriction limited in duration, location, & intensity?
2. **Was the stop justified by reasonable suspicion that the person was about to commit (or had committed) a crime?**
3. **Was there a Frisk?**
   1. did the officer invade the individuals reasonable expectation of privacy?
   2. if so was the invasion limited to a brief pat down of the surfaces of outer clothing?
4. **Was the frisk justified by a reasonable suspicion that the person was armed & dangerous?**

## Levels of Police Interactions:

1. **Voluntary encounter**: **Person is free to leave - no S/S**
   1. Ask: would a reasonable person feel free to decline officers request/terminate encounter?
   2. A cop who casually approaches an individual on the street & asks stuff = not a stop
   3. Factors: the threatening presence of several officers, display of a weapon by a cop, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance w/ the cops request might be compelled
      1. Perspective of a reasonable innocent person, not the cop
   4. *US v Drayton (bus case)*: cops don’t violate 4A merely by approaching individuals in other public places & putting questions to them if they are willing to listen
2. **Terry Stop (& Frisk)**: **For a brief period, person is not free to terminate the encounter – S/S**
   1. Must be justified by facts that objectively give rise to a reasonable suspicion that criminal activity may be afoot
      1. Reasonable Suspicion must be supported by specific articulable facts, more than an suspicion or hunch
         1. Dependent upon content & reliability of info, totality of the circumstances
         2. Anonymous tip that lacks all indicia of reliability does NOT satisfy the reasonable suspicion standard
   2. Seizure occurs: stop temporarily restricts the individuals freedom to leave
      1. Look at length (short) & place of detention (at the scene, not police station)
   3. Search occurs: frisk is classified as a minimally-intrusive search
      1. a proper stop does NOT automatically justify a frisk, need reasonable suspicion
3. **Arrest: Person not free to leave/full search, intrusive invasion of freedom & privacy – S/S**
   1. Must be justified by facts that objectively give rise to a probable cause that criminal activity may be afoot
      1. Look at length (long) & place of detention (anywhere)
   2. Arrests In Public: No warrant needed
   3. Arrests at Home: Need arrest warrant to enter D's home to arrest him. Can consent to officer coming into your home, and then they can arrest you (whoops!)

## Exceptions to Warrant Requirement

### Search Incident to Arrest

1. **Contemporaneous to a custodial arrest, officer may search**
   1. **the arrestees person &**
   2. **areas w/in the arrestees immediate reach** (wingspan/lunging area)
2. May search incident to arrest even after the D has been cuffed, but the arrest & search must be contemporaneous: can’t be too remote in time from each other
3. Wingspan/Lunging Area: the area from w/in which the arrestee might gain possession of a weapon or destructible evidence; case by case limits to the are immediately surrounding the arrested party
   1. Cop may search closed containers found on the arrestee & w/in their wingspan
      1. Can search a container even if its too small to have a weapon inside
   2. Why? Container may have a weapon or evidence.
4. *Chimel v. California (1969) 441:* Search incident to arrest is restricted to the person and the areas around him (never reasonable to search the entire house).
5. Why: officers’ protection & preservation of evidence. *US v. Robinson (1973) 450*

### Search Incident to Arrest: In a Car

1. **Search of passenger compartment permitted when a cop makes a lawful custodial arrest of rider**
2. Where D has voluntarily existed the car & begins to walk away from the car before the officer has initiated contact, case-by-case determination of the reasonableness of the searching of the car
3. *Thornton v. United States (2004)* 578: Can search a car incident to arrest of a recent occupant.
4. *Arizona v. Gant (2009)* 586: Police can search a car (a) within reaching distance incident to arrest of a person or (b) entire vehicle if a person is arrested and police have reasonable suspicion they will find evidence of the offense the arrest in the car.
5. *Knowles v. Iowa (1998)* 599 No search of a car incident to mere citation issuance.
6. Why: A suspects awareness that he is facing arrest gives him a strong incentive for grabbing a weapon or destroying evidence, for the officer safety & preservation of evidence.

### Auto Exception: Vehicle & Container Searches

1. **Search is permitted wherever cop has probable cause to believe something seizable is.**
2. Includes containers found in the car, include trunk
   1. So long as there is PC to believe that the objects of the searches may be found therein
   2. regardless of who owns containers
3. *California v. Acevedo (1991)* 550 - If you have probable cause you can search automobiles and the containers within them (including the trunk).
4. *Chambers v. Maroney (1970)* 535: Automobile Exigency extended to impound lot.
5. *Chadwick*: If a closed container is outside a vehicle and police have pc to think there is something in a container, i.e. briefcase, then they can't search the container w/o a warrant. But they can seize it until they get a warrant.
6. Why: Mobility & privacy rationales: warrants not required b/c cars disappear before warrant can be obtained, expectation of privacy differs in degree b/w a structure & a vehicle

### Inventory Search

1. **Exception to warrant requirement for administrative/regulatory reasons:** 
   1. **Govt purpose must be regulatory not pretext (not criminal law) + balancing test**
   2. Balance regulatory interest against the individual interest infringed upon
      1. Factors: Weight of the states purported non-criminal investigation interest, effectiveness of the chosen means in attaining the states goals, availability of less restrictive alternative means for pursuing those goals, degree of the individuals interests must be gauged (S/S of cars/business less invasive S/S of homes & persons).
2. *Illinois v. Lafayette (1983) 458* - Inventory search upheld (a type of administrative search)
3. *South Dakota v. Opperman (1976)* 571 - No probable cause required for inventory search!
4. Why: Deter theft by police; unfounded claims of missing property.

### Exigent Circumstances

1. **If PC exists + sufficient exigent circumstances to justify immediate S/S**
   1. sufficient circumstances: if the cops need to act swiftly to either arrest or search or both or otherwise give up the arrest/search
   2. Exigency: in the process of getting a warrant that evidence will be somehow compromised.
      1. A warrant only takes a couple hours.
2. Ex: Hot Pursuit – officers may to w/o a warrant if: (1) they are in pursuit of a fleeing felon & (2) that pursuit began in a public place, where they cops could have made a warrantless arrest.
3. *Welsh v. Wisconsin (1984) 483* – ability to do a warrantless search depends on exigent circumstances, and there will always be exigent circumstances if police are chasing someone for drunk driving.
4. Why: safety risks to cops, possibility that evidence may be destroyed, that a felon may evade arrest

### Plain View Doctrine

1. **Officers may seize contraband, evidence & instrumentalities of crime in plain view**
   1. Cop must be in a lawful vantage point **+**
   2. The incriminating character must be immediately apparent **+**
   3. Cop must also have a lawful right of access to the object itself
2. Plain view means any of the five senses of the officer (sight, sound, smell, etc.)
3. *Florida v. Riley (1989) 80*: Plain view doctrine: if a police officer is legally present, anything they can observe from that vantage point is not a search.
4. *Dow Chemical Company v. U.S. (1986) 70*: Police can observe anything exposed to the public.
5. *Arizona v. Hicks* (note case, moving the stereo to find serial # is not plain view)
6. Why: this increases efficiency by eliminating warrant requirement in situations in which that requirement would serve no purpose; Cops do not have to turn a blind eye if they are lawfully in the vantage point. Its really easy to draft a warrant to articulate looking for small things (to make other things become plain view)

### Voluntary Consent

1. **Police may search if they receive voluntary consent of the individual whose stuff is to be searched**
2. What is voluntary: (Factors:) Age, Fluency in English, Educational level, Knowledge of right to refuse, Knowledge of criminal justice system in general, Intelligence, Duration of questioning, Threats or weapon displays by police. NOT coercion.
3. Who may consent: An officer may get consent from either the person who owns or controls the property, such as a homeowner or renter. Others who can give consent might include a third party who has mutual use of the property, such as someone who lives in a home.
   1. Any joint occupant (for jointly shared areas)
   2. Apparent consent of non-joint occupant sufficient & police do not have to inquire.
4. *United States v. Matlock (1974)*: 3rd party consent is effective in joint occupancy contest where consenting party shares a dwelling with the suspect.
5. *Illinois v. Rodriguez :* apparent consent of a non-joint occupant is permissible
6. *Schneckloth v. Bustamonte -* mother of consent cases – voluntariness is a judicial decision, a person does not have to be told that they have the option not to consent
7. *United States v. Drayton (2002) 113 (bus)*: Do not have to be informed to consent
8. *Stoner v. California (1964):* Cannot search hotel room based on hotel proprietor’s consent.

# Due Process

5A & 14A: “"No person shall... be deprived of life, liberty, or property, without due process of law."

**TEST: DUE PROCESS**

1. **Was the statement the product coercion by a government entity?**
   1. If NO: not due process coercion
   2. If YES: continue:
2. **Was the confession voluntary under the totality of the circumstances?**
   1. Involuntary: confession suppressed for all purposes.
   2. Not voluntary (gross interrogation techniques)
      1. **Torture**
      2. **Severe physical deprivation**
      3. **Severe psychological duress**

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1. 14A extended due process & equal protection to the states, to create federal jurisdiction over southern states to break down slavery.
   1. If confessions are being wrung out of people, the trial is merely a sham (police control).
2. *Brown v. Mississippi (1936)* 629 - Convictions, which rest solely upon confessions that have been extorted by police officers by brutality and violence, are not consistent with due process.
3. *Colorado v. Connelly (1986) 740 (crazy guy with hallucinations/voice of god)* Unless there is coercive police conduct there is no involuntariness under the due process clause.
4. Coerced statements may not be even be used for impeachment purposes
5. Why? We don't know if the statement is credible- Did D confess just to stop the beating? Deters police misconduct – police must obey the law while enforcing it (the law) Exclusionary remedy voices society’s disapproval for techniques so offensive to a civilized system of justice that they must be condemned, exclusion protects the integrity (from evidence that is revolting to justice)

# Confessions & Self-Incrimination

5A: “No person shall be compelled in any criminal case to be a witness against himself…”

## TEST: WHEN DOES THE PRIVILEGE AGAINST SELF-INCRIMINATION APPLY?

1. Is the privilege asserted by a natural person on the person’s own behalf?
2. Is the person compelled to communicate (custodial interrogation/ct process/government)?
3. Does the communication involve something testimonial (rather than physical acts/characteristics)?
4. Is there a substantial or real hazard that the testimonial communication could be used in a criminal prosecution or could lead to other evidence that might be so used?
5. Has the privilege been waived
   1. in the same proceeding?
   2. by other communications on the same or a related subject?
6. If the compulsion involves pre-existing documents or items:
   1. Would the act of producing them be incriminating?
   2. Would the act of production reveal the existence /the person’s possession of the items?
   3. Would the act of production authenticate the items?

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1. **Who has a Privilege Against Self-Incrimination?**
   1. Natural persons (under 5A)
   2. Only the individual holding the privilege may assert it, no one else can claim on their behalf
2. **How to Invoke & Waive 5A Privilege**
   1. D in a criminal case: invokes simply by choosing not to take the stand
      1. Prosecution can not call the D to the stand, or make any reference to the D’s silence
3. **5A only applies to compelled, incriminating testimony**
   1. Compulsion (by a govt actor)
      1. While in custody, any statement may be “compelled” unless warnings are given
      2. While not in custody, persons speaks at their own peril unless privilege claimed
   2. incrimination
   3. testimony
      1. giving blood, sobriety tests: not testimonial
      2. *Schmerber v CA* – involuntary blood test does not violate 5th right against self incrimination b/c 5th protects only against compulsion to give *testimonial or communicative* evidence and not against compulsion which makes a suspect the source of real or physical evidence
4. **The Act of Production Privilege** 
   1. Incriminating testimony must be *compelled* before a person can assert 5th
      1. Creation of a pre-existing doc not compelled but producing docs could be compelled
   2. Applies to the production of *anything* if the act itself might be incriminating
      1. *Baltimore Dept of Soc Serv v Bouknight:* Bouknight would be incriminated by producing her kid b/c her production would constitute an admission that the child was in her possession, mom assumed custodial duties related to production & b/c production is req’d as part of a non-criminal regulatory regime

### Immunity

1. Decision not to prosecute can be formalized in a grant of immunity from prosecution
2. Federal Immunity: prohibits the use & derivative use of the testimony for which immunity was granted in state cts as well as federal
   1. once immunized, persons 5th claim evaporates b/c there is no longer the possibility of incrimination, they can lawfully be compelled to provide the requested info
3. Use Immunity: government *cannot use statements given under grant of immunity* against the person who made the statement
4. Derivative Use Immunity: government cannot use statements given under grant of immunity and *can't use any evidence derived from those statements*.
5. Transactional Immunity: government could never prosecute from the crime that was the subject of grant of immunity.
6. Dangers of testifying under immunity:
   1. Scope of limited to the subject matter spelled out in the immunity order
   2. Immunized testimony may potentially be used indirectly.
7. *Kastigar v. US (1972)*  773: Government can compel testimony under use/derivative use immunity.

# Custodial Interrogations & The Miranda Doctrine

Miranda: (1) You have the right to remain silent (2) Anything you say can & will be used against you in a ct of law (3) You have the right to consult w/ a lawyer & to have the lawyer w/ you during the interrogation (4) If you can’t afford a lawyer, one will be appointed to represent you prior to any questioning

🡪 Miranda decision relies on 5th right against self-incrimination more than 6th right to counsel

1. Miranda applies to ANY statement made by the suspect while in custody & right to remain silent or to have a lawyer may be exercised at any time during the questioning
2. Why: when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significan’t way & is subjected to questioning, the privilege against self-incrimination is jeopardized.
3. Miranda’s Constitutional Status:
   1. *Dickerson v. United States* Miranda challenged on the basis of Fed statute which requires only that confessions be voluntary. Court finds that Miranda is still valid, but majority is unable to come to the conclusion that it is constitutionally mandated. Instead court relies on Miranda being supported by stare decisis and it being a pretty decent idea. Effect: Upholds all previous decisions on Miranda, but does not come to the conclusion that it is constitutionally mandated.
4. Criticism of Miranda:
   1. 5A: “no person shall be compelled in any criminal case to be a wit against himself” read literally the amend only offers protection against being called to testify at trial, or pretrial.
      1. would not extend protection to pretrial interrogations by cops
   2. Miranda & Original Intent: Framers didn’t expressly say that privilege against self incrimination should apply to stationhouse confessions; but they did expect it to reach pretrial interrogations

### Surely Coercive Psychological Techniques that are not Due Process Coercion:

1. **Pressure Tactics** 
   1. use of psychological pressures may render a confession involuntary
   2. to determine whether such pressures overcame the D’s will, cts consider characteristics such as D’s age, ability to understand, & psychological profile
   3. *Spano v. New York (1959)* 636 - Under the totality of the circumstances, due process violated.
   4. *Colorado v. Connelly (1986)* 740 Without coercive police conduct there is no involuntariness under the due process clause: significant shift: State action before there is compulsion.
2. **Deception**
   1. Deception alone does not render a confession involuntary
   2. Police lying about other evidence doesn’t rendering confession involuntary, but is a factor
   3. Most common type of deception is cops being placed in jail cells undercover
   4. *Colorado v. Spring (1987) 904*:You don’t have to be informed of what police are going to ask you about for your Miranda waiver to be complete.
3. **Promises of Leniency** 
   1. Officers’ words of comfort & assurances made to make a D feel more comfortable about speaking will NOT render a confession involuntary

### Miranda Threshold: Custodial Interrogation:

1. **Custody**: when a person is formally arrested, after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way- reasonableness test used if no formal arrest:
   1. How would a reasonable man in the suspects position have understood his situation?
2. **Interrogation (or its functional equivalent):** Words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police *should know* are reasonably likely to elicit an incriminating response from the suspect.
   1. *Rhode Island v. Innis (1980)* 814: Miranda applies when suspect in custody is subjected to interrogation (express questioning or its functional equivalent)
   2. What is reasonably likely to elicit an incriminating response:
      1. If officer has special knowledge about the suspect (i.e. knows suspect is insane or deeply religious) OR
      2. If police officer has no special knowledge, then what a reasonable police officer would know would elicit an incriminating response from a suspect.

### Adequacy of Warnings (Voluntary, knowing, & intelligent) & Asserting the Privilege

1. BOP on prosecution to show that D waived privilege
2. Today’s standard: preponderance of the evidence
3. Waiver: a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained
   1. Waiver can be clearly inferred from the actions/words of the person interrogated
   2. *Berghuis v. Thompkins (2010) 873:* Waiver of rights may be implied so long as its voluntary and with full understanding. Prosecutions “heavy burden” of voluntary/knowing is just by a preponderance of the evidence.
   3. *North Carolina v. Butler (1979)* 870: Express statement is strong proof, but not inevitably necessary, to establish waiver.
4. Voluntary: under totality of circumstances was waiver was product of a free & deliberate choice
   1. A long period of time b/w the reading of Miranda rights & the waiver suggests the waiver was derived by overcoming the suspects will to invoke his right.
   2. *Missouri v. Seibert (2004) 911*: Not okay to question for confession, do Miranda, & repeat.
   3. *Michigan v. Mosley (1975)* 847: After D exercises right to remain silent, he may later be interrogated on another subject as long as reasonable time has passed & a new warning given.
5. Knowing & Intelligent: decide based on the ‘particular facts & circumstances surrounding the case, including background, experience, & conduct of the accused’
   1. focus is on suspects ability to understand the warnings & the consequences of speaking
   2. *Colorado v. Spring (1987) 904*:You don’t have to be informed of what police are going to ask you about for your Miranda waiver to be complete.
   3. Suspect must understand their *rights*, (anything said can be used) for waiver to be “intelligent.” Miranda does not bear on the factual context of interrogation, only rights and coercion. *Moran v. Burbine (1986) 887 –* Even if your attny is looking for you, police don’t have to tell you.

### Right to Counsel

1. Suspect having expressed his desire to deal w/ cops only thru counsel, is NOT subject to further interrogation by cops until counsel has been made avail to him, unless the accused himself initiates further communication, exchanges, or conversations w/ the cops
   1. Valid waiver of that right can NOT be established by showing only that he responded to further cop-initiated interrogation even if he has been advised of his rights
2. *Edwards v. Arizona (1981)* 853: After asserting right to counsel under 5A, interrogation must be stopped until counsel is provided or defendant initiates talk.

### Miranda Exceptions: Public Safety, Undercover Activity

1. Public Safety Exception: If the officer is concerned for his immediate safety or the public safety, then he is excused from Mirandizing to protect his safety or the public safety.
   1. Objective, not subjective, determination
   2. *New York v. Quarles (1984)* 825: Public safety exception to *Miranda*. Cops accosted D, a suspected rapist, in a grocery store, found an empty gun holster & w/o giving Miranda, asked where the gun was; D told them, statements were admitted
   3. Analogous to exigency exceptions under the 4th amendment.
   4. The *Dickerson* Effect: Ct. relies on *Miranda* not being constitutionally required. In *Quarles* there were no warnings that met the Constitutional bottom line from *Dickerson*.
2. Trickery/Undercover Activities: Miranda is not violated when a suspect is unaware that he is speaking to a cop & gives a voluntary statement.
   1. **Use of undercover agents may lead to a violation of suspects 6th rights** 
      1. once a suspect has been indicted or otherwise charged, it will be a violation of his right to counsel for a secret agent to deliberately obtain incriminating statements from him in the absence of counsel, & to pass these on to the prosecution
   2. Why No Miranda violation? if a suspect does not know that he is in the presence of police, there are no inherent pressures which are the concerns implicated by Miranda/no implied coercion if D is unaware interrogator is an officer, even though D was in jail. This isn't the paradigm *Miranda* was meant to address. Ct. is saying undercover work is a valid police tool.

# 6A Right to Counsel

**D will only have 6A right to counsel if they are**

**being interrogated after formal proceedings have begun,**

but not in custody.

**D will only have a *Miranda* right to counsel they are**

being interrogated before formal proceedings have begun, &

**in custody.**

**D will have a 6A & a *Miranda* right to counsel they are**

**being interrogated after the start of formal proceedings &**

**in custody.**

### Thresholds: Formal Charge & Deliberate Elicitation

1. *Massiah v. United States (1964)* 644: 6A right to counsel attaches commencement of formal proceedings. 6A Right to counsel is violated if self-incriminating statements are made by someone is (1) indicted and (2) counsel is not present.
2. Requirement of a Formal Charge
   1. 6A limited to situations in which the adversarial process has begun
      1. ‘the initiation of adversary judicial criminal proceedings – whether by way for formal charge, prelim hearing, indictment, info, or arraignment’ b/c only at that point has the state fully committed all its resources to prosecution
3. Deliberate Elicitation
   1. directly –engaging D in conversation about the charged conduct
      1. *Brewer v. Williams (1977) 694 (Christian Burial Speech)*: Interrogation = Questioning or its functional equivalent
      2. If the officer wanted or hoped D would respond, then that makes a difference.
   2. indirectly –knowingly exploiting an opportunity to confront an accused w/o an atty present.
      1. *Kuhlmann v. Wilson (1986)* 711 - If the statement is volunteered, it is not a functional equivalent of interrogation; asking an informant merely to listen does not violate.

### 6A Right to Counsel Must be Invoked

1. Requires D to indicate expressly, by words/conduct, that he wishes to avail himself of the right
2. Waiver: prosecution bears BOP of waiver, & must show an intentional relinquishment or abandonment of a known right or privilege
   1. must have been ‘voluntary’ & ‘knowing & intelligent’
   2. Analysis mirrors that of Miranda & the same warnings will satisfy both Miranda & Massiah

# Exclusionary Rule: Remedy with its own Rationale & Scope

1. **The Exclusionary Rule is a remedy with its own rationale and scope.**
   1. Rationale: to deter unconstitutional police conduct, to protect the integrity of justice process
   2. Scope:
      1. only applies to exclude the evidence from the prosecutors case in chief
      2. does NOT bar evidence that was obtained by officers acting in reasonable reliance on a search warrant issued by a proper magistrate but ultimately found to be unsupported by probable cause
2. Limits on the Exclusionary Rule:
   1. **Standing**
   2. **Independent Source & Inevitable Discovery** (*Nix v. Williams)*
      1. If evidence is or would have been uncovered independently of the violation it will not be excluded.
      2. Why: put govt in same position as if violation had not happened: no more, no less
      3. Warrant affidavits: same rule if affidavit contains no information derived from violation 🡪 warrant valid.
3. Exclusionary rule is controversial, most countries don’t use it except for confession by torture.
   1. Under pressure, always, by certain members of the court.
   2. Many believe exclusionary rule and the hydraulic pressure of the remedy (removing evidence that leads to the truth) constricted like a vice the privacy rights themselves because of the result. This is one way the exclusionary rule shrinks rights:
      1. The narrowing of 4A away from *Katz* & restriction of 4A came about because the exclusionary rule exacts such a high price that the court has looked for ways to maintain its credibility to restrict rights so that the application of the rule of exclusion can stay narrow.
   3. Does the tail (the exclusionary rule) wag the dog?
      1. Hydraulic pressure on the court created by the exclusionary rule.How much does the exclusionary rule drive privacy decisions? (probably a lot) (*Hodari*)
4. Litigated through a motion & hearing practice: “Motion to Suppress”
   1. “Suppression Hearing” (a non-jury event, facts are litigated before the court)
   2. Very controversial, always been controversial, but never as much as now (can exclude relevant truthful evidence, which often drives the court’s decision).
   3. Scope: determined by courts’ choice of rationales
5. Alternatives to the Exclusionary Rule: Tort Remedies , Bivens & 1983 suits
6. 4A/Search & Seizure
   1. the most common area where this issue of derivative evidence is most often litigated
   2. FoPT applies
      1. Everything derived from that illegal search cannot be used *against the person whose rights were violated.*
      2. Exception: Independent Source Doctrine, Inevitable Discovery
7. 5A/Due Process:
   1. Due process violations always warrant exclusion.
   2. Excludes all statements, all physical evidence, no questions about due process violations.
8. *Miranda*
   1. Not constitutionally mandated
   2. Physical evidence is not suppressed: No FoPT
9. 6A/ Right to Counsel
   1. Court is very protective, much more closely C based right than *Miranda*.
   2. FoPT applies

### Fruits of Poisonous Tree Doctrine:

1. once the original evidence is shown to have been unlawfully obtained, all evidence *stemming from* it is equally unusable
2. **FOTPT exceptions:**
   1. independent source
      1. evidence found during lawful searches will be admissible as long as there is an independent source for that search
   2. inevitable discovery
      1. prosecution has BOP by preponderance that the evidence would have been found by lawful means anyway even though there was a violation
   3. attenuated taint
      1. whether the evidence was discovered by exploitation of the illegality or was obtained by means

## Good Faith Exception: A significan’t limit on the scope of the exclusionary rule

TEST: GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

1. did the police rely on an invalid warrant to conduct a search or seizure?
   1. if YES: can the prosecution establish that a ‘reasonably well trained officer’ would have believed the warrant to be valid?
2. was the warrant not based on an affidavit ‘so lacking in indicia of PC as to render official belief in its existence entirely unreasonable?
3. was the warrant not so facially deficient that a reasonable officer would recognize is invalidity?
   1. if YES: can the D establish that the warrant was issued on the basis of an affidavit containing false statements, or statements made in reckless disregard for the truth, or that the warrant was issued by a magistrate who was not neutral & detached?
4. *US v Leon*: as long as an officer is relying on a warrant that has been properly issued
   1. the exclusionary rule has been modified so as not to bar the use in the prosecutors case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached & neutral magistrate but ultimately found to be unsupported by probable cause
   2. Rule: good faith exception = reqs that an objectively reasonable officer was relying on a properly issued warrant & correct procedures were followed
      1. decision should be based on a cost/benefit analysis
      2. in S/S cases – the exclusionary rule is not required by the 4A b/c it is judicially created remedy. Also, the ct said the rule is designed to deter police misconduct rather than punish the errors of judges & magistrates.
      3. Dissent: angry at where the rule came from; dissent says its implied in the const & 4A by its terms takes the cost of those criminals never caught
5. **Instances there will NOT be good faith reliance: (will suppress evidence)**
   1. misleading affidavit – if the officer who prepared the affidavit on which the warrant is based knows that the info in it is false, or recklessly disregards its truth/falsity
   2. ‘rubber stamping’ magistrate –exception will not apply if the magistrate wholly abandons his judicial role.
   3. inadequate affidavit – the underlying affidavit may be lacking so much idicia of PC to render official belief in its existence entirely unreasonable
   4. facially deficient warrant – warrant may be so facially deficient that the cops who execute it can’t reasonable presume it to be valid

**Comparison of Right to Counsel During Interrogations Under Sixth Amendment and *Miranda:*** The right to counsel under the [Sixth Amendment](http://www.lexis.com/research/xlink?searchtype=lxt&search=uscs+const+amend+6) and the Fifth Amendment *Miranda* [[384 U.S. 436](http://www.lexis.com/research/xlink?canceldest=form&keyenum=25270&keytnum=0&searchtype=get&search=384+U%2ES%2E++436)] decision differ in the following ways:

1.      (1) **Timing** – The Sixth Amendment right applies only after adversary judicial criminal proceedings have been initiated against the accused; the Fifth Amendment right attaches once the defendant is taken into custody.

2.      (2) **Custody** – The Fifth Amendment right does not attach unless the suspect is in custody; the [Sixth Amendment](http://www.lexis.com/research/xlink?searchtype=lxt&search=uscs+const+amend+6) is not so limited, *e.g.*, it applies when the accused has been released from custody on bail or on his own recognizance.

3.      (3) **Nature of offense** – The Sixth Amendment right is offense-specific; the Fifth Amendment right to counsel applies to any and all offenses, once custodial interrogation commences.

4.      (4) **Focus of inquiry** – The Fifth Amendment right to counsel applies when the custodial suspect is “interrogated,” and focuses on the perceptions of the suspect (whether he believes he is in custody); the [Sixth Amendment](http://www.lexis.com/research/xlink?searchtype=lxt&search=uscs+const+amend+6) prohibits “deliberate elicitation,” and focuses on the intentions of the police.

5.                  (5) **Questioning by undercover agent or informant** – The Fifth Amendment right to counsel is not invoked when the suspect is questioned by an informant or undercover officer; the [Sixth Amendment](http://www.lexis.com/research/xlink?searchtype=lxt&search=uscs+const+amend+6) applies to deliberate elicitation by overt and covert government agents.

6.                  (6) **Fruit-of-the-poisonous-tree doctrine** – The doctrine applies to Sixth Amendment violations; the doctrine does not apply to violations of the Fifth Amendment right to counsel.

7.                  (7) **Impeachment** – Statements secured in violation of the Fifth Amendment right may be used for impeachment purposes; statements secured in violation of the Sixth Amendment *Jackson* [[475 U.S. 625](http://www.lexis.com/research/xlink?canceldest=form&keyenum=25270&keytnum=0&searchtype=get&search=475+U%2ES%2E++625)] rule may be used for impeachment.