Outline

Saturday, April 17, 2010
8:19 AM

1. Due Process
    a. Straight-Up Due Process Clause Violations
        i. Conduct which "shocks the conscience"
            1) *Rochin* (1952) (stomach-pumping to get drugs)
            2) *Toscanino* (2d. Cir.) (kidnapped in Nicaragua, tortured there, etc.)
        ii. Voluntariness of confession cases like *Spano* are technically DPC cases. (See below.)
        iii. Line-up cases before formal proceedings are DPC cases. *Kirby*. (See below.)
    b. Incorporation
        i. The "test" from *Palko* (Double Jeopardy Clause unincorporated; overruled by *Benton*)
            1) **"Implicit in the concept of ordered liberty"**
            2) "The very essence of a scheme of ordered liberty"
            3) A 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'"
            4) "[T]he essential implications of liberty itself"
        ii. Example — *Adamson* (1947) — States may allow comment on a defendant's silence, even where testifying triggers the admissibility of certain past crimes evidence.
            1) Due Process Clause reasoning*: Palko* "implicit in the concept of ordered liberty."
            2) Frankfurter Concurrence:
                a) Vigorous attack on Black's Bill of Rights Incorporation position; fine with *Palko*-esque test.
                b) "Absorption" rather than "Incorporation": rights against states may have only the "core" of the right against the federal government.
            3) Black dissent: The *Palko* approach is natural law; let's be judges, not philosophers, and incorporate the Bill of Rights and only the Bill of Rights
            4) Murphy/Rutledge dissent: All the Bill of Rights is incorporated, but not only the Bill of Rights is incorporated by the Due Process Clause.
        iii. Although the *Palko* approach, not Black's all and only the Bill of Rights approach, remained the formal reasoning, most of the Bill of Rights (but not much else) has been incorporated.
2. Fourth Amendment Searches and Seizures
    a. The Text: "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."
    b. **Two Basic Frameworks**
        i. If the Warrant Clause is primary (classic approach, favored by Weinreb, but on the wane)
            1) Standing: Does the defendant have standing to object to the introduction of evidence?
                a) Test: Does the defendant have a *legitimate* expectation of privacy in the items or places searched? (*Rakas*, *Stoner*)
            2) Consent: Was there effective consent?
                a) Extent of consent
                b) Person who gave consent
                c) Voluntariness of Consent
            3) Warrant: Was there a valid warrant?
                a) If there was no warrant, does some exception apply?
                    i) Search incident to arrest

ii) Vehicular search
iii) Jailhouse search
iv) Emergency / exigent circumstances

4) Seizure: Was the evidence allowed to be seized / seizure reasonable?

ii. If the Reasonableness Clause is primary (current search/seizure test)

1) Standing: Does the defendant have standing to object to the introduction of evidence?
   a) Test: Does the defendant have a *legitimate* expectation of privacy in the items or places searched? (*Rakas*, *Stoner*)
2) Consent: Was there effective consent to the search / seizure?
   a) Extent of consent
   b) Person who gave consent
   c) Voluntariness of Consent
3) Reasonableness: Was the search / seizure reasonable?
   a) Search incident to arrest
   b) Vehicular searches
   c) Jailhouse searches
   d) Emergency / Exigent Circumstances
4) Warrant: If the search wasn't reasonable, was there a warrant?
5) Seizure: Was the evidence allowed to be seized / seizure reasonable?

iii. Differences Between the Two Frameworks

1) On the second view, the Warrant Clause is a gateway for otherwise-unreasonable searches.
2) On the first view, "reasonableness" means specific exemptions, whereas on the second approach it means general reasonableness as in *Rabinowitz*.

iv. Evaluation of the Frameworks

1) Fourth Amendment doctrine increasingly takes the second approach
2) Weinreb thinks the 4A text weakly suggests the first approach
3) As a matter of political philosophy:
   a) Individual-based (Lockean) approach: Warrant Clause should prevail because searches are exceptional intrusions by the state into persons' affairs.
   b) Community-based (Rousseau) approach: Reasonableness should prevail because of the community's interests in crime prevention and detection.
4) Principles at Stake — What Kind of Privacy Does the Fourth Amendment Protect
   a) "Public benefit" privacies
      i) This approach would support the car/house distinction.
      ii) This approach would support jailhouse searches
      iii) This approach would support the Fourth Amendment's emphasis on property rights (with their accompanying social value)
   b) "Individual privacies"
      i) This approach would not support the distinctions above.
      ii) This approach *is* suggested by the Bill of Rights and classical liberalism
5) Effects of the Two Frameworks
   a) Under the broader approach, more criminals caught and punished.
   b) Under the broader approach, more invasions against non-criminals.
      i) The Court *rarely* sees these searches. *But see* ...

c. Probable Cause

i. To Arrest

1) Test: "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves **to warrant a man of reasonable caution in the belief that' an offense has been or is being committed**." *Draper* (quoting *Carroll*).
2) Evidence To Be Considered:
   a) Specific, articulable facts rather than "hunches."

b) Totality of the circumstances (*Gates*)
c) Hearsay evidence may be considered (*Draper*)

3) Examples
a) *Draper*: Probable cause existed to search man at train station after reliable informant described him and officer verified the description.

ii. To Search
1) Test: Facts and circumstances sufficient to warrant a man of reasonable caution in the belief **that there is evidence of a crime on a person or premises and that such evidence is subject to seizure**.

iii. Comments
1) Some cases suggest probable cause determinations made by magistrates will be less than those made by officers searching or seizing pursuant to exceptions. *Watson*.

d. Exceptions to the Warrant Clause

i. Search Incident to a *Lawful* Arrest
1) When does an "arrest" occur?
a) Test: An arrest requires *either* physical force *or*, where that is absent, *submission* to the assertion of authority. *Hodari D.* (kid runs, drops drugs)

2) Where may arrests without warrants but with probable cause lawfully be carried out?
a) Warrants are *required* to arrest at home. *Payton*.
b) But probable cause alone justifies arrests elsewhere, even if there was time to obtain a warrant. *Watson* (informant/credit card thief bust at restaurant)

3) What is the proper scope of a search incident to a lawful arrest?
a) Grabbable area test:
i) Police may search "the arrestee's person and the area 'within his immediate control' — … the area from within which he might gain possession of a weapon or destructible evidence." *Chimel* (1969) (search of coin thief's house).
ii) This grabbable area may be searched even when the arrestee is no longer within the grabbable area. *Cf. Edwards* (1974) (jailhouse search)
b) Protective sweeps — *Maryland v. Buie* (1990)
i) Police may automatically do a protective sweep of the immediate vicinity.
ii) To go beyond the immediate vicinity, police must have a *reasonable belief* based on *articulable facts*, a standard much lower than probable cause.
c) Rationales, Commentary and Upshot
i) Officer safety and destruction of evidence are the official rationales.
ii) But given how police actually arrest people, it's rare that officer safety and evidence destruction are at issue, so *Chimel*/*Buie* have expanded to cover routine searches simply aimed at getting evidence.
iii) Though we aren't back to *Rabinowitz*'s rule allowing searches of everything within the arrestee's possession or control (broadly understood), we're getting closer.

4) The officer's intent in arresting is irrelevant. *Whren*.

ii. Vehicular Searches
1) Probable cause to search
a) Police may, without a warrant, search a vehicle if and only if they have probable cause to believe there is evidence of a crime in the car. *Chambers* (1970)
i) Scope: Police may search all and only those parts where evidence may be found. *Ross*.
ii) Crimes: Police may search for evidence from crimes *other than the crime of arrest* if they have probable cause. *Ross* (as read by *Gant*)
b) Rationale:
i) Cars are mobile; it could be impossible to get a warrant before they leave the jurisdiction, and we aren't going to make cops go through the hassle of getting a warrant because they searched at the stationhouse instead.

ii) People have a lesser expectation of privacy in cars.

2) Search of a vehicle incident to arrest
   a) Searches without reasonable grounds:
      i) Police may search an automobile "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant* (2009) (drugs found after arrestee locked up in squad car for driving on suspended license)
   b) Searches with reasonable grounds:
      i) However, with reasonable grounds police may search an arrestee's vehicle and *any containers therein*. *Gant*.
      ii) Criticism
         1) Note distinction from *Chambers*: with an arrest, police only need reasonable grounds, not probable cause, to search at least the passenger compartment.
         2) Why should searches incident to arrest require less to search the vehicle when admittedly the safety and evidence rationales are inapplicable?
   c) Different kinds of stops, different kinds of searches
      i) Custodial arrest — police can search the car as well as person, subject to the rules above. (*Robinson*/*Parsons*)
      ii) Traffic stops — police can *only* search the person, for safety. *Knowles*.
3) Stops for routine traffic violations
   a) If the stop results in a custodial arrest — police can search the car as well as person, subject to the rules above. (*Robinson*/*Parsons*)
   b) Traffic stops not resulting in custodial arrest — police can *only* search the person, for safety. *Knowles*.
4) Inventory searches of seized vehicles
   a) Police may conduct a *routine* search — *without probable cause* — of all portions of a lawfully impounded vehicle. *Opperman* (drugs found in impounded car's glove compartment)
   b) *Opperman*'s rationales
      i) Lessened expectation of privacy in automobiles
      ii) Protection of the police from possible danger
      iii) Protection of the owner's property
      iv) Protection of the police against false claims

iii. Jailhouse Searches
1) After a lawful arrest, police may conduct a warrantless search of *the effects on the arrestee's person* at the time of the arrest. *Edwards* (1974) (paint chips).
   a) Time: The search seems to be lawful as long as the custody is. *Edwards*.
   b) Probable Cause: Police may conduct these searches as routine booking searches, regardless of probable cause regarding evidence. *Lafayette*.
2) Rationale
   a) The arrest by itself removes privacy rights to things in your pockets. *Cf. Chimel*.
   b) Inventory rationale a la *Opperman* (impounded cars)
   c) Arrestees have lowered expectations of privacy
   d) Everyone does this, so it must be reasonable
   e) This is sort of like a search incident to arrest. Sort of.
3) Criticism / Consistency
   a) Functionally, *Lafayette* seems to overrule *Chadwick*'s luggage exception — you could do a routine inventory search.
   b) All of the legitimate, non-warrant requiring interests the police have good be satisfied by having arrestees place their materials in lock-seal bags; restrictions on liberty and privacy should be as minimal as necessary.
   c) Weinreb thinks almost everyone accepts these searches.

iv. Emergency / Exigent Circumstances
    1) Hot pursuit: Police may enter any space necessary in hot pursuit. *Warden* (1967).
    2) Safety: Police may enter to protect their own or others' safety.
    3) Evidence preservation: Police may enter if they have grounds to believe evidence will be destroyed.
    4) Apprehension: Police may enter to prevent a suspect from fleeing.
v. Luggage — An Exception to the Exceptions
    1) The test: Luggage not "immediately associated with the person of the arrestee" cannot be searched incident to arrest if the item is already reduced to police control. *Chadwick* (1977) (dog who sniffed the footlocker, cops open locker at the station)
        a) Weinreb thinks the test is between items "on your person" (searchable, *Draper*) and items not on your person (not searchable if reduced to police control)
    2) Automobile Exception: If a footlocker is in a car and you have probable cause to search the footlocker, you can search without a warrant. *Acevedo*.
    3) Criticism/Consistency
        a) Flatly inconsistent with *Chimel*'s grabbable area rule for searches incident to arrest.
        b) The last case really to play up the Warrant Clause; hard to argue for today.
vi. What May Be Seized in a Lawful Warrantless Search?
    1) General Rule
        a) If you are lawfully conducting the search, you can seize anything you have probable cause to believe is related to a crime.
        b) Examples
            i) *Draper* — looking for heroin, found a syringe.
            ii) *Chambers* — looking for fruits of a robbery, found those fruits and evidence from and earlier crime.
            iii) *Opperman* — weren't looking for *anything* and found drugs
        c) There is no "particularity" requirement for warrantless searches, unlike warrant searches; they're narrowed by the justifications for going around the warrant requirement.
    2) "Mere evidence" — Police may seize anything, not just instrumentalities of the crime, fruits of it, or contraband, when searching. *Warden* (hot pursuit search, find clothes in the washing machine).
    3) Plain View Doctrine — *Horton* (warrant-based search for jewelry turns up weapons and clothing instead)
        a) The Requirements: Anything in plain view may be seized when:
            i) The police are lawfully on the premises
            ii) The evidence is discovered inadvertently
            iii) It is immediately apparent the items are subject to seizure. *Coolidge*.
        b) Moving items constitutes a new search requiring independent justification. *Hicks* (police lawfully on premises turn the stereo around to get its numbers)
vii. General Pattern
    1) Once you allow a warrantless search based on plausible justifications that do not actually fit the situation, the category is going to expand to the limits of "reasonablenesss," not to the specific justification.
    2) Examples
        a) Grabbable area / protective sweep searches under *Chimel* and *Buie*
        b) Jailhouse searches in *Edwards* and *Lafayette*.

e. Consent To Search
    i. Was the consent given fully, without relevant conditions?
    ii. Was the consent given by one with proper authority?
        1) Landlords and hotel owners — they cannot consent for guests, even if state property law gives them some access to the room. *Stoner* (hotel room).
        2) Common authority — someone actually has authority to let another in

a) Rule — Consent by one with common authority is good against the absent, nonconsenting party with whom authority is shared. *Matlock* (wife consents to search as husband is arrested outside).
    i) Qualification — If the nonconsenting party is *present* and *objecting*, the other party's authority is insufficient to allow the search. *Randolph* (trailer park).
        1) Criticisms of *Randolph*
            a) Formalistic, accidental Fourth Amendment protection
            b) If common authority is about *authority*, not *agency*, this makes absolutely no sense.
            c) The Court talks about common *understandings of* authority, rather than just actual common authority, unlike *Matlock*.
        2) Support for *Randolph* — Weinreb likes warrants?
    ii) Parsing of space — If the consenting party has sufficient authority to invite friends into the space, she can consent to a search.
    iii) Weinreb's Hypos
        1) Babysitter: No, control is limited to the scope of the agency
        2) Uncle: Very fact-sensitive; courts will get into the details
        3) Adult child living at home
            a) Usually allowed, even where parents don't often enter
            b) Who pays rent is often important
            c) Wouldn't allow a search of a footlocker, though
b) Definition: Common authority exists where there is *mutual use* of the property by persons having *joint access or control*. *Matlock*.
c) Rationale: People have lowered expectations of privacy in shared property and assume the risk that those they share authority with may invite police in.

3) Apparent authority — someone appears to but does not have common authority
    a) Rule: Police may enter without a warrant where a reasonable person would believe that the consenting person had common authority over the premises. *Rodriguez* (ex-girlfriend's consent)
    b) Qualification: Presumably *Randolph*'s present objector rule in common authority cases would *apply a fortiori* to apparent authority cases.

iii. Was the consent given voluntarily?
1) Rule: Consent is given freely if and only if *a reasonable person would feel free to decline the officers' requests and terminate the encounter*. *Bostick* (bus search)
2) Burden of proof / Notification of Rights:
    a) The state must prove voluntariness.
    b) But it need not inform parties of their right to deny consent. *Bustamonte* (1973) (driver consents to search of 6-person car)
3) Examples
    a) Lying about having a warrant removes the voluntariness of consent. *Bumper* (1968)
    b) No flat rule against consent given when police board buses and ask to see inside people's luggage. *Bostick*.
    c) Undercover agent deception does not vitiate consent.

iv. Details of Consent
1) Conditioning Consent — If you can refuse, you can impose what conditions you want.
2) Withdrawing Consent?
    a) If background property norms apply, withdrawal could happen at any time.
    b) Estoppel-like considerations are irrelevant because of the availability of warrants, and a "destruction" exigency rationale would swallow withdrawal.
    c) Does consent give some minimal scope of a search? Depends on your views on what consent is all about.
3) Consent Once Removed

a) Lower courts have generally held that once undercover agents enter, subsequent agents making the bust have consent to enter because the privacy has been surrendered to the undercover agent.
b) Weinreb thinks this is pretty fishy, but it seems pretty necessary to safety/longterm undercover operations.

f. The Exclusionary Rule
  i. "Standing"
    1) The Test — To assert a Fourth Amendment claim, there are two requirements:
      a) An actual subjective expectation of privacy in the places/objects searched; and
      b) Society must be prepared to recognize that interest as legitimate
    2) When is an expectation of privacy a "legitimate" one?
      a) General Factors
        i) The expectation must derive from something other than the 4A. *Rakas*.
        ii) Expectations based in a property interest are generally legitimate. *Rakas*.
          1) Both *Rakas* and *Carter* suggested that ownership of the seized items might provide standing even if seized at another's house
        iii) The longer one's association with the place/item, the more likely it is one will have a legitimate expectation. *See Carter* (short-term business transaction).
        iv) Places of "business" seem to receive less protection than non-business. *Carter*.
        v) *Greenwood* Principle: If your treatment of the item made it such that anyone could (legally or illegally) go through it, your expectation is illegitimate.
      b) Specific Acts That Destroy Privacy Interests
        i) Items knowingly exposed to the public. *Katz* (telephone booth) (dicta)
        ii) Items accessible to public view, even if that public view has to be exercised from an airplane. *Ciraolo* (backyard view from airplane)
        iii) Information voluntarily given to / shared with third parties. *Smith* (numbers dialed on telephone)
          1) Applies to police informants. *White* (wired informant)
      c) Examples
        i) *Rakas* (1978) — "mere passengers" do not have legitimate expectations of privacy in another's car.
        ii) *Carter* (1998) — people cutting drugs in business acquaintance's apartment do not have legitimate expectations of privacy.
        iii) *Greenwood* (1988) — no legitimate expectation in trash that *other people could have unlawfully rifled through*
          1) Rationales — Assumption of Risk
    3) Rules About Specific Places
      a) Cars
        i) Mere passengers lack legitimate privacy interests. *Rakas*.
        ii) Owners may consent for nonowner drivers.
        iii) Traffic stops
          1) Officer making a lawful arrest may order passengers out. *Wilson*
          2) But the ordering out counts as a seizure (*Brendlan*), which is flatly inconsistent with *Rakas*'s view that they have no 4A rights.
      b) Another's House/Property
        i) Overnight guests have a reasonable/legitimate expectation of privacy. *Olson* (overnight guest)
        ii) Social guests will usually have a legitimate expectation of privacy (Kennedy's concurrence in *Olson*)
        iii) "Fleeting" and "insubstantial" connections with others' property, especially for "mechanical" or "business" acts, is insufficient. (Kennedy's

concurrence in *Olson*)
c) Commercial premises — lowered expectations (*Carter* drug packing)
d) Phone booths — legitimate expectation for words spoken into phone. *Katz*.

4) Rejected Theories
a) Target theory — Anyone may challenge evidence to be used against them.
i) Rejected in *Rakas*.
ii) The Fourth Amendment protects privacy, not incrimination.
b) Legitimate Presence theory — Anyone legitimately there may challenge
i) Rejected in *Rakas*/*Carter*
ii) We're interested in legitimate *expectations of privacy*, which are distinct from legitimately being at a location. (Think public parks.)

5) Two Kinds of Privacy — Weinreb
a) Privacy of Place
i) Continuous as long as one maintains an interest in the place
ii) Privacy remains even when you are not in the place
iii) Allows you the ability to make a space your own space
iv) Examples: homes, cars, footlockers
b) Privacy of Person
i) Discontinuous, existing only while you are there.
ii) Protects your ability to be in private
iii) Often accompanies privacy of place, but not necessarily.
c) Upshot
i) *Rakas* recognizes both kinds, but strongly privileges privacy of place.
ii) This focus on place leads to the post-*Rakas* framing of the question: what kinds of non-possessory interests are sufficiently connected to a place to generate privacy of place?

ii. What Happens When a Search/Seizure Violates Someone's Fourth Amendment Rights?

1) General Framework — The Fruit of the Poisonous Tree and the Taint
a) The Test — Evidence obtained through an unlawful search or seizure must be excluded if it "has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* (the mess).
i) But-for causation is insufficient; something like proximate cause required.
b) The "Taint"
i) What Dissipates the Taint?
1) Closeness to paradigmatic examples of taint/no taint
2) Temporal distance
3) Intervening acts of free will
a) A decision to come back later and give a statement
b) The decision of a witness to testify
4) Additional links in the causal chain
5) Certain intervening events
a) Release from jail — *Wong Sun*
b) Talking to a lawyer
ii) What Does Not Dissipate the Taint?
1) Just talking to the police. *Wong Sun*.
2) *Miranda* warnings. *See Dunaway*.
c) Exceptions to the Ban on Tainted Fruits of the Poisonous Tree
i) Independent source — if fruits of an unlawful search are also obtained in another, lawful search, they are admissible. *Silverthorne*; *Segura*
ii) Inevitable discovery — if fruits would inevitably have been discovered in another, lawful search, they are admissible. *Nix* (body of girl)
d) Details
i) Where information generating probable cause is illegally obtained, that

illegality does not eliminate the existence of probable cause. *Wong Sun*.

ii) *Segmentation of Police Activity/Defendents*: Where part of a search is illegal and part is not, only that stemming as a fruit from the illegal portion is excluded. *Harris* (arrestee makes statement in house, on porch)

e) The History of the Exclusionary Rule

i) *Weeks* (1914) — exclusionary rule applies in federal cases

ii) *Wolf* (1949) — Although the 4A is incorporated, it's remedy — the exclusionary rule — is not constitutionally required.

iii) *Mapp v. Ohio* (1961)

1) Incorporates the exclusionary rule against the states

2) Suggests exclusion is part of the right and that deterrence isn't that important, though in a confusing, bad opinion

iv) Through the 1960s, the Court talks about the exclusionary rule as part of the right, but in the 1970s it starts talking about it as prophylaxis.

v) Post-*Herring*'s broadening of the good faith exception, we may be back to something closer to *Wolf*: exclusion only in the face of deliberate, flagrant police misconduct as in *Rochin* (stomach pumping)

2) The Good Faith Exception to the Exclusionary Rule

a) General Rule: Where both the applying officer and issuing magistrate issue a defective warrant in good faith, the exclusionary rule does not apply. *Leon*.

i) Note the requirements

1) Officer must apply for the warrant in good faith

2) Magistrate must issue it in good faith

3) Officer must have reasonably relied on the warrant in good faith

ii) Policy

1) The exclusionary rule is a *judicially created remedy*

2) Evidence should only be excluded where

a) Deterrence benefits outweigh costs of suppression

b) Exclusion vindicates the interests 4A protects

b) Possible broadening — *Herring* declined to apply the exclusionary rule where police carelessly relied on a report that there was a warrant.

i) New Rule (*Herring*) (2009) — For exclusion to be appropriate:

1) "Police conduct must be sufficiently deliberate that exclusion can meaningfully deter it," and

2) "[It] must be sufficiently culpable that such deterrence is worth the price paid by the justice system.

a) The requisite levels of culpability: "deliberate, reckless, or grossly negligent, or in some circumstances recurring or systemic negligence"

b) Rationale

1. The exclusionary rule is about deterrence
2. Only culpable behavior can really be deterred.
3. Exclusion's costs are heavy; it's a last resort.

ii) Implications

1) Unclear how far *Herring* extends past mistaken warrants

2) Treats right/remedy question as settled in favor of remedy

3) Heavily weighs costs, at the individual level

3) The Knock-and-Announce Rule — Another Exception to the Exclusionary Rule

a) Violations of the knock-and-announce rule — regardless of good faith? — do not require exclusion. *Hudson* (2006)

b) Rationale

i) Exclusion is a last resort.

ii) The knock-and-announce rule is about avoiding violence, not protecting privacy, and the exclusionary rule should be applied only where there is

no attenuation either in deterrence or in purposes.
iii) Cost-benefit analysis
c) Implications
i) *Hudson* counts the "flood" of knock-and-announce exclusion motions arising from this malleable standard as a cost of balancing. That's new.
ii) *Hudson* invites cost-benefit analysis at the level of particular cases.
4) Weinreb on the Exclusionary Rule
a) The deterrence approach is misguided — police aren't affected by this much.
b) But the rule may help if it can establish norms of professional policing.
c) The rule is systematically undermined by courts, and the police here that.
d) Weinreb doesn't think we'll kill the rule, just gut it.

g. Stop-and-Frisk / Investigatory Stops
i. Current rule:
1) Police may stop someone and ask questions where they have:
a) **reasonable suspicion**
b) based on specific, articulable facts
i) Reasonable suspicion may be based on tip from third party (*Adams*, officer receives tip that person in car has gun)
c) to believe a person is committing or has committed a crime may stop the person and ask some questions.
i) Time of crime: Officer does not have to believe that the criminal activity currently is occurring (*Hensley*, police stop person suspected of robbery 12 days earlier)
ii) Vehicle stop: Probably always okay for an officer to stop and frisk if he pulls a car over
iii) No requirement of reasonable suspicion that person is armed and dangerous (*Adams*)
2) A stop must be:
a) justified at its inception and
b) reasonably related in scope to the circumstances justifying the stop (*Hiibel*).
c) *Terry* says that inquiries must be "reasonable."
ii. Determining whether a stop was justified: Either (*Brown*)
1) Reasonable suspicion: Officer must have specific, articulable facts upon which to base reasonable suspicion that the person is involved with criminal activity, or
a) Grounds for reasonable suspicion:
i) Tip from third party (*Adams*)
ii) running from police (*Wardlow*)
b) Not reasonable grounds for suspicion: Person "looks suspicious" (*Brown*, person stopped merely because he "looked suspicious," then convicted of violating TX law that required him to identify himself)
2) Neutral plan: The stop must be part of a neutral plan set up in advance — i.e., a codified police policy that applies neutral criteria in advance for stops
a) Sobriety checkpoints: Generally okay (*Sitz*, sobriety checkpoint that checked every tenth vehicle)
i) Exception: Stops must be related to the purpose of the plan plain (*Edwards*, sobriety checkpoints to catch people with drugs invalid, because sobriety checkpoints not related to drug use)
iii. Frisk procedure:
1) Frisk limited to search for weapons (*Terry*, *Dickerson*)
2) Items recognizably illegal may be seized: If in course of valid search officer feels something recognizably illegal, officer can seize it in accordance with the plain view doctrine (*Dickerson*, officer felt packet during frisk)
3) Frisk does not need to be least intrusive means available: Must only be reasonable under the circumstances (*Sharpe*, 20 minute detention with spread eagle frisk upheld

where officers suspected truck was carrying pot)

4) Self-identification statutes: Valid if (*Hiibel*):
   a) Officer's request for identification made during the course of a valid *Terry* stop (officer has a reasonable suspicion of criminal activity), and
   b) There is a law requiring self-identification
5) Removal to stationhouse:
   a) Person cannot be taken into custody (i.e., to the police station) (*Dunaway*, accused taken to police station and was not free to go)
   b) Person cannot be taken to the police station for fingerprinting (*Hayes*, police told accused would arrest him if he didn't come in for fingerprinting)
      i) Possible exception: If magistrate signed off on it
   c) Rule of thumb: Probable cause required to take person to the police station. *Terry* limited to brief, on-the-street stops.

iv. Upshot of *Terry* and Its Progeny
1) *Terry* has extended beyond its original narrow bounds and are now an important part of ordinary police work.
2) Police have generally refrained from brief street questioning, street fingerprinting, or judicial authorizations.
3) Police under *Terry* (and custodial interrogation cases) still lack authority to do real investigatory work when they have reasonable suspicion but not probable cause.
   a) The grand jury could help (*Dionyso*), but it's too impractical.
4) *Terry* / *Hayes* might draw the line correctly because police often just want the show of power that accompanies bringing someone down to the stationhouse.

h. Specific applications:

i. Wiretapping:
1) Current Regime
   a) Unauthorized: Violates the speaker's reasonable expectation of privacy (*Katz*)
      i) Rationale: 4th Amendment applies to people, not places, so fact that tap is made outside of person's property irrelevant; question is one of privacy.
   b) Authorized: Valid so long as conducted in such as way as to minimize interception of communications not otherwise subject to interception (*Scott*, authorized wiretap valid even though 60% of calls not on point)
      i) 18 U.S.C. § 2510: Prohibits disclosure of information obtained via wire tap EXCEPT for a huge range of state and federal offenses.
   c) If one party consents: No violation (*White*, informant wears wire to meeting)
2) Old Rule
   a) Electronic eavesdropping does not violate the Fourth Amendment because the Government did not intrude on property and the speakers' intended on being heard. *Olmstead* (1928) (large-scale booze operation)
   b) Eavesdropping that *did* involve physical trespass, however slight, was illegal.

ii. Electronic surveillance — *Kyllo* (thermal imaging)
1) Sense-enhancing device: Police use of a sense-enhancing device to explore details of a home is presumptively unreasonable where
   a) The item is not in general public use, and
   b) The details are otherwise unknowable without physical intrusion.
2) Note that when not using sense-enhancing devices, police can observe whatever they can naturally and use it against you, even if no one would expect such activities.

iii. Undercover agents:
1) Home converted to commercial center for illegal activity: Upon invitation of owner, agent can enter home that has been converted to a commercial center for illegal activity (*Lewis*, agent invited in to purchase marijuana)
   a) Weinreb strongly dislikes *Lewis*; it doesn't square with Fourth Amendment principles or general principles about government deceit.
   b) Weinreb thinks *Lewis* is a generally accepted but poorly reasoned justification

for undercover police work.

2) Wire-wearing: An informer can record a conversation and transmit it to the police (*White*)

iv. Blood tests: Valid where there is: (*Schmerber*)

1) A lawful arrest (on probable cause);

a) Note that in the blood test context, arrest alone is not enough to justify the test

2) A clear indication that evidence is in the blood;

a) Must be based on a particularized suspicion, based on specific, articulable facts

3) Either (i) a warrant or (ii) an emergency owing to the likelihood that the evidence in the blood will destroyed before a warrant may be obtained; and

a) Open question whether presence of either could overcome religious scruples against test on part of Δ

4) A hygienic, reasonable procedure for extracting the blood

a) A reasonable procedure is one that is

i) Commonplace

ii) Minimally invasive, and

iii) Performed in a reasonable manner (e.g., by a skilled profession)

i. Weinreb's Fourth Amendment Summary and Commentary

i. The doctrinal mess of the Fourth Amendment — Why is it so crazy?

1) The Fourth Amendment is a grab bag, covering widely differing subject areas.

2) The Warrant Clause and the Reasonableness Clause have an opaque relationship.

3) The subject matter is politically loaded — "Law and Order"

4) The adversary process introduces systemic skewing.

ii. Weinreb's Fourth Amendment Inquiry

1) Was there a Fourth Amendment right?

2) Was there a warrant?

3) Which Clause prevails — Warrant (Stewart) or Reasonableness (White)?

4) What was the location of the search?

5) What police activities were in question?

6) What's at stake, privacy of place or privacy of person?

7) What's the nature of the activity — business or nonbusiness?

8) What is the relevance of exigency?

9) What technology is being used?

10) Is the activity consistent with swift, forceful, mobile police operations? Is it consistent with police institutions?

11) Was there deceit?

3. Constitutional Limits on Police Questioning / Line-Ups

a. The Due Process Clause

i. General Rule: Coerced, involuntary confessions violate the Due Process Clause

ii. Examples:

1) Old Torture-Like Cases

a) *Brown* — defendants literally tortured until they confessed.

b) *Chambers v. Florida* — Threats of torture, strong suggestion of detention until confession

c) *Ashcroft* — a turn toward the modern, non-torture feel

i) 36 hours of questioning

ii) Made statements incriminating someone else

iii) Shadow of lynching not present

2) The Modern Cases — *Spano* (boxer case, false friend, stressed out) — "involuntary"

a) *Moran*: Lying to lawyer about time of interrogation before formal proceedings not sufficiently awful to violate the DPC.

iii. Compelling blood samples do not violate the Due Process Clause. *Breithaupt* (see the 4A section above on *Breithaupt*'s limits, though Weinreb thinks it's really a Due Process case).

b. The Fifth Amendment Privilege Against Compulsory Self-Incrimination

i. Text: "No person shall ... be compelled in any criminal case to be a witness against himself"
ii. The Three Requirements for a Compulsory Self-Incrimination Claim
    1) Compulsion
        a) What Kinds of Compulsion Count?
            i) The *production* of the statements, not their receipt by the police, must be compelled. *Olmstead*; *Katz* (no "compelled" when police overhear voluntarily uttered statements)
        b) When is One Compelled?
            i) Un-*Mirandized* statements close enough to "compulsion" to be prophylactically protected by *Miranda* to avoid compulsion.
            ii) Public Employees
                1) *Garrity* — threat of being fired sufficient to generate compulsion
                2) *Gardner* — if the questioning *is related to one's work*, firing is acceptable because the employee is fired *not* for exercising the privilege, but rather for being a bad employee.
    2) Incrimination of *Oneself*
        a) The privilege is personal; you can be compelled to testify against anyone else.
        b) Refusal to testify against others punished through contempt proceedings.
    3) *Incrimination* of Oneself
        a) Definition: Incriminating evidence "renders one subject to prosecution or gives evidence for that prosecution."
            i) Prosecutors can overcome the privilege by granting the witness "use" immunity — prosecutors can still prosecute you for crimes related to the compelled statement, they just have to show an independent source for evidence they already had before questioning you. *Kastigar*.
            ii) Embarrassing or painful evidence is not necessarily incriminating.
        b) "Testimonial" / Real Evidence
            i) Testimonial evidence — that which in itself is an affirmation or rejection of a proposition — cannot be compelled if it is self-incriminating.
            ii) "Real" or "Physical" evidence — that which does not itself affirm or reject a proposition — can be compelled against oneself. *Schmerber* (blood test)
iii. *Miranda* and Its Progeny — Addressing a Different Kind of Compulsion/"Voluntariness Plus"
    1) The Source of *Miranda*
        a) Congress may not override *Miranda* simply by declaring such statements admissible. *Dickerson*.
        b) However, the Court routinely refers to *Miranda* as a "prophylactic" rule preventing violations of the privilege against self-incrimination.
    2) The Warnings Required in Custodial Interrogation
        a) The required warnings
            i) Right to remain silent
            ii) Right to counsel, appointed if necessary
            iii) Statements can and will be used against the speaker
        b) Police may give warnings in such a way that they would inform a reasonable person of her rights. *Florida v. Powell* (2010).
        c) Policy — *Miranda* is premised on the view that custodial interrogation presents inherent compelling pressures, pressures that must be overcome by informing those interrogated of their rights.
    3) What Counts as Custody?
        a) General Definition: When person is taken into custody or deprived of freedom of action in any significant way
        b) Custodial interrogation must be full custody (same as in the Fourth Amendment context?), but it need not be at the station house.
            i) *Orosco*: person in apartment who couldn't leave required the warnings
            ii) *Beckwith*: guy at home who could have stopped did not need warnings

iii) *Mathiason*: parolee who voluntarily comes to the station and is told he is free to leave does not need warnings

4) What Counts as Interrogation?
   a) Broad Definition: Any words or actions likely to elicit an incriminating response. *Innis*.
   b) Narrow Application
      i) *Innis* — "Wouldn't it be awful if a kid found a gun?" not "interrogation"
      ii) Cases all over the place on whether truthfully telling the suspects the evidence you have is "interrogation"
   c) Deception Exception —
      i) Warnings not required where the suspect *does not know he is speaking with the police*. *Perkins* (undercover cop in next cell)
         1) Policy: *Miranda* is about overcoming coercive pressures, and there are no such pressures when the suspect does not know he's being questioned.

5) Waiving *Miranda* Rights
   a) Broad Stated Rule and Prophylactic Protection:
      i) The Government bears a heavy burden to show the waiver of *Miranda* rights. *Miranda*
      ii) Any request for a lawyer *must end questioning*. *Edwards*
   b) Narrow Application
      i) The Mechanics of Waiver
         1) *Michael C.* — request for *parole officer* insufficient to trigger
         2) *Davis* — Ambiguous requests for counsel can be ignored
         3) (Lower courts) — Anticipatory requests for counsel do not trigger *Edwards*
         4) *Butler* — Waiver can be through conduct, not simply express statements.
      ii) Attempts To Stop
         a) *Shatzer* — *Edwards*' no contact after invocation rule does not apply if there has been a two-week break between interrogations.
         1) *Moran* — *Miranda* not violated where the suspect's *lawyer* is not allowed in / deceived about the time of interrogation; *Miranda* is about pressure *on the defendant* and about knowingly waiving *the right*, not about knowing how soon you could exercise the right.
      iii) Deception and *Miranda*
         1) Since *Miranda* is about *felt pressure*, deception that *does not increase felt pressure* is acceptable.
            a) *Moran* — <u>lawyer</u> lied to, not defendant (who waived)
            b) *Perkins* — undercover cop in adjacent cell, no warnings
         2) Contrast *Massiah*, but compare Fourth Amendment (*White*)

6) Effects of a *Miranda* Violation
   a) The Statements
      i) Statements received in violation of *Miranda* must be excluded from use in the prosecution's case-in-chief. *Miranda*.
      ii) Statements received in violation of *Miranda* <u>can</u> be used to <u>impeach</u>. *Harris* (overruling *Miranda*'s "dictum")
      iii) Statements given *again* after *proper warnings* are admissible. *Elstad*.
         1) But police can't systematically abuse this rule. *Seibert*.
   b) The Fruits of the Statements
      i) Fruits of the statements can be admitted. *Tucker*/*Patan* (spelling?)
      ii) Policy:
         1) *Miranda* itself not constitutionally required.

2) Cost/benefit analysis against exclusion.

7) Exceptions to the *Miranda* Requirements
   a) Public Safety — when police need the information immediately to protect public safety. *Quarles* (chased into store, hides gun)
   b) Traffic stops — *Berkemer*
   c) *Terry* stops? — Lower courts wrestling with this, as *Terry* stops get longer.

c. The Sixth Amendment Right to Counsel and Police Questioning
   i. Questioning/Information Gathering After the Onset of Formal Proceedings
      1) General Rule: Once the right attaches, police may not deliberately elicit statements about the crime or deceive the defendant to elicit statements. *Massiah* (wired informant).
      2) Exceptions/Qualifications to the General Rule
         a) Police may question about non-indicted, related offenses. *Cobb*.
         b) "Passive" informant in adjacent cell is acceptable. *Kulhmann*.
         c) Request for counsel at early proceeding followed by custodial interrogation
            i) Old rule — When a defendant requests counsel, police may not ask any more questions. *Jackson*
               1) Based on *Miranda*-related *Edwards* rule that once defendants ask for a lawyer at the initial hearing, questioning must stop.
            ii) New rule — Defendants must re-invoke their right to counsel at questioning to trigger *Edwards*'s ban on subsequent questioning. *Montejo* (2009).
               1) *Edwards* is a Fifth Amendment case, not a Sixth Amendment case.
               2) This rule is only about presumptions regarding waiver of the right to counsel, and the presumption that invoking (sometimes automatically) at the initial appearance means subsequent waiver was the result of an overborne will is untenable.
   ii. Questioning/Information Gathering Prior to the Onset of Formal Proceedings
      1) Old Rule — *Escobedo* — Right to Counsel Applies in Some Context pre-Formal Stuff
         a) Asking further questions violates the suspect's Sixth Amendment right to counsel once:
            i) investigation has shifted from investigatory to accusatory (has narrowed to a particular suspect)
            ii) suspect taken into custody
            iii) police carry out interrogation that leads to incriminating statements
            iv) suspect has asked for an been denied consultation with counsel, and
            v) police have not given warning of right to remain silent.
         b) *Miranda* reinterprets *Escobedo*'s right to counsel language as a factor in the *Fifth Amendment* voluntariness-plus inquiry, completed by *Moran*'s limiting of *Escobedo* to its facts.
      2) New Rule — Because there is no right to counsel prior to the onset of formal proceedings, the Sixth Amendment generally does not affect police questioning in such circumstances.

d. The Right to Counsel and Police Line-Ups
   i. Line-Ups *Before* Formal Proceedings / Right to Counsel Attaching — *Kirby*
      1) NO right to counsel at the line-up (cutting back on *Wade*'s spirit)
      2) However, the Due Process Clause requires that line-ups be "reliable." Courts look at indicia of reliability including:
         a) Description by the witness of the suspect prior to the line-up
         b) Lighting conditions
         c) Temporal distance between the crime and the identification
         d) Upshot: This is a fairly low requirement for admissibility, relying on cross-examination to address most questions of reliability.
   ii. Line-Ups *After* Formal Proceedings / Right to Counsel Attaching — *Wade*

1) What Rights Do Defendants Have?
    a) Defense counsel must:
        i) Be notified and have an opportunity to observe
        ii) But can be kept from participating and from hearing witness ID suspect
    b) Line-ups are NOT totally forbidden post-attachment, in tension with *Massiah*'s "hands-off" principle.
    c) Exception: Identification through photo books are only subject to *Kirby*/pre-attachment Due Process Clause scrutiny, even post-attachment. *Simmons*.
2) What Are the Consequences for Violation?
    a) Suppression is required for the pre-trial identification.
    b) The trial identification must be suppressed unless "independence," which has come to mean "reliability," can be shown.

4. The Sixth Amendment Right to Counsel
    a. The Text: "***In all criminal prosecutions, the accused shall enjoy the right*** to a speedy and public ***trial***, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and ***to have the Assistance of Counsel for his defence.***"
    b. When Does the Right Attach?
        i. At onset of formal adversary proceedings. *Rothgery*
            1) Events that initiate formal adversary proceedings:
                a) Arraignment (Δ brought before magistrate and appraised of charges against him)
                b) Formal charges
                c) Preliminary hearing
                d) Indictment
                e) Information
            2) Time between arrest and onset of formal proceedings: An arrestee must be brought before a magistrate within 8-12 hours of his arrest
            3) *Escobedo* rule (superseded by *Miranda*; reinterpreted as 5th Amendment case by *Moran*):
                a) According to this (dead) rule, the right attaches when:
                    i) investigation has shifted from investigatory to accusatory (has narrowed to a particular suspect)
                    ii) suspect taken into custody
                    iii) police carry out interrogation that leads to incriminating statements
                    iv) suspect has asked for an been denied consultation with counsel, and
                    v) police have not given warning of right to remain silent
                b) Policy: Value of Δ's silence — "Any lawyer worth his salt will tell the client to make no statement under any circumstances"
            4) *Moran* / Current Rule: Before formal proceedings, no right to counsel even where lawyer is deceived about the time of interrogation.
    c. The Right to Counsel at Different Procedural Stages
        i. At trial
            1) Basic rule — Counsel must be appointed for indigent defendants. *Gideon*.
                a) Counsel is essential to a fair trial
                b) The state and rich defendants spend tons of money in this process.
                c) The adversary process is the crucible of truth yada yada
            2) Qualifications
                a) People may waive their right to counsel. *Gideon*/*Faretta*
                    i) Only effective if made knowingly and intelligently
                        1) Δ must be aware of the dangers of waiving counsel (go in with "eyes open")

2) Technical legal knowledge not relevant to assessment of Δ's ability knowingly to waive the right (*Faretta*, judge had denied request of self-representation after quizzing Δ about hearsay rules and trial procedure)

ii) Right of self-representation guaranteed / implied by the structure of the 6th Amendment (*Faretta*)

b) Types of Crimes?

i) *Argersinger* held that absent waiver no one who lacked counsel may be imprisoned

ii) *Scott* interpreted *Argersinger* to allow unrepresented trials for crimes (maybe felonies?) where the prosecutor/court agreed not to imprison.

ii. On appeal

1) Appointed counsel is required on the first appeal as of right. *Douglas*

a) Justified on due process ("meaningless ritual"), equal protection grounds.

b) Harlan Dissent

i) Not appointing counsel cannot violate the Due Process Clause because states can remove appeals entirely.

ii) The Equal Protection Clause does not require societal leveling.

2) Appointed counsel is *not* required for discretionary appellate review by the state supreme court or in petitions for SCOTUS certiorari. *Ross*.

a) Test for EPC: Do indigent defendants have "adequate opportunity" because of things like counsel at trial and at first appeal as of right?

b) *Halbert v. Michigan*: Counsel must be appointed in Michigan's two-tier system, where ordinary convicts get first appeals as of right and plea convicts only get discretionary appeals.

d. Competency of Counsel

i. Rule for ineffective assistance of counsel claim: Δ must show that: (*Strickland*)

1) Counsel's performance was deficient (performance prong), and

2) The deficiency was "prejudicial" to the Δ's defense, meaning that there is a reasonable probability that but for counsel's errors, the result would have been different (prejudice prong)

e. The History of the Right to Counsel

i. *Powell v. Alabama* (1932)

1) In trying the Scottsboro boys, the Due Process Clause required the appointment of counsel because of the gravity of the charges, lack of opportunity to acquire counsel, and inability of the boys to defend themselves.

2) This was essentially a judicial lynching

ii. *Betts v. Brady* refused to incorporate the right to counsel, instead requiring counsel only where "special circumstances" existed — but special circumstances were always found.

iii. *Gideon* (post-WWII) finally incorporated the right in felony cases.

5. Plea Bargaining

a. Basic Rules

i. Plea bargains must be knowingly and voluntarily entered. *Brady*.

ii. That the plea was influenced by bargaining does not vitiate voluntariness or unacceptably "put a price" on constitutional rights. *Brady* (death penalty induced plea)

b. Comparison with Other Course Topics

i. Pressure to plead is likely as great as pressure to confess in *Miranda*. Why don't we care?

ii. Practitioners all love plea bargaining, but academics all hate it. Why?