Criminal Procedure classnotes, Spring 2005. Professor R. Miller.

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Wednesday, January 12

Introduction to fundamental concepts

What do we want from criminal procedure?

- Well, we have security, on the one hand, and individual rights, on the other. We want criminal procedure to *stike a balance* between the two.
    - Cole: what kind of balance does Cole want?
        - Well, Miller doesn't think Cole's saying *anything* about the balance, other than that it has to be struck. (In fact, Cole even says that if we *do* apply the balance equally, we would have to favor security more than we currently do.)
        - Cole's *important* argument is that the balance should be applied *equally* across the board.

        So, Cole's challenge is for us to ask: how fairly are we applying the balance?
- What other measures of success are there, for our criminal procedure system?
    - Legitimacy?
    - Effectiveness?

    N.b. Schwartzman's dissent in *Idaho v. Brumfield*[, 138 Idaho 913, 918 (Ct. App. 2001).]

Where do we get our criminal procedure?

- From the law:
    - The U.S. Constitution
    - The state constitutions
    - Federal statutes
    - State statutes

        Why should we be leery of these last two—the statutes?
            - Because they're fluuid, and subject to the "tyranny of the majority." Whereas, resting criminal procedure in constitutions says that criminal procedure is important to us—because it's constitutions where we express our aspirations.

Powell v. Alabama (1932) (p5)

- Procedural facts:
    - Δs rapidly haled into court.
    - The "entire bar" is appointed as Δs' counsel.
        - Some out-of-state guy comes in, *on the day of trial*, and says he might be up to helping out, but says he doesn't know anything

about the case.
        - Also, a member of the "entire bar" is representing the state, as prosecutor.
    - Δs were illiterate and uneducated, and from out of state.
    - The nature of the crime (rape) and the potential punishment (death) are both serious and severe.
    - There's a mob (mentality).
- The Court holds that this appointment of counsel (of the "entire bar") was not constitutional.
    - However, this holding is pretty narrow—it's limited more or less to the (unusual) facts and circumstances here.
    - BUT, it's unconstitutional because of DUE PROCESS—14th *amendment* due process, that is.
        - (Even so, and as the book notes, don't always look just to the federal constitution for help—look also to the state constitution and other laws.)
        - And, by the way, why does SCOTUS have any say in this state matter at all? Because there's federal (constitutional) law at issue here—recall *Hunter's Lessee*.

Incorporation

Could (or should) the entire Bill of Rights be incorporated into am14 Due Process?

- *Palko* (1937) (p35 in text): a very restrictive approach—incorporate only if it would be shocking otherwise.
- Justice Black: arguing, persistently and to no avail, for total incorporation.

What we actually get, these days, is gradual, selective incorporation.

Current status of incorporation:

- Almost the entire Bill of Rights and its "bag and baggage" has been incorporated.
    - EXCEPT:
        - Eight Amendment no excessive bail right.
        - The grand jury guarantees.

<u>Wednesday, January 19</u>

Relections on Cole: what measures of success of our criminal procedure could we use, besides equality?

Overview of the course

This is a *constitutional* class. Constitutional procedure (*not* the R. Crim. P.).

- Nevertheless, this *constitutional* procedure involves lots of technical management (e.g., *Miranda*).
- So, this course will involve:
    - Incorporation (and thus federalism: should states be managed by federal values?)
    - Constitutional interpretation (= constitutional reading)
    - Constitutional provisions
        - Search and seizure (am4)
        - Interrogation (am5 & am6)
        - Right to counsel (am5 & am6)
        - Plea bargaining (am5 & am6)
        - Cruel and unusual punishment (am8)

Incorporation

Okay, so we've got:

- Total incorporation, which Black argued for (but, as a compromise, he didn't demand that the "bag and baggage" come in to).
- Versus fundamental rights incorporation (where the "bag and baggage" comes in, too—but that's because with FRI we're looking *just at* the bag and baggage, not at the broader rights package created by the amendment as a whole).
- Versus selective incorporation (which, this is another compromis—this one between total and fundamental rights incorporation).

Wolf v. Colorado (1949) (p65)

- Note how these *post WWII* cases are operating in the context of our understanding of ourselves in a global context (we are not the Nazis).
    - See ¶0p67: "The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of *recent history* to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples" (emphasis added).
- This case rejects total incorporation. Instead, it recognizes Due Process as a "living" doctrine—not a fixed one.

The Fourth Amendment

<u>The text:</u>

- Note the many ambiguities it contains:
    - Who's protected? That is, who are "the people"?
    - Against what actors do these protections apply?
        - We know the answer to this one: it's government actors.
    - What are "the people" protected *from*?

- Well, "unreasonable" *and/or* warrantless searches.
- What's the remedy?

Now, it is the *Court* that will answer these ambiguities.
- AND, the answers change over time. The Amendment is flexible.

The remedy:

- The *unique* American remedy is the exclusionary rule (which is in practice secured by the motion to suppress).
  - *Weeks* (1914) (p70): articulating and adopting the exclusionary rule. The Court argues that without the XR, am4 is hollow.
  - *Mapp* (1961) (p74): extending the XR to the states as being part and parcel of am4.
    - The majority (Clark) repeatedly referes to the XR as a *constitutional* rule.
      - The majority says that the "factual basis" of *Wolf* had changed—i.e., the number of states employing the XR had grown. Especially, California had adopted it, and in adopting it had found that *all other remedies had failed.*
    - Harlan, dissenting, says the decision to adopt the XR or not should be left to the states—it is *not* a constitutional rule.
- Reasons to have the XR:
  - Deterrence.
    - This is perhaps the only surviving reason.
  - Self-incrimination (am5), which is an exclusionary rule in itself.
  - The XR is inherent in am4, because no right can exist without a remedy.
  - Judicial integrity—the courts preserve their integrity by distancing themselves from constitutional violations (by not admitting unconstitutionally obtained evidence).

Monday, January 24

Recall:

- Who? "The people."
- What? "Persons, houses, papers, and effects."
- What action? "Searches and seizures."
- What kind of action? "Unreasonable" and/or "warrant"-less.

"Searches" and "seizures" are *thresholds*—so, if it's not a "search" or a "seizure," then it's not protected.

"Searches"

Katz (1967) (p86)

- The trial court said there was no am4 violation, and the appeals court agreed.
- Δ argues that the *place*—the phone booth—is protected. This was an argument based on precedent (*Olmstead* and *Goldman*), which analyzed am4 based on *place*. It said that am4 violation or not was a question of trespass.
    - And the Court rejects this argument, but it still finds an am4 violation, taking a new tack.
    - (Note that there are no incorporation issues itc., because the conduct in question was done by a federal agent.)
- The majority wants to look at the *person's* intent and actions—not the nature of the place: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (¶0p88).
    - This idea suggests that there's a *right of privacy* in am4.
        - However, the majority indicates that there are limits to this right of privacy.
            - Most especially, it's limited to protection from *unreasonable searches and seizures*.
            - Furthermore, any *general* right to privacy will come from the states, who have the ability to do that kind of thing, because of their police powers.
- Harlan, concurring, wants to still talk about places.
    - His "place" analysis takes place in the second prong of his test—the "objective" prong.
- Black, dissenting, wants to talk about "things," Miller posits. Not people *or* places. Specifically he wants to talk about the "things" mentioned in the text of am4: "persons, houses, papers, and effects." Thus, itc., this *conversation* can't be covered, because it's not mentioned.
    - Now, Black was pretty liberal (I mean, we've seen it in his incorporation views). What's he doing here? Isn't this pretty law-and-order conservative of him??
        - Well, in criminal procedure, we see our models of SCOTUS liberal-vs.-conservative jurisprudence break down, Miller says.
- So, note the interpretive conflict here:
    - The majority and Harlan: following the *spirit* of am4.
    - Black: seeing am4 as a *static* provision—and so looking only at its text.

Remember, still, though, that we're only just determining if there's a "search" or not. Even *if* there's a search, we're still not protected unless it was unreasonable or warrantless.

Applying the Harlan test:

- Hypo: Police in an area known for illegal drug activity, with a listening device, overhear two men's conversation 50'-75' away. The men were standing in a road outside a vehicle, whispering about a drug sale going on with the vehicle occupant.
    - The subjective prong:
        - Well, they were whispering.
        - But, they were outside (Miller thinks this is a subjective, not an objective, element).
        - But, still, they were removed from others (50'-75' away).
    - The objective prong:
        - They were outside.
        - It was a high crime area (?).

    This case is *Florida v. Stevenson*[, 667 So.2d 410 (Fla. Ct. App. 1996)]. The court there said:
        - There is *no* reasonable subjective expectation of privacy.
        - And no objective expectation of privacy.
        - (The court doesn't even mention the use of a long-distance listening device.)

Post 9/11 reality check

- *Katz* says electronic surveillance is a "search."
- Title III (18 USC §§ 2510–2521) (see appx. B in supp.)
    - Codifies *Katz* and other caselaw.
    - A court ordered search warrant can be had in exchange for a detailed and particular application for one.
- What about foreign and security surveillance, though?
    - Does Title III apply?
        - *Keith* (1972): Title III has no explicit exception in it for foreign/security surveillance, *but* the standards might be different for those cases.
        - *Ehrlichmann* (1974): a district court recognizes a Title III exception for electronic eavesdropping of foreign interests.
        - *Truong Dinh Hung* (1980): the 4th Cir. recognizes an exception to Title III for:
            - Electronic surveillance of foreign powers.
            - Surveillance for purposes of foreign intelligence.
    - FISA: which permits electronic surveillance in some situations:
        1. Surveillance of foreign powers and agents.
        2. Surveillance by an order of FISA court.
        3. The target person must be foreign.

        But:
            - The effects on the U.S. people must be minimal.

        - The officer requesting the court order must say that the purpose of the surveillance is to gather foreign intelligence.
- That was all pre-9/11. Now, post-9/11:
    - There's been a blending of Title III land and FISA land.
    - And there's been a loosening of the standards:
        - FISA has been amended to allow Title III search people to share with FISA search people, and vice versa.
        - The old FISA requirement that the requesting officer must say that the purpose is to gather foreign intelligence? That's gone. Now, the requesting officer must only say that foreign intelligence is a *significant* purpose.

        (Note that only *one* FISA request has even been denied. And, since 9/11, requests have gone up exponentially.)

Wednesday, January 26

Katz redux

- The majority (Stewart) makes a major shift from prior am4 jurisprudence—from protecting places to protecting people.
- Harlan lays out a two-prong test:
    1. Subjective prong
    2. Objective prong
        - Why do we need this prong? Well, to strike a blance between security and liberty!!
        - This objective prong ends up being a reasonability test.

White (1971) (p94)

- Applying *Katz*: the Court uses Harlan's test (tacitly). *But*, it doesn't quite adopt it, Miller thinks. Rather, they blur the two prongs.
    - It looks at:
        - Expectations of privacy...
        - ...constitutionally *justifiable*.

        It *doesn't* use the reasonability idea.

        ("Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally 'justifiable'" (¶2p96).)

        This feels more like the objective prong (but it has in it aspects of both prongs).

So, is "justifiable" really, ultimately, the same as "reasonable"?

Does "justifiable" mean the Court is using the security vs. liberty calculus?

- YES! "Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable" (¶1p97). The Court doesn't want to keep out this "relevant and probative" evidence."
  - That idea, note, doesn't have much to do with expectations of privacy.

- Harlan, dissenting, is concerned that your subjective expectation of privacy is a reflection of social context. And so, he's willing to accept that the plurality kind of abndons the subjective prong in favor of an objective only test.
- Other aspects of this case to bear in mind:
  - False friends
    - Do we really assume we have false friends? And that they're wired?
      - Well, the Court says you only assume it in when you're conducting (sic—the Court says "contemplating") illegal activity.
    - What about the additional assumption here that false friends might be *broadcasting*?!
      - Both Harlan and Doublas dissent vigorously on this point specifically.

Smith v. Maryland (1979) (p103)

- Applying the Harlan test:
  - The Court distinguishes the number dialed from the *content* of the phone call: there is no objective expectation in the number dialed.
  - Witht he subjective prong, the court again pretty much abandons it (see n5p105).
- Marshall, dissenting, says it is unreasonable that by turning over phone numbers to the phone company that you're also turning them over to the state.
  - Note the class-oriented suggestions that come out of this—the phone is the most accessible medium of communication for many. Many don't have access to other means, like flying, e.g.

Kyllo (2001) (p127)

- Why is Scalia coming out all liberal here, Miller asks?
- The majority distinguishes *Dow Chemical* on the grounds that itc. we're talking about a home, and there, it was a business.
  - So, Scalia is reasserting the value of *place* in am4 "search" analysis. He's returning to a categorical, formalist approach.

        - (Note how this exposes the Court's current conflict over *method* (more so than substance): fundamentalism (categories) versus modernity (open-ended).
    - Scalia's baseline:
        - Information about the home...
        - ...which couldn't be had without physical intrusion otherwise.

        And these thermal-imaging devices itc. are just too novel.
    - Critiques of Scalia's approach:
        - It's too categorical.
        - The novelty aspect of his baseline allows shifts, over time, in the amount of privacy to expect.

Open fields and curtilages (student presentations; see handout).

Monday, January 31

Aerial surveillance and garbage (student presentations; see handout).

"Searches" review
- People, not places (?).
    - But, *Kyllo*, where the whole question was whether the statee was going into a *place* (the home) or not.
    - So, does the "people, not places" distinction really still hold up?
        - Or did it ever even exist? Because "place" concerns were embedded in Harlan's objective prong.
- How is the am4 privacy interest (if it exists) limited?
    - By the terms of am4 itself.
    - By the fact that there isn't a generalized right to privacy in am4—am4 only protects certain *things* from *state* intrusion in the context of *criminal investigation*.
- What's the subtle shift in *White*?
    - There's a blend of the Harlan test prongs—to end up asking whether intrusion is "justifiable" (rather than "reasonable," as in the original Harlan test).
    - In *White*, the Court looks at:
        - Assumption of risk (of privacy intrusion).
        - Accuracy, reliability, and probativeness of the evidence (!!!).
- How does privacy protection look, especially after *Kyllo*, in the face of advancing technology?
    - What does *Kyllo* say about reasonability wrt. emerging technology?
        - It establishes a *baseline* espectation of privacy, which the government can cross only if the technology if publicly common

(is this a "Radio Shack" test?).

"Seizures"

Karo (1984) (p138)

- "Seizure" involves meaningful interference with an individual's *possessory interests*.
    - The detective's interests? No interference—he's doing with his beeper just what he wanted to do.
    - The photo shop's owner? No interference—he consented to the tampering with his ether cans.
    - The Δ? The Court says there was no meaningful interference.
- So, when analyzing seziure, ask: what's your expectation of property ownership?
    - Doesn't the conduct in *Karo* interfere with the smugglers' exclusive, absolute control of their property?
        - Think about how this Court would rule on "meaningful interference" when it comes to environmental regulation.
            - (So, does this mean that the Court is actually really concerned, in *Karo*, with the *security* of the people?)
                - (And, security against what? It used to be we were concerned with security against the government—are we now concerned about security against other people?)
- Hypo: photo album with drugs, held in the mail by law enforcement for ten days in order to install a tracking beeper.
    - Well, there's a ten-day delay!!! A Hawai'i state court has said that this is meaningful interference.

<u>Other "seizure" aspects</u>

- What's a legitimate target of a seizure?
    - Criminal evidence
        - Contraband
        - Fruits of a crime
        - Instrumentalities of a crime
        - And, with recent caselaw, even just "mere evidence" a crime
        - People (i.e., arrest)
- Seizure of a person—arrest:
    - Occurs when:
        - There's the slightest application of force, and
        - There's submission to authority by the arrestee.

The Warrant Requirement

The options:

- *All* searches and seizures require a warrant
- Searches and seizures are measured only on "reasonable"-ness

The Court has picked the first one—*all* S&S require a warrant. But, that decision is under *brutal* attack, on two fronts:

1. Exceptions
2. A shift to the second option—reasonableness analysis

In any case, *both* are measured by *probable cause.*

- So, what's the point?
  - Well, which option we use determines *who* gets to say whether probable cause exists!!!
    - Warrant requirement: the judiciary decides.
    - Reasonableness: law enforcement decides (at first, and this is only *later* tested by the judiciary (with property, it's tested at a suppression hearingl; with people, it's tested at a *Gerstein* hearing)).

Probable Cause

PC exists:

- "Where the facts and circumstances within the officers' knowledge and of which they have 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 by the person to be arrested." *Brinegar* (1949) (¶2p142 in text).
- Where, "given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates* (1983) (¶1p157).

<u>The policies at stake:</u>

- Whether a judge must be involved, and at what point.
  - We want a neutral and detached magistrate to stand between the citizen and law enforcement.
  - We want the judge to serve as a check on the competitive nature of law enforcement (among other aspects of law enforcement culture).
- PC is a measure of the *scope* of am4 protection.
  - Again, this is a protection of the individual—but against whom? The state, or society?

<u>Wednesday, February 2</u>

[Quiz #1 and review of the quiz]

Warrants

- There *is*, currently, general warrant requirement. But it is under *brutal* attack by:
  - Exceptions
  - A shift to a reasonableness analysis

Spinelli (1969) (p143)
- The Court sets up a three-part test for PC:
  1. How fundamental is the informant's tip? (What's the proper weight to give it?)
  2. If the tip is fundamental, is the tip reliable?
     - This part has two subparts, from *Aguilar*:
       1. How reliable is the informant?
       2. What's the basis of the informant's tip? (How did this guy end up with this info?)
  3. If the tip fails the *Aguilar* subparts, compare the tip to other information provided, to see if there's any corroboration.
     - What role does *Draper* have in this *Spinelli-Aguilar* test? It serves as a benchmark for step three.

Gates (1983) (p151)
- Does the Court throw out *Spinelli-Aguilar* altogether?
  - No—but, what role do they play in the new standard?
    - Well, the new standard is a totality of the circumstances standard. However, that doesn't mean that information consisting solely of informant tips will suffice for PC. It still has to be evaluated; and *Spinelli-Aguilar* provides good questions to ask—they just aren't controlling anymore.
  - The Court is concerned that technical, legalistic standards will inhibit law enforcement. And that law enforcement will just break the constitution rather than adhere to them. So, the Court argues, we might as well adjust the rules to match that expectation (!!!).

Johnson (1948)
- Here, Jackson, J., has returned from prosecuting at Nuremburg and writes itc. reaffirming a warrant requirement.
  - (But, note that 98% of searches have no warrant, mainly because they're consent searches. And, even so, only 8% of warrants are denied.)

Monday, February 7

- The constitutional debate
    - (Amar, Maclin, and Davies: a little "petri dish" of constitutional interpretive method, Miller notes.)
    - Does the Fourth Amendment require a warrant or not?
        - Davies says that the founders couldn't have even *conceived* of law enforcement operating without a warrant.
            - So, why would they add the "no warrants shall issue" clause? Just to make explicit what was already implied in the context of their day.
            - The founders couldn't have imagined the law enforcement of today, especially stuff like electronic eavesdropping.
                - The rebuttal to this, though, is that they couldn't have imagined the nature and scope of crime today, either.
        - Amar asks why a warrant requirement even matters these days, what with all the exceptions that we're willing to live with. (That's a policy argument, cloaked as a "common sense" argument, Miller notes.)
            - Thus, going back to the text, there should only be a reasonableness requirement. Especially since a warrant requirement creates a paradox, when you consider all the exceptions, that the text can't sustain.
            - Plus, historically, we've *always* seen exceptions.
            - And, if we do impose a warrant requirement (a strict one), judges will just begin to say that certain acts just aren't "searches" or "seizures." (And/or, they'll stretch other elements of am4 to make LE activity constitutional.)
            - Plus, too, this warrant requirement idea isn't an essential element of am4 when you consider *real life* (!), like administrative searches such as emissions tests, and metal detectors, and so on. We *expect* these things, Amar argues.
        - Maclin says that reasonableness (no warrant requirement) is okay, but that we *need* a neutral an detached magistrate to stand between citizens and the state.
            - If there's only a judge *after* the fact, then the citizen has already lost on the privacy issue—all we're talking about at that point is the admissibility of evidence.
            - Plus, by then, you're already looking at the evidence—the bad acts.

So: recall the Fourth Amendment analysis:

1. Was it a "search" or a "seizure"?
2. If it was, was it supported by probable cause?
    - The "fair probability" test is one to look at.
    - The *Gates*, totality of the circumstances, test is another.

Idaho:

- We've got a statutory warrant requirement, I.C. § 19-4401–4408.
    - Warrants must be issued by a magistrate, judge, or justice.
    - Warrants must be limited to tangible evidence of crime (i.e., not "mere" evidence)
    - Warrant can be obtained telephonically
    - A magistrate *must* issue a warrant is PC is shown.
    - The form of a warrant is given in the statute.
- See *State v. Walker* (Idaho Ct. App. 1984) [handout].

Arrest warrants

- *Watson* (1976) (in *Payton*): the Court *presumes* the constitutionality of a federal statute (!!) (and can't find precedent (!!)).
- *Payton* (1980) (p170)
    - The Court does *not* answer here:
        - Whether there were exigent circumstances under these facts.
        - Anything about the entry into a third party's home for an arrest issue.
        - Anything about consent under these facts.
    - Itc., we just have entry into the *defendant's* home to arrest *defendant*. And the Court says this is impermissible.
        - The Court distinguishes *Watson*:
            - *Watson* involved an arrest in public.
            - In the middle of the day.
            - And in plain view.
        - Then the Court works point by point through the analysis used in *Watson*, in order to further distinguish this case, looking at:
            - The common law tradition.
            - The federal statute.
            - The burden on law enforcement.

Search warrants

- *Lo-Ji* (1979) (p196)
    - The Court here is concerned about:
        - Particularity: the warrant here was specified further *at the scene* of the search.
        - Neutrality and detachedness of the magistrate: the magistrate here *went with* LE for the search.

- Execution of search warrants:
    - *Wilson* (1995) (p200 in text): the Court establishes the "knock and announce" rule.
        - Exceptions to K&A:
            - There's danger in K&Aing.
            - There's a risk of flight.
            - There's a risk of evidence destruction.
    - Does the K&A rule provide safety for LE? For defendants?
    - *Richards* (1997) (p201)
        - The Court's justifications for the K&A rule:
            - Presumption that people are law-abiding and are willing to peacefully to the precinct house—so, we'll give them a chance, at least, to comply with the state.
            - Doors cost a lot! (I.e., there are property interests, not mere civil rights, at stake!!)

Wednesday, February 9

[Note that Miller later said he was pretty unprepared for this class, and made a few mistakes.]

- *State v. Walker* (Idaho Ct. App. 1984) (handout)
    - The probable cause issue: defendant argues that LE didn't establish the reliability of its informant.
        - The majority uses *Gates* (totality of the circumstances) to say that this search was constitutional.
        - Burnett, concurring, wants *Gates* to be a final resort analysis. First, he wants magistrates to consider *Aguilar-Spinelli*, because *A-S*'s questions are fundamental—any magistrate is going to want to know the answer to them *first*.

Warrant requirement exceptions

- (While we might call these "exceptions," they could also be cast simply as reasonableness inquiries (see ¶2p209)).

Taxonomy of warrant exceptions

- Exigent circumstances
- Search incident to arrest (SITA)
- SITA: Auto
- Cars and containers
- Plain view
- Consent

Exigent circumstances

- *Warden v. Hayden* (1967) (p209)
  - The Court allows that some kind of search was permissible here—that is there *is* an exigent circumstances exception.
    - Justifications for the XC exception:
      - Time
      - Safety
      - Perservation of evidence
    - The real question, though, isn't whether XC is acceptable to the Court, but what the *scope* of XC is.
      - E.g., itc., what was the officer looking for in the washing machine? This question isn't even *asked* here!!!
  - Does the Court use the "exception" model or the "reasonableness" model? Reasonableness—the Court says it's "not unreasonable" here.
- Hypo: drunk driver runs into a pole. Another driver stops an tries to persuade the other guy to stay put, but the other guy wanders away. LE comes, gets the address of the crashed guy from the license plate on the car, and goes and enters they guy's home without a warrant. They awaken him and arrest him.
  - Time: BAC will be dropping.
  - Safety: There's little danger—the guy's at home, after all (and he's abandoned the threatening instrument).
  - Preservation of evidence: again, BAC is dropping.
  - Home? Does this matter? It has special am4 value, we've seen (and is in the actual text).

  This is *Welsh* (1984) (p211). The Court did not approve this entry of the home.

- So, the exigent circumstances considerations, compiled:
  - Time/pursuit
  - Extent of search
  - Preservation of evidence
  - Threat
  - Home

  And all these conclusions must be supported by probable cause. (And, n.b., these are what will be judged only at a suppression hearing, since XC is, after all, an exception to the warrant requirement).

Searches incident to arrest

- First, here, you have to know if the *arrest* itself was valid:
  - There has to have been an arrest warrant, OR
  - It has to have been a public, midday arrest, like in *Payton* (so, be suspicious if the arrest was in the middle of the *night*, in a *home*).

And, of course, there has to have been PC:

- In the context of an arrest, PC is:
  - PC that a crime's been committed.
  - PC that the committor is going to be apprehended by this arrest.

- *Chimel* (1969) (p217)
  - Again, the Court makes it clear that there's an exception—the question is, what's the allowable scope of the search?
    - (Er...wait: is the court actually talking about an exception, or is it talking, like in *Hayden*, about reasonableness? Itc., it looks like it's actually talking about an exception—see ¶1p220.)
    - The Court justifies the exception on:
      - Safety on LE
      - A little history
      - No doctrine
      - No text
      - Some policy
    - The scope of the exception is:
      - Limited to the immediate vicinity
      - Limited to weapons and evidence
- Since *Chimel*: in *Bowie*, the Court expanded SITA—LE may now look (if the arrest is in home) in closets or other spaces from which an attack could immediately be launched.

Monday, February 14

Exigent circumstances (again)

- *Warden* and *Welsh*
- Scope: extends to the securing of evidence (but no further).
- XC and arrests:
  - You don't need an XC exception to justify warrantless arrests. That is, you don't need to even *talk* about exigencies wrt. arrest. You just need to talk about *Watson* (public, midday arrest is okay) and *Payton* (no warrantless arrests in the home). Those are the standards.
  - In hot pursuit, you can enter a home and arrest, in what would otherwise be a violation of *Payton*.
    - What's "hot pursuit"? "Some sort of chase," the Court has said. But it needn't be a "hue and cry."

SITA (again)

- First, ask if the arrest itself was valid.
  - Note that nighttime arrests without warrants have been (tacitly) upheld.

        - So, the real question becomes whether LE was in the home or not.
- *Chimel*: LE, making valid arrest, may conduct a contemporary search of:
    - The person
    - The grabbing area (the area in the subject's "immediate control")
    - *If* the arrest is made in a home, LE can also search areas from which an attack could be launched (*Bowie* (1990)).

    Note, though, that only a few circumstances justify SITA (that is, there's got to be an arrest).
- *Robinson* (1973) (p225)
    - The appeals court said:
        - LE couldn't do a full search under the SITA exception here. The search should have been limited to a frisk for weapons.
        - The appeals court worked with *Chimel* to find a *Chimel*-approved justification here:
            - There was no risk of flight.
            - There was no danger of evidence being destroyed, even though drugs were found, because they guy wasn't *stopped* for drugs.
        - So, what the appeals court was looking for was a *connection* between the arrest and the destruction of evidence justification.
            - After all, one could reason, *Chimel* was meant to be a *narrow* exception.
        - Also, the main concern that justifies the SITA exception is officer safety, and the appeals court said that a patdown would satisfy that concern, here.
    - The Court (re)characterizes the SITA exception:
        - An arrest itself is already *so* intrusive that an attending search is not really an intrusion at all, after that.
        - The Court does this jurisprudential work by:
            - (Citing officer safety as a concern again.)
            - Saying that there is NO WARRANT REQUIREMENT—that's why the appeals court got it wrong, the Court says.
                - So does this mean that there's only a reasonableness requirement, now?
- Are *Chimel* and *Robinson* consistent at all?
    - Well, the *scope*, at least, of a SITA search remains the same from *Chimel* to *Robinson*.
    - So, all that *Robinson* resolves is that PC isn't required once you have an arrest.
    - However, *Chimel* uses the warrant exception model, and *Robinson* uses the reasonableness model.
    - The two also differ wrt. their concern about the potential "pretext" problem—*Chimel* would require a connection between the stop and the aim of the search, whereas *Robinson* requires reasonableness only.

SITA: Auto

- *Belton* (1981) (p237)
  - The Court defines the allowable scope of a SITA:Auto search itc.:
    - The *Chimel* "immediate control" area, when a auto is involved, is the entire passenger compartment. This is *regardless* of where the Δ was apprehended.
      - Note ¶1p239, where the Court says it is a "fact" (!!!) that the entire interior of a car is grabbable.
      - Note also how the Court doesn't even mention that itc. the Δs were *cuffed*, *outside* of the car (!!!!!).
    - But, what's the *true* extent of this scope, really?
      - Inside the car.
      - AND, any container inside the car.
        - A "container," n.b., is anything that can hold another object inside of it (fn4p239).
- *Knowles* (1998) (p244): if an officer uses a citation, rather than an arrest, the officer loses his *Belton* opportunity.
- *Atwater* (2001) (p245): *Belton* applies even with minor offenses, as long as there's an arrest.
- *Thornton* (2004) (p7S): you're still an "occupant" of a car even after you've left it.

Wednesday, February 16

SITA (again)

- *Chimel* and *Robinson*: are they consistent?
  - Well, note that *Chimel* remains the controlling standard. So, it's clear that *Chimel* survives *Robinson*.
  - *Robinson* just says that, wrt. to SITA *justifications*, you don't need PC.
- What about *Belton*, then?
  - Does it make *Chimel* irrelevant?
    - Well, it does create a bright line...
    - But it only applies to SITA involving an auto.
  - Why does the Court move away from *Chimel* and to a bright-line test in *Belton*?
    - The Court says a bright line takes the guesswork out of LE's job.
      - (But why wasn't *Chimel* or *Robinson* enough? With those, all LE had to ask was:
        - Does a justification exist?
        - Is the evidence within the grabbable area?)

The pretext problem

- What is it? Where LE makes a valid stop just so it can invoke a warrant exception.
- *Ladson* (Wash. 1999) (p249 in text)
    - LE admits that the stop was pretextual—the officers admit that they pursued Δs based merely on *rumor* (!!!).
        - Thus, they couldn't have gotten a warrant.
        - Rather, they used Δ's 5-day expired license plate tabls to pull him over.
- Note the statistics on p257.
- What's troubling about all this? When driving are we *ever* truly driving legally? And, if it's true that we never are, how does LE decide who to stop?
- *Whren* (1996) (p250)
    - The violations that justified the stop here:
        - Too lengthy of a stop at a stop sign.
        - Sudden unsignaled turn.
        - Unreasonable speed (but below the speed limit).
    - What PC did LE have, then? Well, the traffic violations (only).
    - Δ argues for a new standard, on the grounds that there are some police encounters where PC isn't enough.
        - Δ cites precedent for such a standard in the way the Court has handled administrative and inventory searches.
            - The Court, however, distinguishes that precedent since those searches never involve PC, whereas LE had PC here.
    - So, the Court says that if there's PC, then a pretextual stop is fine.
        - The subjective intent of LE doesn't matter—rather, reasonableness is the standard. That is, if a reasonable LE officer would have made the stop, then the stop and the search are constitutional.
            - But, what drives the decisions of a "reasonable" LE officer? Doesn't itc. leave the standard up to the LE community? (!!!!)

<u>Cars and containers</u>

- *Carroll* (1925) (p260 in case): mobility! A car, on a highway, has *just* been pulled over—so, if LE had to get a warrant, the car could take off.
- *Chambers* (1970) (p258)
    - Mobility: the car itc. was searched while in lockdown at the precinct house.
        - So, why then is this search okay?
            - Because, under *Carroll*, LE *could have* searched it at the scene—so they might as well just go ahead an do it now.
            - Also, even if the car is impounded, the Court says, it is *still* movable: somebody might come and take it, and, more importantly, a car is just *inherently* movable (Miller

notes).
    - Thus, a car may be seized an searched following an arrest.
    - Note though, that there *still* has to be PC.
    - Footnote 10 (p261): says it wasn't unreasonable here to take a car to the precinct house (implying that it has to be reasonable).
        - This limitation is gone now—LE can now seize a car even if it's unreasonable (*White* (1975) (p265 in text)).
- *Coolidge* (1971) (p265 in text)
    - (Note that there's only a plurality here.)
    - The Court again emphasizes mobility, saying that there was not *any* reason that the car itc. was going anywhere, and so a warrant was required.
    - The Court foreshadows the container problem, noting that containers are just as mobile as cars.
    - (This case, n.b., is the last gasp of the Warrent Court's struggle to protect civil liberties.)
- *Carney* (1985) (p267)
    - The Court here moves away from the mobility analysis, and to a bright-line auto exception:
        - LE can search an auto as long as there's PC that they'll find criminal evidence.
    - And it uses brand new justifications:
        - Inherently reduced privacy expectation in autos:
            - We enjoy them in plain view.
            - They are heavily regulated.

Wednesday, February 23

Cars and containers (again)

- *Carroll* (1925)
- *Chambers* (1970)
    - The Court recognizes the auto exception—because cars are mobile, they're "rolling exigencies" (Miller's term).
        - Here, like in *Carroll*, the car was on the side of the road.
        - But, here, unlike in *Carroll*, the car was taken to the preceinct house. So, the Court itc. wasn't looking at *literal* mobility.
    - Note, there's no SITA here, because the search isn't contemporaneous.
        - (*Belton*, remember, addresses SITA:auto.)
- *Coolidge* (1971) (p264 in text)
    - The Court limits the scope of the auto exception (or so Miller says.)
        - N.b. the facts itc., though:
            - The car was held for over a year.
            - The auto was found at the *home*.

        - The Court forecasts the container problem.
    - *Carney* (1985) (p267)
        - Here, we have a motor home.
        - The Court sets up a bright-line auto exception, based *not* on mobility, but on expectation of privacy:
            - Pervasive regulation of autos
            - Use of autos is a *public* act
            - Mobility (it's still important—the Court hasn't totally abandoned it as a justification)

            (But, Miller asks, wouldn't homes fit under these justifications (other than mobility), too? (N.b., though, fn3p269, where the Court lists factors that make a car look more like a house, which is protected.)
        - Ultimately, the Court asks: can you turn the key and get away? (That is, does the setting indicate that the vehicle is being used for transport?) If so, you're subject to the auto exception.
    - (Remember, though—even if the auto exception applies, LE must still have PC.)
    - Does *Coolidge* survive *Carney*? Maybe.
        - Is mobility still important? It is still immensely important, but now it is *technically*, at least, in the background.
        - It's still one (major) justification of the auto exception, (along with reduced justification of privacy).

        So, you might be still able to argue *Coolidge* today, as a Δ, to move a search outside the auto exception.
            - You could also look at the "ignition switch" test, and the extent to which the vehicle looks like a "home."

Containers

- The auto exception extends to the *whole* car—i.e., more than just the passenger compartment, as in SITA:auto.
- *Chadwick* (1977) (p274)
    - "Observing" isn't an "am4 moment" here, because there's no *Katz* expactation of privacy in a public place.
    - The sniffing dog isn't an am4 moment either, because it's not a "search" (*Caballes* (2005) (no expectation of privacy in *illegal* activity)).
    - The arrest here was valid, because it was in public, at midday.
    - So, finally: the trunk (that was in the trunk):
        - SITA:auto (*Belton*): not implicated here:
            - The search was contemporaneous. (?)
            - The subjects weren't recent occupants of the car. (?)
            - Most importantly, the trunk was in the trunk, not in the passenger compartment.

- Auto exception:
  - *Carroll*/*Chambers*/*Carney* line of cases: not implicated here, because there was still an expectation of privacy in the trunk, *even though* it ws found in the car.
- So, the Court draws a distinction between the *focuses* of LE's interest—a distinction between focusing on the container itself, versus the car, generally.
  - The Court says that containers, unlike cars, *do* have an objective expectation of privacy about them—*unless* the search was aimed at the auto. (!)
- Note how the state argues here that am4 only protects homes (!!!). The Court wholly rejects this (on history, text, and doctrine).

Monday, February 28

[Missed class—overslept.]

Wednesday, March 2

[No class.]

Monday, March 7

[Quiz #2]

Consent searches

Schenckloth (1973) (p307)

- The issue itc. isn't about whether the consent exception is valid—it's aabout whether the facts here put itc. *in* the exception.
  - So, the Court is focused on: What's the standard? That is—what's the standard for determining whether the state has meet its burden of showing voluntariness?
    - The 9th Circuit wanted LEOs to have to inform suspects of their right to consent.
    - But the Court rejects this idea, finding no doctrine to support it and saying that waiver of am4 rights is not like waiver of trial rights.
      - The Court notes that without consent searches, there'd be a real risk that good and reliable evidence would be lost.
      - Also, LEOs have a hard enough time as it is, the Court

says, without being required to inform people of their rights.
- Plus, the Court says, it's good for the *suspect* that we have consents—because otherwise there'd be a lot of big messes, lots of stigma, and more arrests (!!!). (That is, it's in *your* interest that we're not telling you that you can say "no.")

- Justifications for the consent exception:
  - A valid consent search may be the only way to get good evidence in some cases.
  - Consents are voluntary (because we "make sure" they are)

- Voluntariness
  - *Schenckloth*
    - Consider the characteristics of the accused:
      - Whether the suspect knew his rights or not
        - (But, of course, this is not determinative.)
      - Education, country of origin, intelligence
      - Suspect's state of mind:
        - Insanity
        - Intoxication
        - Anxiety
      - Custodial status
        - The Court has said that a suspect under arrest and in custody can give a valid consent to search.
        - Also, the Court said that whether you knew, during a traffic stop, that you were free to leave, is not determinative.
        - However, the Court has said that it's too much coercion if you've actually been taken to the precinct house.
      - Force
      - Deceit by LEOs
      - Whether the suspect exhibited hesitation
        - (But note—where can you get this evidence? Only from the suspect himself!! (And the state can easily rebut this with LEO testimony.))

<u>Wednesday, March 9</u>

- Third party consents
  - The standard: whether it was reasonable to believe the cohabitants had the right to consent to search of the home (*Matlock*).

- This is limited, though: the third party must have "common authority" over the premises.
- Parents can consent to searches of their children's rooms.
    - But children can't consent to the search of their parent's home (that they live in).
- A landlord can *not* consent to search of a tenant's property—even if the landlord has a right of access for other reasons.
    - But, a landlord *can* consent to searches of common areas (and a tenant cannot consent to such searches).
- An employer may consent to search of an employee's work area.
    - This can work in reverse, too, if the employee has significant authority in the chain-of-command.

- What if LEOs make a judgment about "common authority" and they're wrong?
    - Well, we use a "reasonable cop" standard—the officer need only have reasonable (objectively assessed) belief that the consenter had authority to consent.

The reasonableness standard

- There are *three classes* of am4 activity:
    1. Warrant requirement: requiring probable cause and a magistrate
    2. Warrant exceptions: requiring only probable cause, but applying only in limited circumstances:
        - Exigent circumstances
        - SITA
        - Autos and containers
        - Plain view
        - Consent
    3. Reasonableness requirement

    The warrant requirement held sway until about the 1960s. Now, we're seeing it eroded and things headed toward a mere reasonableness requirement.

- Under the warrant requirement, we required probably cause; but under a reasonableness requirement, the Court requires "reasonable suspicion" only.
    - While we may not know exactly what "reasonable suspicion"is (yet), one thing's for sure—it's *not* probably cause.

- Miller's thesis: what if *Terry* is a constitutional moment?? Keep in mind that when *Terry* was decided, the U.S. was *burning* (from the MLK assassination riots).
    - What if that's the originalist meaning of *Terry*? That we need to protect against such things—riots.

Terry (1968) (p335)

- Spheres of am4 activity:

1. Am4 doesn't apply at all (*Katz*)
2. Reasonbleness only (*Terry*)
3. Full arrest (probable cause required)

How do we determine which zone we're in? *Terry* sets out a balancing test:

- Intrusiveness, versus...
- Government interests:
  - The need for effective crime prevention
  - Officer safety

Monday, March 21

A brief review

- The tradition had been to require a warrant.
- Then, *Terry*. Which justified a lesser requirement—"reasonable suspicion," based on the public's interest in safety.
  - The Court uses, now, a balancing analysis:
    - Intrusiveness versus state interests.
  - See Miller's chart:
    - Consensual encounters
    - *Terry* stops
    - Full arrests

    So, our job is to identify where these lines are.

- What kinds of facts got us to this point?
  - *Terry* stops versus full arrests
    - *Dunaway* (1979) (p354)
      - Facts:
        - LEOs come to the guy's *home*.
        - They all go to the station, *but*, the guy is *not* under arrest, say the LEOs.
        - Although, the LEOs say that they would have restrained him if he'd tried to leave.
          - (What does this say about intrusiveness??)
      - The majority must, therefore, decide how intrusive this is, uner the *Terry* balancing analysis.
        - It says that *Terry* is limited to its narrow circumstances—it says that *Terry* is nothing more than it is, and that it should be limited to its facts.
      - Distinguishing *Terry* and *Dunaway*:

- *Terry*:
  - On the street
  - Brief
  - Crime imminent
  - Officer at risk
- *Dunaway*
  - At home
  - Longer
  - Crime already over
  - Not as much risk to officers

- So, in the end, the *Dunaway* majority sees *Terry* as an *exception* to the warrant requirement. In part, the majority does this to provide a bright-line rule to LEOs.
  - But, this is *not* how the Court has seen *Terry* since then.
- So, what factors distinguish a full arrest from a *Terry* stop, based on *Dunaway*?
  - Duration of the encounter
  - Location of the encounter
  - Voluntariness (was the suspect told he was free to go?)
- Rehnquist, dissenting in *Dunaway*, would apply an objective, free-to-leave test, *only*.

- *Royer* (1983) (p357x)
  - Here, we have a kind of detention—LEOs move the suspect into a room.
  - The suspect here probably did not feel free to leave.
- *Mimms* (1977) and *Wilson* (1997) (p359x)
  - Traffic stops, both; where LEOs order someone out of the car.
  - The Court says, in both cases, that these were not arrests—they were not too intrusive.
- *Sharpe* (1985) (p360x)
  - Duration—a 20 minute traffic stop. The Court says this is too long, *here*.
- *Montoya* (1985) (p362x)
  - A 16-hour detention, for 24-hours total.
  - The Court concludes that because this is a border situtation, these kinds of searches are inherently difficult for LEOs—and so this isn't too intrusive.
    - Also, the Court notes that the suspect did not avail herself of other, less intrusive methods.
    - And, the Court notes that the suspect tried to thwart the LEOs' search.

- *Terry* stops versus consensual encounters
  - *Mendenhall* (1980) (p362)
    - There are two approaches to the *Terry*/consensual line, here.
    - (Recall *Royer*.)

- Stewart, for the Court, says:
    - There's no "seizure" at all here—so it's a consensual encounter (!!).
    - "Free-to-leave" should be the standard.
- Powell, concurring, says:
    - It's a "seizure," but it was only a *Terry* stop (using the *Terry* balancing analysis to get to that conclusion).
- White, dissenting, says:
    - It's a "seizure," *and* there was *not* reasonable suspicion.
- So, what factors emerge from itc.?
    - Threatening presence
    - Display of weapons
    - Physical force
    - Tone of voice

Wednesday, March 23

- So, after *Terry*, we need to know when "reasonable suspicion" is enough, and when probable cause will be required.
    - Important factors:
        - Location
        - Duration
    - (N.b. *Sharpe*, which Miller says he "oversimplified" in Monday, March 21's class.)
- Also, we need to know when something is not even a *Terry* stop—when it's only a conensual encounter. There, not even "reasonable suspicion" is required.
    - *Mendenhall*
    - What's the difference between a consensual encounter and a "seizure"?
        - *Mendenhall* says something's a "seizure" *only if* a *reasonable person* would have believed he wasn't free to leave.
            - Look at the factors laid out in *Mendenhall*:
                - Threatening presence
                - Display of weapons
                - Physical force
                - Tone of voice
        - Note, too, that the nature of the encounter can infect the *later* consent search with coerciveness/nonvoluntariness.
        - Note how the Court, in *Mendenhall*, beings to parse *each* phase of the LEO-suspect interaction.
- Then, there's consent to search, following the initial encounter.
    - There, we use a totality of the circumstances analysis (*Schenckloth*).

Bostick (1991) (p373)

- What's at stake here?, Miller asks.
    - Well, for one thing, the amount and type of justification that LEOs need for doing this kind of thing is at stake.
- The encounter:
    - *Mendenhall* says that the test is a "reasonable person" "free to leave" test.
        - Itc., the guy is at a bus station—if he left, he'd be SOL.
    - But, itc. the Court *abandons* the "free to leave" test!!
        - The Court notes *Delgado* (p376x), where employees *chose* to stay.
        - Then, the Court goes on to say that the free-to-leave test doesn't work when the suspect has contributed to his own non-freedom to leave.
        - But, the Court says, that doesn't mean the suspect didn't still have the freedom to *ignore* the LEOs.
- The dissent doesn't disagree with this new *standard*—just the application of it.

Monday, March 28

Reasonable suspicion

- First, we have to ask if am4 is implicated at all.
    - Recall *Bostick*—the real test for whether you've got a nonconsensual encounter or something more is: would a reaosnable person feel that he could terminate the encounter.
        - Also see *Sharpe*, *Royer*, and *Dunaway*.
- If am4 is implicated, at the *Terry* level, we must then know whether there is "reasonable suspicion" or not.

- So, what *is* reasonable suspicion?
    - Well, it's *not* probably cause.
        - Probable cause: a substantial basis / fair probability that:
            - If a search, that the search will trun up criminal evidence.
            - If a seizure, that the seizure will be of someone guilty of a crime.

          And this is measured by the totality of the circumstances (*Gates*).
    - And, reasonable suspicion is *less* than probably cause.
        - (And considerably less than a preponderance of the evidence.)
    - RS is some *minimal* level of objective justification:
        - Measured by the totality of the circumstances.
        - It involves specific, articulable facts, along with the rational inferences from those facts, that reasonably suggest that criminal activity has occurred or it imminent.

White (1990) (p390)

- A consent search, here. But we still need to know if the initial *encounter* was valid.
- An anonymous tip led to the encounter.
    - RS will be enough with an anonymous tip, the Court says.
        - But, a tip *alone* is not enough (here, there was more).
    - For RS in this situation, the Court says to assess:
        - Reliability of the information
        - The basis of the information.

        These ideas are familiar—they're from the old *Aguilar* / *Spinelli* test.

        With an *anonymous* tip, there is *no* basis. The reliability itc. is what saved the encounter—because the informant was able to predict *future* behavior, it had greater (and enough) reliability.

J.L. (2000) (p395)

- Basis: none (anonymous tip).
- Reliability: not enough.
    - What's lacking here?
        - No *predictive* information. The tip doesn't refer to any *future* conduct. (That is, the informant could have got all of his information just by driving by the bus stop.)

- Hypos:
    - 8A (p397): there's no criminal activity suggested by the tip (however, recall the facts of *Terry* itself).
    - 8C (p397): this is like *White*, but maybe less reliable because the informant did not give a destination.
        - The court itc. said there was *not* RS; it also said that all the informant's details were innocent details.

Wardlow (2000) (p398)

- Here, we don't have an informant's tip—itc. is about investigation that LE did on its own.
- Facts:
    - High-crime neighborhood: the Court says this is not enough *alone*.
    - Flight:
        - Couldn't you argue that this is just the suspect's exercise of encounter termination as suggested in *Bostick*?
            - If it is, then am4 isn't implicated (!!) (so Δ shouldn't argue this).
            - If not, then Δ is forced to argue that there's no RS.

- The death of the warrant requirement (?):
    - Property: *Place* (1983) (p404)
    - Autos: *Long* (1983) (p409)
    - Homes: *Buie* (1990) (p414)

Wednesday, March 30

Special needs searches

- Now, we have an addendum to our chart:
    - Full arrest
    - *Terry* stop
    - Special needs searches
    - Voluntary encounters

  The first three are am4 events. But only the first *two* require individualized suspicion (!!!!).

- Why do we need a new category?
    - Well, for one, "special needs" searches are (usually) oriented towards non-criminal ends (e.g., not towards getting an arrest and then conviction).
        - E.g.: administrative searches, motorist searches.
- The "special needs" irony: it's the law-abiding citizens—the ones who are supposed to *benefit* from am4—who get the *least* amount of protection (!!!!!!!).
    - The special needs sphere is an invitation to LEOs to have encounters with *innocent* people!!!

Administrative searches

- *See* (1967) and *Camara* (1967) (p422x)
    - The Court in these cases suggests an "administrative" warrant, which doesn't require PC. Rather, it requires only that the administrative search be non-arbitrary.
        - (Keep in mind, though, that these cases came out when the Court was fixated on warrants.)
- *Burger* (1987) (p422x)
    - Since *See* and *Camara*, the Court has lost interest in warrants.
    - So, now the Court says itc. that a warrantless search is okay if it's of a heavily regulated industry.
        - It gets there by using a balancing analysis, oriented towards reasonableness.
            - How is this different from *Terry*? No individualized

suspicion is required.
- Miller asks, if this is a heavily regulated industry, why send LEOs??!
- Also, if a junkyard is heavily regulated, what isn't?!!
- *Most importantly*, itc.: the administrative regulations were checked right away—and even so the Court allowed the search to continue *after* that.
    - The Court justifies this using the "plain administrative purposes" test.

Motorist searches

- Borders
    - The general rule here: no individualized suspicion required at the border.
        - Why? Because every sovereign has this right at borders.
    - Motorists near the border:
        - This is more complicated the further from the border you get.
            - The Court says that *some* of these are okay without a warrant or even individualized suspicion.
        - *Martinez-Fuerte* (1976) (p424x)
            - The Court says that suspicionless searches near the border are okay *if* routinized (e.g., by *fixing* the interior checkpoint).
            - Roving border patrols, however, require suspicion.

        The Court distinguishes these two things based on:
            - Subjective intrusion (fear and surprise)
            - Objective intrusion (LEO discretion, e.g.)
- Sobriety checkpoints
    - *Sitz* (1990) (p424)
        - There are multiple constitutional events here: e.g., the initial stop, the extended "holding," etc.
        - The Court says this is *not* a voluntary encounter—am4 applies.
            - It gets there by looking at reasonableness and using a balancing test:
                1. Government interest: high.
                    - The "tragedy" of drunk driving.
                2. Degree of intrusion: low.
                    - There's only a 25 second delay, the Court says.
                    - The Court measures intrusion here by considering an *innocent* person.
                3. Effectiveness of the tactic
                    - A 1.6% return is to be expected, the Court

says, and is enough, here.
- *And*, the decision as to how effective a tactic has to be is not for the courts, the Court says, but for politically accountable officials.

- Dissents: they absolutely *freak out*!! And they talk about this liberty versus security nonsense.

Monday, April 4

Fourth Amendment remedies

- First, and again: am4 is being eroded. It is an endangered species, Miller says. How? Through the expansion of the things that are not covered by am4 and through the riddling of am4 with exceptions.
- And the story's no different with respect to am4 remedies:
  - Narrowing of the standing requirement
  - Good faith exception to the exclusionary rule
    - (This was the nail in the coffin, Miller says.)
  - Exceptions to the fruit of the poisonous tree doctrine

- The exclusionary rule
  - Jusitifications
    - *Mapp* (1961) (p74)
      - Is the exclusionary rule justified in the text of am4 itself? That is, is the rule a constitutional mandate, or is it a judicially created remedy?
        - The *Mapp* Court says that the rule is constitutionally mandated.
      - Other justifications made for the rule in *Mapp*:
        1. Deterrence of constitutional violations
           - (This justification comes to dominate the later debate.)
        2. Preservation of judicial integrity
  - The demise of the rule
    - *Calandra* (1974) (p470x)
      - The Court says that the exclusionary rule does *not* apply in grand jury proceedings.
        - Why? Because it's not an effective deterrent in that context, the Court says.
      - So, itc. turns the rule from a constitutional mandate into a purpose-driven remedy.
        - The Court here wants to apply a cost-benefit analysis in

determining whether to apply the rule (and, here, the Court finds that the costs, in the grand jury context, outweigh the benefits).

- The debate over the rule
  - Does the rule actually deter?
    - Well, one argument is that the rule has no punch unless there's actually a criminal charge that goes all the way to trial.
      - (But even if the charge does go all the way to trial, that doesn't change the fact that in cases of bad-faith LEOs, the state has already made the victim miserable.)
      - And, even with good-faith LEOs, the suppression sometimes doesn't happen until *years* later—and by that time, the LEOs will have completely forgotten about the violation.
    - But, are the critics of the rule interested in actually finding a more effective deterrent?
      - What are viable alternatives, at any rate?
        - Cause of action (tort remedy)
          - (But n.b. sovereign immunity.)
        - Civil rights suits
        - Criminal prosecution
        - Injunctive relief
        - Conduct review boards (external and/or internal)
        - More and better-trained LEOs
  - Comparative law
    - International UN trial criminal procedure rules used to try Rwanda genocide
    - Iraqi interim constitution

    Both of these have an *express* exclusionary rule.

- Standing
  - That is—do you have the right to complain about a particular am4 violation?
  - *Rakas* (1978) (p445)
    - Previously, standing was a threshold question.
    - The Court here subsumes the standing question under the *Katz* analysis —so, you ask if the person had a subjective/objective privacy expectation. If he did, then he has standing.
      - Why is this shift a *limitation* on am4? Everyone says it is (except Miller, who doesn't understand how it's a limitation).
        - Well, maybe it's a limitation because now the *only* person who can bring an am4 complaint is the person who actually had his privacy expectation violated. Whereas, with the standing requirement, a court might be able to let in a greater pool on complainants.

- Post-*Rakas* standing parameters
    - Possessor of property is a plus factor.
        - (What about autos, though? Any special rules, as usual?)
    - Legitimately on the premises—a minus factor if *not* legitimate.
    - Overnight guests—a plus factor (compared to shorter stays).
    - Merely present (not overnight): social guests get a plus, whereas commercial guests get a minus.

- The good faith exception to the exclusionary rule
    - Note, first, that the exclusionary rule is not applicable in civil proceedings *at all*.
    - And, it's not even applicable in *all* criminal proceedings:
        - Not in grand jury proceedings
        - Not at preliminary hearings
        - Not at probation and parole revocation hearings
        - Not at sentencing proceedings
        - Not applicable when tainted evidence is used for impeachment

      The Court got to all of these exceptions through the *Calandra* cost-benefit analysis.
    - And, so the big one: the good faith exception
        - *Leon* (1984) (p473)
            - The majority uses the cost-benefit analysis.
            - After itc., it there *any* LE activity that would be objectively unreasonable?
                - Well, the Court suggests:
                    - LEO misleading a judge
                    - A *facially* defective warrant

<u>Wednesday, April 6</u>

Confessions

- We're back to liberty versus security. Here, the idea is that the state's monopoly on violence, which was ceded by the people in the social contract, is *not* plenary.
    - This social contract bargain is executed through *criminal procedure*. The Court has due process and the am5 self-incrimination protection both acting to impose a protection against involuntary confessions generally. (The latter, though, note, is a substantive protection.)
- Why are confessions so desirable? Because we can take some assurance that we've got the right person.
    - But what about the danger that we've got the wrong person? See *Brown* (p24).
- Note the *personal* aspect of a confession—there is something essential in *words*. And

confessions are the state taking your *words*.

Brown (1936) (p24): this case tells us what fails. But it gives very little guidance on where the line is—all we get is a "fundamental fairness" notion from itc.

Lisenba (1941) (p523)

- Here, the Court tells us that a confession must be disregarded unless it's *voluntary*, under due process. So, no threats, violence, coercion, etc.
    - "Voluntariness" is a "free and rational choice," the Court says.

Cicenia v. La Gay, 357 U.S. 504 (1958)

- The Court says that voluntariness will be measured by the totality of the circumstances, including:
    - Physical abuse
    - Threats
    - Extensive questioning
    - Incommunicado detention
    - Lack of education of suspect
    - Lack of experience with law enforcement
    - Instability of suspect

Spano (1959) (p533)

- The Court provides more totality of the circumstances factors, adding to the *Cicenia* factors.
- The Court also notes that here, the interrogation occurred *after* LE already had an indictment.

Connelly (1986) (p541)

- Compare *Bostick*: there and here, the Court shifts from a personal focus, on the suspect, to a systemic focus (on the system)

Monday, April 11

[Missed class—stranded in Denver]

Wednesday, April 13

- The am5 protection against self-incrimination: the primary mechanism for protection against law enforcement interrogations. (But there's also due process, recall.)

Miranda (1966) (p560)

- Holding:

- The am5 privilege is *fully* applicable in custodial interrogations.
- There's a presumption of invalidity for custodial interrogations.
    - And this presumption can be overcome only if law enforcement provided procedural safeguards against coercion.

- Custody
    - Is is custody? What kind of analysis is the Court inclined toward:
        - Is there a bright-line test?
        - Or a rationale-type analysis (like in *Miranda* itself)?
    - *Mathiason* (1977) (p583)
        - (Miller believes that *Miranda* is anti-interrogation, n.b.)
        - (N.b. that itc. is a per curiam opinion—the majority here was so unanimous that the result was obvious to them.)
        - The Court says that a custodial interrogation is questioning initiated by LEOs after a person has been taken into ustody or otherwise deprived of his freedom in any significant way.
            - So, Miller says, the Court looks like it's inclined towards a definition of custody much like that of formal arrest.
            - No custody itc., the Court says: the suspect was free to go, and, plus, he had voluntarily appeared.
                - This result doesn't seem to come from the spirit of *Miranda*, which took a subjective perspective: the Court there was concerned with what the suspect felt. Here, though, the Court is just looking for external *facts*. So, this is a *bright-line* analysis, and this Court doesn't ask at all about what the suspect felt.
    - *Berkemer* (1984) (p587)
        - Autos: do we have an exception to *Miranda* here? No, the Court says.
            - Why?
                - The Court is worried about pretexts and erosion of constitutional protections (but we let that happen to am4!!).
                - A bright-line, exceptionless rule is good for LEOs.
                - The Court doesn't care that auto stops are minor, and public and open.
        - So, since there's no auto exception to *Miranda*, *Miranda* will apply if there's custody. Is there?
            - Facts: LEO has already made up his mind that he's going to arrest—this is the cat-out-of-the-bag doctrine.
            - N.b. “free to leave” idea. Recall *Bostick*. But *here*, the “free to leave” standard is radically different, and much higher. And so this creates a “free to leave gap” that is favorable to LE.
            - Marshall, writing for the Court, returns the Court to a rationale-based, *Miranda*-style, subjective analysis, away from a bright-line, objective, *Mathiason*-style test.

- But, at any rate, the Court says there's no custody here.
- The emerging standard: has the person's freedom been curtailed to a degree that it sufficiently impairs his free exercise against self-incrimination.

- Interrogation
  - *Innis* (1980) (p595)
    - (This is one of Miller's favorite cases.)
    - Rule: once a suspect invokes one of *Miranda*'s safeguards, questioning must cease.
    - Itc. also talks about express questioning versus functional equivalents.

Monday, April 18

- *Miranda's* promise
  - A *constitutional* ruling (!!). One that gives force to am5 in the context of custodial interrogations.
    - It gives (gave) that force through a bright-line rue that made statements inadmissible.
    - And LE had a heavy burden to show that:
      - Any statement was made after the procedural safeguards were provided,
      - And that the suspect waived those protections.
- But, *Miranda* has been subject to major erosion (just like am4):
  - Narrow interpretation
    - The Court has focused on the waiver/invocation analysis for this narrowing.
  - Exceptions

- Waiver and assertion
  - *Miranda* critics argue that the case reduced the number of confessions by 15-20%. But, supporters have questioned the critics' studies and police people have said the effect of *Miranda* has been to professionalize LE. Also, studies show that nearly everyone waives their *Miranda* protections (about 87%). So, it's arguable that *Miranda* is simply not having a significant effect.
    - So, isn't *Miranda helping* LE? That is, by allowing them to sanitize their interrogations?
  - *Miranda* itself on waiver
    - Waiver is not to be presumed by silence, or by the mere existence of a confession.
    - Express "waiver" followed by a statement *could* constitute a waiver.
    - Assertion? If the suspect indicates in *any manner* that he wants to be silent or wants an attorney, that's an assertion.

But all of this from *Miranda* is, technically, dicta.

- Waiver
  - *Butler* (1979) (p607)
    - Just how formally must a suspect be in making a waiver?
      - Here, there's no *express* waiver, but there's not mere silence, either.
      - The Court is willing to *infer* a waiver from the suspect's actions and words.
    - What's the standard, then?
      - Well, the state must prove the waiver.
      - And the waiver must be voluntary, knowing, and intelligent.
        - By the totality of the circumstances.
        - And by a preponderance of the evidence.

        - Voluntariness
          - The test for this emerges from am14 due process—and we've got the same questions here as with due process, measured by the totality of the circumstances.
        - Knowing and intelligent
          - Again, a totality of the circumstances inquiry. Look at age, education, experience, etc.
          - How much do you have to "know"?
            - Full awareness of the consequences of abandoning *Miranda* protections.
            - But, you *don't* have to have full awareness of the *full* consequences.
  - Waiver and invocation are *not* crime-specific—a waiver or invocation in one investigation is good for all investigations.
    - That is, they can ask you whatever they want, about anything, if you waive; and they can't ask you anything at all if you invoke.
  - *Moran* (1986) (p611x)
    - Waiver is personal—a third-party can't invoke or waive for you.
- Invocation ("assertion," Miller calls it)
  - (Does invocation mean more than a lack of a waiver?)
  - Once silence or counsel protections are asserted, all questioning must cease...
  - ...*but*, the Court, almost inexplicably, splits these two protections out:
    - Silence

- *Mosley* (1975) (p619x): questioning need not cease *forever*, as long as LEOs first "scrupulously honor" the assertion, and later questioning only beging again with a new crew, about a different crime, at a later time.

- Counsel
  - *Edwards* (1981) (p614): once the counsel protection is asserted, *all* contact is prohibited unless:
    - The contact is initiated by the suspect
      - Initiation by the suspect must be a manifested desire to open generalized discussion relating to the investigation.
    - OR, counsel is present.
  - Why is this stronger than for silence—especially considering that the silence protection is more obviously in the am5 text?!!
  - Actual invocation of the counsel right:
    - *Davis* (1994) (p622x): the suspect must *unambiguously* request counsel to successfully invoke—the Court says that even though some people may not be used to articulating things this unambiguously, a formal rule is needed.

Wednesday, April 20

***Miranda* exceptions**

- The public safety exception
  - *Quarles* (1984) (p629)
    - First, ask whether there's "custody."
      - Yes, the Court says here, because this is either a formal arrest of a restraint on freedom.
    - Then, ask whether "interrogation."
      - The Court apparently assumes this.
    - So, we've got custodial interrogation. And that ought to trigger the presumption of invalidity where there's no *Miranda* warnings.
      - *But*, the Court carves out an exception...
        - It's *not* dependent on the officer's subjective concern for public safety—rather, it looks objectively at a reasonable officer.
        - And thus we no longer have a bright-line rule. Now, we have a case-by-case analysis.
        - Why the exception?
          - Deferral to LEO discretion in these exigent

circumstances.
- The inherent risk of coercion in incommunicado interrogations was what underpinned *Miranda* itself, and there's nothing incommunicado here—this is in public.
- (But, seriously, what was the actual public safety concern itc.? Well, even though there doesn't seem to have been one, the Court insists on deferring to LEOs discretion in these matters.)

- Other exceptions
  - Exclusionary rule limitations: where *Miranda* applies (and no exceptions apply), but the Court still says the statements can be admitted
    - Impeachement (*Harris*)
    - Identity of witnesses as fruit of a violation (*Tucker*)
    - *Elstad* (1985) (p628x): the fruit of the poisonous tree doctrine doesn't apply to statements resulting from *Miranda* violations (this is the "cat-out-of-the-bag" doctrine).
      - *Seibert* (2004) (p30p): four justices, as a plurality, distinguish *Elstad*:
        - The first questioning there was brief.
        - There, the violation was an accident.
        - There, the admissions were short.
        - There, there wasn't a causal connection between the first and the later statements.

        But, the fact and nature of this distinguishing still implies that *Miranda* isn't a constitutional requirement.
    - *Patane* (2004) (p45px): the fruit of the poisonous tree doctrine doesn't apply to physical evidence resulting from *Miranda* violations.

Monday, April 25

- Ways in which *Miranda* is being eroded—e.g.:
  - Impeachment doctrine
  - *Tucker*: identity of witnesses (and where Rehnquist says he sees *Miranda* as an evidence rule, only).
  - *Elstad*: no fruit of the poisonous tree doctrine for *Miranda* violations.
- *Seibert* and *Patane*
  - *Seibert* (2004) (p30p)
    - The Court distinguishes *Elstad* and says that the fruit of the poisonous tree doctrine *does* apply here.
      - There, the violation had no direct effect. So, this seems to mean that if the violation was a direct cause of a later waiver, then the

fruit doctrine applies.
- Also, there, the violation was an accident.
- Also, there, the violation—the first questioning—was brief.

- *Patane* (2004) (p43px)
  - The Court here says that the fruit doctrine will not apply to later-discovered physical evidence.

- Klymer article (handout)
  - This article argues that the impeachment exception and the fruit jurisprudence are not *just* weakening *Miranda*,but are actually also incentives for LE to violate *Miranda*.
    - E.g., since physical evidence is often the most important evidence, and *Patane* won't exclude physical evidence after a violation, why would LE be disinclined to give coercive interrogation a try for finding physical evidence?
- The *Miranda* Court thought that *Miranda* warnings were *constitutionally* necessary to protect the constitutional rights in am5. But, later cases have retreated from this idea (see, e.g., Rehnquist in *Tucker*). I mean, what do all these exceptions and exclusionary rule exceptions say about the constitutional-ness of the warning? Are we still talking about constitutionally-grounded safeguards?
  - *Dickerson* (2000) (p239)
    - 18 U.S.C. § 3501: Congress tried to reassert a voluntariness standard for confessions.
    - The Court here must answer whether *Miranda* safeguards are constitutionally based, or whether *Miranda* was simply about managing and administering the courts.
      - The Court says they're constitutionally based, because:
        - *Miranda* is applied to the states.
        - *Miranda* itself *says* it was giving constitutional guidelines.
        - The fact that the Court has tinkered with *Miranda* doesn't matter—that's what the Court does with all constitutional protections (see, e.g., am4).
        - Stare decisis
          - But this is just saying that the Court otherwise *hates Miranda* (!!!).
- Klymer (handout) again
  - There's also *Chavez* (2003) (handout) (pp18-19p, 46p)
    - A § 1983 case, and the Court says that *Miranda* is wedded to am5, which has to do only with *criminal* cases. So, there's no constitutional violation where the suspect is never charged.
      - So, this seems to says that *Miranda* is not a constitutional right the way your other rights are—rather, it appears that *Miranda* just has to do with "mere rules" about criminal cases. (Does itc. reopen the question whether *Miranda* is constitutional at all?)
- Simon *Homicide, A Year on the Killing Streets* excerpt (p648)