

Criminal Procedure: security v. liberty

### Sources of Criminal Law

- Federal Constitution
- State Constitutions
- Statutes/Rules
- Law Enforcement Agencies Rules and Procedures

### Approaches to Due Process: Red Bears Are Fake

- Rule of Law
- Bill of Rights
- Accurate Procedures
- Fundamental Fairness

### Theories of Incorporation (No Fucks + Shits)

- No Incorporation
- Full Incorporation
- Full Incorporation +
- Selective Incorporation

### **4TH AMENDMENT**

Interests?

- Privacy
- Property

### Searches

- Was there a search/seizure?
- Was it reasonable?

Pre-Katz—property understanding; no violation unless constitutionally protected area

Katz Revolution—Privacy Understanding!!

- 4th Am. protects *people*—not places
- What one seeks to preserve as private, even in public can be protected—i.e. phone booth
- **Two-prong test:**
  - o Subjective: did they have an actual expectation of privacy?
  - o Objective: society prepared to accept as reasonable? (REP) (rareness/commonness)
- Was the search reasonable?
  - o Warrant/exception?

Is it a search?

- Open fields—no 4th Amendment if privately owned, if not curtilage

- Aerial (Tim's Weed farm)—no expectation of privacy because of prevalence of air travel
- Squeezing: i.e. luggage: tactile search = is protected 4th Amendment
- Sniffing
  - o Dog sniffs bags @ airport = not search
  - o Traffic stop = not search; as long as doesn't prolong search
  - o Curtilage—don't sniff my curtilage it is a search because intrusion on property
- Bugged Informant—not search b/c voluntarily giving up information (knowingly exposed)
- Trash on Curbs
  - o Not search; you expose to public
  - o Dissent: only to waste management; Tim = mad!!
- Electronic Tracking Device
  - o If you could get same information from visual surveillance = not search
  - o If you see details of the home = search
  - o If you attach GPS to automobile (trespass) = search → violation of privacy and property
- Thermal Imagers
  - o Search b/c sensory enhancing, shows intimate details; it's not in public-use
    - Drones??

### Seizures

- Did government conduct seizure?
- Was it reasonable?

Seizure of Property

- **Rule: control over person's property by destroying or removing from possession**
  - o **Must me meaningful interference**

Seizure of Person (2 Types)

- Stop + frisks (*Terry*)
- Arrests

Tests for all seizures

- **All circumstances, would reasonable person feel free to decline officer's request/terminate encounter?**
  - o Bus—OK b/c could have left situation
  - o Fleeing suspect—not seizure until phys. force or actual submission to authority

## Warrants

- Substantive standard → probable cause
- Procedural—need one! (duh)

## Arguments

- For: reliance by citizens; consistency by courts; prevents redress 4th Amendment violations
- Against: hinders law enforcement

## Warrant Requirement (POPEN)

- 1) **P**: Probable Cause
- 2) **O**: Oath Affirmation
- 3) **P**: Particularity
  - Person/Place
- 4) **N**: Neutral Magistrate

## Procedural Requirement: Knock Announce

- 1) WARRANT
- 2) Knock
- 3) Identify Yourself
- 4) State Purpose
- 5) request admittance “May I cum in?” ;)
- *Wait 15-20*
- 6) enter by force

## Substantive Requirement: Probable Cause

- Sliding scale
- Officer’s purpose ≠ relevant
  - o Magistrate decides
- Is there probable cause?
  - o Is the evidence trustworthy?
  - o Is it sufficient/enough?
- Anonymous Informants?
  - o Basis of knowledge
  - o Veracity and reliability
  - o = sliding scale → totality of circumstances
- To Whom Does PC extend?
  - o PC must be particularized; mere propinquity not enough (bartender case)
  - o Exception: Automobiles
    - PC extends to passengers because they share an enterprise

Exception to Procedural Requirements = no warrant;  
PC ALWAYS needed

- Exception: Exigent Circumstances
  - o Need PC; don’t need warrant
  - o Delay would;
    - endanger lives of officers/others
    - cause destruction of evidence
    - Hot pursuit (BFD crime)

- o Search occurs for something other than law enforcement
  - Helping victims; community caretaking etc.
- o After a homicide? → not exigent circumstance b/c you can go get warrant
- o Police create exigent circumstance? → as long as not on purpose, still applies

## - Exception: Plain View

- o Need PC; don’t need Warrant
- o (1) lawful vantage point
- o (2) right of physical access
- o (3) crim. nature is immediately apparent
- o Example
  - Move papers to look @ VIN and see contraband = OK
  - DON’T move stereo

## - Exception: Automobiles

- o Need PC; don’t need warrant
- o Must be for particular article of contraband
- o Somewhat related in time
- o Applies to motor homes
- o Containers in Cars
  - Whole car if not particularized info, but not areas where not possible concealed (i.e. no TV in glove box) *Acevado*
  - Can look @ passengers belongings
  - \*?? Outside car = need warrant; in car don’t need warrant? wtf?

## - Exception: Consent Searches

- o NO PC; NO warrant
- o No reasonable suspicion needed!
- o CANNOT be coerced
- o Voluntariness determined by **totality of the circumstances**
- o Police do not have to tell you that you have the right to refuse
- o 3rd Parties
  - Police have reason to believe person has common authority
- o Disagreeing Parties
  - one party disagrees = no consent
- o Scope of Consent

- What is reasonable?—unless the person limits the scope

\*All arrests are seizures—not all seizures are arrest  
Arrest—custody by lawful authority, in order to answer to criminal charge

- ALWAYS need PC
- Exception: Arrests
  - PC; no warrant (sometimes)
  - When are you seized?
    - Freedom restrained/don't feel free to terminate encounter
  - Public Place
    - Need PC—don't need warrant
    - Severity doesn't matter
  - In Home
    - Warrant; unless exceptions apply (same as warrantless search)
  - 3rd Party Homes
    - Need warrant + search warrant for 3rd Party's house
    - Why? protect rights of 3rd party
  - Motive/Manner
    - Doesn't matter as long as PC
  - Knock and Announce Applies
  - Deadly Force
    - PC to believe that suspect is significant threat
    - Reasonable believe force necessary
- Exception: SILA
  - No PC; NO warrant
  - **R:** police can search an arrestee or the grab-able area to remove any weapons
  - Rationales
    - Officer Safety
    - Destruction of Evidence
  - Home
    - Closets/closed spaces adjoining area—can search w/out RS
    - Not immediately adjoining—need RS if you worry of attack
      - Don't look in drawers!
  - Person—arrested w/PC = SILA always
  - Autos
    - SILA car only if
    - 1) reach grab-able area of passenger compartment

- 2) RS assume vehicle contains evidence of arrest

- Exceptions: Terry—Stop
  - No Sub; No Warrant
  - Open up discretion—racial profiling ☹
  - Rule: limited search of outer clothing with RS based on specific facts that armed/dangerous
  - Stop (seizure)
    - Standard: RS
    - Reason: investigate crim. activity
    - Scope: limited time/confirm dispel suspicion
  - Frisk (search)
    - Standard: RS
    - Reason: officer safety (NOT destruction of evidence)
    - Scope: limited pat down
      - Plain touch— search for safety and feel contraband = can seize
      - NO extra squeezing
  - High crime + flight = RS
  - Nervous/evasive behavior contribute to RS
  - Auto—can order to exit car w/out RS
    - Passenger compartment: search where weapon may be hidden if RS that dangerous + could grab weapon
- Exception: Special Needs
  - Public safety
  - Balancing test: public interest v. liberty
  - Roadblocks
    - Borders OK
    - Highway sobriety OK b/c checked ALL cars
  - Nexus between nature of stop and non-law enforcement goals

#### Remedies to 4th Amendment Violations:

##### **Exclusionary Rule**

- **R:** evidence seized in violation of the 4th Amendment is excluded from use during trial
- Purpose: deter unlawful police conduct; shouldn't gain from breaking law
- Motion in Limine to suppress
- Good Faith Exception: if reasonable officer believed warrant was valid; then later declared invalid = can still be introduced

- Not reasonable: knowingly give false info; rubber stamp; no basis for PC; not particularized
- Why have it: no deterrence if think valid
- BOP on Prosecutor
- Expansion: applies to other employees/negligence of officer; binding precedent later overturned —does not extend to officer mistake
- Can use for impeachment
- Standing: can only seek to suppress if search seizure violated own REP, not someone else's

### Fruit of the Poisonous Tree

Always ask WHO (standing); and WHAT (evidence)

- Exclude evidence obtained as result of illegal search
- Rationale: deterrence
- Extends to both phys. evidence & verbal statements
- Evidence can be admitted if it is distant enough from the unlawful action to no longer be considered FPT
  - But-For Causation: Did the illegal search cause the receipt of evidence?
  - Independent Source
  - Inevitable Source

**Other Remedies:** civil suits against the police for trespass; crim. suits; admin. penalties; reducing penalty

### 5TH AMENDMENT

Elements:

- Compulsion
- Incrimination
- Testimony
- (Natural Person)

Purpose?

- Privacy
- Non-Incrimination
  - Majority view: non-incrimination

Invocation

- Witness!
- Judge determines if incriminate
- Witness to either to invoke or not

Enough to form link-in chain—doesn't have to directly incriminate

Immunity Statutes

- Use/Derivative Use: Government can still prosecute you, just can't use your statements or any evidence obtained from statement
- Transactional: immunity from prosecution for offense (can't use testimony/other evidence—amnesty)
- Purpose: protect from self-incrimination

Element 1: Compulsion

- Spectrum
- Case by case basis

Element 2: Incrimination

- What is criminal?
  - When you can invoke?: criminal trials; grand jury; police encounter etc.
  - To determine if criminal:
    - Legislative intent
    - How punitive is it?
- How serious must it be?
  - Unclear
  - Danger must be real and appreciable

Element 3: Testimony

- Privilege is limited to testimonial/communicative evidence
- Revealing contents of one's mind
- Not physical/real evidence

Cruel Trilemma

- Tell the truth and face incrimination
- Lie and risk perjury
- Stay silent and face contempt

Compulsion & Police Interrogation

- \*most likely to run into compulsion element
- Pre-Miranda—voluntariness standard
- **Miranda**
  - In situations of custodial interrogation → police must notify suspect of 5th Amendment Rights
  - Triggered by Custodial Interrogation
  - **Custodial:**
    - Formal custody or otherwise deprived of his freedom of action in significant way
    - Inherently coercive/compelling situations
    - Would a reasonable person feel deprived of freedom?
  - **Interrogation**
    - Express questioning or functional equivalent
    - Ploys = okay (says Tim)

- Coercion judged from suspect's perspective
- Reasonably likely to elicit an incriminating response
- Warning
  - 1) right to remain silent
  - 2) anything you say can/will be used against you
  - 3) right to attorney
  - 4) can't afford, one will be appointed
  - Do you understand?

- Talking about custody (ask for water, bathroom etc.) = no re-initiation
- Talk about interrogation = police can interrogate again

- *Miranda* required by constitution

Public Safety Exception

- No disclosures when may prevent from protecting selves/public

Consequences of *Miranda* violation

- Exclusionary Rule (not exactly as 4th)
  - Can still use for impeachment
- FPT
  - Un-mirandized, involuntary = excluded
    - All fruits of the same = excluded
  - Un-mirandized, voluntary = excluded
    - Fruit of the same = NOT excluded

**6TH AMENDMENT**

- *Gideon v. Wainwright*—6th Amendment applies to the states, for all felony cases
  - Needed for fair trial
  - Negatives
    - Strain on courts
    - Increased incentive to encourage plea bargaining
  - Application
    - Entitled to counsel if face jail time (even if only one day)
    - No indigent be sentenced to jail without counsel
    - (actual—no potential)

When does the right to counsel begin?

- (1) Attachment
- (2) Critical Stage
- (3) (Harm Protected by 6th)

- **Attachment**

- Attaches at initial appearance/equivalent judicial proceeding initiated
- Occurs when relationship become adversarial

- **Critical Stage**

- *After* right attaches
- Not entitled to counsel present unless it's a critical stage
- Critical stage:
  - Pretrial procedures that would impede a defense on the merits

Legal Assessments after *Miranda* Warnings

- **Invocation**

- Can claim the 5th at any time (right to remain silent)
- Unclear = no invocation
- Must be Express, not Implied
- Must unambiguously request counsel
- Once invocation is established—police MUST cease interrogation

- **Waiver**

- Express
- Implied—CHECK THIS FRIENDS??
- Elements of Waiver:
  - Voluntarily
  - Knowingly and intelligently

- **No invocation + waiver**

- Questioning allowed, statements admissible

- **No invocation, no waiver**

- Questioning allowed, statements inadmissible

- **Invocation + later waiver**

- **Without Re-initiation of suspect:**
- Right to remain silent: can keep asking for waiver; admissibility depends on whether right was scrupulously honored
- Right to Counsel: police can't continue until counsel is present
- **Re-initiation by suspect:**

- if the accused is required to proceed without counsel
    - Any stage of the prosecution, formal or informal, where counsel's absence might derogate from the accused right to a fair trial
    - Any informal meeting between Δ and representative of the State that is designed or likely to elicit incriminating information
  - Ex. preliminary hearing; interrogation after initial appearance; arraignments
- **Timing:** counsel must be appointed within a reasonable time after attachments to allow for adequate representation at any critical stage and trial

#### Police Line-Ups/Eyewitness Identification

- Pre-trial eyewitness identifications = critical stage → Δ have right to counsel (if right has attached)
- Evidence of pre-trial identification in violation of 6th = inadmissible
- In-Court identification—following a pre-trial identification obtained in violation of the right counsel as always inadmissible
  - Unless:
    - (1) gov. carries burden
    - (2) by clear and convincing evidence
    - (3) there is an independent basis for the in-court identification (ex. long term friend)
- Post-indictment line-ups ALWAYS require counsel
- There is NOT a per se rule against pre-indictment lineups

#### When Does the Right to Counsel End

- 6th Amendment right applies to all “critical stages” through sentencing by the trial-judge, but not appeals
- Doesn't apply to direct appeals/collateral review
  - Other bases on appeal: statutory or EPC

#### Interrogation Limits under the 6th Amendment

- Constitution is violated when government agents, absent defense counsel, deliberately elicit incriminating information from a person whom adversary judicial proceedings have commenced (*Massiah*)
  - Ex. Christian burial speech
  - (subjective)