CRIMINAL PROCEDURE I FALL 2010 (LASSITER)

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Primary Reading Materials: **The syllabus cites to many cases, which receive limited attention in the case book. Except where otherwise noted, e.g., *Mapp, Duncan, Katz, Terry*, and *Schmerber* you need not read beyond case excerpts printed in the casebook. Citations are to the 2010 Supplement. The syllabus cites to many cases; you need only read the references cited in bold.**

Required:

1. Frank W. Miller et. al., CRIMINAL JUSTICE ADMINISTRATION (5th ed. 2000 Foundation Press) [hereinafter CB], pp. 1-601.

2. 2010 SUPPLEMENT to CB (2010 Foundation Press) [hereinafter SUPP].

3. TWEN Handouts.

Recommended:

1. LaFave, Israel, and King, CRIMINAL PROCEDURE (5th ed. 2009 West Group).

2. 2010 Supplement to CRIMINAL PROCEDURE (2010 West Group).

Memorandum assignment: A five page memorandum will take the place of one major essay on the final exam. This assignment responds to the *ABA Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. Sec. Leg. Ed. and Prof. Dev. Rep. (Robert MacCrate, chair), [hereinafter the *MacCrate Report*]. Recommendation C of the MacCrate Report called for increased emphasis on lawyering skills in the law school curriculum. I will be happy to discuss your memorandum to assist you in its preparation, however the memorandum will be graded anonymously. Toni McGuire will set up a ticket system. Your memorandum must be turned in to Toni McGuire on or before 1300, Monday, November 22, 2010. All work must be yours and yours alone. Plagiarism as defined in the College of Law Student Code of Conduct is prohibited.

Course Objective: In this course students are expected to develop an understanding of the constitutional restraints imposed on the investigation of suspected criminal activity. The pertinent constitutional clauses are found in the Fourth, Fifth and Sixth Amendments to the United States Constitution as made applicable to state actors in state courts through the due process clause of the Fourteenth Amendment. The primary purpose of this course is to enable students to master (*i.e.*, to answer questions concerning) the limits of police activity constituting search and seizure, police interrogation and continuing investigatory steps taken during critical stages of prosecution in advance of trial. Students are invited to initiate class room discussion on matters of interest.

Teaching Methodology: The teaching methodology for this course is lecture supplemented by the discussion method for major cases. Regardless of teaching methodology, critical thinking is a cornerstone of legal analysis. Legal analysis means the ability to recognize legal questions and to construct answers. The background of legal analysis in the area of criminal procedure spans broad themes of liberty, government authority, community values, individual rights, and federalism.

Class Place: Rm 114 Time: MW 1330-1455.

Class attendance and participation: Prompt class attendance is mandatory. Students seeking an excused absence from class or from being called upon may do so by submitting a signed, typewritten or e-mail request to me in advance of class, circumstances permitting, or after class otherwise. The sanction for excessive absences, tardiness, and lack of preparation not otherwise excused range from grade reduction to exam disqualification.

Exam Objective: The exam will be closed book. The exam will consist of no more than three traditional essay questions requiring issue spotting, application and analysis of existing law, and no more than three short answer questions requiring persuasive reasoning to discuss extending or rolling back existing law. The pedagogical aim of the examination will be to generate a dialogue between student and teacher on questions of criminal procedure. To the extent that your answers reflect an appreciation of the law of criminal procedure as well as developing issues and how to address them using an acceptable level of American legal analysis, you will score points. Exam performance will be measured by demonstrated legal analysis beyond that of a hypothetical reasonable person positioned to sit for the exam without benefit of this course, namely a future client.

Grades: Grades will be based upon the five page written memorandum assignment (33%) and the final examination (67%). Outstanding class participation and attendance may be taken into account to raise scores falling significantly below demonstrated performance in class. I expect to submit grades to the Registrar by 30 December 2010. I will prepare a comprehensive diagnostic analysis of the exam, which will be available at Toni's desk at the time I submit grades. The exam memorandum will contain a statistical analysis of the class scoring and a discussion of general flaws in examsmanship. A model answer and the best student answers may be included.

Curriculum notes. This syllabus is lengthy, but the length works to your advantage as the length is due to detailed outlining of the course and inclusion of holdings to cited cases. Thus the added length helps you by bringing organization and focus to the sprawling landscape of constitutional criminal procedure. **Again, please note: you are required to read only cases or casebook references in bold.** The syllabus is ambitious in coverage, and we may get behind, depending on class preparation and participation or the lack thereof. I hope not. In any case, no skipping--we will follow the syllabus, no matter how far behind we might find ourselves.

CLASS ASSIGNMENTS

1. 23 Aug PART ONE: THE CRIMINAL PROCESS (on your own)

I. The Investigatory Stage of Criminal Justice

Read CB at 1-14; TWEN #1: Stages in Criminal Procedure.

II. Federal Solution to Police Over Zealousness

Read TWEN #2: Federal Initiatives.

PART TWO: CONSTITUTIONAL RULE MAKING

I. Criminal Investigation--A Problem of Constitutional Dimension

A. Federalism.

1. Question: Why are criminal investigations of state crimes largely governed by the U. S. Constitution rather than state statutory law?

2. Question: What is the basis for using the federal constitution to over turn state court decisions applying state law?

B. The Supreme Court's Response to Overzealous Police Investigation.

1. Fourth Amendment exclusionary rule. *Weeks v. United States*, 232 U.S. 383, 391-392 (1914)(excluding evidence begotten of Fourth Amendment violation).

2. Application to the States: Fourth Amendment--yes; exclusionary rule--no. *Wolf v. Colorado*, 338 U.S. 25 (1949)(The due process of law clause of Fourteenth Amendment exacts from the states for the lowliest and most outcast, all that is implicit in the concept of ordered liberty, embracing all those rights which courts must enforce because they are basic to a free society. The security of one's privacy against arbitrary intrusion by the police is basic to a free society and implicit in the concept of ordered liberty

and as such it is enforceable against the states through due process of law clause. However, in a prosecution in state court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by unreasonable search and seizure though the evidence would be inadmissible in a prosecution for violation of federal law in a federal court because of a violation of the Fourth Amendment).

3. The Supreme Court reacts to the "the casual arrogance of those who have the untrammeled power to invade one's home and to seize one's person.**"** ***Mapp v. Ohio*, 367 U.S. 643, 671 (1961)**(applying the exclusionary rule to state criminal proceedings; Douglas, J., concurring).

Read CB at 15-22 n1-4. Note the excerpt of *Mapp* in the casebook will prove inadequate for classroom discussion. Therefore students should download, read, and bring to class the entire decision. Each of the different opinions presented should be studied.

II. Underpinnings of *Mapp*: Fundamental Rights and the Theory of Incorporation

A. Bill of Rights and the Fourteenth Amendment.

B. Fundamental Rights. *Rochin v. California*, 342 U.S. 165 (1952) (fundamental rights approach); *Wilson v. Arkansas*, 514 U.S. 927 (1995)(fundamental rights approach and applying original intent constitutional theory of interpretation).

C. Incorporation. *Duncan v. Louisiana*, 391 U.S. 145 (1968)(reviewing the debate on incorporation and fundamental rights).

Read CB at 1019-1024. Note: The excerpt of *Duncan v. Louisiana* in the casebook is inadequate for class discussion especially as it omits Justice Black's concurring opinion. Therefore students should download, read, and bring to class the entire decision.

Read: TWEN #3: Selected Provisions of the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution. TWEN #4: Fundamental Rights and Incorporation Theory.

2. 25 Aug

III. Paradigms of Criminal Procedure

A. Crime Control.

B. Due Process.

IV. Goals and Approaches

A. Truth v. Justice in the Criminal Justice System.

B. Accusatorial v. Inquisitorial Systems of Justice.

V. Constitutional Rule Making: Theories of Interpretation

A. Judicial Restraint.

B. Textualism.

C. Original Intent.

VI. *Mapp* Redux

A. The Significance of *Mapp*.

B. Alternatives to the Exclusionary Rule.

1. Executive relief from police misconduct. Union contracts.

2. Legislative relief from police misconduct.

a. *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau*, 403 U.S. 388 (1971)(held that complaint alleging that agents of Federal Bureau of Narcotics, acting under color of federal authority, made warrantless entry of petitioner's apartment, searched the apartment and arrested him on narcotics charges, all without probable cause,

stated federal cause of action under the Fourth Amendment for damages recoverable upon proof of injuries resulting from agents' violation of that Amendment).

b. **Supp at 6-8 n8.** *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005)(Wife did not have protected property interest in police enforcement of restraining order, issued pursuant to Colorado law, against her husband, and thus, she could not prevail in civil rights action against police and municipality for an alleged due process violation, arising from failure to enforce it; even assuming that Colorado law created an entitlement to police enforcement of the restraining order, it was an indirect benefit, rather than a direct benefit).

3. Judicial relief from police misconduct.

Recommended reading: LAFAVE & SCOTT at 2-35. **Read TWEN #5: Remedies for Constitutional Violations in Criminal Procedure Civil Relief.**

3. 30 Aug VII. New Federalism

A. Memo Assignment--(using state constitutions as a source of liberty from oppressive state government).

B. Ohio Case Law.

1. Criticism of new federalism in Ohio. *Ohio v. Robinette III*, 73 Ohio St. 3d 650, 653 N.E.2d 695; 1995 Ohio LEXIS 1872 (1995)(adopting a totality of the circumstances approach in evaluating legitimacy of consent given following a traffic stop).

2. Express rejection of new federalism in Ohio. *Ohio v. Brown*, 99 Ohio St 3d 323, 792 N.E. 2d 175 (Ohio 2003) (rejected the *dicta* in the 1992 *Brown* case and expressly aligned Ohio search incident to arrest law with U.S. Supreme Court case law).

Read *Ohio v. Robinette III*, 73 Ohio St. 3d 650, 653 N.E.2d 695; 1995 Ohio LEXIS 1872 (1995) and *Ohio v. Brown*, 99 Ohio St 3d 323, 792 N.E. 2d 175 (Ohio 2003).

C. New Federalism in Reverse.

Arkansas v. Sullivan, 532 U.S. 769 (2001); **Supp at 1-2**.

4. 1 Sep Class cancelled. To be re-scheduled.

PART THREE: THE EXCLUSIONARY RULE: THE CONSTITUTIONAL REMEDY IN CRIMINAL PROCEDURE

I. Scope of the Fourth Amendment Exclusionary Rule

A. Class of Violations That Trigger the Fourth Amendment Exclusionary Rule--Proximate Cause.

1. Fruit of the poisonous tree. **CB at 26-36.** *Wong Sun v. United States*, 371 U.S. 471 (1963)(exclusionary prohibition extends to indirect as well as to direct products of such invasions).

2. Attenuation.

a. **CB at 36-37 n7.** *Rawlings v. Kentucky*, 448 U.S. 98 (1980)(Assuming for the sake of argument that petitioner and his companions were illegally detained by the police, the Commonwealth of Kentucky met its burden to prove that petitioner's inculpatory statements to police were acts of free will unaffected by any illegality in the detention and thus were admissible where petitioner received *Miranda* warnings only moments before he made his incriminating statement and, by all accounts, the atmosphere prevailing during the 45 minutes preceding petitioner's admissions was congenial and unmarked by threats or violence and where there was no allegation that petitioner's inculpatory statements, which were apparently spontaneous reactions to the discovery of drugs in the purse of a female

acquaintance, were anything but voluntary and the conduct of the police was not such conscious or flagrant misconduct as to require prophylactic exclusion of petitioner's statements).

b. **Supp at 32-39:** *Hudson v. Michigan*, 547 U.S. 586 (2006)(violation of requirement that police officers knock-and-announce their presence before executing a search warrant did not require the suppression of all evidence found in the search, since the interests violated had nothing to do with the seizure of the evidence).

3. The inevitable discovery exception. **CB at 55-56 n5.** *Nix v. Williams (Williams II*), 467 U.S. 431 (1984)(held that: (1) the inevitable or ultimate discovery exception to the exclusionary rule is adopted; (2) applicable burden of proof is preponderance-of-evidence standard; (3) under the exception the prosecution is not required to prove absence of bad faith; (4) the exception applies to Sixth Amendment right to counsel violations; and (5) evidence supported finding that search party ultimately or inevitably would have discovered victim's body even had petitioner, whose statement directing police to the site was result of post-arrest interrogation in violation of right to counsel, not been questioned by the police).

4. Independent source doctrine. **CB at 35-36 n5.**

a. Unlawful seizure, lawful means possible. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)(rights against unlawful search and seizure are protected even if the same result might have been achieved in a lawful way).

b. Lawful seizure, after unlawful entry. Lawful means possible. *Murray v. United States*, 487 U.S. 533 (1988)(held that to determine whether marijuana observed in plain view at

time of unlawful entry and later seized during subsequent search pursuant to warrant was admissible under independent source doctrine, remand was required to determine whether government agents would have sought warrant if they had not earlier entered warehouse).

B. Class of Violatees–Standing/Personal Scope.

1. Standing. **CB 26-36.** *Wong Sun v. United States*, 371 U.S. 471 (1963)(Petitioner lacked standing to assert a claim based on assumed constitutional violation done to another).

2. Personal scope. **CB at 32-33 n2**; 105-111. *Rakas v. Illinois*, 439 U.S. 128 (1978)(held that petitioners, who asserted neither a property nor a possessory interest in the automobile searched nor an interest in the property seized, and who failed to show that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the vehicle in which they were merely passengers, were not entitled to challenge the search of those areas). Note: *Rakas* sets aside the standing approach applied in *Wong Sun*.

6 Sep Labor Day. No class scheduled.

5. 8 Sep C. Class of Violators.

1. Good Faith Exception. **CB at 40-56.** *United States v. Leon*, 468 U.S. 897 (1984)(cop on the beat); *Illinois v. Krull*, 480 U.S. 340 (1987)(legislature) *Arizona v. Evans*, 514 U.S. 1 (1995)(court employees); **Supp at 9-16.** *Herring v. United States*, 129 S.Ct. 695 (2009)(police record keeping error). *Groh v. Ramirez*, 540 U.S. 551 (2004)(reasonableness of the good faith). **TWEN #6: The Good Faith Exception to the Exclusionary Rule.**

2. State action requirement. **CB at 68-69; 71: Editor's Note.** *Burdeau v. McDowell*, 256 U.S. 465 (1921)(held that giving protection against unlawful

searches and seizures, applies only to governmental action, and that Fourth amendment is not violated by the seizure of private papers by a private corporation from the possession of a director and employee, though such seizure was unlawful).

3. Distinguishing Private Searches from State Searches. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)(held that: (1) removal by federal agents, who had been informed by employees of a private freight carrier that they observed a white powdery substance in the innermost of a series of four plastic bags that had been concealed in a tube inside a damaged package, of the tube from the box, the plastic bags from the tube and a trace of powder from the innermost bag infringed no legitimate expectation of privacy and therefore did not constitute a "search" within meaning of Fourth Amendment and, while agents' assertion of dominion and control over the package and its contents did constitute a "seizure," that warrantless seizure was not unreasonable, and (2) federal agents were not required to have a warrant before testing small quantity of a powder to determine whether it was cocaine).

. 4. Duplication of Wrongful Actions by Private Individuals. *Walter v. United States*, 447 U.S. 649 (1980)(held that notwithstanding that the nature of the contents of films was indicated by descriptive material on their individual containers, the unauthorized exhibition of the films by FBI agents constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy; it was a search, there was no warrant, the owner had not consented, and there were no exigent circumstances).

5. Private motives. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)(private motive immunizes a search and seizure from constitutional constraints).

Read TWEN #7: The State Action Requirement.

D. Use Exceptions to Application of Fourth Amendment Exclusionary Rule.

1. Impeachment. The Fourth Amendment exclusionary rule generally applies only to the Government's case-in-chief on the merits.

2. Specific impeachment. **CB at 39-40: Editor's note.** *Walder v. United States*, 347 U.S. 62 (1954)(held that defendant's assertion on direct examination that he had never possessed any narcotics opened the door, solely for purpose of attacking his credibility, to evidence that heroin had been unlawfully seized from him in connection with earlier prosecution).

3. General impeachment. *James v. Illinois*, 493 U.S. 307 (1990)(held that impeachment exception to exclusionary rule that permits prosecution in criminal proceeding to introduce illegally obtained evidence to impeach defendant's own testimony would not be expanded to permit prosecution to impeach testimony of all defense witnesses with illegally obtained evidence).

4. Live witnesses. **CB at 37 n8.** *United States v. Ceccolini*, 435 U.S. 268 (1978)(held that degree of attenuation between police officer's illegal search of envelope at defendant's flower store and store clerk's testimony as to defendant's activities was sufficient to dissipate connection between illegality and testimony so as to render testimony admissible, where substantial period of time elapsed between time of illegal search and initial contact with clerk and between latter and clerk's trial testimony, clerk's testimony was an act of her own free will and was not coerced or induced by official authority as result of illegal search and officer did not enter store or pick up envelope with intent of finding evidence of crime or finding willing and knowledgeable witness to testify against defendant).

5. Personal jurisdiction. **CB 36 n6.** *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)(Extradition Treaty between United States and Mexico did not prohibit abductions outside of its terms, and general principles of international law provided no basis for interpreting Treaty to include implied term

prohibiting international abductions, and therefore district court had jurisdiction to try Mexican national who had been forcibly kidnapped and brought to the United States to stand trial for violations of criminal laws of United States).

E. Forum Execeptions.

1. Forum. **CB at 22-24 n5.** *Pennsylvania Bd. Of Probation and Parole v. Scott*, 524 U.S. 357 (1998)(held that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment).

F. Treaties.

2. Treaties. Refer to Vienna Convention on Consular Relations, Article 36(1); (Mexico v. United States), 2004 I.C.J. 12 Judgment of Mar. 31)(*Avena*)(holding that the United States was obligated to provide a forum in which Mexican nationals not given timely advice concerning their consular rights could secure review and reconsideration of their convictions. This process must guarantee that violations of the Convention and possible prejudice caused by those violations are "fully examined" and "taken into account in the review and reconsideration process."; *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)(noting that since the Convention did not mandate suppression of evidence in a criminal proceeding, the Supreme Court , any right to suppression must come form United States law); *Medillin v. Texas*, 552 U.S. 491 (2008). **Supp at 3-6.**

6. 13 Sep PART FOUR: FOURTH AMENDMENT PROTECTION

I. Fourth Amendment Privacy/Searches

A. Jurisprudential Shift From Property to Privacy.

1. Property interest/trespass inquiry. *Boyd v. United States*, 116 U.S. 616 (1886), the first Supreme Court case to seriously consider the nature of Fourth Amendment, laid the seeds of the property rights interpretation of the amendment. According to *Boyd*, the odious practice of general warrants were fresh in the memories of the drafters. Base on *Boyd*, the Supreme Court held that Fourth Amendment protections did not apply absent a physical intrusion by law enforcement officers.

2. Privacy interest/search inquiry. ***Katz v. United States*, 389 U.S. 347 (1967**(held that government's activities in electronically listening to and recording defendant's words spoken into telephone receiver in public telephone booth violated the privacy upon which defendant justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within Fourth Amendment, and fact that electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance. The Court further established a two prong analysis to determine privacy interest: subjective and objective).

3. Jurisprudential definition of Fourth Amendment privacy.

a. Spiritual nature of man.

b Personal liberty.

c. Unreasonable actions.

Read CB at 69-70. Note: The excerpt of *Katz* in the casebook will be inadequate for classroom discussion. Therefore students should download, read, and bring to class the entire decision in

***Katz*.**

B. Non-Invasions of Privacy.

1. Open fields. **CB at 75-84.** *Oliver v. United States*, 466 U.S. 170 (1984)(Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance).

2. Curtilage. **CB at 85-86.** *United States v. Dunn*, 480 U.S. 294 (1987)(held that: (1) barn which was located 60 yards from home and which was not within area enclosed by fence surrounding the house was not within the curtilage of the home; (2) police officers standing in open field could look into barn, even if defendant did have reasonable expectation of privacy in barn; and (3) use of flashlight to illuminate the inside of the barn did not transform officers observations into unreasonable search).

3. Trash--property exposed to third parties. **CB at 73-75.** *California v. Greenwood*, 486 U.S. 35 (1988)(held that defendants did not have reasonable expectation of privacy protected by the Fourth Amendment in garbage which they placed in opaque bags outside their house for collection by trash collector).

4. Canine sniff--contraband specific. **CB at 73.** *United States v. Place*, 462 U.S. 696 (1983)(exposure of luggage to a trained narcotics detection dog is not a search for Fourth Amendment purposes; detention of luggage for short period may be based upon reasonable suspicion, but 90 minute detention without telling defendant where luggage was located required probable cause). **Supp at 21-22n5:** *State v. Rabb*, 881 So.2d 587 (Fla.App. 2004). **Supp at 111-118**: *Illinois v. Caballes*, 543 U.S. 405 (2005)(exposure of luggage to a trained narcotics detection dog is not a search for Fourth Amendment purposes).

5. Manipulation of luggage. **Supp at 17-19:** *Bond v. United States*, 529 U.S. 334 (2000)(held that law

enforcement officer's physical manipulation of defendant's carry-on bag on bus violated Fourth Amendment).

6. Electronic surveillance--pen registers. **CB at 73:** *Smith v. Maryland*, 442 U.S. 735 (1979)(held that installation and use of a pen register by a telephone company does not constitute a "search" within the meaning of the Fourth Amendment).

7. Electronic surveillance--beepers. **CB at 93-94 n3.**

   a. Open fields. *United States v. Knotts*, 460 U.S. 276 (1983)(held that monitoring the signal of a beeper placed in a container of chemicals that were being transported to the owner's cabin did not invade any legitimate expectation of privacy on the cabin owner's part and, therefore, there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment).

   b. Inside a home. *United States v. Karo*, 468 U.S. 705 (1984)(Fourth Amendment protects against warrantless monitoring by beepers in private residences even if there is requisite justification in facts for believing that crime is being or will be committed and that monitoring beeper wherever it goes is likely to produce evidence of criminal activity).

8. Aerial and other observations. **CB at 86-93 n1.**

   a. Curtilage. *California v. Ciraolo*, 476 U.S. 207, *reh'g denied*, 478 U.S. 1014 (1986)(held that warrantless aerial observation of fenced-in backyard within curtilage of home was not unreasonable under the Fourth Amendment).

   b. Greenhouse. *Florida v. Riley*, 488 U.S. 445 (1989)(held that officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from vantage point of helicopter circling 400 feet

above did not constitute a "search" for which a warrant was required).

c. Open fields and technological enhancement in aerial surveillance: *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986)(aerial photography of chemical company's industrial complex was not a "search" for Fourth Amendment purposes).

d. Home and thermal imaging. **Supp at 19-21 n4.** *Kyllo v. United States*, 533 U.S. 27 (2001)(held that: (1) use of sense-enhancing technology to gather any information regarding interior of home that could not otherwise have been obtained without physical intrusion into constitutionally protected area constitutes a "search," and (2) use of thermal imaging to measure heat emanating from home was search.

Read TWEN #8: Nonsearches.

7. 15 Sep III. Seizures of Property

A. The Right of Property and Possession.

1. Property interests. **CB at 94-95.** *Soldal v. Cook County, Illinois*, 506 U.S. 56 (1992)(held that complaint by mobile home owners alleging that deputy sheriffs and owner and manager of mobile home park dispossessed owners of their mobile home by physically tearing it from foundation and towing it to another lot sufficiently alleged "seizure" within meaning of Fourth Amendment to state cause of action under § 1983, even if owners' "privacy" was not invaded).

2. Seizures defined. *Texas v. Brown*, 460 U.S. 730, 747 (1983)(meaningful interference with property interests); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Hale v. Henkel*, 201 U.S. 43, 76 (1906).

B. Rules Constituting Seizures.

1. Items subject to seizure: mere evidence: *Warden v. Hayden*, 387 U.S. 294 (1967)(finding invalid the proposition that there is under the Fourth Amendment a 'distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.' Thus the Court held that where police were notified that armed robber wearing light cap and dark jacket had entered house and clothing matching description was found in washing machine in house by officer without warrant before he knew that weapon had been found in another part of house, even though clothing was 'mere evidence' and had 'evidential value only,' it was subject to seizure and was admissible in prosecution of petitioner who was arrested in house.

2. Inadvertence rule. **CB at 96-105.** *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)(Where arresting officer inadvertently comes within plain view of piece of evidence, not concealed, although outside area under immediate control of arrestee, officer may seize it, so long as plain view was obtained in course of an appropriately limited search of the arrestee. *United States v. Horton*, 496 U.S. 128 (1990)(held that Fourth Amendment does not prohibit warrantless seizure of evidence of crime in plain view, even if discovery of evidence was not inadvertent; abandoning the inadvertence line of inquiry established in *Coolidge v. New Hampshire*).

C. Rules Constituting Nonseziures.

1. Tracking devices. **CB at 93-103.** (*United States v. Knotts*, 460 U.S. 276 (1983)(bugging is not a meaningful interference with property interests) and *United States v. Karo*, 468 U.S. 705 (1984).

2. Intellectual property. *Arizona v. Hicks*, 480 U.S. 321 (1987)(held that: no "seizure" occurred, for purposes of Fourth Amendment, when officer merely recorded serial numbers of stereo equipment he observed in plain view).

IV. Arrests: Seizures of Persons

A. Constitutional Meaning of Arrest.

B. Types of Arrests and Non Arrests.

1. Arrest or formal arrest.

2. Custodial arrest.

3. Noncustodial arrest.

CB at 171-172; 179-180.

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4. Investigatory stops or Field detentions.

5. Traffic stops.

C. Types of Police Encounters: What Constitutes an Arrest.

1. Seizure by questioning. **CB at 178-9.**

a. At the workplace *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 216 (1984)((1) actions of INS agents in moving systematically through factory to inquire as to workers' citizenship while INS agents were stationed at each exit did not amount to Fourth Amendment seizure of the entire work force of the factory, and (2) questioning of individual workers did not amount to a seizure or detention for Fourth Amendment purposes).

b. Uniformed officers on the bus. *Florida v. Bostick*, 501 U.S. 429 (1991)("Seizure" does

not occur simply because officer approaches an individual and asks a few questions, as long as reasonable person would feel free to disregard police and go about his business; such encounters are consensual and need not be supported by reasonable suspicion of criminal activity).

c. Plainclothesman on the bus. **Supp at 44-48:** *United States v. Drayton*, 536 U.S. 194 (2002)(held that: (1) plainclothes police officers did not "seize" passengers on bus when, as part of routine drug and weapons interdiction effort, they boarded bus at rest stop and began asking passengers questions; and (2) passengers' consent to search was voluntary even though passenger was not informed of right to refuse).

2. Seizure by searching. *United States v. Drayton*, 536 U.S. 194 (2002)(held that: (1) plainclothes police officers did not "seize" passengers on bus when, as part of routine drug and weapons interdiction effort, they boarded bus at rest stop and began asking passengers questions; and (2) passengers' consent to search was voluntary).

3. Seizure by pursuit. **CB at 172-78.**

a. Fuzzy rules. *Michigan v. Chesternut*, 486 U.S. 567 (1988)(held that no seizure of defendant occurred when police officers in automobile observed defendant, upon seeing the automobile, start to run, and officers accelerated to catch up to defendant and then drove alongside him before he discarded a pack of pills, which the officers then seized–test for determining whether a person has been seized within meaning of the Fourth Amendment is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation).

b. Bright line rules. *California v. Hodari*, 499 U.S. 621 (1991)(held that, even if police officer's pursuit was a show of authority enjoining juvenile to halt, because juvenile did not comply with that injunction, he was not seized until he was tackled so that cocaine abandoned while juvenile was running was not fruit of seizure).

4. Seizure by ramming. In *Scott v. Harris*, 550 U.S. 372 (2007), the parties agreed (and the Court apparently accepted) that an officer's decision to terminate a car chase by ramming the officer vehicle into the suspect's viable constituted a seizure). **Supp at 44.**

5. Moving the suspect. **CB at 214-219 n1.**

a. To the police station. *Dunaway v. New York*, 442 U.S. 200 (1979)(defendant was "seized" for Fourth Amendment purposes when he was arrested and taken to the police station for questioning).

b. To a police room. *Florida v. Royer*, 460 U.S. 491 (1983)(defendant, who was a nervous young man paying cash for an airline ticket from Miami to New York under an assumed name, and who carried heavy American Tourister bags, could be stopped by police and they had grounds to temporarily detain him and his luggage while they attempted to verify or dispel their suspicions that he was a drug courier; however, police exceeded the limits of an investigative stop where they asked defendant to accompany them to a small police room, and retained his ticket and driver's license and indicated in no way that he was free to depart.

6. Traffic stops. **Supp at 22n3:** *Brendlin v. California*, 551 U.S. 249 (2007)(Passenger of automobile that was pulled over by police officer for traffic stop was "seized" under the Fourth Amendment from moment automobile came to halt on roadside and, therefore,

was entitled to challenge constitutionality of traffic stop; any reasonable passenger would have understood police officers to be exercising control to point that no one in the automobile was free to depart without police permission).

C. Seizure by Excessive Force.

1. Unnecessary deadly force. **CB at 186-87:** *Tennessee v. Garner*, 471 U.S. 1 (1985)(held that: (1) apprehension by use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement; (2) deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others; (3) Tennessee statute under authority of which police officer fired fatal shot was unconstitutional insofar as it authorized use of deadly force against apparently unarmed, nondangerous fleeing suspect; and (4) the fact that unarmed suspect had broken into a dwelling at night did not automatically mean that he was dangerous).

2. Excessive force standard. *Graham v. Connor*, 490 U.S. 386 (1989)(Claim that law enforcement officials have used excessive force, deadly or not, in course of arrest, investigatory stop or other "seizure" of a person is properly analyzed under Fourth Amendment's "objective reasonableness"standard, rather than under substantive due process standard.

3. Necessary deadly force. **Supp at 52-54:** *Scott v. Harris*, 550 U.S. 372 (2007)(County deputy acted reasonably when he terminated car chase by ramming his vehicle's bumper into vehicle of fleeing motorist, even though that action posed high likelihood of serious injury or death for motorist, given actual and imminent threat to lives of any pedestrians present, to other motorists, and to officers involved in chase resulting from motorist's conduct, and given motorist's culpability and innocence of those who might have been harmed had deputy not acted, and therefore deputy did not violate motorist's Fourth Amendment

right against unreasonable seizure, notwithstanding motorist's contention that threat to public safety could likewise have been avoided had police ceased their pursuit. *Brosseau v. Haugen*, 543 U.S. 194 (2004)(held that it was not clearly established, in particularized sense, that officer violated Fourth Amendment's deadly-force standards by shooting suspect as he fled in vehicle, given risk posed to persons in immediate area

4. Misdemeanor offenses. **Supp at 70-82:** *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)(Responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in field be converted into occasion for constitutional review. Standard of probable cause applies to all arrests, without need to balance interests and circumstances involved in particular situations. Motorist's Fourth Amendment right to be free from unreasonable seizure was not violated when she was arrested, handcuffed, and detained in jail for one hour for failing to wear her seat belt and failing to fasten her children in seat belts; officer observed violation, and arrest was not conducted in extraordinary manner, unusually harmful to motorist's privacy interests).

8. 20 Sep PART FIVE: GOVERNMENTAL INTRUSION INTO FOURTH AMENDMENT PROTECTED AREAS

PART FIVE-A: PROBABLE CAUSE BASED SEARCHES AND SEIZURES

I. Probable Cause and The Warrants Clause

A. The Constitutional Role of Probable Cause.

B. The Constitutional Role of Warrants.

Read Handout #10 Probable Cause and The Warrants Clause.

C. How Probable is Probable Cause?

1. The Quantum of Evidence Sufficient to Constitute Probable Cause.

2 Should Probable Cause be Less Than a Preponderance of the Evidence? Read *Maryland v. Pringle* 540 U.S. 366 (2003)(Police officer had probable cause to believe that defendant, who was the front-seat passenger in vehicle, committed the crime of possession of cocaine, either solely or jointly with other occupants of vehicle, and therefore defendant's arrest did not contravene the Fourth and Fourteenth Amendments, where defendant was one of three men riding in the vehicle at 3:16 a.m., $763 of rolled-up cash was found in the glove compartment directly in front of defendant, five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three vehicle occupants, and, upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money).

II. Probable Cause Based Searches-- With or Without Warrants

A. Plain View Seizures.

1. Right to be where the item is found.

2. Lawful vantage point.

3. Lawful right of access. *Arizona v. Hicks*, 480 U.S. 321 (1987) held that: (1) no "seizure" occurred, for purposes of Fourth Amendment, when officer merely recorded serial numbers of stereo equipment he observed in plain view, but (2) officer's actions in moving equipment to locate serial numbers constituted "search," which had to be supported by probable cause, notwithstanding that officer was lawfully present in apartment where equipment was located.

4. Statutorily required display. *New York v. Class*, 475 U.S. 106, 112 (1986), (held that action of police officers, who stopped defendant for two traffic violations, in reaching into interior of his automobile to remove from dashboard certain papers obscuring the

vehicle identification number was a search but was sufficiently unintrusive to be constitutionally permissible, thereby justifying officer's seizure of weapon found protruding from underneath driver's seat.

B. Search Incident to Arrest.

1. Home. **CB at 189-95.** *Chimel v. California*, 395 U.S. 752, 763 (1969)(held that warrantless search of defendant's entire house, incident to defendant's proper arrest in house on burglary charge, was unreasonable as extending beyond defendant's person and area from which he might have obtained either weapon or something that could have been used as evidence against him).

2. Automobiles. **CB 195-99.** (*New York v. Belton*, 453 U.S. 454 (1981)(held that: (1) when a policeman has made a lawful custodial arrest of the occupants of an automobile he may, as a contemporaneous incident of that arrest, search the passenger compartment of the vehicle and may also examine the contents of any container found within the passenger compartment and such "container", I. e., an object capable of holding another object, may be searched whether it is open or closed, and (2) where defendant, an automobile occupant, was subject of lawful custodial arrest on charge of possessing marijuana, search of defendant's jacket, which was found inside passenger compartment immediately following arrest, was incident to lawful custodial arrest, notwithstanding that officer unzipped pockets and discovered cocaine); **Supp 54-70:** *Thornton v. United States*, 541 U.S. 615, 617 (2004)(police officers may search vehicles incident to arrest of a person outside the vehicle as long as the person was a recent occupant). *Arizona v. Gant*, 129 S.Ct. 1710 (2008)(declining to extend *Thornton*, holding instead that search incident to arrest is limited to where arrest occurs in automobile).

C. Exigency Searches. **CB at 261-66.**

1. Arrest inside home. *Warden v. Hayden*, 387 U.S. 294

(1967)(held that where police were notified that armed robber wearing light cap and dark jacket had entered house and clothing matching description was found in washing machine in house by officer without warrant before he knew that weapon had been found in another part of house, even though clothing was 'mere evidence' and had 'evidential value only,' it was subject to seizure and was admissible in prosecution of petitioner who was arrested in house).

2. Extending privacy to overnight guests. *Minnesota v. Olson*, 495 U.S. 91 (1990)(defendant, as overnight social guest in upstairs duplex, had a reasonable expectation of privacy in the premises which was protected by the Fourth Amendment and, thus, had standing to challenge his warrantless arrest, and (2) there were no exigent circumstances that justified warrantless entry to make arrest). But not to business acquaintances. *Minnesota v. Carter*, 525 U.S. 83 (1998)(held that defendants, who were in another person's apartment for a short time solely for the purpose of packaging cocaine, had no legitimate expectation of privacy in the apartment, and, thus, any search which may have occurred did not violate their Fourth Amendment rights).

3. Arrest outside home. *Vale v. Louisiana*, 399 U.S. 30 (1970)(Where defendant was arrested on front steps of his premises immediately after arresting officers had observed what they believed to have been sale of narcotics to known drug addict, with transaction being consummated in addict's automobile parked near curb, and officers had two warrants for defendant's arrest and had satisfied themselves that no one was in premises when they entered, warrantless search of premises was illegal and could not be justified as incident to arrest, and admission of heroin found in search of rear bedroom was constitutional error.

4. Preventing homeowner from entering property as a seizure permitted under exigency exception. **Supp at 134-40:** *Illinois v. McArthur*, 531 U.S. 326 (2001)(In determining whether police officer violated the Fourth

Amendment by refusing to allow defendant, whose wife informed police that he had illegal drugs, to enter his residence without an officer until search warrant for residence was obtained, balancing of privacy-related and law enforcement-related concerns was appropriate rather than application of per se rule of unreasonableness; exigent circumstances justified keeping defendant out of residence, and restraint was limited in time and scope).

5. Entering home to provide assistance. **Supp at 140-143:** *Utah v. Stuart*, 547 U.S. 398 (2006(Regardless of their subjective motives, police officers were justified in entering a home without a warrant, under exigent circumstances exception to warrant requirement, as they had an objectively reasonable basis for believing that an occupant was seriously injured or imminently threatened with injury; officers responded to complaints about loud party at the home at three o'clock in the morning, they heard fighting and yelling from within the home as they approached, and from the backyard of the home through windows, they observed a juvenile being held back by several adults, and the juvenile struck one of the adults, sending the adult to the sink spitting blood).

D. Compact Searches--Not. **CB at 168 n1.**

1. Searching others not listed on the warrant. *Ybarro v. Illinois*, 444 U.S. 85 (1979)(held that although search warrant, issued upon probable cause, gave police officers authority to search premises of small public tavern and to search the bartender for narcotics, pat-down search and seizure from tavern patron was not constitutionally permissible where there was no reasonable belief that patron was involved in any criminal activity or that patron was armed or dangerous).

2. Detaining subject while searching pursuant to a warrant. *Michigan v. Summers*, 452 U.S. 692 (1981)(held that if the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the

citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home; thus, for Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants at the premises while a proper search is conducted).

E. Crime Scenes--Not. **CB at 266 n4.**

1. Arrest does not justify four day warrantless search. *Mincey v. Arizona*, 437 U.S. 385 (1978)(held that: (1) warrantless four-day search of defendant's apartment following his arrest after the shooting of a police officer in the apartment could not be justified on the basis of any so-called "murder scene exception"; (2) fact that a homicide occurred did not, of itself, give rise to such exigent circumstances as to justify four-day warrantless search; (3) the fact that defendant had been arrested did not lessen his privacy right in his apartment).

F. Protective Sweeps. **CB at 195 n4; 226.**

1. In-home arrest. *Maryland v. Buie*, 494 U.S. 325 (1990)(held that Fourth Amendment permits properly limited protective sweep in conjunction with in-home arrest when searching officer possesses reasonable belief based on specific and articulable facts that area to be swept harbors individual posing danger to those on arrest scene).

2. Lawful investigatory stop of automobile. *Michigan v. Long*, 463 U.S. 1032 (1983)(Protective search of passenger compartment of motor vehicle during lawful investigatory stop of occupant of vehicle was reasonable, where hour was late and area rural, defendant had been driving his automobile at excessive speed and his car swerved into ditch, officers had to repeat their questions to defendant, who appeared to be "under the influence" of some intoxicant, and defendant was not frisked until officers observed that there was large knife in interior of car which defendant

was about to reenter).

G. Limited Rights of Probationers and Parolees.

1. Parolees. *Sampson v. California*, 547 U.S. 843 (2006)(Suspicionless search of California parolee, conducted pursuant to California law requiring all parolees to agree to be subjected to search or seizure at any time, did not violate the Fourth Amendment).

2. Probationers. **Supp at 143-46:** *United States v. Knights*, 534 U.S. 112 (2001)(held that warrantless search of probationer's apartment, supported by reasonable suspicion and authorized by a condition of his probation, was reasonable within the meaning of the Fourth Amendment).

9. 22 Sep III. Warrant Application

A. Probable Cause Determination.

1 Reliable anonymous tipsters. **CB 120-132** *Illinois v. Gates*, 462 U.S. 213 (1983)(held that: (1) rigid "two-pronged test" under *Aguilar* and *Spinelli* for determining whether an informant's tip establishes probable cause for issuance of a warrant would be abandoned and a "totality-of-the-circumstances" approach that traditionally has informed probable cause determinations would be substituted in its place, and (2) probable cause for warrant authorizing search of defendants' home and automobile was established by anonymous letter indicating that defendants were involved in activities in violation of state drug laws and predicting future criminal activities where major portions of the letter's predictions were corroborated by information provided to affiant by federal agents).

2. Unreliable anonymous tipsters. **Supp at 103-08:** *Florida v. J.L*, 529 U.S. 266 (2000)(Anonymous tip stating that young black male standing at particular bus stop and wearing plaid shirt was carrying gun lacked sufficient indicia of reliability to establish reasonable suspicion to make *Terry* investigatory stop of suspect matching description; tip provided no predictive

information that would provide police with means to test informant's knowledge or credibility, so that all police had to rely on was bare report from unknown, unaccountable informant who neither explained how he knew about gun nor supplied any basis for believing he had inside information about suspect.

3. Anticipatory warrants. . **Supp at 24-26.** *United States v. Grubbs*, 547 U.S. 90 (2006)(approving anticipatory warrants as meeting particularity requirements and not different in kind from ordinary warrants; the same warrant requirements apply)

Read TWEN #12: *Gates* and Probable Cause Determination.

B. Magistrate. **CB 115-120; Supp 23-24:** (Local magistrate).

1. Neutrality and detachment. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)(held that warrant issued upon determination of probable cause by chief enforcement agent of state, the Attorney General, who was actively in charge of investigation and later was to be key prosecutor at trial was invalid).

2. Initial showing before the magistrate.

C. Particularity.

1. **Supp at 39-41.** *Groh v. Ramirez*, 540 U.S. 551 (2004)(held that (1) search warrant that utterly failed to describe the persons or things to be seized was invalid on its face, notwithstanding that requisite particularized description was provided in search warrant application; (2) residential search that was conducted pursuant to this facially invalid warrant could not be regarded as "reasonable," though items to be seized were described in search warrant application, and though officers conducting search exercised restraint in limiting scope of search to that indicated in application).

D. Credibility Challenges.

1. Challenging factual assertions in a warrant. **CB at**

132-143. *Franks v. Delaware,* 438 U.S. 154 (1978)(Where defendant makes substantial preliminary showing that false statement knowingly and intentionally, or with the reckless disregard for the truth, was included by affiant in search warrant affidavit, and if allegedly false statement is necessary to finding of probable cause, Fourth Amendment requires that hearing be held at defendant's request. If, after evidentiary hearing, defendant establishes by a preponderance of evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in search warrant affidavit, and, with affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, search warrant must be voided and fruits of search excluded to the same extent as if probable cause was lacking on the face of the affidavit).

2. Disclosure of informant's identity–Not!. **CB at 142 n2:** *McCray v. Illinois,* 386 U.S. 300 (1967)(That Illinois court, following settled Illinois law, refused to compel police officers, at preliminary hearing to determine probable cause for arrest and search of defendant, to divulge identity of informant who had informed officers that defendant was selling narcotics and had narcotics on his person was not violative of due process clause or defendant's constitutional right to confrontation).

10. 27 Sep IV. Warrant Execution

A. Promptness.

B. No-Knock Entries.

1. No categorical exception. **CB at 144-158; Supp at 30-2 ns 2 and 2a:** *Richards v. Wisconsin,* 520 U.S. 385 (1997)(Fourth Amendment does not permit a blanket exception to knock-and-announce requirement for felony drug investigations; rather, to justify a "no-knock" entry, police must have a reasonable suspicion that knocking and announcing their presence, under the

particular circumstances, would be dangerous or futile, or that it would inhibit effective investigation of crime by, for example, allowing destruction of evidence).

2. Justifiable no-knock entry. **CB at 180-4; Supp at 32-39:** *Hudson v. Michigan*, 547 U.S. 586 (2006)(It is not necessary for police officers to knock and announce their presence when executing a search warrant when circumstances present a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile).

3. Knock and entry following a brief interval. **Supp 26-30:** *United States v. Banks*, 540 U.S. 31 (2003)(held that: (1) interval of 15 to 20 seconds from officers' knock and announcement of search warrant until forced entry was reasonable, given exigency of possible destruction of evidence, and (2) entry did not violate "refused admittance" requirement of federal statute governing breaking of doors or windows in execution of search warrants).

C. Excessive Force.

D. Daytime v. night time.

E. Particularity.

1. Reasonable mistakes. **CB at 158-170.** *Maryland v. Garrison*, 480 U.S. 79 (1987)(held that: (1) fact that search warrant was broader than appropriate because it was based on mistaken belief that there was only one apartment on third floor of building did not retroactively invalidate warrant, and (2) whether warrant was interpreted as authorizing search of entire third floor or only apartment of third party, search of defendant's apartment by mistake was valid because objective facts available to officers at the time suggested no distinction between third party's apartment and third-floor premises). **Supp 41-43:** *Muehler v. Mena*, 544 U.S. 93 (2005)(detention and initial handcuffing was reasonable; handcuffing beyond need to command the situation...say two or

three hours might be unreasonable).

2. Defective search warrant. **Supp at 39-41:** *Groh v. Ramirez*, 540 U.S. 551 (2004)(qualified immunity from civil liability for search pursuant to defective warrant and the *Leon-Sheppard* "good faith" exception to the exclusionary rule demand the same objective reasonableness of officers).

V. Warrant Based Searches and Seizures

A. Arrest in Home. **CB at 181-184; 112.**

1. Search warrant required to enter home to make routine arrest. *Payton v. New York*, 445 U.S. 573 (1980)(Fourth Amendment prohibits police from making warrantless and nonconsensual entry into suspect's home in order to make routine felony-arrest).

2. Search warrant required to arrest in home of third party. *Steagald v. U.S.*, 451 U.S. 204 (1981)(held that absent exigent circumstances or consent, law enforcement officer could not legally search for subject of arrest warrant in home of third party, without first obtaining search warrant.

3. Search warrant not required to arrest business guests in third party home. *Minnesota v. Carter*, 525 U.S. 83 (1998)(held that defendants, who were in another person's apartment for a short time solely for the purpose of packaging cocaine, had no legitimate expectation of privacy in the apartment, and, thus, any search which may have occurred did not violate their Fourth Amendment rights).

4. Warrantless entry absent exigent circumstances. **Supp at 49-52:** *Kirk v. Louisiana*, 536 U.S. 635 (2002)(held that absent exigent circumstances, police officers' warrantless entry into defendant's apartment, and their arrest and search of defendant violated Fourth Amendment.

B. Arrest in Public. **CB at 180-1.**

1. Felonies. *United States v. Watson*, 423 U.S. 411 (1976)(held that where, based on information from reliable informant that defendant possessed stolen credit cards, there was probable cause for arrest, warrantless arrest of defendant by postal officers in restaurant at midday was valid under statute authorizing postal officers to make warrantless arrests for felonies if they have reasonable grounds to believe that felony has been or is being committed, and that defendant, who while on public street subsequent to such arrest, after being given Miranda warnings and further cautioned that results of search of automobile could be used against him, persisted in consenting to search of automobile, gave voluntary and valid consent to search of his automobile

2. Misdemeanors. **Review Supp at 70-81:** *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)(held that: (1) officer's authority to make warrantless arrest for misdemeanors was not restricted at common law to cases of "breach of the peace," and (2) arrest did not violate motorist's Fourth Amendment rights).

Read TWEN #13: Search Warrants and #14: Arrest Warrants.

11. 29 Sep D. Electronic Surveillance.

1. Search of oral communications.

2. Seizure by electronic devices.

3. Technological information-gathering. **CB at 356-378.** *United States v. Kahn*, 415 U.S. 143 (1974)(holding that particularity requirement was met by specifying the telephone to be tapped, not limited to the user under suspicion). Supp at 141.

4. National security searches. **Read Supp at 158; TWEN #15: Wire Taps and TWEN #16: National Security Searches.**

12. 4 Oct PART FIVE-B: REASONABLE INTRUSIONS

I. The Reasonableness Clause

Read TWEN #18: Reasonable Searches and Seizures.

II. Consent Searches

A. Relinquishing Fourth Amendment Protection.

1. Consent standard. *Schneckloth v. Bustamontes*, 412 U.S. 218 (1973)(held that when the subject of a search is not in custody and the state attempts to justify a search on basis of his consent, state must demonstrate that the consent was in fact voluntarily given; that voluntariness is a question of fact to be determined from all the circumstances; and that, while the subject's knowledge of his right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent). Review *Ohio v. Robinette III*, 73 Ohio St. 3d 650, 653 N.E.2d 695; 1995 Ohio LEXIS 1872 (1995).

B. Apparent Authority.

1. Third party consent. *Illinois v. Rodriguez*, 497 U.S. 177 (1990)(held that: former cotenant did not have common authority over defendant's premises, and thus could not give consent to search premises; and (3) warrantless entry is valid when based upon consent of third party whom police, at time of entry, reasonably believe to possess common authority over premises, but who in fact does not do so).

C. Co-tenants.

1. Absent non-consenting tenant. *United States v. Matlock*, 415 U.S. 164 (1974)(held that consent to warrantless search by one who possesses common authority over the premises or effect is valid as against absent, nonconsenting person with whom that authority is shared; that there should be no automatic rule against the reception of hearsay evidence in suppression proceedings; and that it was error to exclude out-of-court statements by woman who

consented to search of defendant's bedroom, indicating that she was sharing bedroom with defendant, where trial court was satisfied that statements had been made and there was nothing to raise serious doubts about the truthfulness thereof, where statements were against woman's penal interest, and where woman was available for cross-examination at suppression hearing).

2.. Present non-consenting tenant. **Supp at 150-53:** *Georgia v. Randolph,* 547 U.S. 103 (2006)(held that warrantless search based upon with common authority was unreasonable as to defendant who was physically present and expressly refused to consent).

D. Scope of Consent. **CB at 279-302.**

1. *Florida v. Jimeno*, 500 U.S. 248 (1991)(held that criminal suspect's right to be free from unreasonable searches was not violated when, after he gave police officer permission to search his automobile, officer opened closed container found within car that might reasonably hold object of search).

III. International Borders

A. At the Border.

1. Scope of border searches. **Supp at 153-54:** *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985)(detention while awaiting passage of suspected drug ingestion); *United States v. Flores-Montano,* 541 U.S. 149 (2004)(detention for removal and inspection of gas tank).

2. Detention during warranted search. *Muehler v. Mena*, 544 U.S. 93 (2005)(held that: (1) officers acted reasonably by detaining occupant in handcuffs for two to three hours while search was in progress, given fact that warrant sought weapons and evidence of gang membership, and (2) officers needed no independent reasonable suspicion in order to question occupant about her immigration status).

B. Border Related.

1. Fixed checkpoints. **CB at 327-355; Supp 154-157.** *United States v. Martinez-Fuertes*, 428 U.S. 543 (1976)(held that vehicle stops at a fixed checkpoint for brief questioning of its occupants, even though there is no reason to believe the particular vehicle contains illegal aliens, are consistent with the Fourth Amendment, and that the operation of a fixed checkpoint need not be authorized in advance by a judicial warrant. It was constitutional for the border patrol, after routinely stopping or slowing automobiles at permanent checkpoint, to refer motorists selectively to a secondary inspection area, for questions about citizenship and immigration status, on basis of criteria that would not sustain a roving-patrol stop, and there was no constitutional violation even if such referrals were made largely on basis of apparent Mexican ancestry).

13. 6 Oct PART FIVE-C: REASONABLE SUSPICION BASES FOR GOVERNMENT INTRUSIONS

I. Field Detentions

A. Reasonable Suspicion.

1. *Terry*. **CB at 199-213.** *Terry v. Ohio*, 392 U.S. 1 (1968)(held that police officer who observed conduct by defendant and another consistent with hypothesis that they were contemplating daylight robbery, and who approached, identified himself as officer, and asked their names, acted reasonably, when nothing appeared to dispel his reasonable belief of their intent, in seizing defendant in order to search him for weapons, and did not exceed reasonable scope of search in patting down outer clothing of defendants without placing his hands in their pockets or under outer surface of garments until he had felt weapons, and then merely reached for and removed guns).
Note: the casebook excerpt of *Terry* will prove inadequate for classroom discussion. Therefore students should download, read, and bring to class the full decision.

2. Anonymous tips: **Supp at 103-08.** *Florida v. J.L.*, 529 U.S. 266 (2000)(held that anonymous tip lacked sufficient indicia of reliability to establish reasonable suspicion for *Terry* investigatory stop).

B. Evolving Standards of Reasonable Suspicion.

1. Running from the police. **Supp at 86-94.** *United States v. Wardlow*, 528 U.S. 119 (2000)(Defendant's unprovoked flight from officers in area of heavy narcotics trafficking supported reasonable suspicion that defendant was involved in criminal activity and justified stop).

2. Mechanical mannerisms. **Supp at 82-84:** *United States v. Arvizu*, 534 U.S. 266 (2002)(In determining whether border patrol agent's investigatory stop of defendant's minivan was justified, appellate court should not have casually rejected as a factor the

idiosyncratic waving actions of children who were riding in the van, which had been characterized by the district court judge, who had seen and heard the agent's testimony, as "methodical," "mechanical," "abnormal," and "certainly a fact that is odd and would lead a reasonable officer to wonder why they are doing this," in light of the district court's superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom).

C. Scope of *Terry* Stop.

1. Identification. **Supp at 95-103.** *Hiibel v. Sixth Judicial District of Nevada, Humboldt County, et. al*., 542 U.S. 177 (2004)(held that: (1) arrest of *Terry* stop suspect for refusal to identify himself, in violation of Nevada law, did not violate Fourth Amendment prohibition against unreasonable searches and seizures, and (2) defendant's conviction for refusal to identify himself did not violate his Fifth Amendment right against self-incrimination).

2. Plain feel. *Minnesota v. Dickerson*, 508 U.S. 366 (1993)(held that: (1) police may seize nonthreatening contraband detected through the sense of touch during protective patdown search so long as the search stays within the bounds marked by *Terry*, and (2) search of defendant's jacket exceeded lawful bounds marked by *Terry* when officer determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket, which officer already knew contained no weapon).

TWEN #19: Reasonable Suspicion: The Use and Abuse of *Terry*.

11-15 Oct Fall Break. No classes scheduled.

14. 18 Oct PART FIVE-D: AUTOMOBILE SEARCHES/REVIEW OF FOURTH AMENDMENT JURISPRUDENCE

I. Automobile Searches

A. Searches of Vehicles.

1. Warrants vs. probable cause. **CB at 302-04.** *Carroll v. United States*, 267 U.S. 132 (1925)(mobility rationale); *California v. Carney*, 471 U.S. 386 (1985)(expressly accepted the "lesser-expectation-of-privacy rationale in conjunction with the "mobility rationale" to justify warrantless search of automobile).

2. Probable cause to search cars. **CB at 304-310.** *Chambers v. Maroney*, 399 U.S. 42 (1970)(held that where police, as result of talking to victim and teen-age observers, had probable cause to believe that robbers, carrying guns and fruits of crime, had fled scene in light blue compact station wagon carrying four men, one wearing a green sweater and another wearing a trench coat, officers had probable cause to stop automobile and search it for guns and stolen money, and search of automobile at station house without warrant was not improper).

B. Searches of Containers in Vehicles.

1. Probable cause search of containers in cars. **CB at 310-18.** *California v. Acevado*, 500 U.S. 565 (1991)(held that police may search container located within automobile, and need not hold container pending issuance of search warrant, even though they lack probable cause to search vehicle as whole and have probable cause to believe only that container itself holds contraband or evidence).

C. Seizures and Inventory of Vehicles.

1. Standardized procedures. **CB at 318-321.** *Colorado v. Bertine*, 479 U.S. 367 (1987) (held that in the absence of showing that police, who followed standardized care taking procedures, acted in bad faith for the sole purpose of investigation in conducting

inventory search of defendant's van, evidence discovered during search was admissible).

2. Latitude in searching containers. **CB at 321-326.** *Florida v. Wells*, 495 U.S. 1 (1990)(Although standardized criteria or established routine must regulate opening of containers found during inventory searches, police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of nature of the search and characteristics of the container itself; thus, while policies of opening all containers or of opening no containers are permissible, it is equally permissible to allow opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors; allowance of exercise of judgment based on such concerns relating to purposes of inventory search does not violate the Fourth Amendment).

3. Forfeitable contraband. **CB at 326-27 n**. *Florida v. White*, 526 U.S. 559 (1999)(Fourth Amendment did not require police to obtain warrant before seizing automobile from public place when they had probable cause to believe that it was forfeitable contraband; although police lacked probable cause to believe that defendant's car contained contraband, they did have probable cause to believe that vehicle itself was contraband under Florida forfeiture law, and, because police seized vehicle from public area, the warrantless seizure also did not involve any invasion of defendant's privacy).

II. Traffic Stops

A. Detentions Short of Arrest.

1. Search authority based on speeding citation. **CB at 230-36.** *Knowles v. Iowa*, 525 U.S. 113 (1998)(held that a full search of an automobile pursuant to issuance of a citation for speeding, as authorized by an Iowa statute, violated the Fourth Amendment). **Supp at 110:** *Arizona v. Johnson*, 129 S.Ct. 781 (2009)(pat down of passengers at routine traffic stop is

presumptively reasonable provided officers have reasonable suspicion that a traffic violation has occurred).

2. Canine sniff during traffic stop. **Supp at 111-19:** *Illinois v. Caballes*, 543 U.S. 405 (2005)(held that, where lawful traffic stop was not extended beyond time necessary to issue warning ticket and to conduct ordinary inquiries incident to such a stop, another officer's arrival at scene while stop was in progress and use of narcotics-detection dog to sniff around exterior of motorist's vehicle did not rise to level of cognizable infringement on motorist's Fourth Amendment rights, such as would have to be supported by some reasonable, articulable suspicion).

2. Search authority after stop. **CB at 236-238 n2.** *Ohio v. Robinette*, 519 U.S. 33 (1996)(consent to search after concluding initial basis for stop does not violate Fourth Amendment).

3. Protective sweeps during traffic stop. **CB at 238-9 n3.** *Michigan v. Long*, 463 U.S. 1032 (1983)(permitting protective sweep search of passenger compartment of stopped car).

4. Removal of passengers. **CB at 239-40.** *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(held that: (1) where police officers on routine patrol observed defendant driving an automobile with an expired license plate and lawfully stopped vehicle for purpose of issuing a traffic summons, order of one of officers that defendant get out of automobile was reasonable and thus permissible under Fourth Amendment, notwithstanding that officers had no reason to suspect foul play from defendant at time of the stop since there had been nothing unusual or suspicious about his behavior, and (2) bulge in jacket of defendant automobile operator, who had been lawfully ordered out of automobile following stop for traffic violation, permitted officer to conclude that defendant was armed and thus posed a serious and present danger to safety of officer thus justifying "pat-down" search of defendant whereby weapon was

discovered)**. CB 240-45:** *State v. Soto,* 324 N.J. Super 66 (1996).

B. Seizures.

1. Seizure of driver. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(held that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle).

2. Seizure of passengers. *Maryland v. Wilson*, 519 U.S. 408 (1997)(held that the rule of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, extends to passengers as well). *Brendlin v. California*, 551 U.S. 249 (2007)(Passenger of automobile that was pulled over by police officer for traffic stop was "seized" under the Fourth Amendment from moment automobile came to halt on roadside and, therefore, was entitled to challenge constitutionality of traffic stop; any reasonable passenger would have understood police officers to be exercising control to point that no one in the automobile was free to depart without police permission). **Supp 110-111.** *Arizona v. Johnson*, 129 S.Ct. 781 (2009)(a traffic stop is described as probable cause to believe that the driver has committed a minor vehicular offense and such stop is a seziure of the driver and passenger for the duration of the stop).

3. Arrest in lieu of citation. **Supp 48-49:** *Virginia v. Moore*,553 U.S. 164 (2008)(held that: (1) police officers did not violate the Fourth Amendment by arresting motorist whom they had probable cause to believe had violated Virginia law by driving with suspended license, even though, as matter of Virginia law, this misdemeanor offense of driving with suspended license was one for which, under particular circumstances of motorist's case, officers should have issued summons rather than made arrest; and (2) Fourth Amendment did not require exclusion of evidence that police officers obtained as result of search that was incident to their constitutionally permissible arrest of motorist.

C. Pretext.

1. Subjective and legitimate objective motivations. **CB at 252-8:** *Whren v. United States*, 517 U.S. 806 (1996)(held that: (1) constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved; (2) temporary detention of motorist who the police have probable cause to believe has committed civil traffic violation is consistent with Fourth Amendment's prohibition against unreasonable seizures regardless of whether "reasonable officer" would have been motivated to stop the automobile by a desire to enforce the traffic laws; and (3) balancing inherent in Fourth Amendment inquiry does not require court to weigh governmental and individual interests implicated in a traffic stop).

2. Improper motivation. **Supp 130-33.** *Arkansas v. Sullivan*, 532 U.S. 769 (2001)(Defendant's arrest, which was supported by probable cause and which followed traffic stop, officer's realization that he was aware of "intelligence on [defendant] regarding narcotics," and officer's observation of roofing hatchet on car's floorboard, was not rendered violative of Fourth Amendment by any improper subjective motivation of police officer for stopping defendant's vehicle, namely, to search for evidence of crime).

3. Racial profiling. **Supp 84-85; 108-110;** *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir.2000), cert. Denied, 531 U.S. 889 (2000)(rejecting Supreme Court dictum suggesting that in making a *Terry* stop of a person suspected of being an illegal alien the person's Hispanic apperance could be considered).

4. Announcing basis for arrest is not relevant to reasonableness inquiry. **Supp 130-32.** *Devenpeck v. Alford*, 543 U.S. 146 (2004) (officers are not limited as a matter of Fourth Amendment law to defending the arrest as one for an offense closely related to the officer's announcement at time of arrest).

15. 20 Oct PART FIVE-E: ADMINISTRATIVE INSPECTIONS; REGULATORY SEARCHES AND SPECIAL GOVERNMENT NEEDS SEARCHES.

I. Property

II. Administrative and Regulatory Searches

A. Building codes.

1. Administrative searches. **CB at 266.** *Camara v. Municipal Court*, 387 U.S. 523 (1967)(held that administrative searches by municipal health and safety inspectors constitute significant intrusions upon interests protected by Fourth Amendment, and such searches, when authorized and conducted without warrant procedure, lack traditional safeguards which Fourth Amendment guarantees to individuals. The Court further held that probable cause to issue warrant for inspection of dwelling by municipal health and safety officials must exist if reasonable legislative or administrative standards for conducting area inspection are satisfied with respect to particular dwelling); *See v. City of Seattle*, 387 U.S. 541 (1967).

2. Administrative warrants. *New York v. Burger*, 482 U.S. 691 (1987)(held that a "closely regulated" business may be inspected w/o a warrant if three conditions are met:1) The regulatory scheme must advance a "substantial interest," such as to protect the health and safety of workers; 2) Warrantless searches must be necessary to further the regulatory scheme. This condition is met, if there is a serious possibility that a routine warrant requirement would allow the subjects of the regulations to conceal their violations of the rules, and thereby frustrate the administrative system; 3) The ordinance or statute that permits warrantless inspections must, by its terms, provide and adequate substitute for the warrant, such as rules that limit the discretion of the inspectors, regarding the time, place and scope of the search).

B. Fire scene. **CB at 279.**

1. Investigation while fighting fire. *Michigan v. Tyler*, 436 U.S. 499 (1978)(held that: (1) an entry to fight a

fire requires no warrant, and, once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze; (2) thereafter, additional inquiries to investigate cause of the fire must be made pursuant to the warrant procedures governing administrative searches, and (3) evidence of arson discovered in course of such investigations is admissible, but if investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for possible prosecution, they may obtain warrant only upon traditional showing of probable cause applicable to searches for evidence of crime).

2. Investigating after fighting fire. *Michigan v. Clifford*, 464 U.S. 287 (1984)(held that: (1) if reasonable expectations of privacy remain in fire-damaged premises, search directed to cause and origin of a fire is subject to warrant requirement; (2) administrative warrant will suffice if primary object is to determine cause and origin of fire; (3) criminal warrant is required when primary object of search is to gather evidence of criminal activity; (4) defendants had reasonable expectation of privacy in fire-damaged home which they had arranged to have secured in their absence; and (5) once fire investigators had determined cause of fire, additional search of home could only have been for the purpose of finding evidence of arson and thus criminal warrant was required).

C. Checkpoints.

1. License and registration checkpoint. *Delaware v. Prouse*, 440 U.S. 648 (1979) (disallowed a random, suspicionless search of a motorist, stopped as part of a license and car-registration check. The Court noted the Officer was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated either by his department [or the state].

2. Substitute procedures for individualized suspicion requirement. *Brown v. Texas*, 443 U.S. 47 (1979)(Court articulated a three part test for reasonable suspicion: 1) the gravity of the public concerns served

by the seizure; 2) the degree to which the seizures advance the public interest; and 3) the severity of the interference w/ individual liberty. In dictum the Court noted: A central concern in balancing these competing considerations is "to assure that an individual's reasonable expectations of privacy is not s.t. to arbitrary invasions solely at the unfettered discretion of officers in the field." To prevent such discretion, the Court stated that a seizure of a person must be based on individualized suspicion "or...be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.").

3. Sobriety checkpoints-Yes. **CB at 245-52.** *Michigan v. Sitz*, 496 U.S. 444 (1990)(upholding sobriety check points based upon safety precautions).

4. Criminal detection--No. **Supp 120-28.** *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)(held that city's drug interdiction checkpoints were in violation of the Fourth Amendment).

5. Looking for witnesses–Yes. **Supp at 128-29.** *Illinois v. Lidster*, 540 U.S. 419 (2004)(Brief stops of motorists at highway checkpoint were not presumptively invalid under the Fourth Amendment where the stops were brief and sought voluntary cooperation in investigation of a recent crime that occurred on that highway and did not involve individualized suspicion of those stopped at the checkpoint).

16. 25 Oct III. Extraordinarily Intrusive Searches

A. Medical Surgery.

1. Bullet inside body. **CB at 348-354.** *Winston v. Lee*, 470 U.S. 753 (1985)(held that surgical intrusion into attempted robbery suspect's left chest area to recover bullet fired by victim was unreasonable under the Fourth Amendment where surgery would require suspect to be put under general anesthesia, where medical risks, although apparently not extremely severe, were subject of considerable dispute, and

where there was no compelling need to recover the bullet in light of other available evidence).

IV. Special Government Needs

A. Public Employees.

1. Operators of mass transit vehicles. *Skinner v. Railway Labor Executives' Association* 489 U.S. 602 (1989) (compelling government concern for safety outweighed employee interest in privacy and thus upheld warrantless, suspicionless, blood, breath, and urine testing of some public employees, conducted pursuant to administrative regulations to detect drug or alcohol usage).

2. Custom agents. *Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)(held that: (1) Custom Service's drug-testing program was subject to reasonableness requirement of Fourth Amendment; (2) Customs Service did not need warrant to conduct drug-testing program; and (3) suspicionless drug-testing of employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms was reasonable under Fourth Amendment).

3. Cell phones. *City of Ontario, California v. Quon*, 130 S.Ct. 2619 (2010)(permitted search of text messages sent on a city issued pager under a special needs analysis). **Supp at 146-47 n3**

4. Law enforcement agents. **Supp at 147-50 n4.** *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)(informed consent as a factor that might render tests reasonable).

B. School Children.

1. Lesser standard of reasonable suspicion justifies full search. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)(Accommodation of privacy interests of school children with substantial need of teachers and administrators for freedom to maintain order in schools does not require strict adherence to requirement that

searches be based on probable cause to believe that subject of search has violated or is violating the law; rather, legality of search of student should depend simply on reasonableness, under all the circumstances, of the search).

2. Urinalysis testing of highschool athletes. *Veronia School District 47J v. Wayne Acton, Et Ux., Etc*., 515 U.S. 646 (1995)(held that public school district's student athlete drug policy did not violate student's federal or state constitutional right to be free from unreasonable searches).

3. Urinalysis testing of students involved in any extra-curricular activity. **Supp at 150 n5.** *Board of Education of Independent School District No. 92 of Pottawatomie County et. al. v. Earls*, 536 U.S. 832 (2002)(held that policy requiring all students who participated in competitive extracurricular activities to submit to drug testing was a reasonable means of furthering the school district's important interest in preventing and deterring drug use among its schoolchildren, and therefore did not violate Fourth Amendment).

4. Strip searches. *Safford United School District No. 1 v. Redding*, 129 S.Ct. 2633 (2009)(held that: (1) assistant principal had reasonable suspicion that student was distributing contraband drugs; (2) principal's reasonable suspicion did not justify strip search; but (3) law regarding strip searches of students was not clearly established, and therefore the officials were entitled to qualified immunity).

17. 27 Oct PART SIX: INTERROGATIONS AND CONFESSIONS

PART SIX-A: THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

I. Issues

II. Due Process

A. Voluntariness. **CB 380-386; Supp 159-161.**

1. Voluntariness of confessions analyzed as a rule of evidence. **CB at 386.** *Hopt v. Utah*, 110 U.S. 574 (1884). (confessions freely and voluntarily given is evidence of the most satisfactory kind).

2. Voluntariness analyzed under due process. **CB at 386-87.** *Bram v. United States*, 168 U.S. 532 (1897)(commenting that "in criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by Fifth Amendment due process clause).

3. Physical coercion. **CB at 387.** *Brown v. Mississippi*, 297 U.S. 278 (1936) (ruling inadmissible confession beaten out of four suspects).

4. Mental coercion. **CB at 387-88.** *Blackburn v. Alabama*, 361 U.S. 199 (1960)(explaining that involuntary confessions are inherently untrustworthy and law enforcement integrity, the Court recognized mental as well as physical coercion).

5. Procedural aspects to determining voluntariness. **CB at 388-90; 392:** *Culombe v. Connecticut*, 367 U.S. 568 (1961)(applying a totality of the circumstances approach to determine voluntariness). *Lego v. Twomey*, 404 U.S. 477 (1972)(government as proponent of confession bears the burden of proof by a preponderance of the evidence to have confession admitted. *Arizona v. Fulminante*, 499 U.S. 279 (1991) (suggested that admission of confession could constitute harmless error). **Supp 161-65:** *Chavez v. Martinez*, 538 U.S. 760 (2003)(questioning a dying

suspect while receiving treatment did not violate Fifth Amendment); *Corley v. United States*, 129 S.Ct. 1558 (2009)(§3501 did not completely nullify the *McNabb-Mallory* rule) .

6. Promises. **CB at 390-91.** *Arizona v. Fulminante*, 499 U.S. 279 (1991) (rejecting Bram's statement of voluntariness relating to promises, and finding that confession to a prison plant based upon promise of protection did not render confession involuntary).

7. Deception. **CB at 391-92.** *Frazier v. Cupp*, 394 U.S. 731 (1969)(no violation of due process where police tricked defendant into confessing by falsely telling him that his cousin had confessed).

3. Schizophrenia, not police coercion. **CB at 393-400.** *Colorado v. Connelly*, 479 U.S. 157 (1986)(confession motivated by defendant's schizophrenia did not constitute police coercion). **Supp 165-69.** (*Ohio v. Petitjean*, 140 Ohio App. 3d 517, 748 N.E. 2d 133 (2000), appeal not allowed, 91 Ohio St. 3d 1480, 744 N.E. 2d 1194 (Ohio 2001)(overbearing of will in aggressive interrogation).

III. Fifth Amendment Privilege Against Self-Incrimination

A. *Miranda* Warnings.

1. Protecting admissibility of confessions. **CB at 400-413.** *Miranda v. Arizona*, 384 U.S. 436 (1966)(held that a Fifth Amendment right to counsel attaches as a procedural safeguard against uncounseled admissions exacted by the police during a custodial interrogation; this right is enforced by a warnings requirement. Statements taken in violation of *Miranda* are presumptively coercive and therefore inadmissible. However, the presumption may be rebutted by a showing of voluntariness).

2. *Zerbst* waivers.

Read TWEN #21: Confessions and Interrogations.

B. Modification of the *Miranda* Warnings.

1. Complicated warnings. **CB 413-14 n1.** *California v. Prysock*, 453 U.S. 355 (1981)(held that: (1) the content of *Miranda* warnings need not be a virtual incantation of the precise language contained in the *Miranda* opinion; such a rigid rule is not mandated by *Miranda* or any other decision of the Supreme Court, and is not required to serve the purposes of *Miranda*, and (2) where the accused was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one, and where those warnings conveyed to him his right to have a lawyer appointed if he could not afford one prior to and during interrogation, such *Miranda* warnings were not inadequate simply because of the order in which they were given).

2. Conditioning warning. **CB at 413-414 n.1.** *Duckworth v. Eagan*, 492 U.S. 195 (1989)(held that police officer's statement that attorney would be appointed for suspect "if and when he went to court" did not render *Miranda* warning inadequate). **Supp 169.** *Florida v. Powell*, 130 S.Ct. (2010)(held that warnings which seemed to imply that right to counsel before, but not during interrogation did not render *Miranda* warning inadequate).

3. Warnings frustrated by suspect. **Supp at 169.** *United States v. Patane*, 542 U.S. 630 (2004)(interrupted warnings rendered statements inadmissible).

18. 1 Nov IV. Application of *Miranda*

A. Interrogation.

1. Direct interrogation.

2. Indirect interrogation. **CB at 416-28.** *Rhode Island v. Innis*, 446 U.S. 291 (1980)(Where the cops do not explicitly question or interrogate outright, a conversation claimed to be the functional equivalence of express questioning is to be evaluated by an

objective measure).

B. Custody.

1. Voluntary appearance at stationhouse. *Oregon v. Mathiason*, 429 U.S. 492 (1977)(held that defendant, who came voluntarily to police station, was immediately informed he was not under arrest, and gave a half hour interview during which he confessed to burglary after which he left the police station without hindrance, was not in custody or otherwise deprived of his freedom of action in any significant way, and it was not necessary that he be given the Miranda warnings prior to confession). **Supp 170-73:** *Yarborough v. Alvarado*, 541 U.S. 652 (2004)(upheld a finding of no custody despite two hour interrogation where parents drove juvenile to police station and waited for him).

2. No custody absent formal arrest. *California v. Beheler*, 463 U.S. 1121 (1983)(held that *Miranda* warnings were not required where defendant, although a suspect, was not placed under arrest and voluntarily came to police station and was allowed to leave unhindered after brief interview); *Minnesota v. Murphy*, 465 U.S. 420 (1984) (probationary status is not arrest)

3. Detentions. **CB at 428-34.** *Berkemer v. McCarty*, 486 U.S. 420 (1984)(traffic stop and citation did not constitute custody); **Supp 8 at Section B.** *Kaupp v. Texas*, 538 U.S. 626 (2003) (Seizure of seventeen-year old defendant was an "arrest" within meaning of the Fourth Amendment, where defendant was awakened in his bedroom at three in the morning by three police officers, one of whom stated, "we need to go and talk," and taken from his home in handcuffs, without shoes, in his underwear in January for questioning, and in such situation, defendant's response of "okay" to officer's statement and his failure to struggle with officers did not constitute consent sufficient to overcome probable cause requirement for arrest. The giving of Miranda warnings is not enough alone to establish an act of free will).

4. Post-conviction incarceration as "custody"–Not! *Maryland v. Shatzer*, 130 Sct. 1213 (2010) (held that prison incarceration does not constitute custody for *Miranda* purposes).

19. 3 Nov C. Invoking *Miranda* Rights.

1. Right to silence. **CB at 438-439.** *Michigan v. Mosley*, 423 U.S. 96 (1975).(custody has exercised his right to remain silent depends on whether his "right to cut off questioning" was scrupulously honored, that *Miranda* does not require that once a person has indicated a desire to remain silent any subsequent questioning may be undertaken only in presence of counsel and that where defendant, who had been arrested on robbery charge, was given required *Miranda* warnings, when defendant stated that he did not want to discuss the robberies the detective immediately ceased interrogation and it was only after more than two-hour hiatus and following re-admonition of *Miranda* rights that another detective questioned defendant solely about an unrelated murder, admission of inculpatory statement made during the second interrogation did not violate the *Miranda* principles). **Supp at 171-72.**

2. Right to remain counsel. **CB at 434-38.** *Edwards v. Arizona*, 451 U.S. 477 (1981)(where defendant had invoked his right to have counsel present during custodial interrogation, valid waiver of that right could not be established by showing only that he responded to police-initiated interrogation after being again advised of his rights; thus, use of defendant's confession against him at his trial violated his rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation).

3. Right to prevent questioning. **Supp 173-75.** *Maryland v. Shatzer*, 130 Sct. 1213 (2010) (held that because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his custodial statement).

4. At the start and during the middle of an

interrogation. **CB at 439-448.** *Davis v. United States*, 512 U.S. 452 (1994)(held that: (1) if suspect makes ambiguous or equivocal reference to attorney, cessation of questioning is not required but, rather, suspect must unambiguously request counsel, and (2) accused's remark, "Maybe I should talk to a lawyer," was not request for counsel and Naval Investigative Service (NIS) agents therefore were not required to stop questioning him).

5. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010)(nonresponsiveness did not revoke the right to remain silent in the aftermath of Miranda warnings and therefore, Thompkins never invoked his Miranda right to remain silent). **Supp 176-184).**

6. Asking to see probation officer is not per se invocation of *Miranda* rights. *Fare v. Michael C.*, 442 U.S. 707 (1979).(held that: (1) California Supreme Court erred in finding that juvenile's request for his probation officer was a *per se* invocation of the juvenile's Fifth Amendment rights under *Miranda;* (2) whether statements obtained during subsequent interrogation of a juvenile who has asked to see his probation officer, but who has not asked to consult an attorney or expressly asserted his right to remain silent, are admissible on the basis of waiver is a question to be resolved on the totality of the circumstances surrounding the interrogation, and (3) juvenile court's findings that respondent voluntarily and knowingly waived his rights and consented to continued interrogation after denial of request to consult with his probation officer, and that his statements were voluntary were correct).

7. Juvenile brought to station by parents. **Review Supp at 170-73.** *Yarborough v. Alvarado*, 541 U.S. 652 (2004)(Juvenile did not invoke *Miranda* rights; warnings not required).

20. 8 Nov D. Waiving *Miranda* Rights.

1. Right to remain silent. **CB at 438-39.** *Michigan v. Mosley*, 423 U.S. 96 (1975)(suspect may waive right

to silence by speaking).

2. Right to Fifth Amendment counsel. **CB at 434-38.** *Edwards v. Arizona,* 451 U.S. 477 (1981)(suspect must initiate talking after invoking right to counsel).

3. Waiving , not invoking and deception. **CB at 448-66.** *Moran v. Burbine*, 475 U.S. 412 (1986)(held that failure of police to inform defendant of efforts of attorney, who had been retained by defendant's sister without his knowledge, to reach him did not deprive defendant of his right to counsel or vitiate waiver of his *Miranda* rights).

4. Doing nothing. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010)(explicit waiver not required; need not be expressed; question about prayer to God for forgiveness could have been ignored; the Fifth Amendment privilege is not concerned with moral and psychological pressure to confess emanating from asource other than official coercion) **Supp 185-191.**

E. Scope of Fifth Amendment Exclusionary Rule.

1. Exceptions. **CB at 416-18.** *New York v. Quarles*, 467 U.S. 649 (1984)(safety); *Pennsylvania v. Munoz,* 496 U.S. 582 (1990)(booking); and *Hiibel v. Sixth Judicial District of Nevada, Humboldt County, et. al*., 542 U.S. 177 (2004) (name).

2. Belated *Miranda* warnings. **CB at 466-475.** *Oregon v. Elstad,* 470 U.S. 298 (1985)(held that: (1) there is no warrant for presuming coercive effect where a suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary, and relevant inquiry is whether the second statement was also voluntarily made, and (2) where initial inculpatory statement made while defendant was in police custody in his home was voluntary, failure to give *Miranda* admonitions did not bar admissibility of station house confession made shortly thereafter and preceded by careful admonition and waiver of *Miranda* rights, notwithstanding failure to advise defendant that prior statement could not be used against him.

3. Failure to give cleansing warnings. **Supp at 193-203:** *Missouri v. Seibert*, 542 U.S. 600 (2004)(held that *Miranda* warnings given mid-interrogation, after defendant gave unwarned confession, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial).

4. Confession voluntary despite absence of warnings. **Supp at 151.** (*United States v. Patane*, 542 U.S. 630 (2004)(Police officers' failure to give *Miranda* warnings after arresting suspect for violating restraining order and before questioning him about weapon he reportedly possessed did not require suppression of weapon at felon-in-possession-of-firearm trial, since weapon was recovered based on suspect's voluntary statements that he possessed it and advising officers where it could be found; there was no risk of admission at trial of any coerced self-incriminating statements).

5. Confession might be involuntary notwithstanding *Miranda* warnings. **Supp at 8; 85-86:** *Kaupp v. Texas*, 538 U.S. 626 (2003).

6. Impeachment. *Walder v. United States*, 347 U.S. 62 (1954) (statement elicited in violation of Fourth Amendment and *Harris v. New York*, 401 U.S. 222 (1971)(statement elicited in violation of Fifth Amendment may be used for specific impeachment)

7. Exclusion of physical evidence as a result of Miranda violation. **Supp at 191-93:** *United States v. Patane*, 542 U.S. 630 (2004).

V. Constitutionality of *Miranda*

A. Legislative initiatives.

CB at 476-489: *Dickerson v. United States*, 530 U.S. 428 (2000)(held that *Miranda's* warning-based approach to determining admissibility of statement made by accused during custodial interrogation was constitutionally based, and could not be in effect overruled by legislative act). **Supp at 203-215.**

B. *Miranda*'s inherent infirmary.

Read TWEN #22: Prisoner's Dilemma.

21. 10 Nov Veterans Day. Yes class.

PART SIX-B: THE SIXTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

VI. Sixth Amendment Right to Counsel During Police Questioning

A. Right to Counsel Clause. **CB at 400; 490-95.**

1. Prior to formal charges. *Escobedo v. Illinois*, 378 U.S. 478 (1964)(held that where the investigation is no longer a general inquiry into unsolved crime but has begun to focus upon particular suspect, the suspect has been taken into police custody, the police carry out process of interrogations that lends itself to eliciting incriminating statements, suspect has requested and been denied opportunity to consult with his lawyer, and police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied assistance of counsel in violation of Sixth Amendment as made obligatory upon the states by Fourteenth Amendment, and no statement elicited by police during interrogation may be used against him at criminal trial).

2. Post indictment. *Massiah v. United States*, 377 U.S. 201 (1964)(held that defendant's Fifth and Sixth Amendment rights were violated by use in evidence against him of incriminating statements which he made to co-defendant after their indictment and their release on bail and in absence of defendant's retained counsel and which were overheard on radio by government agent without defendant's knowledge that co-defendant had decided to cooperate with government and had permitted agent to install radio transmitter under front seat of co-defendant's automobile).

3. Per se rule for post indictment contact. *Fellers v. United States*, 540 U.S. 519 (2004)(held that officers violated Sixth Amendment by deliberately eliciting

information from defendant during post-indictment visit to his home absent counsel or waiver of counsel, regardless of whether officers' conduct constituted an "interrogation.").

4. Approach on unrelated charges. **Supp 217-19.** *Texas v. Cobb*, 532 U.S. 162 (2001)(held that Sixth Amendment is offense specific).

B. Sixth Amendment Trigger.

1. Arraignment. **CB at 491-93.** *Michigan v. Jackson*, 475 U.S. 625 (1986)(arraignment certainly marks initiation of adversary proceedings).

2. Initial appearance. **Supp at 217.** *Rothgery v. Gillespie County*, 554 U.S. 191 (2008)(criminal defendant's initial appearance before magistrate judge, where he learns charge against him and his liberty is subject to restriction, marks initiation of adversary proceedings that trigger attachment of Sixth Amendment right to counsel). In *Rothery*, defendant had been arrested, 2) officer filed with magistrate a sworn reciting charge, 3) defendant appeared before magistrate, 4) magistrate informed defendant of charge and set bail, 5) defendant was jailed until he posted bail–action of prosecutor or even knowledge of prosecutor not required.

C. Waiver of Sixth Amendment.

1. Simultaneous waiver with Fifth Amendment right to counsel. **CB at 495-503.** *Patterson v. Illinois*, 487 U.S. 285 (1988)(that: (1) fact that defendant's Sixth Amendment right to counsel arose with his indictment did not bar police from questioning defendant if defendant waived his right to counsel, and (2) *Miranda* warnings were sufficient to make defendant aware of his Sixth Amendment right to counsel during post-indictment questioning.

2. Anticipatory request for counsel. *Jackson*'s application of the *Edward*'s rule in the Sixth Amendment context. **Supp at 219-21:** *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009)(defendant made no request for counsel, but was appointed one at preliminary appearance; in such a

situation, the Sixth Amendment is applicable, but officers are not barred from reapproaching a defendant who for whom counsel has been appointed or who has retained counsel).

3. Questioning after grand jury indictment. **Supp at 221-23:** *Fellers v. United States*, 540 U.S. 519 (2004)(*per se* rule for "discussion" following indictment).

D. Use for Impeachment.

1. Sixth amendment violation. *Kansas v. Ventris*, 129 S.Ct. 1841 (2009), (held that a statement elicited in violation of a defendant's Sixth Amendment right to counsel can be used to impeach a defendant who testifies at trial). **Supp at 223.**

2. Fifth amendment violation. *Harris v. New York*, 401 U.S. 222 (1971)(statement elicited in violation of Fifth Amendment may be used for specific impeachment)

3. Fourth amendment violation. *Walder v. United States*, 347 U.S. 62 (1954) (statement elicited in violation of Fourth Amendment and

22. 15 Nov PART SEVEN: UNDERCOVER INVESTIGATIONS

I. Entrapment Analysis

A. Issues. **CB at 504-6.**

B. Objective Approach: Limits on Outrageous Government Conduct. **CB at 506-14.**

1. Supplying essential ingredient. *United States v. Russell*, 411 U.S. 423 (1973)(held that where undercover narcotics agent who was investigating defendant and his confederates for illicitly manufacturing a drug offered them essential ingredient which, although difficult to obtain, was legal to possess and was obtainable, and where criminal enterprise of unlawfully manufacturing and processing the drug was already in process, agent's contribution of the ingredient to such criminal enterprise did not violate fundamental fairness shocking

to universal sense of justice, mandated by due process clause of the Fifth Amendment).

C. Subjective Approach: Predisposition.

1. Supplying criminal intent. **CB at 514-18.** *Jacobsen v. United States*, 503 U.S. 540 (1992)(held that Government did not establish that defendant, who had received mailings from the Government purporting to be from organizations asserting individual rights, was predisposed to commit the offense prior to first contact 57-59by Government).

23. 17 Nov II. Elicitation of Self-Incriminating Statements

A. Fourth Amendment, Fifth Amendment, Sixth Amendment.

1. Cell mate. **CB at 521-29.** *United States v. Henry*, 447 U.S. 264 (1980)(held that defendant's incriminating statements made to paid informant who, while confined in same cellblock as defendant, had been told by government agents to be alert to any statements made by federal prisoners but not to initiate conversations with or question defendant regarding the charges against him were inadmissible as being"deliberately elicited" from defendant in violation of his Sixth Amendment right to counsel).

2. Inherent unreliability of jailhouse snitches. **Supp at 223:** *Kansas v. Ventris*, 129 S.Ct. 1841 (2009)(rejecting a per se exclusionary rule of jailhouse snitch's uncorroborated testimony).

3. Pending trial. **CB at 528-29.** *Kuhlmann v. Wilson*, 477 U.S. 436 (1986)(Sixth Amendment does not forbid admission of accused's statements to a jailhouse informant who is placed in close proximity but makes no effort to stimulate conversations involved in crime charged, and (5) it was error for Court of Appeals to determine that police had deliberately elicited prisoner's incriminating statements where state courts had found to the contrary).

4. Undercover surveillance as a search. **CB 530-35.**

Hoffa v. United States, 385 U.S. 293 (1966)(false friend); *United States v. White*, 401 U.S. 745 (1971)(wired false friend).

24. 22 Nov III. Interrelationship Between the Fourth Amendment and Fifth Amendment

Review Justice Black's concurring opinion in *Mapp v. Ohio*, 367 U.S. 643; **CB at 58-68. *Schmerber v. California*, 384 U.S. 757 (1966)(limiting Fifth amendment protection to testimonial evidence). Note: the excerpt in the casebook will be inadequate for classroom discussion. Therefore students should download, read, and bring to class the full opinion.**

Read: TWEN #40 Fourth Amendment Issue Outline; TWEN #50: Fifth Amendment Issue Outline; and TWEN #60 Sixth Amendment Issue Outline.

24-27 Thanksgiving Break. No classes scheduled.

25. 29 Nov PART EIGHT: GRAND JURY INVESTIGATIVE FUNCTION

I. Fourth Amendment Protection

A. Subpoena Power.

1. Subpoena ducus tecum issued by grand jury. **CB at 536-555.** *United States v. Dioniso*, 410 U.S. 1 (1973)(voice exemplars); *United States v. Mara*, 410 U.S. 19 (1973)(handwriting examples). Supp at 180-82.

II. Fifth Amendment Protections At Grand Jury

A. Immunity.

1. Use and derivative use. **CB at 549-554 ns 1-4.** *Kastiger v. United States*, 406 U.S. 441 (1972)(held that although a grant of immunity must afford protection commensurate with that afforded by the privilege against compulsory self-incrimination, it need not be broader, and immunity from use and derivative use is coextensive with the scope of the privilege and is

sufficient to compel testimony over claim of privilege. The Court also held that in any subsequent criminal prosecution of a person who has been granted immunity to testify, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of compelled testimony).

2. Attorney client privilege. **CB at 554-5 n5.** *Fisher v. United States*, 425 U.S. 391 (1976)(held that taxpayers' Fifth Amendment privilege was not violated by enforcement of documentary summons directed toward their attorneys, for production of accountants' documents which had been transferred to attorneys in connection with an Internal Revenue Service investigation, whether or not the Amendment would have barred a subpoena directing taxpayers to produce documents while they were in taxpayers' hands, and fact that attorneys were agents of taxpayers did not change result; and that compliance with a summons directing taxpayers to produce accountants' documents, which were not taxpayers' "private papers," would involve no incriminating testimony within protection of Fifth Amendment, and thus such documents were not, under theory of attorney-client privilege, immune from production in hands of taxpayers' attorneys to whom they had been transferred in connection with Internal Revenue Service investigation.

B. Collective Entity Doctrine.

1. Fifth Amendment are rights of private individuals. In *Hale v. Henkel*, 201 U.S. 43 (1906)(corporate records are not private and therefore not subject to Fifth Amendment protection).

2. Piercing corporate veil. *Braswell v. United States*, 487 U.S. 99 (1988)(held that president of corporation could not interpose Fifth Amendment objection to compel production of corporate records, even if act of production might prove personally incriminating).

C. Act of Production Doctrine. **CB at 549-555.**

1. Testimonial aspects to act of production. *Fisher v.*

United States, 425 U.S. 391 1976(testimonial aspects to act of production are afforded Fifth Amendment protection); *United States v. Doe*, 465 U.S. 605 (1984)(sustained finding of testimonial aspects to records, which defendant owned).

2. No testimonial aspects to signing release. *Doe v. United States*, 487 U.S. 201 (1988)(Signing bank form).

3. Required records exception. *Baltimore v. Bouknight*, 493 U.S. 549 1990(applied a required records exception to testimonial aspect to act of production).

D. Miranda Warnings at Grand Jury?

1. No protection for grand jury testimony. **CB at 555-565:** *United States v. Washington*, 431 U.S. 181 (1977)(held that testimony given by a grand jury witness suspected of wrongdoing may be used against him in a latter prosecution for a substantive criminal offense even though defendant is not informed in advance of his testimony that he is a potential defendant in danger of indictment). Supp 163-165.

2. Immunity. **Supp at 225-27:** *United States v. Hubbell*, 530 U.S. 27 (2000)(the constitutional privilege against compelled self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena seeking discovery of those sources).

26. 1 Dec PART NINE: SIXTH AMENDMENT RIGHT TO COUNSEL AT CRITICAL STAGES

I. Sixth Amendment Trigger

II. Eyewitness Identification

A. Sixth Amendment.

1. Physical line-up is critical stage. *United States v. Wade*, 388 U.S. 218 (1967) Brennan (post-indictment physical line-up without notice to and absence of Sixth Amendment counsel is *per se* reversible).

2. In-court identification after defective line-up. *Gilbert v. California*, 388 U.S. 263 (1967)(establishing a ed a *per se* exclusionary rule for courtroom identification where the witness testified that he had picked out defendant at a defective lineup).

3. Pre-indictment line-up. *Kirby v. Illinois*, 406 U.S. 682 (1972)(Sixth Amendment right to counsel does not attach until prosecution has been initiated and therefore pretrial confrontation before charging does not violate Sixth Amendment).

4. Photo array. *United States v. Ash*, 413 U.S. 300 (1973) Counsel is not required at a post-indictment photo array as the risks inherent in the use of photographs are not so pernicious that an extraordinary system of safeguards is required.

Read CB 566-588; Supp 228-31.

B. Fourteenth Amendment.

1. Pre-indictment and pre-arrest. *Stovall v. Denno*, 388 U.S. 293 (1967)(upholding a pre-indictment, pre-arrest show-up using a "totality of the circumstances test." The Court stressed that victim's desperate medical condition made confrontation imperative).

2. Accuracy as paramount concern. *Manson v. Brathwaite*, 432 U.S. 98 (1977)(held that lineup procedure whereby accused was first placed in lineup with considerably shorter men and after no positive identification was made a one-to-one confrontation was arranged with robbery victim who made only a tentative identification until a subsequent lineup at which victim identified accused, who was the only man who had been in first lineup, was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process.

C. Fifth Amendment Due Process.

1. Applying due process standards to eye-witness identification procedures. *Foster v. California*, 394 U.S. 440 (1969)(held that lineup procedure whereby accused was first placed in lineup with considerably shorter men and after no positive identification was made a one-to-one confrontation was arranged with robbery victim who made only a tentative identification until a subsequent lineup at which victim identified accused, who was the only man who had been in first lineup, was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process).