**4TH AMENDMENT SEARCH AND SEIZURE**

① Whether a search and seizure is governed by the 4th Amendment

㋐ Is there government conduct?

　(1) **Public paid police** who are on or off duty

(2) Private citizens but only if acting **at the direction of the police**

(3) Privately paid police but only if **deputized with the power to arrest**

・児童ポルノの証拠を集めるために自主的にハッキングして証拠を警察に提出→OK

警察に報酬を約束され同じ行為をすれば？→OUT　∵ at the direction of the police

㋑ The search or seizure? trigger the 4th amendment?

**A search occurs when state action intrudes into a reasonable expectation of privacy.**

1) investigatory trespass against a person or their property

investigatory = for the purpose of gathering evidence of a crime

2) intrusion into a **reasonable expectation of privacy**

a) D must exhibit a subjective expectation (by making effort to shield) and

b) the expectation is objectionably reasonable.

**The Third Party Doctrine**

People who voluntarily give information to third parties—such as banks, phone companies, [internet service providers](https://en.wikipedia.org/wiki/Internet_service_provider), and e-mail servers—have "no reasonable expectation of privacy."

① Wiretapping and Eavesdropping 原則は令状がいる∵search，以下は例外

※令状はmust name the person, must specify the conversation and must be for a

strictly limited time period.

Katz v. US (1967)　電話ボックス外側設置マイクでの盗聴はsearch ※2)がsearchと初認定

Wiretapping of telephone calls made **in a public telephone** booth constituted a search and therefore required a warrant.

※　刑務所内ではプライバシーの期待は無いから盗聴OK

United States v. White, (1971)　会話**with false friend**の秘密盗聴はＯＫ

Recording conversations using [concealed radio transmitters](https://en.wikipedia.org/wiki/Covert_listening_device) worn by informants

does not violate the [4th Amendment](https://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution) protection.

“However strongly D may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent.”:

Smith v. Maryland (1979):　　電話利用記録装置データもＯＫ

Law enforcement’s use of a pen register — a device that records the numbers

dialed by a phone — did not constitute a search.

“Because Smith had voluntarily conveyed numerical information to the telephone

company and ‘exposed’ that information to its equipment in the ordinary course of

business,” “A pen register differs significantly from the listening device employed”

② Account records held by a bank

United States v. Miller, (1976)

Documents voluntarily conveyed to a bank could be shared with the government.

Couch v. United States, (1973)

D did not have a reasonable expectation of privacy in **business records**

**turned over to an accountant.** (who then turned them over to the IRS)

**Other things exposed to the public**

③ Monitoring the location of vehicles (even electronically) in public places

(but cannot use the monitoring devices in homes.)

US v. Knotts (1983)　 発信機をつけた物を運搬する車を追跡することはOK

・違法薬物搬送を疑い同人が購入する物品に発信をつけて同車を警察が追跡

The Court ruled that a "person traveling in an automobile on public thoroughfares has no reasonable [expectation of privacy](https://en.wikipedia.org/wiki/Expectation_of_privacy) in his movements from one place to another”. Such information—the starting point, the stops one made, as well as the final destination—was voluntarily conveyed to anyone.

⇔US v. Karo (1984) – surveillance by beeper in a container **in home** not OK

④ Search of Open Fields and buildings in them (exception for curtilage)

Open fields = unoccupied and undeveloped area outside the curtilage

Oliver v. US (1984) – Open Fields Doctrine and curtilage.

Not search. Even if the field is fenced with no trespassing signs.

D growing marijuana on farm in field more than a mile from home, posted with “**No Trespassing**” signs.

→Not a search “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”

US v. Dunn (1987)

Cops cross several barbed wire fences and a wooden fence, look into a barn and see evidence of amphetamine production.

→OK ∵the barn was outside the curtilage.

“curtilage questions should be resolved with particular reference to four factors”

1) Distance 2) Enclosure by Fence 3) Nature of Use 4) Protection from Observation

→The barn was separated from the house by a fence and was a substantial

distance away from the house (60 yards). Thus, not curtilage.

In [Florida v. Jardines](https://en.wikipedia.org/wiki/Florida_v._Jardines) (2013)　front porchで犬を使って麻薬をかがすのは×

The curtilage may not be used by a [police dog](https://en.wikipedia.org/wiki/Police_dog) to sniff for [marijuana](https://en.wikipedia.org/wiki/Marijuana)

We therefore regard **the area "immediately surrounding and associated with the home"**—what our cases call the curtilage—as

"intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened."

※ “backyard”通常reasonable expectation of privacyの保護範囲

BACKYARDS: Privacy expectations in most backyards are usually higher.

“porch”は微妙 People v. Superior Court (1974) 37 Cal.App.3d

FRONT YARD, PORCH: Walking on the front yard or porch is not considered

intrusive because “a front yard is likely to be crossed at any time by door-to-door

solicitors, delivery men and others unknown to the owner of the premises.”

前提：use of trained animals is not search when the smell is exposed to the public

※犬に車をかがせるのはOK (Illinois v. Caballes:2005)⇒公道から家をかがせる場合は未決。technology not in a general public useを家に使うのは違憲と判例があ

るがdog sniffing is not technology.またintimate detailsは明らかにならない。

なお，一定の信用性がありprobable causeにもなる (Florida v. Harris:2004)

In [Collins v. Virginia](https://en.wikipedia.org/wiki/Collins_v._Virginia) (2018)

Motor vehicles parked within the curtilage do not qualify for the [motor vehicle exception](https://en.wikipedia.org/wiki/Motor_vehicle_exception) for a warrantless reasonable search.

⑤ Aerial surveillance

Rule: If the surveillance 1) occurs from public navigable airspace 2) is conducted

in a physically nonintrusive manner 3) does not reveal intimate activities

traditionally connected with the use of home, ⇒ not search

US v. Ciraolo (1986)

**naked-eye** aerial observation of a backyard within the cartilage of

a home does not constitute a search under the 4th

(１０フィートの壁で囲まれ見えないようにしていた庭をのぞいた事件)

Dow Chemical Company v. United States (1986)

4th Amendment protection involves the invasion of areas where intimate activities occur, whereas "the open areas of an industrial complex are more comparable to an open field”→上空からのaerial mapping cameraでの工場施設撮影

OK ∵1) commonly used in mapmaking, not unique sensory device,

2) commercial property.

⑥ 現代技術

Kyllo v. US (2001) the use of a thermal-imaging device

It aimed at a private home form a public street to detect relative amounts of heat constitutes a “search”. 大麻栽培用ハロゲンランプ調査

Rule –the government uses a device that

1) **is not in general public use,**

2) to explore details of the home that would previously have been

unknowable without physical intrusion,

The surveillance is a search.

United States v. Jones. (2012) GPS

GPS monitoring for 28 days constituted a search because the placement of the GPS

monitoring device on the suspect’s car constituted a physical intrusion (trespass).

※ trespass doctrineを用いてKats test用いず違憲判断。

少数意見はKats testを用いて２８日の監視はunreasonableと結論

⑦ Abandonment

The garbage set out on the curb for collection　Ca. v. Greenwood

POST-PURSUIT ABANDONMENT:

This occurs at the end of a car chase when the suspect bails out and leaves the evidence

inside the vehicle.

PRE-ARREST ABANDONMENT

It often happens that a suspect, having suddenly become aware that he is about to be

arrested, detained, or searched, will toss the evidence away.

EVIDENCE LEFT AT CRIME SCENE

A defendant who fled the scene of his crime will ordinarily be deemed to have abandoned

any evidence he left behind because it is highly unlikely that he will return to claim it

(“Excuse me, but I forgot my burglar tools.”)

DISCLAIMERS AND DENIAL

It often happens that a suspect will tell officers that he does not own, possess, or control a

container in which drugs or other evidence was found.

⑧ その他 ・Paint on the outside of the car

・Odors emanating from the luggage (Sniff test)

**Seizure**:

seizure of properties =meaningful interference with a possessory interest in the property

⇒ 破壊行為等もseizureにあたりうる

seizure of persons =後述

㋒ Standing To have “standing” to challenge the lawfulness of a government search and

seizure, an individual’s **personal privacy rights must be invaded**. (not those of a third party）

※ Aへの違法な捜索に基づきBを逮捕→Bの権利は侵害されていないからBは証拠排除不可

※ 共犯者が違法な捜索を受け，同押収物が共犯者との関係で証拠排除されても他の共犯者との

関係では証拠排除されない。

※ 信号無視及び無免許で運転手が逮捕され, 車内捜索でマリファナ発見→ 同乗者は排除請求×

※ 隣の家に忍び込み, そこから被疑者の家内のマリファナ発見。それに基づく令状を取り捜索

⇒被疑者にstandingなし,令状は有効 Murray v. United States (1990)

**Inside homes**

automatic Standing = 1) the suspect lives on premises searched

2) the suspect owns premises searched

3) overnight guests on premises

※ ホテルの部屋の捜索は，宿泊者の承諾又は令状必要（判例）

FAMILY MEMBERS: All members of the family will ordinarily have standing

PERSON IN TEMPORARY CONTROL

: A person who has been given temporary exclusive control over the premises by the owner.

(such as a babysitter or caretaker) will ordinarily have standing.

INVITEES WITH GENERAL PRIVILEGES

: An invitee who is allowed to use certain rooms or areas in the residence at will may have a

protectable privacy interest in those places even though he does not stay overnight.

U.S. v. Haydel The homeowner’s adult son had standing because he was permitted to store

his things there, and because he had been given a key to the premises.

CASUAL VISITORS

: People who have been invited inside—including, of course, guests who came to plan or engage

in criminal activity—will not have standing.

**Motor vehicles**

STANDING TO CHALLENGE THE CAR STOP

: When officers make a car stop, everyone in the vehicle has standing to challenge the

justification for the stop.

PASSENGERS: STANDING TO CHALLENGE SEARCHES:

: A person who was merely a passenger will, of course, have standing to challenge an intrusion

into his personal belongings. He may not, however, challenge searches of other places and

things in the vehicle, such as the glove box, under the seats, or the trunk.

※ a week-long guest on a long drive may have standing.

※ He must be a victim of the unreasonable search and seizure.

Rukas v. Illinois (1978) Start of new approach. 以降ほぼstanding = search

　　　Passenger of the car unlawfully searched cannot suppress the rifle found in the locked glove

　　　 compartment of the car.

∵ No standing. No legitimate expectation of privacy in the invaded place

② Whether a search and seizure satisfies constitutional requirements.

　　 warrant 無し→ 後述

warrant 有り→ the warrant creates a presumption of reasonableness.

㋓　(1) Was the search authorized by a valid warrant?

or (2) Does an officer’s “good faith” save the defective search warrant?

㋔　Was the search warrant properly executed by the police?

　　㋓⑴ 1) **Probable cause** : A fair probability that contraband or evidence of crime

will be found in the area searched.

2) **Particularity** : The search warrant must specify the place to be searched

and the items to be seized.

3) issued by **neutral and detached** magistrate.

× the executive branch such as the state attorney general

× magistrate who receive a fee only for each warrant issued

× a judge who accompanies officer’s investigation

〇 non-lawyer court clerks

What is Probable Cause in detail ?

It exists when there are sufficient facts,

within an officer’s personal knowledge and from a reasonable reliable

information,

that he believes

(1) in the case of arrest the person arrested committed an offense,

(2) in the case of search, a specifically described item will be found in the

place to be searched.

Mere evidence rule is abolished

Police can seize, (1) a fruit of a crime (2) instrumentalities of a crime, (3)

contrabands and (4)“mere evidence” that have only evidentiary value in

the apprehension or conviction of a person.

Traffic Offence

Officers may make an arrest for a minor traffic offense or can use the

traffic violation to stop the car and conduct an investigation.

The probable cause is determined objectively. Hidden motives are

irrelevant.

Informant’s Tip

Informant’s tip (even if he is anonymous) can support probable cause

if 1) carried with enough indicia of reliability or

2) corroborated by police. 適当な規範. 判例は総合事情を考慮して決定.

Subjective belief

Mere subjective belief does not constitute the probable cause, however

expertise of an officer may constitute the probable cause.

- officer familiar with area, smell of look of narcotic

⑵ GOOD FAITH EXCEPTION ~ exception of exclusionary rule

If an officer believes in “**good faith**” that he had valid warrant, the evidence

obtained by search is not excluded.

　US v. Leon(1984) good faithの意義明確化

Probable causeを欠くとして無効にされた匿名情報に基づくsearch warrantに基

づく証拠は排除されるか

Rule: if a reasonably well-trained officer would have believed that the

warrant was valid (not subjective test), → not excluded

Exceptions

1) The affidavit underlying the warrant is so **lacking in probable cause** as to

render official belief unreasonable.

2) The warrant is deficient on its face. (lacking particularity, such as “all stolen goods”)

3) The officer **lied to** or **mislead** the magistrate.

4) The reasonable officer knows the magistrate is **not neutral and detached.**

㋔⑴ Did the officers **exceed the scope** of warrant?

Michigan v. Summers (1981)

- have authority to detain occupants of premises while executing search warrant.

⑵ Did the police comply with the “**Knock and Announce**” rule?

Police must knock and announce their identity before entering a home to execute a warrant.

<Exception> 1) futile, 2) dangerous, or

3) leading to the flight of the suspect or the destruction of evidence.

US v. Banks (2003)

Knock wait 15-20 seconds / Bust down door / cops afraid ∆ flush coke

→OK: Exigent circumstances allow the break if reasonable in totality of facts.

**Warrant exceptions　※ここまではarrestでも同じ**

**前提　probable cause arrest & full scale intrusion to find evidence (Automobile exception)**

**reasonable suspicion brief investigatory seizure or cursory search**

**no reasonable suspicion search incident to arrest, protective sweep, special needs**

　(1) Exigent circumstances (2) Search incident to arrest (3) Automobile

(4) Consent 　(5) Plain View 　 (6) Terry Stops and Frisks

(7) Special Needs

**(1)** **Exigent circumstances** - **it only lasts as long as the emergency exists.　　exigent＝緊急の**

**rule:** police may make a warrantless search and seizure, (※including entry to home)

that was necessary to **prevent**

① **physical harm** to the officers or other persons,

② the **destruction** of relevant evidence,

③ the **escape** of the suspect.

\*once exigency ends, the police may no longer search without warrant.

\*there must be probable cause.

\*this exception cannot apply if the police creates the exigency by engaging in conduct

that violates the 4th Amendment.

= ②Evanescent Evidence

Evidence that is likely to disappear before a warrant can be obtained.

Ex. A police officer can scrape under a suspect’s fingernails without getting a warrant

because defendant might wash his hands.

※ May be used in conjunction with plain view exception

③Hot pursuit of a fleeing felon (few minutes behind) may make a warrantless search and

seizure and may even pursue the suspect into a private dwelling of a non-suspect.

※ Mincey v AZ (US, 1978)　　 × 犯人追っかけて４日アパート捜索は長すぎ

Welsh v. WI (US, 1984) × 交通違反の証拠確保目的で家に上がって逮捕はやりすぎ

The gravity of the suspected offense is a factor

IL v. McArthur (US, 2001) 〇 マリファナ所持容疑者を令状取得まで２時間restrain

Brigham City v. Stuart(2006) 〇「あの家から銃声が！」窓から倒れている人見つけて突入

Police may enter a home without a warrant if "the officers had an objectively reasonable basis for believing that an occupant is seriously injured, the injured adult might need help.

　 　→その後のprotective searchもOK(search incident to arrestと同じ要件)

**(2) Search incident to arrest**

**A police officer**

**1) who makes a lawful custodial arrest**

**2) may conduct a contemporaneous warrantless search of**

**a) the arrestee’s person b) the area within arrestee’s control** (his wingspan, lunging area)

Justification: (i) ensure the **safety** of the officer or (ii) to **preserve evidence**.

probable causeはもちろんreason不要, flow automatically from the arrest itself

※ custody for the minor offenseでもcustodyが合法であればＯＫ, シートベルトしないで逮捕

するstate lawがあればＯＫ（そのようなstate lawも合憲Atwater v. Lago Vista;2001）

※ arresteeが動けばwingspanも動く。裸で逮捕したので，服を着せるためにリビングに連れて

いった場合に，同所を捜索することもＯＫ。

US v. Robinson (1969) 初めて認めた判例

　may search an arrestee although they have no reason to believe that weapons or criminal evidence will be found.

無免許運転で警察署に連行しpat-downで何かを発見し取りだすと麻薬。

　people who violate traffic laws are less likely to possess dangerous weaponsという

級審判断を却下。A search incident to arrest requires no additional justification

**If arrest occurs in a home,**

The police may also conduct a warrantless search of **closets and other spaces immediately adjoining the place** of arrest from which an attack could be immediately launched.

Maryland v. Buie (1990) **Protective Sweep**:**上記規範**

Officers may “as a precautionary matter and **without reasonable suspicion**, look in closets and other spaces **immediately adjoining** the place of arrest”

・not for weapons or evidence → contain a human beingな場所の捜索だけＯＫ

・may extend only to a cursory inspection of those spaces where a person may be found.

※ 人が隠れようもないクローゼットの中の箱内の捜索は不可

※ once an arrestee is removed from his home, a search is no longer justifiable

※**Terry** v. Ohio (1968) から以下が通説　– harbor=かくまう

to look in additional areas not immediately adjoining the scene, there must be **articulable suspicion** that the area swept harbors an individual posing a danger to those present.

= When the police enter an area and make a valid arrest, they make a protective sweep of

the area beyond the D’s wingspan if they believe accomplice may be present.

**If the police arrest a person in a vehicle or recent occupant of a vehicle**,

The police may also conduct a warrantless search of **the passenger compartment of the vehicle**, 1) if the arrestee sill may gain access to the interior of the car or 2) the officers **have reason to believe** that **the vehicle contains evidence** of the offense of the arrest.

(even if the arrestee does not have immediate access to it.)

NY v. Belton (1981)

Fact: An officer stopped a car for speeding. He smelled marijuana and saw an envelope.

He removed occupants from the car and searched the car and found a leather

jacket, and unzipped a pocket of it, they found cocaine.

Issue: May an officer lawfully search a car without a warrant after the occupants are

separated from the vehicle and under arrest?

→　OK including **all containers**. (The trunk and engine compartment fall outside)

Thornton v. US (2007)

怪しい車が逃げ出し，追いかけていくと，parking lotに停車して, Ｄが下りてきた。

D was outside vehicle when O first accosted him→Hold; recent occupantでもBelton rule apply.

Arizona v. Gant (2009) 歯止め判例

　Fact: D parked his car in a driveway and exited his vehicle and lawfully arrested for a driving on a suspended license. After O handcuffed D and placed him in their squad car, they went on to search his vehicle.

Hold: police may search the vehicle of its recent occupant after his arrest only if it is **reasonable to believe** that the arrestee might access the vehicle at the time of the search **or that the vehicle contains evidence** of the offense of the arrest.

　　→手錠されておりgrabbing areaでないこと明白，無免許証拠が発見される合理的理由なし⇒違憲

**(3) Automobile Exception**

**Police may search an automobile** or any other self-propelled conveyance **without**

**warrant 1) so long as** they have **probable cause** to believe that there is **contraband or**

**evidence** of crime in the automobile 2) including **all containers** and trunk that may

reasonably contain the item for which he has probable cause to search.

※ This probable cause must arise before the search (×before the car is pulled over)

※ Inapplicable if it absolutely cannot move, しかし警察署にあっても，動く車なＯＫ

Unoccupied automobile もＯＫ，住居兼自動車でも同じ

※ Probable causeにより範囲は限定 → 盗難テレビ捜索理由でglove compartment (ダッシュボードの小

物入れ) の捜索は不可。また，同テレビが発見されれば捜索は中断する必要あり。

※ Probable cause = specifically described item will be found in the place to be searched

Police cannot search a car even if he saw the driver hided **something**.

Wyoming v. Houghton (1999) 同乗者の財布内までOK

　　　 Fact : During a routine traffic stop, an officer noticed a syringe (注射器，スポイト) in the driver’s shirt pocket, which the driver admitted using to take drugs. The officer then searched the passenger compartment and her purse. The officer found drug there.

Hold: 合憲 ∵When there is probable cause to search for contraband in a car, it is

reasonable for police officers to examine containers or a passenger’s belongings capable

of concealing contraband. without an individualized probable cause.→OK

(原審：違憲 ∵He lacked [probable cause](https://en.wikipedia.org/wiki/Probable_cause) to search her purse)

※ トランク内も基本ＯＫ (ちなみにinventory searchesもOK)

search incident to a lawful arrestは×∵not wingspan

stop & friskも×∵not imminent danger

**(4) Consent consentあればsearchでない ∵no violation of reasonable expectancy**

**Rule: Valid consent justifies an officer in conducting a warrantless search without probable cause. To be valid, 1) the consent must be voluntary and intelligent,**

**and 2) the scope of the search must not exceed the consent granted.**

1) “voluntary” means free from police coercion.

(assessed based on the totality of the circumstances)

×gained by asserting a fake warrant, a threat to do something the officer has authority to do

×consent of obtained following an unlawful seizure is invalid ∵the fruit of poisonous tree

“intelligent” does not require the defendant to be informed of his right to refuse consent.

Third Party Consent

Where two or more people have, or are reasonably believed to have equal right to use a piece of property, then any one can consent to a warrantless search.

If both people are present and one consents to the search and the other does not consent, then the one who does not consent controls.

Il. v. Rodriguez (1990) – **3rd party’s consent OK if the officers reasonably believe.**

Georgia v. Randoloph (2006)

D's wife told the officers that D was a cocaine user, and consented to the search.

However, D objected to the police request.⇒Ｄが反対した以上searchは違憲

2) Scope of search

FL. v. Jimeno (1991) – **consent to search car = consent to search packings in car**

Fact : stop on routine traffic stop / ask to search / OK / open paper bag/find coke

Jimeno : argued that his consent didn’t extend to search within containers and packages.

Hold : Consent given to search a car also allows officers to search bags in the car

※ a container too small to hide the object to the searchを開くのはダメ

※ 麻薬持っているか調べてＯＫというconsentで紙ファイルを開くのはダメ

Lewis v. United States (1966)

An undercover federal narcotics agent, by misrepresenting his identity on the telephone, was twice invited to the home of petitioner for the purpose of executing unlawful narcotics transactions.

Held : The facts of this case present no violation of the Fourth Amendment.

When the home is opened as a place of illegal business to which outsiders

are invited for commercial purposes, the Fourth Amendment is not violated

when a government agent enters pursuant to an invitation.

**(5) Plain View**

The Police officer may make warrantless seizure under the plain view exception.

The exception requires

1) the officer to be **lawfully present** at the place where the evidence can be plainly viewed,

2) the officer to have **a lawful right of access** to the object, and

3) the **incriminating character** of the object to be “**immediately apparent**”.

※Plain view does not expand the scope of searches → Weed in window, can’t walk into house and get plant.

Arizona v. Hicks (1987) ×ステレオのシリアルナンバー見るためにturn over

∵Physically moving a suspicious object without probable cause

**(6) Terry Stops and Frisks**Terry v. Ohio (1968)

① Terry Stop = brief seizure for the purpose of investigating suspicious conduct

An officer can stop and seize a person without probable cause, if he has an **articulable and reasonable suspicion** of involvement in criminal activities (= a reasonable belief based on articulable information that the suspect has engaged or is about to engage in

criminal activity).

　　※逮捕に近い行為であり, 証拠発見のreasonable suspicionではなくinvolvement in criminal activity

　　　Reasonable？ 　　　personal observation, informant’s tip (even if he is anonymous)

carried with enough indicia of reliabilityがあればＯＫ

Illinois v. Wardlow(2000) 犯罪多発地帯で警察を見て逃げだす→reasonable suspicionあり(5-4)

area of heavy narcotics＋nervous, evasive behavior

　　　Length of duration？ = necessary to effectuate the purpose of the stop.

If it is not seizure but arrest, probable cause is necessary.

US v. Sharpe(1985)　 20 minutes is OK, but in special situation. 通常は数分

US v. Montoya(1985) エックス線検査を拒否されたため16時間,トイレは自由にして狭

屋にdetainしてsearchはＯＫ (special case at international border)

Rodriguez v. United States (2015)

違反切符を切ったあと10分犬に車内をかがせる→unlawful seizure, stopの目的が終了すれば，reasonable suspicionがない限り, 解放すべき

Forcible Movement of the Suspect

Dunaway v. New York, (1979) De fact arrest if police transport him to a police station.

Florida v. Royer, (1983)

Police transported Royer to small room forty feet away where the investigation continued.

It was in the airport → Arrest

※ 当然路上の質問すべてが禁止されるわけではない, coercive factor

not request to stop but order to stop

② Terry frisk＝A limited search for weapons

An officer can **frisk a person** if he reasonably believes the suspect is **armed and dangerous.** Frisk is generally limited to patting down the outer clothing. (a reasonable suspicion that a suspect is armed and dangerousが必要)

※ During a Terry frisk,

an officer finds a weapon⇒ it can always be seized.

　 an officer finds something she recognizes as contraband **without manipulating** the

object (e.g. a crack pipe) ⇒ she can seize it as well. : Plain touch doctrine

**A traffic stop**

= essentially the same as a Terry stop.

**Police officer can stop a car with a reasonable suspicion to believe law has been violated**

(OK in violation of a traffic law); **and can briefly search the passengers and the passenger**

**compartment for weapons upon reasonable suspicion they are armed or dangerous.**

※ Passengers – have NO standing – No REP

Pennsylvania v. Mimms, (1977)

Whenever a police officer lawfully stops a vehicle, even for a minor offense, it is reasonable for the officer to order the driver to exit (step out from) the vehicle without no additional justification.

Drivers may be searched for weapons upon reasonable suspicion they are armed and dangerous. (passengerも同様＝Marylandv*.* Jerry Lee WILSON*,*:1997 )

Knowles v. Iowa, (1998)

Police may conduct a "Terry pat-down" of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon. pat-down=ボディーチェック

Extending Terry ~ weapons search of automobiles

Michigan v. Long (1983)

Fact: Officers observed D driving erratically（不規則に）at night, and swerved

into a ditch. D got out of his car. 警察の質問を無視して車に乗り込もうとする

のでついていくとfound a hunting knife on the floor of the car. "Terry"

pat-downしても武器無し. A "protective search" of the car実行

　　　　　　　　　　 →The [Supreme Court](https://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States) extended to allow searches of car compartments

during a stop with reasonable suspicion.

**(7) Special Needs**:Searches **without any individualized suspicion**

**〇 to protect the public from imminent danger ×general crime control**

1) **special needs**, beyond the normal need for law enforcement, exist

2) the warrant and probable-cause requirement are **impracticable** in a given context.

　3) **necessary to** balance special needs against invasions of individual privacy.

Henderson v. City of Simi Valley (Cal)

DV禁止法の命令に基づき，娘が母の家から所持品を移動する際にofficerが手伝う→〇

**Roadblocks or Checkpoints**

(1) stop cars on the basis of some **neutral, articulable standard**

(2) be designed to serve purposes closely related to a particular **problem pertaining to**

**automobiles and their mobility**. ×for general crime prevention

例：嫌疑なくrandom stopさせたら助手席に麻薬が見えたので逮捕は×

※ 自動車特例，歩行者には適用ない

Delaware v. Prouse (1979) : 犯罪多発地帯でもrandom stopは不可

P may not stop motorists without any [reasonable suspicion](https://en.wikipedia.org/wiki/Reasonable_suspicion) to suspect crime or

illegal activity, to check their driver's license and auto registration.

Michigan Department of State Police v. Sitz (1990)

**Sobriety checkpoint** did not violate the Fourth Amendment.

Applying a balancing test: the government interest and the effectiveness of the program outweigh the degree of intrusion into privacy.

"substantial government interest" to advance in stopping drunk driving, and that this technique was rationally related to achieving that goal. the impact on drivers, such as in delaying them from reaching their destination, was negligible, and that the brief questioning to gain "reasonable suspicion" similarly had a negligible impact on the drivers' Fourth Amendment right.

Indianapolis v. Edmond (US 2000) 麻薬影響運転チェックポイント

Vehicle checkpoints in an effort to intercept unlawful drugs

→Where a vehicle checkpoint program is designed **primarily** to uncover evidence of criminal wrongdoing, such program constitutes an unlawful search and seizure in violation of the 4th Amend.

・some measure of individualized suspicionが必要

・A special category of searches are excluded from the reasonable

requirement where they are required to serve “special needs, beyond the

normal need for law enforcement.”→逃走中犯人捜索目的ならたぶんＯＫ

Illinois v. Lidster (US 2004)

Facts:ひき逃げ事件発生を受け, the police set up a highway checkpoint designed to obtain more information about the accident. It randomly stopped cars. (ひき逃げの一週間後)→飲酒運転発覚

⇒Information-seeking highway stops do not **per se violate** the 4th Amend.

Special law enforcement concerns will sometimes justify highway

stops without individualized suspicion. 別判例だが以下の総合考慮

1) The gravity of the public concerns,

2) The degree to which the seizure advances the public interest,

and 3) The severity of the interference with individual liberty.

**Inventory Searches** of arrestees or their vehicles pursuant to established department procedure

⇒その間に車から麻薬見つければplain viewでseizure OK

**International border searchers**, **Airport searches**

Probable cause is not required for the custom officers’ search of international mail  
non-routine border search = reasonable suspicion必要

**Custody-related searches** Employee drug testing- Student searches (Middle, High, College)

※これだけ常にreasonable suspicion必要

**Administrative Searches** (investigatoryでないので別項目という考えもある)

United Statesv*.* Biswell*,* (1972)

Warrantless search of locked storeroom during business hours as part of inspection procedure authorized by **the Gun Control.**

"It is... plain that inspections …pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this **pervasively regulated business** and to accept a federal license.”

Colonnade Catering Corp. v. United States (1970) licensed dealers in alcoholic beverages.も同じ

※ **Body Intrusions**

The due process clause requires searches within a person’s body to be reasonable which

involve **balancing Society’s Need** against the **magnitude of the intrusion**.

・Giving blood may be ok, but not to remove a bullet in defendant’s spine.

Schmerber v. Ca (1966)

Taking a blood sample for drunk driver is OK without warrant.

1. Not against 4th Amendment because of Exigent circumstance.
2. Not against 14th Amendment because it is rarely painful or traumatic.

Drug Tests

・Ok for railroad employees involved in an accident

・Ok for public school students who participated in extracurricular（課外の) activities

・Ok for persons seeking employment from a public employer

**ARRESTS** (Other Detentions)

Seizure – A seizure occurs when a reasonable person would believe that she is **not free to**

**leave** or **terminate an encounter with the government**.

by 1) physical force used to restrain a suspect or

2) a show of authority followed by submission.

uniform, weapon, number of officers, use or tone of language, physical touching

….などからの総合判断

[Florida v. Royer](https://en.wikipedia.org/wiki/Florida_v._Royer) (1983)

Rule: the police could approach a suspect in a public place (an airport concourse)

and ask him a few questions and request to consent to search luggage without

violating the 4th Amendment.

⇒航空券を返さずに事務所まで来てくださいと言って連れていけばseizure

Florida v. Bostick (US 1991)　 Unreasonable seizure? 原審をreverse and remand

Facts: police officers displaying badges and a gun boarded a bus and questioned

Bostick, a passenger, without reasonable suspicion. One officer stood in front of Bostick’s seat, blocking his access to the aisle. They informed him of his right to refuse consent to the search, but Bostick consented. Found cocaine in suitcase

Rule:× a per se rule that every encounter on a bus is a seizure.（原審）

〇　a reasonable passenger would not feel free to terminate the questioning

　　　　　　　　　　　 ※ A consensual encounter does not trigger Fourth Amendment scrutiny.

Even when officers have no basis for suspecting a particular individual,

they may generally ask the individual questions.

Dissent: (ruleは同じ): The officers wore jackets displaying the logo of the Sheriff's Department and brandished their badges. One of them carried a gun. They cornered Bostick at the back of the bus, blocking the aisle so that Bostick could not leave.

→it was obvious that Bostick was not free to terminate the encounter with the police.

Bostick had been unreasonably seized before they posed that question to Bostick,

his consent was irrelevant.

Arrest – When the police take a person into **custody against their will** for the purpose of

**criminal prosecution or interrogation**.

Arrests in a PUBLIC – Must have **probable cause**. NOT need an arrest warrant.

(Common Lawではmisdemeanorは現行犯逮捕のみOK)

Arrests in a HOME – Non-emergency arrest of an individual in his own home, requires

an arrest warrant.

※ 被疑者不在が分かっていればwarrantあっても×

the arrest warrant authorized forcible entry only if the officers had

reason to believe that the person is at home at the time of entry.

※ Station house detention – need probable cause to bring a person to the station for

questioning or fingerprinting.

※ Hot pursuit – Police chasing a fleeing felon may make a warrantless seizure and can

follow suspect into a private dwelling.

(or other exigent circumstances of warrant exception apply)

**EXCLUSIONARY RULE**上記違反があった後の問題state lawは適用外

Can prosecutors use the evidence gathered in an unconstitutional search and seizure against the defendant in court?

**Under the exclusionary rule, evidence obtained in violation of the fourth amendment may not be introduced at trial to prove guilt.**

※ 不当逮捕でも起訴は却下されない: an unlawful arrest does not serve an adequate reason to dismiss an indictment.

大陪審では証拠能力のない証拠も採用され起訴される。違法収集証拠に基づく起訴も却下されない｡

Exception

　　① Case-in-chief vs. cross-examination: ② Certain proceeding exempted:

③ “Knock and Announce” violations: 　④ An officer's “reasonable" mistakes:

**1. Case-in-chief vs. Cross-examination**:

To Impeach the credibility of DEFENDANT’S OWN testimony (Not a witness of D)

May impeach defendant with: (inconsistent with testimony)

Improperly Mirandized statements

Pre or Post arrest **unMirandized** silence

Unconstitutionally seized evidence

May NOT impeach with:

Coerced Confessions (In violation of Due Process)

Post Mirandized silence

6th amendment right to counsel violations

**2. Certain proceeding exempted**:

Grand Jury Proceedings (Except for Federal Wiretapping)

Civil cases

Parole revocation hearings.

**3. “Knock and Announce” violations**:

Hudson v. Michigan (2006)

The evidence seized as a result of violation of knock and announce rule will

not be excluded.

**4. An officer's “reasonable” mistakes**:

When police rely in good faith on:

1) Judicial opinion later changed by another opinion

2) Statute or an ordinance later declared unconstitutional

3) Defective search warrant (詳しくは上述，good-faith exception)

**Fruit of the Poisonous Tree**

Under the fruit of the poisonous tree doctrine, evidence **derived from** an unconstitutional

search and seizure will also be inadmissible, unless an exception applied.

Ex. an illegal interrogation that leads to physical evidence

Coerced a confession/ found weapon based on the info

illegal search of car / found marijuana/ obtain a warrant/ find more in home

(but-for connectionが原則テスト)

　　一般的例外 only applied to fruit of the poisonous tree, not direct unreasonable search!

① **Independent source** of discovery for that evidence

**・**when the challenged evidence has an independent source

② **Inevitable discovery** by police

　　・Police would have discovered the evidence lawfully despite the unconstitutional act

・①②もbut-for connectionがない場合。違いは微妙だがこちらはhypothetically independent

　　 Nix v. Williams (1984)　Right to counsel違反の自白に基づき死体を発見。別の

チームが既にa few miles of discovered corpseであった。

③ **Attenuation** : so distant from the initial illegality as to dissipate the taint.

≒Intervening act of free will by D.

・①②と異なり, proximate causeの問題

※ 不当逮捕後の自白が典型的問題

※ 1) the distance, 2) the passage of time,

3) a different office discovered,

4) a valid Miranda warning, などから検討

※ Intervening acts of freewill of the defendant が最大問題

　　 　 Miranda warning alone cannot always make the act of confessing a product of free will

　　　 Kaupp v. Texas (2003)

　　　　 深夜３時に家に行き，probable causeなく‟we need to go and talk”と伝え，手錠

をして警察署に連れていき, Miranda warning後, すぐに殺人の自白獲得。

　　　　　　　　　　　　⇒1) a reasonable person would not feel free to ignore the police→arrest

　　　　　　　　　　 2) his confession must be suppressed unless the State can show that it was

an act of free will sufficient to purge the primary taint of the unlawful

invasion. The only relevant consideration supporting the State is the

observance of *Miranda,* but such warnings alone cannot always break the

causal connection between the illegality and the confession→ remand

他の例外

④ Knock and Announce Rule

⑤ Miranda Violations

– No real or physical evidence exclusion obtained as a result of a Miranda violation.

Miranda violationでinadmissibleになりうるのはconfessionのみ

　　Harmless Error

– If illegal evidence is admitted, a resulting conviction should be reversed on appeal

unless the government can show beyond a reasonable doubt that the error was harmless.

(Does NOT apply to the right to counsel at trial – NEVER harmless error)

**CONFESSION**

Confessionが排除される４例:

① 1)Involuntary statements by Due Process Clause

≒2)Compelled self-incrimination by the 5th Amendment (州には14修正で適用)

② Confession obtained in the violation of Miranda v. Arizona

③ Confession obtained in the violation of D’s right to counsel

※ 普通は解釈により第５修正で認められるMiranda right to counsel, 第６修正も含む

④ As fruits of illegal conduct

**① 14th Amendment Voluntariness**

・To be admissible, the Due Process Clause of the **14th** Amendment requires

that a confession be **voluntary,** determined by **the totality of the circumstances**

(the 5th and 14th amendment protect individuals against compulsory statements)

**手段**　　 1) Actual or threatened use of physical force

2) Psychological pressure

3) Promises of leniency and threat of harsh legal treatment

※通常いずれか単独では任意性失わない

4) Deception

※deception alone-lying to the suspect-will almost never invalidate a confession.

Ilinois v. Perkins(1990)　placing an undercover officer in a jail cell where he

purposely elicit incriminating statementはOK

**考慮事項**1) D’s health, age, intelligence 2) location and duration of the interrogation

　　　　　 3) number of police officers 4) D’s experience 5) the use of deception

**効果** → If police officers violate the Due Process Clause, any statements made by the

suspect will be suppressed under the exclusionary rule.

※ 弾劾目的でも不可

※ 毒樹の果実などexclusionary ruleは通常通り適用

※ Standing is a requirement

Arizona v. Fulminante (1991)

The government proves that the erroneous admission of the confession did not

affect the outcomeであればwrongful admissionがあってもreversal不要

**5th Amendment privilege against self-incrimination**

**No person…shall be compelled in any criminal case to be a witness against himself,**

**1) No person**  ※ corporationは含まれない. incriminatingな文書提出等強制できる。

**2) shall be compelled**

・interrogation ではthe two concepts -compulsion and involuntariness- are not distinguishable

・forced to testify at trial, to produce incriminating documentは許されない。

※ painless blood testを拒否すれば，同事実は，刑事訴訟で不利益利用してよい (最高裁,1992)

※ 犯罪事実が記載されている手帳はcannot be compelled produce to the grand jury by a

subpoena duces tecum unless immunity is granted to the defendant.

**3) in any criminal case**

・失職や民事上の拘禁に利用され得る発言について第５修正特権の主張は不可

⇔一方で条文と異なり，将来の刑事訴訟での不利益恐れがあれば民事訴訟，大陪審，行政手

続，取調等一切の手続で主張可能

(民事の証人も麻薬の影響で信号見てなかったのでは？という質問を拒否できる)

**・**IF the witness answers **any incriminating questions** (even during a civil proceeding), he

cannot later bar that evidence from being used against him in a criminal proceeding.

**4) to be a witness against himself,**

Protects a defendant against **testimonial incrimination** (×make you take lie detector test)

The clause does not apply to real or physical evidence

1) human voice or handwriting for identification purpose

2) **production of documents**

3) the **collection of** [**DNA or Fingerprints**](http://criminal.findlaw.com/criminal-procedure/how-dna-evidence-works.html)

・It is unconstitutional for Prosecutor to make a **negative comment** on the D’s **failure to testify** or his remaining silent on hearing the Miranda warning.

Pennsylvania v. Muniz (1990) 5-4.絶対多数意見無し

Muniz's videotaped confusion and slurred speech indicating his drunkenness.

を証拠にできるか？（ミランダ警告がなかったので任意性はないのが前提）

・compelled answers about his name, address, date of birth as part of a

sobriety testはadmissible ∵ physical evidence of intoxication

・Answer to the question regarding the date of his sixth birthday is testimonial. → inadmissible

**Waiver:** the privilege will be waived by answering the question by police

その他

　　　　・The Supreme Court has held that if a defendant voluntarily testifies at the trial that he did not commit the crime, his confession may be introduced to challenge his credibility, to "**impeach**" the witness, even if it had been obtained without the warning.

　　　 ・In [Hiibel v. Sixth Judicial District Court of Nevada](https://en.wikipedia.org/wiki/Hiibel_v._Sixth_Judicial_District_Court_of_Nevada) (2004), the Supreme Court ruled 5–4 that being required to identify oneself to police under states' [**stop and identify statutes**](https://en.wikipedia.org/wiki/Stop_and_identify_statutes) is not an unreasonable search or seizure, and is not necessarily self-incrimination.

・Defendants are entitled to assert the privilege against compelled self-incrimination in a civil court case→ But, The Supreme Court has held that "the Fifth Amendment does not forbid

adverse inferences against parties to civil actions.”(刑事訴訟法的な民事訴訟は除く)

Privilege may be Eliminated

**Grant of Immunity**

**Derivative Use Immunity**

– Prohibit the **use of the witness’s testimony** against him

May still be prosecuted for the crimes he was forced to testify about

例：友人と強盗をしたとuse immunityに基づき大陪審で証言

→ 同証言に基づき友人から証言をとっても同証言は利用不能 ∵useしている

**Transactional Immunity** called TOTAL immuniy

– Prohibit any future prosecution of the witness for the transaction that is the subject

of the testimony.

However, the D may still be prosecuted by an alternative sovereign but they may not use the immunized testimony nor any evidence that may have been derived from it.

**No Possibility of Incrimination** – i.e. Statute of Limitations has run

Already been **convicted** or **acquitted** and can’t be retried for the crimes for which

he is being asked to give information.

A witness who has been granted immunity but refuses to offer testimony to a

federal grand jury may be held in contempt.

Kastigar v. United States, (1972)

The Court ruled that the grant of use and derivative use immunity is sufficient.

② **5th Amendment - Miranda Rights**

(The Supreme Court has ruled that the 5th applies to not only the trial but also police interrogations.)

The 5th Amendment protects a person from being forced to incriminate oneself

　 The protection is applicable to the state through the 14th Amendment.

Additionally, under the 5th Amendment, **anyone in custody must be given**

**Miranda warnings prior to interrogation by the police.**

**1) IN CUSTODY**

formal arrest or “the deprivation of freedomof action in any significant way.*"*

(to a degree associated with formal arrest.)

※ Arrest > Custody > Terry stop

i.e. Being in police car or in jail you are in custody.

NOT Probation interviews, tax audit interviews or routine traffic stops.

例：スピード違反で停止させた段階ではcustodyではないので，ミランダ警告な

しに，尋問してもOK

※ 裁判終了後の受刑者はnot in custody for the purpose of interrogation

Stansbury v. California, (1994) → custody認定

　 殺人事件調査中の警察が夜に参考人(目撃者と考えていた)の家に行き, 警察署に連れ

ていき質問したところ参考人が自白。その後ミランダ警告。その後黙秘。

　　　　 　→the officer’s intent was irrelevant to the determination of whether a person being interrogated is “in custody”.

Berkemer v. McCarty (1984) → custody認定せず

Fact: An officer observed D’s car weaving, then, stopped D and asked D if he had

consumed any intoxicants. D said that he drank two beers.

Hold:　　　1) Miranda applies to custodial interrogations involving minor traffic offenses.

2) Routine questioning of motorists detained pursuant to traffic stops is not

custodial interrogation under Miranda.

Orozco v. Texas (1969) → custody認定,普通は家ではcustodyないが朝4時！

At about **4 a.m**. four police officers arrived at petitioner's boardinghouse, were admitted by an unidentified woman, and were told that petitioner was asleep in the bedroom. All four officers entered the bedroom and began to question petitioner.

Oregon v. Mathiason (1977) → custody認定せず

The officer left his card at D's apartment with a note asking him to call because “I'd like to discuss something with you.” The D did call. The officer asked where it would be convenient to meet. The D had no preference, so the officer asked if the D could meet him at the state patrol office.

"The officer met D in the hallway, shook hands and took him into an office. The D was told he was not under arrest. The door was closed. The two sat across a desk. The officer told D he wanted to talk to him about a burglary. The officer further advised that the police believed D was involved in the burglary and [falsely stated that] D's fingerprints were found at the scene. / 5mintutes / And confession

→not "deprived of his freedom of action in any significant way." **he came to the police station freely and was free to leave at any time.**

“coercive environment.” is not irrelevant ※批判も多い判例

**2) INTERROGATION**

express questioning and any conduct that are reasonably likely to **elicit an incriminating statement** (Miranda does not protect spontaneous statements).

Rhode Island v. Inni*s* (1980)

ショットガン強盗犯被疑者をパトカーで移送中。警察官同士の会話で

“a lot of handicapped children in this area” “God forbid one of them might find

a weapon with shells and they might hurt themselves.”

→was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped childrenを知らなければinterrogationでない。D' statement were viewed as voluntary and thus not barred by the [Fifth Amendment](https://en.wikipedia.org/wiki/Fifth_Amendment_to_the_United_States_Constitution).

**Warnings** ※right to silenceとright to counselを同時に保証する。

1) right to remain silent

2) anything you say can and will be used against you

3) you have the right to an attorney

4) if you cannot afford one, you have the right to have an attorney appointed for you

**3) WAIVER**

Waiver must be 1) **Voluntary**, 2) and done **Knowingly, and Intelligently**.

1) free from public coercion (low threshold, same as 14th amendment violation)

2) understands the nature of his rights and the consequences of abandoning them.

※ Old rule: No waiver of Miranda rights from **silence** or shoulder shrugging.

Sometimes, firm answers of "yes" are required.

BUT the Supreme Court ruled 5–4 that police are allowed to interrogate suspects

who have invoked or waived their rights ambiguously.

Berghuis v. Thompkins, (2010)

Facts: Police properly advised Thompkins of his Miranda rights. He appeared to

understand the rights but refused to sign a Miranda form. P then interrogated

him for three hours.  During the interrogation, he was largely silent, but near

the end, he answered “yes” when an officer asked if he prayed for God’s

forgiveness for shooting the victim.

Rule : Any statement given during questioning prior to invocation is admissible.

Invocation: The mere act of remaining silent is insufficient to imply the

suspect has invoked their rights.

Waiver : A voluntary reply even after lengthy silence can be construed as

Thompkins waived his Miranda right to remain silent when he

"knowingly and voluntarily" made a statement to the police.

[Colorado v. Connelly](https://en.wikipedia.org/wiki/Colorado_v._Connelly), (1986)

精神障碍者がミランダ警告を聞いた上で行った殺人の自供はadmissible

Suspects reasonably appear to understand what they are doing and are not being coerced into signing the waiver → The Court ruled that it is irrelevant whether the suspect may actually have been insane at the time. ∵the rule is meant to deter police.

**4) INVOCATION of RIGHT**

**The invocation must be unequivocal.**

To be effective, D must assert her rights unambiguously.

○: “ I don’t want to talk to you,”×: “maybe I should talk a lawyer”

Colorado v. Connelly (1986)

×“Maybe I should talk to a lawyer”,それに対して“Are you sure?”と質問してOK

その後の自供はfree from public coercionでなければadmissible.

US v. Kelly, (8thCir 1983)

D’s initial invocation of right to counsel was invalid because he was not in

custody; thus, it posed no barrier to further interrogation and waiver.

**Right to Remain Silent**

**If the suspect invokes his right to remain silent, police officers must**

**scrupulously honor his right and must cease question.**

前提:“If a suspect receives adequate Miranda warnings, understand them and has an opportunity to invoke the rights”, the interrogation can continue until the suspect invokes one of the right, even if the suspect has not yet waived the rights.

Re-initiation

The re-initiation of interrogation is not a per se violation of Miranda rights.

Michigan v. Mosley (2010)

Detective began to question Mosley, but he immediately stopped when

Mosley said that he did not wish to speak about the robberies. A few hours later, Other detective brought Mosley out from his cell to question him about the recent murder, and Mosley was again informed of his Miranda rights.→ the Court held that Mosley’s invocation of his right to silence had been honored because the interrogation ceased as soon as he stated he

did not wish to continue, he was read his rights again before interrogation

was re-initiated, and a significant amount of time passed between the two interrogations (他a different officer, different location, different crime).

**Right to Counsel stronger than above**

**If the suspect invokes his right to counsel, police officers must cease all**

**questioning and cannot re-initiate the interrogation without his counsel**

**present,**

**unless 1) the suspect re-initiates the contact with police** Edwards v. Arizona, 1981**or**

**2) two weeks have passed since release and the suspect is given a new**

**Miranda warning.**

**Invocation of right to counsel is not offense-specific.**

Arizona v. Roberson, (1988)

Three days after invocation, D was approached by a different officer who was

unaware of initial invocation and questioned about a different crime⇒inadmissible

　　　　 再開可能例外　1) D re-initiates the contact with police.

「水が欲しい」では当然ダメだが，“a willingness and a desire for a

generalized discussion about the investigation”がindirectlyでもあれば

　 よいと広く解釈

Oregon v. Bradshaw, (1983)

Fact: After invoking right to counsel, D said, “what is going to happen to

me now?” officer told him he would be taken to the station house

and charged; officer also suggested that he might help himself by

taking a lie detector test. D agreed, and after new Miranda warnings

were given, D took the test and subsequently confessed

Held: D re-initiates the contact, then no violation of Edwards rule.

Intelligently waivedは認められる⇒破棄差し戻し

2) Two weeks have elapsed and the suspect is given a new Miranda warning

Maryland v. Shatzer, 559 U.S. 98 (2010)

If you choose to invoke your right to an attorney and **are released**

**from custody**, law enforcement can attempt to question you again

after two weeks. ※ 裁判終り受刑後2週間すれば同様にOK

\*Waiver will not happen if police re-initiate the interrogation ignoring the invocation of

Miranda right. (論文で注意)

**6) PUBLIC SAFETY EXCEPTION**

Police officers need not give Miranda warnings “in a situation posing a threat to the

public safety.” 例: “Where is the gun!?”

[New York v. Quarles](https://en.wikipedia.org/wiki/New_York_v._Quarles), (1984)

A police officer **arrested** a rape suspect who was thought to be carrying a firearm in an open but empty grocery store. He found an empty shoulder holster, handcuffed the suspect, and asked him where the gun was. The suspect said, "The gun is over there".

※ そもそも現場に到着した警察官が「何をしたんだ!」と聞いてOK ∵not in custody,

上記は逮捕後に聞いてもOKというところがポイント

**7) EFFECT of MIRANDA VIOLATIONS**

In general, Statements are barred by the exclusionary rule.

Impeachment

May be used for impeachment of the suspect’s testimony 　

∵different from 5th Amendment privilege rule (by coercionは常に×)

[Harris v. New York](https://en.wikipedia.org/w/index.php?title=Harris_v._New_York&action=edit&redlink=1), (1971) 　 a confession obtained in violation of the Miranda standards may

be used for purposes of impeaching the defendant's testimony

Oregon v. Hass (1975) 　　 D was arrested/ Miranda warning/ D asked to call his attorney

/ D wants attorney/ cops continue interrogation in the police car

/ get confession/ Holding: can be used for impeachment purposes

Fruit of poisonous tree

No fruit of the poisonous tree exclusions

Oregon v. Elstad (1985)

incriminating statement prior to warning. second statement after warning allowed in.

US v. Patane (US 2004)

Dを令状逮捕。Miranda warningしようとしたら「俺の権利は分かっている」としてさえ

ぎる。警察が銃の場所について聞くと「寝室にある，好きに調べろよ」と回答

下級審：銃を排斥 (１審: arrestにprobable causeなし ２審: fruits of a poisonous tree)

最高裁 : ミランダ警告なしの供述を端緒とした物的証拠はadmissible

**③b. 6th Amendment – Right to Counsel**

The right to have the Assistance of Counsel for his defense

In all criminal prosecutions, **the accused** shall enjoy the right … to have the

assistance of counsel for his defense.

**When**: In all criminal prosecutions?

Kirby v. Illinois, (1972)

The right attaches “at the commencement of **formal judicial proceedings**”

[Rothgery v. Gillespie County](https://supreme.justia.com/cases/federal/us/554/191/opinion.html" \t "_blank) (2008)

For a person who is arrested, the beginning of formal judicial proceedings is at

“a criminal defendant’s initial appearance before a judicial officer”

For all defendants, the commencement of prosecution, “whether by way of

formal charge, preliminary hearing, indictment, information, or arraignment,”

signals the beginning of formal judicial proceedings.

※ pre-indictment plea negotiationsに全く適用無いかは下級審は分かれている.

**What occasion**

・Right attaches at all **critical stages of prosecution**

〇 at in-person lineups and show-ups (×pre-charge lineups.)

× photo line ups, taking handwriting samples

※ 弁護士を呼べと言われても無視してミランダ警告なしに筆跡サンプルを書かせてOK

[Rothgery v. Gillespie County](https://supreme.justia.com/cases/federal/us/554/191/opinion.html) (2008)

“Once attachment occurs, the accused at least is entitled to the presence of

appointed counsel **during any ‘critical stage’ of the post-attachment**

**proceedings** . . ..”

**Effect**: Police officers cannot **question a D** unless the D’s attorney is **present.**

※ May question regarding unrelated, uncharged offenses.

Prohibit **Deliberate elicitation** of an incriminating response.

Brewer v. Williams (1977)

D was charged with murdering a little girl. “will not talk about the case without an attorney present”と述べているan accusedを護送中に. Detective, *who knew Williams was religious*, initiated a discussion on the importance of a Christian burial for the victim.→自白獲得

⇒Once adversary proceedings have commencedのdeliberate elicitation×

US v. Henry(1980)

Paid informant, a fellow inmate, engaged in conversations with D while he was incarcerated after indictment that led to a confession.→although government agents instructed informant not to question D about his crime, the informant was an active participant in conversations with D ⇒

The statements made in the course of these conversations are inadmissible

**Waiver**

As in Miranda, waiver must be voluntary, knowing, and intelligent. (VKI)

Patterson v. Illinois, (1988)

*Miranda* warnings, if understood, can establish knowledge necessary for

valid waiver of 6th amendment rights.

**②との違い**

Attach 　　　　5th : can apply before an individual has been arrested,

　6th : not triggered until after criminal proceedings have begun.

　Scope 　5th : not offense-specific：forbids police to question a suspect on any matter

　6th : offense-specific → police may question the suspect on unrelated matters

Custody 　5th : custodial interrogationに適用

6th : custodyでなくても適用

　Prohibit 5th : Interrogationに適用, 客観判断.

An undercover officerに適用ない∵捜査段階であり幅広い手法を認める必要

6th :Deliberate elicitationに適用，主観判断

An undercover officerにも適用 ∵公判段階であり弁護人立会を認める必要

その他の憲法上の権利

[**4th**](https://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution) **amendment　prohibition against unreasonable** [**searches and seizures**](https://en.wikipedia.org/wiki/Search_and_seizure)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

[**5th**](https://en.wikipedia.org/wiki/Fifth_Amendment_to_the_United_States_Constitution) **amendment**

**Indictment of a Grand Jury**

**Prohibition against** [**double jeopardy**](https://en.wikipedia.org/wiki/Double_jeopardy)

Any person shall not be subject for the same offence to be twice put in jeopardy of life or limb

A defendant cannot be **retried**

1) for the same offense

2) by the same sovereign (may be prosecuted by a Federal court and a state court)

When Jeopardy Attaches

Attaches 1) when the defendant pleads guilty

2) in a jury trial when the jury is sworn

3) in a judge trial when the first witness is sworn in

Exceptions Permitting Retrial

1) **Hung Jury**

2) **Defense Successfully Appeals**

**3) Breach of Plea Bargain by Defendant**

4) **Mistrial** for **Manifest Necessity**

– ex. D suffers medical condition mid-trial ×裁判官が身内が病気で飛んで帰った

Same offense ?

Two crimes do NOT constitute the **same offense** if each crime **requires proof of an additional element** that the other does not. 要件に違いあればOK

例：殺人で無罪になった後に同一事件について強盗で起訴可能

　BUT Attachment of jeopardy for greater offense bars retrial for lesser included offense.

Attachment of jeopardy for a lesser offense bars retrial for the greater offense,

**exception**1) new evidence 2) unable to try both simultaneously

　 例　retrial for **murder** is permitted if the **victim dies** after attachment of

jeopardy for **battery**.

公判前と公判

１. 検察官がcomplaint (告発状)を司法官憲に提出し＝Charging (告発)により刑事手続開始

令状逮捕：Charging→令状発布→逮捕→booking

無令状逮捕；逮捕→booking(身柄登録)→検察官がcharge

2. 逮捕の場合は速やかに (通常２４時間以内) にjudge or magistrateの面前に引致 (initial appearance)。

公選弁護人を選任したり，予備審問期日を指定したり，保釈条件を設定したりする。

3. 裁判官によるpreliminary hearing. probable causeをチェック→information (略式起訴) or

⇒Grand jury手続をさらに行い (多くは予備審問を経ない)→indictment (正式起訴)

※ presentment =大陪審の職権による告発もある

4. 公開の法廷にてarraignment（罪状認否）⇒pre-trial, trialへ

**Pre-Trial Identification** – Two bases for attacking pretrial

種類　a) line-ups (standing in a line) b) Show-ups (one on one) c) photo array

A suspect may attack the pre-trial identification by claiming it violates

1) his 6th amendment right to counsel or 2) due process.

・A suspect has a right to counsel at any post-charge line-ups and show-ups ×photo array

・If pretrial identification is so **unnecessarily suggestive** and so **substantially likely** to

produce a **misidentification**, it violates his due process right.

※ essay: no 5th Amendment right to counsel because not elicit incriminating statement.

Remedy

原則 exclusion of the in-court identification

例外 the government can prove by **clear and convincing evidence**, that there was an

**independent source** for the defendant’s in-court identification.

Ex. witness viewed defendant close up for 40 minutes during commission of the crime.

**Grand Jury**

**・Exclusionary rules** do NOT apply. i.e. may consider excluded evidence

Proceedings of grand juries are secret

・D has No right to **notice** or to be **present** at a grand proceeding against him.

・D has No right to **introduce evidence** or **confront witnesses.** (only P present evidence)

・D has No right to have **counsel present.**

**Trial**

Speedy Trial

– Whether 6th right to speedy trial is violated depends on totality of circumstances.

Factors : 1) length of delay 2) reason for delay,

3) whether D asserted his rights　　　　　4) prejudice to D.

Remedy: Dismissal with prejudice.

※**Attaches once someone has been arrested or accused by formal charging.**

Unbiased Judge

D has right to unbiased judge.

Judge must have no **financial interest** in the outcome of the case or **actual malice** against D.

Right to Jury Trial

Anytime charged with offense that the **maximum authorized sentence exceeds 6 months**

the defendant have a constitutional right to jury trial.

・Also, **criminal contempt** if the sum of the sentences exceeds 6 months.

・No right for **juvenile** delinquency or for imposing **probation up to 5 years.** .

Number and Unanimity

Minimum number that works is 6. If you use 6, then must be **unanimous.**

No federally protected right to a unanimous 12 person jury verdict. (9-3 ok)

上記以外は判例不明，憲法上の要請であり，現実には連邦ではThe verdict must be

unanimous (rule 31).

Williams v. Florida (1970)　　　: ６人制刑事陪審も合憲

　 Colgrove v. Battin (1973) 　　: ６人制民事陪審も合憲

Bellew v. Georfia (1978) 　　　　 : ６人未満の刑事陪審は違憲

Apotican v. Oregon(1972) : １０対２の有罪評決は合憲

Johnson v. Louisiana (1972) : ９対３の有罪評決は合憲

Burch v. Louisiana (1979) 　　: ５対１の有罪評決は違憲

Cross-sectional requirement (6th amendment)

Right to have the jury pool reflect **a fair cross section** of the local community, but

NO right to have your own jury reflect cross-section of the community

Death Penalty Cases

Cannot automatically exclude jurors who are **opposed** to the death penalty unless their

opposition would substantially impair their ability to follow the court’s instructions.

・陪審員候補者が死刑に反対で死刑評決する自信ないと述べればexcuse for causeにはなり得る

**Right to counsel at trial and on appeal**

The right to appointed counsel

Indigents have the right to have counsel appointed for them at government expense.

Where an accused is deprived of his liberty = may not be imprisoned without counsel.

The right to representation by one’s preferred attorney

The 6th Amendment comprehends the right to select and be represented by one’s

preferred attorney.

Indigents has no right to choose their appointed counsel

No right to be represented by an attorney who has a conflict of interest.

The right to counsel on appeal

6th Amendment will not apply. No constitutional right to appeal (though every state permits)

The right to Effective Assistance of Counsel (Effective assistance is presumed)

Right to counsel of 6th amendment includes the right to effective counsel.

It is presumed. Thus, D must show both Deficiency and Prejudice.

1) **deficient** performance by counsel, and

2) but for the deficiency, the result of the proceeding would have been different.

※ D must point out specific deficiencies.

Cannot be based on inexperience, lack of time to prepare, the gravity of the

charges, complexity of defenses or accessibility of witnesses to counsel.

・判例: 死刑を否定する事情提出しなくても無理と考えたなら合憲

ファイルを見逃して提出しなければ違憲(但し要変更可能性)

The right of self-representation

　　 6th amendment right to counsel includes a right of self-representation.

The court **must** grant the right if the defendant is competent.

　　　 要件: 1) competent 2) not causing undue delay.

The right to the assistance of counsel must be waived voluntarily and knowingly.

　　　　 Timeliness of the Request

―A defendant must assert in timely fashion. No unduly delay.

Standby counsel = Advisory counsel

―A criminal defendant who proceed pro se has no constitutional right to assistance

of counsel.

The court may require the standby counsel at a sole discretion even over the

objection of the defendant.

**Guilty Pleas and Plea Bargaining**

・The Supreme Court has adopted the **contract theory** of plea bargaining.

The defendant has a right to rescission or specific performance.

・In a GUILTY plea the judge must advise D **directly and on the record**

1) **Nature of charge** 2) **Maximum authorized penalty** and any **mandatory minimum** penalty

3) The **constitutional rights the defendant is giving up** by pleading guilty (jury / counsel)

4) **Right** to plead **not guilty** and **demand a trial**

→ if there is a failure to meet the standard, D may withdraw his plea and plead again.

The Supreme Court will NOT disturb guilty pleas after sentencing, EXCEPT

1) Plea was **involuntary** (Some mistake in the pleading ceremony)

2) Lack of jurisdiction3) Ineffective Assistance of Counsel

4) Failure to keep the Plea Bargain (failure of P to keep agreed on terms of the plea bargain)

**8th Amendment ~ Death Penalty**

　 Violation of the 8th amendment’s prohibition of cruel and unusual punishment？

Cruel and unusual punishment= any penalty that is grossly disproportionate to the

seriousness of the offense committed.

**・**There can be NO **automatic category** for imposition of the death penalty.

**・**The state may NOT by statute **limit the mitigating factors**. ALL relevant mitigating

evidence must be admissible or the statute is unconstitutional.

＝Any death penalty statute that does not **give the defendant a chance** to present

**mitigating** facts and circumstances is unconstitutional.

・It is an unconstitutional violation of the prohibition against the imposition of cruel and unusual punishment not to exclude someone who, **at the time of the crime** was UNDER the age of **18**, or **mentally retarded**, or who at the time of execution is **legally insane**.

　＝①犯行時未成年者&精神障害者②執行時時無能力者への死刑は違憲

・Only a **jury** and NOT a judge may determine the **aggravating factors** justifying imposition

of the death penalty.

・The 8th amendment prevents the death penalty from being imposed for **rape** or **felony**

**murder**.

**6th Amendment Right to Confront Witnesses**

– Right in a **criminal** case to **confront adverse witnesses**.

・NOT an **absolute right** (e.g., protecting child witness from trauma, or removing disruptive D)

Right to Confront Witnesses Applies:

Introduction of a **Co-Defendant’s statement** implicating the other, unless

1) Portions relating to the D can be **eliminated**

2) The confession D takes the stand and subjects himself to cross examination

or3) The confession is used to **rebut** the D’s claim that his confession was **obtained coercively**

Any defendants have the right not to take a stand because of 5th Amendment rights

against self-incrimination.

If the co-defendant exercises this right, he cannot cross-examined, and the defendant’s

right of confrontation is violated.

One remedy is to try defendants separately.

**その他**

・２人が必要な犯罪で一人だけ罰する法律であれば他方は無罪

　例 prostitute and customer, seller of alcohol and buyer

・各要件事実すべて合理的疑いなく検察官が立証すべきなのは憲法上の要請

　一方，Affirmative defenseについては，被告人に立証責任を負わせてもよい。

・被告人有利なDirect verdictはOK. 被告人に不利な場合は不可。

　被告人の弁護人が異議を述べなくても裁判官が有罪評決をするよう指示することはできない。

・Felonyの被告人はmust be present at every trial stage (Rule 43)

→ Jury selectionに被告人を立ち会わせないのは違法