

# Evaluating “Reasonable Expectation of Privacy”

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- How has the employee exercised control over the property?
- Who else has access to the area or item?
- Who owns the item or property?
- Any policy regarding agency’s access to the area, item or property?
- What’s been the “actual practice” regarding agency access to workplace property?



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# Workplace Search must be “reasonable”

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- At the INCEPTION of the search
- During the SCOPE of the search
- Regarding the SPECIFIC ITEM being searched



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# Review

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- Searches are legal when they are reasonable.
  - What is reasonable is based upon *the totality of circumstances/facts* that led to the search.
- States may provide more protections than the U.S. Constitution (via state constitution, state statutes, state supreme court decisions).
- Items recovered during a legal search are admissible for any purpose in a criminal, administrative or civil case.



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# Review:

## Standards for Conducting Searches

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### Criminal

- Generally requires a **warrant**.
- **Probable Cause** – specific facts regarding: 1) basis of affiant's knowledge; 2) description of crime(s) committed; 3) specifics of place to be searched; 4) specific items to be seized.
- Generally, search is **limited** to scope of the warrant.

### Administrative

- **No warrant** requirement.
- **Reasonable Suspicion** – articulate facts that: 1) a possible violation of policy, rule, procedure occurred; and 2) items or evidence related to the violation may be located in the workplace area to be searched.
- The search is narrowly **limited** to the item(s) and workplace area where such items may be found.



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# Technology and the 4<sup>th</sup> Amendment

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# How about texting?

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# Electronic Communications: Different Rules?

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*City of Ontario v. Quon*, 560 U.S. 746 (2010)



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# *City of Ontario v. Quon,* 560 U.S. 746 (2010)

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- City had policy regarding e-mail, internet use, and cell phones –“no expectation of privacy.”
- Police department issued alpha-numeric pagers to SWAT team.
- Quon kept going over monthly allowance.
- Lt. and Chief reviewed text messages and found “sexting.”
- Sent to IA for administrative investigation.
- Quon and others disciplined.
- Quon and others filed civil rights suit.



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# *City of Ontario v. Quon,* 560 U.S. 746 (2010)

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- Court used ***O'Connor*** standard to determine whether PD's search was "reasonable."
- Court assumed that Quon had "a reasonable expectation of privacy" in the text messages.
- PD conducted a work-related search (audit of texts).
- Search of texts were reasonable AT THE INCEPTION based upon information known before search was conducted.
- The search was reasonable since the PD limited THE SCOPE of its search.



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# Impact of Technology

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- “The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” *Id.* at 759.



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# Diminishing Expectation of Privacy

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- **POLICY** – a reasonable policy is essential to diminishing an employee's expectation of privacy in the workplace. Such policy should be *in writing* and *specific to items subject to search*.
- **PRACTICE** – agency must actually and continuously insure actual practice in workplace.
- **ENFORCEMENT** – policy must be enforced by supervisors/managers.
- **NOTICE** – employees should be periodically noticed about the policy.



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# How about GPS Trackers?



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# Where is the law on GPS?

## *United States v. Jones, 565 U.S. 400 (2012)*

- **HOLDING:** The Government's attachment of a GPS device to a vehicle, and the subsequent use of that device to monitor the vehicle's movements, constitute a "search" under the Fourth Amendment.
- What does that mean? In practical terms, it means that law enforcement will need to get a warrant from now on if they want to use these devices in criminal investigations.



# *United States v. Jones*, 565 U.S. 400 (2012)

## THE FACTS

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- Antoine Jones, who owned and operated a night club in Washington D.C., was suspected of major narcotics trafficking.
- The FBI and the D.C. Metro Police task force conducted a joint criminal investigation.
- They obtained a warrant to install and monitor a GPS tracking device on Jones's vehicle.
- Problems with the execution of the warrant (location, length of surveillance, etc.).



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# *United States v. Jones*, 565 U.S. 400 (2012)

## FACTS (cont.)

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- Government conceded non-compliance with the warrant, but argued that the search was reasonable and supported by probable cause.
- Jones was tried in 2006 (hung jury) and again in 2007; eventually convicted of conspiracy to distribute and possess with intent to distribute more than 5 kilos of cocaine and 50 grams of cocaine base.
- Sentenced to life in prison.



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# *United States v. Jones*, 565 U.S. 400 (2012)

## THE LEGAL ARGUMENT

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- Jones moved to suppress evidence obtained from GPS.
- District Court suppressed GPS data obtained while vehicle parked at Jones's residence, but held remaining data admissible because Jones had no reasonable expectation of privacy on public streets.
- D.C. Circuit Court reversed, concluding that warrantless use of GPS violated the Fourth Amendment.



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# *United States v. Jones*, 565 U.S. 400 (2012)

## THE COURT'S HOLDING

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- All 9 justices agreed that the warrantless use of the GPS violated the Fourth Amendment.
- Majority opinion relied on physical trespass involved in installation of device on Jones's vehicle to conclude that a search occurred.
- Majority opinion is fairly narrow. Practical result is that warrant required for installation and monitoring of GPS on vehicle.



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# *United States v. Jones*, 565 U.S. 400 (2012)

## 9 -0 OPINION BUT NOT TOTAL AGREEMENT

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- Two concurring opinions, read together, suggest that some members of the Court see a need for tighter restrictions on electronic surveillance than simply physical trespass.



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# *United States v. Jones*, 565 U.S. 400 (2012)

## Changing the fact pattern...

- *Jones* involved police placement of GPS device and subsequent monitoring on a private vehicle.
- What about a public employer who uses GPS device already installed on a publicly-owned vehicle to track a public employee?
- In 2018, a federal district court in West Virginia concluded that installing and monitoring GPS on a government-owned and issued car was NOT a search under *Jones*.



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# *United States v. Jones*, 565 U.S. 400 (2012)

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## Bottom line:

- *Jones* is fairly narrow, but a majority of the court is strongly hinting that it is willing to restrict electronic surveillance that does not include physical trespass.
- Regardless, if you want to surreptitiously use GPS on a vehicle, get a warrant.
- Let's talk about cell phones ...



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# Cell Phones and Smartphones

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# Cell Phones and Smartphones

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- Search of cell phone incident to arrest?
- Using cell phone data to monitor a person's movements?



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# Where is the law?

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## ■ *Riley v. California* and *United States v. Wurie*, 573 U. S. 373 (2014)

- HOLDING: Court unanimously held that police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.



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# *Riley v. California,* 573 U.S. 373 (2014)

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- “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’ The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.” *Id.* at 403.



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# *Riley v. California,* 573 U.S. 373 (2014)

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- Law enforcement officials can still use the exigent circumstances exception to justify a warrantless search of a suspect's phone.
  - Example: a suspect preparing to detonate a bomb
  - Example: a suspect with information about the location of a missing child



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# *Riley v. California,* 573 U.S. 373 (2014)

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- “The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.” *Id.* at 402.
- Bottom line: You need a warrant (or exigent circumstances) to search a defendant’s phone post-arrest.

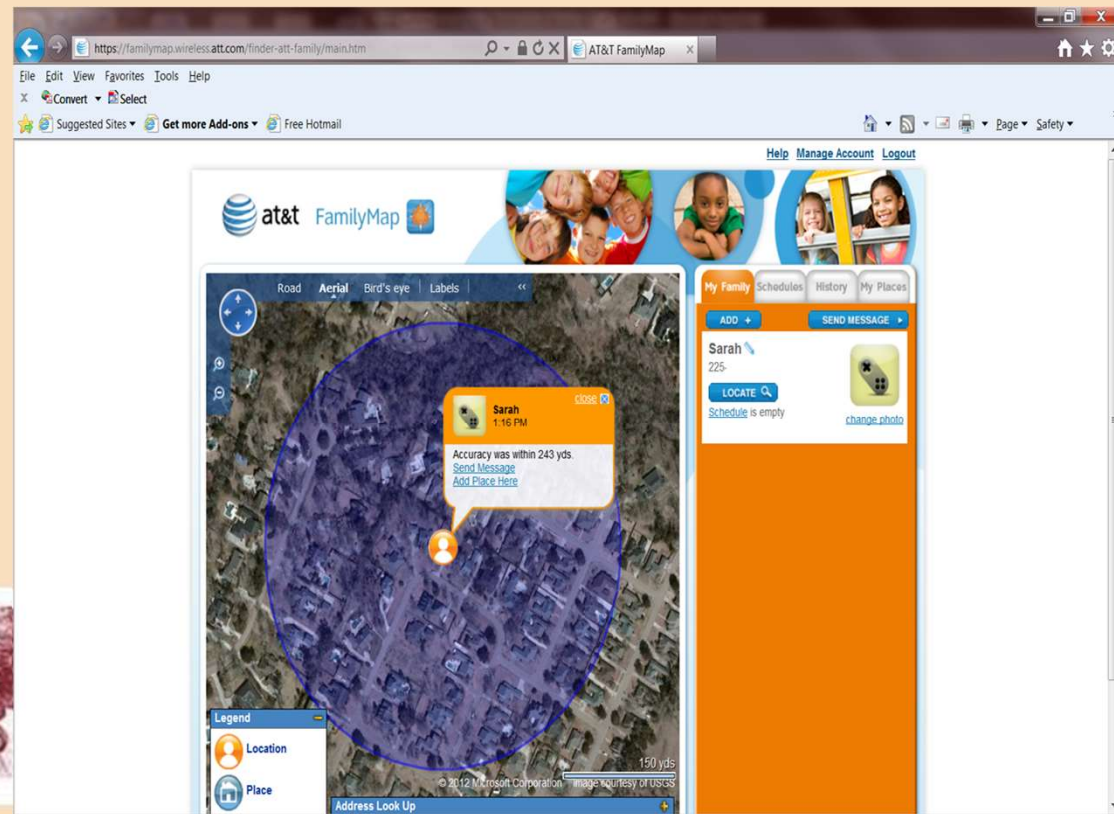


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# What about GPS tracking of smartphones?

- How many of YOU and your children have smartphones, iPads, etc.?
- AT&T Family Map ...



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# Cell phone GPS tracking

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- State and federal courts were split about whether defendants can be tracked using the GPS capabilities of their mobile phones:
  - 6<sup>th</sup> Circuit (*Skinner*) – no reasonable expectation of privacy in GPS data emanating from phone (defendant traveling on public roads, no physical intrusion)
  - D.C. Circuit (*Jones*) – use of cell-site simulator to locate and track defendant was invasion of his reasonable expectation of privacy in his location



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# *Carpenter v. United States,* 585 U.S. \_\_\_, 138 S. Ct. 2206 (2018)

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- Latest statement of U.S. Supreme Court re: 4<sup>th</sup> Amendment and cell phone data.
- In a 5–4 decision, **the Court held that the government violates the Fourth Amendment by accessing historical records containing the physical locations of cellphones without a search warrant.**



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# *Carpenter v. United States*

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- The Court held that **even though the cell phone location records are held by a 3<sup>rd</sup> party, individuals still maintain a reasonable expectation of privacy in the records of their physical movements.**
- This means that the defendant's location information was the product of a search and required a warrant.



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# *Carpenter v. United States*

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- The Court moved away from the physical trespass analysis used in *Jones* and emphasized that “individuals have a reasonable expectation of privacy in the whole of their physical movements.” *Id.* at 2217.
- These cell phone location records “present even greater privacy concerns than the GPS monitoring of a vehicle.... While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time.” *Id.* at 2218.



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# *Carpenter v. United States*

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- Bottom line: After *Carpenter*, government entities must obtain a warrant in order to access historical cell phone location records.



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# Where do we go from here?

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- Driving apps like Waze?
- Built-in GPS on personal vehicles?
- Data from fitness trackers?
- Where are the lines?
- Not much out there in terms of case law yet



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# *United States v. Warshak,* 631 F.3d 266 (6<sup>th</sup> Cir. 2010)

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- Case involving the Stored Communications Act, 18 U.S.C. § 2701 et seq. (SCA)
- Indicted on 112 counts of conspiracy, mail fraud, wire fraud, bank fraud, access-device fraud, and money laundering from fraudulent natural male enhancement drug.
- Warshak and multiple co-defendants convicted of large majority of counts.
- Warshak sentenced to **25 years** in federal prison.
- **\$500 million** asset forfeiture judgment.



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# What happened to Steve Warshak?

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# Why is the *Warshak* case important?

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- Email was a critical form of communication at Warshak's company (Berkley Nutraceuticals).
- Government obtained 27,000 of Warshak's emails from one of his private internet service providers.
- Government relied on the SCA to preserve the emails and did not inform Warshak. Government later obtained the emails by subpoena issued pursuant to the SCA.



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## Why is the *Warshak* case important? (cont.)

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- The court concluded that a Fourth Amendment violation DID occur: defendant had a reasonable expectation of privacy in the emails, and the government cannot compel his internet service provider to turn over the emails without first obtaining a warrant based on probable cause.
- However, the exclusionary rule DID NOT apply because the government relied in good faith on the SCA.



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# Bottom Line from *Warshak* case

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- If you want content and don't want to notify the target, get a warrant.

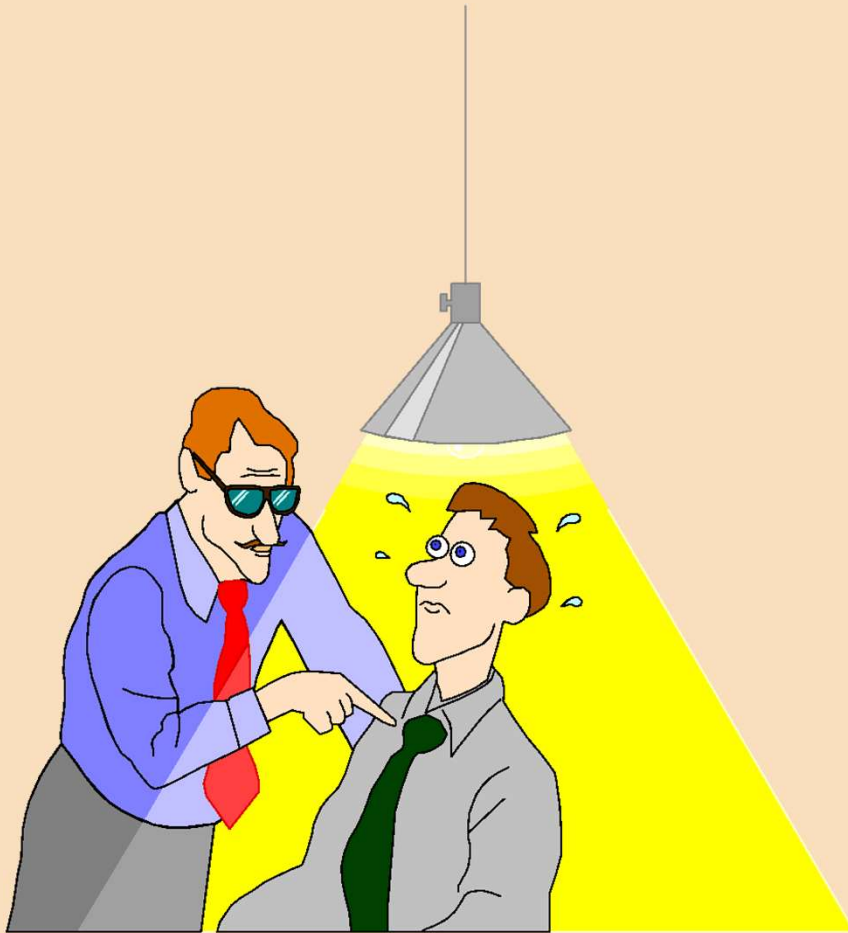


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# STATEMENTS

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## 5<sup>th</sup> Amendment Administrative and Criminal Investigations



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# Fifth Amendment

## *protection against self-incrimination*

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- *“No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”*



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# Overview

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## ■ 5<sup>th</sup> Amendment

### ● Criminal context

- Voluntariness
- *Miranda* (custodial interrogation)
- Waiver

### ● Administrative context

- *Garrity*
- *Kalkines*



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# When does the 5<sup>th</sup> Amendment apply?

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- It applies to all people whenever they interact with the government:
  - Civil or criminal
  - Formal or informal
- **Protects people from having to give testimonial evidence against themselves.**
- **What is testimonial evidence? Oral and written statements**



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# Self-Incrimination IS NOT:

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- Blood samples
- Handwriting exemplars
- Presence in a line-up
- Voice exemplars
- Business records
- Corporate records
- Partnership records
- The business records of a sole proprietor may be privileged



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# 5<sup>th</sup> Amendment Rights: *Non-Miranda*

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- Occurs during a criminal investigative interview (non-custodial)
- Any statement obtained must be **voluntary**:
  - You do not have to answer questions.
  - No disciplinary action for not answering.
  - Statements can be used against you in a criminal or disciplinary proceeding.



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# Voluntariness

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- The voluntariness of a statement is critical to whether the statement will be admissible at trial.
- Government must prove by a preponderance of the evidence that the statement was not obtained through psychological or physical intimidation, but rather was the product of a rational intellect and free will.
- Evaluate voluntariness under the totality of the circumstances.



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# Determining “Voluntariness”

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- Age, education, background, experience with the legal system, physical condition of the interview subject
- Location and/or time of day
- Statements / actions of the interview subject and the **interviewer** (This means us)



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# Examples of Involuntary Statements

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- Four-hour interrogation while defendant sedated in intensive care unit
- Defendant on medication interrogated for eighteen hours without food or sleep
- Police officer held gun to suspect's head to extract confession
- Promises of leniency



## ■ Deception



# “Proper” vs. Improper” Deception

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## PROPER DECEPTION

- Sympathy, compassion, understanding
- Reference to fictitious evidence
- Exaggeration of the evidence
- Minimization

## IMPROPER DECEPTION

- To obtain a waiver of rights
- To intimidate into a confession
- Promises of leniency
- Creation of physical evidence



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# Miranda (cont.)

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- *Miranda* is triggered only by CUSTODIAL interrogations.
- Custody = when law enforcement official formally places someone under arrest or deprives them of freedom in a meaningful way
- Test for custodial interrogation: Considering the **totality of circumstances** surrounding the interview, ***would a reasonable person would have felt free to terminate the interview and leave?***



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# *Miranda Rights*

## *What is not “in custody”*

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- When a subject, who is ***the focus of the criminal investigation***, is being questioned, it does not necessarily mean that the subject is in custody for *Miranda* purposes.
  - Ex. When a subject questioned in a neutral location and is free to leave or discontinue the interview.
  - Ex. When a subject is going to be arrested, but investigator has not disclosed it and the individual does not believe that he/she is under arrest.



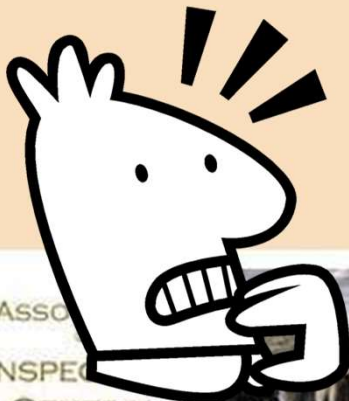
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# What is “interrogation” under *Miranda*?

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- Not only express questioning – but also any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.



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# 5<sup>th</sup> Amendment Rights per *Miranda* (custodial interrogation)

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- You have the right to remain silent.
- If you choose to waive that right, anything you say can and will be used against you in a court of law.
- You have the right to speak to an attorney and have the attorney present during questioning.
- If you can't afford an attorney, the court will appoint one to represent you at no charge.



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# Miranda

## Right to an Attorney

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- A defendant must unambiguously request the assistance of counsel in order to invoke the right to an attorney under *Miranda*.
- Once a person invokes the right to an attorney, STOP QUESTIONING
- No more questions unless:
  1. the defendant initiates further statements

AND

2. waiver is clear & unambiguous



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# *Miranda*

## Right to an Attorney

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- Examples of ambiguous requests for counsel:
  - “Maybe I should talk to a lawyer.”
  - “Do you think I need a lawyer?”
  - “I think I need a lawyer.”
  - “Could I call my lawyer?”
- Best practice = stop interview if the defendant even mentions the word “lawyer” or “attorney” (or clear up any ambiguity).



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# *Miranda*

## Right to an Attorney

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- If the person comes back later and wants to talk, re-Mirandize and get a new waiver.
- If the defendant is represented by counsel, do not question the defendant without the lawyer present.



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