

**MAKING SENSE OF SEARCH AND SEIZURE LAW:
A FOURTH AMENDMENT HANDBOOK**

JANUARY 2010 SUPPLEMENT

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Introductory Note.

This supplement covers all U.S. Supreme Court cases on the Fourth Amendment decided between December 31, 2004 [the cut-off date for such decisions in the book] and December 31, 2009 — a five year period.

During that time [which largely tracks the advent of the Roberts Court], some significant changes in Fourth Amendment law have occurred — many limiting Fourth Amendment rights. In particular, the Fourth Amendment exclusionary rule, covered in Chapter 17, has undergone remarkable changes that have further constricted the reach of the rule.

ACCORDINGLY, THIS SUPPLEMENT SHOULD BE CAREFULLY CONSULTED --- ELSE SOME SERIOUS MISCONCEPTIONS OF EXISTING FOURTH AMENDMENT LAW MAY VERY WELL ARISE.

This supplement also includes additional material prompted by comments made by my colleagues and students since the book was first published --- as well as my own independent review of the book.

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Probable cause justifies custodial arrest for any offense: no limitation for minor offenses or where arrest is unlawful under state law

Chapter 13. Initial Fourth Amendment Intrusion: Searches of Private Premises Conducted with a Warrant

Section 2. Probable Cause Requirement

Add a new subsection:

i. Anticipatory search warrants

Chapter 14. Initial or Secondary Fourth Amendment Intrusion: *Searches of Private Premises Conducted with a Warrant*

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Chapter 17. Historical Development, Nature and Purpose, and Substantive Law of the Fourth Amendment

Add a new subsection:

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Chapter 1. Introduction

- § 1. The Importance and Limit of Fourth Amendment Freedom
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 - § 3. Growth and Complexity of Fourth Amendment Law
 - § 4. Other Sources of Search and Seizure Law
 - § 5. General Framework for Analyzing a Fourth Amendment Question in a Criminal Case
-

§ 1. The Importance and Limit of Fourth Amendment Freedom

Fn. 15. After the *Minnesota v. Carter* citation in this footnote, insert the following:

, quoted with approval in *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 1523, 164 L.Ed.2d 208 (2006).

§ 3. Growth and Complexity of Fourth Amendment Law [pp. 13-16]

p. 13, 1st paragraph. Delete the first two sentences in the text, along with the accompanying footnotes nos. 45-48. Substitute the following:

Over 400 cases on the Fourth Amendment were decided by the U.S. Supreme Court from 1791-2009. **Fn. 45.** Only five of these cases were decided prior to 1900, **Fn. 46** and only 91 were decided in the twentieth century prior to the landmark 1961 decision of *Mapp v. Ohio* **Fn. 47** which applied the Fourth Amendment exclusionary rule to the states. The balance, over 300 cases or 75% of the total, are post-*Mapp* decisions rendered during a scant 48-year period, 1961-2009. **Fn. 48.**

Fn. 45. This exact case count is 417 and is current through the end of December 2009. The count, however, includes some selected early wiretapping, electronic eavesdropping, and search warrant execution cases which have Fourth Amendment implications but technically were decided under federal statutes. All references to Fourth Amendment case counts should be read with this caveat in mind.

Fn. 46. The two most important cases were: *Boyd v. United States*, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886); and *In re Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1877). The remaining cases were of lesser significance: *Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 18 How. 272, 15 L.Ed. 372 (1855); *Ex Parte Burford*, 7 U.S. 448, 3 Cranch 448, 2 L.Ed. 495 (1806). There were no Fourth Amendment decisions rendered in the brief period between 1791-1800.

Fn. 47. 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Fn. 48. In the preface to the first edition of his treatise on the Fourth Amendment, Professor LaFave notes that “[a]t least in the years following the Supreme Court’s landmark decision in *Mapp v. Ohio* in 1961, it is beyond question that the Fourth Amendment has been the subject of more litigation than any other provision of the Bill of Rights.” 1 Wayne LaFave, *Search and Seizure IX* (4th ed. 2004).

Part I. Historical Background and Purpose of the Fourth Amendment

Chapter 3. The English Experience: General Warrants Controversy 1762-70

§ 1. Introduction

§ 2. English Decisions Condemning the General Warrant

§ 3. Impact of English General Warrant Decisions in England and America

§ 4. Parliamentary Efforts to Abolish the General Warrant

§ 4. Parliamentary Efforts to Abolish the General Warrant

p. 49. Add the following to the last sentence in this section following numbered footnote 55:

, and has since reverberated as a fundamental privacy principle throughout our entire national history. **Fn. 55a**

Fn. 55a. “We have, after all, lived our whole national history with an understanding of the ‘ancient adage that a man’s home is his castle to [t]he point that the poorest man may in his cottage bid defiance to all the forces of the Crown.’”*Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 1524, 164 L.Ed.2d 208 (2006), quoting from *Miller v. United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958).

Part II. Substantive Law of the Fourth Amendment

Chapter 7. Interpretation of the Fourth Amendment: Approaches to Constitutional Construction

§ 1. Introduction

§ 2. The Historical Approach

§ 3. The Balancing of the Interests Approach

§ 4. The Common Law Reasoning Approach

§ 1. Introduction

Fn. 2.

Akhil Amar, *America's Constitution* (2005); Stephen Breyer, *Active Liberty* (2005).

Add the following materials to the last paragraph, at the end of the second sentence:

Fn. 6a

For a representative example of how the Court has used the historical approach, together with the common law reasoning approach (history of prior cases and principled adjudication), to interpret the Fourth Amendment, see: *Virginia v. Moore*, 553 U.S. ___, 128 S.Ct. 1598, 170 L.Ed.2d 559(2008) (historical approach: Part II of the opinion); (common law reasoning, past history of cases approach: Part IIIA of the opinion); and (common law reasoning, principled adjudication approach: Part IIIB of the opinion).

§ 2. The Historical Approach

a. An overview to the historical approach

Fn. 9. Add the following to the outset of this footnote:

“In determining whether a search or seizure is unreasonable [under the Fourth Amendment], we begin with history. We look to the statutes and common law of the founding era to determine the norms the Fourth Amendment was meant to preserve.” *Virginia v. Moore*, 553 U.S. ___, 128 S.Ct. 1598, 1602, 170 L.Ed. 2d 559 (2008). “To determine what is an ‘unreasonable’ search under the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness. “*Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1724, 173 L.Ed.2d 485 (2009) (Scalia, J. concurring) (“Since the historical scope of officers’ authority to search vehicles incident to arrest is uncertain, [citation omitted], traditional standards of reasonableness govern.” id.).

Add the following to the end of this footnote:

“The study of history for the purpose of ascertaining the original understanding of constitutional provisions is much like the study of legislative history for the purpose of ascertaining the intent of the lawmakers who enact statutes. In both situations the facts uncovered by the study are usually relevant but not necessarily dispositive.” *Georgia v. Randolph*, 547 U.S. ___, 126 S.Ct. 1515, 1528, 164 L.Ed.2d 208 (2006) (Stevens, J. concurring). See also Justice Scalia’s discussion of originalism as applied to the *Randolph* case. 126 S.Ct. at 1539-41 (Scalia, J. dissenting).

c. Post-Boyd cases utilizing the historical approach

(1) Historical analysis cases

Fn. 27. Add the following to the outset of the footnote:

Virginia v. Moore, 553 U.S. ___, 128 S.Ct. 1598, 1602-04, 170 L.Ed. 2d 559 (2008).

§ 3. The Balancing of the Interests Approach

a. An overview to the balancing approach: comparison with historical approach

p. 96. Delete the second quotation on this page and insert the following:

“When that [historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes on an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” [Fn. 39]

Fn. 39. After the Wyoming v. Houghton citation, insert the following:

; see, Virginia v. Moore, 553 U.S. ___, 128 S.Ct. 1598, 1604, 170 L.Ed. 2d 559 (2008).

Fn. 41. After the second sentence in this footnote, insert the following:

Samson v. California, 547 U.S. 843, 126 S.Ct. 2193, 2197, 165 L.Ed.2d 250 (2006);

p. 97. At the end of the first complete paragraph in text, insert the following:

It should be noted, however, that “a generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.” **Fn. 41a.**

Fn. 41a. Georgia v. Randolph, 547 U.S. ___, 126 S.Ct. 1515, 1524, n. 5, 164 L.Ed.2d 208 (2006), citing: “[T]he privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.” Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); and “The warrant requirement . . . is not an inconvenience to be somehow ‘weighed’ against the claims of police efficiency.” Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971).

b. General applications of the balancing approach
(2) Unusual searches and seizures

p. 101, fn. 63. Add:

Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769, 1778-79, 167 L.Ed.2d 686 (2007)

p. 101, first complete paragraph, second to last line. After the word

“probationer”, insert the following:

or parolee, **Fn. 68a**

Fn. 68a. Samson v. California, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006);.

c. Related balancing approaches in the administration of the exclusionary rule

Fn. 71. Add this case at the end of the citations following the first sentence in this footnote:

Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159, 2165-68, 165 L.Ed.2d 56 (2006) (“knock and announce” violations).

p. 102. Add the following sentence to the first complete paragraph, last sentence:

Moreover, the flagrancy of the Fourth Amendment violation weighs in favor of applying the exclusionary rule so as to deter such serious misconduct — while less egregious violations weigh against such application. **Fn. 71a.**

Fn. 71a. “The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in Leon, ‘an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus’ of applying the exclusionary rule. [citation omitted].” Herring v. United States, 555 U.S. ___, 129 S.Ct. 695, 701, 172 L.Ed.2d 496 (2009).

§ 4. Common Law Reasoning Approach

b. History of prior court decisions

Fn. 80.

Safford Unified School District No. 1 v. Redding, 559 U.S. ___, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009) (applying the TLO standard for public school student searches);

Arizona v. Johnson , 553 U.S. ___, 129 S.Ct. 881, 172 L.Ed.2d 694 (2009) (applying a line of Terry v. Ohio cases in a traffic stop context); Brigham City v. Stuart, 547 U.S. ___, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (applying a line of U.S. Supreme Court cases upholding a warrantless entry onto private premises under exigent circumstances, regardless of the subjective motivations of the officers making such an entry)

Fn. 82.

Arizona v. Gant, 556 U.S. ___, 129 S.Ct. 1710, 172 L.Ed.2d 694 (2009) (distinguishing and modifying New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) as to the scope of search incident to the arrest of an occupant of an automobile); Scott v. Harris, 550 U.S. ___, 127 S.Ct. 1769, 1777, 167 L.Ed.2d 686 (2007) (distinguishing Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 443, 455-56 (1985), in a § 1983 action involving alleged use of deadly force to effect an arrest); Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) (distinguishing Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), as to what constitutes a Fourth Amendment search in a narcotics “dog sniff” case).

c. Principled adjudication

Fn. 85. Add the following to the beginning of this footnote:

“Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that has recently been adopted to improve operation of the courts, and experience has pointed up the precedent’s shortcomings.” Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 816, 172 L.Ed.2d 565 (2009) (giving principled reasons for overruling, in part, Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 72 (2001), which had set up a mandatory two-step process for ruling on a defendant’s motion for summary judgment based on the affirmative defense of qualified immunity in a civil rights action claiming a Fourth Amendment violation).

“The doctrine of *stare decisis* is, of course, ‘essential to the respect accorded to the judgments of the Court and to the stability of the law,’ but it does not compel us to follow a past precedent when its rationale no longer withstands ‘careful analysis.’

[citation omitted]. We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice.” *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1722, 172 L.Ed.2d 694 (2009) (modifying *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) which had allowed an automatic police search of a vehicle whenever the driver or passenger of same was arrested).

“I recognize that *stare decisis* is not an inexorable command, and applies less rigidly in constitutional cases. But the Court has said that a constitutional precedent should be followed unless there is a special justification for its abandonment. Relevant factors identified in prior cases include whether the precedent has engendered reliance; whether there has been an important change in circumstances in the outside world; whether the precedent has proven to be unworkable; whether the precedent has been undermined by later decisions; and whether the decision was badly reasoned. *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1728, 173 L.Ed.2d 485 (2009) (internal citations and quotes omitted) (Alito, J. dissenting).

Fn. 86.

Georgia v. Randolph, 547 U.S.103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (giving principled reasons for striking down a warrantless search of private premises where one occupant of the premises consents to the search, but a physically present co-occupant of the premises expressly objects to the search)

II. Substantive Law of the Fourth Amendment

Subpart A. The “Standing” Requirement

Chapter 9. Search or Seizure Element: *Seizures* of Persons, Houses Papers or Effects

§ 1. Overview of Search or Seizure Element

§ 2. Seizure of the Person

§ 3. Seizure of House, Papers or Effects: Interference with Possessory Interest Test

§ 2. Seizure of the Person

a. Physical seizure

p. 121. Add the following material in the text following fn. 8:

; or ramming a pursuing police car into a vehicle fleeing from police in order terminate the fleeing vehicle’s freedom of movement. **Fn. 8a.**

Fn. 8a. “Scott [the police officer] does not contest that his decision to terminate the car chase by ramming his bumper into respondent’s [suspect’s] vehicle constitutes a ‘seizure [of the person].’” “‘A Fourth Amendment seizure [occurs] . . . when there is some governmental termination of freedom of movement by means intentionally applied.’” [citations omitted]. *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007).

b. Submission-to-authority seizure: contrast with “mere contact”

p. 122, second complete paragraph. Add the following footnote to the end of the last sentence in this paragraph.

Fn. 10a.

See e.g. *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2405, 168 L.Ed.2d 132 (2007).

p. 123, first complete paragraph. Add the following sentence at the end of this paragraph.

Moreover, not only is the driver seized in these traffic stop scenarios, but also any passenger in the automobile. **Fn. 18a..**

Fn. 18a. “When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of the passenger. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.” *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2403, 168 L.Ed.2d 132 (2007).

Chapter 10. Search or Seizure Element: *Searches* of Persons, Houses, Papers or Effects

- § 1. Introduction
 - § 2. General Test: Governmental Invasion of One’s Reasonable Expectation of Privacy
 - § 3. First Component of a Fourth Amendment “Search”: Complaining Party Must Have a Reasonable Expectation of Privacy as to Protected Interests
 - § 4. Second Component of a Fourth Amendment “Search”: A Government Agent Must Invade the Complaining Party’s Reasonable Expectation of Privacy
 - § 5. Special Search or Seizure Element Problems
-

Section 2. General Test: Governmental Invasion of One’s Reasonable Expectation of Privacy

Fn. 2. Add the following to the end of this footnote:

On the other hand, “[o]fficial conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’ This is because the expectation ‘that certain facts will not come to the attention of the authorities’ is not the same as an interest in ‘privacy that society is prepared to consider as reasonable.’” *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 837-38, 160 L.Ed.2d 842 (2005) (internal citations omitted). Examples of such official conduct revealing *solely* the possession of contraband are (1) a narcotics “dog sniff” of a car, *Illinois v. Caballes*, *supra*; and (2) a chemical test of a powder to determine whether it is cocaine. *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85, 100-101 (1984). See Section 5c, *infra*, of this chapter for a discussion of narcotic “dog sniffs.”

- ### **§ 3. First Component of Fourth Amendment “Search”: Complaining Party Must Have a Reasonable Expectation of Privacy as to Protected Interests [p. 134-51]**
- c. Reasonable expectation of privacy as to one’s “papers or effects”:
complaining party’s substantial connection thereto**

(2) complaining party's substantial connection thereto

Fn. 108. Add the following material to this footnote:

“When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of the passenger. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.” *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2403, 168 L.Ed.2d 132 (2007)

Moreover, the police seizure of property from the passenger compartment of the automobile generally constitutes a Fourth Amendment *seizure* of property from the possession of every occupant in the automobile. This is so because (a) a Fourth Amendment *seizure* of a person's property occurs when there has been some meaningful governmental interference with the person's possessory interests in the property, whether that possession be legal or illegal [see Chapter 9, Section 3, pp. 126-27 of this work]; and (b) all occupants of an automobile, as a general rule, are in constructive possession of all property in the passenger compartment of the automobile and may be properly arrested for possessing any contraband drugs found therein. [*Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003)].

In sum :

1. A guest passenger of an automobile can challenge the constitutionality of the *automobile stop* [*Brendlin v. California*, *supra*], and if *illegal*, the evidence secured in the automobile subsequent to the stop would be generally inadmissible as the fruit of the poisonous tree.
2. But if the stop is *lawful*, a guest passenger cannot challenge the lawfulness of the *search* of the automobile [*Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)].
3. Such a passenger can, however, challenge the lawfulness of the *seizure* of any property taken from the passenger compartment of the automobile. But the only basis for challenging such a seizure is that there was no probable cause to believe that the item seized constituted contraband, evidence of crime, or fruits or instrumentalities of crime. [See Chapter 12, Section 2b(3) at 218-19 of this work].

§ 5. Special Search or Seizure Element Problems [pp. 155-58].

c. Narcotic “dog sniffs” of luggage or cars

Fn. 153.

Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) (car).

p. 158. Add the following after the end of the first complete paragraph.

The underlying rationale for this result is that a narcotics “dog sniff” is *sui generis* --- namely, the only thing the dog sniff reveals is the presence of contraband drugs in the container or vehicle, nothing else. **Fn. 154a.** Even a false alert by the dog reveals nothing else. **Fn 154b.** And a person has no reasonable expectation of privacy to keep hidden from public view contraband drugs. Accordingly there can be no Fourth Amendment search in such a sniff **Fn. 154c** --- as, by definition, a Fourth Amendment search is an official invasion in one’s reasonable expectation of privacy in otherwise protected interests. **Fn. 154d.** Stated differently, if a police officer smells the aroma of marijuana emanating from a briefcase or car, it is clear that no Fourth Amendment search has occurred. **Fn. 154e.** All the trained narcotics dog does is act as a substitute for the officer’s sense of smell. **Fn. 154f.**

Fn. 154a. “In United States v. Place [citation omitted], we treated a canine sniff by a well-trained narcotics detection dog as ‘sui generis’ because it ‘discloses only the presence or absence of narcotics, a contraband item.’” Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 838, 160 L.Ed.2d 842 (2005) (car). There is some dispute, however, over whether all such dogs are that accurate. See Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 839-40, 160 L.Ed.2d 842 (2005). (Souter, J. dissenting) and authorities collected. (“The infallible dog, however, is a creature of legal fiction.”).

Fn. 154b. Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 838, 160 L.Ed.2d 842 (2005).

Fn. 154c. “Official conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus

governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’ This is because the expectation ‘that certain facts will not come to the attention of the authorities’ is not the same as an interest in ‘privacy that society is prepared to consider as reasonable.’ . . . Accordingly, the use of a well-trained narcotics detection dog --- one that does not expose noncontraband items that otherwise would remain hidden from public view --- during a lawful traffic stop, generally does not implicate legitimate privacy interests.” *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 837-38, 160 L.Ed.2d 842 (2005) (internal citations omitted) (dog sniff of car conducted during a traffic stop held not a Fourth Amendment search).

Fn. 154d. See *supra* Chapter 10, Section 2, n. 2 and authorities collected.

Fn. 154e. “[T]here is no ‘reasonable expectation of privacy’ from lawfully positioned agents with ‘inquisitive nostrils.’ This means, for example, that no search in a Fourth Amendment sense has occurred when a law enforcement officer, lawfully present at a certain place, detects odors emanating from private premises, from a vehicle, or from some personal effects nearby.” 1 Wayne LaFave, *Search and Seizure* §2.2(a), at 454 (4th ed. 2004) and authorities collected (footnotes omitted).

Fn. 154f. As an aside, however, it is arguably an open question whether law enforcement officials can, without reasonable suspicion, use a trained narcotics dog to smell people [or their property] who *have not been seized at all* --- such as people as they walk down the public street, or in an airport, or while waiting in their vehicle for a stoplight, or while residing in their home. But see *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 839, 160 L.Ed.2d 842 (2005) (Souter, J., dissenting) (“[A]n uncritical adherence to *Place* would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks; if a sniff is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely unless it is treated as a search.”).

II. Substantive Law of the Fourth Amendment

Subpart B. The “Unreasonableness” Requirement

Chapter 11. General Rules and Principles of Unreasonableness

- § 1. Search Warrant Requirement Rule
 - § 2. General Definition of “Unreasonableness”: Balancing Test
 - § 3. The Evidentiary Standards of Probable Cause and Reasonable Suspicion
 - § 4. Other Important Rules and Principles
-

§ 1. Search Warrant Requirement Rule

p. 163, Fn. 1. After the case of *Maryland v. Dyson*, insert the following:

Brigham City v. Stuart, 547 U.S. 398, 126 S.Ct. 1943, 1947, 164 L.Ed.2d 650 (2006) (“It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.”) (citation and internal quotation omitted);

Arizona v. Gant, 556 U.S. ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (“Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval of judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions.’ [citation omitted].”).

§ 3. The Evidentiary Standards of Probable Cause and Reasonable Suspicion

Fn. 38. At the end of the first paragraph in this footnote, insert the following new paragraph:

“‘Under our general Fourth Amendment approach’ we ‘examin[e] the totality of the circumstances’ to determine whether a search is reasonable under the Fourth Amendment.” *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 2197, 165 L.Ed.2d 250 (2006) (internal citation omitted).

Insert the following new paragraph at the end of this footnote:

Comparison between probable cause and reasonable suspicion standards: “A number of our cases on probable cause have an implicit bearing on the reliable knowledge element of reasonable suspicion, as we have attempted to flesh out the knowledge component by looking to the degree to which the known facts imply prohibited conduct, the specificity of the information received, and the reliability of its source. At the end of the day, however, we have realized that these factors cannot rigidly control, and we have come back to saying that the standards are ‘fluid concepts that take their substantive content from the particular contexts’ in which they are being assessed.

Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer’s evidence search is that it raises a ‘fair probability’ or a ‘substantial chance’ of discovering evidence of criminal activity. The lesser standard [of reasonable suspicion] for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.” *Safford Unified School District v. Redding*, 557 U.S. ___ 129 S.Ct. 2633, 2639, 174 L.Ed.2d 354 (2009) (internal citations omitted).

Chapter 12. Initial or Secondary Fourth Amendment Intrusion: *Seizures of Persons or Property*

§ 1. Seizure of Persons

§ 2. Seizure of Property: Houses, Papers and Effects

§ 1. Seizure of Persons

a. Two types of seizures of the person: temporary detentions and arrests

Fn. 16.

“It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is justified solely by the interest in issuing a warning [traffic] ticket can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 837, 160 L.Ed.2d 842 (2005) (internal citation omitted).

c. Probable cause justifies custodial arrest for any offense: no limitation for minor offenses

Add new material to the title to this subsection so that it reads as follows:

c. Probable cause justifies custodial arrest for any offense: no limitation for minor offenses or where arrest is unlawful under state law

p. 185. Add an additional paragraph to the end of this subsection:

Moreover, an arrest by a state officer based on probable cause for a minor offense is reasonable under the Fourth Amendment, even though the arrest is otherwise unlawful under state law — as where the state requires a summons, rather than a custodial arrest, for such a minor offense. This is so because the reasonableness of an arrest must be based on Fourth Amendment standards and cannot be rendered unreasonable because state law requires such a result. **Fn.**

30.

Fn. 30. *Virginia v. Moore*, 553 U.S. ___, 128 S.Ct. 1598, 170 L.Ed. 2d 559 (2008) (arrest by city police officer for misdemeanor of driving with a suspended license based on probable cause held reasonable under the Fourth Amendment — although the arrest was unlawful under state law, as a summons was required for such an offense rather than a custodial arrest) (“We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter Fourth Amendment restrictions.” 128 S.Ct. at 1607). Accordingly, an arrest not based on probable cause is unreasonable under the Fourth Amendment — although the arrest may be lawful under state law, as where state standards on probable cause are more lenient on the police than federal standards. See *Ker v. California*, 374 U.S. 23, 34, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (“The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet ‘the practical demands of effective criminal investigation and law enforcement,’ provided those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.”).

k. Temporary detention during a search warrant execution

Fn. 95.

Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465, 1470, 161 L.Ed. 2d 299 (2005) (search warrant authorized the seizure of deadly weapons [presumably contraband]; occupant was asleep in her bed when the search began) (“Mena’s [the occupant’s] detention was, under *Summers*, plainly permissible.”).

p. 204. At the end of the first paragraph in the text, add the following:

Inherent in the authorization to temporarily detain the occupant of premises while a search warrant is being executed is the authority to use reasonable force to effectuate the detention. **Fn. 97a.** The use of handcuffs, however, to detain the occupant is a separate Fourth Amendment intrusion aside from the detention --- and

therefore requires a separate justification, as where the safety of the officers and occupants require it. **Fn. 97b.**

Indeed, when executing a search warrant, the officers may take any reasonable action that is necessary to secure the premises and to ensure their own safety and the efficacy of the search. **Fn. 97c.** This authority authorizes the officers to order naked residents found in bed to stand for a brief time while officers secure the premises — although for no longer than is necessary to accomplish this purpose. **Fn. 97d.** Accordingly, unreasonable actions in executing a search warrant are prohibited — such as the use of excessive force or restraints that cause unnecessary pain or ones that are imposed for a prolonged and unnecessary period of time. **Fn. 97e.**

Moreover, the officers are authorized to question the occupant during the detention concerning matters that have nothing to do with the search. This is so because police questioning in itself does not constitute a Fourth Amendment seizure of the individual and therefore does not require a showing of reasonable suspicion. **Fn. 97f.** But presumably, where the questioning exceeds the time reasonably necessary to conduct the search, the basis for the temporary detention disappears, the detention becomes illegal, and any questioning during this detention would be tainted thereby. **Fn. 97g.**

Fn. 97a. “Inherent in *Summers*’ authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.” *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465, 1470, 161 L.Ed. 2d 299 (2005).

Fn. 97b. “The imposition of correctly applied handcuffs on Mena [the occupant], who was already lawfully detained during a search of the house, was undoubtedly a separate intrusion in addition to the detention in the converted garage. * * But this was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk to both officers and occupants.” *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465, 1470-71, 161 L.Ed. 2d 299 (2005) (handcuffing of occupant upheld during search of gang house; one of the gang members resided on the premises; the warrant authorized the seizure of deadly weapons; three other individuals on the premises were also detained and

handcuffed).

Fn. 97c. “In executing a search warrant, officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search.” *Los Angeles County v. Rettele*, 550 U.S. 609, 127 S.Ct. 1989, 1992, 167 L.Ed.2d 974 (2007).

Fn. 97d. *Los Angeles County v. Rettele*, *supra* (a male and female resident of house found in bed naked forced to stand naked for 1-2 minutes while officers secured premises; held reasonable action, even though house had subsequently been sold to innocent party and nothing incriminating was found).

Fn. 97e. “Unreasonable actions (in executing a search warrant) include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged or unnecessary period of time. * * *

This is not to say, of course, that the deputies were free to force Rettele and Sandler (the residents) to remain motionless and standing for any longer than necessary. We have recognized that ‘special circumstances’ or possibly a prolonged detention might render a search unreasonable.” *Los Angeles County v. Rettele*, 127 S.Ct. At 1993.

Fn. 97f. *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465, 1471-72, 161 L.Ed. 2d 299 (2005) (questioning of occupant’s immigration status upheld during otherwise reasonable search of gang house for deadly weapons and evidence of gang membership).

Fn. 97g. See *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (suitcase held longer than reasonably necessary to conduct a narcotics dog sniff of the suitcase tainted the dog alert on the suitcase and invalidated the search warrant for the suitcase based on the alert); *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 837, 160 L.Ed.2d 842 (2005) (“It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is justified solely by the interest in issuing a warning [traffic] ticket can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”) (internal citation omitted).

m. Excessive force in effecting an arrest or temporary detention

p. 210. Strike the second complete paragraph in this subsection and add the following:

Moreover, when deadly force is used to effect an arrest of a suspect, such force violates the suspect's Fourth Amendment rights only if unreasonable under the circumstances. **Fn 125a.** Accordingly, it was held unreasonable for police to shoot and kill an unarmed suspected felon who was fleeing from the police on foot but otherwise posed no threat to anyone. **Fn 125b.** On the other hand, it was held reasonable for police to ram a fleeing motorist with the pursuing police car, causing the car to crash, rendering the motorist a quadriplegic, in order to stop the motorist's dangerous high-speed police chase from continuing to endanger the lives of innocent bystanders. **Fn 125c.**

Fn. 125a. *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1777, 167 L.Ed.2d 686 (2007), interpreting *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 443 (1985). "It is also conceded, by both sides, that a claim of 'excessive force in the course of making [a] . . . seizure of the person . . . is properly analyzed under the Fourth Amendment's 'objective reasonableness' standard.'" [citation omitted]. 127 S.Ct. at 1776. "In determining the reasonableness of the manner in which a seizure is effected, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" [citation omitted]. 127 S.Ct. at 1778.

Fn. 125 b. *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 443, 455-56 (1985), as interpreted in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1777, 167 L.Ed.2d 686 (2007).

Fn. 125c. *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1777, 167 L.Ed.2d 686 (2007). "Instead we lay down a more sensible rule: a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." 127 S.Ct. at 1779. Justice Ginsburg, in her concurring opinion in *Scott*, states some of the relevant circumstances for determining whether deadly force for effecting an arrest in this case was reasonable: "Were the

lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place and circumstances, to stop the fleeing vehicle.” 127 S.Ct. at 1779.

Chapter 13. Initial Fourth Amendment Intrusion: *Searches of Private Premises Conducted with a Warrant*

§ 1. Governed by the Warrants Clause of the Fourth Amendment

§ 2. Probable Cause Requirement

§ 3. Particularity Requirements: Place to be Searched and Things to be Seized

§ 4. Execution Requirements

§ 5. Neutral and Detached Magistrate

§ 2. Probable Cause Requirement

b. Interpretation of search warrant affidavits: judicial review of magistrate’s probable cause determination

p. 226. Add the following sentence to the first incomplete paragraph on this page:

Moreover, the fact that the search pursuant to a warrant uncovers no evidence of wrongdoing does not show that there was no probable cause for the warrant — as the test of probable cause is based entirely on pre-search evidence presented to the magistrate, not on what the search uncovers. **Fn. 12a.**

Fn. 12a. “The Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty. Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost.” *Los Angeles County v. Rettele*, 550 U.S. 609, 127 S.Ct. 1989, 1993, 167 L.Ed.2d 974 (2007) (probable cause to search house that had been sold to innocent party). True, but perhaps we should remember that “nothing is easier than to bear other people’s calamities with fortitude.” *W. Somerset Maugham, The Razor’s Edge* 144 (1944) (Giant Cardinal pocketbook ed. 1963).

p. 236. Add a new subsection:

i. Anticipatory search warrants

An anticipatory search warrant is a warrant based on an affidavit showing

probable cause that at some future time (but not presently) certain evidence will be located at a specified place --- usually subjecting its execution to a future “triggering condition.” **Fn. 35a.** Such a warrant is constitutional under the Fourth Amendment, providing two conditions are met: (a) there must be probable cause to believe that the “triggering condition” will take place, and (b) there must be probable cause to believe that when the triggering condition occurs, there is a fair probability that certain evidence of crime will be found in a particular place. **Fn. 35b.** The triggering condition, however, need not be included in the warrant **Fn. 35c** --- although the failure to do so can create certain dangers. For example, an officer who executes the warrant, but did not obtain the warrant, may not be aware of the triggering condition, and may execute the warrant before the triggering condition occurs --- thereby rendering the search unreasonable. **Fn. 35d.**

Fn. 35a. United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 1494, 1498, 164 L.Ed.2d 195 (2006). See 2 Wayne LaFave, Search and Seizure § 3.7(c) (4th ed. 2004) & pp. 55-58 (Supp. 2009-10).

Fn. 35b. “In other words, for a conditioned anticipatory warrant to comply with the Fourth Amendment’s requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that *if* the triggering condition occurs ‘there is a fair probability that contraband or evidence of crime will be found in a particular place’ [citation omitted], but also that there is probable cause to believe the triggering condition *will occur*. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable cause determination.” United States v. Grubbs, 547 U.S. 90 126 S.Ct. 1494, 1500, 164 L.Ed.2d 195 (2006) (anticipatory search warrant upheld based on triggering condition of future controlled delivery of child pornography videotape to petitioner’s home).

Fn. 35c. United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 1494, 1500-01, 164 L.Ed.2d 195 (2006)

Fn. 35d. United States v. Grubbs, 547 U.S. 90, 126 S.Ct. 1494, 1502, 164 L.Ed.2d 195 (2006) (Souter, J. concurring).

§ 4. Execution Requirements

a. Forcible entry into a dwelling: knock and announce rule

p. 240. Add the following to the end of the second paragraph on this page:

It is important to point out, however, that the Fourth Amendment exclusionary rule does not apply to a violation of the knock-and-announce doctrine; a civil suit, however, may be brought to redress such a violation. **Fn. 50a.**

Fn. 50a. *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). The Court reached this result because (1) any evidence seized on the premises after such a violation is so attenuated as to dissipate the taint of the original violation, and therefore is not the “fruit of the poisonous tree,” and (2) the limited deterrence benefits of applying the exclusionary rule in this context is outweighed by the substantial social costs sustained in such an application, and therefore an exception to the exclusionary rule is shown. 126 S.Ct. at 2163-65, 2165-68. See Justice Kennedy’s concurring opinion in *Hudson* emphasizing the importance of vindicating this important doctrine: “It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security [in the home] must not be subject to erosion by indifference or contempt.” 126 S.Ct. at 2170 (Kennedy, J. concurring).

See also Ch. 17, Sec. 3a & Sec. 5d of this work [incl .this supplement] concerning the Fourth Amendment exclusionary rule --- as well as Ch. 17, Sec. 6g of this work for a discussion of civil suits that may be brought to enforce Fourth Amendment rights.

b. Detention and search of persons on the premises

Fn. 67.

Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465, 1470, 161 L.Ed. 2d 299 (2005) (search warrant authorized the seizure of deadly weapons [presumably contraband]; occupant was asleep in her bed when the search began) (“Mena’s [the occupant’s] detention was, under *Summers*, plainly permissible.”).

p. 245. Add the following three paragraphs after the first complete paragraph

in the text:

Inherent in the authorization to temporarily detain the occupant of premises while a search warrant is being executed is the authority to use reasonable force to effectuate the detention. **Fn. 69a.** The use of handcuffs, however, to detain the occupant is a separate Fourth Amendment intrusion aside from the detention --- and therefore requires a separate justification, as where the safety of the officers and occupants require it. **Fn. 69b.**

Indeed, when executing a search warrant, the officers may take any reasonable action that is necessary to secure the premises and to ensure their own safety and the efficacy of the search. **Fn. 69c.** This authority authorizes the officers to order naked residents found in bed to stand for a brief time while officers secure the premises — although for no longer than is necessary to accomplish this purpose. **Fn. 69d.** Accordingly, unreasonable actions in executing a search warrant are prohibited — such as the use of excessive force or restraints that cause unnecessary pain or ones that are imposed for a prolonged and unnecessary period of time. **Fn. 69e.**

Moreover, the officers are authorized to question the occupant concerning matters that have nothing to do with the search. This is so because police questioning in itself does not constitute a Fourth Amendment seizure of the individual and therefore does not require a showing of reasonable suspicion. **Fn. 69f.** But presumably, where the questioning exceeds the time reasonably necessary to conduct the search, the basis for the temporary detention disappears, the detention becomes illegal, and any questioning during this detention would be tainted thereby. **Fn. 69g.**

Fn. 69a. “Inherent in *Summers*’ authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.” *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465, 1470, 161 L.Ed. 2d 299 (2005).

Fn. 69b. “The imposition of correctly applied handcuffs on Mena [the occupant], who was already being lawfully detained during a search of the house, was undoubtedly a separate intrusion in addition to the detention in the converted garage. * * But this was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently

dangerous situations, the use of handcuffs minimizes the risk to both officers and occupants.” *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465, 1470-71, 161 L.Ed.2d 299 (2005) (handcuffing of occupant upheld during search of gang house; one of the gang members resided on the premises; the warrant authorized the seizure of deadly weapons; three other individuals on the premises were also detained and handcuffed).

Fn. 69c. “In executing a search warrant, officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search.” *Los Angeles County v. Rettele*, 550 U.S. 609, 127 S.Ct. 1989, 1992, 167 L.Ed.2d 974 (2007).

Fn. 69d. *Los Angeles County v. Rettele*, *supra* (a male and female resident of house found in bed naked forced to stand naked for 1-2 minutes while officers secured premises; held reasonable action, even though house had subsequently been sold to innocent third party and nothing incriminating was found).

Fn. 69e. “Unreasonable actions (in executing a search warrant) include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged or unnecessary period of time. * * *

This is not to say, of course, that the deputies were free to force Rettele and Sandler (the residents) to remain motionless and standing for any longer than necessary. We have recognized that ‘special circumstances’ or possibly a prolonged detention might render a search unreasonable.” *Los Angeles County v. Rettele*, 127 S.Ct. at 1993.

Fn. 69f. *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465, 1471-72, 161 L.Ed. 2d 299 (2005) (questioning of occupant’s immigration status during otherwise reasonable search of gang house for deadly weapons and evidence of gang membership upheld).

Fn. 69g. See *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (suitcase held longer than reasonably necessary to conduct a narcotics dog sniff of a suitcase tainted the dog alert on the suitcase and invalidated the search warrant for the suitcase based on the alert); *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 837, 160 L.Ed.2d 842 (2005) (“It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is

justified solely by the interest in issuing a warning [traffic] ticket can become unlawful if it is prolonged beyond the time reasonably required to complete that mission)." (internal citation omitted).

Chapter 14. Initial or Secondary Fourth Amendment Intrusion: *Warrantless Searches* and *Criminal* Exceptions to the Search Warrant Requirement Rule

§ 1. An Overview of Exceptions to the Search Warrant Requirement Rule

§ 2. Search Incident to a Lawful Arrest

§ 3. “Stop and Frisk” Search

§ 4. Moving Vehicle Exception: Carroll Doctrine

§ 5. Consent Search

§ 6. Exigent Circumstances Search

§ 1. An Overview of Exceptions to the Search Warrant Requirement Rule

p. 250. At the end of the last complete sentence on this page, insert the following:

At times, however, the Court reaches the same result by employing the standard balancing process for determining Fourth Amendment reasonableness without requiring a showing of special governmental needs. **Fn. 4a.** In this entire balancing process, the Court creates, at times, special needs exceptions to the search warrant requirement rule, and at other times straight civil exceptions *sans* any showing of special governmental needs.

Fn. 4a. *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 2200 n. 3, 165 L.Ed.2d 250 (2006) (general balancing definition of reasonableness used to hold that a warrantless, suspicionless search of a parolee did not violate the parolee’s Fourth Amendment rights; special governmental needs showing not required.).

§ 2. Search Incident to a Lawful Arrest

a. The wingspan rule

Fn. 11, p. 253. Add the following to the end of this footnote:

“Among the exceptions to the warrant requirement is a search incident to a lawful arrest. [citation omitted]. The exception derives from interests of officer safety and

evidence preservation that are typically implicated in arrest situations. [citation omitted].

In *Chimel*, we held that a search incident to arrest may only include the arrestee’s person and the area ‘within his immediate control — construing that phrase to mean the area from within which he might gain possession of a weapon of a weapon or destructible evidence. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.” *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009).

p. 252. At the end of the first sentence of the first complete paragraph on this page, insert the following:

The scope of police authority to search incident to a lawful arrest undoubtedly extends to containers possessed by the arrestee at the time of arrest. **Fn. 9a**

Fn. 9a. *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed 2d 619, 631 (1991) (“And the police often will be able to search containers without a warrant . . . as a search incident to a lawful arrest. . . . Under *Belton*, the same probable cause to believe that a container holds drugs will allow the police to arrest the person transporting the container and search it.”) .

c. Search of person: purpose of the search irrelevant.

Add the following to the end of this subsection:

Of course, most of the time law enforcement officers search a lawfully arrested suspect to safeguard evidence and to ensure their own safety; such a search is a reasonable search as it is incident to a lawful arrest. **Fn. 13a.**

Fn. 13a. “When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to search the suspect in order to safeguard evidence and ensure their own safety.” *Virginia v. Moore*, 553

U.S. ___, 128 S.Ct. 1598, 1608, 170 L.Ed.2d 559 (2008).

f. Arrest of motor vehicle driver or passenger

DELETE THIS SUBSECTION ENTIRELY AND SUBSTITUTE THE FOLLOWING — AS THE LAW ON THIS SUBJECT HAS SUBSTANTIALLY CHANGED.

Notwithstanding the *Chimel* wingspan rule, the Court has adopted a limited exception thereto — confined to a search incident to the arrest of a motor vehicle driver or passenger. Accordingly, when a law enforcement officer makes an arrest of a motor vehicle occupant, the officer is authorized to conduct a search of the vehicle’s passenger compartment and any container therein [but not the trunk] only where:

- (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the arrest, or
- (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the passenger compartment. **Fn. 16.**

The Court has noted that the first situation will rarely arise because law enforcement officers are almost always able to promptly effect an arrest without the arrestee having access to the subject vehicle. But if unable to do so safely during which the potential arrestee is unsecured and has ready access to the vehicle, the officer is allowed to search the passenger compartment in the course of the struggle in order to protect himself from weapons therein and for evidence preservation. **Fn. 17.** This search will necessarily go beyond the physical wingspan of the arrestee.

The Court has further noted that the second situation arises only where the arrest is for an offense that one can reasonably expect to find evidence thereof in the vehicle. This necessarily excludes minor traffic violations — like speeding or a defective tail light — which rarely, if ever, involve physical evidence. But the exception can apply to arrests for certain felonies or serious misdemeanors — both of which may encompass physical evidence one might expect to find in the vehicle. **Fn. 18.** This search can go beyond the physical wingspan of the arrestee and extend to the entire passenger compartment of the vehicle, including containers therein. Indeed, the arrestee may be safely secured in a patrol car at the time of the search.

This exception represents a limited retreat from earlier more expansive U.S. Supreme Court rulings that allowed *as a bright line rule* an automatic police search of a motor vehicle’s passenger compartment following an arrest of the driver or passenger of the vehicle. **Fn. 19.** As previously noted, such a search is now allowed only in limited situations that are tethered more to the original justification for searches incident to arrest.

If this exception is inapplicable, a search of the arrestee’s vehicle is unreasonable under the Fourth Amendment — unless the police obtain a search warrant for the vehicle or show that another exception to the search warrant requirement applies. **Fn. 20.**

Fn. 16. “Accordingly, we . . . hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within the reaching distance of the passenger compartment.

Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justifies a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’ * * *

Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1719, 1723, 173 L.Ed.2d 485 (2009) (search of motor vehicle held not incident to traffic arrest of driver for (a) driving with a suspended license; driver was handcuffed and placed in the back of police patrol car at time of arrest).

The current exception also leaves undisturbed the Court’s prior rulings that under this exception (a) *containers* in the vehicle’s passenger compartment may also be searched, but (b) the vehicle’s *trunk* may not be searched. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768, 775 (1981). Indeed, the *Gant* Court expressly stated that under its second holding, as stated above, “the offense of arrest will [often] supply a basis for searching the passenger compartment of an arrestee’s vehicle *and any containers therein.*” *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009) (emphasis and brackets added). Moreover, the entire *Gant* decision was centered on searches of the passenger compartment of a motor

vehicle, not the vehicle's trunk — which clearly cannot be searched under the search-incident-to-arrest exception.

Fn. 17. “Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains. [citation omitted]. But in such a case a search incident to arrest is reasonable under the Fourth Amendment.” *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710 n. 4, 173 L.Ed.2d 485 (2009). Moreover, Justice Alito agrees in his dissenting opinion (joined by C.J. Roberts, and Kennedy and Breyer, JJ.): “First, in the great majority of cases, an officer making an arrest is able to handcuff the arrestee and remove him to a secure place before conducting a search incident to the arrest.” 129 S.Ct. at 1730.

Fn. 18. “In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. [citations omitted]. But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.” *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009).

Fn. 19. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768, 775 (1981) (“Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”); see *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (following *Belton*).

As previously noted, the Court has since backed off *Belton*’s broad rule:

“Accordingly, we hold that *Belton* does not authorize a vehicle search after the arrestee has been secured and cannot access the interior of the vehicle.”

Except for one situation:

“[W]e also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.”

Arizona v. Gant, 556 U.S. ___, 129 S.Ct. 1710, 1714, 173 L.Ed.2d 485 (2009) .

The latter portion of the above holding was apparently tacked on to get Justice Scalia's vote and secure a majority of Justices for the Court's opinion. Indeed, this point had previously been suggested by Justice Scalia's concurring opinion in *Thornton*, 124 S.Ct. at 2127, which was expressly referenced and followed by the *Gant* Court in its opinion. *Id.*

Fn. 20. “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.” *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1723-24, 173 L.Ed.2d 485 (2009).

§ 3. “Stop and Frisk” Search

a. General Rule

p. 259, Fn. 38.

“In a pathmarking decision, *Terry v. Ohio* [numerical citation omitted], the Court considered whether an investigatory stop (temporary detention) and frisk (patdown for weapons) may be conducted without violating the Fourth Amendment’s ban on unreasonable searches and seizures. The Court upheld ‘stop and frisk’ as constitutionally permissible if two conditions are met. First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.” *Arizona v. Johnson*, 555 U.S. ___, 129 S.Ct. 781, 784 172 L.Ed.2d 694 (2009).

Fn. 45.

“Accordingly, we hold that, in a traffic-stop setting, the first *Terry* condition —

a lawful investigatory stop — is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe that any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person suspected to the frisk is armed and dangerous.”Arizona v. Johnson, 555 U.S. ___, 129 S.Ct. 781, 784, 172 L.Ed.2d 694 (2009).

p. 261. Add the following sentence to the end of the first incomplete paragraph at the top of the page:

During a lawful traffic stop, however, the police may question the driver or any passenger concerning any criminal offense [even if unrelated to the stop] and need not have reasonable suspicion that such person is involved in said criminal offense — so long as the questioning does not measurably extend the duration of the traffic stop.

Fn. 46a

Fn. 46a. “A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of the driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. [citation omitted]. An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made clear, does not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” Arizona v. Johnson, 555 U.S. ___, 129 S.Ct. 781, 788, 172 L.Ed.2d 694 (2009) (police questioning of passenger during a lawful traffic stop concerning criminal gang activity, where there was no reasonable suspicion of same, did not render the passenger’s detention unlawful, and thus invalidate the later patdown search of the passenger; on remand, however, state appellate court could determine whether the patdown was nonetheless unlawful if there was no reasonable suspicion that the passenger was armed and dangerous).

§ 5. Consent Search

Fn. 92.

“To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person’s house as unreasonable *per se* [citations omitted], one ‘jealously and carefully drawn’ exception [citation omitted] recognizes the validity of searches with the voluntary consent of an individual possessing authority, [citation omitted]. That person might be the householder against whom evidence is sought [citation omitted], or a fellow occupant who shares common authority over property, when the suspect is absent [citation omitted], and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant. [citation omitted].” *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 1520, 164 L.Ed.2d 208 (2006).

p. 273. Insert a new footnote at the end of the first sentence, second paragraph, on this page:

Fn. 92a.

Fn. 92a. “A person on the scene who identifies himself, say, as a landlord or hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant. [citations omitted]. A tenant in the ordinary course does not take rented premises subject to any formal or informal agreement that the landlord may let visitors into the dwelling, [citation omitted], and a hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into the room. [citations omitted]. In these circumstances, neither state-law property rights, nor common contractual arrangements, nor any other source points to a common understanding of authority to admit third parties generally without the consent of a person occupying the premises.” *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 1522, 164 L.Ed.2d 208 (2006).

p. 273. At the end of the second paragraph on this page, add the following new paragraph and footnotes:

On the other hand, a warrantless search by law enforcement officers of private premises shared by two occupants --- where one occupant consents to the search, but a physically present co-occupant expressly objects to the search --- cannot be justified under the consent exception to the search warrant requirement rule and, therefore, without more, is unreasonable under the Fourth Amendment as to the non-consenting co-occupant. **Fn. 96a.** Moreover, a young child living in a home with his parents may have the power to admit police to the common areas of the home, but would have no authority to consent to a police search of his parents bedroom. **Fn. 96b.**

Fn. 96a. “The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of the evidence so obtained. [citations omitted]. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.” * * * “We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given by the other resident.” Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 1518-19, 1526, 164 L.Ed.2d 208 (2006) (search of marital home with consent of wife, but over the express objection of husband held a violation of husband’s Fourth Amendment rights).

The Court notes, however, that a different result would obtain if the *exigent circumstances exception* to the search warrant requirement rule is shown. See Sec. 6, *infra*, of this chapter. For example, where the circumstances show that it is reasonably necessary to protect a resident from domestic violence, “it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or is soon to), however much a spouse or other co-tenant objected.” 126 S.Ct. at 1525. “Sometimes, of course, the very exchange of information like this in front of the objecting inhabitant may render consent irrelevant by creating an exigency that justifies immediate action on the police’s part: if the objecting tenant cannot be incapacitated from destroying easily disposable evidence during the time required to get a warrant. [citations omitted], a

fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement.” 126 S.Ct. at 1524, n.6. But the state does not argue that the exigent circumstances exception was applicable in this case. 126 S.Ct. at 1528.

The Court also notes that “[t]he co-tenant acting on his own initiative may be able to deliver evidence to the police [citation omitted], and can tell the police what he knows, for use before a magistrate in getting a warrant.” 126 S.Ct. 1524.

Fn. 96b. “[A] child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted, but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents’ bedroom.” *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 1522, 164 L.Ed.2d 208 (2006) [internal quotation from the LaFave treatise omitted].

Section 6. Exigent Circumstances Search

a. General Rule

Fn. 101.

“We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause [citation omitted], to prevent the imminent destruction of evidence [citation omitted], or to engage in ‘hot pursuit’ of a fleeing suspect. [citation omitted]. * * * One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury . . . [citations omitted]. Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. [citations omitted].” *Brigham City v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 1947, 164 L.Ed.2d 650 (2006).

c. Life Threatening or Perilous Situations

p. 276. Add the following text and footnote after the first sentence in the first complete paragraph on this page.

, even though the officers' *subjective* intent in entering the premises may have been to make an arrest of persons therein --- so long as the *objective* facts justified the entry to protect life and limb. **Fn. 107a.**

Fn. 107a. “One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. . . . [citations omitted]. Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. [citations omitted].” * * * “An action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer’s state of mind ‘as long as the circumstances viewed *objectively* justify [the] action.’ [citations omitted]. The officer’s subjective motivation is irrelevant. [citations omitted]. It therefore does not matter here --- even if their subjective motives could be so neatly unraveled --- whether the officers entered the kitchen to arrest the respondents and gather evidence against them or to assist the injured and prevent further violence.” *Brigham City v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 1947, 1948, 164 L.Ed.2d 650 (2006) (police properly entered home without a warrant to break up a brawl they could see was taking place therein; this result is not changed by the fact that the officers’ subjective intent in entering the premises may have been to make an arrest and gather evidence to support the arrest).

Fn. 110.

See also *Michigan v. Clifford* 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) (post-fire search of arson defendant’s home at 1:30 PM, 6 ½ hours after firemen had extinguished the fire therein [including a search of the basement and later the rest of the house], was held unreasonable because it was conducted without a warrant) (plurality opinion; result concurred in by five Justices).

p. 278. Add the following sentence and footnote to the end of the first paragraph on this page:

On the other hand, a warrant is unnecessary for such post-fire entries if the fire has so gutted the building that no person could entertain a reasonable expectation of privacy therein. **Fn. 110a.**

Fn. 110a. “Some fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, regardless of the owner’s subjective expectations.” Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477, 483 (1984) (plurality opinion).

Chapter 15. Initial or Secondary Fourth Amendment Intrusion: Warrantless Searches and Civil or Special Needs Exceptions to the Search Warrant Requirement Rule

- § 1. Introduction
 - § 2. Primary Civil or Special Needs Exceptions
 - § 3. Secondary Civil or Special Needs Exceptions
 - § 4. Rejected Exceptions
-

§ 1. Introduction

p. 283, top of the page, strike the first complete sentence and substitute the following:

At times, however, the Court reaches the same result by employing the standard balancing process for determining Fourth Amendment reasonableness without requiring a showing of special governmental needs. **Fn. 4a.** In this entire balancing process, the Court creates, at times, special needs exceptions to the search warrant requirement rule, and at other times straight civil exceptions *sans* any showing of special governmental needs.

Fn. 4a. *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 2200 n. 3, 2201 n. 4, 165 L.Ed.2d 250 (2006) (general balancing definition of reasonableness used to hold that a warrantless, suspicionless search of a parolee did not violate the parolee’s Fourth Amendment rights; special governmental needs showing not required.).

Fn. 10

“[W]e have held in the context of programmatic searches conducted without individual suspicion --- such as checkpoints to combat drunk driving or drug trafficking --- that ‘an inquiry into *programmatic purpose* is sometimes appropriate. [citations omitted]. But this inquiry is directed at ensuring that the purpose behind the program is not ‘ultimately indistinguishable from the general interest in crime control.’ [citation omitted]. It has nothing to do with discerning what is in the mind of the individual officer conducting the search.” *Brigham City v. Stuart*, 547 U.S. 398, 126

S.Ct. 1943, 1948, 164 L.Ed.2d 650 (2006).

§ 3. Secondary Civil or Special Needs Exceptions [pp. 291-99].

a. Probationer’s home search

p. 291. Change the name of this subsection and add a footnote:

a. Probationer and parolee search. Fn. 52a

Fn. 52a. For a thorough discussion of probationer and parolee searches, see 5 Wayne LaFave, *Search and Seizure* §10.10 (4th ed. 2004).

p. 292. Strike the first complete paragraph on this page and substitute the following:

It does not follow, however, that “an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it.” **Fn. 57.** Accordingly, the Court has, in fact, done away with any constitutional requirement of reasonable suspicion for a *parolee* search --- a result that seems equally applicable to a *probationary* search. Namely, the Court has held that a suspicionless search of a parolee by a police officer under a state statute that authorized such a search did not violate the parolee’s Fourth Amendment rights. **Fn. 58.** The only limitation to this holding is that under the applicable state law, the parolee search cannot be “arbitrary, capricious or harassing” --- a limitation that resembles a due process restriction and therefore an arguable requirement of the Fourth Amendment as well. **Fn. 58a.** As in probationary searches, the Court expressly declined to decide whether the parolee’s acceptance of a parole condition that authorized such a suspicionless search constituted a voluntary consent to such a search. **Fn. 58b.**

Fn. 57. *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 590, 151 L.Ed.2d 497 (2001).

Fn. 58. “California law provides that every prisoner eligible for release on state parole

‘shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.’ [citation omitted]. We granted certiorari to decide whether a suspicionless search, conducted under the authority of this statute, violates the Constitution. We hold that it does not.” * * * “Thus, we conclude that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.” *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 2196, 2202, 165 L.Ed.2d 250 (2006)(suspicionless search of parolee’s person on the street by police officer upheld; the officer knew petitioner was on parole).

Fn. 58a. “The concern that California’s suspicionless search system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California’s prohibition on ‘arbitrary, capricious or harassing’ searches.” *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 2202, 165 L.Ed.2d 250 (2006). As the Court notes, a search by a police officer of a person not known to the officer to be on parole has been held unreasonable under California law. 126 S.Ct. at 2202 n.5. “It would necessarily be arbitrary, capricious and harassing to conduct a suspicionless search of someone without knowledge of the status that renders that person, in the State’s judgment, susceptible to such an invasion.” 126 S.Ct. at 2208 n. 7 (Stevens, J. dissenting).

Fn. 58b. “Because we find that the search at issue is reasonable under our general Fourth Amendment approach, we need not reach the issue whether ‘acceptance of the search condition constituted consent in the *Schneckloth* . . . sense of a complete waiver of his Fourth Amendment rights.’” *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 2199 n. 3, 165 L.Ed.2d 250 (2006). See Justice Stevens rejection of the consent theory in this context as “sophistry.” 126 S.Ct. at 2206 n. 4 (Stevens, J. dissenting).

c. Public school student search

(1) General rule [p. 293]

Add footnote after the term “school rules” in the fourth line of this section:

Fn. 64 a.

“When the object of a school search is the enforcement of a school rule, a valid search assumes, of course, the rule’s legitimacy. The Court said plainly in *New Jersey v. T.L.O.* [citation omitted] that standards of conduct for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed. Except in patently arbitrary instances, Fourth Amendment analysis takes the rule as a given, as it should obviously do in this case.” *Safford Unified School District v. Redding*, 557 U.S. ___ 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009) (school rule prohibiting possession of all prescription or over-the-counter drugs without prior school permission held obviously proper).

Fn. 65. Add the following at the end of this footnote:

“We have thus applied a standard of reasonable suspicion to determine the legality of a [public] school administrator’s search of a student and have held that a school search ‘will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.’” *Safford Unified School District v. Redding*, 557 U.S. ___ 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009) (quoting from *New Jersey v. T.L.O.*).

In *Redding*, a strip search of a 13 year old female public school student was held a violation of her Fourth Amendment rights because the scope of the search was too intensive. There was reasonable suspicion to believe that the student had brought prescription and over-the-counter drugs to school in violation of school rules. But because there was no reason to suspect that these drugs posed a danger to the school or that they were concealed in her underwear, the strip search was held unreasonable under the Fourth Amendment.. 129 S.Ct. 2633 (2009) (but the school official who ordered the search was held entitled to qualified immunity from liability in this civil rights lawsuit because the Fourth Amendment right asserted in factual context of case was not clearly established at the time of the search).

“The issue here is whether a 13-year-old student’s Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by [public] school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. Because there was no reason to suspect the drugs presented a danger or were concealed in her underwear, we hold that the search did violate the Constitution, but because there is reason to question the

clarity with which the right was established, the official who ordered the unconstitutional search is entitled to qualified immunity from liability.” 129 S.Ct. at 2637-2638 [S.Ct.].

“Here the content of the suspicion failed to match the degree of the intrusion. Wilson [the school official] knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large quantities of the drugs were being passed around, or that individual students were receiving great numbers of pills.

Nor could Wilson have suspected that Savana [the public school student] was hiding common painkillers in her underwear. * * * But where the categorically extreme intrusiveness of a search down to the body of an adolescent require some justification in suspected facts, general possibilities fall short; a reasonable search that extensive calls for suspicion that will pay off. * * *

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, or any reason to suppose that Savana was carrying pills in her underwear. We think the combination of these deficiencies was fatal to finding the search reasonable.” 129 S.Ct. at 2642-43.

Fn. 66. At the end of this footnote add the following paragraph:

“There is no question that justification for the school officials’ search was required in accordance with the T.L.O. standard of reasonable suspicion, for it is common ground that Savana [the public school student] had a reasonable expectation of privacy covering personal things she chose to carry in her **backpack** [citing TLO], and that Wilson’s [the school official] decision to look through it was a ‘search’ within the meaning of the Fourth Amendment.” *Safford Unified School District v. Redding* 557 U.S. ___, 129 S.Ct. 2633, 2641 n. 3, 174 L.Ed. 2d 354 (2009) (emphasis added).

Chapter 16. Special Unreasonableness Requirement Problems

§ 1. Searches of Homes

§ 2. Automobile Searches

§ 3. Container Searches and Seizures

§ 4. Subpoena Duces Tecum

§ 5. Surgical Intrusions into the Body

§ 6. Search and Seizure of Materials Presumptively Protected by the First Amendment

§ 1. Searches of Homes

d. Applicable exceptions to the search warrant requirement rule

(2) Consent search

p. 304. Insert the following after the second to last sentence, last paragraph, on this page after fn. "16"[as it appears in the text]:

On the other hand, a warrantless search by law enforcement officers of private premises shared by two occupants --- where one occupant consents to the search, but a physically present co-occupant expressly objects to the search --- cannot be justified under the consent exception to the search warrant requirement rule and, therefore, without more, is unreasonable under the Fourth Amendment as to the non-consenting co-occupant. **Fn. 16a**

Fn. 16a. Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 1518-19, 1526, 164 L.Ed.2d 208 (2006).

§ 2 Automobile Searches

b. Search of the automobile [p. 309-313]

Add the following to fn. 42 on page 310.

“When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of the passenger. We hold that a passenger is seized as well and so may challenge

the constitutionality of the stop.” *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2403, 168 L.Ed.2d 132 (2007) .

Top of page 511. STRIKE THE ENTIRE SUB-SUB-SECTION ENTITLED “● Search incident to a lawful arrest” AND SUBSTITUTE THE FOLLOWING — AS THE LAW HAS SUBSTANTIALLY CHANGED:

● **Search incident to a lawful arrest Fn. 45.**

When a law enforcement officer makes an arrest of a motor vehicle occupant, the officer is authorized to conduct a search of the vehicle’s passenger compartment and any container therein [but not the trunk] only where:

- (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the arrest, or
- (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the passenger compartment. **Fn. 46.**

The first situation rarely arises because law enforcement officers almost always promptly effect an arrest upon deciding to do so. **Fn. 47.** The second situation necessarily excludes minor traffic violations — like speeding or a defective tail light — which rarely, if ever, involve physical evidence that might be found in the vehicle. **Fn. 48.**

As an aside, however, if the police give the driver a traffic ticket and do *not* arrest the driver or any of the passengers, the police may *not* search the automobile under this exception — although arguably some other exception to the search warrant requirement rule might be applicable. **Fn. 48a.**

Fn. 45. This exception is examined at Chapter 14, Section 2 of this work.

Fn. 46. *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1719, 1723, 173 L.Ed.2d 485 (2009).

Fn. 47. *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009).

Fn. 48. Arizona v. Gant, 556 U.S. ___, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009).

Fn. 48a. Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (police under state law could have lawfully arrested defendant for speeding, but instead issued a traffic citation and then searched defendant's car, finding marijuana; held unreasonable search).

§ 3. Container Searches and Seizures [pp. 313-19]

(3) Applicable exceptions to the search warrant requirement rule

. Search incident to a lawful arrest: container in automobile or on person

p. 316, 4th complete paragraph. At the end of the last sentence in this paragraph, insert the following:

This is particularly true because, as noted above, the police already have the authority to conduct a search of a container found in an automobile as incident to a lawful arrest of any occupant in the said automobile --- and it seems logical that such search-incident authority would extend as well to arrests effected outside an automobile. **Fn. 85a**

Fn. 85a. California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619, 631 (1991) (“And the police often will be able to search containers without a warrant . . . as a search incident to a lawful arrest Under Belton, the same probable cause to believe that a container holds drugs will allow police to arrest the person transporting the container and search it.”)

II. Substantive Law of the Fourth Amendment

Subpart C. Enforcement of the Fourth Amendment

Chapter 17. Historical Development, Nature and Purpose of the Exclusionary Rule

§ 1. Historical Development

§ 2. The Nature and Purpose of the Exclusionary Rule

§ 3. Fruit of the Poisonous Tree Doctrine

§ 4. Applicability of Exclusionary Rule to Given Proceedings

§ 5. Exceptions to the Exclusionary Rule at Criminal Trials

§ 6. Miscellaneous Procedural and Appellate Considerations: Alternative Civil Remedy

§ 2. The Nature and Purpose of the Exclusionary Rule

p. 336, add Fn. 16a to the second sentence, first complete paragraph of this section — which sentence states that the Fourth Amendment exclusionary rule is not a right of the individual who invokes it:

Fn. 16a. Herring v. United States, 555 U.S. ____, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009).

p. 337, Fn. 22. Add the following to the beginning of this footnote:

Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159, 2163, 165 L.Ed.2d 56 (2006);

And add the following to the end of this footnote:

Moreover, the flagrancy of the Fourth Amendment violation weighs in favor of applying the exclusionary rule so as to deter such serious misconduct — while less egregious violations weigh against such application. “The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in Leon, ‘an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus’ of applying the

exclusionary rule. [citation omitted].” Herring v. United States, 555 U.S. ___, 129 S.Ct. 695, 701, 172 L.Ed.2d 496(2009).

p. 340. Add the following material to the end of the first incomplete paragraph:

“Indeed, the abuses that gave rise to the exclusionary rule [in Weeks, Silverthorne and Mapp] featured intentional [law enforcement] misconduct that was patently unconstitutional.” **Fn. 39a.**

Fn. 39 a. Herring v. United States, 555 U.S. ___, 129 S.Ct. 695, 702, 172 L.Ed.2d 496(2009).

p. 338. At the end of the first incomplete paragraph in the text, add the following text and footnote material:

or for “knock and announce” violations prior to executing a search warrant. **Fn. 25a.**

Fn. 25a. Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159, 2165-68, 165 L.Ed.2d 56 (2006)

pp. 340-41. Eliminate the last paragraph of this section and substitute the following:

Until recently, it was felt that the best accommodation of these competing principles was an exclusionary rule for evidence seized in violation of the Fourth Amendment, subject to certain limitations and exceptions, particularly a safety valve “good faith” exception for minor mistakes of law or fact. But it now appears that the Court may be moving to eliminate this “good faith” exception altogether in favor of limiting the Fourth Amendment exclusionary rule to all but egregious violations. **Fn. 42a.** In so doing, the constable arguably still has a strong incentive to avoid unconstitutional search and seizure conduct, but is not needlessly penalized for minor mistakes of law or fact.

Fn. 42a. See Herring v. United States, 555 U.S. ___, 129 S.Ct. 695, 172 L.Ed.2d

§ 3. Fruit of the Poisonous Tree Doctrine [pp. 341-45]

b. Examples of derivative fruits of an unreasonable search and seizure

p. 343. Add the following new subsection at the bottom of the page:

(5) Contrary examples

● **“Knock-and-announce” violation.** Any evidence secured on private premises pursuant to a valid search warrant after law enforcement officers have forcibly entered the premises in violation of the “knock and announce” doctrine **Fn. 57a** is considered so attenuated as to dissipate the taint of the original “knock and announce” violation. This is so because, the “interest[s] protected” by the “knock-and-announce” requirement is not “served by suppression of the evidence obtained.” **Fn. 57b** Accordingly, the “fruit of the poisonous tree” doctrine --- and therefore, the Fourth Amendment exclusionary rule --- is inapplicable to such evidence. **Fn. 57c.**

Fn. 57a. See Ch. 13, Sec. 4 of this work for a discussion of the “knock-and-announce” requirements which law enforcement must follow when executing a search warrant.

Fn. 57b. “Attenuation can occur, of course, when the causal connection is remote. [citation omitted]. Attenuation also occurs when, even given a direct connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct 2159, 2164, 165 L.Ed.2d 56 (2006).

Fn. 57c. “One of those interests [protected by the “knock-and-announce” rule] is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases put it) absent an

announcement would penalize someone who did not know of the process, of which if he had notice, it is to be presumed that he would obey it. The knock-and-announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. * * *

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of evidence, the exclusionary rule is inapplicable." *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct 2159, 2165, 165 L.Ed.2d 56 (2006) [internal citations and quotations omitted]. See also Ch. 17, Sec. 5d of this supplement in which the Court also carves out an exception to the Fourth Amendment exclusionary rule for knock-and-announce violations.

But see LaFave's withering critique that "*Hudson* deserves a special niche in the Supreme Court's pantheon of Fourth Amendment jurisprudence, as one would be hard-pressed to find another case with so many bogus arguments piled atop one another." 6 Wayne LaFave, *Search and Seizure* §11.4 at 41 (4th ed. Supp. 2009-10). See also LaFave's further analysis of *Hudson* at 1 Wayne LaFave, *Search and Seizure* §1.6(h) at 25-31 (4th ed. Supp. 2009-10).

● **Warrantless arrest in a person's home.** Any evidence secured *outside* a person's home [such as a person's statement to the police] --- following an illegal arrest in the home based on probable cause but without a required search or arrest warrant **Fn 57d** --- is not considered the "fruit of the poisonous tree" because (a) such a person is lawfully in custody based on probable cause once he is removed from the home, and (b) the purpose of the warrant requirement would not be served by suppressing such a statement. Accordingly, the "fruit of the poisonous tree" doctrine --- and therefore, the Fourth Amendment exclusionary rule --- is inapplicable to such evidence. **Fn. 57e.**

On the other hand, any evidence secured *inside* the home from such a person [such as a person's statement to the police] following such an illegal arrest is

considered the “fruit of the poisonous tree” because (a) the person is unlawfully in custody without a warrant while inside his home, and (b) the purpose of the warrant requirement is served by suppressing such evidence. Accordingly, the “fruit of the poisonous tree” doctrine --- and therefore, the Fourth Amendment exclusionary rule --- is applicable to such evidence. **Fn. 57f.**

Fn. 57d. A routine arrest in a person’s home without a search or arrest warrant and without consent or exigent circumstances is unreasonable under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); see also *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed. 2d 38 (1981). See discussion of this subject at Ch. 12, Sec. 1b of this work.

Fn. 57e. “We hold that, where the police have probable cause to arrest a suspect, the [Fourth Amendment] exclusionary rule does not bar the State’s use of a statement made by the defendant outside of his home, even though the statement is taken after [a routine felony] arrest [of the defendant] made in the home [without a warrant] in violation of [the rule stated] in *Payton* [v. *New York*].” *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13, 22 (1990).

“We do hold that the station house statement in this case was admissible because [at that time], Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else. To put the matter another way, suppressing the statement taken outside the house would not serve the purpose of the [Payton] rule that made Harris’ in-house arrest illegal.” *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13, 21-22 (1990).

Fn. 57f. “The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated.” *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13, 22 (1990).

c. Refinements: independent source doctrine and inevitable discovery rule

p. 344. At the end of the first paragraph on this page, insert the following:

To invoke the doctrine, it must be shown that the fruits of the initial illegal search or seizure (1) formed no basis for the *decision* to conduct the subsequent lawful search that led to the items ultimately seized, and (2) formed no *evidentiary basis* for this subsequent search as well. **Fn. 58a**

Fn. 58a. The Court in *United States v. Murray*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), held that where there is an initial illegal police entry onto premises followed by the issuance of a search warrant that leads to the seizure of evidence on the same premises, the government, under the independent source doctrine, has “the onerous burden of convincing a trial court that no information gained from the illegal entry affected either [1] the law enforcement officers’ decision to seek a warrant or [2] the magistrate’s decision to grant it.” * * * “The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence [ultimately obtained]. This would *not* have been the case if [1] the agents’ *decision* to seek the warrant was prompted by what they had seen during the initial entry, or [2] if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.” 108 L.Ed.2d at 482, 483-84 (1988) (emphasis and brackets added).

In *Murray*, federal agents illegally entered a warehouse, observed bales of marijuana therein, immediately withdrew when they found no one there, and thereafter kept the warehouse under surveillance while others of their number obtained a search warrant for the warehouse. The agents’ affidavit in support of the warrant did not mention the prior illegal entry, but otherwise stated probable cause for the warrant based on information obtained prior to the illegal entry. The warrant was then executed and the bales of marijuana in the warehouse were seized. The trial court denied the defendant’s motion to suppress, and the Court of Appeals affirmed based on the independent source doctrine.

The Supreme Court, however, reversed with directions for the trial court to

determine “whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described.” 108 L.Ed.2d at 484.

Fn. 65.

“That [inevitable discovery] rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place. * * * The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one.” Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159, 2178, 165 L.Ed.2d 56 (2006) (Breyer, J. dissenting).

§ 5. Exceptions to the Exclusionary Rule at Criminal Trials

c. Objectively reasonable “good faith” exception

(1) Underlying principle.

p. 349. Strike the second sentence of this section and replace with:

This exception is still in the process of development and has only been applied in four distinct factual situations — the last of which may have morphed the exception into a general broad-based rule.

pp. 350-51. Strike the last three paragraphs of this section and substitute the following:

Although not free from doubt, the Court nonetheless appears to have bypassed any case-by-case approach in this area and has [arguably] adopted a broad-based rule that the Fourth Amendment exclusionary rule does not apply to negligent police errors

— that is, to negligent police mistakes of fact or law. **Fn. 93a.** We turn now to a more thorough discussion of this arguably morphed “good faith” exception.

Fn. 93a. *Herring v. United States*, 555 U.S. ___, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

p. 353. Add the following new material:

(5) Arrest based on a negligent police computer error: negligent police mistake of fact or law

In the landmark decision of *Herring v. United States*, **Fn.105a** the U.S. Supreme Court held that the Fourth Amendment exclusionary rule does not apply to the fruits of an illegal arrest based on a negligent police computer error that an outstanding arrest warrant existed against the arrestee, when the subject warrant had in fact been previously recalled. **Fn. 105b.** The rationale for this result was that the Fourth Amendment exclusionary rule does not apply to negligent police errors but only to deliberate, grossly negligent, or reckless police conduct — as well as recurring or systemic police negligence. **Fn. 105c.** Although not free from doubt, it would appear, based on this reasoning, that a mere negligent police mistake of fact or law, does not trigger the subject exclusionary rule. **Fn. 105d**

Fn. 105a. 555 U.S. ___, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009).

Fn. 105b. “The Fourth Amendment forbids ‘unreasonable searches and seizures,’ and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes that there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping [computer] error by another police employee [of another police department] ? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution.

Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.” *Herring v. United States*, 129 S.Ct. at 698.

In *Herring*, a county police officer arrested a man [*Herring*] after being informed by the police clerk of an adjoining county that the man had an outstanding arrest warrant in that county for failure to appear on a felony charge. The officer conducted a search incident to the arrest and seized a pistol from the man’s person and illegal drugs from the car the man was driving. Shortly thereafter, however, the aforesaid police clerk discovered that the subject warrant had been recalled five months previously and immediately so informed the officer’s department.

Normally, when a warrant is recalled in the adjoining police department, that fact is conveyed to the clerk who enters same in the police computer and the physical copy of the warrant is disposed of. In this case, however, the warrant was destroyed, but for whatever reason the recall of the warrant was never entered in the police computer database — so that the warrant information was erroneously still in the police computer.

Herring was indicted in federal court for illegally possessing the above gun and drugs. His motion to suppress same was denied by the trial court and *Herring* was convicted. The court of appeals and the U.S. Supreme Court affirmed.

Fn. 105c. “To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level. * * *

In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the judicial system [citation omitted], we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless [or deliberate or grossly negligent] disregard of constitutional requirements, any marginal deterrence does not ‘pay its

way.’ [citation omitted]. In such a case, the criminal should not ‘go free because the constable has blundered.’ [citation omitted].” *Herring v. United States*, 129 S.Ct. at 702, 704.

Fn. 105d. See 1 Wayne LaFave, *Search and Seizure* §1.6 (i) at 31-52 (4th ed. 2009-10 Supp), for an extensive analysis and damning critique of the *Herring* decision as having “taken another slice out of the exclusionary rule.” *Id.* at 31. Indeed, *Herring* may have even [arguably] receded from the “good faith” exception to the exclusionary rule — and instead simply limited the impact of the Fourth Amendment exclusionary rule to egregious Fourth Amendment violations. In fact, the *Herring* Court itself disparaged the very use of the term ‘good faith.’” 129 S.Ct. at 701. If that be the case, it would appear that the exclusionary rule will *presumptively* be applicable, as it always has been, whenever a Fourth Amendment violation is shown — and that the burden of showing its inapplicability under *Herring* will, as usual, remain on the prosecution. LaFave agrees. 1 Wayne LaFave, *Search and Seizure* § 1.6(i) at 52 (4th ed. Supp. 2009) (“Though nothing is said about this in *Herring*, it would appear that the burden of proof [on this issue] must be on the prosecution,” as this conclusion “squares with the policy of placing the burden of proof on the party seeking an exception to the general rule.”). We await, however, the Court’s further clarification on these unsettled issues.

d. “Knock and announce” violation

Evidence secured from private premises pursuant to a valid search warrant after law enforcement officers forcibly have entered the premises in violation of the “knock and announce” doctrine **Fn.105e** is admissible in evidence as an exception to the Fourth Amendment exclusionary rule. **Fn.105f** The Court engaged in a balancing process to reach this holding, concluding that the social costs of applying the exclusionary rule to “knock and announce” violations outweighed whatever deterrence benefits might be gained from such an application. In particular, the Court was impressed with the deterrence benefits that already exist from (a) civil suits, and (b) the increasing professionalism of police forces --- benefits that were not present to the extent they were at the time *Mapp v. Ohio* was decided in 1961. **Fn. 105g.**

Fn. 105e. See Ch. 13, Sec. 4 for a discussion of the “knock-and-announce” requirements which law enforcement must follow when executing a search warrant.

Fn. 105f. *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 2165-68, 165 L.Ed.2d 56 (2006). “In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentives to such violations are minimal to begin with, and the extant deterrence against them are substantial --incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.” 126 S.Ct. at 2168.

The Court also concluded, as an alternative holding, that evidence secured on private premises pursuant to a valid search warrant following a “knock and announce” violation is so attenuated as to dissipate the taint of such violation, and is therefore not barred from evidence by the “fruit of the poisonous tree” doctrine. See Ch. 17, Sec. 3b(5) of this supplement.

See LaFave’s withering critique that “*Hudson* deserves a special niche in the Supreme Court’s pantheon of Fourth Amendment jurisprudence, as one would be hard-pressed to find another case with so many bogus arguments piled atop one another,” 6 Wayne LaFave, *Search and Seizure* §11.4 at 41 (4th ed. Supp. 2009-10). See also LaFave’s further analysis of *Hudson* at 1 Wayne LaFave, *Search and Seizure* §1.6(h) at 25-31 4th ed. (4th ed. Supp. 2009-10).

Fn. 105g. *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 2167-68, 165 L.Ed. 56 (2006). Justice Kennedy concurred in the Court’s 5-4 decision, but noted that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.” *Hudson v. Michigan*, 126 S.Ct. at 2170 (Kennedy, J. concurring). Moreover, the Court itself has since stated that “the Constitution protects property owners . . . by interposing, *ex ante*, the ‘deliberate, impartial judgment of a judicial officer . . . between the citizen and the police’ [citation omitted], and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.” *United States v. Grubbs*, 547 U.S. 90, 126 S.Ct. 1494, 1501, 164 L.Ed.2d 195 (2006).

Still, LaFave cautions that *Hudson* “has the capacity to metastasize into a much broader limitation on the suppression doctrine” and recommends that it “should be

confined to its particular facts” 1 Wayne LaFave, Search and Seizure §1.6(h) at 27 (4th ed.Supp. 2009-10).

§ 6. Miscellaneous Procedural and Appellate Considerations: Alternative Civil Remedy

c. Standard of appellate review

p. 358. Add the following paragraph after the second complete paragraph on this page:

Similarly, in a civil suit for violation of one’s Fourth Amendment rights, all reasonable factual inferences must be resolved on appeal in favor of the jury or non-jury verdict. But whether those historical facts legally amount to a violation of the Fourth Amendment is reviewed based on a *de novo* standard. **Fn. 134a.**

Fn. 134a. Muehler v. Mena, 544 U.S. 93, 125 S.Ct. 1465, 1470, n. 1, 161 L.Ed. 2d 299 (2005).

f. Retroactive application of Fourth Amendment appellate decisions

Strike the last two paragraphs of this subsection and substitute the following two paragraphs:

The Court has followed a zig-zag course in deciding this issue. **Fn. 143.** Without reciting all the Court’s twists and turns, the current law is that when a U.S. Supreme Court decision announces a *new* constitutional rule of criminal procedure [**Fn. 144**], the new rule does *not* generally apply retroactively, and therefore is inapplicable to a federal habeas corpus proceeding collaterally attacking a state court conviction. The new constitutional rule is, however, applicable (a) to all cases on direct review *at the time* the new rule is announced, and (b) to all future trials conducted *after* the new rule is announced. There are two exceptions to this non-retroactivity approach in which the new rule must also be applied in a federal habeas corpus proceeding. (1) The first is where the new rule places certain individual conduct beyond the power of the states to

proscribe; and (2) the second is where the new rule is a “watershed” rule that implicates the fundamental fairness of the criminal trial. Nonetheless, the states are free to apply or not apply a new rule of constitutional criminal procedure retroactively in a *state* collateral attack proceeding. **Fn. 145.** On the other hand, where the U.S. Supreme Court decision announces no new constitutional rule of criminal procedure but merely applies settled precedents to a new and different factual situation, the decision is fully retroactive. **Fn. 146.**

Fn. 143. For a discussion of the Court’s line of decisions on this issue, see 6 Wayne LaFave., *Search and Seizure* § 11.5 (4th ed. 2004). It all began with *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), in which the Court held that the rule of *Mapp v. Ohio* did *not* apply retroactively and thus was inapplicable to any post-conviction collateral attack proceeding. This was done primarily because of the enormous disruptive effect on the administration of justice if the *Mapp* exclusionary rule were retroactively applied to finalized convictions in the 24 states that had no exclusionary rule prior thereto.

Fn. 144. “In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal Government. [citations omitted]. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334, 349 (1989). In turn, the Court has defined “final” to mean when the judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition to the U.S. Supreme Court has either elapsed or such certiorari petition has been denied. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601, 608, n. 8 (1965); see *Allen v. Hardy*, 478 U.S. 255, 258 n.1, 106 S.Ct. 2878, 92 L.Ed.2d 199, 204 n.1 (1986) (adopting the aforesaid *Linkletter* definition of “final”).

Fn. 145. “New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe, as well as “watershed” rules of criminal procedure must be applied in all future trials, all cases on direct review, and all federal habeas corpus proceedings. All other new rules of criminal procedure must be applied in future trials and in cases pending on direct

review, but may not be the basis for a federal collateral attack on a state conviction. This is the substance of the “Teague” rule described by Justice O’Connor in her plurality opinion in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The question in this case is whether Teague constrains the authority of the state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not.” *Danforth v. Minnesota*, 552 U.S. ___, 128 S.Ct. 1029, 1032-33, 169 L.Ed.2d 859 (2008) (footnote omitted in which the Court notes that the Teague rule has since been adopted by *Perry v. Lynaugh*, 492 U.S. 302, 313, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)).

“Justice O’Connor [in *Teague*] endorsed a general rule of nonretroactivity for cases on collateral review stating that ‘[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases that become final before the new rules are announced.’ [citation omitted]. The opinion defined two exceptions: rules that render types of primary conduct “beyond the power of the criminal law-making authority to proscribe, “and ‘watershed’ rules that ‘implicate the fundamental fairness of the trial,’ [citation omitted].” *Danforth v. Minnesota*, 128 S.Ct. at 1037-38.

Fn. 146. “First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retroactively. In such cases, it is a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. [citations omitted].” *United States v. Johnson*, 457 U.S. 537, 549, 102 S.Ct. 2579, 73 L.Ed.2d 202, 213 (1982).

In the Fourth Amendment context, this means that any U.S. Supreme Court decision announcing a new Fourth Amendment rule must be applied to any case which has not yet become “final” [Fn. 147] prior to the effective date of the decision — i.e.(1) to all cases on direct review *at the time* the new rule is announced, and (2) to all future trials conducted *after* the new rule is announced. [Fn. 147a]. Such a new Fourth Amendment rule, however, is never applicable in a federal habeas corpus proceeding.

This is so because the above two exceptions to nonretroactivity would never be applicable — namely, Fourth Amendment jurisprudence (a) never places individual conduct beyond the power of a state to proscribe, and (b) never implicates the fundamental fairness of the underlying criminal trial. [Fn. 147b]. The states, nonetheless, are free to apply or not apply a new Fourth Amendment rule retroactively in a state collateral attack proceeding. Fn. 147c. Of course, where the U.S. Supreme Court decision announces no new Fourth Amendment rule but merely applies settled Fourth Amendment precedents to new and different factual situations, the decision is fully retroactive. Fn. 147d. Finally, it would appear that all pre-Teague precedents on the issue of retroactivity remain intact. Fn. 147e.

Fn. 147. The Court has defined “final” to mean when the judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition to the U.S. Supreme Court has either elapsed or such certiorari petition has been denied. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601, 608, n. 8 (1965); see *Allen v. Hardy*, 478 U.S. 255, 258 n.1, 106 S.Ct. 2878, 92 L.Ed.2d 199, 204 n.1 (1986) (adopting the aforesaid *Linkletter* definition of “final”).

Fn. 147a. See authorities collected at footnote 145 *supra*.

Fn. 147b. As an aside, Fourth Amendment issues of any kind can, in any event, *only* be raised by a state prisoner in a federal habeas corpus proceeding where the state has not accorded the prisoner an opportunity for a full and fair litigation of his or her Fourth Amendment claim in state court; otherwise, such issues are precluded from federal habeas corpus review. *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

Fn. 147c. See authorities collected at footnote 145 *supra*.

Fn. 147d See authorities collected at footnote 146 *supra*.

Fn. 147e. Compare *United States v. Johnson*, 457 U.S. 537, 549, 102 S.Ct. 2579, 73 L.Ed.2d 202, 213 (1982) (leaving intact all pre-1982 retroactivity decisions). See e.g. *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969)(the rule

of *Katz v. United States* is not retroactive); *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971) (the rule of *Chimel v. United States* is not retroactive); *United States v. Peltier*, States,422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975) (rule of *Almeida-Sanchez v. United States* is not retroactive).

g. Alternative civil remedy: *Bivens* suit and § 1983 suit

Fn. 152. Add the following to the beginning of this footnote:

“An officer conducting a search is entitled to qualified immunity where clearly established law does *not* show that the search violated the Fourth Amendment. (citation omitted). This inquiry turns on the ‘objective legal reasonableness of the action, in light of the legal rules that were clearly established at the time it was taken.’ (citations omitted). * * * The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions.” *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808, 822, 833, 172 L.Ed.2d 565 (2009) (§1983 action) (emphasis added). “To be established clearly, however, there is no need that ‘the very action in question [have] previously been held unlawful.’ The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that the ‘[t]he easiest cases don’t even arise. But even as to action less than an outrage, officials can still be on notice that their conduct violates established law . . . in novel factual circumstances.” *Safford Unified School District v. Redding*, 557 U.S. ___, 129 S.Ct. 2633, 2643, 174 L.Ed.2d 354 (2009) (internal citations omitted) (qualified immunity shown as lower federal court decisions were divided on how the TLO standard applies to strip searches as here).

p. 362. Strike the first paragraph on this page and substitute the following two paragraphs, as the law has substantially changed:

Initially, a two fold inquiry [known as the *Saucier* inquiry] was *mandatorily* required in determining whether this qualified immunity defense was applicable in a

given case: (1) Taken in the light most favorable to the party asserting the Fourth Amendment injury, do the facts alleged show the law enforcement officer's conduct violated a Fourth Amendment right of the party complaining? (2) If so, was this right clearly established in the specific factual context of the case, so that it would be clear to a reasonable officer that his conduct was unlawful in the factual situation that he confronted? **Fn. 153.** If the answer to *either* question was “no,” the officer was entitled to a summary judgment based on qualified immunity; if not, a summary judgment based on this defense did not lie. **Fn. 154.**

Since then, the law has changed in one — but only one — important respect. Although permissible and certainly appropriate in many cases, the *sequence* of this two-fold inquiry is no longer *mandatory*, but is now *discretionary* depending on the facts and circumstances of the case. **Fn 155.** This means that a trial or appellate court, for example, has the sound discretion to skip the first inquiry and solely address the second inquiry — if the answer thereto would otherwise be dispositive in sustaining the qualified immunity defense. **Fn. 155a.** Of course, the courts are still free to follow the two-step inquiry sequence should they so choose; they simply are not required to do so. **Fn. 155b.** Moreover, it still remains true that when the defendant officer asserts a qualified immunity defense, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. **Fn. 155b.**

Fn. 153. “A court required to rule upon the qualified immunity issue must consider, then, this threshold issue: [1] Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? *** If no constitutional right would have been violated, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the party's submissions, the next [2] sequential step is to ask whether the right was clearly established.” Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 2155-56, 150 L.Ed.2d 272 (2001) (bracketed numbers added)

Fn. 154. It has been held that the lead officer who executed a search warrant that contained no description of the things to be seized could not rely on an objective “good

faith”qualified immunity defense in a *Bivens* civil suit brought against the officer --- and that a summary judgment in favor of the officer based on this defense was improperly entered. *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). An opposite result, however, has been reached in a §1983 action where a police officer shot and wounded a fleeing felon attempting to escape arrest in a motor vehicle which arguably threatened the safety of other people in the immediate vicinity. *Brosseau v. Haugen*, 543 U.S. 194 125 S.Ct. 596, 160 L.Ed.2d 583 (2004).

Fn. 155. “[W]e conclude that, while the sequence set forth there [in *Saucier*] is often appropriate , it should no longer be regarded as mandatory. The judges of the district courts and courts of appeals should be permitted to exercise their sound discretion which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808, 818, 172 L.Ed.2d 565(2009).

Fn. 155a. “There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009); see also *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1774, 167 L.Ed.2d 686 (2007).

Fn. 155b. “Although we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to believe that it is often beneficial * * * Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.” *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808, 821, 818, 172 L.Ed.2d 565 (2009). The court, for example, may deem it important to “the development of constitutional precedent” that it be understood that the officer’s conduct did, in fact, violate the complaining party’s Fourth Amendment rights — although the Fourth Amendment right asserted was not clearly established at the time of the search, and thus a qualified privilege would lie. 129 S.Ct. at 818. Moreover, ‘[i]t often may be difficult to decide whether a Fourth Amendment right is clearly established without deciding precisely what that constitutional right is’ — thereby requiring the court to answer both inquiries in certain cases, regardless of whether the qualified immunity defense be sustained or not. 129 S.Ct. at 818, quoting

from *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J. concurring).

Fn. 155c. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

TABLE OF CASES AND AUTHORITIES IN SUPPLEMENT

Cases

Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). **Ch. 17, Sec. 6f.**

Arizona v. Gant, 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). **Ch. 11, Sec. 1; Ch. 11, Sec. 1; Ch. 14, Secs. 2a, 2f; Ch. 16, Sec. 2b.**

Arizona v. Johnson, 555 U.S. ___, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). **Ch. 7, Sec. 4b; Ch. 14, Sec. 3a.**

Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). **Ch. 9, Sec. 2; Ch. 10, Sec. 3; Ch. 16, Sec. 2.**

Brigham City v. Stuart, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). **Ch. 7, Sec. 4; Ch. 11, Sec. 1; Ch. 14, Sec. 6; Ch. 15, Sec. 1**

Brousseau v. Hagen, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). **Ch. 17, Sec. 6.**

California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619, 631 (1991). **Ch. 14, Sec. 2; Ch. 16, Sec. 3.**

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