

Chapter 14

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

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

As previously discussed, a search conducted without a search warrant is per se unreasonable under the Fourth Amendment, subject to certain important exceptions.¹ Accordingly, to determine whether a given *warrantless* search is reasonable in the Fourth Amendment sense, all relevant exceptions to the search warrant requirement rule must be examined. If one of the exceptions is applicable, the search is considered reasonable, even if other exceptions may be inapplicable; if no such exception is applicable, however, the search is considered unreasonable.²

Although the Court has never expressly so stated, it seems clear from its decisions that there are two general types of exceptions to the search warrant requirement rule: (1) criminal exceptions, and (2) civil or special needs exceptions. The criminal exceptions all serve a compelling investigative purpose in ordinary criminal law enforcement cases in which the societal costs of obtaining a warrant are deemed to outweigh the reasons for resorting to a warrant.³ The civil or special needs exceptions, on the other

1. See e.g. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576, 585 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, 576 (1971); see also Chapter 11, Section 1 of this work. As an aside, the existence of probable cause to search a dwelling is *not* an exception to this search warrant requirement rule. “It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.” *Jones v. United States*, 357 U.S. 493, 497–98, 78 S.Ct. 1253, 2 L.Ed. 2d 1514, 1518 (1958).

2. See e.g. *Vale v. Louisiana*, 399 U.S. 30, 33–35, 90 S.Ct. 1969, 26 L.Ed.2d 409, 413–14 (1970) (exceptions found inapplicable, and search held unreasonable); *Coolidge v. New Hampshire*, 403 U.S. 443, 453–73, 91 S.Ct. 2022, 29 L.Ed.2d 564, 575–87 (1971) (same).

3. “Nonetheless, there are some exceptions to the warrant requirement. These have been established where it was concluded that the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search. Thus a few ‘jealously and carefully

hand, serve a compelling public purpose that the warrant procedure, and at times the probable cause or individualized suspicion requirement, is deemed ill-suited to accomplish based on a balancing of competing governmental and privacy concerns.⁴ In particular, where special governmental needs beyond the normal need for criminal law enforcement are shown, the Court generally strikes the balance in favor of dispensing with a warrant—and, at times, dispensing as well with a probable cause requirement, or even any showing of individualized wrongdoing.⁵ Moreover, the physical scope of a

drawn' exceptions provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss of evidence, outweigh the reasons for prior recourse to a neutral magistrate. But because each exception to the warrant requirement impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and 'the burden is on those seeking the exemption to show the need for it.'" *Arkansas v. Sanders*, 442 U.S. 753, 759–60, 99 S.Ct. 2586, 61 L.Ed.2d 235, 242 (1979) (internal citations omitted).

"It is true that there have been some exceptions to the warrant requirement. But those exceptions are few in number and carefully delineated; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction." *United States v. United States District Court*, 407 U.S. 297, 318, 92 S.Ct. 2125, 32 L.Ed.2d 752, 767 (1972).

"Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common sense exceptions to this requirement." *Texas v. Brown*, 460 U.S. 730, 735, 103 S.Ct. 1535, 75 L.Ed.2d 502, 509 (1983).

4. For a representative statement of the balancing approach, see *Delaware v. Prouse*, 440 U.S. 648, 653–55, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); and *Brown v. Texas*, 443 U.S. 47, 50–51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). For other statements of the balancing approach, see: *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714, 724 (1987); *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1, 7 (1985); *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381, 388 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720, 731–32 (1985); *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110, 118 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22, 30 (1983); *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554–55, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *Terry v. Ohio*, 392 U.S. 1, 20–21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536–37, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

5. "Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be (citation omitted)), we have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.' (citation omitted)." *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709, 717 (1987) (search of probationer's home by probation officers upheld).

"For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. What is reasonable, of course, 'depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' In most criminal cases, we strike the balance in favor of the procedures described by the Warrants Clause of the Fourth Amendment. Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. *We have recognized exceptions to this rule, however, 'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.' When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context.*" *Skinner v. Railway Labor Executive's Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639, 661 (1989) (internal citations omitted) (emphasis added) (drug testing program for train employees involved in train accidents upheld).

"While we have long emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, our decision in *Railway Labor Executives* reaffirms the long-standing principle that neither a warrant nor probable cause, nor, indeed, any mea-

search authorized by a given exception is strictly limited to that which is required to carry out the purpose of the exception.⁶

As previously stated, all relevant exceptions must generally be examined to determine whether a given warrantless search is reasonable or unreasonable under the Fourth Amendment. Merely because one exception is inapplicable does not necessarily mean that the search is unreasonable, as another exception may be applicable. Only where no relevant exception is applicable can it be said that a warrantless search is unreasonable under the Fourth Amendment.⁷ There is an important limitation, however, to this general proposition. Some exceptions necessarily involve or presuppose a prior seizure of an individual's person or property before the search in question takes place; if this seizure is unreasonable under the Fourth Amendment, any evidence secured as the fruit of this seizure would generally be inadmissible in evidence under the *Weeks-Mapp* exclusionary rule. And that may include the fruits of the search that immediately follows the prior unreasonable seizure.

The criminal exceptions will be examined in this chapter and include search incident to a lawful arrest, stop and frisk, moving-vehicle *Carroll* doctrine, consent, and exigent

sure of individualized suspicion is an indispensable component of reasonableness in every circumstance. As we noted in *Railway Labor Executives*, our cases establish that *where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impracticable to require a warrant or some level of individualized suspicion in the particular context.*" *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685, 702 (1989) (internal citations omitted) (emphasis added) (drug testing program for Treasury agents involved in drug enforcement upheld).

"Where a search is undertaken by law enforcement to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrants Clause. But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrants Clause not applicable), probable cause is not invariably required either. *A search unsupported by probable cause can be constitutional, we have said, 'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable.'*" *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564, 574 (1995) (citations omitted) (emphasis added) (drug testing program for public high school athletes upheld).

"The Fourth Amendment requires that searches and seizures be reasonable. A search is generally unreasonable in the absence of individualized wrongdoing. While such suspicion is not an 'irreducible' component of reasonableness, we have recognized circumstances where the usual rule does not apply. For example, *we have upheld certain regimes of suspicionless searches where the program was designed to serve 'special needs beyond the normal need for law enforcement.'*" *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333, 340 (2000) (internal citations omitted) (emphasis added) (traffic roadblock to interdict drug traffic struck down).

6. "But a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Mincey v. Arizona* 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290, 300 (1978), quoting from *Terry v. Ohio*, 392 U.S. 1, 25–26, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112, 125 (1990). "Moreover, we have limited the scope of each exception [to the search warrant requirement rule] to that which is necessary to accommodate the identified needs of society." *Arkansas v. Sanders*, 442 U.S. 753, 760, 99 S.Ct. 2586, 61 L.Ed.2d 235, 242 (1979).

7. See e.g. *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16, 19–20 (1999) (warrantless search of home based on a non-existent "murder scene" exception to the warrant requirement disapproved; case remanded without prejudice for state to invoke any applicable exception to the warrant requirement, including consent, to sustain the search) ("A warrantless search by the police is invalid unless it falls within one of the exceptions to the warrant requirement... none of which the trial court invoked here.").

circumstances. The civil or special needs exceptions, on the other hand, will be examined in Chapter 15.

Section 2. Search Incident to a Lawful Arrest

a. The wingspan rule

After over half a century of flux and uncertainty,⁸ the law is now settled that after making a lawful arrest, a law enforcement officer is authorized to search (1) the arrestee's person, and (2) the physical area into which the arrestee may physically reach to grab a weapon or evidentiary item; this is the so-called wingspan rule announced in the leading case of *Chimel v. California*.⁹ On the other hand, a search beyond this physical scope cannot be justified as a search incident to a lawful arrest, with some exceptions to be discussed below. Of course, a search that is not incident to an otherwise lawful arrest may nonetheless be justified based on some other applicable exception to the search warrant requirement rule.

As just alluded to, in order for this exception to apply, the arrest itself must be lawful. Indeed, an illegal arrest is an independent Fourth Amendment violation as it is an unreasonable seizure of the person, and will generally taint and render inadmissible the fruits of such a seizure under the *Weeks-Mapp* exclusionary rule.¹⁰ If that be the case, no

8. For a discussion of the zig-zag progression of U.S. Supreme Court decisions from 1914–1969, announcing various rules on the physical scope of a search incident to a lawful arrest that eventually led to the rule we have today, see 3 Wayne LaFare, *Search and Seizure* §6.3(b) at 348–51 (4th ed. 2004).

9. “When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.” *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, 694 (1969), overruling *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), and *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947).

In *Chimel*, the Court held that the search of the defendant’s entire three-bedroom house—including the attic, garage and small workshop—was not incident to the defendant’s lawful arrest effected at the front door of the house.

For lower federal and state court cases on the scope of a search incident to an arrest, see “Searches and Seizures” §52, “Arrest” §§71.1 (4.1), (5), (8) West Key Nos.

10. For a discussion of (1) unreasonable seizures of the person, see Chapter 12, Section 1 of this work; and (2) the evidentiary consequences thereof under the *Weeks-Mapp* exclusionary rule, see Chapter 17, Section 3 of this work.

other exceptions to the search warrant requirement rule need be examined, because the fruits of the search that follows the illegal arrest would, on that account alone, be generally barred from evidence.

b. Rationale for exception

The rationale for this exception seems obvious enough. It would be entirely impracticable to require a search warrant in order to conduct a search incident to an otherwise lawful arrest. There is a real danger that before a search warrant could be obtained, the arrestee might injure or kill the arresting officer with a concealed weapon, make an escape with such a weapon, or destroy evidence. There is, accordingly, a pressing need to immediately conduct a warrantless search incident to the arrest in order to disarm the suspect and to preserve evidence for later use at trial.¹¹

Beyond that, the Framers of the Fourth Amendment clearly had no intention of requiring search warrants for searches incident to an arrest as defined by *Chimel*. As previously noted, the Framers intended to end the abuse of general exploratory searches and seizures wrought by the general writs of assistance regime [1761–76] by constitutionalizing the special warrants or special writs practice of the English common law that generally required a search warrant to conduct a search of private premises.¹² Clearly, there was no thought that a “wingspan” search of an arrestee incident to an arrest, so necessary to disarm the suspect and preserve evidence, required a search warrant.

c. Search of person: purpose of search irrelevant

A search of the person of a lawfully-arrested individual—as opposed to the wingspan area into which the arrestee might reach—has a long-standing common law acceptance and is deemed a reasonable search, quite apart from being an exception to the search warrant requirement rule. Consequently, even if the arresting officer is not searching for weapons or evidence of crime following a custodial arrest, a search of the arrestee’s person is nonetheless considered reasonable in the Fourth Amendment sense.¹³

11. “In [United States v. Robinson, 414 U.S. 218, 234, 94 S.Ct. 467, 38 L.Ed.2d 427(1973)], we noted the two historical rationales for the ‘search incident’ exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial.” Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492, 498 (1998).

12. See Chapter 6, Section 2 of this work.

13. “The authority to search the person incident to a full custodial arrest, while based on the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the *person* of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to an arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and *we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a reasonable search under that Amendment.*” United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed. 427, 440–41 (1973) (emphasis added).

In *Robinson*, the Court held that it was reasonable under the Fourth Amendment for police to search the person of a defendant who was arrested for operating a motor vehicle after revocation of defendant’s drivers license—even though the arresting officer had no subjective fear of the defen-

d. Search may precede arrest

In a routine arrest, a search incident to that arrest usually takes place after the arrest has been physically effected. But this is not essential to invoke the exception. A search incident to a lawful arrest may actually precede the physical arrest—providing the arrest is based on probable cause developed prior to the search, and is not based on the fruits of the search.¹⁴ This rule, of course, makes good sense, else form would triumph over substance. Surely, it makes no difference whether the arrest is formally effected prior to or after the incidental search—so long as there is probable cause for the arrest quite apart from what is discovered during the search.

e. Release of suspect after search

It is rare that police will release a suspect after a search incident to the arrest has been conducted, and incriminating evidence seized. But it may happen. The evidence that is uncovered in such a search, although subject to seizure under the “plain view” doctrine, may nonetheless require some type of scientific or chemical analysis. Police may feel that the totality of the evidence in the case developed both before and after the arrest, although amounting to probable cause, may not be enough to convict. Accordingly, they may temporarily release the suspect and have the seized evidence tested, following which they may re-arrest the suspect if the tests prove incriminating. Under these unusual circumstances, such a search would seem clearly reasonable as it was conducted incident to the preceding arrest based on probable cause, notwithstanding a subsequent police decision to temporarily release the suspect. Indeed, such a search has been upheld where the suspect was not formally arrested but only temporarily detained, where the detention was based on probable cause as required for an arrest.¹⁵

dant, did not suspect that defendant was armed, and was not searching for fruits and instrumentalities of the offense for which defendant was arrested.

See *Gustafson v. Florida*, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973) (search of defendant’s person after lawful arrest for driving without a valid driver’s license held reasonable under authority of *Robinson*).

14. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) (search of suspect’s person held incident to arrest effected after the search was conducted, where probable cause to arrest existed prior to the search). “Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man’s person, it has met its total burden. There is no case in which a defendant may validly say, ‘Although the officer had a right to arrest me at the moment when he seized and searched my person, the search is invalid because he did not arrest me until afterwards.’” *Peters v. New York*, 392 U.S. 40, 77, 88 S.Ct. 1889, 20 L.Ed.2d 917, 943 (1968) (Harlan, J. concurring). This analysis is fully supported by case law throughout the country. See e.g. Justice Roger Traynor’s decision in *People v. Simon*, 45 Cal.2d 645, 290 P.2d 531 (1955); 3 Wayne LaFare, *Search and Seizure* §5.4(a) (4th ed. 2004) and cases collected.

“It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.” *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 20 L.Ed.2d 917, 934–35 (1968); *Smith v. Ohio*, 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990) (probable cause to arrest cannot be based on the fruits of the arrest).

15. *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900, 905 (1973) (defendant voluntarily came to police station alone in response to a police request; police were investigating the strangulation death of defendant’s wife; while there, police noticed a dark spot that resembled blood on the defendant’s finger; police requested permission to take a sample of scrapings from beneath defendant’s fingernails; defendant refused; police detained defendant without formally arresting

f. Arrest of automobile driver or passenger

Notwithstanding the *Chimel* wingspan rule, the Court has adopted a bright-line exception thereto confined to a search incident to the arrest of the driver or passenger of an automobile. Where a police officer makes such an arrest, the officer may search the passenger compartment of the automobile and any containers therein as an incident to such an arrest—even though the arrestee is safely secured in a nearby police car at the arrest scene and could not possibly reach anything in the arrestee’s automobile.¹⁶ This rule is not confined to cases where the driver or passenger is inside the automobile at the time the officer makes the arrest; the rule also obtains where the driver or passenger has left the vehicle by the time the officer first confronts the arrestee.¹⁷ The automobile trunk, however, may not be searched under this rule.¹⁸

The rationale for this bright-line exception is that the passenger compartment of an automobile, although not the trunk, is, in most cases, within the wingspan area of an arrested motorist or passenger—and that, given the large number of arrests involving persons in automobiles, a bright-line search rule of this nature is fair and brings a needed certainty to the scope of a search following such an arrest.¹⁹ Also the evidentiary consequences that flow from a violation of the Fourth Amendment under the *Weeks-Mapp* exclusionary rule “spur the Court [at times] to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder.”²⁰

him, took the aforesaid scrapings, and released the defendant; the scrapings were later tested and turned out to contain traces of skin and blood cells, as well as fabric from the victim’s nightgown; *held*: the search and seizure of the fingernail scrapings was “constitutionally permissible under the principles of *Chimel v. California*.”). See 3 Wayne LaFare, Search and Seizure §5.4(b) at 193–95 (4th ed. 2004).

16. “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. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within the reach of the arrestee, so also will containers in it be within his reach.” *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768, 775 (1981).

17. “We conclude . . . that *Belton* governs even when an officer does not make initial contact until the person arrested has left the vehicle.” *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 2129, 158 L.Ed.2d 905 (2004) (search of car upheld as incident to a valid arrest of driver who was first confronted and later arrested by police after driver had left his vehicle).

18. “Our holding encompasses only the interior of the passenger compartment and does not encompass the trunk.” *New York v. Belton*, 453 U.S. 454, 460 n. 4, 101 S.Ct. 2860, 69 L.Ed.2d 768, 775 (1981).

19. *New York v. Belton*, 453 U.S. 454, 459–460, 101 S.Ct. 2860, 69 L.Ed.2d 768, 774–775 (1981). “The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of rationalization which *Belton* enunciated.” *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 2132, 158 L.Ed.2d 905 (2004).

20. *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744, 753 (1981) (Justice Powell, concurring).

As an aside, Justice Scalia has criticized the *Belton* rule rationale where the arrested person is handcuffed in a nearby police car before the search of the arrestee’s car begins—as in that instance there is virtually no risk that the arrestee will grab a weapon or an evidentiary item from his car, the twin justifications for such a search under *Chimel*. Justice Scalia would, however, uphold such a search as an exception to the *Chimel* rule—by returning, in part, to earlier abandoned authority that allowed a search incident to arrest of the general area where the arrest takes place in order to discover evidence of the crime for which the arrest is made. *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 2133–2138, 158 L.Ed.2d 905 (2004) (Scalia, J. concurring); see *United States v. Rabinowitz*, 339

On the other hand, a search of an automobile is not considered incident to the arrest of an occupant therein where police do not physically take the occupant into custody, but instead issue a traffic citation to the driver.²¹ The same is true where the search of the automobile is not contemporaneous in time and place with the arrest—as where the police arrest a motorist, tow the motorist’s car to the police station, and search the car at that removed location.²²

g. The “protective sweep” rule

There is yet another exception to the *Chimel* wingspan rule. When arresting a person on private premises, law enforcement officers are automatically allowed to look in closets and other spaces *immediately adjoining* the place in the premises where the arrest takes place, even though the areas searched may be technically beyond the wingspan of the arrestee. Like a search incident to the arrest of a motorist, there is a need for a bright-line rule so as to protect the safety of the arresting officer.²³

U.S. 56, 70 S.Ct. 430, 94 L.Ed.2d 653 (1950), overruled *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, 694 (1969); see also 3 Wayne LaFare, *Search and Seizure* § 6.3(b) (4th ed. 2004) for a historical discussion of the Court’s decisions in this area that culminated with *Chimel*.

Justice Scalia states:

In short, both *Rabinowitz* and *Chimel* are plausible accounts of what the Constitution requires, and neither is so persuasive as to justify departing from settled law. But if we are to continue to allow *Belton* searches [of vehicles] on *stare decisis* grounds, we should at least be honest about why we are doing so. *Belton* cannot be reasonably explained as a mere application of *Chimel*. Rather, it is a return to the broader sort of search incident to arrest that we allowed before *Chimel*—limited, of course, to searches of motor vehicles, a category of “effects” which give rise to a reduced expectation of privacy and heightened law enforcement needs.

Thornton v. United States, 124 S.Ct. at 2137 (Scalia, J. concurring) (internal citations omitted).

21. *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).

22. *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964) (search of car at police station following arrest of suspect on the street for vagrancy, wherein suspect’s car was towed from the arrest scene to the police station, held not incident to the arrest); *Dyke v. Taylor Implement Mfg.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968) (same; arrest was for reckless driving); *Coolidge v. New Hampshire*, 403 U.S. 443, 455–57, 91 S.Ct. 2022, 29 L.Ed.2d 564, 576–78 (1971) (search of car at police station two days after arrest of suspect at his house for murder, wherein suspect’s car was towed to the police station, held not incident to the arrest); see also *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325, 335–36 n. 6, 7 (1974) (alleged search of car in parking lot a half block from police station held not incident to arrest of suspect at police station; fact that police seized car keys and parking lot claim ticket from the person of the suspect at police station did not give police possession of the car a half block away so as to constitute a seizure of same, incident to the arrest).

It is important to note, however, that the search of a car at the police station, following an arrest on the street in which the car is towed to the police station, may nonetheless be upheld under another exception to the search warrant requirement rule: namely, (1) as a moving-vehicle *Carroll* doctrine search, providing there is probable cause to believe that the car contains contraband or evidence of crime, *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984); *Colorado v. Bannister*, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1, 3–4 (1980); see Section 4e of this Chapter; or (2) as a valid inventory search of a car, *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) (car seized for forfeiture purposes; *Preston v. United States* distinguished); see Chapter 15, Section 2a of this work.

23. “We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately

Beyond that, police may also briefly “sweep” the entire premises if there is a reasonable suspicion that there are other persons on the premises who may pose a danger to those at the arrest scene. This protective sweep must be limited to a cursory inspection of those spaces on the premises where a person may be found, and does not authorize a general exploratory search of the premises. For that reason, an inspection of dresser drawers and bathroom medicine cabinets in the home would not be authorized because a person could not hide in such spaces.²⁴

h. Search must be contemporaneous with the arrest

It has long been held, even prior to *Chimel*, that a search incident to a lawful arrest must be contemporaneous in time and place with the arrest; a search conducted at another time or place removed from the arrest is generally not considered incident to the arrest.²⁵ Thus, a search of a defendant’s dwelling has been held not incident to an arrest of the defendant made at another part of town,²⁶ or made several blocks away on the street,²⁷ or made a short distance outside the house,²⁸ or made several blocks away in another person’s house,²⁹ or made two days later in a different city.³⁰

There are, however, a few wrinkles to this “contemporaneous requirement.” Clothing and other evidence taken by police from an arrestee, while the latter is in custody at a local jail after being arrested on the street, is considered incident to a prior arrest on the street. “[S]earches and seizures that could be made on the spot at the time of the arrest may legally be conducted when the accused arrives at the place of detention.”³¹ This rule

adjoining the place of arrest from which an attack could immediately be launched.” *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276, 286 (1990).

24. “Beyond that, however, we hold that there must be articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those at the arrest scene. * * * We should emphasize that such a protective sweep, aimed at protecting the officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep takes no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276, 286–287 (1990). For lower federal and state case on protective sweep searches, see “Searches and Seizures” §71 West Key No.

25. “The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as the need to prevent the destruction of evidence of the crime — things which could easily happen where the weapon or evidence is on the accused’s person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.” *Preston v. United States*, 376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777, 780–781 (1964).

26. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

27. *James v. Louisiana*, 382 U.S. 36, 86 S.Ct. 151, 15 L.Ed.2d 30 (1965) (hotel room).

28. *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

29. *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925).

30. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

31. *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771, 75 (1974); see also *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) (same result based on the civil inventory exception to the search warrant requirement rule; see Chapter 15, Section 2a(4) of this work).

is more a matter of administrative convenience than anything else—as a more thorough search of an arrestee may not be possible, following a patdown search for weapons, until the arrestee has been taken to jail. Also, after a person is lawfully arrested for drunk driving, police, as an incident of the arrest, may take the arrestee to a medical facility or other location to extract a nonconsensual sample of the person’s blood according to accepted medical practices, for subsequent blood alcohol analysis.³²

Moreover, when, as sometimes happens, a police officer lawfully arrests a suspect and requests identification, the officer, as an incident of a lawful arrest, is authorized to accompany the suspect into the latter’s residence, where the suspect says his identification is located, to obtain the identification. It is clearly reasonable for a police officer, as a matter of routine, to monitor the movements of such an arrested person by entering the residence, rather than let the person enter the premises alone and possibly escape. A search of the arrestee’s dwelling, of course, is not authorized, but if the officer sees contraband or evidence of crime in plain view while in the dwelling, the officer is privileged to seize such evidence under the “plain view” doctrine.³³

i. Seizure of alleged obscene film

The warrantless seizure of an alleged obscene film following an arrest raises certain First Amendment concerns. Consequently, the seizure of such a film, following an arrest of a person for the public exhibition of such a film in a commercial theater, has been held unreasonable under the Fourth Amendment because it was accomplished without a warrant and without a prior judicial determination that the film was obscene.³⁴ A film of this nature can only be seized pursuant to a search warrant in which there has been a judicial determination that the film is obscene.³⁵

j. “Plain view” seizure of evidence

During an otherwise proper search incident to arrest as thus defined, law enforcement officers will sometimes discover certain physical objects. If there is probable cause to believe that these objects are contraband, fruits or instrumentalities of a crime, or ev-

32. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, 917–20 (1966).

33. *Washington v. Chrisman*, 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982) (police officer observed marijuana and a marijuana pipe while in defendant’s dormitory room and lawfully seized same under the “plain view” doctrine; proper for officer to go in the defendant’s room following a lawful arrest of defendant to obtain defendant’s identification, even though the defendant asked officer to remain outside the room). For a discussion of the “plain view” doctrine, see Chapter 12, Section 2c of this work.

34. *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) (the local sheriff and prosecutor purchased tickets to a drive-in theater, watched the film which was being commercially shown there, following which the sheriff proceeded to the projectionist booth, arrested the defendant [manager of the theater] for exhibiting an obscene film, and seized the film incident to the arrest; held: seizure of the film was unreasonable).

35. For a discussion of the rules governing the search and seizure of materials presumptively protected by the First Amendment, such as books and films, see Chapter 16, Section 6 of this work.

idence of a crime, the officers are privileged to seize such objects under the “plain view” doctrine—whether such objects are related or unrelated to the offense for which the suspect was arrested.³⁶

Section 3. “Stop and Frisk” Search

a. General rule

In the landmark case of *Terry v. Ohio*,³⁷ the Court held that a law enforcement officer, after making a valid temporary detention of a person based on reasonable suspicion, is allowed to conduct a patdown search of the outer clothing of the detainee for weapons, provided there is a showing of articulable suspicion that the detainee is armed and dangerous.³⁸ The purpose of this limited patdown search is not to discover evidence of crime, but to allow the officer to pursue his or her investigation without fear of being violently assaulted.³⁹ As a consequence, a full-blown search of the person, in which an officer reaches into the pants pockets and other hidden recesses of the detainee’s clothing, is not justified by this exception because such an extensive search is unnecessary to determine if the detainee is armed.⁴⁰

36. For a discussion of the “plain view” doctrine, see Chapter 12, Section 2c of this work

37. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, 911(1968).

38. “We merely hold today that [a] where a police officer observes unusual conduct which leads him reasonably to conclude that criminal activity may be afoot and the persons with whom he is dealing are armed and dangerous, [b] where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and [c] where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is authorized for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced against the person from whom they are taken.” *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, 911(1968) (bracketed letters added).

In *Terry*, an experienced police officer observed defendant and a companion one afternoon walking back and forth peering into the front of a store about 12 times in downtown Cleveland, Ohio, following which they would confer with one another and later with a third person. Based on his police experience, the officer had reasonable suspicion that these men were casing the store for a robbery and were armed and dangerous. He approached defendant and two companions, identified himself, asked their names; when they mumbled something in response, the officer immediately frisked them, feeling a gun under defendant’s outer clothing. The Court upheld the initial stop and frisk; the Court also upheld the seizure of the gun.

39. “The purpose of this limited [Terry] search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to its protective purpose.” *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612, 617 (1972).

40. In *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), the Court struck down a full-blown search of a detainee when a police officer reached into detainee’s pocket to determine whether the detainee had narcotics therein, and pulled out several glassine envelopes containing heroin, while effecting a temporary *Terry* stop.

“In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron’s pocket and took from him envelopes of heroin. His testimony shows that he

If, while conducting a valid patdown search for weapons, the officer feels a hidden object that gives one probable cause to believe that the detainee is carrying a concealed weapon, (a) the acquisition of this knowledge is considered valid under the “plain view” doctrine, sometimes referred to as the “plain feel” extension of this doctrine, which relies on both tactile as well as visual inspection while conducting an otherwise reasonable search;⁴¹ and (b) based on this knowledge, the officer is privileged (i) to reach into the hidden recesses of the detainee’s clothing thereby conducting a full-blown search of the detainee, based on the search-incident-to-a-valid arrest exception discussed in the previous section of this chapter, and (ii) to seize any concealed weapon [or contraband, fruits or instrumentalities of crime, or evidence of crime] in the detainee’s pocket under the “plain view” doctrine.⁴² But—and here things get technical—if during the initial patdown search for weapons, the officer acquires no knowledge to give one probable cause to believe that the detainee has a weapon, the search at that point must cease. If, nonetheless, the search illegally continues, and the officer manipulates with one’s fingers the hidden object on the detainee’s person to determine if it is contraband drugs, the extended search is invalid under the *Terry* stop-and-frisk exception, as it is conducted outside the scope of this search warrant exception—thereby tainting any searches or seizures that follow, and rendering the fruits thereof generally inadmissible under the *Weeks-Mapp* exclusionary rule.⁴³

Although most valid *Terry* stops for felony offenses justify an automatic patdown search of the detainee for weapons, it does not follow that every valid *Terry* stop justifies such an intrusion. To conduct a patdown search, there must also be a showing of reasonable suspicion that the detainee is armed and dangerous—which requirement is met where the detention itself is for an offense in which the offender would likely be armed.⁴⁴ But where neither the basis for the detention itself nor other surrounding cir-

was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.” *Sibron v. New York*, 392 U.S. at 65–66, 88 S.Ct. 1889, 20 L.Ed.2d at 936 (1968).

41. “If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.” *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334, 345 (1993).

42. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, 911 (1968) (patdown search of detainee revealed contour of a gun, thereby giving police probable cause to arrest detainee, to conduct full-blown search of detainee’s person, and to seize a gun found during such search); see Chapter 12, Section 2c of this work for a discussion of the “plain view” doctrine.

43. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334, 348–49 (1993) (search held invalid as conducted outside scope of valid stop-and-frisk search). “If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.” 124 L.Ed.2d at 344.

44. “Where a [*Terry*] stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightly but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.” *Terry v. Ohio*, 392 U.S. 1, 33, 88 S.Ct. 1868, 20 L.Ed.2d 889, 913 (1968) (Harlan, J. concurring).

“Lower courts have been inclined to view the right to frisk as being ‘automatic’ whenever the suspect has been stopped upon suspicion that he has committed, was committing, or was about to

circumstances present a reasonable suspicion that the detainee is armed and dangerous, as in a routine traffic stop where the officer issues a ticket to the motorist—police are not privileged to conduct a patdown search of the detainee.⁴⁵

As an aside, in order for this exception to apply, the temporary detention itself must be lawful. Indeed, an illegal temporary detention is an independent Fourth Amendment violation as it is an unreasonable seizure of the person—and will generally taint and render inadmissible the fruits of such a seizure under the *Weeks-Mapp* exclusionary rule.⁴⁶ If that be the case, no other exceptions to the search warrant requirement rule need be examined, because the fruits of the search that follows the illegal detention would on that account alone be generally barred from evidence.

b. Rationale for exception

Like a search incident to an arrest, a stop and frisk search could not, as a practical matter, be carried out with a search warrant. Before a search warrant could be obtained, the detainee would obviously have an opportunity to assault the detaining officer with a hidden weapon; a warrantless frisk must therefore immediately follow the stop, else the officer's safety would be placed at risk.⁴⁷ Plainly, this result is fully consistent with the

commit a type of crime for which the offender would likely be armed, whether the weapon would be used to actually commit the crime, to escape if the scheme went awry, or for protection against the victim or others involved. This includes such suspected offenses as robbery, burglary, rape, assault with weapons, homicide, and dealing in large quantities of narcotics. In such circumstances, then, 'the officer's reasonable belief may derive as much from his experience in similar cases as from his precise knowledge of the dangerous propensities of the suspect at hand.'" 4 Wayne LaFave, Search and Seizure §9.6(a) at 625–26 (4th ed. 2004) (footnotes and citations omitted).

45. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (being present as a patron on the premises of a tavern while a search warrant was being executed therein for contraband drugs did not, without more, constitute a basis for conducting a patdown search of the patron); see also *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (detainee, who was seen over a number of hours conversing with known narcotics addicts on the street, could not be searched by police, as there was no showing that the detainee was armed and dangerous).

"But for other types of crimes, such as trafficking in small quantities of narcotics, possession of marijuana, illegal possession of liquor, prostitution, bookmaking, shoplifting, underage drinking, driving under the influence and lesser traffic offenses, minor assault without weapons, or vagrancy, as well as when the stop is for a legitimate noncriminal reason, there must be, as Justice Harlan noted in *Terry* 'other circumstances present [to justify a patdown search]'" 4 Wayne LaFave, Search and Seizure §9.6(a) at 626–27 (4th ed. 2004) (footnotes and citations omitted). For illustrative examples of such "other circumstances," see LaFave, *supra*, at pp. 627–31 and cases collected.

46. For a discussion of (1) unreasonable seizures of the person, see Chapter 12, Section 1, of this work; and (2) the evidentiary consequences thereof under the *Weeks-Mapp* exclusionary rule, see Chapter 17, Section 3 of this work.

47. "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure or that in most instances failure to comply with the warrant procedure can only be excused by exigent circumstances. But we deal with an entire rubric of police conduct—necessarily swift action predicated upon on-the-spot observations of an officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, 905 (1968).

"The purpose of this limited [patdown] search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612, 617 (1972).

intent of the Framers of the Fourth Amendment, who clearly had no purpose whatever to regulate such searches with a search warrant.

c. Automobile weapons search

There is, however, a special rule for the search of an automobile driver or passenger who has been temporarily detained. After a valid *Terry* stop of such an occupant, the police may search the passenger compartment [but not the trunk] of the automobile for weapons for their own self-protection and safety—provided there is reasonable suspicion that the automobile contains weapons dangerous to the investigating officers; if weapons or contraband drugs are found during this search, the same may be seized under the “plain view” doctrine.⁴⁸ There is no justification, however, for conducting such a passenger compartment search in the absence of a reasonable suspicion that the automobile contains weapons dangerous to the officer—as in a routine traffic stop of a non-dangerous motorist to whom police issue a traffic ticket, but do not take into custody.⁴⁹ Moreover, after a valid *Terry* stop of a car, police may, without more, order the driver and occupants out of the car.⁵⁰

48. “In *Terry v. Ohio* . . . we upheld the validity of a protective search for weapons in the absence of probable cause to arrest because it is unreasonable to deny a police officer the right ‘to neutralize the threat of physical harm,’ when he possesses an articulable suspicion that an individual is armed and dangerous. We did not, however, expressly address whether such a protective search for weapons could extend to an area beyond the person in the absence of probable cause to arrest. In the present case, respondent David Long was convicted for possession of marijuana found by police in the passenger compartment and trunk of the automobile that he was driving. The police searched the passenger compartment because they had reason to believe that vehicle contained weapons dangerous to the officers. We hold that the protective search of the passenger compartment was reasonable under the principles articulated in *Terry* and other decisions of this Court. * * * These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on ‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. [fn. 14]. We stress that our decision does not mean that police may conduct automobile searches whenever they conduct an investigative stop, although the ‘bright line’ we drew in *Belton* clearly authorizes such a search whenever officers effect a custodial arrest.] * * * If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.” *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201, 1210, 1220, n. 14 (1983) (citations omitted).

In *Long*, police stopped defendant who was driving his car at an excessive speed around midnight in a rural area and swerved into a ditch. Defendant appeared to be under the influence of something when police talked to defendant outside the car, as defendant did not respond to police questions. Defendant was about to re-enter his car, when police spotted a large hunting knife in the interior of the car. Police immediately patted defendant down, went into the interior of the car, looked under the arm rest, and found a pouch containing marijuana. The Court upheld the search on the basis that the police had a reasonable suspicion that the car contained weapons dangerous to the officers, and that the marijuana was properly seized during the course of this search.

For lower federal and state court cases on this issue, see “Searches and Seizures” §68 West Key No.

See also Chapter 12, Section 2c of this work for a discussion of the “plain view” doctrine.

49. *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (search of automobile “incident to a traffic citation” struck down).

50. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (driver); *Maryland v. Wilson*, 137 L.Ed.2d 41 (1997) (passengers).

Section 4. Moving Vehicle Exception: Carroll Doctrine

a. General rule

In the landmark case of *Carroll v. United States*,⁵¹ the Court held that law enforcement officers may conduct a warrantless search of a moving vehicle, such as an automobile, if there is probable cause to believe that the vehicle contains (a) contraband, (b) fruits or instrumentalities of a crime, and, under a later ruling, (c) evidence of crime.⁵² Two requirements must be met for this exception to apply: (1) the moving vehicle must be mobile, i.e. operational, capable of being moved from the jurisdiction; and (2) there must be probable cause to believe that the vehicle contains contraband, evidence of crime or fruits or instrumentalities of a crime. It is unnecessary, however, to show that it was, in fact, impracticable to obtain a warrant for such a vehicle; no special exigency or emergency situation need be shown, as the vehicle's mobility itself supplies the exigency.⁵³ Where, however, a vehicle is not readily mobile at the time the police confront it, a subsequent search thereof, although based on probable cause, is unreasonable for lack of a valid search warrant—as, for example, where the vehicle is located at the suspect's home, and the suspect is otherwise in police custody with no one left at the home to remove the vehicle from the jurisdiction.⁵⁴

As an aside, this exception necessarily presupposes that the police are in lawful possession of the moving vehicle that they search. In deed, an illegal seizure of the moving vehicle is an independent Fourth Amendment violation, as it is an unreasonable seizure of a Fourth Amendment "effect." This may happen, for example, if police ille-

51. 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Remarkably, a Florida statute was shortly thereafter enacted adopting the entire *Carroll* opinion as the law of Florida on automobile searches. §933.19, Fla. Stat.

52. *Warden Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); see Chapter 11, Section 4d of this work.

53. "The Fourth Amendment generally requires police to secure a warrant before conducting a search. As we recognized 75 years ago in *Carroll v. United States*..., there is an exception to this requirement for searches of vehicles. And under our established precedent the 'automobile exception' has no separate exigency requirement." *Maryland v. Dyson*, 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (citations omitted) (search of automobile based on probable cause upheld, although it was arguably practicable for police to have obtained a warrant for the auto). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) (same holding as *Dyson*).

54. *Coolidge v. New Hampshire*, 403 U.S. 443, 458–64, 91 S.Ct. 2022, 29 L.Ed.2d 564, 576–581 (1971) (Court struck down the search of an automobile, based on probable cause, for lack of a valid search warrant where (a) the automobile was located at the suspect's home; and (b) both the suspect [who had been cooperative with police in the past with respect to the murder being investigated] and his wife were removed by police from the scene—so that there was no one left with access to the auto; under these circumstances, especially where police had the suspect under surveillance for weeks, the Court concluded that a valid warrant was required for the search of the auto). "Neither *Carroll*, supra, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." *Chambers v. Maroney*, 399 U.S. 42, 50, 90 S.Ct. 1975, 26 L.Ed.2d 419, 428 (1970).

gally stop a person who is driving a moving vehicle, in which event police have unreasonably seized both the person of the driver, and the moving vehicle. Such an unreasonable seizure will generally taint and render inadmissible the fruits thereof under the *Weeks-Mapp* exclusionary rule.⁵⁵ If that be the case, no other exceptions to the search warrant requirement rule need be examined, because the fruits of the search that follows the illegal seizure of the moving vehicle would on that account alone be barred from evidence.

b. Moving vehicles covered

Although most of the cases under the *Carroll* doctrine involve automobiles and at times refer to this exception as the “automobile” exception, the doctrine is applicable to any self-propelled vehicle—including a truck, a boat, an airplane and the like.⁵⁶ To be a moving vehicle, the vehicle in question must be mobile or operational—that is, capable of being moved from place to place. Accordingly, a motorized mobile home operating on the public streets is covered by this exception, and is not entitled to Fourth Amendment protection as a home.⁵⁷

c. Rationale for exception

The primary rationale for this exception is the moving vehicle’s mobility which, by its very nature, makes it generally impracticable for police to obtain a warrant. As stated by the *Carroll* Court, “it is not practicable to secure a warrant because the vehicle can quickly be moved out of the locality or jurisdiction in which the warrant must be sought.”⁵⁸

55. For a discussion of (1) unreasonable seizures of the person, see Chapter 12, Section 1, of this work; and (2) the evidentiary consequences thereof under the *Weeks-Mapp* exclusionary rule, see Chapter 17, Section 3 of this work.

56. See e.g. *United States v. Lee*, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927); (warrantless search of a motorboat at sea based on probable cause upheld); 3 Wayne LaFare, *Search and Seizure* § 7.2 at 538 n. 2 (4th ed. 2004) and cases collected; “Searches and Seizures” §59 West Key No.

57. *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985).

58. *Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

There is also a second rationale for the rule: the reduced expectation of privacy in automobiles and other motor vehicles, as compared to a home or office. Due to the pervasive governmental regulation of such vehicles, the motoring public may reasonably expect to be stopped and their vehicle examined without a warrant for scheduled inspections, or for various equipment violations, or for improper operation of the vehicle, or if license plates or inspection stickers have expired. As a result, one's reasonable expectation of privacy in an automobile or like vehicle is clearly diminished, as warrants are ill-suited to carry out the purpose of such pervasive regulation.⁵⁹

d. Probable cause showings

The term "probable cause" has been traditionally defined as a practical, non-technical evidentiary showing of individualized wrongdoing that amounts to more than reasonable suspicion, but less than proof beyond a reasonable doubt.⁶⁰ In applying this highly flexible standard under the *Carroll* doctrine, the U.S. Supreme Court has given law enforcement officials wide-ranging, although not unlimited, authority to search

59. "However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is the not the only reason for the exception. The reasons for the vehicle exception, we have said are two-fold. 'Beside the element of mobility, less rigorous warrant requirements govern because the expectation of privacy in one's automobile is significantly less than that relating to one's home or office.' * * *

These reduced expectations of privacy derive . . . from the pervasive regulation of vehicles capable of traveling on the public highways. As we explained in *South Dakota v. Opperman* . . . , an inventory search case:

Automobiles, unlike homes, are subjected to pervasive and continuing regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in working order.

The public is fully aware that it is accorded less privacy in its automobile because of this compelling need for regulation. * * * In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met." *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406, 413–14 (1985) (internal citations omitted).

"Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's 'ready mobility,' an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. (citations omitted). More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation. (citation omitted). If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more. (citation omitted)." *Pennsylvania v. Labron*, 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031, 1035–36 (1996).

"There is still another distinguishing factor [underlying the *Carroll* doctrine]. 'The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.' (citation omitted). One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view." *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325, 335 (1974).

60. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879, 1890–91 (1949).

moving vehicles without a warrant in fast-moving emergency encounters on the street while investigating felony offenses—especially crimes of violence, theft, narcotics,⁶¹ and, at an earlier time in our history, contraband liquor.⁶²

61. See e.g. *Chambers v. Maroney*, 399 U.S. 42, 46–47, 90 S.Ct. 1975, 26 L.Ed.2d 419, 425–26 (1970) (police had probable cause to search an auto without a warrant when (a) they stopped an auto, on the public streets, that matched the witness’ description of the getaway car (a green compact station wagon containing four men) in a service station robbery committed less than an hour before; (b) the auto contained four men, one wearing a green sweater, with a trench coat in the auto; and (c) the witnesses described one of the robbers as wearing a green sweater and the other as wearing a trench coat).

United States v. Johns, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) (US customs officials had probable cause to search two pickup trucks without a warrant when they (a) followed these trucks to a remote airstrip 50 miles from the US-Mexican border; (b) saw two airplanes land on the airstrip on two separate occasions during which one truck drove up to the airplane; and (c) approached the trucks, smelled an odor of marijuana coming from the trucks, and saw in open view in the back of the pickup trucks packages wrapped in dark green plastic and sealed with tape, packages that the agents knew from their prior experience are commonly used to smuggled marijuana; seizure of marijuana from these packages upheld).

Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980) (police had probable cause to search auto without a warrant when they (a) lawfully stopped the auto on the public streets for speeding, (b) saw in open view while standing outside the auto (i) that the driver and his companion matched the description given in a radio dispatch report of persons suspected of stealing motor vehicle parts, and (ii) that certain auto lug nuts and wrenches were scattered throughout the auto; seizure of the lugnuts and wrenches upheld).

California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) (state drug enforcement agents had probable cause to search mobile motor home in public parking lot when they (a) observed defendant and a companion enter defendant’s mobile motor home on the streets where they remained for slightly over an hour, (b) questioned the companion when he left the motor home, and (c) the companion stated that he received marijuana from defendant in exchange for sexual favors, which corroborated information from another source that the motor home was being used to exchange marijuana for sex; seizure of marijuana from the motor home upheld).

New York v. Class, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986) (police had probable cause to search auto without a warrant when they (a) lawfully stopped the auto on the public street for speeding and driving with a cracked windshield, and (b) saw the butt of a gun protruding from underneath the driver’s seat in open view, while properly reaching into the auto to move papers from the dashboard to see the auto VIN no.; seizure of gun upheld).

The cases in the lower federal courts and state courts follow a similar pattern on this issue. “Searches and Seizures” §62 West Key No.

62. See e.g. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) (federal alcohol agents had probable cause to search an auto without a warrant when they (a) saw the defendant driving an auto on a highway between Detroit and Grand Rapids, Michigan, a regular route for introducing illegal liquor into the U.S. from Canada; (b) recognized the defendant as a man with whom the agents in an undercover capacity had negotiated to buy illegal liquor about three months before, but which sale never materialized; (c) recognized the auto as the same auto the defendant was driving in the earlier aborted liquor sale; and (d) stopped the auto, searched it and seized 68 bottles of contraband liquor).

Brinegar v. United States, 338 U.S. 160, 165–171, 69 S.Ct. 1302, 93 L.Ed. 1879, 1885–88 (1949) (follows *Carroll* as being indistinguishable on the facts) (federal alcohol agents had probable cause to search an auto without a warrant when they (a) saw the defendant driving the auto which appeared to be heavily loaded; (b) the agent recognized the defendant (i) as a man the agent had arrested for transporting illegal liquor five months earlier, (ii) as a man the agent had seen loading liquor into a truck on two occasions in the area in the preceding six months, (c) saw the defendant proceeding on a highway that was a transport route for liquor from a “wet” state (Missouri) to a “dry” state (Okla.); (d) followed the defendant who thereupon sped up his auto and attempted to evade the agent in a high-speed chase; and (e) finally stopped the auto, searched it and seized 13 cases of contraband liquor).

Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938) (federal alcohol agents had

Only in a limited range of cases where, to the judicial mind, the law enforcement conduct smacks of police state tactics, or the individual's conduct is relatively innocuous or only slightly suspicious, has the Court been inclined to strike down such intrusions as not based on probable cause. Although admittedly the extent of the police power is great in this area, this by no means declares a field day for law enforcement officials to search moving vehicles on the street virtually at their discretion.⁶³ Indeed, to sanction such arbitrary conduct in the name of effective law enforcement would be contrary to one of the primary purposes of the Fourth Amendment—namely, to end the abuse of general exploratory searches by government officials, as wrought by the general writs of assistance regime 1761–76.⁶⁴

e. Place for search of vehicle

If there is probable cause to search a moving vehicle located on the public streets, police may search the vehicle there, or may tow the vehicle to a more secure location, such as a police station, and search the vehicle there; in either event, a search warrant need not be obtained.⁶⁵ If the vehicle is towed to the more secure location, the search

probable cause to search an auto without a warrant when they (a) received information from an informant that at a particular time and place a Dodge auto with described license plates would transport contraband whiskey from a specified dwelling; (b) went to the described location and saw the described auto; (c) heard, from their vantage point, what seemed to be heavy paper packages passing over wood near the auto, and auto doors slamming; (d) followed the auto driven by the defendant to an open garage of a defendant's residence; (e) got out of their car, confronted the defendant, identified themselves, and stated that they had information that the auto contained bootleg liquor, to which the defendant replied that it was "just a little for a party;" and (f) opened the trunk of the auto and seized 88 bottles of contraband liquor).

Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931) (federal alcohol agents had probable cause to search an auto when they (a) received information from an informant, who had given them reliable information in the past, that defendant had contraband liquor in two described autos at a particular location; (b) were familiar with the defendant as he had two prior convictions for violations of the Prohibition Act; (c) went to the location described by the informant and saw one of the described autos parked on the public street; (d) observed the defendant and companions enter the auto and drive off; and (e) stopped the auto, searched it and seized 18 cases of contraband whiskey).

See also: *United States v. Lee*, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927) (U.S. Coast Guard officer in patrol boat shined a searchlight on a motorboat at sea and observed numerous cases of contraband liquor on the deck of the motorboat, thereby giving the officer probable cause to board the motorboat and seize the liquor).

63. "[T]he Carroll doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." *Almeida-Sanchez v. United States*, 413 U.S. 266, 269, 93 S.Ct. 2535, 37 L.Ed.2d 596, 600–01 (1973) (operating an automobile near the U.S.-Mexican border insufficient basis for roving border patrol to search the auto for illegal aliens); *Ortiz v. United States*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) (traveling by automobile through a border patrol traffic checkpoint near the U.S.-Mexican border insufficient basis to search the auto for illegal aliens).

64. See Chapter 6, Section 2 of this work.

65. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984). "[I]t is axiomatic that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically well-established and well-delineated exceptions.' One of these exceptions recognized at least since *Carroll v. United States*... exists when an automobile or other vehicle is stopped and the police have probable cause to believe it contains evidence of crime. *Carroll* upheld the legality of a search that was conducted immediately after

need not take place immediately and may be accomplished at a later time, although the search cannot be postponed indefinitely.⁶⁶ Moreover, a moving vehicle may be seized from a public place if police have probable cause to believe that the vehicle is forfeitable contraband under a state or federal statute—for example, if the vehicle is being used to deliver illegal drugs—and thereafter the automobile may be inventoried at another more secure location.⁶⁷ Finally, law enforcement agents, in pursuit of an automobile that the agents have probable cause to search, may follow the auto to an open garage at a private residence and search the auto there, although not the garage itself.⁶⁸

f. Scope of vehicle search: containers and passengers

Where there is probable cause to believe that a moving vehicle contains contraband or fruits or instrumentalities of a crime or evidence of crime, all areas within the vehicle may be searched, so long as the object of the search may be found in those areas—including all containers therein.⁶⁹ This rule extends to containers that belong not only to the driver, but to all passengers in the motor vehicle—such as a purse left on a car

the stop. Since *Carroll*, warrantless searches have been found permissible even when the car was searched and after being seized and moved to the police station. In each of these latter cases, the search was constitutionally permissible because an immediate on-the-scene search would have been permissible.” *Colorado v. Bannister*, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1, 3–4 (1980).

66. *United States v. Johns*, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890, 896–99 (1985) (3-day delay in search of packages taken from pickup trucks towed to DEA headquarters upheld).

67. *Florida v. White*, 526 U.S. 559, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999) (car seized from parking lot at defendant’s place of employment after the defendant was arrested there; police had previously seen the defendant using car to deliver cocaine; later inventory search of car found crack cocaine in car ashtray; held: reasonable seizure of the car, thereby sustaining the later search, based on principles of *Carroll* and founding era statutes).

68. *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938)

69. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) [overruling *Robbins v. California*, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981)] (probable cause that defendant was selling narcotics out of the trunk of his car and had narcotics in the car justified a warrantless search of paper bag and zippered leather pouch found in trunk of car); *Michigan v. Thomas*, 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982) (probable cause that car contained marijuana justified search of the air vents under the car dashboard, as marijuana might be hidden there; revolver discovered in air vents properly seized).

“We hold that the scope of the warrantless search authorized by that exception [the *Carroll* moving vehicle exception] is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572, 594 (1982).

“Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband does not justify a search of the entire cab.” *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572, 593 (1982).

For lower federal and state court cases on this point of law, see “Searches and Seizures” §65 West Key No.

seat.⁷⁰ On the other hand, where there is probable cause to believe that only a container located in a motor vehicle has contraband or evidence of crime therein [but no probable cause to believe that the rest of the vehicle contains contraband or evidence of crime], the container [but not the entire vehicle] may be searched without a warrant.⁷¹ Also, this exception does not, without more, confer a right on law enforcement officers to search the person of a passenger in the automobile.⁷²

g. “Plain view” seizure of evidence

During an otherwise proper *Carroll* moving vehicle search as thus defined, law enforcement officers are privileged to seize any physical evidence under the “plain view” doctrine if there is probable cause to believe that this evidence constitutes contraband, fruits or instrumentalities of a crime, or evidence of a crime—whether such objects are related or unrelated to the probable cause that justified the search in the first instance.⁷³

Section 5. Consent Search

a. General rule of voluntariness

Under the consent exception to the search warrant requirement rule, law enforcement officers may search private premises and other protected property or an individual’s person without a warrant—provided the individual whose property or person is searched, freely and voluntarily consents to the search, and is not coerced, either expressly or im-

70. “We hold that police officers with probable cause to search a car may inspect passengers’s belongings found in the car that are capable of concealing the object of the search.” *Wyoming v. Houghton*, 119 S.Ct. 1297, 1304 (1999) (police, with probable cause to search car for illegal drugs, could search passenger’s purse left on front seat of car).

71. “The Court in *Ross* put it this way: ‘The scope of a warrantless search of a vehicle . . . is not determined by the nature of the container in which the contraband is secreted. Rather it is defined by the object of the search and the places in which there is probable cause to believe it may be found.’ It went on to note: ‘Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.’ We reaffirm that principle. In the case before us, the police had probable cause to believe that the paper bag in the automobile trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.” *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619, 634 (1991)

Acevedo overruled the results reached and rationale of *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct 2476, 61 L.Ed.2d 538 (1977) (footlocker in trunk of car searched; probable cause that footlocker contained marijuana; search held invalid because conducted without a warrant); and *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) (same result for search of suitcase in taxicab). Under *Acevedo*, the footlocker in *Chadwick* and the suitcase in *Sanders* could be searched without a warrant, but not the entire vehicle.

72. *United States v. Di Re*, 332 U.S. 581, 583–87, 68 S.Ct. 222, 92 L.Ed. 210, 214–16 (1948). “*United States v. Di Re* . . . held that probable cause to search a car did not justify a body search of a passenger.” *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 1302, 143 L.Ed.2d 408 (1999).

73. See Chapter 12, Section 2c of this work for a discussion of the “plain view” doctrine.

plied, into giving such consent.⁷⁴ The prosecution has the burden to show by a preponderance of the evidence that the consent was freely and voluntarily given.⁷⁵ A voluntary consent search is an important tool in the arsenal of law enforcement officers, and is often used in investigating crime where no probable cause for a given search otherwise exists.⁷⁶

Voluntariness, in turn, is a question of fact to be determined based on the totality of the circumstances of the case,⁷⁷ which means that the same factors that go into determining whether a confession is voluntary are equally applicable in a consent search case.⁷⁸ Accordingly, the following factors are important in determining whether a consent to search was given voluntarily: the accused's youth, lack of education, or low intelligence; the lack of any advice to the accused of his or her constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as deprivation of food or sleep.⁷⁹ Law enforcement officers, however, are not required to give *Miranda*-like advice that the suspect has a right to

74. "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable... subject only to a few specifically established and well-delineated exceptions.' It is equally well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. * * *

But the Fourth and Fourteenth Amendments require that a consent [to search] not be coerced, by explicit or implicit means, by implied threat or covert force. * * *

We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that consent was in fact voluntarily given and not the result of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 858, 863, 875 (1973) (defendant's consent for police to search his car held voluntary); see *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, 609 (1976) (rule of *Schneckloth* extended to a defendant in police custody; consent search of car upheld).

75. "When a prosecutor seeks to rely on consent to justify the lawfulness of a search, he [or she] has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797, 802 (1968). "In any event, the controlling burden of proof at suppression hearings [on the consent issue] should impose no greater burden than proof by a preponderance of the evidence." *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242, 253, n. 14 (1974).

76. "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence."

"Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on a highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 231–32, 93 S.Ct. 2041, 36 L.Ed.2d 854, 863, 865 (1973).

"The so-called consent search is frequently relied upon by police as a means of investigating suspected criminal conduct." 4 Wayne LaFare, *Search and Seizure* §8.1 at 4 (4th ed. 2004).

77. "[T]he question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854, 862–863 (1973). "The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances.'" *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347, 355 (1996) (citation omitted).

78. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223–227, 93 S.Ct. 2041, 36 L.Ed.2d 854, 860–862 (1973).

79. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223–227, 229, 248, 93 S.Ct. 2041, 36 L.Ed.2d 854, 860–862, 864, 875 (1973). For an extensive discussion of the factors that bear upon the voluntariness of a consent search, see 4 Wayne LaFare, *Search and Seizure* §8.2 (4th ed. 2004).

refuse to give such consent—before asking the suspect for a consent to search, although this is a factor to be considered in determining whether the consent is voluntary based on the totality of the circumstances.⁸⁰ Nor are such officials required to advise a suspect that the suspect is free to go, if not in custody, before obtaining a consent to search.⁸¹

b. Application of general rule

Ordinarily, absent unusual circumstances, a verbal consent given by a person to search private premises or property upon a simple request by the police is routinely upheld by the courts as voluntarily given.⁸² Indeed, most consents to search are given promptly and voluntarily on the street, and are not the product of custodial or even extended police questioning. Moreover, the fact that the person consenting to the search is in police custody at the time consent is given does not in itself make the consent involuntary.⁸³ But a consent to search is generally considered involuntary when given while the suspect is *unlawfully* in police custody, as the consent is generally tainted by the prior unreasonable seizure of the suspect's person.⁸⁴

Beyond that, a submission to a police claim of lawful authority to conduct a given search does not constitute a voluntary consent to search.⁸⁵ Accordingly, a consent to

80. "Voluntariness is a question of fact to be determined under all the circumstances, and while the subject's knowledge of a right to refuse [consent] is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49, 93 S.Ct. 2041, 36 L.Ed.2d 854, 875 (1973) (defendant's consent for police to search his car after a traffic stop held voluntary, although police did not advise defendant that he had a right to refuse such consent); *United States v. Drayton*, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002) (defendant's consent to search his person while aboard as a passenger on an interstate commercial bus held voluntary, although police did not advise defendant of his right to refuse such consent).

81. *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (consent upheld to search a detained motorist's automobile).

82. See e.g. *United States v. Watson*, 423 U.S. 411, 424–25, 96 S.Ct. 820, 46 L.Ed.2d 598, 609 (1976) ("There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on the public street, not in the confines of the police station.") (consent given to U.S. Border Patrol to search pickup truck held voluntarily given, absent any evidence of coercion).

For lower federal and state court cases on the voluntariness of consents to search as well as words or conduct expressing consent or mere acquiescence to authority, see "Searches and Seizures" §§ 172, 179.1, 180, 181 West Key Nos.

83. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, 609 (1976); see 4 Wayne LaFare, *Search and Seizure* § 8.2 (4th ed. 2004) for a comprehensive discussion of the relevant factors in determining whether a given consent to search has been freely and voluntarily given.

84. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229, 242–43 (1983) (consent to search suitcase held tainted and involuntary after defendant was subjected to a functional arrest in police interrogation room at airport based on no probable cause; Court concluded that the consent was "tainted by the illegality and was ineffective to justify the search." 75 L.Ed.2d at 243). See cases collected at "Searches and Seizures" § 184 West Key No.

85. "Conversely, if under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in a submission to a claim of lawful authority—then we have found the consent invalid and the search unreasonable." *Schneckloth v. Bustamonte*, 412 U.S. 218, 233, 93 S.Ct. 2041, 36 L.Ed.2d 854, 866 (1973). "[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a

search is generally considered involuntary, and the search unreasonable, when given in response (a) to a police announcement that the officers have come to search the suspect's premises,⁸⁶ or (b) to a police demand for entry onto private premises;⁸⁷ or (c) to a police assertion that they have a search warrant for the search of the suspect's premises, and the warrant later turns out to be invalid or nonexistent.⁸⁸ In each of these situations, the consent given constitutes an acquiescence to a preceding assertion of police authority—and is generally considered coerced.⁸⁹ On the other hand, if the police announcement in each of these situations is entirely supportable—and police otherwise have a legal right to enter the premises because they have a valid search warrant or are operating under an applicable exception to the search warrant requirement rule other than consent—the search is considered reasonable based on the warrant or the relevant warrant exception, but not under the consent exception.⁹⁰

mere submission to a claim of authority.” *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229, 236 (1983).

86. *Amos v. United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921) (consent held coerced when federal agents told defendant's wife that they had come to search the premises, and she opened the door to let the agents in).

87. *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (police officer smelled opium coming from defendant's hotel room; officer knocked on door, identified himself as a police officer and said he wanted to talk to her; defendant opened the door and let the officer in). “Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.” 92 L.Ed. at 440.

88. “The issue thus presented is whether a search can be justified as lawful when that ‘consent’ has been given after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances. * * * This burden [of the state to show voluntary consent to search] cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State did not even attempt to rely on the validity of the warrant or fails to show that there was, in fact, any warrant at all.” *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797, 803–04 (1968). (third party consent of defendant's grandmother to search house where defendant and grandmother lived was held involuntary; police announced, “I have a search warrant to search your house,” and the grandmother responded, “Go ahead;” at the motion to suppress hearing, state did not rely on the warrant to justify the search).

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920, 930 (1979) (adult book store clerk cooperates with police after being placed under arrest at store and told that police have a search warrant which turns out to be invalid; held: involuntary consent).

89. See cases collected at “Searches and Seizures” §182 West Key No. But see 4 Wayne LaFare, *Search and Seizure* § 8.2(a) at 55–58 (4th ed. 2004) for a discussion of whether additional circumstances in the case might make the consent voluntary, notwithstanding a prior unsupportable police claim of a lawful authority to search.

90. *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (federal treasury agent conducted a proper administrative inspection without a warrant of a locked storeroom in a pawnshop pursuant to the federal Gun Control Act of 1968; the search was expressly *not* upheld based on consent when the pawnshop owner agreed to the search after the agent asserted a right to inspect the storeroom without a warrant pursuant to the said Act, and showed a copy of the Act to the pawnshop owner). “Respondent's submission to lawful authority and his decision to step aside and permit the inspection rather than force a criminal prosecution is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry. In neither case does the lawfulness of the search depend upon consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all.” 32 L.Ed.2d at 91–92.

c. Third party consent

It is settled that a joint occupant of private premises or property may give the police voluntary consent to search such premises or property—as against the absent, nonconsenting co-occupant.⁹¹ Even where the ostensible joint occupant is later determined not to be a joint occupant, the search may nonetheless be upheld as based on voluntary consent if the asserted joint occupant had *apparent* authority to give such consent—that is, if based on all the circumstances, the law enforcement officers reasonably believed at the time of the search that such person was, in fact, a joint occupant of the premises.⁹²

Certain people, however, do not as a matter of law possess joint control over another's premises and cannot give consent to search such premises. For example, a landlord of a rented house generally has no authority to consent to a police search of his tenant's house.⁹³ Similarly, a hotel clerk generally has no authority to consent to the police search of a guest's room.⁹⁴ On the other hand, when a man and woman are living together, either as man and wife or outside of matrimony, either may consent to a police search of the premises where they live.⁹⁵ And a person in possession of a container, such as a duffel bag, that has been entrusted to him or her by the owner may consent to a search of the container.⁹⁶

91. "It has been assumed by the parties and the courts below that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial. * * * [M]ore recent authority here clearly indicates that the consent of one who possesses common authority over the premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared. * * * These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show permission from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. * * * Common authority, is, of course, not to be implied from the mere property interest a third party has in the premises. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-habitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242, 248, 249, 250, n. 7 (1974) (internal citations omitted). For an extensive discussion of the subject of third party consent, 4 Wayne LaFare, *Search and Seizure* §§ 8.3–8.6 (4th ed. 2004). Also see cases collected at "Searches and Seizures" § 177 West Key No.

92. *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

93. *Chapman v. U.S.*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961). Also see cases collected at "Searches and Seizures" § 175 West Key No.

94. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). Also see cases collected at "Searches and Seizures" § 176 West Key No.

95. *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242, 248–49 (1974) (girl friend may give consent to search of room where she and her boy friend live); see also *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (same result where it reasonably appeared to police that girl friend was living on premises, even though she was not). For cases involving consents to search given by family members, see "Search and Seizure" § 178 West Key No.

96. *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969).

d. Scope of consent search

In measuring the scope of a suspect's consent to search certain premises or property, the test is one of objective reasonableness: what would a reasonable person have understood by the exchange between the police and the consenting party as to what physical area the police could search?⁹⁷ Where a suspect gives a voluntary general consent to search his or her automobile, law enforcement officers may search the interior of the automobile and all unlocked containers therein, provided the evidence police say they are looking for can reasonably be found in these areas—but apparently may not search locked containers such as a locked briefcase without express consent to do so.⁹⁸ Moreover, the consenting party may expressly limit the areas on the premises that the police may search.⁹⁹

e. “Plain view” seizure of evidence

During an otherwise voluntary consent search, law enforcement officers are privileged to seize any physical evidence under the “plain view” doctrine if there is probable cause to believe that this evidence constitutes contraband, fruits or instrumentalities of a crime, or evidence of a crime—whether such objects are related or unrelated to the evidence that the officers were looking for.¹⁰⁰

Section 6. Exigent Circumstances Search

a. General rule

The Court has recognized an exigent circumstances exception to the search warrant requirement rule, in which police are confronted with a serious emergency requiring an

97. “The standard for measuring the scope of a suspect's consent [to search] under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? The question before us, then is whether it is reasonable to consider a suspect's general consent to search his car to include consent to examine a paper bag lying on the floor of the car. We think it does.” *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297, 302–03 (1991).

98. In *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991), the Court distinguishes *State v. Wells*, 539 So.2d 464 (Fla. 1989), relied on by the Florida Supreme Court in affirming the suppression order under review. “There the Supreme Court of Florida held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.” 114 L.Ed.2d at 304.

In *Jimeno*, the police officer told the defendant that the officer believed the defendant was carrying narcotics; the defendant gave a voluntary general consent for police to search defendant's car, placing no restrictions on the consent. The Court held that it was proper for the police to look in a closed paper bag lying on the floor of the car.

99. “A suspect may of course limit as he chooses the scope of the search to which he consents.” *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297, 304 (1991). For a discussion of the scope of a consent search, see 4 Wayne LaFare, *Search and Seizure* § 8.1(c) (4th ed. 2004). Also see cases collected at “Searches and Seizures” § 186 West Key No.

100. See Chapter 12, Section 2c of this work for a discussion of the “plain view” doctrine.

intrusion into protected Fourth Amendment premises where there is no time to obtain a search warrant to deal with the emergency. Under this fairly loose, fact-specific exception, police are authorized to make a warrantless, nonconsensual entry onto private premises [or otherwise invade protected Fourth Amendment interests] in order to deal with certain emergency situations. The compelling public necessity for such an exception is obvious, although how one defines and applies it in given cases may be debatable.

Although the Court has not articulated an exhaustive list of the emergencies involved in this exception, the exception has to date revolved around three general scenarios with possible variations on each: (1) police in “hot pursuit” of a fleeing felon enter private premises to arrest the suspect; (2) police or firemen enter private premises to deal with a situation that is life-threatening or perilous to persons inside or outside the premises or to the police themselves; and (3) police enter private premises to prevent the imminent destruction of evidence of a serious crime. In each case, there is no time for the police to obtain a warrant; immediate action is required to deal with the emergency.¹⁰¹

Of course, if this exception is inapplicable because the police entry into private premises or private property is deemed unreasonable under the Fourth Amendment, the ensuing search will be unreasonable and its fruits will generally be inadmissible under the *Weeks-Mapp* exclusionary rule. If that be the case, no other exceptions to the search warrant requirement rule need be examined, because the fruits of the search that follow the illegal entry would on that account alone be generally barred from evidence under the *Weeks-Mapp* exclusionary rule.¹⁰² Of course, the house entry may, in unusual circumstances, be reasonable notwithstanding the absence of exigent circumstances—as, for example, if the householder voluntarily consents to the entry.¹⁰³

b. Hot pursuit of a fleeing felon

Law enforcement officers are privileged to enter a home without a warrant when in immediate pursuit of a person whom they have probable cause to arrest for a felony,

101. “The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that ‘a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect’s escape, or the risk of danger to the police or to other persons inside or outside the dwelling. The court also apparently thought that in the absence of hot pursuit there must at least be probable cause to believe that one or more of the other factors justifying the entry were present and that in assessing the danger, the gravity of the crime and the likelihood that the suspect is armed and dangerous should be considered.’ *Minnesota v. Olsen*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85, 95–96 (1990) (emphasis added).

The Court has also stated that a warrantless search of private premises to deal with an emergency public health situation is constitutionally permissible—such as the seizure of unwholesome food, a compulsory small pox vaccination, a health quarantine, or the summary destruction of tubercular cattle. *Camara v. Municipal Court*, 387 U.S. 523, 539, 87 S.Ct. 1727, 18 L.Ed.2d 930, 941 (1967).

For lower federal and state court cases on the exigent circumstances exception, see “Searches and Seizures” §§42.1, 43, 44, 45 West Key Nos.

102. See Chapter 17, Section 3 of this work for a discussion of the fruit of the poisonous tree doctrine.

103. See e.g. *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16, 20 (1999) (remand to determine if consent search exception to warrant requirement was applicable, where exigent circumstances exception was inapplicable). For a discussion of consent searches, see the preceding section of this chapter.

and who has just entered the house to escape apprehension.¹⁰⁴ The rule is generally inapplicable, however, where only a minor offense is involved, such as a civil traffic infraction.¹⁰⁵ But absent a showing of hot pursuit or some immediate danger to persons in the house or to the police, to be discussed in the next subsection, the Court has held that a non-consensual entry to effect a felony arrest in the home must be authorized by a valid search or arrest warrant.¹⁰⁶ Moreover, where the officers are not in immediate pursuit of the suspect, but the suspect is simply traced in the fullness of time to a particular house in which no one therein is in immediate danger, the exception is inapplicable.¹⁰⁷

c. Life threatening or perilous situations.

Law enforcement officers may also enter private premises, such as a home, and make a warrantless search of the premises if there is probable cause to believe that a life-threatening or perilous situation exists on the premises, in which someone may be in need of immediate aid. Accordingly, when officers enter premises where a homicide may have been committed, the officers may sweep the premises for homicide victims, the potential killer,

104. *Warden Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (armed robbery of business by suspect who fled on foot; witnesses in a car followed suspect until he entered house; police arrived within minutes and entered house; warrantless entry upheld). *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976) (police pursue an illegal drug sale suspect into her home; drug sale to undercover officer had just taken place a short distance away and seller was arrested; police then traveled by car to nearby residence to arrest suspect who was the drug source for the sale; suspect was standing in front doorway of her house when police arrived and shouted “police;” suspect retreated into her house; warrantless entry upheld).

For lower federal and state court cases on the issue of hot pursuit, see “Searches and Seizures” §§43, 44, 45 West Key Nos.

105. “Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is especially appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government’s interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.” “[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind involved in this case, has been committed.” *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732, 743, 745 (1984) (drunk driving suspect abandoned his car at scene of one-car accident and walked a short distance to his nearby home; witnesses called the police and directed them to defendant’s home; police entered the home and arrested the defendant at night about ½ hour after the accident; the drunk driving offense was a civil traffic offense only; warrantless entry struck down; no hot pursuit; suspect was no danger to anyone, having left his car at the scene of the accident; no real emergency existed to ascertain defendant’s blood alcohol level for this non-jailable offense).

106. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Stegald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). “Our decision in *Payton*, allowing home arrests [without a warrant] upon a showing of probable cause and exigent circumstances, was also expressly limited to felony arrests.” *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732, 743 at n. 11 (1984). For a discussion of the *Payton-Stegald* rule requiring a warrant to effect an arrest in the home, see Chapter 12, Section 1b of this work.

107. *Minnesota v. Olsen*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (police traced a robbery suspect to a house, although not in immediate pursuit of the suspect, entered the house, and arrested the defendant therein; there was no danger to anyone in the house; the Court defers to the Minnesota Supreme Court’s conclusion that a warrant should have been obtained prior to police entering the house; exigent circumstances exception not applicable).

and weapons—and may seize any evidence of crime in “plain view” while engaged in such a sweep. Any search thereafter, however, must be conducted with a search warrant, as there is no “murder scene” exception to the search warrant requirement rule—and if no warrant is obtained, the search is considered unreasonable and the fruits thereof are generally inadmissible in evidence under the *Weeks-Mapp* exclusionary rule.¹⁰⁸

108. “Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if the killer is still on the premises. ‘The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent the emergency.’ And the police may seize any evidence that is in plain view during the course of their legitimate emergency.” *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed. 290, 300 (1978) (internal citation omitted). Also see 3 Wayne LaFare, *Search and Seizure* §6.5 (d)(e) (4th ed. 2004), and cases collected at “Searches and Seizures” §42.1 West Key No.

Mincey involves a classic “drug bust” gone bad, a scene from an action movie. An undercover narcotics police officer arranged to buy narcotics from defendant in the latter’s apartment and had left to get the money to complete the transaction. When the officer returned, he had nine plain-clothes policemen with him. The officers forced their way into the apartment and a shootout took place between the police officers and the people in the apartment. Several people were severely wounded, including the defendant; the undercover officer was killed. After the shooting, police went through the apartment to find out who had been shot and then summoned medical assistance. Ten minutes later, homicide detectives were on the scene; they conducted an intensive four-day search of the apartment. The Court held that this four-day search was outside the scope of the exigent circumstances exception to the search warrant requirement rule; police needed a search warrant to conduct such an intensive search. *Specifically, the Court rejected a “murder scene” exception to the search warrant requirement rule.*

Although the Court in *Mincey* sends the case back to sort out which of the above police searches in the apartment might qualify under the exigent circumstances exception and expresses no view thereon, it would seem that the initial police sweep was reasonable under the exigent circumstances exception, but that all the warrantless searches thereafter were outside the scope of this exception. If so, any evidence of crime seen and seized during this initial sweep would be a reasonable seizure under the “plain view” doctrine; anything else seized in the subsequent searches would be unreasonable as not within the purview of the same doctrine.

“We noted [in *Mincey v. Arizona*] that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt searches of a homicide scene for possible other victims or a killer on the premises, (citation omitted), but we rejected any general ‘murder scene exception’ as ‘inconsistent with the Fourth and Fourteenth Amendments. . . . The warrantless search of Mincey’s apartment was not constitutionally permissible simply because a homicide had recently occurred there.” *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16, 20 (1999) (citation omitted).

In *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), the Court applied *Mincey* to strike down another “murder scene” search of a house. In that case, the defendant’s daughter called the police and reported that the defendant had just telephoned to say that she had just shot her husband and had taken a quantity of pills in a suicide attempt, and then, changing her mind, had called the daughter for help. Police arrived at defendant’s house, entered apparently without consent, discovered the husband dead of a gunshot wound in a bedroom and the defendant in another bedroom unconscious due to a drug overdose, and inspected the other rooms in the house to find no other victims. They then called the ambulance for the defendant. [So far, it would seem that the police entry and search was within the exigent circumstances exception, but the plot thickens]. Thirty-five minutes after the defendant was transported to the hospital, two homicide investigators from the sheriff’s office conducted a thorough two-hour search in the house for evidence of crime. They found three items during this search: (a) a gun inside a chest of drawers in the same room as the dead body, (b) a torn-up note in the waste basket of the adjoining bathroom and (c) an alleged suicide note found folded up inside a Xmas card on the top of the chest of drawers. The Court held that this general exploratory search for evidence was outside the scope of the exigent circumstances exception, and that the warrantless seizure of evidence during this search was unreason-

Firemen may enter a burning building without a warrant to put out a fire therein, and may seize any evidence of an arson in plain view while engaged in their fire-fighting activity.¹⁰⁹ The firemen may also remain on the scene for a reasonable time after the fire has been extinguished for the purpose of discovering the cause of the fire. But generally any re-entries onto the premises thereafter [for example, several days later] must be made with an administrative-type warrant—and as a rule such warrantless re-entries are considered unreasonable and the fruits thereof inadmissible in evidence under the *Weeks-Mapp* exclusionary rule.¹¹⁰

d. Destruction or removal of evidence¹¹¹

The Court has never upheld a warrantless home entry based on a showing that it was necessary to prevent the destruction of evidence. But in the course of striking down

able under the 4th Amendment. The homicide investigators needed a warrant to continue their investigations at the defendant's house.

In *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999), the Court applied *Mincey* to disapprove a “murder scene” exception to the search warrant requirement rule used by state courts to uphold a 16-hour search of a rented cabin in a state park—following defendant's 911 call to police that he and his wife had been attacked by an intruder. The case was remanded to determine whether the search was conducted with defendant's consent or whether some other exception to the search warrant requirement rule might apply. The Court held that the subject search could not be upheld under the emergency or exigent circumstances exception to the search warrant requirement rule.

109. “Our decisions have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant. *** A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry ‘reasonable.’ Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in the building for this purpose, firefighters may seize evidence of arson in plain view.” *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486, 498 (1978).

110. “For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes is also constitutional.” *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486, 499 (1978).

In *Tyler*, the Court held that (a) the initial warrantless entry into the defendant's leased furniture store to put out a fire therein shortly after midnight, (b) the firemen's activity on the premises to put the fire out and thereafter investigate the cause of the fire until 4 AM, and (c) subsequent warrantless re-entry by the same firemen at 9AM during daylight hours to continue their investigation—were all reasonable under the exigent circumstances exception. Various items of evidence and pictures were taken during these inspections—all reasonably obtained under the “plain view” doctrine. The defendant was charged and convicted of a conspiracy to burn his leased furniture store.

However, the subsequent warrantless re-entry by firemen onto the defendant's premises several days later and further warrantless re-entries on a number of occasions within the next three weeks for the purpose of gathering evidence of arson—were all unreasonable as being outside the scope of the exigent circumstances exception; the firemen needed an administrative-type warrant to continue their investigations at the building. Evidence obtained during these re-entries was not admissible under the “plain view” doctrine. See 5 Wayne LaFave, *Search and Seizure* § 10.4 (3d ed. 1996). See Chapter 13, Section 2h of this work for a discussion of administrative search warrants. Also see Chapter 12, Section 2c of this work for a discussion of the “plain view” doctrine. And see Chapter 17, Section 3 of this work for a discussion of the fruit of the poisonous tree doctrine.

111. For a discussion of related exceptions to the general rule requiring a warrant for the *seizure* [as opposed to a search] of personal or real property [i.e. seizures pending application for a search warrant, and seizures pending further investigation], see Chapter 12, Section 2b(1)(2) of this work.

warrantless home entries, the Court has stated that no showing was made in the case that evidence of crime was in danger of being destroyed or removed. By this discussion, the Court seems to imply that if such a showing had been made, the search would have been reasonable.¹¹² The Court has held, however, that police entry into a home to make an arrest for a non-jailable drunk driving traffic offense so as to prevent the destruction of evidence [namely, the home dweller's blood alcohol level] was not justified under the exigent circumstances exception to the search warrant requirement rule.¹¹³

On the other hand, the Court has struck down a warrantless entry onto business premises by IRS agents to levy on corporate assets in satisfaction of a tax deficiency. The exigent circumstances exception to the warrant requirement was inapplicable because the agents had at least a day to obtain a search warrant for the defendant's office, and the evidence therein was otherwise in no danger of disappearing.¹¹⁴

e. Other searches

The exigent circumstances exception to the search warrant requirement rule is not confined to entries and searches of homes and business premises. The Court has also indicated that this exception is applicable to intrusions into the human body to prevent the destruction of certain internal chemical evidence, and to searches of luggage to disarm a bomb or weapon that is dangerous to others.¹¹⁵

112. *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436, 441 (1948) (“No evidence or contraband was threatened with removal or destruction . . .”); *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59, 64 (1951) (“[N]or was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized.”); *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153, 158 (1948) (“Nor was the property in the process of destruction . . .”); *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409, 414 (1970) (“The goods ultimately seized were not in the process of destruction.” “We decline to hold that an arrest on the street can provide its own ‘exigent circumstances’ so as to justify a warrantless search of the arrestee’s house.”). See also *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 148 L.Ed.2d 838, 851–52 (2001) (Souter, J. concurring) (police would have been justified, under the exigent circumstances exception, in entering accused’s house trailer without a warrant to prevent the imminent destruction of marijuana therein).

113. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732, 743 (1984) (“Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is especially appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.”).

114. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530, 549 (1977). For a discussion of this aspect of the exigent circumstances exception, see 3 Wayne LaFare, *Search and Seizure* § 6.5(b) (4th ed. 2004). Also see cases collected at “Searches and Seizures” §§42.1, 45 West Key Nos.

115. In striking down the warrantless search of a footlocker in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538, 551 n.9 (1977), the Court stated that “if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage and disarming the weapon.”

The Court made a similar comment in striking down the warrantless search of a suitcase in *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235, 245 n. 11 (1979): “There may be cases in which the special exigencies of the situation would justify the warrantless search of a suitcase. *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (police had reason to suspect automobile trunk contained a weapon). Generally, however, such exigencies will depend upon the probable contents of the luggage and the suspect’s access to those contents.”

f. “Plain view” seizure of evidence

During a valid exigent circumstances search of a home or other private premises, law enforcement officers are privileged to seize any physical evidence under the “plain view” doctrine if there is probable cause to believe that this evidence constitutes contraband, fruits or instrumentalities of a crime, or evidence of a crime, so long as the search is within the scope of the exception.¹¹⁶ But any search on such premises that is not confined to the purpose of the exigent circumstances entry is considered unreasonable, if not otherwise justified by some other search warrant exception.¹¹⁷

In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, 920 (1966), the Court upheld a clinically safe, medically approved extraction of the blood from a motorist who had just been arrested for drunk driving based on probable cause. The Court upheld the search based, in part, on the fact that police were “confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened ‘the destruction of evidence.’ We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.”

In *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), however, the Court affirmed a federal court injunction against the surgical removal of a bullet lodged in a robbery suspect’s chest, primarily because of the danger to the suspect’s life in such surgery and the lack of a compelling need by the state for the bullet as evidence, given the other evidence of guilt against the suspect.

116. See Chapter 12, Section 2c of this work for a discussion of the “plain view” doctrine.

117. In *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), the Court accepted the holding of the Arizona courts that a police entry into an apartment to look for gunmen, victims and weapons was justified under the exigent circumstances exception to the search warrant requirement rule, after police received information that a person in this apartment had fired a shot through the floor of the apartment and actually injured a person in the apartment below. However, the Court held that the police seizure of stereo equipment inside the apartment did not fall within the purview of the “plain view” doctrine because the police did not have probable cause to believe that the equipment was stolen. Indeed, the police went outside the scope of the exigent circumstances exception when they moved the stereo equipment to get the serial numbers of the equipment in question; this was a Fourth Amendment search not justified by the subject exception.