# Making Sense of Search and Seizure Law

## A Fourth Amendment Handbook, Second Edition

## 2017 Supplement

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# January 2017 Supplement to Making Sense of Search and Seizure Law: A Fourth Amendment Handbook 2d ed.

This Supplement brings up to date all U.S. Supreme Court decisions on the Fourth Amendment through December 31, 2016.

**Chapter 1. Introduction to Fourth Amendment Law**

**Section 3. Growth and Complexity of Fourth Amendment Law**

**p. 13, Strike the 1st complete paragraph with accompanying footnotes and add:**

Over 440 cases on the Fourth Amendment were decided by the U.S. Supreme Court from 1791-2016**. Fn. 46**. Only five of these cases were decided prior to 1900, **Fn. 47**, and only 91 were decided in the twentieth century prior to the landmark decision of *Mapp v. Ohio* **Fn. 48** in 1961, which applied the Fourth Amendment exclusionary rule to the states. The balance, over 340 cases or about 75% of the total, are post-*Mapp* decisions rendered during a 50 plus year period 1961–2016. **Fn. 49.** No doubt this trend will continue well into the twenty-first century. As Dean Erwin Griswold has accurately observed:

> For more than a century, this provision [the Fourth Amendment] was a sleeping giant. . . . Except for the Boyd case, virtually no search and seizure cases were decided by the Supreme Court for the first 110 years of our existence under the Constitution, that is, up to the year 1900. . . . Except for a few cases arising out of the federal courts, the active history of the Fourth Amendment did not begin until 1961, when the Court decided the case of Mapp v. Ohio. . . . The result has been — as in so many areas in recent years — a great torrent of litigation. **Fn. 50**

**Fn. 46.**

The exact count is 441 and is current through the end of December 2016. The count,

however, includes some older wiretapping, electronic eavesdropping, and search warrant execution cases which have Fourth Amendment implications but technically were decided under federal statutes. All references to Fourth Amendment case counts should be read with this caveat in mind.

**Fn. 47.**
The two most important cases were: Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886); In re Jackson, 96 U.S. 727, 24 L.Ed. 877 (1877). The remaining cases were of lesser significance: Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 18 How. 272, 15 L.Ed. 372 (1855); Ex Parte Burford, 7 U.S. 448, 3 Cranch 448, 2 L.Ed. 495 (1806). There were no Fourth Amendment decisions rendered in the brief period between 1791–1800.

**Fn. 48.**

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

**Fn. 49.**

In the preface to the first edition of his Fourth Amendment treatise published in 1978, Professor LaFave notes that "[a]t least in the years following the Supreme Court's landmark decision in Mapp v. Ohio in 1961, it is beyond question that the Fourth Amendment has been the subject of more litigation than any other provision of the Bill of Rights." 1 Wayne LaFave, Search and Seizure v (1st ed. 1978). Moreover, in the fifth edition of the same treatise published in 2012, Professor LaFave comments that the flow of Fourth Amendment decisions “has in no sense diminished over the past thirty-four years.” 1 Wayne LaFave, Search and Seizure: v (5th ed. 2012).

**Fn. 50.**

Erwin Griswold, Search and Seizure: A Dilemma of the Supreme Court 2, 7 (1975).

# Part II. Substantive Law of the Fourth Amendment

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

### Section 3. The Balancing of the Interests Approach

### b. General applications of the balancing approach

### (2) Unusual Searches and seizures

**p. 103, last line, after "the inspection of Presidential papers and materials," add:**

the taking of breath and blood samples from a motorist arrested for drunk driving, **Fn. 68a**

**Fn. 68a.**

Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

### c. Related Balancing approaches in the administration of the exclusionary rule

**p. 105, end of 1st complete paragraph, add**

Indeed, the Court engages in a balancing analysis utilizing these same three factors to determine whether any evidence discovered during an illegal search or seizure was the "fruit" of that illegality. **Fn. 81a**

**Fn. 81a**

Utah v. Strieff, 579 U.S. ___, 136 S.Ct, 2056, 2061, 195 L.Edd.2d 400 (2016).

### Section. 4. Common Law Reasoning Approach

### b. History of prior court decisions

**Fn. 85, p. 107**

Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, 191 L.Ed.2d 430 (2015) (applying the rule announced in United States v. Jones, 565 U.S. ___ , 132 S.Ct. 945, 181 L.Ed.2d 911 (2012,) and Florida v. Jardines, 569 U.S. ___, 133 S.Ct. 1409, 185

L.Ed.2d 495 (2013), that physically intruding into a constitutionally protected area by a government official without consent to obtain private information constitutes a search within the meaning of the Fourth Amendment);

Rodriguez v. United States, 575 U.S. ___, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015) (applying a rule announced in Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), that a valid traffic stop becomes unlawful if it is prolonged beyond the time reasonably required to complete the normal mission of such a stop);

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## Subpart A. The "Standing" Requirement

### Chapter 8. Preliminary Elements" Personal Standing and Governmental Action

### Section 2. Governmental Action Element

### b. Governmental agent may be criminal or civil official

### Fn. 41, p. 121

"It is well settled . . . that the Fourth Amendment's protection extends beyond the sphere of criminal investigations, and the government's purpose in collecting information does not control whether the method of collection constitutes a search. A building inspector who enters a building simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment." Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 430 (2015).

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

### Section 2. General Test: Governmental Invasion of One's Reasonable Expectation of Privacy & Trespass Addendum

### Fn. 16, p. 138

Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 430 (2015) (an electronic monitoring device placed on the ankle of a recidivist sex offender pursuant to court order to track the offender's movements constitutes a trespassory search of the person under the Fourth Amendment) ("In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of monitoring that individual's movements." )

**Section 3. First Component of Katz Fourth Amendment "Search": Complaining Party Must Have a Reasonable Expectation of Privacy as to Protected Interests**

**a. Reasonable expectation of privacy as to one's "person"**

**(2) Nature of the search of a person: examples**

**p. 143, 1st complete paragraph, 2d complete sentence, ending with ". . . Fourth Amendment search of the person," add a new footnote:**

**Fn. 33a.**

As an aside, under the trespass definition, it has also been held a Fourth Amendment search of the person when "a State . . . attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 430 (2015) (an electronic monitoring device placed on the ankle of a recidivist sex offender pursuant to court order to track the offender's movements held a Fourth Amendment search of the person).

See Section 2 of this chapter for a discussion of the trespass definition of a Fourth Amendment search.

**Section 4. Second Component of a Katz Fourth Amendment "Search"**

**a. Non-consensual and consensual entry onto protected premises or property**

**Fn. 128, p. 160**

When a law enforcement agent engages in this permitted activity, it is often referred to as a "knock and talk." This activity does not constitute a Fourth Amendment

search of the home and thus does not trigger the Amendment's protection. Compare: Carroll v. Carman, 574 U.S. _____, 135 S. Ct. 348, 190 L.Ed.2d 311 (2014)

As yet, however, it is not "clearly established" Fourth Amendment law that a police officer has only an implied invitation to approach *the front door* to a private residence, as opposed to any other entrance open to visitors, if the officer wants to talk to people inside the residence. Carroll v. Carman, 574 U.S. _____, 135 S. Ct. 348, 190 L.Ed.2d 311 (2014) ( in 42 U.S.C. 1983 civil rights suit, defendant police officer had a qualified immunity from such suit when he approached a private residence at a ground-level deck with sliding glass doors to talk to occupants therein; this entrance, according to the officer, looked like "a customary entrance" to the home).

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**Section 5. Special Search or Seizure Problems**

**b. Narcotic "dog sniffs" of luggage, cars or homes**

**Fn. 166, p. 167**

Rodriguez v. United States, 575 U.S. ___, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015) (valid traffic stop becomes an unreasonable seizure of the driver and car if the stop is prolonged beyond the time reasonably required to issue a ticket to the driver and conduct other routine traffic tasks; dog sniff conducted thereafter is tainted ); see also Ch. 12, sec. 1(a) of this supplement for a further discussion of this issue.

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## Subpart B. The "Unreasonableness" Requirement

### Chapter 11. General Rules and Principles of Unreasonableness

**Section 1. Search Warrant Requirement Rule**

**Fn. 1 , p. 173, after Kentucky v. King**

City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2452, 192 L.Ed.2d 435 (2015) ("Based on this constitutional text [the Fourth Amendment], the Court has repeatedly held that searches conducted outside the judicial process, without prior approval by [a] judge or [a]magistrate judge, are per se unreasonable . . . subject only

to a few specifically established and well delineated exceptions. This rule applies to commercial premises as well as to homes." (internal citations and quotations omitted).

**End of Fn 1, p. 173**

See also City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2458, 192 L.Ed.2d 435 (2015) (Scalia, J. dissenting) "The Fourth Amendment provides, in relevant part, that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause.' Grammatically, the two clauses of the Amendment seem to be independent --- and directed at entirely different actors. But in an effort to guide courts in interpreting the Search and Seizure Clause's indeterminate reasonableness standard, we have used the Warrants Clause as a guidepost for assessing the reasonableness of a search, and have erected a framework of presumptions applicable to broad categories of searches conducted by executive officials. Our case law has repeatedly recognized, however, that these are mere presumptions, and the only constitutional requirement is that the search be reasonable."

**Section 2. General Definition of "Unreasonableness": Balancing Test**

**Fn. 20, p. 178**

"The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, 1371, 191 L.Ed.2d 430 (2015) (emphasis in the original).

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**Chapter 12. Seizures of Persons and Property**

**Section 1. Seizures of Persons**

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

**p. 194, add new paragraphs after 1st incomplete paragraph**

In a lawful temporary traffic stop, the police may conduct any routine tasks associated with the purpose of the stop, including: determining whether to issue a traffic ticket or warning; checking the driver's license, car registration, car insurance, and outstanding warrants. But a traffic stop prolonged beyond the time reasonably required to perform these tasks renders the seizure of the driver unreasonable and taints a narcotics dog sniff conducted of the car *thereafter.* **Fn. 16a**.

As an aside, a dog sniff conducted *while* these routine procedures are reasonably being performed is permissible under the Fourth Amendment because (a) the driver is lawfully detained during this time, thus the detention cannot taint the dog sniff, and (b) the dog sniff is not considered a Fourth Amendment search and need not be reasonably related to the purpose of the traffic stop. **Fn. 16b**.

**Fn. 16a.**

"In lllinois v. Caballes, 543 U.S. 405 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted *after* the completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitutional shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time required to complete th[e] mission' of issuing a ticket for the violation. The Court has so recognized in Caballes, and we adhere to the line drawn in that decision." Rodriguez v. United States, 575 U.S. ___, 135 S.Ct. 1609, 1612, 191 L.Ed.2d 492 (2015) (a dog sniff conducted 7-8 minutes after time for traffic stop was completed disapproved as not part of the traffic stop procedures; a "de minimus" Fourth Amendment intrusion rule rejected).

**"**A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called Terry stop than a formal arrest. Like a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." 135 S.Ct. at 1614.

"Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.

"A dog sniff, by contrast, is a measure aimed at detecting evidence of ordinary criminal wrongdoing. Candidly, the Government acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission." Rodriguez v. United States, 575 U.S. ___, 135 S.Ct. 1609, 1615, 191 L.Ed.2d 492 (2015) (internal citations, quotations and quotation marks omitted).

**Fn. 16b**.

lllinois v. Caballes, 543 U.S. 405, 1125 S.Ct. 834, 160 L.Ed.2d 842 (2005); see Ch. 10, sec. 5(c) for a further discussion of this issue.

**b. Probable cause and reasonable suspicion standards: an overview**

**p. 205, first complete paragraph, end of 1st sentence, add a new footnote:**

**Fn. 59b**

It is sobering to read Justice Sotomayer's summary of the power the courts have given the police over all people on the public streets --- including those who occasionally jaywalk or commit a minor traffic offense. This power is wide-ranging and can ensnare innocent people in humiliating situations.

Perhaps this is the price we all must pay to live in an ordered society. But whether the courts have gone too far from time to time is still open to debate. In particular, upholding arrests for officer-observed offenses that carry only a fine and by custom merit only a ticket --- regardless of the circumstances of the case --- may have to be re-examined.

> "Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This

Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. Whren v. United States, 517 U. S. 806, 813 (1996). That justification must provide specific reasons why the officer suspected you were breaking the law, Terry, 392 U. S., at 21, but it may factor in your ethnicity, United States v. Brignoni-Ponce, 422 U. S. 873, 886–887 (1975), where you live, Adams v. Williams, 407 U. S. 143, 147 (1972), what you were wearing, United States v. Sokolow, 490 U. S. 1, 4–5 (1989), and how you behaved, Illinois v. Wardlow, 528 U. S. 119, 124–125 (2000). The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous. Devenpeck v. Alford, 543 U. S. 146, 154–155 (2004); Heien v. North Carolina, 574 U. S. ___ (2014).

"The indignity of the stop is not limited to an officer telling you that you look like a criminal. See Epp, Pulled Over, at 5. The officer may next ask for your 'consent' to inspect your bag or purse without telling you that you can decline. See Florida v. Bostick, 501 U. S. 429, 438 (1991). Regardless of your answer, he may order you to stand 'helpless, perhaps facing a wall with [your] hands raised.' Terry, 392 U. S., at 17. If the officer thinks you might be dangerous, he may then 'frisk' you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may 'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' Id., at 17, n. 13.

"The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or 'driving [your] pickup truck . . . with [your] 3-year-old

> son and 5-year-old daughter . . . without [your] seatbelt fastened.' Atwater v. Lago Vista, 532 U. S. 318, 323–324 (2001). At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to 'shower with a delousing agent' while you 'lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals.' Florence v. Board of Chosen Freeholders of County of Burlington, 566 U. S. ___, ___–___ (2012) (slip op., at 2–3); Maryland v. King, 569 U. S. ___, ___ (2013) (slip op., at 28). Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check. Chin, The New Civil Death, 160 U. Pa. L. Rev. 1789, 1805 (2012); see J. Jacobs, The Eternal Criminal Record 33–51 (2015); Young & Petersilia, Keeping Track, 129 Harv. L. Rev. 1318, 1341–1357 (2016). And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you 'arrestable on sight' in the future. A. Goffman, On the Run 196 (2014)."

Utah v. Strieff, 579 U.S. ___, 136 S.Ct. 2056, 2069-2070, 195 L.Ed.2d 400 (2016) (Sotomayer, J. , concurring in part, dissenting in part).

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**Chapter 13. Searches Conducted with a Search Warrant.**

**Fn. 4, p. 238.**

"Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought." Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 2181, 195 L.Ed.2d 560 (2016).

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## Chapter 14. Warrantless Searches and Criminal Exceptions to the Search Warrant Requirement Rule

### Section 2. Search Incident to a Lawful Arrest

### b. Rationale for exception

**p. 269, last sentence on page, add new footnote.**

**Fn. 15a**

For a thorough discussion of the historical background, rationale, and development of the search incident to a lawful arrest doctrine, see Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 2174-2176, 195 L.Ed.2d 560 (2016).

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

**p. 270, end of 1st paragraph, add new paragraph:**

Nor, *based on this exception*, may law enforcement officers require a motorist lawfully arrested for drunk driving to submit to a warrantless blood draw to measure the level of alcohol in the person's bloodstream. This result is different, however, for the less intrusive breathalyzer test required of such a motorist --- this test being justified as a search incident to a lawful arrest. **Fn.18a**

**Fn. 18a**.

Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016) (1. *misdemeanor conviction reversed* as against a motorist lawfully arrested for drunk driving who refused to submit to a blood draw;

2. *dismissal of misdemeanor charge reversed* as against a motorist lawfully arrested for drunk driving who refused to submit to a breathalyzer test;

3. *two-year suspension of driver's license reversed* as against a motorist lawfully arrested for drunk driving who submitted to a blood draw showing his blood alcohol level above the legal limit, after being told that his refusal to submit to the test was a crime).

"Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not

a blood test, may be administered incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches, a warrant is not needed in this situation." 136 S.Ct. at 2185.

Cautionary note. Apart from the search incident to a lawful arrest exception, a warrantless blood draw may be justified in a drunk driving case under the exigent circumstance exception to the search warrant requirement rule. This is shown where it is impracticable for police to obtain a warrant for the blood draw without significantly undermining the efficacy of the blood test. In the Birchfield case, no such showing was made to justify the blood draws involved therein. But if shown, the results in this case would have been different. For a discussion of this issue, see Section. 6e of this chapter.

**Section 5. Consent Search**

**b. Application of the general rule**

**Fn. 93, p. 290.**

As an aside, a motorist's decision to drive on the public roads does not constitute an "implied consent" to having the motorist's blood drawn when lawfully arrested for drunk driving where the state attaches a criminal penalty for refusing such a draw. Civil penalties may be assessed for such a refusal [i.e. loss of driver's license], but not criminal ones. Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 2186, 195 L.Ed.2d 560 (2016) (misdemeanor conviction for refusal to submit to a blood draw in a drunk driving case reversed) ("[W]e hold that motorists cannot be deemed to have consented to a blood test on pain of having committed a criminal offense.")

**Section 6. Exigent Circumstances Search**

**a. General Rule**

**Fn. 108, p. 294**

See City and County of San Francisco v. Sheehan, 575 U.S. ___, 135 S.Ct. 1765, 1774-1776 ,190 L.Ed.2d 434 (2015) ("Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." (internal citation and quotations omitted).

**Section b. Hot pursuit of a fleeing felon**

**Fn. 112, p. 296, end of footnote:**

There is, however, no absolute prohibition against the police entering a house to make a "hot pursuit" arrest for a misdemeanor as the law here is not "clearly established." See Stanton v. Sims, 571 U.S. ___, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (defendant police officer entitled to qualified immunity against a 42 U.S.C. 1983 civil rights suit when he entered the curtilage of plaintiff's home in "hot pursuit" of a suspect to make a misdemeanor arrest for disobeying a lawful order of a police officer; officer swung open the gate to a home's yard, accidentally hit the plaintiff with the gate, and injured her; held: not "clearly established" Fourth Amendment law that a police officer may never enter a private home to make a "hot pursuit" arrest for a misdemeanor).

**c. Life-Threatening or perilous situations**

**Fn. 115, p. 297, after Rayburn v. Huff**

City and County of San Francisco v. Sheehan, 575 U.S. ___, 135 S.Ct. 1765, 190 L.Ed.2d 434 (2015) (qualified immunity shielded from civil rights suit two police officers who broke into a private room in a group home for mental patients and used non-deadly [pepper spray] and ultimately deadly force [multiple gun shots]to subdue a mentally unstable, knife-wielding mental patient therein who had threatened the life of the officers and a social worker at the home in two other earlier entries into the room).

**e. Other searches**

**Fn. 124, p. 300.**

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), as interpreted in Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552, 1558-1560, 185 L.Ed.2d 696 (2013) (warrantless blood draw upheld in Schmerber under the circumstances of that case, namely, that there was no time for police to get a warrant without undermining the efficacy of the blood test).

Also see Section 2c of this chapter for a discussion of whether blood draws and breathalyzer tests in drunk driving cases are justified under the search incident to a lawful arrest exception to the search warrant requirement rule.

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**Chapter 15. Warrantless Searches and Civil or Special Needs Exceptions to the search warrant requirement Rule**

**Section 2. Primary Civil or Special Needs Exceptions**

**c. Administrative inspection search**

**(2) Statutory inspections programs of particular businesses**

**Fn. 45, p. 312**

"Over the past 45 years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise, [namely]. . . liquor sales . . . firearms dealing . . . mining . . . or running an automobile junkyard. [citations omitted]." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2454, 192 L.Ed.2d 435 (2016) (internal citations omitted) (the hotel industry held not a "closely regulated" industry ).

The lower federal and state courts have identified the following industries as "closely regulated" --- pharmacies, massage parlors, commercial-fishing operations, day-care facilities, jewelers, barbershops, and rabbit dealers. City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2461, 192 L.Ed.2d 435 (2016) (Scalia, J. dissenting). The U.S. Supreme Court, however, has not passed on these lower court decisions.

**p. 312, end of 2d paragraph, add this new sentence:**

The Court has also struck down a statute authorizing a warrantless inspection of a hotel operator's guest registry for failure to give the operator an opportunity to obtain a precomplaince review of the inspection before a neutral decisionmaker --- concluding that the hotel industry is not "closely regulated." **Fn. 50b**

**Fn. 50b.**

City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015).

**p. 312, new sub-section:**

**(4) Precompliance Review Hearing**

An administrative inspection of a business --- at least one that is that is not "closely regulated" --- can only take place, as a general rule, where the business owner or operator is given an *opportunity* to obtain a precomplance review of the inspection before a neutral decision-maker. This would be the case, for example, if a subpoena is issued for such an inspection and the owner or operator of the business is authorized to move to quash the subpoena and be heard in court before the inspection takes place. There are, however, exceptions to this rule where: (1) the owner or operator of such business consents to the inspection, or (2) exigent circumstances exist that compel an emergency inspection**. Fn. 53a**

**Fn. 53a.**

City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2016) (municipal ordinance authorizing a warrantless administrative inspection of a hotel's guest registry held (1) facially invalid under the Fourth Amendment for failure to give the hotel owner or operator an opportunity to have a precompliance review of the inspection before a neutral decisionmaker; and (2) not otherwise justified under the administrative inspection exception to the search warrant requirement rule as (a) hotel industry is not "closely regulated" and (b) statute fails to satisfy other requirements for this exception).

"Respondents brought a Fourth Amendment challenge to a provision of the Los Angeles Municipal Code that compels '[e]very operator of a hotel to keep a record' containing specified information concerning guests and to make this record 'available to any officer of the Los Angeles Police Department for inspection' on demand. [citation omitted]. . . . We hold facial challenges can brought under the Fourth Amendment. We further hold that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them an opportunity for preconpliance review." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2447, 192 L.Ed.2d 435 (2016)

"The Court has held that absent consent, exigent circumstances and the like, in order for an administrative search to be constitutional , the subject of the search must be afforded an opportunity to obtain precomplicance review before a neutral decisionmaker. . . . And, we see no reason why this minimal requirement is inapplicable here." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2452, 192 L.Ed.2d 435 (2016.)

"To be clear, we hold only that the hotel owner must be given an *opportunity* to have a neutral decision-maker review an officer's demand to search the registry before he or she faces penalties for failing to comply. Actual review need only occur in those rare instances where a hotel owner objects to turning over the registry. . . . For instance, respondents accept that the searches authorized by sec. 41.49(3)(a) would be constitutional if they were performed pursuant to an administrative subpoena. These subpoenas, which are typically a simple form, can be issued by the individual seeking the record --- here, officers in the field --- without probable cause that a regulation is being infringed. * * * [W]here a subpoenaed hotel operator believes that an attempted search is motivated by illicit purposes, respondents suggest it would be sufficient, if he or she could move to quash the subpoena before any search takes place. [citation omitted]. A neutral decisionmaker, including an administrative law judge, would then review the subpoenaed party's objections before deciding whether the subpoena is enforceable." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2453, 192 L.Ed.2d 435 (2016)

"Rather than arguing that sec.41.49(3)(a) is constitutional under the general administrative search doctrine, the City and Justice Scalia contend that hotels are closely regulated,' and that the ordinance is facially valid under the more relaxed standard that applies to searches of this category of businesses. They are wrong on both counts." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2454, 192 L.Ed.2d 435 (2016)

See Chapter 14, Sec, 5 & 6 for a discussion the consent and exigent circumstances exception to the search warrant requirement rule.

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## Subpart C. Enforcement of the Fourth Amendment

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

## Section 3. Fruit of the Poisonous Tree Doctrine

### a. General rule

**Fn. 53, p. 374**

" Under the Court's precedents, the exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree. Utah v. Strieff, 579 U.S. ____, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016) (internal citations and quotations omitted).

**p. 375. End of subsection 3a, new paragraph.**

The Court engages in a balancing analysis in determining whether the evidence discovered during an illegal search or seizure was the "fruit" of that illegality --- or whether the causal chain that led to this evidence has been broken. Three factors are necessarily involved : (1) the temporal proximity between the initial illegality and the evidence seized, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the initial illegality**. Fn. 55a**

**Fn. 55a.**

"It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff 's person.

The three factors articulated in Brown v. Illinois, 422 U. S. 590 (1975), guide our analysis. First, we look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider 'the presence of intervening circumstances.' Third, and particularly significant, we examine 'the purpose and flagrancy of the official misconduct.' (internal citations omitted)." Utah v. Strieff, 579 U.S. ___, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016)

### b. Examples of derivative fruits of an unreasonable search or seizure

**(5) Contrary examples**

**p. 378 , after 1st compete paragraph, add a new paragraph:**

Valid warrant discovered during illegal stop. Where a law enforcement officer makes a non-flagrant but illegal investigatory stop of a suspect, and during the stop discovers a valid outstanding arrest warrant against the suspect, any evidence seized incident to the arrest of the suspect is not subject to the Fourth Amendment exclusionary rule. This is so because the discovery of the warrant, under these circumstances, attenuated the connection between the illegal stop and the evidence seized so as to purge the taint of the initial illegality. **Fn. 73a.**

This result, however, might be different if the express purpose of the stop was to conduct a "fishing expedition" for possible evidence of a crime. **Fn. 73b.** For example, where a police officer randomly stops an automobile for a drivers license, car registration, or warrants check to see if any laws have been broken **Fn. 73c** -- or where a police officer randomly stops a person on the street for an ID and warrants check for the same purpose.. **Fn. 73d.** Such clearly illegal stops could be considered flagrant in nature --- and consequently the later discovery of an outstanding warrant might be considered tainted by the prior illegal stop. The Court, however, has yet to address these issues. **Fn. 73e.**

**Fn. 73a.**

"To enforce the Fourth Amendment's prohibition against 'unreasonable searches and seizures,' this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

* * *

"It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and

the discovery of drug-related evidence on Strieff 's person. The three factors articulated in Brown v. Illinois, 422 U. S. 590 (1975), guide our analysis. First, we look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider 'the presence of intervening circumstances.' Third, and particularly significant, we examine 'the purpose and flagrancy of the official misconduct.' (internal citations omitted)."

* * *

"Applying these factors, we hold that the evidence discovered on Strieff 's person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to Strieff 's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff 's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct."

Utah v. Strieff, 579 U.S. ____, 136 S.Ct. 2056, 2059, 2061, 2063, 195 L.Ed.2d 400 (2016) (investigatory stop of defendant who left a house that an anonymous tipster said was a drug house, conceded by the state to be an illegal stop; valid outstanding traffic warrant discovered during the stop when detaining officer relayed defendant's ID to a police dispatcher; defendant arrested pursuant to the warrant and searched incident to the arrest; illegal drugs and drug paraphernalia seized from defendant's person; defense motion to suppress this evidence properly denied).

**Fn. 73b.**

The Court in the Strieff case expressly notes that the detaining officer in the case did not stop the defendant as part of a suspicionless fishing expedition. "He [the defendant] asserts that Officer Frackell stopped him solely to fish for evidence of suspected wrongdoing. But Officer Frackell sought information from Strieff what was happening inside a house whose occupants were legitimately suspected of dealing drugs. This was not a suspicionless fishing expedition in the hope that something might turn up." Utah v. Strieff, 579 U.S. ____, 136 S.Ct. 2056, 2064, 195

L.Ed.2d 400 (2016). If that were the case, however, this stop might have been considered flagrant.

**Fn. 73c**

The Court has squarely disapproved of these tactics. It is "clearly established" law that a police officer may not randomly stop cars on the street for drivers license and car registration checks. "[W]e hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that the automobile is unlicensed, or either the vehicle or an occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to check his [or her] drivers license and the registration of the automobile is unreasonable under the Fourth Amendment. . . . We hold only that persons in automobiles on the public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of the police." Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660, 673-674 (1979). An officer who does so anyway is acting recklessly or with gross negligence and is subject to civil liability. See Chapter 17, Sec. 6g of this work.

**Fn. 73d.**

The Court has held that it is a violation of the Fourth Amendment for a police officer to randomly stop a person on the street for the sole purpose of making an ID check. "The application of [Texas statute] to detain appellant and require him to identify himself violated the Fourth Amendment because the officers lacked reasonable suspicion to believe appellant had engaged in criminal conduct. Accordingly, appellant may not be punished for refusing to identify himself , and the conviction is reversed." Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979) (statute made it an offense to refuse to give his or her name when requested by police). An officer who engages in such behavior based on a whim or a hunch is violating "clearly established" Fourth Amendment law and is subject to civil liability. See Chapter 17, Sec. 6g of this work.

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**Fn. 73e.**

Other issues also remain outstanding that the Court has yet to address.

One issue, which the Court expressly declines to decide in Strieff, is "whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence." Utah v. Strieff, 136 S.Ct. at 2062.

Clearly, if Officer Fackrell actually knew of the warrant's existence, Strieff's arrest would be valid. But the police department as a whole already knew of the warrant's existence as this fact was in the police department's computer system. The police didn't learn about the warrant as a result of Strieff's invalid stop --- they already knew. Presumably, a court clerk had previously informed the police of the warrant's existence.

So why can't the police knowledge of this warrant be imputed to Officer Fackell ? If we don't do that and base it all on Officer Fackell's subjective knowledge, does that result collide with the line of cases holding that reasonable suspicion for a Terry stop must be based on an objective assessment of the totality of the circumstances and not the arresting officer's subjective intent?

Related to that issue is what happens to the defendant if a court in a future case concludes that the discovery of the arrest warrant was the fruit of a *flagrantly unconstitutional* police stop? Does that invalidate the arrest and void the warrant? Does the defendant go free?

Or does a court conclude that the defendant may lawfully be taken into custody pursuant to the warrant, but any evidence secured incident to that arrest is tainted by the prior invalid stop and may not be used in evidence under the exclusionary rule? If so, does that result collide with the line of cases holding that a search conducted incident to a valid arrest is a reasonable search under the Fourth Amendment?

Confounding all these difficult constitutional issues is the real world consequences of sanitizing the common police practice of checking for outstanding warrants whenever an officer stops a motorist or makes an investigative stop of a person on the street.

Justice Sotomayer in her dissent in Strieff notes that "[t]he States and Federal Government maintain a database with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. Even these sources may not track the 'staggering' numbers of warrants, 'drawers and drawers' full, that many cities issue for traffic violations and ordinance infractions. The county in this case has had a 'backlog' of such warrants. The Department of Justice reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding

warrants against them." Utah v. Strief, 136 S.Ct. at 2068 (Sotomayor, J. dissenting) (citations omitted).

Given this ocean of outstanding warrants in the country, do the courts encourage police to take chances based on hunches and whims and make illegal stops of people in the hope of later discovering a warrant against these people? Or does the threat of a possible lawsuit deter the police from such behavior when the person stopped has no outstanding warrants?

Or is the trouble not with Fourth Amendment doctrine upholding the practice but with issuance of so many warrants in the first place? Are any of these warrants improperly issued? Presumptively, all warrants are considered properly issued, but in a given case the circumstances may show otherwise. For example, it could be shown that a court precipitously issued an arrest warrant against a defendant charged with a traffic offense for failure to appear for a court hearing when there was no showing that the defendant was properly notified of the hearing.

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**Section 6. Miscellaneous Procedural and Appellate Considerations: Alternative Civil Remedy**

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

**Fn. 180, p. 402, after Brosseau v. Haugen:**

Mullenix v. Luna, 577 U.S. ___, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (same).

**Fn. 186, p. 404.**

Even where the police officer prevails on the qualified immunity issue, the officer may still be able to appeal the final judgment in the officer's favor where the officer has lost on the initial constitutional issue and the Court has held that the officer's conduct violated the Fourth Amendment. For a thorough discussion of this issue, see Camreta v. Greene, 563 U.S. ___, 131 S.Ct. 2020, 179 L.Ed.2d 118 (2011).

**Fn. 188, p. 404.**

See also Carroll v. Carman, 574 U.S. _____, 135 S. Ct. 348, 190 L.Ed.2d 311 (2014).

**Fn. 189, p. 404**

"Public officials are immune from suit under 42 U. S. C. §1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it, meaning that existing precedent . . . placed the statutory or constitutional question beyond debate. This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protect[ing] all but the plainly incompetent or those who knowingly violate the law." City and County of San Francisco v. Sheehan, 575 U.S. ___, 135 S.Ct. 1765, 1774, 190 L.Ed.2d 434 (2015) (internal citations and quotations omitted) (qualified immunity shielded from suit two police officers who broke into a private room in a group home for mental patients and used non-deadly [pepper spray] and ultimately deadly force [multiple gun shots]to subdue a mentally unstable, knife-wielding mental patient therein who had threatened the life of the officers and a social worker at the home in two other earlier entries into the room).

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

"We have repeatedly told courts not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. Such specificity is especially important in the Fourth Amendment context, where the Court has

recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Mullenix v. Luna, 577 U.S. ___, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (internal citations and quotations omitted) (in 42 U.S sec. 1983 action, qualified immunity shielded from suit a police officer who shot and killed a man in a high speed police chase on an interstate highway) ("The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone a basis for denying qualified immunity." 136 S.Ct. at 310).

**Fn.190, p. 404,.**

See also Stanton v. Sims, 571 U.S. ___, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (defendant police officer entitled to qualified immunity in a 42 U.S.C. 1983 civil rights suit).

**p. 405, new subsection.**

**h. Declarative Decree and Injunction Action**

The Court has entertained challenges against a legislative enactment for being facially invalid under the Fourth Amendment in a declaratory decree action seeking an injunction against the enforcement of the statute. The statute, however, must be clear and unambiguous as well as unconstitutional in all applications that the statute authorizes. If the statute contains substantial ambiguity as to what conduct the statute authorizes, such an action does not lie. **Fn. 193.**

**Fn. 193.** For a thorough discussion of this subject with collected cases, see City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 400, 192 L.Ed.2d 435 (2016) (striking down a municipal ordinance authorizing administrative inspections of a hotel operator's guest registry as a violation of Fourth Amendment).

"Respondents brought a Fourth Amendment challenge to a provision of the Los Angeles Municipal Code that compels '[e]very operator of a hotel to keep a record' containing specified information concerning guests and to make this record 'available to any officer of the Los Angeles Police Department for inspection' on demand. [citation omitted]. . . . We hold facial challenges can brought under the Fourth Amendment. We further hold that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the

police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them an opportunity for precompliance review." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2447, 192 L.Ed.2d 435 (2016)