

The Real-World Fourth Amendment

by BRENT E. NEWTON*

Introduction

As both a legal academic who specializes in constitutional criminal procedure and a former long-time public defender, I regularly have been asked by those not in the legal profession about police officers' or other governmental officials' searches and seizures in common real-world scenarios. May a police officer search inside your car when he or she stops you for a routine traffic violation like speeding or running a red light? May a police officer enter a person's home under any circumstances without a search warrant? May a school principal or teacher search a student's clothing or belongings if another student claimed the first student possesses contraband like drugs or a weapon? Is the Fourth Amendment violated when a police officer accidentally arrests and searches the wrong person (a person other than the one named in an arrest warrant)? What happens if a police officer engages in a search or arrest prohibited by the Fourth Amendment but discovers evidence of criminal activity—does the guilty person automatically “get off”? Can a police officer who engaged in an unconstitutional search or seizure be sued for money?

My answers to such questions—which are typically informed (if not dictated) by Supreme Court decisions—often surprise and sometimes cause consternation to my questioners. People often react to the Court's Fourth Amendment jurisprudence with widely different responses—ranging from the claim that the amendment hinges on “technicalities” that benefit criminals to the assertion that the amendment provides law enforcement officers with excessive power.

It's not just lay people who struggle with the Fourth Amendment. Having taught dozens of law school courses and continuing legal education seminars on criminal procedure during the past two decades, I have

* J.D. Columbia University School of Law. The author, a former Assistant Federal Public Defender and the current Deputy Staff Director of the United States Sentencing Commission, serves as an adjunct professor of law at American and Georgetown Universities. The views expressed in this article are the author's alone and do not represent the position of the Sentencing Commission.

discovered that many law students and legal practitioners grapple with applying Fourth Amendment principles to recurring real-world scenarios because they are too focused on Fourth Amendment theory rather than on Fourth Amendment practice. Therefore, I have written this article in order to provide a comprehensive, yet accessible, survey of the Fourth Amendment as applied to recurring real-world situations in which a police officer or other governmental official¹ engages in a search or seizure of property or a person. This article does not address similar but distinct protections provided by federal or state nonconstitutional rules² or by state constitutions (which occasionally exceed the protections afforded by the Fourth Amendment).³

Before engaging in the survey of the Fourth Amendment in real-world situations, though, it is helpful to set forth the amendment in its entirety because, as demonstrated below, virtually all of its fifty-four words matter in its application:

The 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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴

Because of the brevity of the Fourth Amendment's text, as well as the countless contexts in which searches and seizures can arise, many cases have required the Supreme Court's interpretation of the amendment's language. Indeed, in the modern era, the Court typically has decided several Fourth Amendment cases per year—resulting in more decisions than perhaps any other type of legal issue regularly coming before the

1. The Fourth Amendment, like much of the rest of the Bill of Rights (the first ten constitutional amendments), only applies to government officials (as opposed to private citizens not acting under the authority of the federal, state, or local government). See *Jacobsen v. United States*, 466 U.S. 109 (1984) (holding that a warrantless search by a Federal Express employee of a package containing drugs was not a violation of the Fourth Amendment when law enforcement did not request the private employee to do so).

2. See, e.g., *State v. Johnson*, 939 S.W.2d 586 (Tex. Crim. App. 1996) (holding that, under Texas Rule of Criminal Procedure article 38.23(a), evidence obtained by a private citizen should be suppressed if a comparable search by a police officer would have violated the Fourth Amendment).

3. See, e.g., *State v. Bryant*, 950 A.2d 467 (Vt. 2008) (providing greater protection under the Vermont Constitution than under the Fourth Amendment).

4. U.S. CONST. amend. IV.

Court.⁵ Although the Justices sometimes will interpret the amendment's words based on the "original intent" of the "framers" of the Constitution and Bill of Rights in the late 1700s,⁶ more often the Supreme Court applies the Fourth Amendment based on contemporary society's views of what constitute "reasonable" searches and seizures in modern contexts.⁷ As will be apparent from the discussion below, applying the Fourth Amendment in the real world requires the delicate balancing of individuals' privacy and property interests against society's interest in protecting public health and safety.⁸

Part I of this article discusses some preliminary matters about which one should have a basic understanding before addressing the most common issues arising under the Fourth Amendment. Part II then addresses the most common real-world applications of the Fourth Amendment—including the *many* exceptions to the general rule that searches and seizures by government officials require both probable cause and a warrant. Part III discusses how reasonable mistakes are tolerated under the Fourth Amendment. Part IV addresses Fourth Amendment *remedial* law—that is, the consequences (or lack thereof) for violations of the Fourth Amendment, both in criminal prosecutions of a person against whom the "fruits" of an unconstitutional search or seizure are offered by the prosecution and also in civil rights lawsuits initiated by persons who have been unconstitutionally searched or seized.

I. Some Preliminary Matters

In order to understand the Fourth Amendment as applied to real-world scenarios, the reader should first be familiar with several basic principles of Fourth Amendment law.

5. See, e.g., Edwin Chemerinsky, *Law Enforcement and Criminal Law Decisions*, 28 PEPPERDINE L. REV. 517, 523–24 (2001) ("In an era in which the Supreme Court's docket is dramatically shrinking, the number of Fourth Amendment cases is, if anything, increasing.").

6. See, e.g., *Jones v. United States*, 132 S. Ct. 945 (2012) (interpreting the Fourth Amendment in view of Anglo-American tort law in existence in the late 1700s).

7. See, e.g., *Riley v. California*, 134 S. Ct. 2473 (2014) (interpreting the Fourth Amendment to protect the digital content of a cell phone seized by police officers after arresting the phone's owner); see also *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

8. See, e.g., *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 188–89 (2004) ("The reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.") (citation and internal quotation marks omitted).

A. “Searches” Versus “Seizures”—of People and Property

The Fourth Amendment protects against both unreasonable “searches” and unreasonable “seizures.” A police officer or other governmental official need not engage in both an unreasonable search and an unreasonable seizure in order to violate the Fourth Amendment; either an unreasonable search or an unreasonable seizure is prohibited. Often, however, both occur in a single instance.⁹

The Fourth Amendment is concerned with both people and their property. The amendment’s prohibition of unreasonable “searches” applies to both searches of people not also involving a search of property (e.g., a police officer’s eavesdropping on a private conversation between two people without their knowledge)¹⁰ and searches of property not also involving a search of a person (e.g., a police officer’s warrantless entry into an unoccupied home where the officer saw illegal contraband).¹¹ The Fourth Amendment’s prohibition of unreasonable “seizures” likewise applies to both property and people. However, cases involving an unreasonable seizure of property—without a concomitant unreasonable search of the property—are relatively uncommon in the annals of Fourth Amendment jurisprudence,¹² so this article will focus primarily on searches of property or people and seizures of people.

Although the Fourth Amendment protects both people’s privacy interests and their property rights, the amendment’s degree of protection of privacy and property is somewhat limited. With respect to searches that violate a person’s privacy interests, the Fourth Amendment protects only a person’s “reasonable expectations of privacy,”¹³ and only in certain contexts (such as the person’s body, the words she speaks or writes in certain contexts, and her home and the types of personal property mentioned in the Fourth Amendment).¹⁴ A “search” that violates a

9. See *Soldal v. Cook County*, 506 U.S. 56, 62–65 (1992); see also *People v. Nash*, 947 N.E.2d 350, 356 (Ill. App. Ct. 2011).

10. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967) (police officers eavesdropped on defendant’s telephone conversation).

11. See, e.g., *Fernandez v. California*, 134 S. Ct. 1126 (2014) (police officers entered defendant’s home and searched for evidence of robbery in defendant’s absence).

12. See, e.g., *Soldal*, 506 U.S. at 63–64. A “seizure” of property occurs when a police officer or other governmental official engages in a “meaningful interference” with the property owner’s “possessory interests.” *Id.* at 63.

13. See, e.g., *Jones v. United States*, 132 S. Ct. 945, 949–50 (2012) (quoting from *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

14. See, e.g., *Hughes v. Comm.*, 524 S.E.2d 155, 159 (Va. Ct. App. 2000) (“Under the Fourth Amendment, a search is an invasion into a space or area where a person has a reasonable expectation of privacy in the ‘person,’ or the person’s ‘houses,’ ‘papers,’ or ‘effects.’”).

person's privacy interests typically involves a police officer's use of one or more of the physical senses—such as seeing something,¹⁵ feeling something,¹⁶ hearing something,¹⁷ smelling something,¹⁸ or otherwise sensing something through the use of sense-enhancing technology¹⁹—that reveals incriminating information that a person reasonably expected to remain private.

With respect to “searches” that violate a person's property interests, the Fourth Amendment prohibits some—but not all—physical “trespasses” by police officers against personal or real property,²⁰ *regardless* of whether a “reasonable expectation of privacy” existed in the property that was trespassed upon or in the information that was gained through the trespass.²¹ But not all trespasses are “searches.” An original draft of the Fourth Amendment penned by James Madison extended the amendment's protections to “other property” (in addition to a person's “house,” “papers,”

15. *Arizona v. Hicks*, 480 U.S. 321 (1987) (holding that a police officer's moving a stereo component a few inches away from the wall in order to see its serial number was a “search”).

16. *Bond v. United States*, 529 U.S. 334 (2001) (holding a police officer's physical manipulation of luggage was a “search”).

17. *Katz v. United States*, 389 U.S. 347, 358 (1967) (holding that a police officer's eavesdropping on a phone conversation in a closed telephone booth was a “search”).

18. *United States v. Montes-Ramirez*, 347 Fed. App'x 383, 388–90 (10th Cir. 2009) (holding that a police officer who placed his head inside the interior airspace of a car that he had stopped and smelled marijuana had engaged in a “search”).

19. *Kyllo v. United States*, 533 U.S. 27, 30 (2001) (police officers used a thermal imaging device to detect heat emanating from within a house and used such information, along with other information, to establish probable cause that the defendant was illegally growing marijuana within his house); *see also id.* at 40 (“Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”).

20. *See Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (“When the Government obtains information by physically intruding on persons, houses, papers, or effects, a ‘search’ within the original meaning of the Fourth Amendment has undoubtedly occurred.”) (citation and internal quotation marks omitted); *Jones v. United States*, 132 S. Ct. 945, 949–50 (2012) (“[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (‘persons, houses, papers, and effects’) it enumerates.”); *see also Oliver v. United States*, 466 U.S. 170 (1984) (refusing to apply the Fourth Amendment to a warrantless search of the “open fields” on the defendant's farm on the ground that “open fields” are not part of the “house” and its “curtilage” within the meaning of the Fourth Amendment).

21. *Jones*, 132 S. Ct. at 950–52 (rejecting argument that when a police officer trespasses upon a type of property protected by the Fourth Amendment, a defendant also must show that he or she had a “reasonable expectation of privacy” in the item or area in order to claim a Fourth Amendment violation); *accord Alderman v. United States*, 394 U.S. 165 (1969) (finding that a homeowner's Fourth Amendment right to be free of an unreasonable search was violated when police officers engaged in warrantless eavesdropping of a conversation between two other persons who were inside the home).

and “effects”), yet that additional phrase was stricken from the final version adopted in 1791.²²

For a Fourth Amendment violation to occur, the relevant event not only must qualify as a “search” but also must be “unreasonable.”²³ As discussed below, not all things that the average person would consider to be a “search” in common parlance qualify as such within the meaning of the Fourth Amendment. Therefore, as a threshold matter, unless there is an event that qualifies as a “search” (or “seizure”) as a constitutional matter, the Fourth Amendment is not implicated, even if the actions of a police officer were clearly “unreasonable.”²⁴

There are occasions when a police officer engages in conduct that intrudes in a person’s private space or involves a trespass but the officer’s conduct nonetheless does not qualify as a “search.” For instance, an officer who, without a search warrant, entered onto a person’s private farmland by jumping a perimeter fence—intentionally flouting a “no trespassing” sign—and thereafter learned that the property owner was growing marijuana in one of his fields did not engage in a “search” within the meaning of the Fourth Amendment because the officer did not enter into the portions of the property protected by the amendment (i.e., the farmland was not part of the “house” nor did it qualify as “papers” or “effects”).²⁵ Even if a police officer uses his or her physical senses to detect illegal activity in an area covered by the Fourth Amendment, it still may not qualify as a “search.” For instance, a person engaging in illegal activity in his fenced-in backyard—property considered to be the “curtilage” of a home and ordinarily protected by the Fourth Amendment²⁶—cannot complain that police officers, without a warrant, observed the illegal activity from an airplane flying over the backyard so long as the plane was in navigable airspace.²⁷ This is because a person does not have a “reasonable expectation of privacy” in the navigable airspace over his or her backyard.²⁸ Thus, a police officer’s warrantless peering into the

22. *Oliver*, 466 U.S. at 176–77.

23. *Grady v. North Carolina*, 135 S. Ct. 1368, 1370–71 (2015) (per curiam) (finding a warrantless “search” occurred through use of GPS monitoring but remanding for a determination of whether the search was “unreasonable”).

24. *Id.*

25. *Oliver*, 466 U.S. at 182–83.

26. *Id.* at 180.

27. *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986).

28. *Id.*; see also *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (“In assessing when a search is not a search [under the Fourth Amendment], we have applied somewhat in reverse the principle first enunciated in *Katz* [concerning whether a person has a ‘reasonable expectation of privacy’].”).

person's backyard from the vantage point of an airplane in navigable airspace is not a "search." By contrast, an officer who peered into the fenced-in backyard of a person's residence without a warrant after climbing the fence violated the Fourth Amendment because an average homeowner possesses a "reasonable expectation of privacy" that another person would not climb the fence in order to see within the yard.²⁹

An event that would otherwise qualify as a "search"—in the sense that a police officer or other governmental official used one of his or her physical senses to obtain information about one of the types of property mentioned in the Fourth Amendment or trespassed on protected property—but that is nonetheless "reasonable" does not violate the Fourth Amendment, even if the official lacked a search warrant. For instance, as discussed further below, a public school official, such as a teacher or principal, engages in a "search" of a student's body or his or her personal property, like a backpack, when the official looks for contraband, yet the Supreme Court has held that such searches are reasonable—and, thus, do not violate the Fourth Amendment, even if done without a search warrant—so long as the official has "reasonable suspicion" to believe that contraband was present in the area searched.³⁰

With respect to "seizures" of people within the meaning of the Fourth Amendment, a person is "seized" by a police officer when a "reasonable person" would not have felt "free to leave" based on the officer's words and actions directed at him or her.³¹ For example, a police officer in a patrol car who flashes her blue lights and sounds her siren at a driver "seizes" the driver if he or she pulls the car over to the side of the road in response.³² However, a seizure has not occurred unless the person either "submitted" to the officer's request (e.g., the driver who pulled his car over to the side of the road) or was physically restrained by the officer (e.g., a person who fled on foot from a police officer was tackled by the officer).³³ Just as with searches of people and property, seizures of people do not violate the Fourth Amendment unless they are "unreasonable." And just as with warrantless searches, not all warrantless seizures are unreasonable; indeed, many *are* reasonable.³⁴ Generally, if an officer possesses "probable

29. *State v. Waldschmidt*, 740 P.2d 617, 623 (Kan. Ct. App. 1987).

30. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

31. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality); *Florida v. Bostick*, 501 U.S. 429, 435–36 (1991).

32. *Brendlin v. California*, 551 U.S. 249 (2007).

33. *Hodari D. v. California*, 499 U.S. 621 (1991).

34. *See, e.g., Navarette v. California*, 134 S. Ct. 1683 (2014); *Sharpe v. United States*, 470 U.S. 675 (1985).

cause” or “reasonable suspicion”—terms that are discussed below—to believe that a particular person has committed a criminal offense (no matter how minor, including a traffic violation), a warrantless seizure of the person is reasonable, so long as the person is outside of his or her home.³⁵ Finally, it should be noted that not all “seizures” of people are considered “arrests.” As discussed further below, “arrests” are the most intrusive “seizure” and require probable cause; however, the Fourth Amendment tolerates a lesser form of “seizure”—called an “investigatory detention”—and only requires “reasonable suspicion” rather than the more demanding “probable cause.”³⁶

B. Is a Search or Arrest Warrant Always Required?

The short answer is *no*. In fact, in the vast majority of situations, a search warrant or an arrest warrant is *not* required for a “reasonable” search or seizure to occur. The one context in which a search or arrest warrant is generally required is when a police officer enters a person’s home (or equivalent place, like a hotel room) in order to arrest them or engage in a search of the home or its curtilage.³⁷

With respect to warrantless seizures of persons, the Supreme Court has held that an arrest warrant is not required for otherwise reasonable seizures (including arrests) that occur in “public” (meaning anywhere outside of the home).³⁸ With respect to warrantless searches, which in theory are “presumptively unreasonable” inside or outside the home,³⁹ the Supreme Court has rendered many dozens of decisions creating “exceptions” to the general requirement of a search warrant. Some dissenting Supreme Court Justices over the years have complained that the Court has created so many exceptions that there is no longer a meaningful “rule” against warrantless searches.⁴⁰ That is not entirely true because the Supreme Court and the lower courts regularly find that police officers and other governmental officials have engaged in unconstitutional searches.

35. See, e.g., *Santana v. United States*, 427 U.S. 38 (1976); *United States v. Sokolow*, 490 U.S. 1 (1989).

36. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880–82 (1975).

37. See *Payton v. United States*, 445 U.S. 573 (1980).

38. *Watson v. United States*, 423 U.S. 411 (1976); *Santana*, 427 U.S. at 42 (concluding that the defendant, who opened her door and appeared at the threshold, was in “public” and thus could be lawfully arrested there without an arrest warrant); *United States v. Hensley*, 469 U.S. 221, 225–27 (1985) (permitting public warrantless arrest for past as well as present felonies and also for misdemeanors committed in an officer’s presence).

39. *Horton v. California*, 496 U.S. 128, 133 & n.4 (1990).

40. See, e.g., *Florida v. White*, 526 U.S. 559, 569 (1999) (Stevens, J., dissenting, joined by Ginsburg, J.) (contending that “the exceptions have all but swallowed the general rule”).

Yet, as discussed below, it is true that the exceptions to the search warrant requirement apply in a wide variety of contexts, including warrantless searches of automobiles, warrantless searches at the international border (including incoming flights to international airports located anywhere in the United States), warrantless searches of K-12 public school students, and warrantless searches of a person who has been validly arrested. As discussed further below, sometimes a warrantless search requires the existence of probable cause in order to be a “reasonable” search, while at other times probable cause is not required.

C. What Is “Probable Cause,” And Is It Always Required for a Search or Arrest to Be Constitutional?

1. Meaning of “Probable Cause”

“Probable cause” (“PC”) is a quantum or standard of proof, similar but much less demanding than two other well-known quanta of proof that exist in the American justice system—“preponderance of the evidence” and “proof beyond a reasonable doubt” (“BRD”). The preponderance standard, which is generally used in civil litigation and also in pretrial and sentencing proceedings in criminal cases, requires a party to prove his or her case by a “preponderance” of the evidence, meaning the factfinder—the judge or jury—must believe that one party has offered more convincing proof, however slightly more so (“50.1% or more”) than the other party.⁴¹ Under the preponderance standard, the successful party need only “tip the scales” vis-à-vis the other party to prevail.⁴² The BRD standard requires a prosecutor in a criminal case to offer much more proof than merely a preponderance of the evidence in order to secure a conviction at a trial; the factfinder must have very little or no doubt about a defendant’s guilt for the prosecutor to secure a guilty verdict.⁴³ Although there is no specific minimum percentage of certainty associated with BRD, the BRD standard requires a judge or jury to have a much stronger level of confidence in a criminal defendant’s guilt than that required for a civil plaintiff to prevail at trial.⁴⁴

Conversely, PC is a significantly lower quantum of proof than the preponderance standard, and is dramatically lower than the level of

41. BLACK’S LAW DICTIONARY 1220 (8th ed. 2004) (defining “preponderance of the evidence” as “the greater weight of the evidence . . . [established] by evidence that has the most convincing force . . . however slight the edge may be”).

42. See, e.g., *State v. Moore*, 344 So. 2d 973, 979 (La. 1977).

43. *Victor v. Nebraska*, 511 U.S. 1 (1994).

44. See *In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring).

certainty required for a conviction at a criminal trial. Although the Supreme Court has never declared a specific percentage of certainty associated with PC, the Court has declared that PC is *less* than a preponderance,⁴⁵ and lower court judges have “variously estimated [probable cause] to be anywhere from 25% to 40%.”⁴⁶ Therefore, being such a low standard with such a high margin of error, the existence of probable cause itself does not mean a person searched or seized (even formally arrested) is guilty. Indeed, the Supreme Court has suggested that the existence of PC is not inconsistent with a person’s innocence.⁴⁷ It is simply the relatively low amount of evidence required for police and prosecutors to search, seize, and formally charge a person with a crime. But, without more than mere PC, a prosecutor will not come close to prevailing at a trial. PC is merely enough evidence to start the wheels of justice turning.⁴⁸ In evaluating whether a police officer possessed probable cause, a reviewing court must look at the evidence known to an officer at the time of a search or seizure, with deference given to the officer’s perspective as a trained law enforcement officer.⁴⁹

2. *Exceptions to the Fourth Amendment’s Probable Cause Requirement*

As discussed further below, there are two main exceptions to the Fourth Amendment’s probable cause requirement for a search or seizure. The first is when a person validly *consents* to a search or seizure. In such a case, an officer need not have probable cause. Consent is discussed more below in Part II.D. The second main exception is when a police officer

45. *United States v. Denson*, 775 F.3d 1214, 1217 (10th Cir. 2014) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

46. *United States v. Perez*, 574 F. Supp. 1429, 1437 n.5 (E.D.N.Y. 1983).

47. *See Gates*, 462 U.S. at 223 n.13; *see also United States v. Olson*, 21 F.3d 847, 850 (8th Cir. 1994) (“All of these facts, although individually consistent with innocence, taken together support a finding of probable cause.”).

48. An example of the low amount of certainty required for PC to exist is seen in *Maryland v. Pringle*, 540 U.S. 366 (2003). In that case, the Supreme Court found PC supporting the arrest not only of the driver but also of the two passengers of a car based only on the following evidence: the car was pulled over for a traffic violation in a “high crime” area of Baltimore at 3:16 a.m. and, during a consensual search of the car, a police officer found \$763 in the glove compartment and three sandwich bags of a white powder appearing to be cocaine hidden behind the backseat armrest (which none of the three occupants of the car claimed to own). *See id.* at 367–69. The Court found that there was probable cause to arrest the passengers as well as the driver considering the “totality of the circumstances.” *Id.* at 372 (“We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.”).

49. *See Gates*, 462 U.S. at 231–32 (noting that “the evidence thus collected [by the law enforcement officer] must be seen and weighed [by a judge] not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement”).

possesses “reasonable suspicion” to believe that a person has committed (or is about to commit) a crime outside of his home. In such a case, the officer may engage in a warrantless seizure of the person short of a full-fledged “arrest” and also may “pat down” the outer clothing of the person if the officer additionally possesses “reasonable suspicion” that the person possesses a dangerous weapon (such as a gun or a knife). This type of seizure based on evidence less than probable cause is known as a “stop and frisk,” which is discussed further below in Part II.A.

D. If a Police Officer Possesses a Valid Search Warrant or Arrest Warrant, Are There Any Limits to the Officer’s Authority in Executing the Warrant?

Generally, if a police officer possess a valid search warrant or arrest warrant issued by a “neutral and detached” judicial official (as opposed to another law enforcement official),⁵⁰ the officer may conduct a “reasonable” search or arrest pursuant to the warrant. A reasonable search is one that does not exceed *the scope* of the warrant.⁵¹ For instance, an officer who possesses a search warrant to search a bartender and the area in a bar used by the bartender for illegal drugs may not search patrons of the bar (assuming they are not named in the warrant and further assuming the officer does not possess an independent basis to search or seize those patrons).⁵² Likewise, without an independent basis to arrest someone other than the person named in an arrest warrant, an officer may only arrest the person named or described with sufficient particularity in an arrest warrant.⁵³ Nevertheless, the Supreme Court has held that, during the execution of a search or arrest warrant, police officers may temporarily seize and “pat down” the outer clothing of people in the same premises, so long as the officers possess “reasonable suspicion” to believe that the persons possess dangerous weapons—as a matter of “officer safety.”⁵⁴ In executing a search or arrest warrant inside a home or other private building, an officer must generally “knock and announce” his or her identity and the fact that he or she has a warrant before entering the building without consent.⁵⁵

50. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

51. *See, e.g., United States v. Bershchansky*, 788 F.3d 102 (2d Cir. 2015).

52. *See Ybarra v. Illinois*, 444 U.S. 85, 90–91 (1980).

53. *See People v. Montoya*, 63 Cal. Rptr. 73 (Cal. Ct. App. 1967).

54. *Michigan v. Summers*, 452 U.S. 692 (1981).

55. *Wilson v. Arkansas*, 514 U.S. 927 (1995). Nevertheless, if police officers violate this “knock and announce” requirement under the Fourth Amendment—by failing to knock and announce or by failing to wait a reasonable time before entering the home without permission after knocking and announcing—the Fourth Amendment “exclusionary rule” does not apply

E. “Standing” to Assert Fourth Amendment Rights

When a police officer engages in an unconstitutional search or seizure, not everyone adversely affected can seek a judicial remedy for the constitutional violation. Rather, only persons with “standing”—that is, people with a valid privacy or property interest in the thing or place searched or seized—can seek a remedy.⁵⁶ For instance, assume two persons (A and B) conspired to rob a bank. A went into the bank armed with a gun and tried to take money from a teller (but was thwarted by an alarm, which caused A to flee without money); B served as the “look-out” who stayed immediately outside the bank during the robbery. A and B fled the bank in A’s car (which A drove) after the unsuccessful robbery but were later stopped and arrested after police officers were alerted to a general description of A’s car by a bystander. Assume the arresting officers searched the trunk of the car and located the gun and mask used by A during the robbery taken from the bank. Further assume that the police officers lacked probable cause to search the car because the description given by the bystander was too vague to justify a full-fledged evidentiary search. Although A would have “standing” to object to the admission of the incriminating evidence (the gun and mask) at the trial, B would not possess such “standing” to object at the trial because B did not possess either a “reasonable expectation of privacy” or a property interest in the car (which belonged solely to A) or in the seized property (A’s gun and mask).⁵⁷

F. The “Objective” Nature of the Fourth Amendment

As a general matter, courts assess whether the Fourth Amendment was violated in a particular case by applying an “objective” standard. This means that, in deciding questions such as whether probable cause existed or whether a person was “seized” during an encounter with the police, the “subjective” mental states of both the police officers and the persons they

(meaning any evidence of crime discovered inside would not be suppressed in a criminal prosecution). Rather, the person whose Fourth Amendment rights were violated in this manner is limited to the remedy of suing for money damages in a civil rights lawsuit. See *Hudson v. Michigan*, 547 U.S. 586 (2006).

56. *Rakas v. Illinois*, 439 U.S. 128 (1978). The Supreme Court has stated that “standing” is not an entirely accurate way of describing a person’s ability to claim a Fourth Amendment violation and, instead, a court must decide whether a person moving to suppress evidence had a legitimate privacy or property interest in the area or thing searched or seized. *Id.* at 139–40. Nonetheless, the term “standing” as shorthand for a privacy or property interest sufficient to raise a Fourth Amendment claim has persisted among practitioners and lower courts since *Rakas*. See, e.g., *United States v. Jackson*, 618 F. App’x 472 (11th Cir. 2015).

57. Cf. *Rakas*, 439 U.S. at 129–50 (discussing a very similar set of facts and concluding that the passengers did not have a basis to file a motion to suppress).

interacted with are generally irrelevant to the Fourth Amendment analysis. Instead, courts apply an “objective” standard that considers—based on all the facts known to the officer and the affected persons—a hypothetical “reasonable” officer and a hypothetical “reasonable” person.⁵⁸

For instance, in deciding whether a police officer had probable cause to arrest a person, a court asks whether a “reasonable officer” who knew all of the facts known to the actual arresting officer would have believed that he or she possessed probable cause that a crime or traffic infraction had occurred.⁵⁹ Even if an officer subjectively never intended to arrest a person based on probable cause for a petty offense that was the basis for the initial seizure—such as a traffic violation—the officer may validly seize the person temporarily in the hope of developing probable cause for a more serious offense.⁶⁰ Thus, evidence of a more serious crime that the officer reasonably learns about during the course of the initial “pretextual” seizure can support an arrest for the more serious offense.⁶¹

Similarly, in deciding whether a person was “seized” by a police officer, a court asks whether a “reasonable” person in the defendant’s position would have believed that they were not “free to leave” based on the words and actions of the officer.⁶² The person’s subjective belief that he or she was in fact seized is irrelevant so long as a hypothetical “reasonable” person would have felt free to leave.⁶³

There are some rare exceptions to the general “objective” nature of legal analysis under the Fourth Amendment. For instance, in deciding whether a warrantless, suspicionless police roadblock was constitutional, a court must determine whether the officers who conducted the roadblock were primarily motivated, as a “subjective” matter, by a desire to ferret out criminal activity rather than primarily by a “public safety” concern, such as making sure drivers and cars were properly licensed and insured.⁶⁴ But, for most Fourth Amendment analyses, the standard is objective, not subjective.

58. *Whren v. United States*, 517 U.S. 806, 812–13 (1996) (holding that “subjective motivations” of police officers are irrelevant in determining whether probable cause existed); *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (determining whether probable cause existed from the vantage point of an “objectively reasonable police officer”); *United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980) (plurality) (analyzing whether a particular person was seized by asking whether “in view of all the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave”).

59. *Heien v. North Carolina*, 135 S. Ct. 530 (2014); *Devenpeck v. Alford*, 543 U.S. 146 (2004).

60. *Whren*, 517 U.S. at 812–13.

61. *Id.*

62. *Mendenhall*, 446 U.S. at 554–55.

63. *See, e.g., United States v. Torres-Guevara*, 147 F.3d 1261, 1264 (10th Cir. 1998).

64. *See infra* Part II.G.8.

G. Fourth Amendment “Rights” Versus “Remedies”

The Supreme Court has drawn a line between Fourth Amendment rights and Fourth Amendment remedies. A *right* means a person has a valid privacy right or property interest in the thing searched or seized (such as **A** in the above hypothetical bank robbery case in Part I.E., *supra*). A *remedy* is a judicial consequence of the violation of the Fourth Amendment.⁶⁵

In a criminal prosecution of the person whose Fourth Amendment rights were violated (such as **A** in the hypothetical), the normal remedy would be to prevent introduction of the evidence searched or seized at the criminal trial. The Supreme Court has referred to this remedy as the Fourth Amendment “exclusionary rule.”⁶⁶ In the language of the Court, the remedy excludes (or “suppresses”) the “tainted fruit of the poisonous tree”—that is, the incriminating evidence obtained as the result of a police officer’s unconstitutional search or seizure.⁶⁷ The criminal defendant who raises a Fourth Amendment claim does so in a “motion to suppress” the “tainted” evidence.⁶⁸ “Suppression” simply means exclusion of the “tainted” evidence at a trial. Most types of evidence obtained by an officer as a result of an unconstitutional search or seizure may be “suppressed,” including:

- (1) Incriminating *physical evidence* such as drugs or other illegal contraband or even a murder victim’s body;⁶⁹
- (2) *Information learned* by an officer during an illegal search or seizure (e.g., the serial number of an illegally seized piece of property);⁷⁰
- (3) Incriminating things *seen or heard* by an officer from a vantage point gained through an illegal search or seizure

65. See *United States v. Calandra*, 414 U.S. 338, 347–48 (1974) (discussing the difference between rights and remedies under the Fourth Amendment).

66. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (referring to the suppression of evidence tainted by an unconstitutional search or seizure as the “exclusionary rule”).

67. *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963); see also *Oregon v. Elstad*, 470 U.S. 298, 303 (1985).

68. See, e.g., *Michigan v. Fisher*, 558 U.S. 45, 46 (2009) (per curiam).

69. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980) (suppression of evidence of murder weapon after officers entered defendant’s home and observed murder weapon in plain view and seized it).

70. See, e.g., *Arizona v. Hicks*, 480 U.S. 321 (1987) (suppression of evidence of stolen property based on officer’s movement of a stereo component in order to see serial number, which was used to identify the component as stolen).

- (e.g., the fact that an officer detected an illegal item inside the person's home through the use of technology);⁷¹ and
- (4) A confession given by a person after he was illegally arrested.⁷²

If such “tainted” evidence was used by officers to obtain a search warrant, the “fruits” of the search conducted pursuant to the warrant also must be suppressed if the probable cause used to obtain the warrant hinged on the tainted evidence.⁷³ Although a defendant's body is not subject to suppression based on his illegal arrest—meaning the prosecution can put him on trial assuming they have “untainted” evidence to establish his guilt⁷⁴—evidence taken from his body (such as his fingerprints) linking him to a crime is subject to suppression.⁷⁵

A civil remedy also may exist for the aggrieved person who was subject to an unconstitutional search or seizure. In particular, in a civil rights lawsuit, the person (here called a civil “plaintiff” rather than a criminal “defendant”) may have the ability to sue the government official (the civil “defendant”) who violated the person's Fourth Amendment rights.⁷⁶ For instance, A in the above hypothetical not only could move to “suppress” the incriminating evidence at his criminal trial but also could sue the police officers for money damages in a separate civil rights lawsuit.⁷⁷ Of course, it is not only “guilty” persons (like A) who can seek

71. See, e.g., *United States v. Karo*, 468 U.S. 705 (1984) (suppression of officer's warrantless tracking of an electronic device installed within a container of chemicals used to make illegal drugs inside a defendant's home).

72. See, e.g., *Brown v. Illinois*, 422 U.S. 590 (1975) (confession obtained after defendant unconstitutionally arrested without probable cause or warrant suppressed).

73. See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (evidence obtained after search warrant executed was suppressed where the evidence used to obtain the search warrant was held to have been obtained in violation of the Fourth Amendment).

74. *United States v. Hernandez-Mandujano*, 721 F.3d 345, 353–55 (5th Cir. 2013).

75. See *Davis v. Mississippi*, 394 U.S. 721 (1969) (fingerprints taken after defendant unconstitutionally arrested without probable cause or warrant suppressed).

76. The primary vehicles for such civil rights lawsuits are 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Section 1983 is a statute that permits plaintiffs whose constitutional rights (including Fourth Amendment rights) were violated by a state or local government official (including police officers) to sue the official for monetary damages. In *Bivens*, the Supreme Court recognized that section 1983 did not apply to federal governmental officials and that no other federal statute permitted a civil rights lawsuit against such federal officials. Nevertheless, the Supreme Court in *Bivens* permitted a civil rights lawsuit against federal law enforcement officials for an unconstitutional search and seizure directly under the Fourth Amendment. *Bivens*, 403 U.S. at 391–98.

77. Cf., e.g., *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985) (after the state trial court granted his motion to suppress evidence of his driving under the influence of alcohol in his criminal prosecution, the defendant filed a federal civil rights action seeking money damages

civil rights remedies for violations of their rights under the Fourth Amendment. Innocent persons also can file a civil rights lawsuit assuming they can prove that their Fourth Amendment rights were violated.⁷⁸ Persons whose Fourth Amendment rights were violated not only may attempt to recover monetary damages for *past* violations but also in some situations may be able to obtain an injunction to prevent *future* violations (that is, a court order requiring a government official to stop engaging in conduct that violates the Fourth Amendment).⁷⁹

It is important to understand, however, that the Supreme Court has placed numerous limitations on both the Fourth Amendment exclusionary rule in criminal prosecutions and the ability of a civil plaintiff (whether innocent or guilty) to recover monetary damages or seek an injunction, as discussed further in Part IV below. In other words, merely proving a Fourth Amendment violation does not automatically entitle an aggrieved person to a remedy.⁸⁰

II. The Fourth Amendment in Real-World Scenarios

A. “Stop and Frisk”

The most important exception to the Fourth Amendment’s general requirement that a search and seizure of a person be supported by probable cause (and conducted pursuant to a warrant) is what is commonly referred to as a “stop and frisk.”⁸¹ In *Terry v. Ohio*,⁸² and several subsequent

from the arresting officers who entered his home and searched for evidence of DUI in violation of the Fourth Amendment).

78. See, e.g., *McAfee v. Boczar*, 738 F.3d 81 (4th Cir. 2013) (after she was acquitted at a criminal trial, the former criminal defendant successfully sued the arresting police officer for monetary damages in civil rights lawsuit based on police officers’ illegal arrest and filing of criminal charges in violation of the Fourth Amendment).

79. Both Section 1983 and *Bivens* authorize lawsuits for injunctions as well as monetary damages. See, e.g., *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013) (federal court civil rights action in which plaintiffs obtained an injunction against New York City Police Department’s “stop and frisk” policies); *Ill. Migrant Council v. Pilliod*, 398 F. Supp. 882 (N.D. Ill. 1975) (granting injunction against federal officials who violated the Fourth Amendment).

80. See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987) (in a civil rights case, applying the “qualified immunity” doctrine to prevent the recovery of money damages for a Fourth Amendment violation); *United States v. Leon*, 468 U.S. 897 (1984) (in a criminal case, applying the “good-faith exception” to the Fourth Amendment exclusionary rule to prevent suppression of illegally seized evidence). The good-faith exception to the Fourth Amendment exclusionary rule and the qualified immunity doctrine are discussed in Part IV, *infra*.

81. See, e.g., *Ligon*, 925 F. Supp. 2d at 483.

82. *Terry v. Ohio*, 392 U.S. 1 (1967).

decisions,⁸³ the Supreme Court held that a police officer acts reasonably under the Fourth Amendment when he or she engages in a brief seizure of a person (short of a full-fledged “arrest”) based solely on “reasonable suspicion” of possible ongoing or imminent criminal activity. Such “investigative detentions” based on something less than probable cause must be brief and should last only as long as it takes the officer to “confirm or dispel” the officer’s reasonable suspicion.⁸⁴ If, after a brief detention and questioning,⁸⁵ no such confirmation or dispelling occurs and probable cause still does not exist, the officer must release the person.⁸⁶ During a *Terry* stop, an officer can develop probable cause in various ways other than a defendant’s incriminating admissions, such as through a consensual search revealing incriminating evidence (discussed below in Part II.D.) or by seeing or smelling incriminating evidence exposed to the officer’s (or a drug dog’s) plain senses (discussed below in Part II.B.).

In addition to upholding a brief investigatory detention based on reasonable suspicion, the Court also has held that an officer may engage in a superficial “frisk” of the detained person’s outer clothing if the officer possesses independent reasonable suspicion that the person possesses a dangerous weapon.⁸⁷ Such frisks are not automatically reasonable every time that an investigatory detention occurs. A frisk requires reasonable suspicion that is “particularized” to the specific person.⁸⁸ Therefore, an officer who engages in an investigatory detention for something petty like a suspected traffic violation ordinarily would not be able to frisk the driver—or engage in a “protective sweep” of the car (discussed below in Part II.G.5)—absent “articulable facts” showing reasonable suspicion that the

83. See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972).

84. *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

85. The Supreme Court’s Fifth Amendment decision in *Miranda v. Arizona*, 384 U.S. 436 (1968)—which requires “*Miranda* warnings” before an interrogation of a person in police “custody,” *id.* at 467–69—does not apply to an ordinary “*Terry* stop.” See *Berkemer v. McCarty*, 468 U.S. 420 (1984). In other words, any incriminating statement given by a suspect stopped pursuant to *Terry* will not be suppressed under *Miranda*. Only if a police officer goes further than a mere *Terry* stop—and actually arrests the person or engages in the equivalent type of “custody” beyond a mere *Terry* stop—will *Miranda* apply. See *id.*

86. *Berkemer*, 468 U.S. at 439–40 (“The [*Terry*] stop and inquiry must be ‘reasonably related in scope to the justification for their initiation.’ Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions. But the detainee is not obliged to respond. And, unless the detainee’s answers provide the officer with probable cause to arrest him, he must then be released.”).

87. *Terry*, 392 U.S. at 27–28.

88. See, e.g., *United States v. Starks*, 301 F. Supp. 2d 76, 87 (D. Mass. 2004).

particular driver possessed a dangerous weapon on his person or in the car.⁸⁹

It is important to distinguish “reasonable suspicion” from “probable cause.” Reasonable suspicion is a *less* demanding quantum of evidence than probable cause, although it is not satisfied by a mere subjective “hunch” by an officer. From an objective point of view, an officer must have been aware of specific facts that caused him or her to reasonably believe that a person was committing or about to commit a crime (including a traffic infraction) in order to seize the person for an “investigatory detention.”⁹⁰ Yet, like probable cause, reasonable suspicion is such a low standard (compared to the preponderance or BRD standards) that it can be satisfied by facts that are consistent with innocence.⁹¹ Just as with a court’s assessment of whether probable cause existed, a court ordinarily must afford a strong amount of deference—although not blind deference—to an experienced officer in his or her assessment that the known facts rose to the level of reasonable suspicion.⁹²

The Supreme Court has held that, although “reasonable suspicion” is a low standard, it cannot be satisfied by a person’s merely being located near a scene of a crime or associated with known criminals.⁹³ However, additional facts—such as a person’s unexplained running away from an officer in a high-crime area⁹⁴—can supply reasonable suspicion. The Court has also stressed that a person’s refusal to talk to a police officer or refusal

89. See, e.g., *Lee v. City of South Charleston*, 668 F. Supp. 2d 763, 772–73 (S.D. W. Va. 2009) (finding that a police officer did not have reasonable suspicion to conduct a *Terry* frisk of a driver lawfully stopped based on reasonable suspicion of a traffic violation).

90. *United States v. Sharpe*, 470 U.S. 675, 684–86 (1985).

91. An example of how low the “reasonable standard” quantum is may be found in *United States v. Arvizu*, 534 U.S. 266 (2002). In *Arvizu*, the Supreme Court found “reasonable suspicion” justifying a *Terry* stop of the defendant’s vehicle based on the following facts known to a police officer at the time of the investigatory detention: The defendant was driving himself and his family on a road located near the Mexican border that was commonly used by smugglers of drugs and undocumented aliens; a Border Patrol “sensor” had previously gone off in the general area where the defendant was driving indicating that some vehicle may have been attempting to circumvent a Border Patrol checkpoint; the defendant drove a minivan, a type of vehicle commonly used by smugglers; the minivan was registered to an address located within a neighborhood known for drug and alien smuggling activities; the minivan appeared to be riding low (which could indicate the van was weighted down or simply could indicate worn-out shocks); the driver slowed down significantly and appeared “rigid” when the officer pulled his patrol car up alongside the minivan; and the defendant’s children started “mechanically” waving at the officer as if they were being instructed to do so. See *Arvizu*, 534 U.S. at 269–72, 275–79.

92. See *United States v. Cortez*, 449 U.S. 411, 418 (1981).

93. See, e.g., *Brown v. Texas*, 443 U.S. 47, 51–52 (1979).

94. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

to grant consent to search cannot supply reasonable suspicion when it otherwise does not exist.⁹⁵

B. The “Plain Sense” Doctrine

A common exception to the search warrant requirement is when a police officer sees, hears, or otherwise senses an item of incriminating evidence using his or her “plain” senses from a “lawful vantage point” and develops probable cause or reasonable suspicion solely based on what he or she plainly sensed.⁹⁶ The incriminating nature of the item sensed must be “immediately apparent.”⁹⁷ Any amount of additional warrantless searching beyond what is immediately apparent renders the search unreasonable under the Fourth Amendment. For instance, if a police officer had a hunch that an item of stolen property was in a residence in which the officer was lawfully present but did not develop probable cause about the stolen nature of the property until the officer moved the item of property a few inches away from the wall in order to see its serial number (which had been reported as stolen), that slight movement rendered the search unreasonable because the officer did not develop probable cause based solely on what was immediately apparent from a “plain view” of the property.⁹⁸ Any evidence of a crime that is plainly sensed from an *unlawful* vantage point is “tainted fruit” under the Fourth Amendment.⁹⁹ For instance, if a police officer unconstitutionally stopped a car after unreasonably and erroneously concluding that the driver had committed a traffic violation, subsequently seeing or smelling illegal drugs inside the car after approaching the driver’s door would not constitute a reasonable search under the Fourth Amendment.¹⁰⁰ In such a case, the officer would not have sensed the illegal drugs from a “lawful vantage point.”¹⁰¹

C. “Exigent Circumstances”

Another common exception to the search warrant requirement is when police officers are faced with “exigent circumstances” that allow them to

95. *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (“We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”).

96. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Horton v. California*, 496 U.S. 128 (1990).

97. *Arizona v. Hicks*, 480 U.S. 321 (1987).

98. *Id.* at 324–29.

99. *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

100. *See, e.g., State v. Myers*, 122 A.3d 994 (N.J. Super. Ct. App. Div. 2015).

101. *Id.*

engage in a warrantless search or seizure.¹⁰² There are four main applications of the “exigent circumstances” exception to the warrant requirement: (1) when police officers enter a home into which a “fleeing felon” has just entered;¹⁰³ (2) when officers search for and/or seize evidence of a crime (including by entering a home) in order to prevent its imminent destruction;¹⁰⁴ (3) when officers search for and seize a weapon that could pose a danger to them or to members of the public;¹⁰⁵ and (4) when officers enter a home or other private area in order to render “emergency aid” to a person whose health or safety is reasonably believed to be in immediate danger.¹⁰⁶ If exigent circumstances justified a warrantless search, then any incriminating evidence discovered by police in the scope of their search would be admissible in a subsequent criminal prosecution. For instance, if police officers reasonably believe that they need to enter a home to render emergency aid to an occupant of the home and, once inside, discover evidence of illegal drugs in plain view, that evidence would be admissible in a subsequent prosecution against the homeowner for possession of drugs.¹⁰⁷

Whether bona fide “exigent circumstances” existed is assessed from an objective standard: Would a reasonable police officer under the totality of circumstances have believed that an immediate warrantless search or seizure was necessary to resolve the exigency?¹⁰⁸ In other words, in view of all of the facts known to the officer at the time of the warrantless search or seizure, was the perceived need to act immediately—rather than acting only after a search warrant could be obtained—reasonable?

102. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

103. *Id.* at 298–99; *see also Riggs v. State*, 918 So. 2d 274, 279 (Fla. 2005).

104. *United States v. Santana*, 427 U.S. 28 (1976); *Kentucky v. King*, 563 U.S. 452 (2011).

105. *Hayden*, 387 U.S. at 298–99 (“The[] [officers] acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.”).

106. *Brigham City v. Stuart*, 547 U.S. 398 (2006).

107. *Michigan v. Fisher*, 558 U.S. 45 (2009) (per curiam).

108. *Stuart*, 547 U.S. at 404–05; *United States v. Martin*, 613 F.3d 1295, 1303–04 (10th Cir. 2010).

D. Consent to Search, “Consensual Encounters,” and Abandonment of Property

There are certain situations when the Fourth Amendment simply does not apply to a search or seizure based on a person’s consensual actions. As discussed immediately below, they include giving consent to a police officer to search, consensual encounters with police officers not amounting to a seizure, and abandonment of a privacy or property interest in incriminating evidence.

1. *Consent to Search*

One of the most common situations when Fourth Amendment protections do not apply is when a person validly consents to a warrantless search—including one that would be unreasonable in the absence of such consent. The Supreme Court has held that a person’s right to be free of an unreasonable search under the Fourth Amendment can be waived through consent to a warrantless search not based on probable cause, so long as such a waiver is “voluntary.”¹⁰⁹ A voluntary waiver occurs when the person’s decision to allow a warrantless, otherwise unreasonable search is the result of the person’s free will, as opposed to the result of physical or psychological coercion or trickery on the part of a police officer who obtained purported consent.¹¹⁰

Although consent needs to be voluntary, it can validly occur notwithstanding the consenter’s ignorance of his or her Fourth Amendment rights. In particular, the Court has held that a waiver is valid even if the police officer who secured the waiver did not inform the person that he or she had a right to refuse consent.¹¹¹ Unlike a waiver of the Fifth Amendment right against self-incrimination—which requires the person engaging in the waiver to *know* of his or her right to be silent before a valid waiver can occur¹¹²—a valid waiver of a Fourth Amendment right to be free of unreasonable searches and seizures does not require such knowledge of the right.¹¹³ For practical purposes, this means a waiver of the Fourth Amendment ordinarily occurs when a police officer merely asks for (as opposed to demands) permission to engage in a search and does so

109. *Schneckloth v. Bustamante*, 412 U.S. 218 (1973).

110. *Id.* at 225–27.

111. *United States v. Drayton*, 536 U.S. 194, 206–07 (2002).

112. *See Gardner v. Broderick*, 392 U.S. 273, 276 (1968); *see also Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“In order to . . . permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights, and the exercise of those rights must be fully honored.”).

113. *Drayton*, 536 U.S. at 206–07.

without engaging in coercive behavior (such as pointing a weapon at the person while asking). For instance, if a police officer pulls over a car for a traffic violation, requests permission to search the car for drugs or other contraband, and the driver says yes, the affirmative answer ordinarily amounts to a valid waiver.¹¹⁴

An average person may not know of her right to refuse consent, causing her to mistakenly believe that she must answer yes in response to the officer's request for consent. That mistaken belief does not matter for purposes of Fourth Amendment waiver analysis. In addressing waiver of Fourth Amendment rights, courts apply an "objective" standard, which looks not simply at the circumstances (including the mental state) of the particular person who consented but also at how a "reasonable" police officer would have perceived the voluntariness of the consent given under the circumstances.¹¹⁵ With respect to the scope of the consent—that is, to what degree may an officer search the area in question—courts likewise apply an objective, "reasonable officer" test in determining whether a specific officer has engaged in a more intrusive search than reasonably permitted by the parameters of the consent given.¹¹⁶

2. *Consensual Encounters*

Similar to but distinct from the scenario where one consents to a search is something called a "consensual encounter," which is when a police officer approaches (but do not "seize") a person and engages in a potentially incriminating discussion with that person.¹¹⁷ Such consensual encounters occur when the person—from an "objective" point of view (i.e., from the point of view of a "reasonable person")—would feel "free to leave" or "free to terminate the encounter."¹¹⁸ In applying this objective standard, courts presuppose that the average citizen is not a shrinking violet and, instead, has the capacity to say no in response to an officer's request to talk.¹¹⁹ Critics claim that the Court's assumptions about average people wrongly attribute a greater ability to "just walk away" than most people in the real world in fact possess.¹²⁰ Typically, the critics claim, average

114. See, e.g., *Schneekloth*, 412 U.S. at 220–21.

115. *Florida v. Bostick*, 501 U.S. 429, 437–38 (1991); *United States v. Garcia*, 56 F.3d 418, 423 (2d Cir. 1995).

116. *Florida v. Jimeno*, 500 U.S. 248 (1991).

117. *Bostick*, 501 U.S. at 434.

118. *Id.* at 432–38.

119. See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 557–60 (1980) (plurality).

120. See, e.g., David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51 (2008).

people who are untrained in law acquiesce, talk to officers, and end up consenting to searches because they have been conditioned to routinely accede to requests of persons in positions of authority.¹²¹

A common consensual encounter is a “knock and talk,” which occurs when police officers go the front door of a person’s residence, knock on the door, and ask (as opposed to demand) to talk to the person about something potentially incriminating.¹²² So long as the “knock and talk” occurs under circumstances that would not cause a reasonable person to feel compelled to answer the door and talk to the police officers, the encounter is consensual and the Fourth Amendment is not violated.¹²³ Unlike a person’s consent to a warrantless search (which is a waiver of the right to be free of an unreasonable “search”), a consensual encounter is not a “seizure” so long as the person questioned was, from an “objective” point of view, “free to leave” or “terminate the encounter.”¹²⁴

3. *Third Party Consent*

The Supreme Court has held that a third party—that is, someone other than the person who eventually is charged with a crime based on the results of a consensual search—can give police officers valid consent to search under certain circumstances.¹²⁵ There are two primary scenarios involving such third party consent. The first is when the third party has “actual” authority to consent, and the second is when the third party lacks actual authority to consent but has “apparent” authority to do so. “Actual” authority means that the person who gave consent—such as a criminal defendant’s spouse or roommate—had an equal or superior property or privacy interest in the physical area or item that was searched.¹²⁶ For instance, if police officers knocked on the door of a home and asked a defendant’s wife or live-in girlfriend if they could search the couple’s shared bedroom, and if voluntary consent was given (resulting in evidence of crime in the bedroom being seized by the officers), then the defendant

121. *Id.* at 62.

122. *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *see also Florida v. Jardines*, 133 S. Ct. 1409, 1423 (2013) (Alito, J., dissenting) (discussing *Kentucky v. King*, 563 U.S. 452 (2011)).

123. *King*, 563 U.S. at 468–69. Because the person who answers the door is not considered to be in “custody” (or even “seized” within the meaning of the Fourth Amendment), *Miranda* warnings are not required. *See, e.g., United States v. Johnson*, 619 F.3d 910, 917–18 (8th Cir. 2010).

124. *United States v. Adeyeye*, 359 F.3d 457, 461 (7th Cir. 2004).

125. *United States v. Matlock*, 415 U.S. 164 (1974).

126. *Id.* at 169–71.

has no lawful basis to object later to the warrantless search.¹²⁷ However, a defendant who contemporaneously objects to the third party's consent deprives the consenter of actual authority to consent.¹²⁸

If a third party lacks an equal or superior interest in the area or thing being searched, then the third party does not have actual authority to give consent. For instance, if police officers knock on the door of a home and a part-time housekeeper (who does not live in the home) purports to give consent to allow the officers to search the entire home for drugs, then any search resulting from such purported consent would be unreasonable under the Fourth Amendment, and the defendant could object under the Fourth Amendment.¹²⁹

There are some instances when a third party lacks actual authority to consent yet the resulting warrantless search is not deemed unreasonable under the Fourth Amendment. Those situations are when, from the perspective of a reasonable police officer, the consenter *appeared* to possess actual authority. So long as the person giving consent had "apparent authority"—according to an "objective" standard (i.e., how a reasonable officer would have perceived the person's authority to consent)—the resulting search would not violate the Fourth Amendment.¹³⁰ For instance, when a "mature teenager, possibly an adult" opened the door after a police officer knocked on the door to investigate an alleged shooting by someone reasonably believed to be inside the house, and the teenager agreed to allow the officers to come inside (where they immediately smelled illegal drugs), the teenager possessed "apparent authority" to give consent to enter the home (even if he lacked "actual authority").¹³¹

127. *See id.* A defendant can challenge the third party consent as involuntary, assuming he can prove that it was given involuntarily. *See Bumper v. North Carolina*, 391 U.S. 543 (1968).

128. *Georgia v. Randolph*, 547 U.S. 103 (2007). The objection must occur contemporaneously with the other occupant's purported consent. A refusal to consent by one occupant who was then removed from the scene (such as by being arrested and taken to jail) does not invalidate subsequent consent given by the other occupant. *See Fernandez v. California*, 134 S. Ct. 1126 (2014).

129. *See United States v. Corral*, 339 F. Supp. 2d 781 (W.D. Tex. 2004).

130. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

131. *Limon v. State*, 340 S.W.3d 753 (Tex. Crim. App. 2011). The lower courts generally have upheld searches based on the apparent (and in some cases actual) authority of a minor child who agrees to allow police officers to search inside the family's home—at least in situations where it reasonably appeared the child had the right of access to the portions of the home searched. *See Allen v. State*, 44 So. 3d 525, 529 & n.5 (Ala. Crim. App. 2009) (citing cases from various jurisdictions); *see also* Wayne L. LaFare, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 8.4(c) (Consent by Child) (5th ed.) (collecting cases).

4. *Abandonment*

A related situation in which the Fourth Amendment is not violated by a warrantless search or seizure occurs when a person voluntarily *abandons* a piece of property that is subsequently searched or seized by a police officer.¹³² For instance, if a person who is being chased by police officers without probable cause or reasonable suspicion tosses illegal drugs or other contraband during the chase (which the officers subsequently seize), the person cannot challenge the officers' seizure of the item so long as the person tossed it before being seized by the officers.¹³³ Similarly, if a person puts his or her garbage on the curb to be collected by a trash service (i.e., outside of the curtilage of his or her home), the person cannot complain if police officers later search the contents of the garbage without a warrant or probable cause.¹³⁴

E. Searches After a Person Has Been Validly Arrested or Sentenced

1. *Searches "Incident to Arrest"*

Perhaps the most common type of warrantless search occurs after a police officer validly arrests a person (whether with or without an arrest warrant). The Supreme Court has held that, once an officer validly arrests a person, the officer may search not only that person's clothing and property (including closed containers like a wallet or purse) in his or her immediate possession but also the immediate area around the arrested person (including closets).¹³⁵ Such warrantless searches are permitted without any probable cause or reasonable suspicion to believe that the arrested person has any evidence of a crime or dangerous weapons in his or her possession or in his or her immediate area.¹³⁶ Rather, a search "incident to arrest" is justified as a "preventative" (or "prophylactic") search based

132. *Abel v. United States*, 362 U.S. 217 (1960).

133. *California v. Hodari D.*, 499 U.S. 621 (1991).

134. *California v. Greenwood*, 486 U.S. 35 (1988); *see also* *United States v. Hedrick*, 922 F.2d 396, 398 (7th Cir. 1991).

135. *Chimel v. California*, 395 U.S. 752 (1969); *see also* *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (regarding police officers who entered a defendant's home in order to arrest him pursuant to an arrest warrant, the Court stated: "We . . . 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 adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the 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 on the arrest scene.").

136. *Chimel*, 395 U.S. at 762–63.

on two premises—officer safety and the need to prevent destruction of any evidence that may exist.¹³⁷

2. “Inventory” Searches of Arrested Persons

If an officer, in a search incident to arrest, did not uncover evidence of a crime hidden on an arrested person or in the person’s personal property possessed at the time of the arrest, such evidence still could be discovered later when the arrested person is “processed” or “booked” into jail. The Supreme Court has held that, so long as there are “standardized” procedures for searching persons being placed in jail after being arrested, police officers may engage in a full-fledged “inventory” search of such persons and the property that they possess when taken into custody (e.g., a purse or wallet).¹³⁸ Any evidence of crime discovered during such inventory searches is admissible against the person.¹³⁹ As discussed below, jail officials also may engage in noncontact strip searches (including of arrestees’ body cavities) before placing the arrested persons in a jail cell.¹⁴⁰

3. Fingerprints and DNA Tests

Another routine part of “processing” an arrested person is the taking of fingerprints and, increasingly, DNA tests (by swabbing the inside of the person’s cheek) when a person is arrested for a serious offense such as a violent crime or sex crime. The Supreme Court has held that use of such evidence to link a person to another crime is reasonable because the government has a valid interest in determining the identity of an arrested person through fingerprints¹⁴¹ and, in the case of serious offenders, DNA tests.¹⁴²

4. Searches of Incarcerated Persons

Once a person is actually placed behind bars, the Fourth Amendment protections that would apply in the “free world” are virtually nonexistent. A person in jail or prison has no reasonable expectation of privacy in their

137. *Id.*

138. *Illinois v. Lafayette*, 462 U.S. 640 (1983).

139. *Id.* at 641–42 (illegal drugs seized during inventory search of defendant when he was booked into jail).

140. *See infra* Part II.E.4.

141. *Maryland v. King*, 133 S. Ct. 1958, 1977 (2013) (stating that “routine administrative steps incident to arrest”—including “fingerprinting”—are permitted by the Fourth Amendment without a warrant) (citation and internal quotation marks omitted).

142. *Id.* at 1977–80 (upholding constitutionality of state law permitting warrantless swab of inside of arrestees’ cheeks for use in a DNA test when they were arrested on serious felony charges).

personal effects (e.g., their books or nonlegal mail), their beds, and even the most intimate parts of their bodies.¹⁴³ This lack of Fourth Amendment protection is particularly true for a convicted person serving a sentence of incarceration, but it is largely true for “pretrial detainees” who have not yet been convicted (and who are still presumed innocent).¹⁴⁴ The Supreme Court has held that the Fourth Amendment’s lack of application in the jail or prison setting is required by safety concerns—both the safety of correctional officers (and to prevent escapes) and also the safety of other inmates. It is common knowledge that, without pervasive searches of prisoners, contraband like drugs and dangerous weapons would be ubiquitous in jails and prisons.¹⁴⁵

5. *Searches of Persons on Probation or Parole*

Convicted persons who are not in jail or prison—either because they avoided going to prison in the first place by being placed on probation or because they were released from prison on parole before the end of their sentence of incarceration—also possess far fewer Fourth Amendment protections than normal persons. At least when the conditions of their probation or parole authorize it, such persons are subject to warrantless searches while they remain under supervision.¹⁴⁶ In addition, probationers may be searched based solely on reasonable suspicion,¹⁴⁷ while parolees may be searched without any level of suspicion.¹⁴⁸

143. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520, 544–63 (1979).

144. *See, e.g., Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510 (2012) (upholding warrantless noncontact strip searches of pretrial detainees charged with minor offenses).

145. *Id.* at 1519–20.

146. *Samson v. California*, 547 U.S. 843 (2006); *United States v. Knights*, 534 U.S. 112 (2001).

147. *Knights*, 534 U.S. at 121–22.

148. *Samson*, 547 U.S. at 857.

F. Searches of the Home and Its Curtilage and Arrests of Persons Inside Homes

1. Searches of Homes¹⁴⁹

The Supreme Court has held that, as a general matter, the Fourth Amendment applies most forcefully in the context of searches of people's residences.¹⁵⁰ Searches of homes are not categorically prohibited by the Fourth Amendment but more often require a warrant than other types of searches do. "Homes" (within the meaning of the Fourth Amendment) are not limited to traditional residences but also include hotel rooms and other places that temporarily serve as a person's abode.¹⁵¹ One exception is when such a temporary abode is capable of being readily moved—such as an operable motor home on wheels or a houseboat.¹⁵² A "search" of a home includes a police officer's *entry* into the home—which may result in an officer's seeing or hearing something incriminating in plain view¹⁵³—as well as more intrusive searches of things inside the home, such as drawers, cabinets, and the like.¹⁵⁴

With respect to residential searches, the Fourth Amendment applies not only to the structure itself but also to the "curtilage"—which includes the area immediately proximate to a home, such as the porch and the front and back yard areas close to the house (particularly if enclosed by a fence).¹⁵⁵ Although not absolutely essential to defining a particular area as

149. Although not a "home," a person's business premises may have limited protection from warrantless searches under the Fourth Amendment. While police officers or other government officials may enter into business premises that are open to the public without probable cause or a warrant, *Maryland v. Macon*, 472 U.S. 463 (1985), they generally may not enter a closed business or an area restricted from public access without a warrant. See *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). However, warrantless, suspicionless searches of closed businesses or restricted areas are reasonable under the Fourth Amendment in the case of "closely regulated" businesses (e.g., a liquor store or gun store) where the legislature has enacted a statute permitting such searches. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

150. *Payton v. New York*, 445 U.S. 573 (1980).

151. *United States v. Jeffers*, 342 U.S. 48 (1951).

152. *California v. Carney*, 471 U.S. 386 (1985) (mobile home on wheels that was readily movable); *United States v. Hill*, 855 F.2d 664, 667–68 (10th Cir. 1988) (houseboat that was readily movable on water).

153. See, e.g., *United States v. Jenkins*, 124 F.3d 768 (6th Cir. 1997).

154. See, e.g., *Chimel v. California*, 395 U.S. 752 (1969).

155. The Supreme Court listed the following factors as ones to consider in deciding whether a particular area around a house constituted the "curtilage": (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301 (1987).

curtilage, the existence of a fence enclosing the area is an important factor in the analysis.¹⁵⁶ Unlike the house itself, the curtilage, unless fenced in with a locked fence door,¹⁵⁷ may be entered by a police officer without a warrant and probable cause for the limited purpose of knocking on the front door and asking permission to speak to a person inside (a so-called “knock and talk” discussed above in Part II.D.2.). Such a limited implied “license” (within the meaning of property law) to enter the curtilage is equivalent to the implied license given to Girl Scouts attempting to sell their cookies, religious groups handing out their pamphlets, and the like.¹⁵⁸ However, once a police officer exceeds this limited license, such as by having a police drug dog smell the airspace near the front door, the officer engages in an unreasonable search of the curtilage.¹⁵⁹ Yet any evidence of a crime that the officer (as opposed to a drug dog) sees, hears, or smells in “plain view” while in the curtilage pursuant to the limited license to enter and knock on the door could be used to obtain a search warrant to enter the house.¹⁶⁰

The Supreme Court has held that not only a home owner or renter (or a family member or friend of such a person who also is residing in the home on a long-term basis) but also even an “overnight guest” has “standing” to complain about a police officer’s unconstitutional search of the home in which they were staying.¹⁶¹ It is likely that even a daytime “social visitor” inside the home also would have standing to complain.¹⁶² Conversely, the Court has held that a “commercial visitor”—such as a

156. See *State v. Artic*, 768 N.W.2d 430, 437 (Wis. 2010). A privacy fence (i.e., one that does not allow outsiders to see what is happening inside the fence) offers greater Fourth Amendment protections than a fence that allows passersby to see within the curtilage. See, e.g., *State v. Talkington*, 345 P.3d 258, 270 (Kan. 2015). Yet a fence need not totally prevent outsiders from seeing within in order to militate in favor of the enclosed area constituting curtilage. *Id.* However, if a police officer sees evidence of a crime in plain view from a lawful vantage point outside of the curtilage, the sight of such evidence inside the curtilage is not a “search” under the Fourth Amendment. See, e.g., *State v. Louis*, 672 P.2d 708, 710–11 (Or. 1983).

157. The lower courts are divided on whether a “no trespassing” sign or its equivalent revokes the implied license that otherwise would allow a police officer to enter the curtilage of a home and knocking on the door. See *State v. Christensen*, 2015 WL 2330185, at *7 (Tenn. Crim. App. 2015) (citing cases from numerous jurisdictions). The Supreme Court of the United States has not yet addressed this issue.

158. *Florida v. Jardines*, 133 S. Ct. 1409, 1415–17 (2013).

159. *Id.*

160. *State v. Grice*, 767 S.E.2d 312, 319 (N.C. 2015); *People v. Chavez*, 75 Cal. Rptr. 3d 376, 382 (Cal. Ct. App. 2008).

161. *Minnesota v. Olson*, 495 U.S. 91 (1990).

162. *Id.* at 99 (Kennedy, J., concurring); see also *United States v. Rhiger*, 315 F.3d 1283, 1286 (10th Cir. 2003).

person who is present in a home solely to conduct illegal activity such as manufacturing illegal drugs together with the homeowner or renter—does not have standing to complain if a police officer unconstitutionally enters the home and discovers the illegal activity.¹⁶³

There are two main exceptions to the general rule that a warrantless search of a home violates the Fourth Amendment. The first exception is when valid consent is given—by a person with actual authority or apparent authority to do so. Consent is discussed above in Part II.D. The second exception is when “exigent circumstances” exist, such as when police officers have a reasonable basis to believe that a seriously injured person in need of immediate aid is inside the home. Exigent circumstances are discussed above in Part II.C.

2. *Arrests and Other Seizures of Persons Inside Homes*

The Supreme Court has held that, barring consent or exigent circumstances, a police officer may not enter a home in order to arrest a resident inside the home without a search warrant or arrest warrant, even if the officer has probable cause to believe that the person inside has committed a serious crime (including murder).¹⁶⁴ However, if the person voluntarily opens the door in response to a knock from a police officer and exposes himself or herself at the threshold of the door, the Fourth Amendment likely does not prohibit a warrantless arrest because, at that point, the person is in “public.”¹⁶⁵

Assuming police officers have a lawful basis to enter a home to execute an arrest warrant or search warrant, the officers may temporarily detain all of the occupants inside the home for as long as it takes to reasonably execute the warrant as a matter of officer safety and to prevent destruction of evidence in the home. The officers may not arrest or engage in a full-fledged search of the other persons without an independent legal basis, yet the officers may pat down the outer clothing of the other

163. *Minnesota v. Carter*, 525 U.S. 83 (1998).

164. *Payton v. New York*, 445 U.S. 573 (1980). If a police officer possesses an arrest warrant for an individual other than a resident of a home, the officer must obtain a separate search warrant in order to enter the third party’s home (in which the subject of the arrest warrant is a social guest). See *Steagald v. United States*, 451 U.S. 204 (1981).

165. See *Santana v. United States*, 427 U.S. 38 (1976); see also *State v. Santiago*, 619 A.2d 1132, 1135 (Conn. 1993) (noting the lower courts are divided concerning whether the Fourth Amendment permits a warrantless arrest when a suspect voluntarily opens his door in response to a police officer’s knocking, with a majority of lower courts holding that the Fourth Amendment permits a warrantless arrest in that situation).

occupants if the officers have “reasonable suspicion” that they possess dangerous weapons.¹⁶⁶

G. Automobiles: Seizing Drivers and Passengers and Searching Inside Cars

Compared to residences, which generally receive the strongest protection under the Fourth Amendment, people’s cars—which are “effects” within the meaning of the Fourth Amendment¹⁶⁷—receive much less protection as a general matter, at least those on public roads (as opposed to cars parked within an enclosed curtilage or inside a garage).¹⁶⁸ This is because automobiles are readily mobile and, in addition, people have a lesser expectation of privacy in automobiles, which are heavily regulated by the government.¹⁶⁹

1. Seizures (Including Arrests) for Routine Traffic Violations

The Supreme Court has held that a police officer may seize an automobile (and, by doing so, also seize its driver and any passengers) if the officer has probable cause or reasonable suspicion that the driver or any passenger violated the law, including by committing ordinary traffic infractions like speeding, changing lanes without signaling, or running a red light.¹⁷⁰ If the officer has probable cause to believe that such a violation occurred (or develops probable cause during a traffic stop initially based only on reasonable suspicion), the Fourth Amendment does not prevent an officer from arresting the person and taking her into custody (and searching her and her car incident to arrest, discussed further below).¹⁷¹ This is true even if the applicable state law only allows a fine as a penalty for the law violation and, further, even if state law does not authorize an arrest for the violation and instead requires the officer to issue a citation (and summons to appear in court) rather than engage in an

166. *Michigan v. Summers*, 452 U.S. 692 (1981).

167. *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

168. *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam). It is not clear whether the Fourth Amendment applies with full force regarding a car parked within the enclosed curtilage of a home. Most lower courts have held or suggested that it would not so apply because a car remains “readily mobile” even if parked within the curtilage. See, e.g., *Commonwealth v. Fernandez*, 934 N.E.2d 810, 146 n.13 (Mass. 2010); but see *United States v. Beene*, No. 14-30476, 2016 U.S. Ct. App. WL 890127, at *6 (5th Cir. Mar. 8, 2016) (refusing to apply “automobile exception” to car parked in driveway of defendant’s own home).

169. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

170. *Brendlin v. California*, 551 U.S. 249 (2007).

171. See *United States v. Robinson*, 414 U.S. 218 (1973).

arrest.¹⁷² In other words, even if a driver were to go only one mile over the posted speed limit,¹⁷³ an officer would not violate the Fourth Amendment by seizing the car and arresting the driver, even if state law prohibited such an arrest (and instead required a citation only) and even if the maximum penalty the person faced upon conviction for the traffic violation was a fine only.

2. *The “Automobile Exception”*

In addition to their broad authority to arrest a driver for violating traffic laws, police officers have broad authority to seize and search automobiles without a search warrant if the officers possess probable cause to believe evidence of a crime is located within a car.¹⁷⁴ The so-called “automobile exception” is primarily premised on the fact that automobiles are readily mobile—and that requiring officers to obtain a search warrant could result in the evidence being removed. A secondary rationale is that automobiles are strictly regulated by the government (e.g., they must display valid license plates and pass regular inspections, and drivers must be licensed and insured), which significantly diminishes a person’s reasonable expectation of privacy in his or her car.¹⁷⁵ Under the automobile exception, officers may search anywhere within an automobile if they reasonably believe a particular illegal item or piece of evidence of a crime could be hidden there (including in the trunk and in closed containers in the car).¹⁷⁶ Such warrantless searches are reasonable even if done after a car has been towed to a police impound lot (when officers clearly would have had time to obtain a search warrant).¹⁷⁷

3. *Searches of Automobiles “Incident to the Arrest” of an “Occupant” of a Car*

A separate basis for a warrantless search of an automobile exists when an officer arrests one or more of the “occupants” (driver and/or passengers)

172. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Moore v. Virginia*, 553 U.S. 164 (2008) (per curiam).

173. See, e.g., *People v. Jones*, 32 Misc.3d 1209(A), 2011 WL 26362532, at *4 (N.Y. J. Ct. 2011) (“[T]here is no case that says that someone who is only going one mile over the speed limit cannot be stopped by the police. . . . Whether to stop a vehicle [that] is in violation of a traffic infraction is left to the discretion of the police. Thus it may be true that by custom those going five to ten miles an hour over the speed limit may not be stopped for speeding on a regular basis. Nevertheless, there would be no prohibition to a stop a vehicle in such a case.”).

174. *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam).

175. *California v. Carney*, 471 U.S. 386, 390–92 (1985).

176. *United States v. Ross*, 456 U.S. 798, 820–21 (1982).

177. *Chambers v. Maloney*, 399 U.S. 42 (1970).

even for an offense as petty as a traffic infraction.¹⁷⁸ If such an arrest occurs—either pursuant to an outstanding warrant or as the result of a valid warrantless “public” arrest—the officer may search the arrested occupant “incident to arrest.” In addition, the officer may search inside the car (except in a closed trunk), including closed containers within the car, even without any probable cause or reasonable suspicion to believe that any illegal items or evidence of a crime are inside the car.¹⁷⁹ However, this exception to the warrant requirement “authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”¹⁸⁰ Thus, for example, if an arrested driver had been handcuffed and placed securely in the back of a police car and no other persons were in the car with the driver, police officers would lose their authority to search the car as an incident arrest without separate probable cause to believe evidence of a crime was inside the car.¹⁸¹ Notably, the right of a police officer to search a car or driver incident to the arrest does not apply when the officer only issues a citation or warning for an offense or infraction (as opposed to arresting the driver).¹⁸²

4. “Inventory Searches”

Even if the driver of a car has been secured in the back of a police car or removed from the scene entirely and even if no probable cause exists to believe evidence of a crime is inside the car, the arresting officers may still have the ability to search inside the car. The Supreme Court has approved warrantless, suspicionless searches of cars if they are done as part of a standard “inventory” search in anticipation of the car being towed by a police-authorized tow truck after the driver’s arrest.¹⁸³ Such inventory searches are considered reasonable under the Fourth Amendment because they are done to protect the driver’s property from loss and also to protect the officers from claims of misappropriation of property.¹⁸⁴ Inventory searches are valid only if they are conducted pursuant to an existing, “standard” policy governing such searches and only if the car is to be

178. *New York v. Belton*, 453 U.S. 454 (1981).

179. *See id.* at 460–63.

180. *Arizona v. Gant*, 556 U.S. 332, 343 (2009).

181. *Id.* In dicta in *Gant*, the Court further stated that officers also could search inside the car when it was “reasonable to believe” (i.e., reasonable suspicion existed) that evidence of the crime for which the defendant was arrested was inside the car. *See id.*; *see also* *State v. Ewertz*, 305 P.3d 23, 27–28 (Kan. Ct. App. 2013) (discussing *Gant*’s dicta).

182. *Knowles v. Iowa*, 525 U.S. 113 (1998).

183. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

184. *Id.* at 369.

towed away. If a police department lacks such a standard policy, an officer's purported inventory search is unreasonable. Although inventory searches are not considered part of the "criminal" process, any evidence of a crime discovered during such a search is admissible in a criminal case.¹⁸⁵

5. "Protective Sweeps" of Cars

If a police officer lawfully stops a car but has not arrested the driver and further does not possess probable cause to believe evidence of a crime is located within the car, the officer still may engage in a limited "protective sweep" of the inside of the car (not including a closed trunk) if the officer has reasonable suspicion to believe that a dangerous weapon is inside the car.¹⁸⁶ Such a protective sweep does not permit a full-fledged search of the inside of the car, such as the types of searches permitted under either the automobile exception or the search-incident-to-arrest exception. Rather, an officer may only search "the passenger compartment of an automobile, limited to those areas in which a weapon may be hidden."¹⁸⁷ If, during such a sweep, the officer sees evidence of a crime or a dangerous weapon in plain view, the officer may seize it without a search warrant.¹⁸⁸

6. Removal of Driver and Passengers from Car During Traffic Stop

As a matter of "officer safety," if a police officer stops a car for a traffic violation or for other valid reasons, the officer may require the driver and passenger to exit the car and stand or sit outside the car.¹⁸⁹ The Supreme Court has approved such removals even if the officer lacks any reasonable suspicion that the occupants pose a danger.¹⁹⁰ If, as a result of such a removal, evidence of a crime is exposed in plain view, the officer may seize the evidence, and it may be offered against the person at a trial.¹⁹¹

185. See *Colorado v. Bertine*, 479 U.S. 367 (1987); see also *Florida v. Wells*, 495 U.S. 1 (1990) (where police department's inventory policy did not address whether closed containers in an impounded car could be opened and searched, an officer's opening of a closed container, in which he found marijuana, was an unreasonable search under the Fourth Amendment).

186. *Michigan v. Long*, 463 U.S. 1032 (1983).

187. *Id.* at 1049.

188. *Id.* at 1034–35.

189. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (driver); *Maryland v. Wilson*, 519 U.S. 408 (1997) (passengers).

190. *Wilson*, 519 U.S. at 414–15.

191. *Id.* at 411 ("When Wilson exited the car, a quantity of crack cocaine fell to the ground. Wilson was then arrested and charged with possession of cocaine with intent to distribute.").

7. *Officers' Questions and Actions Concerning Unrelated Matters During a Traffic Stop*

During the course of a traffic stop, police officers often pose questions to the driver or passengers about matters unrelated to the basis for the traffic stop, and occasionally officers also ask for consent to search the car or use a police drug dog to smell the outside of the car. The Supreme Court has held that such questions, requests for consent to search, and use of a drug dog are proper under the Fourth Amendment even if they are totally unrelated to the basis of the traffic stop so long as the questions or actions do not “measurably extend” the duration of the traffic stop.¹⁹² However, if such questions or actions do extend the duration of the traffic stop (e.g., they occur after an officer has issued a warning or citation for a traffic violation but before the officer has returned the license and paperwork to the driver), then any probable cause or reasonable suspicion developed *thereafter* cannot be the basis for a search or seizure.¹⁹³ Note that this limitation on police authority exists only when the officers did *not first arrest* the driver for a traffic violation. As discussed above, an officer has authority under the Fourth Amendment to arrest a driver for even a petty traffic violation, regardless of the limits imposed by state law on such arrests. Usually, officers do not engage in such arrests and, instead, simply issue a citation or warning. Therefore, the limitation on questioning, requests for consent, or dog sniffs only becomes an issue under the Fourth Amendment when officers extended the duration of a traffic stop that did not first result in an arrest of the driver.

8. *Police Roadblocks and Checkpoints*

There are a wide variety of warrantless and suspicionless police “roadblocks” or “checkpoints”—for enforcement of laws against unlicensed drivers or unregistered vehicles, to prevent drunk driving, to enforce the immigration laws near international borders, and to locate dangerous fugitives or find witnesses to crimes such as hit-and-runs that occurred on the roads. The Supreme Court has upheld certain roadblocks or checkpoints as reasonable under the Fourth Amendment but has invalidated other types. Suspicionless roadblocks seeking to enforce licensing or registration laws and those seeking to prevent drunk driving have been deemed “reasonable” under the Fourth Amendment in view of

192. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009).

193. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614–17 (2015) (drug dog’s sniffing of automobile after point in time that automobile was unconstitutionally seized was a violation of the Fourth Amendment).

society's strong interest in having safe roads.¹⁹⁴ However, the Supreme Court invalidated a suspicionless "drug interdiction" roadblock aimed "primarily" at "crime control" (i.e., preventing illegal drug trafficking or drug possession) rather than public safety on the roads.¹⁹⁵ The Court also upheld a suspicionless roadblock aimed at locating witnesses to a hit-and-run accident (as opposed to locating the suspect himself).¹⁹⁶ Finally, the Court has upheld suspicionless checkpoints located relatively near the international border so long as they are brief and only if a "question or two" are posed to the driver and passengers concerning their immigration status.¹⁹⁷ In order for the types of approved suspicionless roadblocks to be valid, officers must stop either every car or stop a predetermined percentage of cars on the road (e.g., every third car). A roadblock or checkpoint whereby officers exercise their discretion to stop only certain cars (as opposed to every car or certain cars in a prearranged sequence) would violate the Fourth Amendment without individualized suspicion.¹⁹⁸ The Supreme Court has not yet addressed the constitutionality of a roadblock seeking to locate a dangerous fugitive, but such a roadblock likely would pass constitutional muster.¹⁹⁹

9. *Summary of Police Officers' Broad Authority to Seize and Question Drivers and Search Cars*

As the foregoing discussion reveals, police officers have a great deal of authority to stop cars based on probable cause or reasonable suspicion of any crime or infraction committed by the driver, including minor traffic law violations. If officers have probable cause (or lawfully develop it during a traffic stop initially based only on reasonable suspicion), the officers may arrest drivers and then engage in searches of their cars without any probable cause to believe that evidence of a crime is inside the car—whether as a search "incident to arrest" (assuming the driver has not been secured) or as a standard "inventory" search in the event that the car is to be towed from the scene. Even if officers do not subjectively intend to arrest a driver for a traffic infraction, the officers may seize the car and

194. *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (DUI checkpoint upheld as reasonable); *see also* *Delaware v. Prouse*, 440 U.S. 648, 657 (1970) (in dicta, suggesting that a police checkpoint for checking drivers' licenses and car registrations would be reasonable under the Fourth Amendment).

195. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

196. *Illinois v. Lidster*, 540 U.S. 419 (2004).

197. *Martinez-Fuerte v. United States*, 428 U.S. 543 (1976).

198. *See Prouse*, 440 U.S. at 648.

199. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 888 (1975) (Rehnquist, J., concurring).

driver based on the objective existence of probable cause of a traffic violation and then arrest and search the driver and car if they develop probable cause of another crime (e.g., the officers discover that the driver lacks a valid license or a consensual search of the car reveals illegal drugs) during the traffic stop. Under the automobile exception, officers can stop and search a car without a warrant if they have probable cause to believe that evidence of a crime exists somewhere inside the car, even if they lack probable cause to arrest the driver. Finally, in certain circumstances, warrantless, suspicionless roadblocks or checkpoints are constitutional. If officers develop reasonable suspicion or probable cause during the roadblock or checkpoint (e.g., officers see or smell illegal drugs or other contraband in plain view), then the officers can engage in additional searches and seizures.

H. Searches by Police Dogs

The Supreme Court has addressed olfactory searches by trained police dogs in several cases.²⁰⁰ Such police “dog sniff” cases have arisen in three contexts: sniffs of luggage in public places such as an airport or train station, sniffs of cars lawfully stopped on the public roads, and sniffs of residences. With respect to luggage and cars, the Court has held that a trained, certified police dog that “alerts” to luggage or a car by sniffing the airspace outside of it does not engage in a “search” within the meaning of the Fourth Amendment.²⁰¹ So long as a police dog is trained solely to alert to the smell of illegal items like drugs or explosives, the Supreme Court held, the person possessing the car or luggage does not possess a “reasonable expectation of privacy” in the airspace *outside* it.²⁰² With respect to a dog sniff of a residence, however, the Court has held that a police dog that is taken into the curtilage of a home to detect the smell of drugs or other illegal items emanating from within the home amounts to a Fourth Amendment “search” ordinarily requiring probable cause and a search warrant.²⁰³ The Court reasoned that such a dog sniff differs from the sniff of luggage or of a car in a public area because, according to an objective standard in our society, people do not extend a “license” for strangers (including police officers) to enter the curtilage of a private home in order to allow a police dog to detect odors of illegal items inside the

200. The Supreme Court has held that an “alert” by a properly trained and certified police dog generally amounts to probable cause to search the item or place to which the dog alerted. *See Harris v. Florida*, 133 S. Ct. 1050, 1057 (2013).

201. *Place v. United States*, 462 U.S. 696 (1983); *Caballes v. Illinois*, 543 U.S. 405 (2005).

202. *Place*, 462 U.S. at 707; *Caballes*, 543 U.S. at 409–500.

203. *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

home. Such a license only extends to humans to come and knock on the door. Therefore, a dog sniff of a home amounts to a “trespass” that, in turn, violates the Fourth Amendment as an unreasonable search.²⁰⁴

It should be noted that, even if a dog sniff of luggage or a car occurred, it still could have violated the Fourth Amendment if the dog sniff occurred when the police officers no longer possessed the right to seize the luggage or car. If the dog sniff occurred during a time that the luggage or car was being illegally seized, then the “fruits” of the dog sniff (i.e., the probable cause developed by the dog sniff and any evidence discovered during a search occurring thereafter) were “tainted” by the unconstitutional seizure, and any incriminating evidence discovered is suppressible under the Fourth Amendment.²⁰⁵

I. Searches of Telephones

Police monitoring and other searches of telephones—both land lines and cellular phones—have been the subject of several Supreme Court cases. As an initial matter, not every governmental monitoring of a telephone is a “search” under the Fourth Amendment. The Court has drawn a line between “wiretaps” (and other nonconsensual *listening in* on telephone conversations) and “pen register” monitoring of telephones. A pen register is a device that simply notes all incoming and outgoing calls on a particular telephone line but does not listen in on a phone conversation. The Court has held that police officers’ use of a pen registrar is not a “search” under the Fourth Amendment because people do not possess a “reasonable expectation of privacy” in the simple record of incoming and outgoing calls by number.²⁰⁶ Conversely, the Court has held, a wiretap is a “search” that requires probable cause and a search warrant because people do possess a reasonable expectation of privacy in their phone conversations.²⁰⁷ An exception exists when one of the two people involved in the phone conversation (such as a cooperating witness) was willing to consent to the monitoring of the phone conversation by law enforcement officers.²⁰⁸ In such a case, the nonconsenting person involved in the phone

204. *Id.* at 1415–17.

205. *United States v. Place*, 462 U.S. 696, 709–10 (suppressing drugs inside luggage); *Rodriguez v. United States*, 135 S. Ct. 1609, 1613–17 (2015) (suppressing fruits of dog sniff of car).

206. *Smith v. Maryland*, 442 U.S. 735 (1979).

207. *Berger v. New York*, 388 U.S. 41 (1967).

208. *See United States v. White*, 401 U.S. 745 (1971) (plurality).

call did not possess a reasonable expectation of privacy in the conversation.²⁰⁹

With respect to data on cellular phones (including “smart phones”), the Supreme Court has held that police officers who have lawfully seized such a phone (e.g., seized from an arrested person pursuant to a search incident to arrest) ordinarily may not examine the digital data in the phone (e.g., photographs or text conversations) without a separate search warrant specifically authorizing a search of such digital data.²¹⁰

J. “Tips” by Known Informants and Anonymous Tips

There are two primary types of “tips” given to law enforcement officers—a tip given by a known person and an anonymous tip. With respect to known tipsters, so long as they have proved to be reliable in the past or assuming their first-time tips suggest reliability and credibility, such tips alone generally provide probable cause.²¹¹ With respect to anonymous tips, the Supreme Court has held that so long as such a tip contains sufficient “predictive” as well as “descriptive” information and such information is sufficiently corroborated by the officers, the tip will generally provide probable cause.²¹² A lesser amount of predictive and descriptive information (along with corroboration) is required to establish the lesser quantum of “reasonable suspicion” that is required for a *Terry* stop.²¹³ In a recent case, a closely divided Court found reasonable suspicion for a traffic stop in a case in which an anonymous 911 caller claimed to have been run off the road by a reckless driver—even though the tip contained no predictive information (other than the fact that the car was still driving on a particular road as described by the caller), and the officer who engaged in the stop did not witness any reckless driving. The Court relied on the fact that the anonymous caller had used 911, which increased the chances that the caller could be ultimately identified (and,

209. *Id.* at 749–54 (holding that a person does not possess a reasonable expectation of privacy in a conversation with another person who is acting as an undercover police informant); see also *United States v. Caceres*, 440 U.S. 741, 744 (1979) (applying *White* to a case in which police monitored a phone conversation without a warrant but with the consent of one of the parties in the conversation).

210. *Riley v. California*, 134 S. Ct. 2473 (2014). The lower courts are divided on the question of whether police officers’ warrantless monitoring of the cell tower signal given off by a particular cell phone is a “search” within the meaning of the Fourth Amendment. See *United States v. Graham*, 796 F.3d 332, 380 (4th Cir. 2015) (Motz, J., dissenting) (noting the division in the lower courts).

211. *Adams v. Williams*, 407 U.S. 143 (1972); see also *United States v. Barnes*, 506 F.3d 58, 64 (1st Cir. 2007).

212. *Illinois v. Gates*, 462 U.S. 213 (1983).

213. *Alabama v. White*, 496 U.S. 325 (1990); see also *Florida v. J.L.*, 529 U.S. 266 (2000).

which, in the Court's opinion, gave the tipster some degree of credibility).²¹⁴

K. Searches of Third Party Business Records

Police officers do not engage in a "search" of a person's business records held by a third party business custodian (e.g., a bank, phone company, or hotel) within the meaning of the Fourth Amendment when they examine such records with the consent of the business holding the records.²¹⁵ The business itself may have constitutional basis to demand a judicial determination of probable cause before turning over the records to police officers,²¹⁶ but the customer does not possess such a basis.

L. Searches of Public K-12 Students

Public²¹⁷ school students in kindergarten through high school²¹⁸ possess significantly fewer Fourth Amendment protections while on school grounds or in school activities off campus than they do outside of school (when they possess the same protections as nonstudents).²¹⁹ The Supreme Court has held that it is reasonable under the Fourth Amendment for school officials to engage in warrantless searches of such students for contraband and weapons (even if not illegal in nature) in the school context based solely on reasonable suspicion.²²⁰ Conversely, police officers who search such students ordinarily are bound by the regular Fourth Amendment requirements (i.e., the probable cause standard and in some situations a warrant); however, if a school official conducts the search and the officer is

214. *Navarette v. California*, 134 S. Ct. 1683 (2014).

215. *See United States v. Miller*, 425 U.S. 435 (1976).

216. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451–53 (2015). "Closely regulated" businesses (e.g., a liquor store) do not have a right under the Fourth Amendment to demand a judicial determination of probable cause when a statute or ordinance permits such warrantless searches. *See id.* at 2453–54.

217. Private school teachers and administrators are not governmental officials, so the Fourth Amendment does not prohibit them from engaging in warrantless searches of their students. *Commonwealth v. Considine*, 860 N.E.2d 673, 676–78 (Mass. 2007).

218. The Supreme Court has not addressed the Fourth Amendment rights of public college students—as compared to public K-12 students—and it is unclear from lower court case law the extent to which Fourth Amendment protections apply to public college students when on school grounds. *See, e.g., Carboni v. Meldrum*, 949 F. Supp. 427, 434–35 (W.D. Va. 1996).

219. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

220. *Id.* at 341; *see also Shade v. City of Farmington*, 309 F.3d 1054, 1060–61 (8th Cir. 2002) (holding that *T.L.O.* applies to school activities off campus). Some warrantless, suspicionless searches—including the use of metal detectors at public schools—have been deemed reasonable under the Fourth Amendment. *See, e.g., State v. J.A.*, 679 So. 2d 316, 319–20 (Fla. Dist. Ct. App. 1996).

merely present (and is not using the school official as the officer's agent), reasonable suspicion is all that is required.²²¹ Warrantless searches by school officials based solely on reasonable suspicion are not unlimited in scope, however. School officials may only search students' personal property or their bodies if there is reasonable suspicion to believe that contraband or a weapon would be in a particular place.²²² If such contraband or weapons are discovered during warrantless searches that are reasonable in scope and such evidence proves that a crime occurred (e.g., a student possessed illegal drugs), the evidence can be used in a criminal prosecution against the student.²²³

The Supreme Court also has upheld warrantless drug tests of public school students as a condition of their voluntary participation in school sports or other extracurricular activities. The Court reasoned that society's interest in preventing illegal drug use by students is strong enough to outweigh the students' privacy interests.²²⁴ Thus, such warrantless and suspicionless searches are reasonable under the Fourth Amendment. However, in those cases, the schools' policies were not to refer students who failed drug tests for criminal prosecution. It is doubtful that a warrantless, suspicionless school drug testing program that referred students for criminal prosecution based on the results of the drug tests would pass constitutional muster.²²⁵

M. Searches at the International Border

The Fourth Amendment applies with its least force at the international border (which includes the portion of an airport with incoming international flights, even airports within the middle of the country).²²⁶ The

221. If a police officer assigned to a public school as a "school resource officer" engages in a warrantless search of a K-12 private school student, the officer need only have reasonable suspicion (and need not have probable cause or a warrant). See *In re K.S.*, 108 Cal. Rptr. 3d 32, 37 (Cal. Ct. App. 2010); *R.S.D. v. State*, 245 S.W.3d 356, 367-68 (Tenn. 2008). Conversely, if a police officer acting independently of the school engages in a search of a student on school grounds, the regular probable cause and warrant requirements of the Fourth Amendment apply. *R.S.D.*, 245 S.W.3d at 368.

222. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (search of a thirteen-year-old public school student's bra and underwear was unconstitutional because there was no reasonable suspicion that she possessed contraband in such intimate places).

223. See *T.L.O.* 469 U.S. at 328-29.

224. *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls*, 536 U.S. 822 (2002).

225. See *Ferguson v. City of Charleston*, 532 U.S. 67, 80 n.16 (2001).

226. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). The Court's "border search" doctrine also allows for routine warrantless searches of incoming international mail. See *United States v. Ramsey*, 431 U.S. 606 (1977).

Supreme Court has held that the government's interest in protecting the country not only from incoming contraband (such as illegal drugs) but also from diseases and other harmful substances justifies extensive warrantless searches at the border.²²⁷ Such searches of incoming persons and property are not unlimited, however. A "routine" search is permissible without any probable cause or reasonable suspicion, while a "nonroutine" search requires reasonable suspicion. The Supreme Court has decided two cases that discuss the difference between a "routine" and "nonroutine" search at the border. With respect to searches of persons, merely patting down the outer clothing and searching through pockets or shoes is "routine," while a strip search (including a body-cavity search) or monitoring of a person's bowel movements (to determine whether drugs were being smuggling in the person's alimentary canal) is "nonroutine."²²⁸ With respect to searches of property, a thorough search of the contents of luggage or other personal property of a passenger or dismantling of parts of a car being driven across the border is "nonroutine" so long as the property is not irreparably damaged.²²⁹

It is important to note that noncitizens—even undocumented aliens—have rights under the Fourth Amendment, although (like citizens) they have considerably less protections at the border.²³⁰ Furthermore, it is important to note that once a person (even a citizen) leaves the United States the Fourth Amendment generally no longer protects them.²³¹

N. Excessive Force

As the foregoing discussion in Part II shows, litigation under the Fourth Amendment usually involves searches and seizures of property or seizures of persons by police officers (either *Terry* stops or full-fledged arrests). However, another commonly occurring Fourth Amendment event is when police officers engage in "excessive force" in seizing a person.²³² Whether force is "excessive" (and, thus, "unreasonable" under the Fourth Amendment) is judged under an "objective" standard—namely, whether from the standpoint of a "reasonable officer" and considering all of the "facts and circumstances of each particular case, including the severity of

227. *Ramsey*, 431 U.S. at 616.

228. *Hernandez*, 473 U.S. at 538.

229. *United States v. Flores-Montano*, 541 U.S. 149 (2004).

230. *See Au Yi Lau v. United States Immigration & Naturalization Serv.*, 445 F.2d 217 (D.C. Cir. 1971); *see also Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

231. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

232. *Graham v. Connor*, 490 U.S. 386 (1990).

the crime at issue,” the forced used was appropriate. Such analysis focuses in particular on “whether the suspect posed an immediate threat to the safety of officers and others, and whether he was actively resisting arrest or attempting to evade arrest by flight.”²³³ Although typically such “excessive force” claims are made by a person who was detained by a police officer, such claims also are made occasionally by persons shot by police officers or by persons whose automobiles crashed during pursuit by a police car.²³⁴

III. The Fourth Amendment Is Forgiving of Many Mistakes by Governmental Officials

As interpreted by the Supreme Court, the Fourth Amendment tolerates reasonable mistakes by police officers or other government officials who conduct searches or seizures. As discussed below, sometimes their reasonable mistakes mean that there was no Fourth Amendment violation at all, while other times their reasonable mistakes simply foreclose a remedy that would otherwise be available for a constitutional violation.²³⁵ The bottom line is that a search or seizure that results from a reasonable mistake almost never will result in the suppression of evidence in a criminal case or the award of money damages in a civil rights action. What is a “reasonable” mistake is judged according to an “objective” standard, i.e., what a “reasonable” police officer would have believed at the time of the search or seizure based on the totality of circumstances known to the actual officer.²³⁶

The Supreme Court has held that the following reasonable mistakes either did not result in a Fourth Amendment violation or, if they did, nonetheless deprived the person erroneously searched or seized of a remedy:

- (1) A police officer’s reasonable mistake of fact (e.g., the identity of a perpetrator of an alleged crime) concerning whether probable cause or reasonable suspicion existed;²³⁷
- (2) A police officer’s reasonable mistake of law (e.g., whether a driver of a car had violated a particular traffic law)

233. *Id.* at 396.

234. *See Tennessee v. Garner*, 471 U.S. 1 (1985) (shooting); *Scott v. Harris*, 550 U.S. 372 (2007) (car crash).

235. The limitations in Fourth Amendment remedies in criminal and civil cases are discussed further in Part IV, *infra*.

236. *See Heien v. North Carolina*, 135 S. Ct. 530, 539–40 (2014).

237. *Hill v. California*, 401 U.S. 797 (1971) (no Fourth Amendment violation).

- concerning whether probable cause or reasonable suspicion existed;²³⁸
- (3) A police officer's reasonable mistake about whether a third party who gave consent to search premises shared with defendant had actual authority to give such third party consent;²³⁹
 - (4) A police officer's reasonable mistake about whether he or she was searching the specific premises named in the search warrant;²⁴⁰
 - (5) A police officer's reasonable reliance on a penal statute, the defendant's violation of which resulted in a warrantless arrest and search incident to arrest, when the penal statute was only later declared invalid by a court;²⁴¹ and
 - (6) A police officer's reasonable mistake about whether an outstanding arrest warrant existed that would justify an arrest and search incident to arrest of a particular person.²⁴²

As these cases demonstrate, the Fourth Amendment gives police officers a large degree of latitude and tolerates many types of reasonable mistakes in an officer's execution of his or her duties.

IV. What Are the Consequences of a Fourth Amendment Violation?

Despite the wide latitude given to police officers and other governmental officials under the Fourth Amendment, a large number regularly violate the Fourth Amendment by engaging in unreasonable searches or seizures. Theoretically, "where there is a right, there is a remedy" for its violation.²⁴³ Traditionally, with respect to Fourth Amendment violations, there are two main types of remedies: "suppression" of the "tainted" evidence in a criminal prosecution ("the exclusionary rule") and/or a civil remedy such as money damages or an injunction in a civil rights case. According to the Supreme Court, however,

238. *Heien*, 135 S. Ct. at 539–40 (no Fourth Amendment violation).

239. *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (no Fourth Amendment violation).

240. *Maryland v. Garrison*, 480 U.S. 79 (1987) (no Fourth Amendment violation); *see also* *Los Angeles Cnty. v. Rettele*, 550 U.S. 609 (2007) (per curiam) (same).

241. *Michigan v. DeFilippo*, 443 U.S. 31 (1979) (no Fourth Amendment violation).

242. *Herring v. United States*, 555 U.S. 135 (2009) (Fourth Amendment violation yet no suppression of evidence); *Evans v. Arizona*, 514 U.S. 1 (1995) (same).

243. *See* *Tex. & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39–40 (1916) (citing the ancient legal maxim, *ubi jus, ibi remedium*).

violations of the Fourth Amendment do not automatically mean that either of these remedies will be available. As discussed below, the Court has placed numerous limits on the remedies available for a Fourth Amendment violation.

A. Limits on Fourth Amendment Remedies in a Criminal Case

There are four main remedial limitations in criminal cases: (1) the “good-faith exception”; (2) when the “taint” of the Fourth Amendment violation has been sufficiently “attenuated” by independent events or circumstances; (3) when the Fourth Amendment violation is “harmless” in relation to all of the other “untainted” evidence supporting the defendant’s guilt; and (4) the rule restricting a criminal defendant’s opportunity to appeal a Fourth Amendment claim only through the “direct appeal” process.

1. *The Good-Faith Exception*

The Supreme Court has held that, when a police officer violated the Fourth Amendment but did so by “objectively” acting in “good faith” based on some external factor, the “tainted” evidence resulting from the unconstitutional search or seizure should not be suppressed because the officer did not act unreasonably at the time (and only can be said to have done so retrospectively). Such external factors giving rise to objective “good faith” include:

- (1) A statute that authorized a warrantless search or seizure that, only *after* a search or seizure by the officer, was found to violate the Fourth Amendment;²⁴⁴
- (2) Binding appellate case law that authorized a particular type of search or seizure at the time it was done but was overruled *after* the search or seizure;²⁴⁵
- (3) A search or arrest warrant issued by a judicial official that only *after* the challenged search or seizure was found to be lacking probable cause;²⁴⁶ and

244. *Illinois v. Krull*, 480 U.S. 340 (1987).

245. *Davis v. United States*, 563 U.S. 229 (2011).

246. *United States v. Leon*, 468 U.S. 897 (1984); *see also Massachusetts v. Sheppard*, 468 U.S. 981 (1984). The good-faith exception only applies to warrants that were not “facially invalid.” A facially invalid warrant is one that a reasonable officer would have determined to be totally lacking particularized probable cause. *See, e.g., United States v. Kow*, 58 F.3d 423, 426-28 (9th Cir. 1995) (refusing to apply the good-faith exception where a warrant was facially invalid); *see also Groh v. Ramirez*, 540 U.S. 551 (2004) (example of facially invalid warrant). It should be noted that the “good-faith exception” does not apply when an officer secured the

- (4) A police computer system or court computer system that, as a result of negligence by police or court clerical staff, erroneously showed an outstanding arrest warrant for a person (when in fact the warrant no longer existed).²⁴⁷

If a police officer relied on any of these four factors in conducting a search or seizure, the Fourth Amendment was violated but a court nevertheless will not suppress the evidence resulting from the unconstitutional search or seizure.

2. *Taint Attenuation*

Another instance of an officer's violation of the Fourth Amendment that will not result in suppression of evidence is when the unconstitutional "taint" from the officer's actions is sufficiently "attenuated" by other events or circumstances. Examples of such taint attenuation include: (1) when a confession given by a person after being arrested in an unconstitutional manner was the product of the person's free will under circumstances that show that the confession was sufficiently attenuated from the illegal seizure;²⁴⁸ (2) when, despite an unconstitutional search or seizure, there was an "independent source" of "untainted" evidence supporting probable cause for a search or arrest warrant (and when the judicial officer who issued the warrant was aware of such untainted evidence in issuing the warrant);²⁴⁹ and (3) when particular evidence that was seized or searched by a police officer in an unconstitutional manner would have been "inevitably discovered" through entirely constitutional means had the evidence not first been searched or seized in a unconstitutional manner.²⁵⁰

3. *Harmless Error*

A criminal "conviction will not be reversed simply because a defendant was illegally arrested or subjected to an illegal search or

warrant in question by relying on "tainted" evidence obtained by an antecedent unconstitutional search or seizure. See *Fitzgerald v. State*, 837 A.2d 989, 1019-20 (Md. Ct. Spec. App. 2003) ("[I]n the case of an antecedent Fourth Amendment violation which contributes to a warrant application, the 'fruit of the poisoned tree' doctrine 'trumps' the officer's "'good faith' reliance" on the warrant.").

247. *Herring*, 555 U.S. at 135; *Evans v. Arizona*, 514 U.S. 1 (1995).

248. *Brown v. Illinois*, 422 U.S. 590 (1975) (setting forth a four-part test to determine whether such a confession was sufficiently attenuated).

249. See *Segura v. United States*, 468 U.S. 796 (1984); *Murray v. United States*, 487 U.S. 533 (1988).

250. See, e.g., *United States v. Almeida*, 748 F.3d 41, 48-49 (1st Cir. 2014).

seizure.”²⁵¹ In particular, such a denial of a remedy occurs when an appellate court concludes that evidence obtained in violation of the Fourth Amendment that was introduced during a criminal trial amounted to “harmless error.” The Supreme Court has reasoned that, if the “tainted” evidence did not “contribute” to the guilty verdict because the “untainted” evidence overwhelmingly proved the defendant’s guilt, the Fourth Amendment violation resulting from the erroneous admission of the tainted evidence is not a basis for reversing the defendant’s conviction.²⁵² Put in more colloquial terms: No harm, no foul.

4. *Limiting Fourth Amendment Claims to the “Direct” Appeal Process*

There are two main types of appeals that criminal defendants ordinarily can pursue after they are convicted and sentenced in a trial court: a “direct” appeal and a “collateral” (or “habeas corpus”) appeal. The direct appeal process, if pursued by a defendant, occurs initially after he is convicted and sentenced. A defendant must file a “notice of appeal” that transfers the jurisdiction from the trial court to the appellate court immediately above the trial court in the jurisdiction’s judicial hierarchy (e.g., a defendant convicted of and sentenced for burglary in a state trial court typically would appeal to the state’s intermediate appellate court). The direct appeal process can proceed further to the state’s highest appellate court and ultimately to the Supreme Court of the United States.²⁵³ If a criminal defendant fails to win a reversal during the direct appeal process, he or she ordinarily may then file a habeas corpus petition and seek a second round of appeals (referred to as “collateral review”). A state defendant can file a federal habeas corpus petition (in federal district court) and seek federal habeas corpus review of federal constitutional claims.²⁵⁴

The Supreme Court has held, however, that a state defendant may not raise a Fourth Amendment claim in a federal habeas corpus proceeding if the defendant had a “full and fair opportunity” to raise the claim in the state trial court and on direct appeal in the state court system.²⁵⁵ Because over ninety percent of criminal defendants in the United States are prosecuted in

251. *People v. Montoya*, 63 Cal. Rptr. 73, 76 (Cal. Ct. App. 1967).

252. *Chambers v. Maroney*, 399 U.S. 42, 53 (1970); *see also* *Chapman v. California*, 386 U.S. 18 (1967).

253. *See* Brent E. Newton, PRACTICAL CRIMINAL PROCEDURE: A CONSTITUTIONAL MANUAL 309 (2d ed. 2011).

254. *Id.* at 329–30; *see also* 28 U.S.C. §§ 2241–2255.

255. *Stone v. Powell*, 428 U.S. 465 (1976).

the state courts,²⁵⁶ this limitation on federal habeas corpus review is significant because it only leaves the Supreme Court of the United States to review state defendants' Fourth Amendment claims on direct appeal. Realistically, the Supreme Court reviews only a small number of state defendants' criminal appeals each year on direct appeal.²⁵⁷ Therefore, federal court review of Fourth Amendment issues raised by state criminal defendants almost never occurs except in the rare occasion when the Supreme Court grants certiorari on direct appeal to decide a Fourth Amendment issue raised by a state defendant. For that reason, state appellate courts are realistically the courts of last resort for the overwhelming majority of state defendants regarding their Fourth Amendment claims.

B. Limits on Fourth Amendment Remedies in a Civil Rights Case

There are two primary types of remedies that are awarded to a civil rights plaintiff who proves that his or her Fourth Amendment rights were violated: money damages and injunctive relief.²⁵⁸ Just as it has limited Fourth Amendment remedies in criminal cases, the Supreme Court also has limited such remedies civil cases.

1. Limits on Money Damages

If a person proves in a civil rights case that his or her constitutional rights were violated in some way by a police officer or other governmental official—including as a result an unconstitutional search or seizure—the plaintiff may seek to recover money damages from the officer (and, in some situations, the governmental unit that employed the officer or official). In a series of decisions, however, the Supreme Court has created hurdles that a plaintiff must overcome in order to obtain such money damages. The most significant hurdle is called “qualified immunity.” Qualified immunity is a shield that an officer or other governmental official may invoke as a defense to having to pay money damages for violating a person’s constitutional rights, including the Fourth Amendment right to be free of an unreasonable search or seizure. An officer may invoke qualified

256. See Sean Rosenmerkel *et al.*, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts*, 2006 (Statistical Tables 9, Table 1.1) (2009) (ninety-four percent of felony convictions occur in state courts).

257. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225–26 (2012) (noting that, during the past decade, the Supreme Court has decided around eighty cases per year—of all types, civil and criminal, combined—“on the merits”).

258. See generally 42 U.S.C. § 1983; *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

immunity if, at the time of the constitutional violation, the governing legal principle was not “clearly established” in binding appellate court decisions.²⁵⁹ The relevant legal principle does not refer broadly to the Fourth Amendment’s general protection against “unreasonable” searches and seizures; rather, the relevant legal principle must be a *specific application* of the Fourth Amendment in a prior case that was done by an appellate court in the jurisdiction in question.²⁶⁰ If extant precedent is not on point and, from an objective standard, it was reasonably “debatable” or “arguable” that the officer acted in conformity with the Fourth Amendment at the time of the search or seizure, a police officer is entitled to qualified immunity even if the court determines that the officer in fact had violated the Fourth Amendment.²⁶¹

Qualified immunity does not serve as a shield against the governmental unit that employs an officer who violates the Fourth Amendment, such as a city, county, or state government.²⁶² With respect to *municipal* governments (i.e., cities or counties), the Supreme Court has allowed for civil rights lawsuits against them based on constitutional violations perpetrated by a municipal employee such as a police officer. However, in order to recover money damages from the municipality, the plaintiff must prove that supervisory officials working for the municipal government authorized (or were “deliberately indifferent” to) an individual officer’s unconstitutional actions or had a “policy” or at least had permitted a “pattern or practice” of such actions culminating in the violation of the plaintiff’s constitutional rights.²⁶³ Such a showing typically is very difficult for a plaintiff to make.

With respect to *state* governments, the Supreme Court has held that the Eleventh Amendment to the United States Constitution bars claims for money damages against state governments based on the unconstitutional actions of their employees, including their law enforcement officers (such as state troopers).²⁶⁴ With respect to the *federal* government, the Supreme Court has held that the doctrine of “sovereign immunity” generally bars claims for money damages against the federal government or its agencies

259. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

260. *Anderson*, 483 U.S. at 643–45.

261. *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004).

262. *Owen v. Independence*, 445 U.S. 622 (1980).

263. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978); *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

264. *Kentucky v. Graham*, 473 U.S. 159 (1985).

based on the unconstitutional actions of federal employees.²⁶⁵ Nevertheless, Congress has created a limited statutory remedy for some illegal searches and seizures by federal officials in the Federal Tort Claims Act, which permits limited suits against the federal government based on certain tortious actions of federal employees.²⁶⁶

In sum, obtaining money damages from a police officer or other governmental official (or the governmental unit that employed the officer or official) is very difficult to do. Finally, it should be noted that even if a plaintiff is able to obtain a verdict of money damages from a court, the likelihood of collecting those damages from an individual law enforcement officer is not great in view of the fact that the typical police officer is not wealthy.²⁶⁷

2. *Limits on Injunctive Relief*

A second primary form of remedy in a civil rights case is injunctive relief. An injunction is an order from a court that directs a person to do (or not to do) something. In a civil rights case, an injunction typically orders a governmental entity to do or not to do something so as to remedy an existing constitutional violation. For instance, if a police department is conducting an unconstitutional roadblock to ferret out suspected drug dealers, a court can issue an injunction that prohibits such a roadblock.²⁶⁸ Unlike their limitations on the remedy of money damages, qualified immunity, sovereign immunity, and the Eleventh Amendment ordinarily do not prevent a court from issuing an injunction to prevent a Fourth Amendment violation.²⁶⁹ However, the Supreme Court has held that to obtain an injunction for a Fourth Amendment violation, a plaintiff must show a continuing pattern of the same Fourth Amendment violation as opposed to isolated instances of past violations or the remote possibility of the violation recurring in the future.²⁷⁰

Therefore, like the remedy of money damages, injunctive relief for Fourth Amendment violations is rare.

265. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 484–86 (1994).

266. *See, e.g., Del Raine v. Williford*, 32 F.3d 1024, 1043 (7th Cir. 1994) (discussing difference between a *Bivens* claim and FTCA claim).

267. Matthew V. Hess, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 166 (1993) (“Typically, police officers are not highly paid, nor do they have sizable assets with which to satisfy a judgment. In effect, many police officers are judgment proof.”).

268. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

269. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004); *Lefemine v. Wideman*, 133 S. Ct. 9 (2012).

270. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Conclusion

The Fourth Amendment's protections against unreasonable searches and seizures have resulted in a massive body of appellate case law, including several hundreds of decisions by the Supreme Court and several thousands of decisions by the lower courts. There are several primary take-away points about that jurisprudence:

- (1) As a threshold matter, there must be a "search" or "seizure" within the specific meaning of the Fourth Amendment, and not all uses of the physical senses by a police officer and not all "trespasses" by an officer against real or personal property to obtain evidence of a crime qualify as such;
- (2) Whether there was a "search" or "seizure" often turns on factual minutiae (such as an officer's moving a piece of personal property a few inches or an officer's maintaining possession of a driver's license during a traffic stop before asking for consent to search a car);
- (3) The Fourth Amendment's protections are largely *contextual* (i.e., the amendment applies more forcefully in some contexts, like in the home, than in other contexts, like at an international border, in a jail, or at a public K-12 school);
- (4) Even if a "search" or a "seizure" has occurred, the Fourth Amendment is not violated unless the search or seizure was "unreasonable," and what is "unreasonable" is usually judged based on an "objective" standard that considers the "totality of the circumstances" and is deferential to police officers;
- (5) Although in theory a search warrant is generally required for searches to be reasonable, there are myriad exceptions to the search warrant requirement, and the only time an arrest warrant is generally required is when officers enter into a person's home to arrest him or her;
- (6) "Probable cause" and "reasonable suspicion" are relatively low quanta of proof that are much less demanding than the preponderance and reasonable doubt standards, and in some situations the Fourth Amendment permits suspicionless searches; and
- (7) Even if a police officer or other governmental official violates the Fourth Amendment in some manner, the aggrieved person who was subjected to an unconstitutional search or seizure may not have a remedy in a criminal prosecution against the

person or in a civil rights lawsuit brought against the police officer or other governmental official.

In sum, there are many hurdles that a person must overcome in order to prove a constitutional violation under the Fourth Amendment and then obtain a concomitant remedy. Determining whether the Fourth Amendment was violated and further determining whether a remedy exists requires an understanding of the Supreme Court's complex body of Fourth Amendment jurisprudence. This article has provided a thorough overview of that jurisprudence, although it has only provided the reader with a "35,000 foot view." A more in-depth understanding will require additional research.²⁷¹

271. The leading multi-volume treatise on the Fourth Amendment is *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (2012), by Wayne R. LaFare (currently in its fifth edition). That treatise is an excellent resource for such additional in-depth research.