CHAPTER 1

THE CONSTITUTIONALIZATION OF CRIMINAL PROCEDURE

INTRODUCTION

1. **Coverage**

This nutshell provides an overview of the current constitutional regulation of the criminal justice process, along with a more detailed analysis of specific constitutional standards governing selected aspects of the process. Chapter 1 discusses the doctrinal foundations of the constitutional regulation of the process. Chapters 2–6 then describe the constitutional regulation of police investigations. The analysis here brings together the various different constitutional guarantees that bear upon different police investigative procedures. In Chapters 7 and 8, we consider the constitutional right to the assistance of counsel and the constitutional prohibition against compelled self-incrimination as they bear upon procedures other than police investigations. We have given these constitutional rights individual treatment because of their pervasive significance, as they impact all stages of the process. In chapter 9, we add a brief survey of several additional constitutional restrictions that are applicable to the non-investigative portions of the process.

It would take far more space than we have available to restate even in the briefest fashion all of the Supreme Court rulings that have shaped the constitutional standards currently applicable even as to the investigative stage alone. Prior to the 1960s, space limitations would not have been a problem. Indeed, those constitutional rulings applicable to the state criminal justice systems—which produce the vast bulk of criminal investigations and criminal prosecutions in this country—could readily have been surveyed in less than a quarter of these pages. That changed during the latter half of Chief Justice Warren’s tenure (basically 1961–69), when the Court issued an extensive body of rulings expanding federal constitutional regulation of the state criminal justice processes. The expansion was so great that commentators described it as the “criminal-justice-revolution” of the Warren Court. Since that time, no field of constitutional adjudication has consistently occupied a more substantial portion of the Supreme Court’s docket than the regulation of criminal procedure. Almost every Supreme Court term has been marked by at least a few decisions producing significant new developments in constitutional criminal procedure, and by a larger group of rulings that have finetuned previously announced standards. The end result is a substantial body of precedent, creating as to some subjects (e.g., police searches) a body of constitutional regulation so extensive that it rivals a complex statutory code in its comprehensiveness and intricacy. Our discussion focuses on the most basic of these constitutional standards, mentioning the “exceptions” to these standards (and the “exceptions to the exceptions”) only where they have a significant practical impact.

1. **The criminal procedure provisions of the Constitution**
2. To understand how constitutional limitations came to play such a significant role in the regulation of the criminal justice process, one must start by examining the provisions in the Constitution that deal with criminal procedure. The Constitution as originally adopted had only a few provisions relating to the administration of the criminal law (the most significant of these provisions being the Article III requirements that the “trial of all Crimes, except in Cases of Impeachment, shall be by Jury,” and in the “the State where the said crimes shall have been committed”). But once the process of obtaining state ratification produced a commitment to add amendments guaranteeing various rights of individuals (and thereby making explicit the federal government’s lack of authority to violate these rights), it became obvious that the criminal justice process would receive considerable attention in those amendments. The various state constitutions in their “Bills of Rights” had given great emphasis to the rights of individuals subjected to the criminal justice process, recognizing the potential, as reflected in English and colonial history, for the government’s misuse of that process to persecute political and religious dissidents. Those state constitutions did not seek to set forth all of the basic protections of suspects and defendants that were recognized at common law, but concentrated on certain celebrated guarantees that had been established in response to notorious misuses of the criminal process by the English Crown (some of these guarantees having been established in the distant past and others being of more recent vintage, reflecting the colonial experience). The federal constitution’s “Bill of Rights” (the first ten amendments, adopted in 1791) adhered to this model. Even though the Bill of Rights deals only selectively with the criminal justice process, of its twenty-seven guarantees of rights of individuals (i.e., excluding the structural safeguards of the Ninth and Tenth Amendments), fifteen deal specifically with the criminal justice process. The Fourth Amendment guarantees the right of the people to be secure against unreasonable searches and seizures and prohibits the issuance of warrants unless certain conditions are met. The Fifth Amendment requires prosecution by grand jury indictment for all infamous crimes (excepting certain military prosecutions) and prohibits placing a person “twice in jeopardy” or compelling him in “a criminal case” to be a “witness against himself.” The Sixth Amendment lists several rights that apply “in all criminal prosecutions”—the rights to a speedy trial, to a public trial, to an impartial jury of the state and district in which the crime was committed, to notice of the “nature and cause of the accusation,” to confrontation of opposing witnesses, to compulsory process for obtaining favorable witnesses, and to the assistance of counsel. The Eighth Amendment adds prohibitions against requiring excessive bail, imposing excessive fines, and inflicting cruel and unusual punishment In addition to these fifteen, the Fifth Amendment’s due process clause clearly includes the criminal justice process in its general prohibition against the “deprivat[ion] of life, liberty or property” (which includes imposing capital sentencing, incarceration, and criminal fines) without “due process of law.” Taken together, the various Bill of Rights provisions offer an obvious potential for extensive constitutional regulation of the criminal justice process. Constitutional provisions, however, are not self-defining. Their ultimate impact depends, in large part, upon how they are interpreted by the judiciary in the course of adjudicating individual cases. Thus, it was not until the Supreme Court came to adopt certain critical interpretations of the Constitution’s criminal procedure guarantees that the potential for substantial constitutionalization of the criminal justice process was realized.
3. **Constitutionalization by judicial interpretation**

Two important doctrinal developments were prerequisites to establishing, through Supreme Court rulings, extensive constitutional regulation of the nation’s criminal justice procedures. First, the relevant guarantees in the Bill of Rights had to be made applicable in large part to state proceedings. Although federal criminal jurisdiction has been expanding over the years, almost 99% of all criminal prosecutions still are brought in the state systems. For the Constitution to have a major impact upon criminal justice administration, its criminal procedure provisions had to be held applicable to state as well as federal proceedings. That application eventually was achieved through the Supreme Court’s reading of the Fourteenth Amendment’s due process clause. Although the Fourteenth Amendment was adopted in 1868, it was not until the Warren Court adopted the “selective incorporation” doctrine in the 1960s, almost 100 years later, that the due process was held to make the major Bill of Rights guarantees applicable to the states. That development is discussed in § 1.2.

The second major doctrinal prerequisite for the extensive constitutionalization of criminal procedure was adoption of expansive interpretations of individual guarantees. Even though applied to the states, the Bill of Rights guarantees, if interpreted narrowly, would have only a limited impact upon the criminal justice process. A narrow construction of each of the guarantees would produce a constitutional regulatory scheme that governs only a small portion of the total process and imposes there limitations fairly restricted in scope and unlikely to have a significant impact upon traditional state and federal criminal justice practices. Consider, for example, the Fifth Amendment clause stating that “no person \* \* \* shall be compelled in any criminal case to be a witness against himself.” Read narrowly, that provision might be said simply to prohibit the state from compelling the defendant to testify in his criminal trial as to any incriminating aspects of his involvement in the offense charged. Such an interpretation would establish constitutionally an important structural element of an accusatorial process, but its significance would be limited to the trial, and even there, it would only restate a prohibition firmly established in the law of all fifty states. On the other hand, an expansive interpretation of the self-incrimination privilege could render the privilege applicable to a wide range of practices occurring throughout the process, and impose limitations that extend far beyond those found in the law of most (and sometimes even all) states. The Supreme Court has, in fact, done exactly that, as discussed in Chapter 8.

The expansive interpretations are the product of a liberal interpretative philosophy. That philosophy rejects viewing constitutional guarantees as narrow, technical provisions. A guarantee’s scope is not limited to barring the particular procedural practice (or series of practices) that gave rise to its adoption. Liberal construction recognizes the need to extend the guarantee, by analogy, to new practices that are modern counterparts of those original core violations. So too, a liberal interpretive philosophy recognizes the potential for extending the basic principle underlying a guarantee in light of a changed procedural context. It also allows for the adoption of requirements that promote the successful implementation of the guarantees in light of administrative realities.

 The application of a liberal interpretive philosophy will vary with the individual justice and the end result will vary with the composition of the Court at a particular time. Liberal construction does not ensure the broadest conceivable interpretation, one that takes the most expansive general policy suggested by the guarantee and applies it without regard to limitations suggested by language and history, or alternative (and narrower) understandings of the clause’s underlying policy. Justices also are influenced by the other theories of constitutional interpretation commonly explored in constitutional law courses (including pragmatism, the concept of a “living constitution,” and originalism).

The adoption of expansive interpretations of the Constitution’s criminal procedure guarantees is not a new phenomenon. Indeed, it is debatable whether any Supreme Court ruling has ever adopted a broader view of the Fourth Amendment than did Boyd v. U.S., 116 U.S. 616 (1886) (§§ 6.3(b), 8.3(a)). Until the 1960s, however, Supreme Court opinions adopting strikingly expansive interpretations of criminal procedure guarantees were fairly infrequent. That was changed by the Warren Court, as its 1960s rulings marked the heyday of expansionist interpretations. Over the subsequent decades, Court rulings have been less pronounced in their extension of constitutional regulation. Indeed, in some instances the Court has withdrawn from previous expansive rulings, and in many instances, it has refused to extend those rulings. Yet each decade also has been marked by rulings that significantly extended the scope of constitutional regulation as to a particular aspect of the criminal justice process.

**§ 1.2 APPLICATION OF THE BILL OF RIGHTS GUARANTEES TO THE STATES**

1. **Introduction**

The first 10 Amendments were enacted as limitations solely upon the federal government. Barron v. Baltimore, 32 U.S. 243 (1833). The adoption of the Fourteenth Amendment in 1868, however, significantly extended federal constitutional controls over the actions of state governments. That Amendment provides, inter alia, that “no State” may “deprive any person of life, liberty, and property, without due process of law.” From the outset, the Supreme Court found troublesome the determination of the exact relationship of the limitations that Fourteenth Amendment imposed upon the states and the limitations that the Bill of Rights imposed upon the federal government.

1. **From fundamental rights to selective incorporation**

The relationship between the Fourteenth Amendment and the Bill of Rights was first considered by the Supreme Court in the criminal procedure context in Hurtado v. Cal., 110 U.S. 516 (1884). The Court there adopted the “fundamental rights interpretation” of the Fourteenth Amendment’s due process clause, an interpretation that prevailed until the early 1960s and that still governs the content of what is commonly described as “free-standing due process” (see § 1.3). The fundamental rights interpretation holds that there is no necessary relationship between the content of the Fourteenth Amendment and the guarantees of the Bill of Rights. The due process clause is viewed as protecting, whether or not included in the Bill of Rights, those rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Snyder v. Mass., 291 U.S. 97 (1934). As applied to criminal procedure, those fundamental rights basically require that the state adhere to “that fundamental fairness essential to the very concept of justice.” Lisenba v. Cal., 314 U.S. 219 (1941). While the recognition of a procedural right in one of the specific guarantees of the Bill of Rights is a likely indicator that the right is an essential component of fundamental fairness, that recognition is not conclusive. Similarly, the absence of a specific Bill of Rights guarantee prohibiting a particular practice does not necessarily mean that the practice complies with fundamental fairness. In support of the fundamental rights interpretation, it frequently was argued that not all Bill of Rights guarantees necessarily reflect in all their aspects that process needed to achieve basic fairness. Some Bill of Rights guarantees were seen as reflecting only the “restricted views of Eighteenth Century England regarding the best method for the ascertainment of facts.” Adamson v. Cal., 332 U.S. 46 (1947) (Frankfurter, J., con.). Still other guarantees were viewed as encompassing a fundamental right in their general conception, but not in every aspect of the guarantee as it had been applied to the federal system. For example, the Fifth Amendment’s double jeopardy clause had been held to prohibit the federal government from retrying a previously acquitted defendant both where the government’s only justification for seeking a retrial was its interest in gaining a second chance to prove guilt and where it alleged that the original verdict of acquittal had been tainted by a trial error that worked to the prosecution’s disadvantage. The Supreme Court held, however, that a retrial did not bar fundamental fairness in the latter situation, as the government was only seeking one fair opportunity to present its case. At the same time, it suggested that the retrial in the former situation would deprive the defendant of fundamental fairness. Moreover, even as to the retrial where the acquittal had been flawed by trial error, it pointed to special circumstances that contributed to its conclusion that fundamental fairness was not violated (e.g., this was not a case where the state had made repeated attempts to convict the defendant). Palko v. Conn., 302 U.S. 319 (1937).

In the course of defending the fundamental fairness approach, the Court rejected the contention that the fourteenth Amendment was intended to make applicable to the states all of the guarantees of the Bill of Rights. This “total incorporation” position was advanced by various dissenting opinions, receiving the support of four dissenters in one case. Adamson v. Cal., 332 U.S. 46 (1947). The Court majority concluded that this position lacked support in either the history or language of the Fourteenth Amendment (including both the due process and privileges and immunities clauses), and was inconsistent with initial interpretation of the Fourteenth Amendment by Justices who were most familiar with its background. In 1961, Justice Brennan, in a dissenting opinion, advanced what came to be known as the “selective incorporation” view of the Fourteenth Amendment. Cohen v. Hurley, 366 U.S. 117 (1961 Brennan, J., dis.). He argued for a position that would combine elements of both the “fundamental rights” and “total incorporation” interpretations. Selective incorporation accepts the basic premise of the fundamental rights interpretation that the Fourteenth Amendment encompasses rights, substantive or procedural, that are so basic as to be ranked as “fundamental.” It recognizes too that not all rights specified in the Bill of Rights are necessarily fundamental. It rejects the fundamental rights interpretation, however, insofar as that doctrine looks only to the character of the particular element of a specified right denied in the particular case, and evaluates that element with reference to the “totality of circumstances” of that case. Evaluating the fundamental nature of a right in terms of the “factual circumstances surrounding each individual case” is viewed as “extremely subjective and excessively discretionary.” Limiting a decision to only one aspect of the specified right also is rejected as presenting the same difficulty. Accordingly, in determining whether a specified right is fundamental, the selective incorporation doctrine requires that the Court look at the total right guaranteed by the particular Bill of Rights provision, not merely at a single aspect of that right nor at the application of that aspect in the circumstances of the particular case. If it is decided that a particular guarantee is fundamental, that right will be incorporated into the Fourteenth Amendment “whole and intact.” The specified right will then be enforced against the states in every case according to the same standards applied to the federal government. With respect to those guarantees within the Bill of Rights held to be fundamental, there is, as Justice Douglas put it, “coextensive coverage” under the Fourteenth Amendment and the Bill of Rights. Johnson v. La., 406 U.S. 356 (1972).

The selective incorporation doctrine gained majority support during the 1960s. The debate as to its adoption was presented largely in concurring and dissenting opinions, as the majority opinions typically applied the doctrine without any extensive discussion as to why the focus should be on the whole of an enumerated right. Justices opposing selective incorporation argued that it was no more than an artificial compromise between traditional fundamental fairness and the total incorporation doctrines. Duncan v. La., 391 U.S. 145 (1968) (Harlan, J., dis.). Supporters of the doctrine stressed that selective incorporation reduced the potential for subjectivity and “avoid[ed] the impression of personal, ad hoc adjudication” by discarding an analysis that focused on the totality of the circumstances of the individual case. Selective incorporation was also praised as promoting certainty in the law, and thereby facilitating state court enforcement of due process standards; once a specified right was held to be fundamental, the state courts were directed to the specific language of the Bill of Rights guarantee and the various past decisions interpreting that guarantee in the context of federal prosecutions. This stood in contrast to the case-by-case rulings under fundamental fairness, which left the state courts at sea as to whether other circumstances and other elements of a particular right would produce a different result as to what was fundamental. Although selective incorporation would also expand federal constitutional regulation of the state criminal justice systems, that was viewed as consistent with the interests of federalism because the regulation was limited to rights which were fundamental and therefore too important to allow the states to disregard in the interests of local experimentation. Pointer v. Tex., 380 U.S. 400 (1965) (Goldberg, J., con.). In the Court’s leading discussion of the adoption of selective incorporation, Duncan v. La., 391 U.S. 15 145 (1968), the Court noted that the caselaw applying the doctrine had also accepted a conception of a “fundamental right” broader than that applied in the earlier fundamental fairness rulings. A right now was to be judged by reference to its operation within the “common law system of [criminal procedure] \* \* \* that has been developing \* \* \* in this country, rather than its theoretical justification as a necessary element of a ‘fair and equitable procedure.’ ” The fact that another system of justice could operate without a particular right (as the civil system operated without jury trials) did not work against finding the right to be fundamental in our system. Also, greater emphasis was placed upon the very presence of a right within the Bill of Rights as strong evidence of its fundamental nature.

1. **The incorporated rights**

 In McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), the Court reviewed the rulings of the 1960s and thereafter and concluded that selective incorporation had made applicable to the states all of the criminal procedure guarantees of the Bill of Rights (see §1.1(B)) except two: (1) the “Fifth Amendment’s grand jury requirement,” and (2) the Eighth Amendment’s prohibition of excessive fines. The governing decisions excluding application of the grand jury clause, although they “long predate the era of selective incorporation,” continue to be followed. The Court simply “never ha[s] decided whether the \* \* \* Eighth Amendment’s prohibition of excessive fines applies to the states through the Due Process Clause.”

1. **Incorporation of federal-context precedent**

In holding that the Fourteenth Amendment selectively incorporated the Sixth Amendment’s jury trial right, the majority in Duncan v. La., 391 U.S. 145 (1968), acknowledged the state’s contention that incorporation could disrupt long established state practices by requiring adherence to past interpretations of the Sixth Amendment that were developed solely in terms of federal court practice. Justice Fortas, in a separate opinion, argued that the proper response to the state’s concern was to distinguish between those past Sixth Amendment rulings that had defined the basic elements of the jury trial requirement and those that had adopted “a system of administration” for applying that right in the federal context (e.g., requiring a 12 person jury). The latter decisions, Justice Fortas argued, need not be selectively incorporated, as the selective incorporation concept did not require the Court to impose upon the states the totality of the Sixth Amendment guarantee, including “all its bag and baggage, however securely or insecurely affixed they may be by law or precedent.”

The Court had no need to decide in Duncan whether absolute parallelism (desparagingly characterized by Justice Harlan as “jot for jot” incorporation) would be mandated in the application of the Sixth Amendment guarantee to federal and state systems. However, the Duncan majority clearly indicated that it was not receptive to the type of distinction that Justice Fortas suggested. It suggested that, if past decisions dealing with “administrative” aspects of the jury trial guarantee should appear to be inappropriate as applied to the states, the proper approach was to “reconsider” the constitutional grounding of those decisions, and possibly conclude that the standards announced there were not required, as a matter of constitutional law, for either the federal or state systems. Subsequently, in Williams v. Fla., 399 U.S. 78 (1970) and Apodaca v. Ore., 406 U.S. 404 (1972), the Court majority rejected the exception to absolute parallelism that had been advanced by Justice Fortas and chose the “reconsideration route” suggested by the Duncan majority.

Williams reconsidered earlier rulings that appeared to require constitutionally the twelve-person jury that traditionally had been used in federal courts, concluded that the twelve-person size was not critical to the jury function guaranteed by the Sixth Amendment, and held that a state’s use of six-person juries in non-capital cases did not violate the incorporated Sixth Amendment. In Apodoca, eight justices agreed that the constitutionally of non-unanimous jury verdicts should be resolved in the same way for both state and federal prosecutions. But on reconsideration of earlier precedent mandating unanimous verdicts in federal trials, the eight divided equally on whether the Sixth Amendment required unanimity, with four justices concluding that the state’s acceptance of 10–2 verdicts was constitutionally acceptable. The deciding vote was cast by Justice Powell, who accepted Justice Fortas’ earlier suggestion as to non-incorporation of constitutional rulings dealing with matters of “administration,” and concluded that the 10–2 verdict was acceptable under the Sixth Amendment as applied to the states, but would not be acceptable in the application of the Sixth Amendment to a federal prosecution. As the Court noted in McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), Apodoca creates the sole exception to the “general rule” that “incorporated Bill of Right protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”

Although the constitutional standards remain the same, the Supreme Court retains the authority to impose more rigorous requirements upon the federal system in the exercise of what it has characterized as its “supervisory authority over the administration of justice in the federal courts” U.S. v. Hasting, 461 U.S. 499 (1983). That authority has most prominently been used to fashion judicial remedies for actions of federal officials that violate statutory duties, see e.g., McNabb v. U.S., 318 U.S. 332 (1943) (§ 4.1(b)), but it also is available to protect the integrity of federal judicial proceedings. Thus, in several cases, after concluding that certain procedures or prohibitions were not constitutionally mandated (and therefore not required of the state), the Court relied on its supervisory power to impose that requirement on federal courts. See e.g., Rosales-Lopez v. U.S., 451 U.S. 182 (1981) (requiring voir dire questioning beyond what is constitutionally mandated).

The Court has noted, however, that federal appellate courts, which also possess this supervisory authority, may not use it simply because they view the current interpretation of constitutional requirements as not sufficiently rigorous to meet desirable procedural goals. See U.S. v. Payner, 447 U.S. 727 (1980) (lower court could not rely on its supervisory power to effectively bypass standing requirement (§ 6.8) for raising Fourth Amendment objections); U.S. v. Hasting, 461 U.S. 499 (1983) (lower court could not rely on supervisory power to reverse a conviction based on a constitutional violation without regard to the harmless error doctrine (§ 9.10) ordinarily applied to such violations). Also, unlike Constitutional rulings, Congress may override rulings based on the Court’s supervisory authority.

**§ 1.3 “FREE-STANDING” DUE PROCESS**

1. **Scope**

 Early fundamental fairness cases recognized that due process could impose fairness requirements that were not to be found in the specific guarantees of the Bill of Rights. Indeed, prior to the adoption of selective incorporation, several of the most significant Supreme Court rulings invalidating state procedures rested on this concept. Thus, although an unbiased judge is not mentioned in the specifics of the Bill of Rights (the Sixth Amendment refers only to an “impartial jury”), Tumey v. Ohio, 273 U.S. 510 (1927) held lack of judicial bias to be an essential element of fundamental fairness (and therefore overturned a state conviction where the trial judge had a pecuniary interest in having the case result in a conviction rather than an acquittal).

Once the Court selectively incorporated almost all of the specific guarantees dealing with criminal procedure, the independent content of due process came to be known as “free-standing due process” (i.e., standing apart from the incorporated guarantees). Notwithstanding the extensive range of the incorporated guarantees, free-standing due process plays an important role in the constitutional regulation of state criminal procedures. Indeed, constitutional requirements grounded in free-standing-due process extend across all stages of the criminal justice process, including police investigations (see § 5.4), pretrial procedures (see §§ 9.2(b), 9.4), adjudication by guilty plea (see § 9.5), adjudication by trial (see § 9.8(f)), sentencing (see § 9.9(a)), and appeals (see § 9.9(b)).

Many of these free-standing due process standards extend concepts found in the specific guarantees to procedural settings not covered by those guarantees. See e.g., § 7.2(a) (due process extension of right to counsel). Others impose fairness requirements that have no ready counterpart in the specific guarantees. See e.g., § 9.4(d) (due process requirements relating to defense access to evidence). Because of their source in the independent content of due process. the rights recognized in these rules are sometimes described as the “unenumerated rights” of due process, in contrast to the incorporated “enumerates rights” of the Bill of Rights.

1. **Interpretive Standards**

The Court in at least the post-incorporation era has offered guidance on the interpretation of the independent content of due process that largely urges restraint in developing the content of free-standing due process. Initially, the Court has noted that, “beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation” and should be construed “very narrowly.” Dowling v. U.S., 493 U.S. 342 (1990). Since the “Bill of Rights speaks in explicit terms to many aspects of criminal procedure,” the expansion of constitutional regulation “under the open-ended rubric of the Due Process Clause” is said to “invite undue interference with both considered legislative judgments and the careful balance that the constitution strikes between liberty and order.” Medina v. Cal., 505 U.S. 437 (1992). So too, giving deference to the “considered expertise of the states in matters of criminal procedure” is a hallmark of free-standing due process analysis. Thus, the Court has emphasized that “a state procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser of give a surer promise of protection.”

In District Attorney’s Office v. Osborne, 557 U.S. 52 (2009) (involving postconviction access to DNA evidence), the Court added that deference is especially appropriate where the issue presented relates to new technology and “the States are currently engaged in serious, thoughtful examination” as to how the criminal justice process should be altered in light of that technology. The Court also has stressed that the focus of free-standing due process should be on the operation of challenged practice in the individual case, and a practice therefore should not violate due process unless it conflicts with a procedural prerequisite for fairness in a manner that actually causes substantial prejudice. Thus, most free-standing due process rulings (although certainly not all) require a defense showing of likely prejudice as an element of the constitutional violation. This stands in contrast to constitutional violations under specific guarantees, which generally are established without showing a prejudicial impact, although they may then be subject to a harmless error analysis. See § 9.10; U.S. v. Gonzalez-Lopez, 548 U.S. 140 (2006), discussed in § 7.5. The case-specific focus of free-standing due process often leads to rulings that are tied to the circumstances of the particular case. See e.g., §5.4 (identification procedures). Still other rulings stress the weighing of multiple factors, rather than setting a bright-line requirement. See e.g., § 9.4(b) (delay in prosecution). On occasion, however, free-standing due process imposes a bright-line requirement quite similar to the requirements imposed as to other stages in the process under an enumerated guarantee. See e.g., § 7.3(h) (indigent’s right to counsel on first appeal).

1. **Substantive Due Process**

The vast majority of free-standing due process rulings deal with procedural due process. On occasion, a due process challenge will be directed to an aspect of the criminal justice process as it relates to the denial of individual liberty standing apart from the fairness of the process used to convict (i.e., which denies liberty apart from the imposition of the criminal sanction). The challenge here may relate to the invasion of bodily integrity, as in Riggins v. Nevada, 504 U.S. 127 (1992), where a defendant objected to being forced to take antipsychotic drugs during his trial. It may relate to burdens that follow from prosecution, as in Albright v. Oliver, 510 U.S. 266 (1994), where the defendant claimed that the state brought charges (later dismissed) based on evidence known to be unreliable. Substantive due process claims face special obstacles. Initially, the individual must show that the aspect of liberty being diminished or lost is a protected liberty interests under the constitution or state law. Secondly, the Court has suggested that standard for finding a violation of due process is especially rigorous. In some instances, the Court has asked whether the practice challenged is so egregiously abusive as to “shock the conscience,” a standard first formulated in the stomach-pumping case, Rochin v. Cal., 342 U.S. 165 (1952), (see § 6.2(c)). Other substantive due process cases, involving different types of liberty, have looked to whether the practice is clearly unacceptable under a historically recognized prohibition. Finally, substantive due process may not be utilized when a “more-specific-provision” is available. Graham v. Connor, 490 U.S. 386 (1989). Where one of the specific constitutional guarantees (e.g., the Fourth Amendment) deals with the general type of conduct at issue, the challenge must be analyzed under that provision, and if no violation is found there, substantive due process cannot be employed to expand constitutional protections.

 **§ 1.4 GUIDEPOSTS FOR CONSTITUTIONAL INTERPRETATION**

A variety of interpretive guideposts have influenced Supreme Court rulings applying constitutional guarantees to the criminal justice process. Some of those guideposts—such as the language of the guarantee and the history underlying the guarantee—are staples of all constitutional interpretation. Our focus here is on guideposts that have been advanced as having a special relevance to the criminal justice process. The justices over the years have been divided as to the appropriateness of these guideposts. Also, those justices accepting a particular guidepost very often have differed as to how much weight should be given to that guidepost when it contradicts other relevant considerations. Thus, although all of these guideposts appear to have played an important role in shaping the Court’s criminal procedure decisions, at one time or another, their influence has varied (and presumably will continue to vary) with changes in the composition of the Court.

1. **Text**

Supreme Court rulings on constitutional criminal procedure relatively infrequently rely on the “plain meaning” of the provision being applied. Challenges to procedures clearly prohibited, or clearly not prohibited, by the language of a guarantee do not present the difficult issues that merit the Supreme Court’s attention. Still, the language of the guarantee in question will often be cited as pointing in a particular direction, which is then confirmed by some other guidepost (typically originalism). So too, the language is often cited as imposing a general limitation upon the reach of the guarantee, if not identifying the specific scope. Thus, the rights of the Sixth Amendment are limited to the “accused” in a “criminal prosecution” and while those terms are hardly unambiguous, the Court views them as clearly excluding certain situations. See e.g., § 7.2(d) (counsel on appeal). So too, the Court has noted with respect to the self-incrimination clause: “We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protection of privacy, a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. \* \* \*[T]he Fifth Amendment protects against ‘compelled self-incrimination, not the (disclosure of) private information.’ ” Fisher v. U.S., 425 U.S. 391 (1976) (see § 8.3(e)).

**(b) Giving priority to reliability guarantees**

Over the years, various justices have maintained that a higher priority should be given to those procedural guarantees that serve primarily to ensure factfinding reliability, with a special emphasis on avoiding the erroneous conviction of the innocent. Such justices tend to be much more willing to give a broad reading to those guarantees that seek to achieve factfinding accuracy, as opposed to guarantees that serve other interests (e.g., the protection of privacy under the Fourth Amendment or the recognition of individual dignity in the Fifth Amendment’s self-incrimination clause). Of course, certain constitutional guarantees serve both to promote accuracy and to protect other interests as well. In such cases, justices arguing that factfinding reliability should receive higher priority may be willing to extend the scope of the guarantee only insofar as it achieves the reliability objective. Thus, they would refuse to apply the self-incrimination privilege to bar most police interrogation, but would extend the policies of the privilege to exclude from evidence potentially unreliable confessions obtained through interrogation so abusive as to encourage false admissions of guilt. Similarly, the double jeopardy protection against reprosecution following an acquittal would be given a more expansive interpretation than the double jeopardy protection against multiple punishment for the commission of a single offense.

 Other justices have flatly rejected treating more favorably those guarantees that seek to ensure factfinding accuracy. They argue that all constitutional guarantees should be treated alike and extensive relief should be available for any constitutional violation. They acknowledge that some remedies afforded for violations of guarantees protecting other interests (such as the exclusion of evidence obtained through a Fourth Amendment violation) often operate to protect the “guilty,” but they note that those remedies also serve the interests of society as a whole. They also contend that attempts to separate the different interests protected by a single guarantee produce uneven interpretations of the guarantee that only serve to undermine the Court’s authority. Expansive protection of all guarantees is essential, in their view, to ensure respect for the place of the Constitution in regulating the criminal justice process. The significance of the position that favors truthfinding guarantees has varied with the composition of the Court and the nature of the issue being considered. That position may well have had considerable influence in the initial development of the “fundamental fairness” standard of due process. In the post-incorporationist era, its greatest influence arguably has been in determining the appropriate scope of remedial measures, with the broader remedies available for guarantees central to factfinding accuracy. Such influence is seen, for example, in Teague v. Lane, 489 U.S. 288 (1989), where the Court created a fact-finding reliability exception to the general rule limiting the retroactive application of new constitutional rulings on habeas review. Similarly, in restricting the reach of the exclusionary rule, which bars use of evidence obtained in violation of the Fourth Amendment, the Court frequently has stressed that this remedy impairs truthfinding by excluding reliable evidence. See § 6.5(c)–(g); § 6.7(a). On the other hand, majority opinions defining the substantive content of guarantees that impede accurate factfinding have very rarely expressed concern as to that impact, and certainly have not expressed the view that such guarantees should therefore be narrowly construed.

1. **Original meaning**

Originalism has a long-standing role in the interpretation of the criminal procedure guarantees, which has increased in prominence over the last few decades (particularly since Justices Scalia and Thomas were added to the Court). One aspect of originalism that has divided the Court in recent years is the choice of the appropriate level of generality at which the guarantee’s original design should be understood. That choice has particular significance in two settings: (1) where the founding generation viewed a guarantee as aimed at prohibiting a particular procedural practice and the modern day procedure being challenged is deemed analogous to that prohibited practice; and (2) where the modern day procedure being challenged is identical to, or analogous to, a procedure known to the founding generation and thought not to be prohibited by the particular guarantee.

In the former situation, a justice tending to stress the general purposes of the guarantee, as opposed to a specific historical application, may tend not to find an analogy to a historically prohibited practice where a strict “originalist” would do so. Differences in the current procedural setting may suggest that the values at stake are not the same as those that required rejection of the prohibited practice. An analysis of the general purpose of the guarantee may produce the conclusion that the historical prohibition was founded on concerns of the common law rather than the constitutional guarantee. But where justices are in agreement as to the character of the original prohibition and the similarity of the modern procedural counterpart, that counter-part will be rejected by both justices favoring “loose” and “strict” originalism. The division tends to be stronger in evaluating historic acceptance of the challenged practice. The Court has made clear that the sanction of settled historical usage is not a shield against constitutional attack. See Williams v. Ill., 399 U.S. 235 (1970) (“neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack”). On the other hand, it also has repeatedly treated the sanction of history as a strong indicator of constitutionality. The critical division among the justice’s has centered on what circumstance justify finding a practice unconstitutional notwithstanding that sanction.

Is historical acceptance readily discounted where the practice in question is contrary to what the Court now views as the overriding function of the constitutional provision at issue? In some cases, that view has prevailed, particularly as to “open-ended” constitutional standards (e.g., the “reasonableness” requirement of the Fourth Amendment). See e.g., Payton v. N.Y., 445 U.S. 573 (1980) (§ 2.7(a)) (such a guarantee should not be read as having “frozen into constitutional law \* \* \* those practices that existed at the time of the [guarantee’s] adoption”). Yet, in other instances, sometimes involving the same type of guarantee, the Court majority has rejected such an analysis. See e.g., U.S. v. Watson, 423 U.S. 411 (1976) (upholding police authority to make arrests in public without warrants, notwithstanding ample opportunity to obtain a warrant prior to the arrest). The Court majority here reasoned that the historical acceptance of a practice seemingly inconsistent with the function of a guarantee indicates that the purpose of the guarantee was more limited than what a logical extension of that function might suggest. The assumed “logic” of the guarantee “must defer to history and experience,” U.S. v. Watson, 423 U.S. 411 (1976) (Powell, J., con.), as the Court must recognize that, in determining the intended purpose of many guarantees, “a page of history is worth a volume of logic,” Ullmann v. U.S., 350 U.S. 422 (1956) (Frankfurter, J., con.).

Changed circumstances can readily alter the impact of an historically accepted practice and thereby deprive historical acceptance of much of its weight. However, with so many institutional differences between the revolutionary-era criminal process and the modern criminal process, strict originalists are wary of the changed-circumstances argument. Still, there is general agreement that “sweeping change in the legal and technological context” can render reliance on historical acceptance “a mistaken literalism that requires the purposes of a historical inquiry.” Tenn. v. Garner, 471 U.S. 1 (1985) (police use of deadly force against fleeing felons, though allowed at common law, must be assessed today in light of the greatly expanded grouping of crimes classified as felonies, the greatly restricted authorization of death penalty sentences for felonies, and the greatly increased capacity, via handguns, for police officers to use deadly force in situations posing no threat to their personal safety).

1. **The use of per se rules**

 In many settings the Supreme Court has viewed the constitutional question at issue as naturally calling for what might be described as a “categorical” or “definitional” standard—i.e., a standard that looks to a single characteristic or event and does not adjust to the uniqueness of each case. Such standards are imposed, for example, in determining when jeopardy attaches and what constitutes the minimum acceptable size for a jury. In other settings, the Court has viewed the constitutional question at issue as calling for a standard requiring a fact sensitive judgment geared to a variety of circumstances that differ with each case. Such standards are applied, for example, in determining whether the police had the probable cause needed to obtain a search warrant or whether a defense lawyer’s performance was so deficient as to deny defendant the effective assistance of counsel. In still other settings, the Court has concluded that, while the question at issue generally calls for a case-by-case balancing of a variety of circumstances, administrative concerns justify imposing a “per se” or “bright-line” test which finds a particular action to be constitutional or unconstitutional based on a single event or characteristic. The per se standard is similar in formulation to the usual categorical standard, but its grounding is different. The Court is not saying that the function of the applicable constitutional guarantee necessarily requires such a bright-line. Indeed, the Court is acknowledging that its per se standard is either overinclusive or underinclusive as compared to the application of that function to all relevant circumstances on a case-by-case basis. Nonetheless, practical considerations relevant to administration of the Court’s ruling have convinced the Court of the need to adopt a shorthand generalization in the form of a per se rule even though the function of the guarantee might point to the ad hoc application of a totality-of-the-circumstances analysis. Illustrative are Pa. v. Mimms, 434 U.S. 106 (1977) (police may order driver of stopped vehicle to get out of the car without regard to the circumstances of the stop or the behavior of the driver) and Turner v. Murray, 476 U.S. 28 (1986) (“because the risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death penalty,” a capital defendant accused of an interracial crime is entitled automatically to voir dire questioning on racial issues “inextricably bound up with the conduct of the trial”). Though per se rules are often associated with the adoption of expansive interpretations of procedural safeguards, that is not necessarily the case.

Thus, ensuring officer safety or preventing the potential arrestee’s destruction of evidence may allow searches that otherwise would be allowed only where the circumstances suggest that the individual was in possession of evidence or a weapon. See U.S. v. Robinson, 414 U.S. 218 (1973), discussed in § 2.6 (b). While the Court has utilized per se standards in various settings, it also has rejected adoption of such standards in other settings viewed as similar by at least some members of the Court. See e.g., U.S. v. Dunn, 480 U.S. 294 (1987) (refusing to adopt a “bright-line rule” that the Fourth Amendment protected area of a dwelling’s “curtilage” would “extend no farther than the nearest fence surrounding a fenced house,” and instead allowing for consideration of indicia of privacy that could on occasion encompass structures lying outside the fenced area); Ristaino v. Ross, 424 U.S. 589 (1976) (rejecting as to noncapital cases an automatic entitlement to voir dire questioning on racial bias where the crime is interracial, as determining the presence of a “constitutionally significant likelihood” of juror bias, justifyingvoir dire questioning, requires an evaluation of “all of the circumstances” presented by the case). As might be surmised from such disagreements, the Court has not been able to develop a bright-line rule as to when administrative concerns will or will not justify adoption of an administratively based per se standard. Factors of obvious relevance include: (1) the extent to which such a standard will be overinclusive or under inclusive as compared to a case-by-case analysis; (2) whether the constitutional regulation deals with decisions made by “front line” players (e.g., police officers) who have limited time and expertise and therefore would have difficulty applying the “subtle nuances” and “hairline distinctions” of a standard geared to a variety of circumstances; (3) whether the failure to provide a clear direction to officials bound by the standard invites abuse by those officials in the form of fabricated testimony as to relevant circumstances; and (4) the significant adjudicatory burdens that would be placed upon trial courts, and the special problems those courts would face, if required to assess certain types of factors (e.g., the motive of the official involved).

Although all of the above factors have been cited by the Court in majority opinions, the justices have disagreed as to the weight to be given to particular factors. Indeed, some justices have viewed only the first factor as critical, and would adopt per se rules only when the bright line rule provides close to a perfect fit to the result that would follow from a case-by-case analysis. Also, even where the justices agree that a particular factor (e.g., the ineffectiveness of case-by-case adjudication) is relevant, they may well view differently the practical impact of that factor. See e.g., Smith v. Phillips, 455 U.S. 209 (1982) (disagreement as to trial court’s capacity to determine through juror questioning whether the juror was biased as a result of a particular interaction with the prosecutor).

1. **The use of prophylactic requirements**

The Supreme Court has described only a handful of its criminal procedure rulings as imposing “prophylactic” requirements, yet that characterization has been the source of considerable controversy, extending beyond the significance of the rulings so characterized. Undoubtedly, the most prominent of the opinions characterized as prophylactic is Miranda v. Ariz., 384 U.S. 436 (1966) (§ 4.4), where the Court required that the police give various warnings to an interrogated suspect in order to ensure that he was not compelled by the interrogation to incriminate himself. Other prophylactic rulings include N.C. v. Pearce, 395 U.S. 711 (1969) (§ 9.9(b)) (requiring a judge who imposes a higher sentence on retrial to set forth the reasons for the higher sentence and to rely on justifications that will ensure that the higher sentence is not vindictive), and Anders v. Cal., 386 U.S. 738 (1967) (§ 7.3(h)) (prescribing procedures that must be followed by appointed appellate counsel in withdrawing from a case in order to ensure that such withdrawals are limited to “wholly frivolous” appeals).

The Court has emphasized two characteristics in explaining why a particular decision imposed a “prophylactic rule.” First, the rule is prophylactic in the sense that it seeks to safeguard against a constitutional violation, typically by imposing procedural requirements designed to provide a protective shield for the underlying constitutional right. Secondly, the prophylactic rule is grounded not on the conclusion that its violation invariably produces a denial of the underlying constitutional right, but on the Court’s exercise of its authority to craft remedies and procedures that facilitate its adjudication responsibilities. Two important consequences, the Court has noted, follow from this second prong grounding: (1) since prophylactic rules may be violated without necessarily denying the underlying constitutional right, violations of prophylactic rules may be given remedial consequences narrower in range than the consequences which would follow from direct violations of the underlying right (see e.g., §§ 6.6(g), 6.7(b), 8.1(e)): and (2) the legislature may eliminate the need for the prophylactic protection added by the Court’s ruling by replacing its prophylactic requirements with alternative safeguards that are equally effective. Some justices have challenged the Court’s authority to impose prophylactic safeguards. Here, they argue, by prescribing additional procedures solely as a prophylaxis, the Court engages in “pure legislation.” N.C. v. Pearce, supra (Black, J., dis.). However, Dickerson v. U.S., 530 U.S. 428 (2000) (§ 4.5(d)), flatly rejected the contention that the Miranda ruling lacked a constitutional grounding, and described that ruling as similar in function to a traditional per se standard (the Miranda requirements simply responded to the “unacceptably great” risk of “overlooking involuntary confessions” when admissibility was tested only by the ad hoc “coerced confessions” standard). The Dickerson opinion failed, however, to explain why Miranda and certain other rulings had been separately characterized as “prophylactic,” thereby suggesting that the Court majority was divided on that question. Chavez v. Martinez, 538 U.S. 760 (2003), later revealed that division.

There, the eight justices commenting on the special character of the Miranda ruling offered quite different characterizations. Four justices utilized the traditional “prophylactic” characterization, and placed in that category, along with Miranda, several earlier rulings dealing with self-incrimination (see § 8.3(b)); two justices described the same group of rulings as establishing “law \* \* \* outside the Fifth Amendment’s core, with each case expressing a judgment that the core guarantee, or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection”; two justices placed Miranda alone in such a special category, describing it as a constitutional measure adopted to “reduce the risk of a coerced confession and to implement the self incrimination clause.” Though Chavez indicated that the Court majority continues to accept the constitutional legitimacy of the distinctive grounding (and distinctive remedial treatment) of the rulings that have been characterized as “prophylactic,” it did not suggest any strong inclination to make use of that grounding in future rulings. In the later case of Montejo v. La., 556 U.S. 779 (2001), the Court overruled the prophylactic prohibition of Mich. v. Jackson (prohibiting police-initiated questioning where the defendant requested appointment of counsel at a first appearance). It did not, however, express hostility toward prophylactic prohibitions as such. Rather, the key was balancing benefits against costs and the Jackson prophylactic rule provided only “marginal” additional protection against possibly missing an involuntary waiver, as Edwards v. Ariz, 451 U.S. 477 (1981) provided ample protection through a separate prophylactic rule applicable to all interrogations after an assertion of rights. See §§ 4.3(f), 4.9(c).

1. **Administrative burdens**

 The more expansive a constitutional requirement, the more likely that it will impose a substantial burden upon the administration of the criminal justice process. That burden can take various forms, including increased expenses for an already underfunded system, additional hearings for already congested court dockets, and perhaps even insurmountable obstacles to the solution of some crimes. The extent to which such “practical costs” should be considered by the Court has been a matter of continuing debate among the justices. The clash of viewpoints on this issue is most often found in the fashioning of standards (particularly per se standards) under the more open-ended procedural guarantees (e.g., the due process clause), and in the application of the more concrete guarantees to new settings. Thus, the Court has noted that where the text or history of a particular provision produces a “constitutional command that \* \* \* is unequivocal,” the practical costs incurred in applying that command become irrelevant. Payton v. N.Y., 445 U.S. 573 (1980). The command itself strikes a balance between the rights of the accused and society’s need for effective enforcement of the criminal law, and the Court is bound to accept that balance.

 Where the application of a guarantee is acknowledged to be less than clear, justices generally have taken positions that fall within a wide-ranging continuum as to the appropriate concern for practical costs. At one end of the continuum are justices who believe that administrative burdens should never be considered in reaching a result, or should be considered only where there is considerable doubt that the proposed standard would be more effective in protecting constitutional rights than a less burdensome standard. At the other end are justices who believe that, where the burden imposed would be great, the court should extend the guarantee only if the particular extension is absolutely essential to fulfilling the function of the guarantee. In between are justices who give practical costs varying weight depending upon a variety of circumstances. They will look to such factors as whether the burden will be substantial and clear (asking, for example, whether other jurisdictions have accommodated such a burden under state law standards similar to the proposed constitutional standard), whether the burden relates to an important state interest (thus, perhaps giving less weight to a mere increase in the state’s financial costs than to an increase in the inconvenience to witnesses), and whether the burden can be offset by other measures (e.g., police use of more advanced technology). Very often differences in perspective are reflected not only as to the weighing of the administrative burden but also in the justices’ evaluation of the likely scope of the burden. Thus, in Miranda, though looking at the same data, the majority concluded that its decision would “not in any way preclude police from carrying out their traditional investigatory role” and thus “should not constitute an undue interference with a proper system of law enforcement,” while one dissenter (Harlan, J.) found that the Court was taking “a real risk with society’s welfare” and another (White, J.) concluded that the Court’s ruling would “measurably weaken” the enforcement of the criminal law and result in an inability to prosecute successfully a “good many criminal defendants.”

**CHAPTER 2**

**ARREST, SEARCH AND SEIZURE**

**§ 2.1 INTRODUCTION**

1. **The Fourth Amendment**

 The Fourth Amendment to the U.S. Constitution reads: “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.” The Amendment is applicable to the states through the due process clause of the Fourteenth Amendment (see § 6.3(a)), but on both the federal and state levels governs only conduct by agents of the government (police, other government employees, and private persons acting at the direction or request of government officials). Burdeau v. McDowell, 256 U.S. 465 (1921).

 The same standards of reasonableness and probable cause govern both federal and state activities. Ker v. Cal., 374 U.S. 23 (1963); Aguilar v. Tex., 378 U.S. 108 (1964). A plurality of the Court concluded in U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990) that the word “people” in the Amendment covers only members of our “national community” and not nonresident aliens, so that the Amendment is inapplicable to the search of such a person’s Mexican residence. (Perhaps the three dissenters, together with the two concurring Justices who instead stressed the inapplicability of the Amendment’s warrant clause to foreign searches, would have produced a different result had the objection been not lack of a warrant but absence of probable cause.) Subject to the Leon or “good faith” exception (see § 6.4), direct and derivative evidence (see § 6.6) obtained in violation of the Fourth Amendment by police or by some but not all other government officials (see § 2.11(f)) is subject to exclusion in state, Mapp v. Ohio, 367 U.S. 643 (1961), as well as federal, Weeks v. U.S., 232 U.S. 383 (1914), criminal cases (regarding other proceedings, see § 6.5)), if the defendant has standing to object (see § 6.8).

1. **Seizure of the person**

 Because of the exclusionary sanction, the Fourth Amendment is more commonly thought of as a limitation on the power of police to search for and seize evidence, instrumentalities, and fruits of crime. However, an illegal arrest or other unreasonable seizure of the person is itself a violation of the Fourth and Fourteenth Amendments, Terry v. Ohio, 392 U.S. 1 (1968); Henry v. U.S., 361 U.S. 98 (1959), although it is no defense to a state or federal criminal prosecution that the defendant was illegally arrested or forcibly brought within the jurisdiction of the court, Frisbie v. Collins, 342 U.S. 519 (1952), except perhaps when the circumstances are particularly shocking. (Even abduction of the defendant in lieu of resort to an extradition treaty is no bar to prosecution when the treaty does not provide otherwise. U.S. v. Alvarez-Machain, 504 U.S. 655 (1992).)

Whether an arrest or other seizure of the person conforms to the requirements of the Constitution is nonetheless frequently a matter of practical importance. The police are authorized to conduct a limited search without warrant incident to a lawful arrest (see §§ 2.6(b), 2.7(c), 2.8(a)), and thus the admissibility of physical evidence acquired in this way depends upon the validity of the arrest. The same is true of certain other evidentiary “fruits” obtained subsequent to and as a consequence of the arrest (see § 6.6(e)).

 **(c) The major issues**

Several Fourth Amendment issues of current significance are surveyed in this Chapter. Consideration is first given to the areas and interests protected by the Amendment (see § 2.2), for they determine what constitutes a “search” and thus what activities are subject to the requirements of the Amendment. The most pervasive requirement of the Amendment is that of “probable cause,” needed for lawful arrests and searches both with and without warrant, and special attention is therefore given to the meaning and significance of this quantum-of-evidence standard (see § 2.3). Other constitutional requirements for obtaining physical evidence by search warrant (see §§ 2.4, 2.5), without a warrant (see §§ 2.6, 2.7, 2.8), and with consent (see § 2.12) are separately considered. Finally, to illustrate the flexibility of the Fourth Amendment limitations, this Chapter also covers some unique practices for which separate rules have been developed because of the limited intrusion or special need attending their use: brief detentions for purposes of investigation (see § 2.9); grand jury subpoenas (see § 2.10); and inspections and regulatory searches (see § 2.11). § 2.2

 **PROTECTED AREAS AND INTERESTS**

1. **Property interests vs. privacy interests**

What is a search under the Fourth Amendment? The traditional approach was to speak of intrusion into certain “constitutionally protected areas,” in that the Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” This property approach was rejected in Katz v. U.S., 389 U.S. 347 (1967), in favor of a privacy approach (although in more recent times the Court has sometimes returned to the property approach; see U.S. v. Jones, 132 S.Ct. 945 (2012), § 2.2(h), and Fla. v. Jardines, 133 S.Ct. 1409 (2013), § 2.2(c)). In concluding that a nontrespassory eavesdropping into a public telephone booth constituted a search, the Court declined to characterize the booth as a “constitutionally protected area”: “For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection \* \* \*. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”

The majority opinion in Katz does not elaborate upon the privacy approach, except for the helpful observation that defendant’s activities were protected because the government intrusion “violated the privacy upon which he justifiably relied.” Justice Harlan’s oft-quoted concurrence suggested a “two-fold requirement: first, that a person have exhibited an actual (subjective) expectation of privacy; and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ ” (But later, dissenting in U.S. v. White, 401 U.S. 745 (1971), he cautioned against undue emphasis upon actual expectations, which “are in large part reflections” of what the law permits.) He also noted, quite correctly, that in asking what protection the Fourth Amendment affords people (i.e., where an expectation of privacy is reasonable), it is generally necessary to answer with reference to a place, so that many of the earlier property-based decisions are not disturbed by Katz. The Fourth Amendment proscription on unreasonable “searches and seizures” extends not only to cases involving both a search and a related seizure, but also to those in which either a search or a seizure has occurred alone. Soldal v. Cook County, 506 U.S. 56 (1992). While the “searches” part of the Amendment has to do mainly with the privacy interest, as in Katz, the “seizures” part concerns the interests in possession of property and liberty of person. See U.S. v. Place, 462 U.S. 696 (1983) (detention of traveler’s luggage 90 minutes an unreasonable deprivation of defendant’s “possessory interest in his luggage” and his “liberty interest in proceeding with his itinerary”).

1. **Plain view, smell and hearing**

 It is not a search under Katz for an officer, lawfully present at a certain location, to detect something by one of his natural senses (e.g., to hear “by the naked ear” conversation in adjoining motel room). But, while “plain touch” has been analogized to plain view for some purposes, ordinarily the touching will itself constitute search activity for which a justification must be shown. Minn. v. Dickerson, 508 U.S. 366 (1993). Because physically invasive inspection is more intrusive than a purely visual inspection, the squeezing of a bus passenger’s luggage in the overhead rack, resulting in discovery of a brick-shaped object within, constitutes a search, as a bus passenger justifiably expects other passengers or bus employees to “move” or “handle” his bag but not to “feel the bag in an exploratory manner.” Bond v. U.S., 529 U.S. 334 (2000).

It is ordinarily no search when common means of enhancing the senses, such as a flashlight or binoculars, are used. U.S. v. Dunn, 480 U.S. 294 (1987); U.S. v. Lee, 274 U.S. 559 (1927). But the use of such devices in particular circumstances may be so highly intrusive as to justify the conclusion that a search has occurred, as where a highpowered telescope is used to determine from a distance of a quarter mile the contents of papers being read in a high-rise apartment. In holding aerial photography of the outdoor areas of an industrial complex was no search although objects as small as half-inch pipes were detected, the Court in Dow Chem. Co. v. U.S., 476 U.S. 227 (1986) intimated the result might be different if (1) the place of surveillance had been “an area immediately adjacent to a private home, where privacy expectations are most heightened,” (2) “any identifiable human faces or secret documents [were] captured in such a fashion,” or (3) the surveillance involved “highly sophisticated surveillance not generally available to the public.”

Also, it is a search to utilize other sophisticated means, such as an x-ray machine or magnetometer. But use of a drug dog to detect narcotics in a suitcase is no search because, unlike any other investigative procedure, it “discloses only the presence or absence of \* \* \* a contraband item” and “does not expose noncontraband items that otherwise would remain hidden from public view.” U.S. v. Place, 462 U.S. 696 (1983), applied to a dog sniff of a lawfully stopped car in Ill. v. Caballes, 543 U.S. 405 (2005). By similar reasoning, it was held in U.S. v. Jacobsen, 466 U.S. 109 (1984) that field testing of a white powder uncovered by a private search was no search, as it would only reveal whether the powder was an illegal substance. Sometimes even police action in opening a package will be treated like a plain view situation on the ground that the opening did not intrude upon any reasonable expectation of privacy. This is so as to containers whose “contents can be inferred from their outward appearance,” such as a gun case, Ark. v. Sanders, 442 U.S. 753 (1979), as to reopening of a package promptly after controlled delivery following an earlier lawful government inspection of the package’s contents, Ill. v. Andreas, 463 U.S. 765 (1983); or reopening a package after the private person who summoned police had opened the package to the same extent but then closed it, U.S. v. Jacobsen, 466 U.S. 109 (1984).

While the characterization of an observation as a nonsearch plain view situation settles the lawfulness of the observation itself, it does not inevitably follow that a warrantless seizure of the observed object would be lawful. As explained in Ill. v. Andreas, 463 U.S. 765 (1983), the plain view doctrine “authorizes seizure of illegal or evidentiary items visible to a police officer” only if the officer’s “access to the object” itself has a “Fourth Amendment justification.” Thus, if an officer standing on the public way is able to look through the window of a private residence and see contraband, he must except in exigent circumstances obtain a warrant before entering those premises to seize the contraband.

1. **Residential premises**

 Even entry and examination of residential premises is not a search if those premises have been abandoned. Abel v. U.S., 362 U.S. 217 (1960). Consistent with Katz, the proper test for abandonment in this context is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the place allegedly abandoned. Except for a hotel or motel guest, such an expectation may exist even after the rental period has expired if the tenant has not yet departed. As for premises not abandoned, it is a search for an officer to make an uninvited entry into even the hallway of a single-family dwelling, but the result is otherwise if the entry is into the common hallway of an apartment building. In the latter instance, some courts reach a contrary result if the building is sufficiently secured so that even common areas are not accessible to the general public.

Looking in or listening at a residence or other structure within the curtilage is no search if the officer uses his natural senses and is positioned on nearby public property, on the adjacent property of a neighbor, or on part of the curtilage of the premises being observed that is the normal means of access to and egress from the house. As for reliance upon sense-enhancing devices, the Court in Kyllo v. U.S., 533 U.S. 27 (2001) held that the use there of a thermal imager, which without sending rays or beams into premises determines the amount of heat emanating therefrom by measuring differences in surface temperatures of targeted objects, constituted a search. Stating a more particularized version of the Katz test for this genre of cases, the Court declared “that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search where (as here) the technology in question is not in general public use.”

As for entry of the curtilage (an area to be ascertained on a case-by-case basis “with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and other steps taken by the resident to protect the area from observation by people passing by,” U.S. v. Dunn, 480 U.S. 294 (1987)), the question under Katz is whether the conduct intrudes upon a justified expectation of privacy. But in Fla. v. Jardines, 133 S.Ct. 1409 (2013) (holding that a drug-dog’s detection of marijuana inside defendant’s residence by sniffing at his front door was a search), the Court opted for a “property-rights” approach under which the question is whether there has been “an unlicensed physical intrusion.” The Court stated a householder’s “implicit license” to potential visitors could be exceeded in three ways: (i) violating the spatial limitation by failing to “approach the home by the front path”; (ii) violating the temporal limitation by failing to act “promptly \* \* \* absent invitation to linger longer”; (iii) violating the purpose limitation, deemed the case in Jardines because the police purpose there was “to conduct a search.” Given the circularity of the latter proposition, it may be that the broader statements of purpose by the Court—“to gather evidence” or “to gather information”—are what counts, though the four dissenters in Jardines complained that such a statement of purpose would bestow the “search” characterization on any on-curtilage police discovery of evidence, even by their natural senses.

Mere looking into these lands from adjacent property will seldom constitute a search, though some courts deem this a search under Katz if the viewing can be accomplished only by most extraordinary efforts unlikely to be utilized by any curious passerby. In Cal. v. Ciraolo, 476 U.S. 207 (1986), the Court held viewing from a plane in public navigable airspace was no search because “any member of the public flying in this airspace who glanced down would have seen everything that these officers observed.” Ciraolo was followed in Fla. v. Riley, 488 U.S. 445 (1989), involving a helicopter hovering at 400 ft., but the Court cautioned flights could be so rare at some lower level, albeit within navigable air space, as to constitute a search.

1. **Other premises and places**

Before Katz, the protections of the Fourth Amendment were “not extended to the open fields,” Hester v. U.S., 265 U.S. 57 (1924), typically viewed as all lands not falling within the curtilage. Hester was reaffirmed in Oliver v. U.S., 466 U.S. 170 (1984), where the Court reasoned that such places were not covered by the Fourth Amendment’s “persons, houses, papers, and effects” language, and that a case-by-case assessment of the privacy expectation in such areas (e.g., that in Oliver the 52 land was fenced, locked and posted with “No Trespassing” signs) would make it too “difficult for the policeman to discern the scope of his authority.” In U.S. v. Dunn, 480 U.S. 294 (1987) the Court assumed that a justified expectation of privacy could exist as to a barn outside the curtilage, so that entry of it would be a search, but held it was no search merely to look into the barn from an open field vantage point. Though the Fourth Amendment mentions only “houses,” offices, stores and other commercial premises are also protected. See v. City of Seattle, 387 U.S. 541 (1967). Whether a particular investigative practice directed at such a place is a search often involves considerations similar to those discussed above as to residences, though it is no search for an officer to enter where and when there is an implied invitation for customers to come in. Md. v. Macon, 472 U.S. 463 (1985). Even if certain business premises are generally open to the public, surveillance into private areas therein, such as fitting rooms and rest rooms, constitutes a search. The outdoor area of business premises, such as the fenced grounds of an industrial plant, can “be seen as falling somewhere between ‘open fields’ and curtilage,” so that it is no search to use sophisticated aerial photography at such a place, even though physical entry probably would be deemed a search. Dow Chem. Co. v. U.S., 476 U.S. 227 (1986).

1. **Vehicles**

It is no search for the police, from a lawful vantage point, to examine the exterior of a vehicle, Cardwell v. Lewis, 417 U.S. 583 (1974), or to see the contents by looking through the windows, N.Y. v. Class, 475 U.S. 106 (1986). Entry of the car is a search under Katz, N.Y. v. Class, 475 U.S. 106 (1986), unless of course the vehicle had been abandoned in such a way that the user no longer had a reasonable expectation that the automobile would be free from governmental intrusion.

1. **Personal characteristics**

 In U.S. v. Dionisio, 410 U.S. 1 (1973), the Court held that requiring a person to give voice exemplars is no search because “the physical characteristics of a person’s voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public,” so that “no person can have a reasonable expectation that others will not know the sound of his voice.” By the same reasoning the Court ruled in the companion case of U.S. v. Mara, 410 U.S. 19 (1973) that it is no search to require a person to give handwriting exemplars. The Court has also referred to fingerprinting as nothing more than obtaining “physical characteristics \* \* \* constantly exposed to the public.” Cupp v. Murphy, 412 U.S. 291 (1973). But seizing evidence from within the body by taking a blood or urine sample quite clearly is a search. Schmerber v. Cal., 384 U.S. 757 (1966).

1. **Effects**

 It has long been accepted that the protections of the Fourth Amendment do not extend to effects that have been abandoned. Hester v. U.S., 265 U.S. 57 (1924) (containers thrown into field); Abel v. U.S., 362 U.S. 217 (1960) (items left in waste basket upon hotel checkout). After Katz, the question is not whether the object has been abandoned in the property sense, but rather whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy as to it. (See e.g., Smith v. Ohio, 494 U.S. 541 (1990), holding there was no abandonment of a grocery bag defendant placed on the hood of a car at police order and then attempted to protect from police inspection.) One has no expectation of privacy as to “trash left for collection in an area accessible to the public” (e.g., in plastic bags placed at the curb), as garbage so placed is “readily accessible” to the public; moreover, the garbage was so placed “for the express purpose of conveying it to a third party, the trash collector,” who could search it or allow others to do so. Cal. v. Greenwood, 486 U.S. 35 (1988). Because only the latter reason would apply, it is unclear what result should obtain where the collector at police request takes the garbage from well within the curtilage and then turns it over to the police.

 In Warden v. Hayden, 387 U.S. 294 (1967), the Court discarded the so-called “mere evidence” rule, whereunder objects of evidential value only could not be seized pursuant to a warrant, Gouled v. U.S., 255 U.S. 298 (1921), or incident to arrest, U.S. v. Lefkowitz, 285 U.S. 452 (1932). This rejection of the distinction between “mere evidence” and instrumentalities, fruits of crime, and contraband was based upon the conclusions that (1) nothing in the language of the Fourth Amendment supports the distinction; (2) privacy is disturbed no more by a search for evidentiary material than other property; (3) the Fourth Amendment protects privacy rather than property, so that the defendant’s or the government’s property interest in the items seized is not relevant; and (4) the distinction had spawned numerous exceptions and great confusion.

 The Court in Hayden was careful to emphasize that “the items of clothing involved in this case are not ‘testimonial’ or ‘communicative’ in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment.” This led some courts to conclude that the result would be otherwise if private papers were seized, but that position was rejected in Andresen v. Md., 427 U.S. 463 (1976). The Court there held that though the Fifth Amendment privilege against self-incrimination protects a person from having to produce testimonial documents in response to a subpoena, the privilege against self-incrimination affords no protection against a search warrant, as when a warrant is utilized the person in possession has not been compelled to make the record or to authenticate it by production. The fact that “mere evidence” is being sought, or that it is being sought from a “third party,” does not limit the manner of seizure. In Zurcher v. Stanford Daily, 436 U.S. 547 (1978), the respondent, a college newspaper, argued that, because it had not been a participant in the crime being investigated, the prosecutor had violated the Fourth and First Amendments by seeking evidence allegedly in its possession (photographs) through a warrant-authorized search of its offices rather than through a subpoena duces tecum. Rejecting this claim, the Court noted that nothing in the Fourth Amendment suggests third parties are entitled to greater protection against searches than suspects; indeed, a contrary rule would be unworkable in that search warrants are often obtained when the identity of all those involved in the crime under investigation is not known. The First Amendment also did not require use of a subpoena duces tecum instead of a warrant, but only that the Fourth Amendment requirements be applied with “particular exactitude.”

1. **Surveillance of relationships and movements**

The courts have upheld a number of surveillance practices on the questionable ground that no justified expectation of privacy was infringed because what was discovered had been revealed in a limited way to a limited group for a limited purpose. In Smith v. Md., 442 U.S. 735 (1979), for example, police use of a pen register to record the numbers called on a phone was held to be no search, as the defendant had conveyed such information to the telephone company equipment when dialing. By an equally narrow view of the Katz expectation of privacy test, it has been held that use of a mail cover, recording information on the outside of incoming mail, is no search. The Court similarly has said that a bank depositor “takes the risk, in revealing his affairs to [his bank],” that the information will be conveyed by the bank to police, and thus has no Fourth Amendment protection against such transfer. U.S. v. Miller, 425 U.S. 435 (1976).

As for use of an electronic tracking device or “beeper” to keep track of an object’s movements, the mere installation of a “beeper” in an object and its transfer to a suspect is no search because it “conveyed no information,” and is no seizure because no one’s possessory interest “was interfered with in a meaningful way.” U.S. v. Karo, 468 U.S. 705 (1984). Monitoring a beeper to keep track of one’s public movements, even if visual surveillance would not have been practicable, is no search, as one “travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” U.S. v. Knotts, 460 U.S. 276 (1983). But “monitoring of a beeper falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance,” such as that a certain object remains inside private premises. U.S. v. Karo, 468 U.S. 705 (1984).

 However, nearly 30 years later the Court unanimously ruled that the use of a much more sophisticated GPS tracking device installed on a vehicle’s undercarriage to closely track its movements over the course of 28 days constituted a search. U.S. v. Jones, 362 U.S. 257 (2012). Four concurring Justices, distinguishing the “relatively short-term monitoring” in Knotts, concluded that “the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy” where, as here, “for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving.” But the 5-Justice majority, concluding that Katz “did not repudiate” the Fourth Amendment’s concern “for government trespass upon areas \* \* \* it enumerates,” decided it sufficed in the instant case that by installing the GPS device the “Government physically occupied private property for the purpose of obtaining information.” As the concurring Justices lamented, under that view long-term and intensely close surveillance without a trespass would continue to fall outside the Fourth Amendment.

 **§ 2.3 “PROBABLE CAUSE” AND RELATED PROBLEMS**

1. **When and why “probable cause” in issue**

 The Fourth Amendment provides that “no Warrants shall issue, but upon probable cause,” and thus it is apparent that a valid arrest warrant or search warrant may only be issued upon an affidavit or complaint setting forth facts establishing probable cause. Those arrests and searches that may be made without a warrant must not be “unreasonable” under the Fourth Amendment, and because the requirements in such cases “surely cannot be less stringent” than when a warrant is obtained, Wong Sun v. U.S., 371 U.S. 471 (1963), probable cause is also required in such circumstances. Draper v. U.S., 358 U.S. 307 (1959).

When the police act without a warrant, they initially make the probable cause decision themselves, although it will be subject to after-the-fact review by a judicial officer upon a motion to suppress evidence found because of the arrest or search. When the police act with a warrant, the probable cause decision is made by a magistrate in the first instance, but his decision may likewise be challenged in an adversary setting upon a motion to suppress. However, because of the Leon “good faith” rule (see § 6.4), a finding of no probable cause in a with-warrant case will not often result in suppression. But Leon is inapplicable when the affidavit was “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” Leon indicates that as far as the executing officer is concerned, the question is “whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate’s authorization.” But Leon also requires good faith on the part of the officer applying for the warrant, and as to him the fact the magistrate acted favorably on the warrant request is irrelevant. Malley v. Briggs, 475 U.S. 335 (1986).

 Although there are many circumstances in which arrests and searches may be made without a warrant (see §§ 2.6, 2.7, 2.8), the Supreme Court has expressed a strong preference for arrest warrants, Beck v. Ohio, 379 U.S. 89 (1964), and search warrants, U.S. v. Ventresca, 380 U.S. 102 (1965), on the ground that interposing an orderly procedure whereby a neutral and detached magistrate makes the decision is better than allowing those engaged in the competitive enterprise of ferreting out crime to make hurried decisions reviewable by a magistrate only after the fact and by hindsight judgment. This preference has even resulted in a subtle difference between the probable cause required when there is no warrant and that required when there is; “in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.” U.S. v. Ventresca, 380 U.S. 102 (1965). Although there is reason to question whether before-the-fact review when warrants are sought is always as cautious as presumed by the Supreme Court, the warrant process at least has the advantage of providing a before-the-fact record of the facts upon which probable cause is based. If the police have acted without a warrant, the probable cause determination must be made primarily upon the basis of the officer’s testimony on the motion to suppress, and thus there is some risk that the facts brought out at that time may not be limited to those upon which the officer acted. But when the police have acted with a warrant, the factual justification is under the prevailing practice set out in a complaint or affidavit, and at the suppression hearing the issue is whether those pre-recorded facts show probable cause. Thus, a defective complaint or affidavit may not be saved by police testimony that they actually had additional facts, Whiteley v. Warden, 401 U.S. 560 (1971), although where not barred by statute it is possible to receive testimony that additional facts were orally presented to the magistrate under oath at the time of the warrant application.

 Even an affidavit sufficient on its face may be challenged upon a later motion to suppress. If the defendant makes a substantial preliminary showing that a false statement was included therein by an affiant who either knew the statement was false or acted with reckless disregard for the truth, and it appears that the allegedly false statement was material (i.e., necessary to the earlier probable cause finding), the Fourth Amendment requires that a hearing be held at defendant’s request. If the defendant then proves the allegation of perjury or reckless disregard by a preponderance of the evidence, the affidavit must then be judged with the false material excised. Franks v. Del., 438 U.S. 154 (1978). This is an express exception to the “good faith” rule of U.S. v. Leon, 468 U.S. 897 (1984). The Court in Franks did not require invalidation because of a material false statement negligently made, as a few courts had previously done, or because of an immaterial but deliberately false statement, as many courts had previously done.

Probable cause for arrest does not necessarily constitute probable cause for a search warrant, nor does probable cause for a search warrant necessarily provide grounds for arrest; each requires the same quantum of evidence, but as to somewhat different facts and circumstances. For a search warrant, two conclusions must be supported by substantial evidence: (1) that the items sought are connected with criminal activity; and (2) that the items will be found in the place to be searched. By comparison, for arrest there must be probable cause (1) that an offense has been committed; and (2) that the person to be arrested committed it. Thus, a showing of the probable guilt of the person whose premises are to be searched is no substitute for a showing that items connected with the crime are likely to be found there, and an affidavit for a search warrant need not identify any particular person as the offender.

1. **Degree of probability**

 The Court in Brinegar v. U.S., 338 U.S. 160 (1949) declared that “in dealing with probable cause \* \* \* we deal with probabilities,” but did not identify the degree of probability needed other than to say that “more than bare suspicion” and “less than evidence which would justify \* \* \* conviction” was required. Some of the Supreme Court’s decisions may be read as adopting a more-probable-than-not test, so that, for example, there would not be grounds to arrest unless the information at hand provided a basis for singling out but one person, e.g., Mallory v. U.S., 354 U.S. 449 (1957), though Md. v. Pringle, 540 U.S. 366 (2003) can be interpreted otherwise. But the lower court cases generally do not go this far, and instead merely require that the facts permit a fairly narrow focus, so that descriptions fitting large numbers of people or a large segment of the community will not suffice. This permits an arrest to be made on the somewhat general descriptions often given by crime victims or witnesses, though courts are not inclined to be as lenient when the uncertainty goes to whether any crime has occurred, as when the police observe suspicious activity. As to this latter situation, it is commonly said that arrest and search based on events as consistent with innocent as with criminal activity are unlawful.

Brinegar also characterized the probable cause requirement as “the best compromise that has been found for accommodating” the often opposing interests of privacy and effective law enforcement. This raises the question of whether this “compromise” must always be struck in precisely the same way, or whether instead probable cause may require a greater or a lesser quantum of evidence, depending upon the facts and circumstances of the individual case. As discussed later herein (see §§ 2.9, 2.11), certain unique investigative techniques that involve significantly lesser intrusions into freedom and privacy are governed by a less demanding probable cause standard. Also, some investigative activities are so intrusive that more than the usual probable cause showing is needed. Winston v. Lee, 470 U.S. 753 (1985) (obtaining evidence by surgery requires, inter alia, strong need for that evidence). Compare N.Y. v. P.J. Video, Inc., 475 U.S. 868 (1986) (fact First Amendment interests involved does not require higher probable cause standard). The Court has wisely declined to adopt a sliding-scale probable cause formulation requiring a weighing and balancing of the competing interests in each and every case. Dunaway v. N.Y., 442 U.S. 200 (1979).

1. **Information to be considered**

Probative evidence may be considered in determining whether there is probable cause, without regard to whether such evidence would be admissible at trial. Thus, it is proper to consider hearsay, Draper v. U.S., 358 U.S. 307 (1959), and a prior police record, Brinegar v. U.S., 338 U.S. 160 (1949). As the Court explained in Brinegar, those rules of evidence at trial that exclude probative evidence because of “possible misunderstanding or misuse by the jury” have no place at the probable cause determination, where “we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” Probable cause may not be established by showing the arresting or searching officer subjectively believed he had grounds for his action. Beck v. Ohio, 379 U.S. 89 (1964).

1. **Information from informants**

Those probable cause cases that have reached the Supreme Court have dealt almost exclusively with the troublesome question of when probable cause may be established solely upon the basis of information from an informant or upon such information plus some corroborating facts. Under the traditional view, if probable cause is to be based solely upon the informant’s information, then the warrant application or the testimony at the suppression hearing if there was no warrant must reveal (1) underlying circumstances showing reason to believe that the informant is a credible person, and (2) underlying circumstances showing the basis of the conclusions reached by the informant. Aguilar v. Tex., 378 U.S. 108 (1964). This “two-pronged test” of Aguilar was abandoned in Ill. v. Gates, 462 U.S. 213 (1983), discussed below, but Gates declares that “veracity” and “basis of knowledge” remain “highly relevant,” so it is still useful to think about those two factors.

For example, a search warrant affidavit merely stating that a credible informant reported that narcotics are concealed in certain premises (as in Aguilar) is defective in two respects. First, there is no disclosure of why the informant is believed to be a credible person, such as that he provided information on past occasions which investigation proved to be correct, McCray v. Ill., 386 U.S. 300 (1967), or that his statement constituted an admission against his own penal interest, U.S. v. Harris, 403 U.S. 573 (1971). But such disclosure alone should not be enough, for even a credible person may reach unjustified conclusions on the basis of circumstantial evidence or information from unreliable sources. That is, even if it were established that the informant was a credible person, it would still be unclear whether he asserted that there were narcotics in the house because (a) he saw them there, (b) he assumed they were there because of defendant’s suspicious conduct, or (c) he was told by someone that they were there. Probable cause cannot be reliably determined without deciding which is the case, for while an informant’s direct observation of criminal conduct would suffice, McCray v. Ill., 386 U.S. 300 (1967), it cannot be decided whether the suspicious conduct is adequate unless the precise nature of that conduct is revealed to the judge, U.S. v. Ventresca, 380 U.S. 102 (1965), while hearsay-upon-hearsay can hardly be adequate unless it is determined that the ultimate source of the information was also credible and in a position to know of what he speaks.

If the underlying circumstances concerning the informant’s credibility are shown, but the source of his information is not disclosed, it must then be considered whether the informant’s tip is “in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual’s general reputation.” Spinelli v. U.S., 393 U.S. 410 (1969). The Court in Spinelli said that the detail provided in Draper v. U.S., 358 U.S. 307 (1959), “provides a suitable benchmark.” There, when an informant who had given reliable information in the past indicated that one Draper was peddling narcotics and that he would return from Chicago by train on one of two days with narcotics, and also described Draper and his clothing and said he would be carrying a tan zipper bag and that he habitually walked fast, there was at that moment probable cause for arrest. The officers knew from their past experience that the informant was credible, but they did not know the exact source of his information; yet there was probable cause, for, as the Court later explained in Spinelli, the agents had been given so many details that they could “reasonably infer that the informant had gained his information in a reliable way.” That is, the informant had given enough details to justify the conclusion that his source was reliable—either direct observation, admissions by the defendant, fair conclusions drawn from circumstantial evidence, or information given by another who was reliable and in a position to know.

This self-verifying detail analysis must be distinguished from the question whether it is significant that there has been partial corroboration of the informant’s tale. The Supreme Court has relied upon corroboration when neither the informant’s basis of knowledge nor his veracity was otherwise clearly established. Thus in Ill. v. Gates, 462 U.S. 213 (1983), where an anonymous letter said a named couple made their living selling drugs and predicted the husband would soon fly to Florida and drive back with another supply, and later police surveillance established he did fly to Florida and then drive northward on an interstate highway, this was deemed sufficient corroboration to show probable cause. The Court stressed that “future actions of third parties ordinarily are not easily predicted,” and that the observed conduct, though on its face innocent activity, was “as suggestive of a pre-arranged drug run, as it is of an ordinary vacation trip.” (Some cases are much easier than Gates because the informer’s story will prompt a surveillance by which police see actions so highly suggestive of criminal conduct that the observation itself will amount to probable cause, in which case neither the credibility of the informant nor the basis of his knowledge is important. Adams v. Williams, 407 U.S. 143 (1972).)

But the greater significance of Gates lies in the Court’s abandonment of the Aguilar “two-pronged test” in favor of a “totality of the circumstances analysis.” Two unconvincing reasons were given for such a shift: (1) that such a “flexible” standard would be easier for laymen police and magistrates to understand and apply; and (2) that veracity and basis of knowledge should not have “independent status” because “a deficiency in one may be compensated for \* \* \* by a strong showing as to the other.” Logically, that is not so. A described basis of knowledge coming from an informant of unknown veracity does not establish veracity (as compared to detailed prevarication). Also, known veracity does not show a basis of knowledge, as is reflected by the Court’s repeated holdings “that the unsupported assertion or belief of [a presumptively reliable] officer does not satisfy the probable cause requirement.” Ill. v. Gates, 462 U.S. 213 (1983) (White, J., conc.). Just how much Gates has “watered down” the probable cause standard is uncertain, but it is clear that a “bare bones” affidavit of the Aguilar variety is still far off the mark. Gates cautions: “Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.”

When probable cause is based in whole or in part upon information from an informant, his identity need not always be disclosed at the suppression hearing. Disclosure is not required when the officer has testified in full and has been cross-examined as to what the informant told him and as to why the information was believed trustworthy. McCray v. Ill., 386 U.S. 300 (1967). Although disclosure may be compelled if there is good reason to doubt the officer’s credibility, many courts protect more broadly against perjury and at the same time honor the informer privilege by requiring disclosure only in camera when the defendant has fairly put into issue the existence of the informant or the correctness of the officer’s report of the informer’s tale or prior performance.

1. **Information from other sources**

 The reliability of informants used to uncover narcotics and gambling offenses has been a matter of special concern because they are often engaged in criminal conduct themselves. Thus, when the facts are provided by a police officer, U.S. v. Ventresca, 380 U.S. 102 (1965), a crime victim, an eyewitness, a cooperative citizen, Jaben v. U.S., 381 U.S. 214 (1965), or an informant not from the criminal milieu, there is no comparable need for establishing credibility. It is still necessary to show why the person giving the information has a basis for his knowledge, although the number of details that need be disclosed varies depending upon the circumstances. See Jaben v. U.S., 381 U.S. 214 (1965), pointing out that tax evasion is not a crime one might directly observe and that therefore there need not be disclosure of the details of the investigation into defendant’s income. A warrantless arrest based upon the conclusory statements or directive of another policeman (i.e., that a certain person should be arrested) is not per se illegal, but will be upheld only upon a subsequent showing that the instigating official possessed facts constituting probable cause. Whiteley v. Warden, 401 U.S. 560 (1971). Inconclusive direct observations by an officer can amount to probable cause, as in Md. v. Pringle, 540 U.S. 366 (2003), deeming it a “reasonable inference,” where police find drugs concealed in a car, that “any or all three of the occupants had \* \* \* exercised dominion and control” of them.

“No more for dogs than for human informants” is a rigid approach to determining reliability called for, the Court stated in Fla. v. Harris, 133 S.Ct. 1050 (2013), rejecting the lower court’s requirement that the state in every case must present an exhaustive set of records showing a drug-detection dog’s reliability. Probable cause was deemed present in the instant case, as the state showed the dog “had successfully completed two drug-detection courses and maintained his proficiency through weekly training exercises,” while defendant’s evidence purporting to show two false alerts to his vehicle might be attributable to defendant, a regular meth user, transferring the odor to the door handle.

1. **Unconstitutional statute**

 What if the officer has information providing probable cause to believe that the suspect has violated a criminal statute, but the statute itself is later held unconstitutional? In Mich. v. DeFillippo, 443 U.S. 31 (1979), the defendant was arrested pursuant to a local ordinance, later held unconstitutional, making it a violation for a person lawfully stopped to refuse to produce evidence of his identity. Upholding the admission of drugs seized in a search incident to that arrest, the Court noted that a “prudent officer” could not be required “to anticipate that a court would later hold the ordinance unconstitutional.” That rule is to be distinguished from the Krull doctrine (§ 6.4(c)), applying a “good faith” exception as to such reliance upon statutes conferring search power later found unconstitutional.

**§ 2.4 SEARCH WARRANTS: ISSUANCE**

1. **Who may issue**

Where a state attorney general, as authorized by state law, issued a search warrant in the context of an investigation of which he had taken personal charge, this procedure violated the Fourth Amendment, as he “was not the neutral and detached magistrate required by the Constitution.” Coolidge v. N.H., 403 U.S. 443 (1971). But it is not necessary “that all warrant authority must reside exclusively in a lawyer or judge”; an issuing magistrate need only be “neutral and detached” and “capable of determining whether probable cause exists,” and thus a clerk of court could be authorized to issue arrest warrants for municipal ordinance violations. Shadwick v. City of Tampa, 407 U.S. 345 (1972). It does not necessarily follow that a clerk could be permitted to issue search warrants, as to which the probable cause issues are often much more complex. Even a judicial officer may not issue a warrant if he has such a personal interest in the matter that his impartiality is in doubt, as where a magistrate receives a fee only when he responds affirmatively to warrant requests. Connally v. Ga., 429 U.S. 245 (1977). A magistrate’s conduct may show he is not “neutral and detached,” as in Lo-Ji Sales, Inc. v. N.Y., 442 U.S. 319 (1979), where the judge allowed himself to become “the leader of the search party which was essentially a police operation.” If a magistrate conducts himself in such a fashion in a particular case that he is not “neutral and detached,” it appears that under the Leon “good faith” doctrine (see § 6.4(b)) suppression is required only if the police actually knew that the magistrate had “wholly abandoned his judicial role.”

1. **Passage of time since facts gathered**

 If information showing probable cause that a crime was committed is gathered, and assuming no other evidence to the contrary is later uncovered, this probable cause will still be present weeks, months, or years later. The same is not true, however, as to information showing probable cause to believe that certain items are to be found at a particular place. As time passes, the chances increase that the goods have since been removed from that location. For this reason, an affidavit in support of a search warrant must contain a statement as to the time when the facts relied upon occurred. This statement of time must be reasonably definite, but declarations that the observations were made “recently” or “within” or “during” a named period have been approved. Rugendorf v. U.S., 376 U.S. 528 (1964).

Just how long a time period may elapse without probable cause vanishing “must be determined by the circumstances of each case.” Sgro v. U.S., 287 U.S. 206 (1932). Generally, a longer time will be allowed as to an ongoing criminal enterprise as compared to a one-shot criminal episode. Thus 49 days is not too long re a search for forged tax stamps being used in an elaborate and extensive counterfeiting scheme, but 4 days might be deemed too long as to a one-time illegal sale of liquor. It is also generally true that more time will be tolerated when the search is for items having continuing utility and not strongly incriminating. Thus, the passage of 3 months from a bank robbery is not too long as to search for clothing worn by the robber, but is too long as to search for the bank’s money bag. Likewise relevant is the extent to which the criminal would have had access to the place to be searched during the time that has elapsed.

1. **Anticipatory warrants**

Somewhat the converse issue is presented by the use of an anticipatory search warrant, one based upon an affidavit showing probable cause as to the presence of certain evidence at a specific place at some future time (but not presently). In U.S. v. Grubbs, 547 U.S. 90 (2006), the Court ruled that “when an anticipatory warrant is issued, ‘the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed,’ ” and then adopted a two-pronged probable cause standard for anticipatory search warrants. It is necessary not only (i) that upon occurrence of the triggering condition (typically a controlled delivery of a package known to contain contraband to the premises named in the warrant) “there is a fair probability that contraband or evidence will be found in a particular place,” but also (ii) “that there is probable cause to believe the triggering condition will occur” with respect to that place. Grubbs’ claim that this triggering condition must be set out in the warrant and not just in the affidavit was rejected on the ground that the Fourth Amendment identifies only two matters, the place to be searched and the things to be seized, that need to be specified in the warrant. But the Court cautioned that if “the government were to execute an anticipatory warrant before the triggering condition occurred,” such execution would violate the Fourth Amendment, for then “there would be no reason to believe the items described in the warrant could be found at the searched location.”

1. **Particular description of place or person to be searched**

The Fourth Amendment provides that no warrants shall issue except those “particularly describing the place to be searched.” This means the description must be such that the executing officer can “with reasonable effort ascertain and identify the place intended.” Steele v. U.S., 267 U.S. 498 (1925). (However, under the Leon “good faith” exception to the exclusionary rule, see § 6.4(b), suppression is required only if the warrant is “so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.”)

In describing premises to be searched, more care is generally required in urban areas than in rural areas. Farm property, for example, might merely be described in a general way and identified by section, township and range number. In a city, however, a building must be identified by street and number or by an equally specific description. Steele v. U.S., 267 U.S. 498 (1925). Minor errors in description, such as an incorrect street number, will not invalidate a warrant if it is still apparent what building or what part of a building is to be searched. In multiple-occupancy structures, the particular unit to be searched must be identified by occupant, room number, or apartment number, unless the multi-unit character of the property was reasonably not known to the officers applying for or executing the warrant and was not externally apparent. Similarly, full execution of a warrant authorizing search of an apartment covering the entire third floor is lawful where the police failure to perceive at execution that there were two apartments on that floor “was objectively understandable and reasonable.” Md. v. Garrison, 480 U.S. 79 (1987).

If a search warrant is obtained for search of an automobile, the description must direct the executing officer to one specific vehicle, either by license number or by the make of the car and the name of the operator. As to misdescription, the question again is whether the officer could select the proper vehicle, and thus a license number is sufficient notwithstanding a mistake as to the color and model year of the car.

A valid warrant for the search of a certain person must indicate the person’s name, if known. If his name is not known, an otherwise complete description, listing such facts as the individual’s aliases, approximate age, height and weight, race, and clothing, is adequate.

1. **Particular description of things to be seized**

The Fourth Amendment also provides that no search warrants shall issue except those “particularly describing the \* \* \* things to be seized.” “The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible \* \* \*. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” Marron v. U.S., 275 U.S. 192 (1927). (Here again, it must be noted that under the Leon rule, see § 6.4(b), suppression is necessary only if the warrant is “so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume to be valid.” A somewhat different application of this “good faith” exception was involved in Mass. v. Sheppard, 468 U.S. 981 (1984), holding the evidence need not be suppressed when the search warrant misdescribed the items to be seized but the police officer relied on the magistrate’s representation he had corrected the description to match that officer’s correct description in his affidavit.)

The degree of particularity required varies somewhat depending upon the nature of the materials to be seized. Greater leeway is permitted in describing contraband (property the possession of which is a crime), and thus during Prohibition a description merely of “cases of whiskey” would suffice. Steele v. U.S., 267 U.S. 498 (1925). By comparison, innocuous property must be described more specifically so that executing officers will not be confused between the items sought and other property of a similar nature which might well be found on the premises. The particularity requirement requires even closer scrutiny of warrants for documents because of the potential they carry for very serious intrusions into privacy. Andresen v. Md., 427 U.S. 463 (1976).

Because of First Amendment considerations, this constitutional requirement “is to be accorded the most scrupulous exactitude when the ‘things’ are books, and the basis for their seizure is the ideas they contain,” Stanford v. Tex., 379 U.S. 476 (1965), or when they are the papers of a newsgathering organization. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). Also, in obscenity cases a search warrant may not authorize the seizure of great quantities of the same publication before the owner has had an opportunity to litigate the question of obscenity, for this would be an unconstitutional prior restraint. A Quantity of Copies of Books v. Kan., 378 U.S. 205 (1964). For the same reason, seizure of even a single copy of a film may not continue if it would prevent further showing of that picture by the exhibitor. Heller v. N.Y., 413 U.S. 483 (1973).

A defective description in the warrant sometimes may be saved by an adequate description in the affidavit. But Groh v. Ramirez, 540 U.S. 551 (2004) held this permissible only “if the warrant used appropriate words of incorporation, and if the supporting document accompanies the warrant,” apparently on the ground that only then is there sufficient notice to the occupant when a copy of the warrant is left at the conclusion of the search. But the Court emphasized it was dealing with a case where the warrant did not describe the items to be seized “at all,” and distinguished other cases, such as where a warrant description contained “a mere technical mistake or typographical error.”

If a search warrant is issued to search a place for several items, but it is later determined that not all of those items are described with sufficient particularity or that probable cause does not exist as to all of them, it is often possible to severe the tainted portion of the warrant from the valid portion so that evidence found in execution of the latter will be admissible. Assume, for example, a warrant for a gun used in and money taken in a bank robbery, and assume also that there is probable cause to search for the gun and that it is particularly described but that there is either no continuing probable cause or no adequate description of the money. If the police, while looking in a desk drawer for the gun, were to find money that by its wrappings clearly came from that robbery, the money would be admissible because found in plain view in execution of the valid part of the warrant. But if the money was found after the gun was located or by looking where the gun could not be (e.g., an envelope), the money would not be admissible.

 **§ 2.5 SEARCH WARRANTS: EXECUTION**

1. **Time of execution**

Even where statutes or court rules purport to authorize execution within a fixed period of time, e.g., 10 days, the better view is that execution even within that time is permissible only if the probable cause recited in the affidavit continues until the time of execution, giving consideration to the intervening knowledge of the officers and the passage of time. Three members of the Court have suggested that a search warrant may be executed at night only upon a special showing of a need to do so, as provided by law in several jurisdictions, because of the “Fourth Amendment doctrine that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches.” Gooding v. U.S., 416 U.S. 430 (1974). A search warrant may be executed in the absence of the occupant.

1. **Entry without notice**

The common statutory requirement that police ordinarily must give notice of their authority and purpose prior to making entry in the execution of a search warrant is grounded in the Fourth Amendment, Wilson v. Ark., 514 U.S. 927 (1995), for it serves to decrease the potential for violence, protect privacy, and prevent the physical destruction of property. (However, under Hudson v. Mich., 547 U.S. 586 (2006), discussed in §§ 6.3(e), 6.6(d), the exclusionary rule is inapplicable to violation of this knock-and-announce requirement.) Police are sometimes excused from the usual notice requirements, but the so-called “blanket rule,” where, for example, all felony cases were deemed to involve a sufficient risk of evidence destruction to justified entry without notice, was rejected by the Supreme Court in Richards v. Wis., 520 U.S. 385 (1997) as too broad.

Richards held that police are excused only when, under the circumstances of the particular case, they have a “reasonable suspicion” that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. Illustrative is U.S. v. Ramirez, 523 U.S. 65 (1998), involving execution of a search warrant authorizing entry to seize a wanted person, where the Court concluded there was a reasonable suspicion giving notice would be dangerous to the police or others, as police had confirmed an informant’s assertion that the wanted person might be inside, and that person was a prison escapee with a violent past, reportedly had access to a large supply of weapons, and had vowed he would not do federal time.

 U.S. v. Banks, 540 U.S. 31 (2003) deals with two aspects of the absence of a response following notice: (1) police may reasonably conclude they have been refused admittance when, on the known facts, it reasonably appears the occupant has had time to get to the door; but (2) a lesser time (e.g., 15–20 seconds in Banks) will excuse not waiting longer if in that time the occupant could have reached readily disposable contraband.

**(c) Detention and search of persons on the premises to be searched**

An individual who merely happens to be present in premises where a search warrant is being executed may not, by virtue of that fact alone, be subjected to a search of his person. This is because such a search “must be supported by probable cause particularized with respect to that person,” a requirement which “cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause \* \* \* to search the premises where the person may happen to be.” Ybarra v. Ill., 444 U.S. 85 (1979).

Of course, if probable cause to search that person did exist and was established when the warrant to search the premises was obtained, that warrant could also authorize search of the person. During execution of a warrant lacking such authorization, a person might be discovered within as to whom there are grounds for arrest, in which case a search of the person could be undertaken incident to arrest and without reliance upon the search warrant. Marron v. U.S., 275 U.S. 192 (1927). Or, if there are not grounds to arrest but yet probable cause that the person has in his possession the items named in the search warrant, this would appear to be an additional basis for the search, for there would not be time to seek an additional warrant. But an actual search of such a person may not be undertaken merely because of suspicion that person may have the objects named in the search warrant. Ybarra v. Ill., 444 U.S. 85 (1979). If there is some basis for thinking that the person may be armed, and if only a frisk is undertaken, this would seem proper, as intimated in Los Angeles Co., Cal. v. Rettele, 550 U.S. 609 (2007). Cf. Terry v. Ohio, 392 U.S. 1 (1968) (discussed in § 2.9).

In Mich. v. Summers, 452 U.S. 692 (1981), the Court held that a resident of premises where a search warrant for contraband is to be executed may be detained there during warrant execution. The Court explained that such detention would serve three important government interests: (1) preventing flight in the event incriminating evidence was found; (2) minimizing the risk of harm to the police; and (3) facilitating the orderly completion of the search. Per Muehler v. Mena, 544 U.S. 93 (2005), a Summers detainee may sometimes be handcuffed (as when the warrant authorizes a search for weapons and there are multiple detainees), and may be questioned about matters unrelated to the warrant if the questioning does not extend the length of the detention. In Bailey v. U.S., 133 S.Ct. 1031 (2013), the Court held that Summers is limited to instances in which “an occupant was detained within the immediate vicinity of the premises to be searched,” as such limitation not only squares with the “three important law enforcement interests” recognized in Summers, but also excludes action which would “resemble a full-fledged arrest” more than the “limited” intrusion allowed by Summers.

1. **Seizure of items not named in the warrant**

Even if, as required, the police look within the described place only where the described items might be located, Harris v. U.S., 331 U.S. 145 (1947), and terminate the search once those items are discovered, they may find supposed incriminating evidence other than that named in the warrant. As to this situation, the Court stated in Coolidge v. N.H., 403 U.S. 443 (1971): “Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence [in plain view], it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.” The requirement that the discovery be “inadvertent” was abandoned in Horton v. Cal., 496 U.S. 128 (1990), where the Court explained it disapproved of Fourth Amendment “standards that depend upon the subjective state of mind of the officer” and believed the Amendment’s particularity-of-description requirement would serve “the interest in limiting the area and duration of the search that the inadvertence requirement inadequately protects.” But the observed item may be seized only if there is probable cause it constitutes the fruits, instrumentalities or evidence of crime. Reasonable suspicion that the article is of such character is an insufficient basis for a closer examination of the item (e.g., picking it up to reveal a serial number) not otherwise permissible in executing the warrant. Ariz. v. Hicks, 480 U.S. 321 (1987).

1. **Notice**

 In City of West Covina v. Perkins, 496 U.S. 292 (1999), the Supreme Court concluded “that when law enforcement agents seize property pursuant to warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return” (to be distinguished from the kind of notice required by Groh v. Ramirez, 540 U.S. 551 (2004); see § 2.4(e)). In Perkins, police had left at the premises a notice of the warrant execution and an inventory of the property seized, so the Court did not have occasion to “decide how detailed the notice of the seizure must be or when the notice must be given” or whether violation of this 14th Amendment requirement would provide a basis for evidence suppression. The Court went on to hold that there is no constitutional requirement of “individualized notice of state-law remedies [for recovery of the property seized] established by published, generally available statute and case law.”

**§ 2.6 WARRANTLESS SEARCHES AND SEIZURES OF PERSONS**

1. **Arrest**

The prevailing view, as a matter of state law, is that an arrest warrant is not required in serious cases notwithstanding the practicability of obtaining one before arrest. Arrest without warrant was lawful at common law when the officer had “reasonable grounds to believe” that a felony had been committed and that the person to be arrested had committed it, and this is the prevailing rule today either as a matter of statute or court decision. This “reasonable grounds” test and the “probable cause” requirement of the Fourth Amendment “are substantial equivalents.” Draper v. U.S., 358 U.S. 307 (1959). While an indictment fair on its face returned by a properly constituted grand jury supplies the requisite probable cause for issuance of an arrest warrant, the same is not true of a conclusory information sworn to by the prosecutor. Kalina v. Fletcher, 522 U.S. 118 (1997).

The common law rule with respect to misdemeanors was quite different: a warrant was required except when the offense occurred in the presence of the arresting officer, and some authorities recognized a second requirement that the offense in question constitute a “breach of the peace.” But because of the “divergent conclusions” reached on the latter point prior to adoption of the Fourth Amendment, as well as the longstanding state and federal practice of authorizing warrantless arrests for misdemeanors not amounting to a breach of the peace, the Court has rejected the claim that the breach-of-the-peace limitation is a part of the Fourth Amendment reasonableness requirement. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). Atwater notes there was no need in that case to speculate about whether the in presence requirement was a part of the Fourth Amendment, as to which lower courts have quite consistently answered in the negative. On the view that there may be a need to arrest for a misdemeanor not occurring in any officer’s presence, several jurisdictions have adopted the felony warrantless arrest rule for misdemeanors as well.

With the exception of the case in which private premises must be entered to make the arrest (see § 2.7(a)), there is no constitutional requirement that an arrest warrant be obtained when it is practicable to do so. While the Court has expressed a “preference for the use of arrest warrants when feasible,” see Gerstein v. Pugh, 420 U.S. 103 (1975), it also has declined “to transform this judicial preference into a constitutional rule,” U.S. v. Watson, 423 U.S. 411 (1976). Such a rule, it noted in Watson, would “encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances.” On the other hand, Gerstein v. Pugh, 420 U.S. 103 (1975) held that once a warrantless arrest is made, the Fourth Amendment “requires a [prompt] judicial determination of probable cause as a prerequisite to extended restraint on liberty following [the warrantless] arrest.” That determination, upon a standard which “is the same as that for arrest,” may be made in an ex parte proceeding (i.e., without defense participation) in the same manner as the issuance of a warrant. A probable cause determination within 48 hours of arrest is presumptively reasonable, though a particular defendant may show such a delay was unreasonable because “for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay’s sake.” On the other hand, a later probable cause determination is presumptively unreasonable, meaning “the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.” Co. of Riverside v. McLaughlin, 500 U.S. 44 (1991). Whether an untimely probable cause determination requires suppression of the arrestee’s earlier confession “remains an unresolved question.” Powell v. Nev., 511 U.S. 79 (1994).

Rejecting the contention that Watson means the Fourth Amendment has nothing to say about how a seizure is made, the Court in Tenn. v. Garner, 471 U.S. 1 (1985) held that the use of deadly force to arrest a fleeing felon is unreasonable unless “the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.” The Fourth Amendment reasonableness standard (1) applies to “all claims that law enforcement officers have used excessive force—deadly or not—in the course of” any seizure; (2) “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight”; (3) “must embody allowance for the fact that police officers are often forced to make split-second judgments \* \* \* about the amount of force that is necessary in a particular situation”; and (4) asks “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” Graham v. Connor, 490 U.S. 386 (1989). This standard applies only to Fourth Amendment activity (such as the high-speed chase in Scott v. Harris, 550 U.S. 372 (2007), upheld because the Court was “loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other peoples’ lives in danger”), not other police conduct, which is instead governed by the due process shocks-the-conscience standard of the 14th Amendment. Co. of Sacramento v. Lewis, 523 U.S. 833 (1998).

1. **Search incident to arrest**

 “When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape [and to] seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.” Chimel v. Cal., 395 U.S. 752 (1969). Given this justification, doubt existed for some time as to whether a search could be undertaken incident to an arrest for a lesser offense, such as a minor traffic violation, where there would be no evidence to search for and a relatively lesser risk that the arrestee would be armed. But in U.S. v. Robinson, 414 U.S. 218 (1973), the Court held that a full search of the person incident to a “full custody arrest” (i.e., one made for the purpose of taking the person to the station) may be undertaken without regard to “what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect,” apparently on the ground that it would be unwise to have courts second-guessing such a “quick ad hoc judgment” by arresting officers. The limited frisk alternative of Terry (see § 2.9(d)) was deemed insufficient in the case of arrest, as “the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.”

What the officer may do absent a “custodial arrest” was later reached in Knowles v. Iowa, 525 U.S. 113 (1998), where the search came after an officer stopped Knowles for speeding but then issued him a citation pursuant to a statute permitting but not requiring that alternative course of action. A unanimous Supreme Court held the two search-incident-to-arrest rationales discussed in Robinson did not justify the search. The threat to officer safety, the Court concluded, was far less than where (as stated in Robinson) there is “extended exposure which follows the taking of a suspect into custody and transporting him to the police station.” The concern with officer safety was thus deemed sufficiently met by the officer’s authority recognized in earlier decisions: to require the driver, Pa. v. Mimms, 434 U.S. 106 (1977), and passenger, Md. v Wilson, 519 U.S. 408 (1997), of the stopped vehicle to get out of the car; to frisk the driver and any passenger on a “reasonable suspicion they may be armed and dangerous,” Terry v. Ohio, 392 U.S. 1 (1968); and to make a limited search of the passenger compartment upon reasonable suspicion “that an occupant is dangerous and may gain immediate control of a weapon,” Michigan v. Long, 463 U.S. 1032 (1983). As for the second Robinson rationale, the “need to discover and preserve evidence,” it was not present in Knowles because there was no evidence of speeding to be found. Left unresolved was the question whether, incident to citation for an offense for which there could be such evidence, the officer would have the search authority he would have if he instead had opted for custodial arrest, or whether instead any search would have to be justified by showing probable cause to search.

The Supreme Court’s ruling in Robinson makes more significant the longstanding issue of what items are subject to seizure once discovered. Clearly seizure is not limited to the items sought; “when an article subject to lawful seizure properly comes into an officer’s possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for.” Abel v. U.S., 362 U.S. 217 (1960). But in Abel there was probable cause to seize the item in question, and on this ground Abel was distinguished in a case where the officer seized an unlabeled bottle of pills from the pocket of a defendant arrested for public intoxication. The court, noting the absence of cases in point, concluded that the seizure was improper because the officer acted only upon suspicion that the pills might be narcotics and not upon reasonable grounds to believe that the article he has discovered is contraband. Compare the situation as to seizure of items not named in a search warrant, § 2.5(d), which likewise raises the question of how much discretion should be left to the searching officer; and consider Warden v. Hayden, 387 U.S. 294 (1967), where the court, in rejecting the contention that abolition of the “mere evidence” rule would result in indiscriminate seizures, emphasized that there “must, of course, be a nexus \* \* \* between the item to be seized and criminal behavior,” and that “probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.”

1. **Time of search; inventory**

It is clear that a search cannot be justified as being “incident” to arrest if the search is conducted without arrest and at a time when a lawful arrest could not be made because sufficient grounds are lacking or because of physical inability to make an arrest at that time. But a search of the person qualifies as a search incident to arrest if “the formal arrest followed quickly on the heels” of that search and was sufficiently grounded upon facts other than those uncovered by the search. Rawlings v. Ky., 448 U.S. 98 (1980). This is a sound position, as a search before arrest when there are grounds to arrest involves no greater invasion of the person’s security and privacy, and has the advantage that if the search is not productive the individual may not be arrested at all. If there was no present intent to arrest and arrest does not promptly follow the search, then the search is not properly characterized as “incident” to arrest, but it is still lawful if made upon probable cause and limited to the extent “necessary to preserve highly evanescent evidence,” e.g., fingernail scrapings. Cupp v. Murphy, 412 U.S. 291 (1973).

 Courts have generally upheld delayed searches of the person arrested (such as those made on the way to or at the station), either on the theory that police control of the person by arrest is so substantial that it of necessity carries with it a continuing right of search, or on the ground that the police are entitled to inventory the property found on a person before placing him in a cell. A contrary result has sometimes been reached because of a prior failure of the police to permit the defendant to exercise his right of stationhouse release. Police need not resort to less intrusive means than the inventory of all effects found on or in possession of a person arrested, provided such searches are pursuant to “standardized inventory procedures.” Ill. v. Lafayette, 462 U.S. 640 (1983). In U.S. v. Edwards, 415 U.S. 800 (1974), the Court held that “once the defendant is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing on the one hand and the taking of the property for use as evidence on the other,” at least where such searches are not unreasonable “either because of their number or their manner of perpetration.”

This qualification suggests that neither Robinson nor Edwards disturb the holding in Schmerber v. Cal., 384 U.S. 757 (1966) that, except where delay would threaten loss of the evidence, a search warrant is required to intrude into an arrestee’s body. (But see § 2.6(e) regarding a DNA cheek swab.) A post-Schmerber ambiguity, “whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigation,” was answered in the negative in Mo. v. McNeely, 133 S.Ct. 1552 (2013). The Court did not have occasion to determine precisely how the exigent circumstance test should be applied in this context, though some Justices suggested the question is merely whether there was “time to secure a warrant before blood can be drawn.”

1. **“Subterfuge” and unnecessary arrests**

Robinson has been criticized on the ground that it opens the door to “subterfuge” arrests for minor offenses made to support searches of persons for evidence of more serious offenses as to which probable cause is lacking, particularly in light of the fact that Robinson was applied in the companion case of Gustafson v. Fla., 414 U.S. 260 (1973) to a situation in which the officer had complete discretion as to whether to arrest or give a citation and whether to search if an arrest was made. Evidence has sometimes been suppressed upon a showing that the desire to seek such evidence was the motivation behind arrest for such minor crimes as vagrancy or a traffic violation, but courts have often overlooked strong evidence of such a “subterfuge.” More recently, however, the pretextual arrest issue appears to have been settled by Whren v. U.S., 517 U.S. 806 (1996), where it was indicated that neither the officer’s subjective motivations nor his departure from usual practice could ordinarily place an otherwise-valid arrest into question. Specifically, the Court stated that with “rare exception” (later stated to be “searches and seizures conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests”), the reasonableness of Fourth Amendment activity “is not in doubt where the search or seizure is based on probable cause.” (Although Whren involved a traffic stop, it was assumed to cover custodial arrests as well, as the Court later confirmed in Ark. v. Sullivan, 532 U.S. 769 (2001).)

The Whren decision made even more significant the issue alluded to in Gustafson, i.e., whether the Fourth Amendment reasonableness requirement imposed some limitation upon the power of police to opt for arrest in lieu of a citation in the case of minor offenses. But in Atwater v. City of Lago Vista, 532 U.S. 318 (2001), where a § 1983 plaintiff was arrested for a seat belt violation, the Court rejected 5–4 plaintiff’s claim that custodial arrest was constitutionally forbidden, “even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention.” Such a rule, the majority objected, would lack “the values of clarity and simplicity” needed for any rule intended to govern a police decision made “on the spur (and in the heat) of the moment,” a price not worth paying absent any showing that “unnecessary minor-offense arrests” are at all common. (The Court later held in Va. v. Moore, 553 U.S. 164 (2008) that Atwater would have come out the same way if state law had mandated resort to a citation on the facts of that case, as the Fourth Amendment does not constitute “a redundant guarantee of whatever limits on search and seizure legislatures might have enacted.”)

1. **The booking process**

 “Booking” is an administrative step taken after the arrested person is brought to the police station, which involves entry of the person’s name, the crime for which the arrest was made, and other relevant facts on the police “blotter,” and which may also include photographing, fingerprinting, and the like. Because booking results in a record of some of the circumstances of arrest, the question has arisen whether the entries made are relevant in determining the lawfulness of the arrest. A few courts have taken the position that an entry that the defendant was arrested “on suspicion of” or “for investigation of” a certain offense shows that the arrest was without probable cause, but in practice such entries are often made solely for the purpose of identifying those cases being referred to the detective division. It has been held that if a person was booked for one offense, his arrest may thereafter be upheld on the ground that the police had sufficient evidence of a quite different offense. Some courts required that there be a nexus between the two offenses, but a unanimous Court rejected such a limitation in Devenpeck v. Alford, 543 U.S. 146 (2004).

One variety of search of arrestees that does not qualify literally as a search “incident” to arrest but is related to booking is DNA testing, legislatively authorized on the federal level and in a majority of states. In Md. v. King, 133 S.Ct. 1958 (2013), the Court held that “[w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photography, a legitimate police booking procedure that is reasonable under the Fourth Amendment.” The Court’s “identification” rationale in King raises the question whether there is thus a constitutional requirement that DNA samples be destroyed and DNA profiles be removed from databases if the arrestee is not thereafter convicted. Also related to the booking/intake process is the question whether “routine” strip searches may be employed against all classes of arrestees as part of jail intake procedure, answered in the affirmative in Florence v. Bd. of Chosen Freeholders, 132 S.Ct. 1510 (2012) on the ground that “undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband.” Four Justices cautioned that there remained open the question “whether an arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer, and who can be held in available facilities removed from the general population, may be subject to the type of searches at issue here.”

**§ 2.7 WARRANTLESS SEARCHES AND SEIZURES OF PREMISES**

1. **Entry to arrest**

In Payton v. N.Y., 445 U.S. 573 (1980), the Court held that the Fourth Amendment prohibits the police from making a warrantless nonconsensual entry into a suspect’s home to make a routine arrest. The Court reasoned that the “basic principle of Fourth Amendment law” that searches and seizures inside a home without a warrant are presumptively unreasonable, long applied when the purpose was to search for an object, “has equal force when the seizure of a person is involved.” This is because “any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind,” and they “share this fundamental characteristic: the breach of the entrance to an individual’s home.” As for the argument that a warrant requirement was impractical, the Court, after noting it had been provided with no “evidence that effective law enforcement has suffered in those States that already have such a requirement,” declared that “such arguments of policy must give way to a constitutional command that we consider to be unequivocal.” Prior to Payton, the Court had held that police may enter premises without a warrant in immediate pursuit of a person to be arrested who sought refuge therein on seeing the police approach, U.S. v. Santana, 427 U.S. 38 (1976). Such an entry may also be made in hot pursuit of an offender, as in Warden v. Hayden, 387 U.S. 294 (1967), where the police were informed that an armed robbery had taken place and that the suspect had entered a certain house five minutes before they reached it, as delay under these circumstances would endanger the lives of the police and others. Once inside, the Court concluded in Hayden, the police were justified in looking everywhere in the house where the suspect might be hiding and also (before his capture) where weapons might be hidden.

Payton casts no doubt on those decisions, for the Court emphasized it was dealing with in-premises arrests for which no exigent circumstances claim had been made. Thus, the Court in Payton had no occasion to elaborate upon what would amount to exigent circumstances. The Court did, however, place considerable reliance upon a case in which exigent circumstances were found to be present based upon these factors: (1) a crime of violence was involved; (2) the suspect was reasonably believed to be armed; (3) there was a very clear showing of probable cause; (4) there was a strong reason to believe the suspect was within the premises; (5) there was a likelihood the suspect would escape if not swiftly apprehended; and (6) the entry was made peaceably. Emphasizing the absence of the first of these factors, the Court in Welsh v. Wis., 466 U.S. 740 (1984) held illegal a warrantless entry to arrest for driving under the influence, made to ensure that defendant’s blood-alcohol level was determined before it dissipated. Noting the crime was a civil offense not punishable by imprisonment, the Court found it “difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.” In response to the “suggestion that only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake,” the Court in Payton concluded that an arrest warrant, though affording less protection than a search warrant, would suffice: “If there is sufficient evidence of a citizen’s participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” But a search warrant, issued on probable cause the person to be arrested is now present within, is needed to enter premises of a third party. Steagald v. U.S., 451 U.S. 204 (1981). Under the Payton-Steagald warrant requirement, police actions in executing the warrant must be “related to the objectives of the authorized intrusion,” meaning that the police may not be accompanied by others, such as members of the news media, whose presence within “was not related to the objective of their authorized intrusion.” Wilson v. Layne, 526 U.S. 603 (1999) (a § 1983 action, meaning the Court did not discuss the exclusionary rule consequences, if any, of such a violation).

1. **Entry without notice**

The proposition that police must ordinarily give notice of their authority and purpose prior to making an entry of premises to arrest a person therein has common law credentials and is often expressed by statute. It appears to have been viewed in Ker v. Cal., 374 U.S. 23 (1963) as a Fourth Amendment requirement, a conclusion strengthened by the Court’s more recent holding that this is so as to entry to execute a search warrant, Wilson v. Ark. (1995). Where notice is given, the occupant must be given a reasonable opportunity to respond, except that a shorter delay will suffice if in that interval the occupant would be able to reach disposable contraband. U.S. v. Banks, 540 U.S. 31 (2003), discussed in § 2.5(b). Entry without notice is permissible, however, when the officer has some reason to believe that compliance with the usual notice requirements would increase his peril, frustrate an arrest, or permit the destruction of evidence.

Some jurisdictions have followed a so-called “blanket rule” under which such exigent circumstances could be established based upon the general category of case involved, as determined by the nature of the charge for which the arrest is to be made, but the Supreme Court has rejected that approach in search warrant cases, Richards v. Wis., 520 U.S. 385 (1997), justifying the conclusion that the “blanket rule” is likewise impermissible in the present context. Rather, Richards teaches that what is required is that the police, based upon the circumstances of the particular case, have a “reasonable suspicion” that one of the previously mentioned risks is present. Illustrative is U.S. v. Ramirez, 523 U.S. 65 (1998), an entry-to-arrest case in which, however, the police also had a search warrant, where the Court concluded there was a reasonable suspicion giving notice would be dangerous to the police or others, as police had confirmed an informant’s assertion that the person to be arrested might be inside, and that person was a prison escapee with a violent past who reportedly had access to a large supply of weapons and had vowed he would not do federal time.

1. **Search incident to and after arrest**

For many years, it could be said that the right to make a warrantless search incident to arrest was an exception that came close to swallowing up the search warrant requirement. Per Harris v. U.S., 331 U.S. 145 (1947), and U.S. v. Rabinowitz, 339 U.S. 56 (1950), such searches were permitted of the premises where the arrest occurred, without regard to the practicality of obtaining a search warrant. Under the Harris-Rabinowitz rule, the scope of the search extended to the entire premises in which the defendant had a possessory interest, and such searches were usually upheld without any showing of probable cause that the objects sought would be found there. In Chimel v. Cal., 395 U.S. 752 (1969), the Court, noting that in more recent decisions such searches had been justified solely upon the need to prevent the arrested person from obtaining a weapon or destroying evidence, overruled Harris and Rabinowitz and limited the scope of warrantless searches incident to arrest consistent with that purpose: “When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. \* \* \* In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” A broader search of the place of arrest “may be made only under the authority of a search warrant.” Chimel involved a search of an entire house, but the Court made it clear that the new rule would also bar more limited searches, such as the one-room search in Rabinowitz and the four-room search in Harris. Chimel is not inconsistent with the notion that if it is necessary for the arrestee to put on clothing or do other things before he is taken to the station, then the police may examine closets and other places to which the arrestee is permitted to move. Such accompanying of the arrestee about the premises is always reasonable, without regard to the degree of risk in the particular case, even if the arrest took place off the premises. Wash. v. Chrisman, 455 U.S. 1 (1982). Subsequent to an in-premises arrest, police may conduct a protective sweep of the area for their own protection, extending (i) to “closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched,” even without reasonable suspicion such a risk is present; and (ii) to other parts of the premises, on a reasonable belief “that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Md. v. Buie, 494 U.S. 325 (1990). If a “potential accomplice” is found, he may be frisked for weapons, and the area within his immediate control may also be searched for weapons and evidence.

1. **Plain view**

As noted in Coolidge v. N.H., 403 U.S. 443 (1971), “an object which comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant.” Thus, if an object is discovered by the officer from a place where he is lawfully present, that discovery is not illegal, and this is so even if an arrest has been made but the object itself is not within the control of the arrestee under Chimel. While in Coolidge it was indicated that the item may be seized only if its discovery was “inadvertent,” that limitation was later abandoned as unnecessary in Horton v. Cal., 496 U.S. 128 (1990) (see § 2.5(d)). Assuming no problems in the manner in which the plain view was acquired, it does not necessarily follow that the observed object may be seized. As stated in Coolidge, it must be “an incriminating object,” meaning that there must be probable cause that the object is the fruit, instrumentality, or evidence of crime. That determination must be made by the police without exceeding their authority, and even the lesser intrusion of picking up an object and looking at it is impermissible on reasonable suspicion short of probable cause. Ariz. v. Hicks, 480 U.S. 321 (1987).

1. **Search to prevent loss of evidence**

In Agnello v. U.S., 269 U.S. 20 (1925), the Court held that “belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant.” But in Johnson v. U.S., 333 U.S. 10 (1948), and Chapman v. U.S., 365 U.S. 610 (1961), reference was made to the possibility of a warrantless dwelling search being upheld upon a showing of a need for immediate action. This issue also took on increased importance because of the Chimel decision, and was not directly confronted in Chimel because no emergency was present there; the police had sufficient opportunity to obtain a search warrant before they tipped their hand by making an arrest.

 But in Vale v. La., 399 U.S. 30 (1970), the circumstances were different; the police had come to arrest the defendant on another matter, observed what reasonably appeared to be a sale of narcotics by the defendant to a person who drove up to his house, arrested the defendant in front of his house, made a cursory inspection of the house to determine if anyone else was there, and then (after the defendant’s mother and brother entered the house during the inspection) made a warrantless search of the house for the additional narcotics they believed were hidden there. Yet the Court concluded that the state had not met its burden “to show the existence of such an exceptional situation” as to justify a warrantless search, as the goods seized were not actually in the process of destruction or removal from the jurisdiction. The Court also asserted that because the officers had arrest warrants for Vale, “there is thus no reason \* \* \* to suppose that it was impracticable for them to obtain a search warrant as well,” but this is a questionable conclusion in view of the fact that here (unlike Chimel) the probable cause for search did not exist until the officers on the scene observed the illegal transaction. Vale, therefore, cannot easily be squared with the search-of-vehicles cases (see § 2.8(b)), but does show that the Court is much more protective of dwellings then vehicles. Although some courts have resisted a broader formulation on the ground that the police can too easily conjure up reasons why evidence within premises might be subject to future destruction or disposal, the lower courts have generally not accepted the Vale formulation as controlling. They have been inclined to state the exception in broader terms, covering instances in which the police reasonably conclude that the evidence would be destroyed or removed if they delayed the search while a warrant was obtained. But the mere fact that a homicide has occurred in certain premises does not of itself establish exigent circumstances justifying a warrantless search. Mincey v. Ariz., 437 U.S. 385 (1978).

Some lower courts have held that the police may respond to the risk of evidence destruction by impounding the premises and keeping the occupants thereof under surveillance while a search warrant is being obtained. In Segura v. U.S., 468 U.S. 796 (1984), dealing with a somewhat easier case in which the 19–hour impoundment was of unoccupied premises belonging to persons then under lawful arrest, the Court held “that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment’s proscription against unreasonable seizures.” The Court went on to hold that in any event any illegality in the initial entry would not require suppression of the evidence first discovered in the later execution of the search warrant. Also relatively easy was the situation involved in Ill. v. McArthur, 531 U.S. 326 (2001), where the defendant (who exited the premises voluntarily after his estranged wife told police standing by that he had marijuana hidden within) was told by police that while a search warrant was sought he would not be allowed to reenter unless accompanied by an officer. In finding that restriction reasonable, the Court stressed four circumstances: (i) the police had probable cause to get the warrant; (ii) the police had good reason to fear that unless restrained McArthur would have destroyed the drugs, as he probably had perceived his wife had informed police about the drugs; (iii) the police tried to reconcile their law enforcement needs with defendant’s privacy by imposing a restraint less restrictive than a warrantless search of the premises; and (iv) the restraint was imposed for a limited period of time, two hours.

Over the years, many lower courts adopted a so-called “police-created exigency” exception to the exigent circumstances rule, but in Ky. v. King, 131 S.Ct. 1849 (2011) the Court rejected various versions of this exception as “unsound” and then opted for a different approach: “that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.” Thus it was not objectionable in the instant case that the police had “banged on the door” and announced “This is the police” (as distinguished from a hypothetical case in which police threatened to break down the door if it was not opened). On remand, the lower court concluded that the mere fact the police then heard people and things moving inside was not a sufficient manifestation of actual or pending evidence destruction to justify warrantless police entry. Entry of premises to search for evidence must be distinguished from those instances in which an immediate search of premises is necessary because of a risk of bodily harm or even death, as in Brigham City v. Stuart, 547 U.S. 398 (2006).

The Court there upheld officers’ entry upon seeing through a screen door and window that a juvenile being held back by several adults had broken loose and struck one of them sufficiently hard that the victim was spitting blood, for they “had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.” This objective standard, the Court added (and later stressed again in Mich. v. Fisher, 425 U.S. 391 (2009)), means that if the circumstances viewed objectively justify the action, it is irrelevant whether the subjective motive of the police was to gather evidence or render assistance. Many of the lower court cases upholding entry on an emergency aid theory are based upon facts much more ambiguous than in Stuart; they stress the need for prompt assessment of often ambiguous information concerning potentially serious consequences.

**§ 2.8 WARRANTLESS SEARCHES AND SEIZURES OF AUTOMOBILES**

1. **Search incident to arrest**

 Although Chimel involved search of premises, the more limited rule of that case was also applied for a time to a search of an automobile incident to arrest. But the need for such case-by-case assessment was largely obviated by N.Y. v. Belton, 453 U.S. 454 (1981), where the Court found the lower court cases on the subject in such “disarray” that a bright-line rule was deemed appropriate, and thus concluded that “the workable rule this category of cases requires” is best achieved by holding “that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile,” inclusive of “the contents of any containers found within the passenger compartment.” Belton applied only when there had been a “custodial arrest” and thus not when the driver had been given a citation (see Knowles case, § 2.6(b)), but to maintain its bright-line character it was applied as well to the arrest of “recent occupants” in Thornton v. U.S., 541 U.S. 615 (2004). The frequent criticisms of Belton finally led to Ariz. v. Gant, 556 U.S. 332 (2009), where however the Court did not overrule Belton/Thornton but instead claimed it was only correcting the loose misinterpretation of these cases by lower courts, although the actual result in Gant is that Belton has been largely replaced by two new search-incident-arrest rules grounded, respectively, in (a) “the possibility of access” and (b) “the likelihood of discovering offense-related evidence.” As to the first of these, the Court held “that the Chimel rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” While a concurrence objected that such a rule “leaves much room for manipulation, inviting officers to leave the scene unsecured \* \* \* in order to conduct a vehicle search,” it appears that the majority deems the question to be whether the arrestee could have been secured: “Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effect an arrest so that a real possibility of access to the arrestee’s vehicle remains.” The second Gant rule was stated thusly: “Although it does not follow from Chimel, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’ ” This appears to mean that, except in a no-evidence case (such as Gant, where the arrest was for driving on a suspended license) or perhaps in a case where any possible evidence of the offense is most unlikely to be in the car (such as where the crime was spatially and temporally distant), a vehicle may be subjected to a search even though (i) probable cause is lacking and (ii) there is no risk of evidence destruction by the arrestee. The Court offered no further explanation or justification for such a conclusion, other than citing a concurring opinion in Thornton purporting to find support for such a rule in the “reduced expectation of privacy” in vehicles and supposed “heightened law enforcement needs” in Belton-type cases.

1. **Search on probable cause**

In Carroll v. U.S., 267 U.S. 132 (1925), the Court upheld a warrantless search of a vehicle being operated on the highway upon probable cause that it contained contraband, because the driver was not subject to lawful arrest and thus the car could be quickly moved out of the locality. Some courts concluded Carroll could not be relied upon to justify a warrantless search of the car after arrest of the driver because “exigencies do not exist when the vehicle and the suspect are both in police custody.” But in Chambers v. Maroney, 399 U.S. 42 (1970), the Supreme Court reached a contrary conclusion. In response to the contention that Carroll was not applicable on these facts because the car in which the defendant was arrested could simply be held until a search warrant was obtained, the Court in Chambers responded: “For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.” Neither Chambers nor later decisions of the Court (e.g., Cardwell v. Lewis, 417 U.S. 583 (1974), allowing warrantless seizure and search of a car parked in a public parking lot after arrest of the driver elsewhere; Tex. v. White, 423 U.S. 67 (1975), allowing search of the vehicle at the station after the driver’s arrest though, unlike Chambers, there was no indication an immediate at-the-scene search would have been impractical) could be explained in terms of the oft-stated principle that a search warrant is required except in exigent circumstances. Finally, the Court acknowledged in U.S. v. Chadwick, 433 U.S. 1 (1977) that warrantless vehicle searches are being permitted “in cases in which the possibilities of the vehicle’s being removed or evidence in it destroyed were remote, if not non-existent.” Why? Because, the Court explained: “One has a lower expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. \* \* \*. It travels public thoroughfares where both its occupants and its contents are in plain view.”

In Cal. v. Carney, 471 U.S. 386 (1985), this reformulated vehicle exception was even applied to a motor home that “is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes.” The majority emphasized both justifications for the vehicle exception, noting that a motor home in such circumstances is “readily mobile” and has “a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling.” One consequence of the Court’s alternative reliance upon the “reduced expectation” theory, as the Court continues to emphasize, Md. v. Dyson, 527 U.S. 465 (1999), Pa. v. Labron, 518 U.S. 938 (1996), is that the so-called automobile exception to the Fourth Amendment’s warrant requirement has no separate exigency requirement. This means, for one thing, that warrantless car searches are not likely to be jeopardized by more substantial delay between seizure of the vehicle and search of it than existed in Chambers. Cf. U.S. v. Johns, 469 U.S. 478 (1985).

1. **Search of containers and persons therein**

 Despite the “lesser expectation of privacy in a motor vehicle” of which the Court spoke in Chadwick, there is no comparable lesser expectation as to containers such as luggage, and thus they can be searched without a warrant only upon a genuine showing of exigent circumstances, U.S. v. Chadwick, 433 U.S. 1 (1977). (This is so even if the police have lawful possession of the object, as “an officer’s authority to possess a package is distinct from his authority to examine it.” Walter v. U.S., 447 U.S. 649 (1980).) But what if the container is in an automobile? In an effort to reconcile the Chadwick and Chambers-Carney lines of authority, the Court has held that if there exists probable cause to search the entire car, then the authority to make a warrantless search of the vehicle (as with the authority to execute a search warrant for a vehicle) extends to containers within the vehicle in which the objects sought might be concealed, U.S. v. Ross, 456 U.S. 798 (1982), even if the police earlier removed the container from the vehicle but still had lawful possession of it, U.S. v. Johns, 469 U.S. 478 (1985). By contrast, it was once the rule that absent true exigent circumstances a search warrant was required to search a container within a car if there was probable cause only as to the container (e.g., a suitcase placed in a taxi by a passenger), Ark. v. Sanders, 442 U.S. 753 (1979), but Sanders was later overruled because of a perceived need for “one clear-cut rule to govern automobile searches”: that containers in cars may be searched without a warrant whether the probable cause is specific or general. Cal. v. Acevedo, 500 U.S. 565 (1991). Assuming a lawful warrantless search of a vehicle, may it automatically extend to the person of an occupant? No, the Supreme Court held in U.S. v. Di Re, 332 U.S. 581 (1948), for the need to do so is no greater than the necessity “for searching guests of a house for which a search warrant had issued,” which the government conceded would not be lawful. Some argue the Di Re analogy is unsound because it is too easy, while police are trying to stop a moving vehicle, for incriminating evidence to be transferred to an occupant. But Di Re was not overturned but merely distinguished in Wyo. v. Houghton, 526 U.S. 295 (1999), where the Court held that “when there is probable cause to search for contraband in a car, it is reasonable for police officers \* \* \* to examine packages and containers without a showing of individualized probable cause for each one,” meaning that such a search may extend to a passenger’s personal belongings (at least those not attached to the person) even absent information suggesting either the passenger’s involvement in the criminality or the driver’s placement of contraband into the passenger’s effects. That conclusion, the Court explained, was justified by the reduced expectation passengers have as to their effects within vehicles, considered with the “practical realities,” i.e., that it would be very difficult to sort out on a case-by-case basis whether there was a likelihood the sought contraband might be in the passenger’s effects.

1. **Inventory**

If the police have lawfully impounded a vehicle (e.g., because it was found illegally parked in such a way as to constitute a traffic hazard), they may, pursuant to an established standard procedure, secure and inventory the vehicle’s contents in order to (i) protect the owner’s property while it remains in police custody, (ii) protect the police from claims or disputes over lost or stolen property, and (iii) protect the police from potential danger. So. Dak. v. Opperman, 428 U.S. 364 (1976). If the driver was stopped on the street while operating the vehicle and then arrested, some lower courts have held that the police must honor the driver’s request that the car instead be lawfully parked there or turned over to a friend; some cases indicate the police must even take the initiative and inquire of the driver what disposition he prefers; and some others declare that if the car is impounded, the driver must be allowed to decide between inventory and waiver of any claims against the police. But in Colo. v. Bertine, 479 U.S. 367 (1987) the Court held vehicle inventory procedures are reasonable under the Fourth Amendment without regard to the existence of such “alternative ‘less intrusive’ means.” An inventory is unlawful if it was not undertaken pursuant to standard policy or practice in the department, but Bertine holds that it is not objectionable that “departmental regulations gave the police officers discretion to choose between impounding \* \* \* and parking, \* \* \* so long as that discretion is exercised according to standard criteria.” An inventory is illegal if it appears to have been undertaken solely for some other motive (as shown, for example, by the failure to use inventory forms or to complete the inventory once contraband was discovered). In terms of scope, the inventory must be limited to areas of the car in which valuables might be found, and may not extend to examination of “materials such as letters or checkbooks, that ‘touch upon intimate areas of an individual’s personal affairs,’ ” So. Dak. v. Opperman, supra (Powell, J., conc.). The inventory may extend to containers (such as suitcases) found in the car. Colo. v. Bertine, supra. Though that case declared it “permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle,” more recent and seemingly conflicting dictum says police “may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself.” Fla. v. Wells, 495 U.S. 1 (1990).

1. **Other seizure of vehicles**

 If a vehicle is itself evidence of crime, may it be seized without a warrant as evidence in plain view? Not necessarily, at least four Justices concluded in Coolidge v. N.H., 403 U.S. 443 (1971), for a warrantless seizure on a plain view theory is permissible only upon “inadvertent discovery” of the item seized. In Horton v. Cal., 496 U.S. 128 (1990), the Court abandoned the “inadvertent discovery” limitation, but then seemed to endorse the result in Coolidge on two other grounds: (1) the seized object’s incriminating character must also be “immediately apparent,” not the case in Coolidge because the probative value of the cars seized “remained uncertain until after the interiors were swept and examined microscopically”; and (2) the officer must also have lawful access to the vehicle, not the case in Coolidge because the seizure there “was accomplished by means of a warrantless trespass on the defendant’s property.”

It is common at both the federal and state level to find statutes authorizing the seizure and subsequent forfeiture of a vehicle because it was used in certain criminal activity. The question of whether such a seizure could be made without a warrant was settled in Fla. v. White, 526 U.S. 559 (1999), upholding the warrantless seizure of a vehicle from a public place on probable cause that it constituted forfeitable contraband under a state forfeiture statute. Noting the “special considerations” recognized in the previously discussed search-of-vehicle-on-probable-cause cases, the Court concluded the need to permit warrantless action was “equally weighty when the automobile, as opposed to its contents, is the contraband that the police seek to secure.” White, the Court added, was “nearly indistinguishable” from G.M. Leasing Corp. v. U.S., 429 U.S. 338 (1977), upholding warrantless seizure of vehicles from public streets and lots as part of a levy on a corporation’s assets for tax deficiencies.

 **§ 2.9 STOP-AND-FRISK AND OTHER BRIEF DETENTION**

1. **Background**

Police have long followed the practice of stopping suspicious persons on the street or other public places for purposes of questioning them or conducting some other form of investigation, and, incident to many stoppings, of searching the person for dangerous weapons. Because this investigative technique, commonly referred to as stop-and-frisk, is ordinarily employed when there are not grounds to arrest the suspect and to search him incident to arrest, it was often questioned whether the practice could be squared with the Fourth Amendment. The Supreme Court provided some answers in Terry v. Ohio, 392 U.S. 1 (1968).

In Terry, where an officer observed three men who appeared to be “casing” a store for a robbery and then approached them for questioning and frisked them, finding weapons on two of them, the Court held “that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.” The result in Terry rests upon three fundamental conclusions the Court reached concerning Fourth Amendment theory. First of all, the Court concluded that restraining a person on the street is a “seizure” and that exploring the outer surfaces of his clothing is a “search,” and thus rejected “the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a ‘technical arrest’ or a ‘fullblown search.’ ” Secondly, after noting that the police conduct here was without a warrant and thus subject to the reasonableness rather than the probable cause part of the Fourth Amendment, the Court utilized the balancing test of the Camara case (see § 2.11(a)) to conclude that a frisk could be undertaken upon facts that would not support an arrest and full search. (Justice Douglas objected in dissent that the Court had in effect said that the police have more power without a warrant than with a warrant, which could have been answered—but was not—by observing that the balancing test applies in determining both the reasonableness of warrantless searches and seizures and, as in Camara, the probable cause for those with warrant.) Finally, in response to the defendant’s observation that some stops and frisks are employed for harassment and other improper purposes, the Court noted that the exclusionary rule is ineffective when the police have no interest in prosecution and that consequently a flat prohibition of all stops and frisks would not deter those undertaken for improper objectives.

1. **Temporary seizure for investigation**

As for what Fourth Amendment evidentiary test is to be applied to temporary seizures, in U.S. v. Cortez, 449 U.S. 411 (1981), the Court stated that the essence of the standard is that “the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” The Court’s emphasis in Terry was upon the situation “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.” If this language is compared with that usually employed to describe the evidentiary test for arrest, it appears that some difference exists in the degree of probability required. As for probable cause to arrest, sometimes said not to required the care that “a preponderance standard demands” Gerstein v. Pugh, 420 U.S. 103 (1975), it is nonetheless commonly assumed that, as to the showing of criminality, facts as consistent with innocent as with criminal activity will not suffice, while the probability that the arrestee committed the crime merely requires a quite narrow focus, e.g., Md. v. Pringle, 540 U.S. 366 (2003) (where presence of illegal drugs in vehicle certain, grounds to arrest all three occupants of car, given virtual certainty at least one out of the three guilty). But for a Terry stop on reasonable suspicion, where the very purpose is to clarify an ambiguous situation, the required “level of suspicion” of criminality “is considerably less than proof of wrongdoing by a preponderance of the evidence,” U.S. v. Sokolow, 490 U.S. 1 (1989), and the same is true with respect to the separate question of the detainee’s involvement in the suspected criminality. Thus, the stopping of a suspect near the scene of a recent robbery because he fitted the general description given by the victim is proper even if arrest would not be proper because the description would also fit several others in the area. (This is so without regard to whether a less intrusive investigative technique is available. Sokolow, supra.)

 The reasonable suspicion for a stop may differ from probable cause to arrest in a quite different way, namely, in the extent to which the information must be shown to be reliable. Ala. v. White, 496 U.S. 325 (1990). Although some lower courts have held that if the means of avoiding the police are sufficiently extreme they alone may justify a Terry stop, that conclusion is in doubt after Ill. v. Wardlow, 528 U.S. 119 (2000). The majority held there were grounds for a stop where the defendant engaged in “headlong” and “unprovoked flight upon noticing the police,” given the additional factor of defendant’s presence in an area of heavy narcotics trafficking. Four Justices, dissenting in part, while emphasizing the majority’s failure to endorse a proposed per se rule allowing a stop in all cases of unprovoked flight upon seeing an identifiable policeman, appeared to admit that flight under some circumstances could justify a stop, but then found the majority’s conclusion unsound “because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas.”

 In Adams v. Williams, 407 U.S. 143 (1972), the Court, 6–3, upheld a stop based upon information the suspect possessed a gun and narcotics, given by a known informant who had provided information in the past. Because the informer could have been prosecuted for making a false complaint if his tip proved false, the tip (though insufficient for arrest) was deemed to have sufficient “indicia of reliability” to justify a stop. As for an anonymous tip from an informant regarding criminal activity, such a tip (i) is insufficient standing alone when the tip gives no indication of the informant’s reliability or basis of knowledge; and (ii) is also insufficient despite corroboration of part of the informant’s story re innocent existing circumstances (e.g., that a certain car is presently parked at a certain location), as virtually anyone could predict such a continuing circumstance; but (iii) is sufficient when corroboration of the informant’s prediction of future events (e.g., that a certain person will travel to a certain place) demonstrates “a special familiarity with” the suspect’s affairs. Ala. v. White, 496 U.S. 325 (1990). Many lower courts adopted a “firearms exception” to the White rule, so that an anonymous tip a person was illegally armed sufficed even without confirmation of predicted future events, but in Fla. v. J.L., 529 U.S. 266 (2000) the Court rejected that position because it would allow anyone wishing to harass another to set in motion a police search simply by making an anonymous phone call. In U.S. v. Hensley, 469 U.S. 221 (1985), the Court applied the Whiteley approach (see § 2.3(e)) in this context, and thus held that a stopping on the basis of a conclusory police bulletin was lawful provided the bulletin had been “issued on the basis of articulable facts supporting a reasonable suspicion.” But in Brown v. Tex., 443 U.S. 47 (1979), where in the afternoon officers saw defendant and another man walk away from each other in an alley in an area with a high incidence of drug traffic, but there was no indication it was unusual for people to be in the alley and the police did not point to any facts supporting their conclusion the situation “looked suspicious,” the Court held there were not grounds for a stop. Similarly, merely consorting with narcotic addicts does not constitute grounds for a stop. Sibron v. N.Y., 392 U.S. 40 (1968). Although the results in Brown and Sibron may have been influenced to some degree by doubts about whether Terry should apply to suspicion of minor possessory offenses, the Court has recognized an offense category limitation only in the somewhat different situation presented by U.S. v. Hensley, 469 U.S. 221 (1985). The Court there held a Terry stop was also permissible to investigate past criminal activity, but only as to “felonies or crimes involving a threat to public safety,” where “it is in the public interest that the crime be solved and the suspect detained as promptly as possible.” A detention for investigation of a somewhat different kind was involved in U.S. v. Van Leeuwen, 397 U.S. 249 (1970), where the Court, citing Terry, upheld the holding of mailed packages for approximately one day while the police promptly investigated the suspicious circumstances of the mailing and obtained a search warrant for the packages. Similarly, in U.S. v. Place, 462 U.S. 696 (1983), the Court held a traveler’s luggage could be seized on reasonable suspicion for purposes of investigation, but wisely added that because such a seizure affects the suspect’s travel plans the luggage may be held no longer than if the traveler himself were detained.

1. **No seizure and arrest distinguished**

If it turns out that grounds for a Terry stop were lacking, the police-citizen encounter is still lawful if no seizure occurred. While stopping a vehicle is a seizure, U.S. v. Hensley, 469 U.S. 221 (1985), many police contacts with pedestrians are not. A person “has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,” which means that the “subjective intention” of the police officer “is irrelevant except insofar as that may have been conveyed to the” suspect. U.S. v. Mendenhall, 446 U.S. 544 (1980), followed in Fla. v. Royer, 460 U.S. 491 (1983), and elaborated in Fla. v. Bostick, 501 U.S. 429 (1991) as presupposing “an innocent person.” Lower court decisions reflect the view that there is no Fourth Amendment seizure when the policeman, although perhaps making inquiries a private citizen would not be expected to make, has otherwise conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occurred between two ordinary citizens. I.N.S. v. Delgado, 466 U.S. 210 (1984) held a “factory survey” involved no seizure where it was apparent INS agents were only questioning workers and those questioned were obligated to remain on the premises anyway by virtue of their obligation to their employer.

Similarly, in Fla. v. Bostick, supra, followed in U.S. v. Drayton, 536 U.S. 194 (2002), the Court recognized that literal application of the “free to leave” test is inappropriate in some circumstances (e.g., where defendant was questioned on a bus he did not want to leave), and concluded that in such cases the proper question “is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” (Neither Bostick nor Drayton involved police stopping of the bus; in Brendlin v. Cal., 551 U.S. 249 (2007), holding stopping of a passenger car is a seizure of the passengers, the Court cautioned that “the relationship between driver and passenger is not the same in a common carrier as it is in a private vehicle.”) In Cal. v. Hodari D., 499 U.S. 621 (1991), the word “seizure” in the Fourth Amendment was construed to cover “application of physical force to restrain movement, even when it is ultimately unsuccessful,” as well as “submission to the assertion of authority,” but not a “show of authority” to which “the subject does not yield.” This means a suspect’s act of discarding contraband is not the fruit of an illegal seizure when, at the time of that act, an officer lacking reasonable suspicion was vigorously chasing but had not yet caught the suspect. If the dimensions of a permissible stop are exceeded when only a reasonable suspicion exists, the result is an illegal arrest.

This can occur because of excessive force or threats of force, but it is not excessive for the police to draw weapons when they have reason to suspect the person is armed and dangerous. U.S. v. Hensley, 469 U.S. 221 (1985). There is no per se rule that the passage of a certain time, such as 20 minutes, escalates the stop into an arrest. In determining whether the time was excessive, it is useful to ask whether the police were diligently pursuing a means of investigation likely to resolve the matter one way or another very soon. U.S. v. Sharpe, 470 U.S. 675 (1985). Movement of the suspect to a nearby location to facilitate the investigation does not inevitably escalate the detention into an arrest. But, as Fla. v. Royer, 460 U.S. 491 (1983) illustrates, such escalation can occur from a wrong choice of investigative techniques by the police. There, the Court held taking the suspected drug courier a mere 40 feet to an airport police office for questioning was an arrest, as resort to “the least intrusive means reasonably available” would have resulted in the summoning of a drug detection dog to the corridor. More recently, however, the Court has cautioned against “unrealistic second-guessing,” and has declared that the “question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.” U.S. v. Sharpe, 470 U.S. 675 (1985).

Terry’s statement that a stop is reasonable only if “the officer’s action \* \* \* was reasonably related in scope to the circumstances which justified the interference in the first place,” suggests a limitation on investigative techniques during a stop, as was seemingly confirmed in Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004), holding that refusal to state one’s name during a Terry stop could be criminalized only if “the request for identification was ‘reasonably related in scope to the circumstances which justified’ the stop.” But in Ill. v. Caballes, 543 U.S. 405 (2005), where after defendant was stopped for a minor traffic violation a drug dog was used to detect drugs within the car even absent reasonable suspicion drugs were there, the Court held an investigative technique violates Terry’s limits only if it (1) extends the period of custody or (2) itself constitutes a search (which use of the dog was not; see § 2.2(b)). Consistent with this, the Court in Ariz. v. U.S., 132 S.Ct. 2492 (2012) suggested that a statute requiring state officers to determine the immigration status of any person lawfully stopped, if there is in addition reasonable suspicion that person is an illegal alien, would pass muster only if limited to instances where “the person continues to be suspected of some crime for which he may be detained” further.

1. **Protective search**

In determining the lawfulness of a frisk, two matters need attention: (i) whether the officer was rightly in the presence of the party frisked so as to be endangered if that person was armed; and (ii) whether the officer had sufficient grounds for a frisk. As noted in Ariz. v. Johnson, 555 U.S. 323 (2009), in the typical “stop and frisk” situation the first factor is satisfied by the fact “the investigative stop [is] lawful,” which is the case “when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense.” But, the Court added, “in a traffic-stop setting, the first Terry condition \* \* \* is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation” under Brendlin v. Cal., 551 U.S. 249 (2007), meaning that then the “police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity.” As for the second factor, Terry says that what is required is that the officer’s observations lead him “reasonably to conclude \* \* \* that the persons with whom he is dealing may be armed and presently dangerous.” Thus, it is sufficient that there is a substantial possibility the person is armed; there need not be the quantum of evidence that would justify an arrest for unlawfully carrying a concealed weapon. Although Terry also emphasizes that the officer frisked only after he had made some initial inquiries and the responses did not “dispel his reasonable fear,” the frisk upheld in Adams v. Williams, 407 U.S. 143 (1972) was not preceded by inquiries. Terry indicates that a two-step process must ordinarily be followed: the officer must pat down first and then intrude beneath the surface of the suspect’s clothing only if he comes upon something that feels like a weapon. In Adams, the Court approved the officer’s conduct in reaching directly into the suspect’s pocket, apparently because the informant had indicated the precise location of the weapon. But in any event, the search is limited by its recognized purpose, that is, to “discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” This means that the search must be limited to those places to which the suspect has immediate access, and may not otherwise go beyond what is necessary to determine if the suspect is armed. Minn. v. Dickerson, 530 U.S. 428 (1993) (prohibiting further squeezing of suspect’s pocket to determine if lump was cocaine). As for a protective search beyond the person, the Court in Mich. v. Long, 463 U.S. 1032 (1983) held “that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.” But the Court then reached the questionable conclusion that such a risk can be present, even as to a suspect outside the car, because of the possibility he would “break away” from the police during the investigation or merely would reenter the car at its conclusion. Absent grounds for a Terry frisk, an officer may still take minimally intrusive action for his own protection without any showing of justification based upon the facts of the individual case. The Court has thus held that where a vehicle has been lawfully stopped, the driver, Pa. v. Mimms, 434 U.S. 106 (1977), or even a passenger, Md. v. Wilson, 519 U.S. 408 (1997), may be required to alight from the vehicle.

1. **Brief detention at the station**

 It remains unclear whether the Terry balancing test may be utilized to support a brief detention for investigation at the station on grounds slightly short of that required for arrest. In Davis v. Miss., 394 U.S. 721 (1969), holding fingerprints inadmissible because obtained after an illegal arrest, the Court noted it was arguable “that because of the unique nature of the fingerprinting process, such detention might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense,” in that it “may constitute a much less serious intrusion upon personal security than other types of police searches and detentions.” The Court added that a warrant would be required for such a detention, a matter which concurring Justice Harlan preferred to leave open. Davis suggests that the intended investigative technique is a relevant consideration; the Court emphasized that detention for fingerprinting “involves none of the probing into an individual’s private life and thoughts which marks an interrogation or search,” cannot “be employed repeatedly to harass any individual,” and “is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the ‘third degree.’ ” Consistent with this, it was held in Dunaway v. N.Y., 442 U.S. 200 (1979) that custodial questioning at the station on less than probable cause for a full-fledged arrest was unlawful. But there is case authority that a properly conducted lineup would be reliable and that therefore detention to facilitate it would be permissible on less than the grounds needed for arrest.

Statutes authorizing stationhouse detention for other investigative purposes, such as fingerprinting or taking voice or handwriting exemplars, have been upheld. The status of these provisions is not entirely clear, as Dunaway can be read broadly as barring all at-the-station detention on less than full probable cause, or narrowly as dealing only with interrogation and allowing detention for other types of investigation, at least if there is judicial authorization and the suspect is ordinarily given a chance to respond to a summons. But it is noteworthy that in more recently reasserting the Davis dictum, the Court made seemingly favorable reference to those statutes. Hayes v. Fla., 470 U.S. 811 (1985).

**§ 2.10 GRAND JURY SUBPOENAS**

 Unlike the detentions for the purpose of collecting evidence considered in Davis and Dunaway, supra, the grand jury subpoena operates largely free of Fourth Amendment restrictions. Insofar as the Constitution is concerned, a subpoena directing a person to testify or produce specific physical evidence before a grand jury need not be supported by a showing of probable cause, reasonable suspicion, or any other factual foundation. U.S. v. Dionisio, 410 U.S. 1 (1973) (subpoena requiring production of voice exemplars); U.S. v. Mara, 410 U.S. 19 (1973) (subpoena requiring handwriting exemplars). As the Court noted in Dionisio, “a subpoena to appear before the grand jury is not a ‘seizure’ in the Fourth Amendment sense.” Unlike an arrest or an “investigative stop,” it does not produce an “abrupt” detention, “effected with force or the threat of it,” or result “in a record [like an arrest record] involving social stigma.” A subpoena, the Court has noted “is served in the same manner as other legal process [and] involves no stigma whatever.” U.S. v. Dionisio, supra. The Court has acknowledged that the compulsion to appear or produce evidence does require some “personal sacrifice,” but that obligation is characterized as simply a “part of the necessary contribution of the individual to the welfare of the public.” Blair v. U.S., 250 U.S. 273 (1919). The Court also has stressed in this connection that a person subpoenaed retains his privilege against self-incrimination (see § 8.2) and, where applicable, judicial protection against abuse of the grand jury process. A subpoena issued on the basis of “tips [or] rumors” is not abusive, however, since a grand jury has an obligation to “run down” every “available clue” in conducting its investigation. U.S. v. Dionisio, supra.

While the Fourth Amendment does not require a showing of some factual foundation for a subpoena, it does prohibit a subpoena duces tecum too sweeping in its terms “to be regarded as reasonable.” Hale v. Henkel, 201 U.S. 43 (1906). This prohibition, arguably resting more appropriately on the due process clause, has application primarily to subpoenas requesting production of numerous documents. In barring overly broad subpoenas duces tecum, courts have sought to ensure that a subpoena (1) commands production only of documents relevant to the investigation being pursued, (2) specifies the documents to be produced with reasonable particularity, and (3) includes records covering only a reasonable period of time.

 **§ 2.11 INSPECTIONS; REGULATORY SEARCHES**

The Fourth Amendment has been held to apply to a variety of searches and inspections conducted as part of regulatory schemes. In each case, however, the standards applied have been somewhat different than those applied to searches conducted in the course of criminal investigations.

1. **Inspection of premises**

 Administrative inspections of residential and commercial premises for fire, health and safety violations may not be undertaken without a search warrant unless the occupant consents to the inspection or the inspection is made in an emergency. The occupant is thus usually free to challenge the inspector’s decision to search without the risk of suffering criminal penalties for his refusal. However, a search warrant for such an inspection does not require a showing of probable cause that a particular dwelling contains violations of the code being enforced, but only that reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular building. This special probable cause test was arrived at “by balancing the need to search against the invasion which the search entails,” considering (1) the long history of acceptance of such inspection programs; (2) the public interest in abating all dangerous conditions, even those not observable from outside the building; and (3) the fact that the inspections are neither personal in nature nor aimed at discovery of evidence of crime, and thus involve a relatively limited invasion of privacy. Camara v. Mun. Ct., 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

The Camara-See warrant requirement has been held inapplicable to certain business inspection schemes. The latest case of that genre, N.Y. v. Burger, 482 U.S. 691 (1987), involving warrantless inspection of an auto junkyard, stressed these factors: (1) the business was “closely regulated,” considering the long tradition of regulation and its extensive nature; (2) “a ‘substantial’ government interest,” combatting auto theft, supports the regulatory scheme; (3) warrantless inspections are “necessary to further [the] regulatory scheme,” as frequent and unannounced inspections are necessary to detect stolen cars and parts; (4) the statutory scheme “provides a ‘constitutionally adequate substitute for a warrant’ ” by informing the businessman inspections will occur regularly, of their permissible scope, and who may conduct them; and (5) the permitted inspection is “carefully limited in time, place, and scope” (business hours only, auto dismantling businesses only, of records, cars and parts only). Entry of premises to fight a fire and thereafter find the cause may be made without a warrant, but subsequent entries on probable cause of arson require a regular criminal warrant on full probable cause. Mich. v. Tyler, 436 U.S. 499 (1978). A post-fire entry merely to ascertain the cause of the fire may be made without even an administrative warrant if notice is given. Mich. v. Clifford, 464 U.S. 287 (1984).

1. **Border searches**

 As noted in Carroll v. U.S., 267 U.S. 132 (1925), quoted with approval in Almeida-Sanchez v. U.S., 413 U.S. 266 (1973): “Travellers may be stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.” Border searches are considered unique, and a person crossing the border may be required to submit to a warrantless search of his person, baggage, and vehicle without the slightest suspicion, just as is true of incoming international mail (at least if correspondence is not read). U.S. v. Ramsey, 431 U.S. 606 (1977). However, some evidence short of probable cause must exist to justify more intrusive and embarrassing searches; “a real suspicion” is said to be required for a strip search, and a “clear indication” for examination of body cavities. But vehicle searches at the border, because they do not likewise intrude upon “dignity and privacy interests of the person,” may be made absent reasonable suspicion, at least if made without significant damage to the property. U.S. v. Flores-Montano, 541 U.S. 149 (2004). On a reasonable suspicion of alimentary canal drug smuggling, a person may be detained at the border until the suspicion is verified or dispelled (by submission to x-ray or a bowel movement). U.S. v. Montoya de Hernandez, 473 U.S. 531 (1985).

The special rules on border searches also apply to persons who have already travelled some distance into the country, if the circumstances indicate that any contraband which might be found was in the place searched at the time of entry. But, a border search must occur at the border or “its functional equivalent,” and thus a car found near the border but not known to have crossed the border may not be subjected to a warrantless search for illegal aliens, either by a roving patrol or at a fixed checkpoint, in the absence of consent or probable cause. Almeida-Sanchez v. U.S., 413 U.S. 266 (1973); U.S. v. Ortiz, 422 U.S. 891 (1975). Such a vehicle may be stopped briefly to enable questioning of the occupants about their citizenship and immigration status if (a) the stopping occurs at a reasonably located fixed checkpoint, U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976), or (b) the officer is aware of specific articulable facts that, together with rational inferences from those facts, reasonably warrant suspicion that the car contains aliens who may be illegally in the country. U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975).

1. **Driver’s license, vehicle registration and DWI checks**

When the police observe a traffic violation, they may stop the vehicle and demand to see the driver’s license and the vehicle’s registration and vehicle identification number. N.Y. v. Class, 475 U.S. 106 (1986). A stopping for a license-registration check is also permissible when there is articulable and reasonable suspicion that a motorist is unlicensed or that a vehicle is not registered, or that either the vehicle or occupant is otherwise subject to seizure for violation of law, but the random stopping of an auto and detaining the driver in order to check the license and registration is unreasonable. This does not preclude use of methods for spot checks that involve less intrusion or less discretion, such as stopping all traffic at a roadblock. Del. v. Prouse, 440 U.S. 648 (1979). Checkpoints may also be utilized to seek out intoxicated drivers, Mich. Dep’t of State Police v. Sitz, 496 U.S. 444 (1990), and many lower courts have upheld such checkpoints that were carefully planned by police supervisory personnel, were operated with a minimum of discretion by on-the-scene officers, and resulted in only very brief detentions. In City of Indianapolis v. Edmond, 531 U.S. 32 (2000), holding that city-operated vehicle checkpoints, complete with drug dogs, undertaken to interdict unlawful drugs, contravened the Fourth Amendment, the Court distinguished Prouse and Sitz because in neither of these “special need” cases “did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” Edmond is not a bar to an information roadblock seeking witnesses to a recent homicide at that location, as the “stop’s primary law enforcement purpose was not to determine whether a vehicle’s occupants were committing a crime.” Ill. v. Lidster, 540 U.S. 419 (2004).

1. **Airport inspections**

 When airport hijacker detection searches were conducted selectively by use of the government’s hijacker “profile,” they were upheld by reliance on Terry v. Ohio, § 2.9(a). Now that all passengers and carry-on luggage are checked, the program can be upheld as a form of administrative search under Camara, at least so long as prospective passengers retain the right to leave prior to submitting to inspection. Presumably this is also the case as to the post-9/11 screening conducted by the Transportation Security Administration, which is generally more intensive and includes random selection of some travelers for even closer scrutiny.

1. **Supervision of prisoners, probationers and parolees**

A prisoner’s cell and effects are not protected by the Fourth Amendment; “the prisoner’s expectation of privacy [must] always yield to what must be considered the paramount interest in institutional security.” Hudson v. Palmer, 468 U.S. 517 (1984). If Hudson does not apply to searches of a prisoner’s person or to searches in pretrial detention facilities, then such searches must be undertaken on reasonable suspicion or pursuant to an established routine or plan. Probationers and parolees may be subjected to searches without arrest or a search warrant and upon evidence falling short of the usual probable cause requirement. In Griffin v. Wis., 483 U.S. 868 (1987), involving a warrantless search of a probationer’s home, the Court explained this was because of the “special needs” of the probation system, where restrictions on freedom and privacy are necessary “to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer’s being at large.” The warrant requirement was deemed inappropriate for probation officers, who “have in mind the welfare of the probationer” and must “respond quickly to evidence of misconduct.” The usual probable cause standard was deemed inapplicable because it “would reduce the deterrent effect of the supervisory arrangement” and because “the probation agency must be able to act based upon a lesser degree of certainty \* \* \* in order to intervene before a probationer does damage to himself or society.” The Griffin standard ordinarily comes into play only if the probationer or parolee is charged with a new crime. Most lower courts have for years declined to apply the exclusionary rule at probation or parole revocation proceedings, and in Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357 (1998) the Court so held as to the latter, reasoning that altering the “flexible, administrative nature” of such proceedings was not worth the “minimal” deterrence that would result, even in the case of a search by an official aware of the parolee’s status.

Though “special needs” analysis (as in Griffin) may only be used when the interest served is other than ordinary law enforcement, City of Indianapolis v Edmond, 531 U.S. 32 (2000), that limitation can be avoided as to probation/parole searches by notifying the probationer or parolee of the search conditions of his release, which sufficiently reduces his expectation of privacy that the premises may be searched on reasonable suspicion- even if the search is by a police officer seeking evidence of a new crime. U.S. V. Knights, 534 U.S. 112 (2001).

Using the Knights balancing approach rather than the Griffin “special needs” approach, the Court in Samson v. Cal., 547 U.S. 843 (2006) upheld a police search of a known parolee even absent reasonable suspicion. In support, it was asserted (i) that parolees have fewer expectations of privacy than probationers because parole is more akin to imprisonment, where the Hudson rule applies; (ii) that parolee Samson had signed an order submitting to the clearly-stated parole condition that he would be subject to search by any parole or police officer with or without warrant or cause; (iii) that the state has an “overwhelming interest” in supervising parolees because they “are more likely to commit future criminal offenses,” as manifested by California’s 60–70% recidivism rate; and (iv) the system did not give officers unbridled discretion to conduct searches, as state law prohibits “arbitrary, capricious or harassing” searches.

1. **Supervision of students**

 In N.J. v. T.L.O., 469 U.S. 325 (1985), the Court held that “the Fourth Amendment applies to searches conducted by school authorities,” but that under the Camara balancing test neither a warrant nor full probable cause is needed. Rather, the search is reasonable if limited in scope, taking into account the age and sex of the student and the nature of the infraction, and if there are “reasonable grounds for suspecting” the search will uncover evidence of a violation of law or school regulation. T.L.O. left unanswered whether individualized suspicion is always necessary, whether students have an expectation of privacy in school desks and lockers, and whether a higher standard applies if there is some police involvement.

The “scope” limitation of T.L.O. was applied in Safford Unified School Dist. #1 v. Redding, 557 U.S. 364 (2009), where a student told school officials she received banned pain relief pills from a named classmate. This information constituted reasonable suspicion the classmate “was involved in pill distribution” which was “enough to justify a search of [her] backpack and outer clothing.” But as for the strip search undertaken by school officials when that search was unproductive, the Court concluded such a search was “categorically distinct, requiring distinct elements of justification” absent in the instant case because “the content of the suspicion failed to match the degree of intrusion.” Specifically, “what was missing from the suspected facts \*\*\*was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that [the girl]was carrying pills in her underwear,” as the T.L.O. scope requirement mandates that for a strip search there be “reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing.

In Vernonia School District 47J V. Acton, 515 U.S. 646 (1995), the Court held on the facts presented that drug testing could be required of student athletes even absent individualized suspicion. The Court emphasized that the privacy expectations intruded upon were limited (because all school children are subject to considerable supervision and control, student athletes’ expectations are “even less” because they voluntarily chose a privacy-reducing activity, the testing was under conditions like those encountered in public rest rooms, and test results were disclosed to a limited number of school officials with a need to know), and were outweighed by the legitimate government interests advanced: deterring drug use by students, and preventing harm to drug users and others involved in athletic competition. Acton was applied to uphold testing in much less compelling circumstances in Bd. of Educ. v. Earls, 536 U.S. 822 (2002), where the random testing policy covered middle and high school students participating in any extracurricular activity.

1. **Supervision of employees**

 Government employees have a justified expectation of privacy in certain work areas, such as individual offices and the desk and filing cabinets therein. If a search of such an area is conducted by a public employer, no warrant is needed for intrusions “for legitimate work-related reasons wholly unrelated to illegal conduct,” and intrusions “for noninvestigatory, work-related purposes, as well as for investigation of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances” rather than the traditional quantum of probable cause. O’Connor v. Ortega, 480 U.S. 709 (1987).

Applying O’Connor, the Court in City of Ontario, Cal. v. Quon, 560 U.S. 746 (2010) upheld the city’s inspection of messages on pagers the city supplied to police, concluding “there were ‘reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose,” i.e., “to determine whether the character limit on the City’s contract with [the service provider] was sufficient to meet the City’s needs.” Public employees may be required to submit to drug testing upon individualized reasonable suspicion or, absent such suspicion, where testing is triggered by a specific event and in addition a special need for testing exists. Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602 (1989) (testing of crew after train accident or violation of safety rules); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (testing of customs agents upon transfer or promotion to position involving drug interdiction or carrying firearms).

Compare Chandler v. Miller, 520 U.S. 305 (1997), invalidating a statute requiring drug testing of candidates for public office and distinguishing Von Raab because there the persons tested and their work were not amenable to “day-to-day scrutiny.” Compare also Ferguson v. City of Charleston, 532 U.S. 67 (2001), invalidating a program for identifying and testing pregnant patients suspected of drug use and then turning the results over to law enforcement agents without the knowledge or consent of the patients, where Skinner and Von Raab were distinguished on two grounds: (i) because in those cases “there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties”; and (ii) because in those cases the “special need” advanced was “one divorced from the State’s general interest in law enforcement,” while here “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.”

**§ 2.12 CONSENT SEARCHES**

1. **Background**

Where effective consent is given, a search may be conducted without a warrant and without probable cause. At one time, the consent doctrine was assumed to be grounded on the concept of waiver, Stoner v. Cal., 376 U.S. 483 (1964). But in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court concluded that “a [traditional] ‘waiver’ approach to consent searches would be thoroughly inconsistent with our decisions,” and thus held that the issue is whether the person’s consent was “voluntary.” Although this voluntariness test would appear to focus primarily upon the state of mind of the person allegedly consenting, the Court in Schneckloth did not have occasion to consider the validity of the position taken by some courts: that because it is the Fourth Amendment prohibition against unreasonable searches which is at issue, the question is whether the officers could reasonably conclude that defendant’s consent was given, in much the same way that scope-of-consent issues are to be resolved (see § 2.12(e)).

1. **Warning of rights**

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) holds that, while a person’s knowledge of his right to refuse is a factor to be taken into account in determining (based on the totality of the circumstances) whether his consent was voluntary, the prosecution is not required to prove that he was so warned or otherwise had such knowledge where the consent was obtained while the person was not in custody. (It follows from this, the Court later held in Ohio v. Robinette, 519 U.S. 33 (1996), that consent by a person who could no longer be lawfully detained is not made involuntary because of a police failure to specifically advise the person he was free to leave.) The Johnson v. Zerbst (see § 7.4(a)) test of waiver, “an intentional relinquishment or abandonment of a known right or privilege,” was distinguished as applicable only to those constitutional rights that, unlike the Fourth Amendment, are intended to protect a fair trial and the reliability of the truth-determining process; the Miranda requirement of Fifth Amendment warnings (see § 4.4(b)) was distinguished because it only governs interrogation of those in custody. While this latter distinction suggests that the Miranda analogy might be persuasive as to a consent to search given by one in custody, it was held in U.S. v. Watson, 423 U.S. 411 (1976), that failure to give Fourth Amendment warnings is not controlling where, as there, the defendant “had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station.” Most courts view the Schneckloth totality of circumstances test as equally applicable to consent obtained from one in custody at the station.

Some courts have taken the position that a consent to search given during custodial interrogation must be preceded by Miranda warnings because the request to search is a request that the defendant be a witness against himself, which he is privileged to refuse under the Fifth Amendment. The prevailing view, however, is to the contrary, on the ground that a consent to search is neither testimonial nor communicative in the Fifth Amendment sense. If the police first obtain statements in violation of Miranda, the subsequently obtained consent might be claimed to be a suppressible fruit of the earlier Miranda violation, but the Supreme Court’s refusal to apply the fruits doctrine to certain other consequences of a Miranda violation (see § 6.6(g)) suggests this contention would not prevail.

1. **Consent subsequent to a claim of authority**

A search may not be justified on the basis of consent when that “consent” was given only after the official conducting the search asserted that he possessed a search warrant, but in fact there was no warrant or an invalid warrant. Such a claim of authority is, in effect, an announcement that the occupant has no right to resist the search, and thus acquiescence under these circumstances cannot be construed as consent. Bumper v. N.C., 391 U.S. 543 (1968). By comparison, the consent is valid if given in response to an officer’s declaration that he will seek a warrant, as no false or overstated claim of authority has occurred. But if the officer said he would obtain a warrant, this invalidates the consent if there were not grounds on which such a warrant could issue. Even when there is no assertion of a warrant or threat to obtain one, submission to such declarations as “I am here to search your house” or “I have come to search your house” are almost certain to be viewed as coercive. Amos v. U.S., 255 U.S. 313 (1921).

1. **Other relevant factors**

The voluntariness of a consent to search is “to be determined from the totality of all the circumstances,” Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Among the other factors to be considered in determining the effectiveness of an alleged consent to search are whether the defendant (1) had minimal schooling or was of low intelligence; (2) was mentally ill or intoxicated; (3) was under arrest at the time the consent was given; (4) was overpowered by arresting officers, handcuffed, or similarly subject to physical restrictions; (5) had seized from him by police the keys to the premises thereafter searched; (6) employed evasive conduct or attempted to mislead the police; (7) denied guilt or the presence of any incriminatory objects in his premises; (8) earlier gave a valid confession or otherwise cooperated, as by initiating the search, or at least the investigation leading to the search; (9) was hesitant in agreeing to the search; or (10) was refused his request to consult with counsel. The presence of some of these factors is not controlling, however, as each case must stand or fall on its own special facts.

**(e) Scope of consent**

 Assuming a valid consent, the police may not exceed the physical bounds of the area as to which consent was granted, such as by looking through private papers after a consent to allow search for narcotics. The standard for determining the scope of the consent “is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect.” Fla. v. Jimeno, 500 U.S. 248 (1991). Assuming consent to search a certain place, the police may look inside unlocked (but not locked) containers large enough to contain the object the police stated they were looking for. Jimeno, supra. There is disagreement as to whether a voluntary consent may be used to justify a second search of the same place after a fruitless first search; at least where there has been a significant passage of time, the second search involves re-entry of defendant’s home, and defendant’s status has changed from suspect to accused, the second search cannot be justified on the assumption that defendant’s consent is continuing. In any event, consent may be withdrawn or limited at any time prior to the completion of the search, though such a revocation does not operate retroactively so as to make invalid a search conducted prior to revocation.

1. **Consent by deception**

A somewhat related problem concerning the scope of the consent arises when the consent was obtained by deception, as where the suspect gives the policeman a gun on the representation that the officer will aid him in selling it, but the officer then has a ballistics test run on the weapon, or where the suspect gives a blood sample to the police on the representation that it will be tested for alcohol content but it is in fact matched with blood found at the scene of a rape. The “misplaced trust” cases, upholding the admissibility of voluntary disclosures of criminal conduct to an undercover officer or police agent, Lewis v. U.S., 385 U.S. 206 (1966), Hoffa v. U.S., 385 U.S. 293 (1966), are probably distinguishable. The above situations are more like Gouled v. U.S., 255 U.S. 298 (1921) (where an old acquaintance acting for the police obtained defendant’s consent to enter his office, but then conducted an extensive search when defendant left the room), in that the officer exceeded the reasonably anticipated scope of the consensual intrusion. That is, in Lewis and Hoffa the defendant voluntarily revealed his criminal activity to another, but this was not so in Gouled or the above illustrations.

**§ 2.13 THIRD PARTY CONSENT**

1. **Background**

 In the area of consent searches, courts have long recognized that certain third parties may give consent which will permit use of the seized evidence against the defendant. Various theories have been utilized to explain this result. An agency theory was relied upon in Stoner v. Cal., 376 U.S. 483 (1964), where the Court held that Fourth Amendment rights can only be waived by the defendant “either directly or through an agent.” But in Bumper v. N.C., 391 U.S. 543 (1968), the Court seemed to rely upon a property theory in intimating that the grandmother’s consent to search of her house for a rifle, had it been voluntary, would have been effective against the grandson who lived there because she “owned both the house and the rifle.” In Frazier v. Cupp, 394 U.S. 731 (1969), consent by defendant’s cousin Rawls to search of a duffel bag jointly used by them was held to be effective against the defendant because he “must be taken to have assumed the risk that Rawls would allow someone else to look inside.” Similarly, in U.S. v. Matlock, 415 U.S. 164 (1974), the Court indicated that where two or more persons have joint access to or control of premises “it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” This assumption-of-risk theory is consistent with the justified-expectation-of-privacy approach to the Fourth Amendment in Katz v. U.S., 389 U.S. 347 (1967) (see § 2.2(a)).

This shift in theoretical basis may affect the result. Under the agency theory it has been held that a wife’s consent is ineffective against her husband if she called the police because she was angry at him, but the contrary result is correct under the assumption-of-risk theory. By like reasoning, under the latter theory A’s consent may be upheld as against B even though B instructed A not to consent, even though the police passed up the opportunity to seek B’s consent, U.S. v. Matlock, 415 U.S. 164 (1974) or even though B’s consent was earlier sought and refused. The most difficult issue is whether A’s consent is effective against co-occupant B who is then present and objecting. The majority in Ga. v. Randolph, 547 U.S. 843 (2006), taking into account the “widely shared social expectations” of co-inhabitants, namely, “that a caller standing at the door of shared premises would have no confidence that one occupant’s invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, ‘stay out,’ ” answered in the negative (though acknowledged that if the rights of the two occupants were not equal, then perhaps the person with the superior interest would prevail). The Court admitted it was “drawing a fine line,” so that, in a case like Matlock where the defendant “was in a squad car not far away,” the outcome would be different: “So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant’s permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant’s contrary indication when he expresses it.” The principal dissent objected to “such random and happenstance lines” and said a “more reasonable approach is to adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others.”

1. **Relationship of third party to defendant and place searched**

Most of the third party consent cases have involved the husband-wife relationship, and the prevailing view is that when a husband and wife jointly own or occupy the premises in question, either may consent to a search of those premises for items potentially incriminating the other. Coolidge v. N.H., 403 U.S. 443 (1971). Recent decisions have also upheld consents given by paramours who actually shared the premises on a continuing basis. U.S. v. Matlock, 415 U.S. 164 (1974).

If a child is living at the home of his parents, a parent may consent to a search of the child’s living quarters. On the other hand, a child may not give effective consent to a full search of the parents’ home, although where it is not unusual or unauthorized for the child to admit visitors into the home, the mere entry of police on the premises with the consent of the child is not improper. A landlord may not consent to the search of rented premises occupied by a tenant, and this is so even though the landlord may have some limited right of entry for purposes of inspecting or cleaning the premises. Chapman v. U.S., 365 U.S. 610 (1961). A person who rents a hotel room is treated as any other tenant, Stoner v. Cal., supra, although once the time of occupancy has expired and the guest has checked out, a hotel representative may then consent to a search for anything the guest has left behind. Abel v. U.S., 362 U.S. 217 (1960). However, the landlord or his agents (such as a building custodian or superintendent) may consent to a search of hallways, basements, and other areas to which all tenants have common access. A tenant may not consent to search of the part of the premises retained by the landlord, Weeks v. U.S., 232 U.S. 383 (1914), but may consent to search of the premises rented to him for items the landlord may have hidden there. A person sharing a house or apartment with another may consent to a search of areas of common usage, and a person in lawful possession of premises may give consent to search of the premises that will be effective against a nonpaying guest or casual visitor.

An employer may consent to a search of an employee’s work and storage areas on the employer’s premises, but he may not consent to a search of areas in which the employee is permitted to keep personal items not connected with the employment. Whether an employee can give a valid consent to a search of his employer’s premises depends upon the scope of his authority. Generally, the courts have been of the view that a lesser employee, such as a secretary, may not give consent.

However, if the employee is a manager or other person of considerable authority who is left in complete charge for a substantial period of time, then the prevailing view is that such a person can waive his employer’s rights.

Whether a bailee, who does not own the property but has lawful possession of it, can consent to a police search of the property which will be effective against the bailor depends upon whether the nature of the bailment is such that the bailor has assumed the risk. Frazier v. Cupp, 394 U.S. 731 (1969). The risk is assumed when, as in that case, a duffel bag is turned over on the understanding that the bailee may use part of it to store his effects, but not when a locked container is involved and the bailee has no key. The extent to which the bailor has surrendered control and the length of the bailment are important; perhaps an attendant in a public garage may consent to the opening of the car door to see items on the floor of the car, but for the bailee to consent to search of the trunk it must appear that the bailee was authorized to open the trunk.

1. **Apparent authority**

 In Stoner v. Cal., 376 U.S. 483 (1964), in response to the state’s contention that a police search of defendant’s hotel room was proper because they reasonably believed that the clerk had authority to consent, the Court emphasized “that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of ‘apparent authority.’ ” This means only that an officer’s mistake as to someone’s legal authority cannot, in effect, expand the limits of third party consent. But, because the Fourth Amendment only proscribes “unreasonable” searches, a consent search is lawful despite an officer’s reasonable mistake of fact (e.g., that the person giving consent actually has the property interest in the premises searched which he claims to have or otherwise appears to have but in fact does not have). Ill. v. Rodriguez, 497 U.S. 177 (1990). In ambiguous circumstances the police may not accept even an explicit claim of authority without further inquiry. Rodriguez, supra.

1. **Exclusive control**

 In third party consent situations, it is necessary to consider the various relationships discussed above as they relate to the particular area or object searched. In U.S. v. Matlock, 415 U.S. 164 (1974), the Court said the effectiveness of the consent depended upon whether there was “common authority” over the premises, which was said to rest on “mutual use of the property” by one “having joint access or control for most purposes.” Consistent with this language is the notion that even if A and B generally share premises together, they each may still have areas therein of mutually exclusive use. Such is least likely to be true in husband-wife situations, where ordinarily the personal effects of each spouse are not thought to be “off limits” to the other, but the result may well be different in the case of friends sharing an apartment.

Israel, Jerold. Criminal Procedure, Constitutional Limitations in a Nutshell, 8th (pp. 44-46). West Academic. Kindle Edition.