JULY 2012 UPDATE

for

The Fourth Amendment:

Its History and Interpretation

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THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION (CAROLINA PRESS 2008) BY THOMAS K. CLANCY

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This supplement summarizes the Supreme Court cases on Fourth Amendment issues decided after the publication of my treatise–beginning with the 2008-09 Term. It is periodically updated at www.NCJRL.org and at www.cap-press.com/books/1795. The treatise is available at www.cap-press.com/books/1795.

Overview: 2012-13 Term. As discussed below, as of June 6, 2012, the Court granted *cert*. in three cases. Two involved dog sniffs and the third involved the detention of persons during the execution of a search warrant.

Overview: 2011-12 term. The term's most significant case, *United States v. Jones*, 565 U.S. __, 132 S. Ct. 945 (2012), held that non-consented to physical installation of a GPS device on a vehicle, combined with its subsequent monitoring for a lengthy period, constituted a search. That case, along with *City of Ontario v. Quon*, 560 U.S. __, 130 S. Ct. 2619 (2010) (digital evidence and expectations of privacy – reasonableness of a search involving a government-issued pager), produced wide-ranging opinions discussing the impact of technology on Fourth Amendment analysis. A second important case in the term established that jails could conduct suspicionless visual searches of the unclothed body of the arrestee whenever a person is arrested as an incident of incarceration. The terms also saw decisions on qualified immunity grounds, illustrating the recent trend in the Court of obscuring the distinction between substantive Fourth Amendment law and qualified immunity analysis.

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Cert. grants for the 2012-13 Term as of June 6, 2012:

1. ***Florida v. Jardines*,** 73 So. 3d 34 (Fla. 2011), No. 11-564, *cert. granted*, January 6, 2012.

    Issue: Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause?

    Note: The trained narcotics dog alerted to the bottom of the front door of a single family house while the dog was on the porch. The Supreme Court, in a series of decisions, has stated that a dog sniff is not a search; the Florida court distinguished those cases because they did not involve a house, which has "special status," and because the dog sniff in *Jardines* was a "sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments." The Florida Supreme Court detailed:

    > On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers, and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch of the residence. Tactical law enforcement personnel from various government agencies, both state and federal, were on the scene for surveillance and backup purposes. The entire on-the-scene government activity—i.e., the preparation for the "sniff test," the test itself, and the aftermath, which culminated in the full-blown search of Jardines' home—lasted for hours. The "sniff test" apparently took place in plain view of the general public. There was no anonymity for the resident.

2. ***Florida v. Harris***, 71 So. 3d 756 (Fla. 2011), No. 11-817, *cert. granted*, March 26, 2012.

    Issue. Whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle?

    Note: The Florida Supreme Court viewed as a given that a dog alert could establish probable cause. It viewed its task as detailing what evidence the state must introduce concerning the dog's reliability to meet that burden of proof. The Florida court stated:

    > [W]e hold that evidence that the dog has been trained and certified to detect narcotics, standing alone, is not sufficient to establish the dog's reliability for purposes of determining probable cause–especially since training and certification in this state are not standardized and thus each training and certification program may differ with no meaningful way to assess them.

> Accordingly, we conclude that to meet its burden of establishing that the officer had a reasonable basis for believing the dog to be reliable in order to establish probable cause, the State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle. To adopt the contrary view that the burden is on the defendant to present evidence of the factors other than certification and training in order to demonstrate that the dog is unreliable would be contrary to the well-established proposition that the burden is on the State to establish probable cause for a warrantless search. In addition, since all of the records and evidence are in the possession of the State, to shift the burden to the defendant to produce evidence of the dog's unreliability is unwarranted and unduly burdensome.

3. ***Bailey v. United States***, 652 F.3d 197 (2d. Cir. 2011), No. 11-770, *cert. granted*, June 4, 2012.

Issue. Whether, pursuant to *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.

The decided cases in this supplement are:[2]

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[2] A few other cases have touched on Fourth Amendment. The Court dismissed without opinion *Tolentino v. New York*, 926 N.E.2d 1212 (N.Y. 2010) (department of motor vehicle records as a fruit of an illegal stop), *cert. dismissed as improvidently granted,* 131 S. Ct. 1387 (2011). The Court denied review of a petition in *Huber v. New Jersey Dep't of Environmental Protection*, 131 S. Ct. 1308 (2011), prompting four Justices, in a statement written by Justice Alito, to comment about the closely regulated industries exception to the warrant requirement:

> In this case, a New Jersey appellate court applied this doctrine to uphold a warrantless search by a state environmental official of Robert and Michelle Huber's backyard. According to the court below, the presence of these wetlands brought the Hubers' yard "directly under the regulatory arm" of the State "just as much" as if the yard had been involved in a "regulated industry."
>
> This Court has not suggested that a State, by imposing heavy regulations on the use of privately owned residential property, may escape the Fourth Amendment's warrant requirement. But because this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate. It does bear mentioning, however, that "denial of certiorari does not constitute an expression of any opinion on the merits."

In *NASA v. Nelson*, 131 S. Ct. 746 (2011), which was not a Fourth Amendment case, the Court discussed the concept of informational privacy and assumed for the purpose of that case that there was one. Justice Scalia, concurring, maintained that no such right existed and asserted that the government's collection of private information is regulated by the Fourth Amendment and that that provision did not prohibit the government from asking questions. Justice Thomas concurred with Scalia.

1. *Pearson v. Callahan*, 555 U.S. 223 (2009) (qualified immunity)

2. *United States v. Herring*, 555 U.S.135 (2009) (exclusionary rule)

3. *Arizona v. Johnson*, 555 U.S. 323 (2009) (frisks of vehicle passengers)

4. *Arizona v. Gant,* 556 U.S. 332 (2009) (search of vehicle incident to arrest)

5. *Safford School District v. Redding*, 557 U.S. 364 (2009) (student searches)

6. *Virginia v. Harris*, 130 S. Ct. 10 (2009) (C.J. Roberts dissenting from denial of writ of certiorari) (DUI stops)

7. *Michigan v. Fisher*, 558 U.S. __, 130 S. Ct. 546 (2009) (exigent circumstances)

8. *City of Ontario v. Quon*, 560 U.S. __, 130 S. Ct. 2619 (2010) (digital evidence and expectations of privacy – reasonableness of a search involving a government-issued pager)

9. *Kentucky v. King*, 563 U.S. ___, 131 S. Ct. 1849 (2011) (police "creating" exigent circumstances)

10. *Ashcroft v. al-Kidd*, 563 U.S. __, 131 S. Ct. 2074 (2011) (detentions of material witnesses; qualified immunity)

11. *Davis v. United States*, 564 U.S. __, 131 S. Ct. 2419 (2011) (good faith exception to the exclusionary rule based on binding appellate precedent; search incident to arrest involving vehicles)

12. *Camreta v. Greene*, 563 U.S. ___, 131 S. Ct. 2020 (2011) (finding merits claim moot, opining that the Court had the discretion to reach the merits of the Fourth Amendment claim, even if a lower court finds for petitioner on qualified immunity grounds, but declining to do so in *Camreta*, and vacating the lower court's opinion regarding merits of detention of child for questioning at school)

13. *Jones v. United States*, 565 U.S. __, 132 S. Ct. 945 (2012) (holding that non-consented to physical installation of a GPS device on a vehicle and monitoring of the device is a search)

14. *Ryburn v. Huff*, 565 U.S. __, 132 S. Ct. 987 (2012) (per curiam) (summary reversal finding, on qualified immunity grounds, that there was sufficient indicia of exigent

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In *Reichle v. Howards*, 131 S. Ct. 2088 (2012), the Court determined that Secret Service agents who made a probable-cause based arrest were entitled to qualified immunity, even though it was alleged that the arrest was in retaliation for the exercise of the First Amendment right to free speech.

circumstances–fear of violence–for warrantless entry into home)

15. *Messerschmidt v. Millender*, 565 U.S. __, 132 S. Ct. 1235 (2012) (broadly worded opinion finding qualified immunity, based on conclusion that warrant had sufficient indicia of probable cause to search home)

16. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. __, 132 S. Ct. 1510 (2012) (permitting jails to conduct suspicionless visual searches of the unclothed body of the arrestee whenever a person is arrested).

17. *Arizona v. United States*, ___ S. Ct. ___, 2012 WL 2368661 (June 25, 2012) (although striking down most of the Arizona immigration law on grounds not related to the Fourth Amendment, extensive dicta on immigration related stops and arrests).

SUMMARY – DECIDED CASES

A. Qualified Immunity:

***Pearson v. Callahan*, 555 U.S. 223 (2009)**
***Camreta v. Greene*, 563 U.S. ___, 131 S. Ct. 2020 (2011)**
***Ryburn v. Huff*, 565 U.S. __, 132 S. Ct. 987 (2012) (per curiam)**
***Messerschmidt v. Millender*, 565 U.S. __, 132 S. Ct. 1235 (2012)**

Treatise references:
§ 13.6. Substantiality of the violation and "good faith"
§ 13.8. Other remedies

Plaintiffs in civil damage suits against government agents have two burdens to overcome. It must be shown that the agent 1) violated the plaintiff's Fourth Amendment rights and 2) is not entitled to qualified immunity, which would bar the law suit from proceeding. An agent is entitled to qualified immunity if the constitutional right violated was not clearly established at the time of the violation.[3] In *Saucier*, the Court established that courts considering such claims must address the first question prior to determining whether the agent is entitled to qualified immunity. This "order of battle" had been criticized by several justices[4] and the Court had candidly admitted that it

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[3] Saucier v. Katz, 533 U.S. 194, 201 (2001). Put another way, police officers are entitled to qualified immunity unless it would have been clear to a reasonable police officer that his conduct was unlawful in the situation he confronted. *E.g.*, Wilson v. Layne, 526 U.S. 603 (1999); Groh v. Ramirez, 540 U.S. 551, 563 (2004).

[4] *E.g.*, Morse v. Frederick, 551 U.S. 393, 430-32 (2007) (Breyer, J., concurring and dissenting) (collecting authorities).

contradicted its policy of avoiding unnecessary adjudication of constitutional issues.[5]

In ***Pearson v. Callahan*, 555 U.S. 223 (2009)**, the Court overruled *Saucier* in an unanimous opinion written by Justice Alito. The Court concluded:

> [W]hile the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

To support that conclusion, the Court rejected *stare decisis* considerations in light of the experience that lower courts had had with the *Saucier* rule and criticisms of that rule from a variety of sources, including from members of the Court. Nonetheless, the Court recognized that a decision on the merits "is often beneficial." Those situations included when little would be gained in terms of conservation of resources in just addressing the clearly established prong and when a discussion of the facts make it apparent that there was no constitutional violation. However, the Court stated that "the rigid *Saucier* procedure comes with a price," including the expenditure of scarce judicial resources and wasting of the parties' time. It noted that the cases addressing the constitutional question "often fail to make a meaningful contribution" to the development of Fourth Amendment principles for a variety of reasons. *Saucier* also made it difficult for the prevailing party, who has won on the qualified immunity issue, to gain review of an adversely decided constitutional issue. The Court concluded its decision by finding that the government's agents were entitled to qualified immunity and did not address the substantive Fourth Amendment claim.

It takes little insight to observe that the new mode of analysis will result in fewer courts developing Fourth Amendment principles and fewer cases presenting such issues for review. Avoiding the constitutional issue is, after all, the purpose of giving lower courts the discretion to dispose of the case on qualified immunity grounds.[6] As illustrated by the cases discussed *infra* in this section, what also results is an increased muddling of Fourth Amendment and qualified

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[5] Scott v. Harris, 550 U.S. 372, 377-78 (2007).

[6] The standard for qualified immunity is equivalent to the good faith exception to the exclusionary rule. Groh v. Ramirez, 540 U.S. 551, 565 n.8 (2004). In *United States v. Leon*, 468 U.S. 897 (1984), the Court established that evidence seized pursuant to a judicial warrant should not be suppressed unless the warrant or the affidavit on which it was based was so clearly defective that the officers who executed the warrant could not reasonably have relied upon it. *Id.* at 922-23. The Court explained that lower courts had "considerable discretion" either to "guide future action by law enforcement officers and magistrates" by deciding the substantive Fourth Amendment question "before turning to the good-faith issue" or to "reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith." *Id.* at 924-25. In light of that discretion, many courts opt to dispose of cases on the basis of good faith, without first considering whether there was a Fourth Amendment violation. *E.g.*, United States v. Proell, 485 F.3d 427, 430 (8th Cir. 2007).

immunity analysis. The Court has stated that, in analyzing qualified immunity claims, "[t]he question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards." Those standards will not be further clarified if courts address only the second question. Indeed, *Pearson* itself illustrates this point. The case involved an undercover drug buy in a house by an informant. After entering the home and confirming that the seller had the drugs, the purported buyer signaled the police, who then entered the house without a warrant. The alleged seller, after obtaining suppression of the evidence in the criminal case against him, sued the police. In defense to that suit, a claim was made that the "consent–once–removed" doctrine, which has been recognized by some courts, permitted the warrantless intrusion.[7] The Supreme Court did not address the merits of that doctrine, skipping directly to the qualified immunity aspect of the case and finding that the officers were entitled to qualified immunity because the illegality of their actions had not been clearly established. The result of *Pearson* may become typical: we are left with uncertainty as to the status of a controversial legal principle that has divided lower courts.

Pearson's new battle order–and the result in *Pearson*–makes more likely the avoidance of difficult Fourth Amendment questions in cases where a defense of qualified immunity is available. Hence, many civil cases will no longer be decided by the lower courts on the merits of the Fourth Amendment claims and, therefore, there will be less cases worthy of review by the Supreme Court. The end result is that the Court will not take as many cases for review because it can always be said: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was not clearly established.

***Camreta v. Greene*, 563 U.S. ___, 131 S. Ct. 2020 (2011),** illustrates one consequence of *Pearson's* battle order. The Ninth Circuit held that the police and a child protective services officer violated the Fourth Amendment when they went to a school and interviewed a nine year old student for two hours in a room without parental consent or a warrant. The Ninth Circuit, nonetheless, found for the governmental officials on qualified immunity grounds. The officials sought review by the Supreme Court on the merits of the Fourth Amendment issue. Justice Kagan, writing for herself and four other justices, found that the merits claim was moot. The majority, however, opined that the Court had the discretion to reach the merits of a Fourth Amendment claim in the proper cases, even if a lower court finds for the petitioner on qualified immunity grounds. It declined to do so in *Camreta*, vacating the lower court's opinion regarding the merits of the Fourth Amendment claim.

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[7] The "consent-once-removed" doctrine has been applied by some courts when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000); United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987); United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996). The Sixth and Seventh Circuits have broadened this doctrine to grant informants the same capabilities as undercover officers. *See* United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986); United States v. Yoon, 398 F.3d 802, 807 (6th Cir. 2005).

No justice addressed the Fourth Amendment merits in *Camreta*.[8] Instead, the case is only important because the Court viewed qualified immunity cases as a "special category when it comes to [the] Court's review of appeals brought by winners." It reasoned in part:

> In this category of qualified immunity cases, a court can enter judgment without ever ruling on the (perhaps difficult) constitutional claim the plaintiff has raised. Small wonder, then, that a court might leave that issue for another day.
>
> But we have long recognized that this day may never come–that our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo. Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior.

***Ryburn v. Huff*, 565 U.S. __, 132 S. Ct. 987 (2012) (per curiam)**, seems to point in the opposite direction in that the Court appeared to be addressing the merits but did not clearly state that it was doing so. The Court summarily reversed the Ninth Circuit, finding, on qualified immunity grounds, that there was sufficient indicia of exigent circumstances–fear of violence–for warrantless entry into a home. The facts are further discussed *infra* with the exigent circumstances cases.

The case is notable for two reasons: the Court's unabashed mixture of Fourth Amendment and qualified immunity analysis; and the detailed factual nature of the analysis. As to the former, the Court observed: "No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposition direction." Indeed, the Court never quoted or even cited a case referencing the current qualified immunity standard. Instead, it cited two cases discussing the exigent circumstances standard, and then engaged in a factual analysis that drew different conclusions than the Ninth Circuit had, criticizing that lower court's mode of analysis. The Court unanimously concluded: "reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent."

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[8] Justice Kennedy, in his dissenting opinion, criticized the majority for not deciding the Fourth Amendment question, noting that it was likely to arise again and that the reasoning of the Ninth Circuit "implicates a number of decisions in other Courts of Appeals." Kennedy, however, did not discuss the merits.

***Messerschmidt v. Millender*, 565 U.S. __, 132 S. Ct. 1235 (2012)**, is another reversal of the denial of qualified immunity by the Ninth Circuit. The case is important not for its result but due to some very broad language concerning the manner in which courts review claims that a warrant is so lacking in indicia of probable cause that the police are not entitled to qualified immunity. Because qualified immunity is equivalent to the good faith standard in criminal cases, the methodology in *Messerschmidt* is equally applicable in criminal cases–and appears to be a change from previous case law.

Messerschmidt was a police officer investigating the attempted shooting of Shelly Kelly by her boyfriend, Jerry Ray Bowen. He wrote a very broad request to search the house where Bowen was supposed to be living for all guns and gang-related material. The Fourth Amendment issue was *not* before the Court; the issue was whether there was sufficient indicia of probable cause to support those two categories of items. Chief Justice wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas, Breyer, and Alito. Justice Breyer wrote a short concurring opinion. Justice Kagan wrote an opinion concurring in part and dissenting in part. Justice Sotomayor, joined by Justice Ginsburg, dissented.

Much of the length of the opinions were disputes over facts and how to evaluate inferences about probable cause from the facts.[9] Beyond those factual disputes, *Messerschmidt* is important

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[9] Chief Justice Roberts' willingness to draw inferences from the facts for the first time, and inconsistent with inferences drawn by the officer drafting the affidavit, drew the ire Justice Sotomayor in dissent. Both the majority opinion and the dissent relied on evidence outside of the affidavit and accused each other of doing so.

One aspect of the Chief Justice's probable cause analysis is particularly noteworthy. In assessing whether the police had probable cause to search for evidence of "gang activity," Roberts stated that it would be reasonable "to believe that evidence regarding Bowen's gang affiliation would prove helpful in prosecuting him for the attack on Kelly." He believed that the evidence would establish Bowen's connection to the premises, help to establish motive, support the bringing of related charges against Bowen for the assault, and "might prove helpful in impeaching Bowen or rebutting various defenses he could raise at trial. For example, evidence that Bowen had ties to a gang that uses guns such as the one he used to assault Kelly would certainly be relevant to establish that he had familiarity with or access to this type of weapon."

Rejecting as important Messerschmidt's own "conclusion," as stated in his deposition, that the crime was not a gang crime, Roberts asserted that "Messerschmidt's evaluation did not answer the question whether it would have been unreasonable for an officer to have reached a different conclusion from the facts in the affidavit."

In dissent, Justice Sotomayor analyzed and rejected this analysis, observing in part:

> The Fourth Amendment does not permit the police to search for evidence solely because it could be admissible for impeachment or rebuttal purposes. If it did, the police would be equally entitled to obtain warrants to rifle through the papers of anyone reasonably suspected of a crime for all evidence of his bad character or any evidence of any "crime, wrong, or other act" that might prove the defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident[.]" Indeed, the majority's rationale presumably would authorize the police to search the residence of every member of Bowen's street gang for similar weapons—which likewise "might [have] prove[d] helpful in impeaching Bowen or rebutting various defenses he could raise at trial." It has long been the

because of the manner in which the Court reached its conclusion that the officers were entitled to qualified immunity. At least since *Leon*, when addressing probable cause claims, courts have limited to the four corners of the affidavit in assessing the indicia of probable cause, good, faith, and qualified immunity.[10] For the other three ways in which a warrant application could be attacked, reference to evidence outside the four corners was permitted.[11] Thus, prior case law had established: "Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'" There is a recognized exception to that rule when the warrant is issued "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

However, the *Messerschmidt* majority went outside of the affiadvit and took into account additional factors:

> Messerschmidt submitted the warrants to his supervisors—Sergeant Lawrence and Lieutenant Ornales–for review. Deputy District Attorney Janet Wilson also reviewed the materials and initialed the search warrant, indicating that she agreed with Messerschmidt's assessment of probable cause. Finally, Messerschmidt submitted the warrants to a magistrate. The magistrate approved the warrants and authorized night service.

Viewing the threshold for application of the exception to objective reliance on the warrant to be "a high one," and that, ordinarily, a officer is not expected to question the magistrate's determination, the majority concluded, based on the facts, that that high bar had not been crossed. In making that assessment, "the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause."

The case also had a confusing mixture of probable cause and particularity concerns. Hence, the majority distinguished *Groh v. Ramirez*, 540 U.S. 551 (2004). The issue in *Groh* was not a lack of probable cause but a complete lack in the warrant of the things to be seized. The majority stated:

> case, however, that such general searches, detached from probable cause, are impermissible. By their own admission, however, the officers were not searching for gang-related indicia to bolster some hypothetical impeachment theory, but for other reasons: because "photos sought re gang membership could be linked with other gang members, evidencing criminal activity as gang affiliation is an enhancement to criminal charges." That kind of fishing expedition for evidence of unidentified criminal activity committed by unspecified persons was the very evil the Fourth Amendment was intended to prevent.

[10] *See* Treatise § 12.3.1.

[11] *See* Treatise §§ 12.3.2. (magistrate abandoned role), 12.3.3. (misrepresentations by affiant), and 12.4.9. (particularity claims).

> The instant case is not remotely similar. In contrast to *Groh*, any defect here would not have been obvious from the face of the warrant. Rather, any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant. This is not an error that "just a simple glance" would have revealed. Indeed, unlike in *Groh*, the officers here did not merely submit their application to a magistrate. They also presented it for review by a superior officer, and a deputy district attorney, before submitting it to the magistrate. The fact that none of the officials who reviewed the application expressed concern about its validity demonstrates that any error was not obvious. *Groh* plainly does not control the result here.

Breyer, in his short concurring opinion, simply believed that there was sufficient indicia of probable cause based on all the circumstances. Kagan agreed that there was sufficient indicia of probable cause as to the firearms and related items but not as to the gang membership. Kagan also took issue with the majority's standard to assess whether officers are entitled to qualified immunity, which permitted the officers to reasonably rely on the approval of supervisors and the deputy district attorney:

> An officer is not "entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant." *Malley* [*v. Briggs* 475 U.S. 335 (1986)], made clear that qualified immunity turned on the officer's own "professional judgment," considered separately from the mistake of the magistrate. And what we said in *Malley* about a magistrate's authorization applies still more strongly to the approval of other police officers or state attorneys. All those individuals, as the Court puts it, are "part of the prosecution team." To make their views relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each other for unreasonable conduct–like applying for a warrant without anything resembling probable cause.

Justice Sotomayor, in dissent,[12] echoed Kagan's views, rejecting as "inconsistent with our focus on the objective reasonableness of an officer's decision to submit a warrant application to a magistrate" any reliance on magistrates, supervisors, or prosecutors. She reasoned that allowing reliance on the magistrate's decision to issue the warrant would encourage "sloppy police work" and that, giving weight to supervisor or prosecutor review "would turn the Fourth Amendment on its head." She stated:

> The effect of the Court's rule, however, is to hold blameless the "plainly incompetent" action of the police officer seeking a warrant because of the "plainly incompetent" approval of his

[12] Sotomayor began her opinion by criticizing the warrant on particularity grounds, viewing the following language as the "kind of general warrant . . . antithetical to the Fourth Amendment[:] the warrant authorized the "search for all evidence related to 'any Street Gang,' '[a]ny photographs . . . which may depict evidence of criminal activity,' and 'any firearms.'"

> superiors and the district attorney. Under the majority's test, four wrongs apparently make a right. I cannot agree, however, that the "objective legal reasonableness of an official's acts" turns on the number of police officers or prosecutors who improperly sanction a search that violates the Fourth Amendment.

Sotomayor did state that, in evaluating qualified immunity, courts are permitted to use a police officer's testimony about the information he or she possessed at the time of the search, including that officer's assessment of the information. She added: "Courts cannot ignore information in crime analysis forms, ballistic reports, or victim interviews by labeling such information 'conclusions.'" Conflating the use of evidence outside the four corners of a warrant to assess whether the officer engaged in misrepresentations during the warrant process and the standard to assess probable cause, Sotomayor opined:

> If an officer possesses information indicating that he lacks probable cause to search, and that information was not presented to the neutral magistrate when he approved the search, it is particularly likely that "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." United States v. Leon, 468 U.S. 897, 922, n. 23 (1984).

Nonetheless, Sotomayor later complained that the majority was relying on additional facts about Bowen's background and arrest record that had not been disclosed to the magistrate, stating:

> The police cannot rationalize a search post hoc on the basis of information they failed to set forth in their warrant application to a neutral magistrate. Rather, "[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." Likewise, a police officer cannot obtain qualified immunity for searching pursuant to a warrant by relying upon facts outside that warrant, as evinced by Malley's focus on "whether a reasonably well-trained officer in petitioner's position would have known that his *affidavit* failed to establish probable cause." Malley v. Briggs, 475 U.S. 335, 345 (1986).

A clarifying case is sure to follow.

B. The Exclusionary Rule:

***United States v. Herring*, 555 U.S. 135 (2009)**
***Davis v. United States*, 564 U.S. __, 131 S. Ct. 2419 (2011)**
***Messerschmidt v. Millender*, 565 U.S. __, 132 S. Ct. 1235 (2012)** (summarized above and outlining modification of the standard by which challenges to probable cause claims are analyzed for purpose of good faith reliance on warrant).

Treatise references:

§ 13.2. Evolution of exclusionary rule doctrine
§ 13.3. Causation: fruit and attenuation analysis

§ 13.6. Substantiality of the violation and "good faith"

***United States v. Herring*, 555 U.S. 135 (2009),** has been read narrowly and broadly.[13] The broader reading signals a dramatic restriction in the application of the exclusionary rule. ***Davis v. United States*, 564 U.S. __, 131 S. Ct. 2419 (2011)**, signals that the board interpretation is the correct one. If the broad language employed in *Herring* and *Davis* prevails, it will fundamentally change the litigation of motions to suppress in criminal cases. That is, a central question will be whether the officer had a culpable mental state; if not, the rule will not apply. If that mode of analysis prevails, it will reduce appreciably the number of cases addressing the merits of Fourth Amendment claims and expand dramatically the inapplicability of the exclusionary rule.

Narrowly, the issue in *Herring* was whether the good faith doctrine should be applied when police officers in one jurisdiction checked with employees of the sheriff's office in another jurisdiction and were told that there was an outstanding warrant for Herring, who was then arrested. Contraband was discovered during the search incident to Herring's arrest. The report was in error and the warrant should have been removed from the records but had not been due to the negligence of personnel in the reporting jurisdiction's sheriff's office.

Writing for a majority of five, Chief Justice Roberts stated that the exclusionary rule did not apply. A narrow reading of *Herring* can be drawn from the following statement by the majority of its holding: "Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence." Words of limitation jump out from these sentences: "isolated negligence;" attenuation.[14] Hence, some have seen *Herring* as a narrow expansion of good faith that has little application.[15]

In contrast, the rest of the majority opinion was very broadly written and significantly recasts

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[13] *See generally* Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHICAGO KENT L. REV. 191 (2010).

[14] Consistent with a narrow view, Roberts later asserted: "An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place."

[15] Justice Kennedy, a crucial fifth vote in *Hudson*, might be attracted to such a view. However, he joined the Court's opinions in *Herring* and *Davis*. In *Hudson*, the majority viewed the knock and announce violation attenuated from the recovery of the evidence in the house. It stated: "Attenuation . . . occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." Kennedy wrote a concurring opinion in which he stated that the *Hudson* "decision determines only that in the specific context of the knock–and–announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression. He added that "the causal link between a violation of the knock–and–announce requirement and a later search is too attenuated to allow suppression." The concept of attenuation in *Hudson* and in *Herring* differs markedly from the concept of attenuation that prevailed in pre-*Hudson* Supreme Court jurisprudence. *See* Treatise §§ 13.3.1.2., 13.3.6.

modern exclusionary rule theory. Instead of viewing the issue as part of a good faith exception to the exclusionary rule, Roberts seemed to dismiss that notion; he viewed *United States v. Leon*,[16] the genesis of that exception, as follows:

> When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance "good faith."[17]

Roberts expansively reframed exclusion analysis, asserting that suppression "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." He later repeated: "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." He added:

> Judge Friendly wrote that "[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights."[18]

Exclusion–and deterrence–appears justified after *Herring* based on culpability. It does not further that inquiry, it appears, to label the situation as a "good faith" exception to the exclusionary rule. Thus, Roberts recounted several cases of "intentional" and "flagrant" misconduct, including in *Weeks*,[19] which was the case that initially adopted the exclusionary rule, that would support exclusion. Roberts thereafter flatly asserted:

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[16] 468 U.S. 897 (1984).

[17] The label "good faith" is misleading to the extent that it suggests that the actual belief of the officer is examined. Instead, the inquiry focuses "expressly and exclusively on the *objective reasonableness* of an officer's conduct, not on his or her subjective 'good faith' (or 'bad faith')." People v. Machupa, 872 P.2d 114, 115 n.1 (Cal. 1994). *See also* United States v. Leon, 468 U.S. 897, 918 (1984) (stating that the Court has "frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment"). However, labeling the officer's conduct as "objectively reasonable" has also been criticized as misleading. For example, Justice Stevens took issue with the Court's characterization of the police's conduct as being objectively reasonable, if they have not complied with the Fourth Amendment, because "when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution." *Id*. at 975 (Stevens, J., dissenting).

[18] Quoting *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (footnotes omitted) and citing Brown v. Illinois, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part) ("[T]he deterrent value of the exclusionary rule is most likely to be effective" when "official conduct was flagrantly abusive of Fourth Amendment rights").

[19] Weeks v. United States, 232 U.S. 383 (1914).

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.[20]

The Chief Justice emphasized that negligence is simply not worth the costs of exclusion.[21] He ended the majority opinion by quoting one of the more famous statements in opposition to the adoption of the exclusionary rule and stated:

[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." In such a case, the criminal should not "go free because the constable has blundered."[22]

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented.[23] Justice Ginsburg certainly did not view the *Herring* decision as narrow. She replied with a broad defense of the rule, which is notable for the fact that, for the first time in decades, a member of the Court

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[20] Roberts maintained that recordkeeping errors by the police are not immune from the exclusionary rule but "the conduct at issue was not so objectively culpable as to require exclusion." He noted: "If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation."

[21] Despite all of the Court's references to apparently subjective states of mind, Roberts added a confusing twist: all of these inquiries are objective ones. He emphasized that "the pertinent analysis of deterrence and culpability is objective, not an 'inquiry into the subjective awareness of arresting officers[.]'" Factors in making that determination include a "particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, but not his subjective intent[.]"

Perhaps the Chief Justice was seeking to preserve the Court's general approach to measuring reasonableness, which has been an objective analysis of the facts. *See* Treatise § 11.6.2.1. (summarizing the Court's general approach to measuring reasonableness). Nonetheless, in situations where a police officer intentionally or recklessly places false information in a warrant (or omits such information), the inquiry has required an examination of the officer's actual state of mind. *See id*. § 12.3.3. (collecting authorities); Franks v. Delaware, 438 U.S. 154 (1978). Indeed, the concepts of knowledge and recklessness are familiar criminal law concepts, each requiring inquiry into the actor's actual state of mind. *E.g.,* Model Penal Code § 2.02. *Herring* seems to create the bizarre principle that, to ascertain if an officer was intentionally or recklessly violating a person's Fourth Amendment rights, that inquiry is an objective one.

[22] 555 U.S. at __, *quoting* People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (opinion of the Court by Cardozo, J.).

[23] Justice Breyer, in a separate dissent joined by Justice Souter, applied a traditional good faith analysis and concluded that it should not apply in *Herring*. He believed that negligent record keeping errors were susceptible to deterrence through application of the exclusionary rule.

suggested that the exclusionary rule may be constitutionally based.[24] Addressing what she perceived as the Court's creation of a system of exclusion based on distinctions between reckless or intentional actions on the one hand and mere negligence on the other, Ginsburg argued that the rule was also justified when the police are negligent. She believed that the mistake in *Herring* justified its application and concluded:

> Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule.

If *Herring's* broader implications are realized, Fourth Amendment litigation will change to one focused primarily on the culpability of the government agent and, often, the merits of the Fourth Amendment claim will not have to be decided. The inquiry after *Herring* becomes a quest to ascertain police culpability: was there intentional misconduct; reckless misconduct; a pattern of recurring negligence; or mere negligence? "Mere negligence" would make many–if not most–Fourth Amendment violations inappropriate candidates for suppression. For example, a police officer–instead of relying on information from other officers as in *Herring*–may believe that her actions are reasonable based on her own investigation, even though the actions do not comply with the Fourth Amendment.[25] Based on a broad reading of *Herring*, a court could simply skip the merits of a claim and address solely the lack of an exclusionary remedy. Thus, a court could simply rule: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence.

***Davis v. United States*, 564 U.S. __, 131 S. Ct. 2419 (2011)**, builds on *Herring* and reinforces the view that *Herring's* analysis will have broad applicability. Narrowly, *Davis* created

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[24] Ginsburg stated:

> Others have described "a more majestic conception" of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental "right of the people to be secure in their persons, houses, papers, and effects," the Amendment "is a constraint on the power of the sovereign, not merely on some of its agents." I share that vision of the Amendment.
>
> The exclusionary rule is "a remedy necessary to ensure that" the Fourth Amendment's prohibitions "are observed in fact." The rule's service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.
>
> Beyond doubt, a main objective of the rule "is to deter-to compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it." But the rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people-all potential victims of unlawful government conduct-that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."

[25] *E.g.,* Moore v. State, 986 So. 2d 928, 934-35 (Miss. 2008) (collecting cases and finding that, when a police officer, under a reasonable mistake of law, believed that there is probable cause to make a traffic stop, the stop is valid, even though the vehicle did not violate the law).

a new good faith exception to exclusion: "we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." It applied that rule to searches incident to arrest involving motor vehicles, concluding that the police reasonably relied on prior precedent that permitted such searches.

Justice Alito wrote for a majority of six. In deciding whether to apply the exclusionary rule in a particular context, Alito maintained that there were several considerations. First, since the sole purpose of the rule was deterrence of future Fourth Amendment violations, application of the rule must yield "'appreciable deterrence.'" "Real deterrent value is a 'necessary condition for exclusion, but it is not "a sufficient" one. Second, Altio continued, the analysis must include the "'substantial societal costs'" of exclusion, including the toll on the judicial system and society at large. He maintained:

> [The exclusionary rule] almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Third, according to Alito, beginning with *United States v. Leon*, 468 U.S. 897 (1984), the Court "recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the 'flagrancy of the police misconduct' at issue." Altio, relying heavily on *Herring*, continued:

> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful or when their conduct involves only simple, "isolated" negligence, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way."

Altio catalogued the Court's good faith cases and then applied the analysis to the facts in *Davis*. He observed: "all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way." He concluded:

> Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis's claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield "meaningfu[l]" deterrence, and culpable enough to be "worth the price paid by the justice system." The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence. Nor does this case involve any "recurring or systemic negligence" on the part of law enforcement. The police acted in strict

> compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.[26]

Justice Sotomayor, in her opinion concurring in the judgment of the Court, was "compelled to conclude" that the exclusionary rule did not apply. However, she observed that, when the law is unsettled, whether exclusion should be applied was an open question. She did not believe that culpability analysis was itself dispositive. Instead, she contended:

> [A]n officer's culpability is relevant because it may inform the overarching inquiry whether exclusion would result in appreciable deterrence. Whatever we have said about culpability, the ultimate questions have always been, one, whether exclusion would result in appreciable deterrence and, two, whether the benefits of exclusion outweigh its costs.

Justice Breyer, joined by Justice Ginsburg, dissented. Much of his opinion addressed retroactivity. He also rejected the Court's new good faith exception in *Davis*, noting that it "creates 'a categorical bar to obtaining redress' in *every* case pending when a precedent is overturned." Critical of the new culpability approach, he posed the question: "If the Court means what it says, what will happen to the exclusionary rule[?]" Breyer continued:

> Defendants frequently move to suppress evidence on Fourth Amendment grounds. In many, perhaps most, of these instances the police, uncertain of how the Fourth Amendment applied to the particular factual circumstances they faced, will have acted in objective good faith. Yet, in a significant percentage of these instances, courts will find that the police were wrong. . . . [A]n officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous "binding precedent." Nor is an officer more culpable where circuit precedent is simply suggestive rather than "binding," where it only describes how to treat roughly analogous instances, or where it just does not exist. Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule. Indeed, our broad dicta in *Herring*–dicta the Court repeats and expands upon today–may already be leading lower courts in this direction. Today's decision will doubtless accelerate this trend.

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[26] The case also had a substantial discussion of retroactivity principles, with Davis arguing that the *Gant* rule should retroactive to foster the development of Fourth Amendment principles. His basic argument was that, if good faith applied to reliance on appellate precedent, future litigants would have no incentive to challenge that precedent and Fourth Amendment law would become "ossified." Rejecting that view, the majority focused intensively on the principle that exclusion is not a personal right but held open the possibility of obtaining suppression "if necessary" in a future case.

Any such change (which may already be underway) would affect not "an exceedingly small set of cases," but a very large number of cases, potentially many thousands each year. And since the exclusionary rule is often the only sanction available for a Fourth Amendment violation, the Fourth Amendment would no longer protect ordinary Americans from "unreasonable searches and seizures." It would become a watered-down Fourth Amendment, offering its protection against only those searches and seizures that are *egregiously* unreasonable.

C. Frisks of Vehicle Passengers:

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

Treatise references:

§ 5.1.4. Show of authority seizures
§ 6.4.3. Traffic stops
§ 9.1. Protective weapons searches [frisks]
§ 11.3.2.1.2. Articulable suspicion

In an unanimous opinion written by Justice Ginsburg, the Court established that a vehicle passenger can be frisked during the course of a vehicle stop if the police have articulable suspicion to believe that that person is armed and dangerous. Johnson was a back-seat passenger of a vehicle legally stopped for a non-criminal vehicular infraction. The Court reviewed prior case law that had established a variety of activities that the police can permissibly engage in during a traffic stop. It also recognized, consistent with *Brendlin v. California,* 551 U.S. 249 (2007), that passengers of a motor vehicle are "seized" when police stop a vehicle. It applied that principle to *Johnson*. The sole aspect of *Johnson* that was new is that, even if the police do not believe that the passenger is engaged in criminal activity, the passenger can be frisked *if* the police "harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous."

Ginsburg's opinion did not note that lower courts had divided on whether the right to frisk is dependent on whether the police suspected the person of criminal activity. *Johnson* has potentially broad applicability to a variety of situations where the police are validity detaining a person (or confronting one) but do not believe that the person has been, is, or is about to be, engaged in criminal activity but do have articulable suspicion that the person accosted is armed and dangerous. Hence, in addition to passengers in a vehicle, *Johnson* could apply to material witnesses, detainees in a house where a warrant is being executed, or to any person the police confront.

D. Search Incident to Arrest of Vehicle Occupants:

***Arizona v. Gant,* 556 U.S. __, 129 S. Ct. 1710 (2009)**
***Davis v. United States*, 564 U.S. __, 131 S. Ct. 2419 (2011)**

Treatise references:

§ 8.1. General considerations and evolution of the doctrine
§ 8.1.2. Exigency versus categorical approach
§ 8.1.3. Officer safety and evidence recovery justifications
§ 8.2. Permissible objects sought
§ 8.3. Timing and location of the search
§ 8.6. Scope: vehicle searches incident to arrest
§ 8.7. Justice Scalia's opinion in *Thornton* and alternative views regarding search incident to arrest

For searches incident to arrest, it had long been established that the police can always search the person and the area of immediate control around that person.[27] If that person is in a vehicle, under *Belton*, the police could always search the entire passenger compartment incident to the arrest.[28] The Court in ***Arizona v. Gant,* 556 U.S. __, 129 S. Ct. 1710 (2009)**, rejected that second principle and created two new rules for searches incident to arrest of persons who are in vehicles. They were:

> 1. A search is not permitted incident to a recent occupant's arrest after the arrestee is secured and cannot access the interior of the vehicle;
> **or**
> 2. A search is permissible if the police have reason to believe that evidence of the offense of arrest might be in the vehicle.

Explaining the first rule, Justice Stevens, writing for a majority of five, stated that a search of a vehicle incident to arrest is permissible "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." In footnote 4, he opined for the majority:

> Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains.

Explaining the second rule, Stevens asserted that circumstances unique to the automobile context

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[27] *E.g.*, Thornton v. United States, 541 U.S. 615 (2004); Michigan v. DeFillippo, 443 U.S. 31, 39 (1979) ("the fact of a lawful arrest, standing alone, authorizes a search [of the person arrested]"); Gustafson v. Florida, 414 U.S. 260, 266 (1973) ("Since it is the fact of custodial arrest which gives rise to the authority to search," the lack of a subjective belief by the officer that the person arrested is armed and dangerous is irrelevant.); Robinson v. United States, 414 U.S. 218 (1973) (adopting a "categorical" search incident to arrest rule: it applied to all arrests, regardless of the underlying factual circumstances).

[28] New York v. Belton, 453 U.S. 454 (1981), (holding that, as an incident to arrest of an automobile occupant, the police may search the entire passenger compartment of the car, including any open or closed containers, but not the trunk). *See also* Thornton v. United States, 541 U.S. 615 (2004) (holding that *Belton* applied to situations where the suspect gets out of a car before the officer has made contact with the suspect).

justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be in the vehicle. In another part of the opinion he called this standard a "reasonable basis." This appears to be the familiar articulable suspicion standard, used to justify *Terry* stops and frisks.

Justice Stevens viewed the primary rationale of the new rules as protecting privacy interests. He saw *Belton* searches, which authorized police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space, as creating "a serious and recurring threat to the privacy of countless individuals." He also maintained that *Belton* was not as bright a rule as had been claimed and that *Belton* was unnecessary to protect legitimate law enforcement interests.

Justice Scalia, in a concurring opinion, said that he did not like the majority's new rules but liked the dissent's view even less; he did not want to create a 4-1-4 situation and, therefore, joined the majority opinion, although acknowledging that it was an "artificial narrowing" of prior cases. Scalia stated that the rule he wanted was that the police could only search a vehicle incident to arrest if the object of the search was evidence of the crime for which the arrest was made.

Justice Breyer's dissent essentially argued that stare decisis applied. Altio, in dissent (joined by Chief Justice Roberts and Justices Kennedy and Breyer (in relevant part)), maintained that *Belton* was a good rule and that the new rules had no rational limitation to vehicle searches. He argued, in effect:

> Why does the rule not apply to all arrestees?
> Why is the reason to believe standard sufficient to justify a search?

***Davis v. United States*, 564 U.S. __, 131 S. Ct. 2419 (2011),** was a necessary followup to *Gant,* given the impact of the change on the vast number of cases pending at the time *Gant* was decided. The lower courts had adopted a variety of views regarding the impact of *Gant. Davis*, as discussed elsewhere in this supplement, created a broad "good faith" exception based on reliance on binding appellate decisions. *Davis* does not add to our understanding of *Gant*. It did, however, clearly state something that *Gant* had refused to do: the Court in *Gant* overruled *Belton* and "adopted a new, two-part rule." *Davis* merely summarized[29] the two part rule from *Gant* and went on to reject application of the exclusionary rule to searches performed within the *Belton* framework performed prior to the decision in *Gant*.

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[29] *Davis* restated the first prong of *Gant* as permitting a search of a motor vehicle "if the arrestee is within reaching distance of the vehicle during the search[.]" *Gant*, as noted in text, stated the first prong of the new regime negatively, which seemed to have two aspects: the arrestee was secured and could not access the vehicle. The second aspect (lack of access) presumably flows from the first (the arrestee is secured). In *Gant,* the majority also stated the first prong as follows: the police may search "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." However, *Davis'* formulation focuses solely on the location of the arrestee and not whether that person is "secured."

E. Student Searches: *Safford School District v. Redding*, 557 U.S. __, 129 S. Ct. 2633 (2009)

Treatise references:

§ 3.3. The reasonable expectation of privacy test

§ 3.3.3.2. Situations where the Court has found reduced expectations of privacy

§ 3.3.4. Measuring expectations of privacy and techniques to create the hierarchy

§ 7.3. Physical invasions; two-sided nature of search analysis

§ 8.4. {intrusive searches incident to arrest} Scope: arrestee's body

§ 11.3.4.4.2.2. Special needs

Middle school official caught a student with prescription-strength ibuprofen pills, which was a violation of school rules. Relying on that student's uncorroborated statement that 13-year-old Savana Redding gave her the pills, school officials required Redding to remove her outer clothing and briefly pull away her underwear. Nothing was found. Redding's mother sued the school, alleging that school officials had violated Redding's Fourth Amendment rights.

In an 8-1 vote, the Supreme Court agreed with Redding that the Fourth Amendment had been violated. Writing for the Court, Justice Souter purported to apply the framework established in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), to the search. First, the Court concluded that there was reasonable suspicion that Redding "was involved in pill distribution." Second, the Court examined the scope of the search. It initially found that the authorities were justified in searching Redding's backpack and outer clothing but that strip searches were a "category of its own demanding its own specific suspicions." Because the authorities did not have individualized suspicion that Redding was hiding the "common pain killers in her underwear," the authorities violated the Fourth Amendment by conducting such an intrusive search. Nonetheless, Justice Souter concluded that the school officials were entitled to qualified immunity because the circuits had been split on the question of when a strip search was justified. Justices Ginsburg and Stevens dissented on the question of qualified immunity. Justice Thomas, concurring and dissenting, argued that the search was not unreasonable and offered an expansive view of school officials' authority.[30]

F. DUI stops: Virginia v. Harris, 130 S. Ct. 10 (2009) (Chief Justice Roberts, with whom Justice Scalia joined, dissenting from denial of certiorari).

Treatise references:

§ 11.3.2. {measuring reasonableness} Model#2: individualized suspicion

§ 11.3.2.1.2. Articulable suspicion

§ 11.3.2.2. Types and sources of information

§ 11.3.2.3. Informants

§ 11.3.4.4.2.2. Special needs

Citing the dangers posed by drunk driving and the frequent reports of such conduct to the police, the Chief Justice argued that the Court should grant certiorari to determine whether an

[30] For extensive treatment of *Redding* and the Fourth Amendment rights of children, *see* Symposium, *The Fourth Amendment Rights of Children and Juveniles*, 80 MISS. L.J. 789 (2011).

anonymous tip that Harris was driving while intoxicated was sufficient to justify a stop. Harris had been convicted of driving while intoxicated but the Virginia Supreme Court overturned the conviction, concluding that, because the officer had failed to independently verify that Harris was driving dangerously, the stop violated the Fourth Amendment.

The Chief Justice asserted: "I am not sure that the Fourth Amendment requires such independent corroboration before the police can act, at least in the special context of anonymous tips reporting drunk driving." He noted that, as a general rule, the Court has held "that anonymous tips, in the absence of additional corroboration, typically lack the 'indicia of reliability' needed to justify a stop under the reasonable suspicion standard." But he believed that "Fourth Amendment analysis might be different in other situations," including "'in quarters where the reasonable expectation of Fourth Amendment privacy is diminished.'" He noted that the "Court has in fact recognized that the dangers posed by drunk drivers are unique, frequently upholding anti-drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances." Roberts also pointed to a conflict in federal and state courts over the question:

> The majority of courts examining the question have upheld investigative stops of allegedly drunk or erratic drivers, even when the police did not personally witness any traffic violations before conducting the stops. These courts have typically distinguished [the] general rule based on some combination of (1) the especially grave and imminent dangers posed by drunk driving; (2) the enhanced reliability of tips alleging illegal activity in public, to which the tipster was presumably an eyewitness; (3) the fact that traffic stops are typically less invasive than searches or seizures of individuals on foot; and (4) the diminished expectation of privacy enjoyed by individuals driving their cars on public roads. A minority of jurisdictions, meanwhile, take the same position as the Virginia Supreme Court, requiring that officers first confirm an anonymous tip of drunk or erratic driving through their own independent observation.

G. Exigent Circumstances:

***Michigan v. Fisher*, 558 U.S. __, 130 S. Ct. 546 (2009) (per curiam)**
***Kentucky v. King*, 563 U.S. ___ , 131 S. Ct. 1849 (2011)**
***Ryburn v. Huff*, 565 U.S. __, 132 S. Ct. 987 (2012) (per curiam)**

Treatise reference:
§ 10.6. Exigent circumstances
§ 11.3.2. Individualized Suspicion
§ 5.1.6. Attempted Seizures

Michigan v. Fisher, 558 U.S. __, 130 S. Ct. 546 (2009) (per curiam). Fisher was charged with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The state trial court granted his motion to suppress evidence obtained as a result of warrantless entry into his residence. After the state appealed but lost in the Court of Appeals of Michigan, the Supreme Court granted certiorari and summarily reversed. In a per curiam opinion,

the Court held that officer's warrantless entry into Fisher's residence was reasonable.

Police officers responded to a complaint of a disturbance. As they approached the area, a couple directed the officers to a residence where a man was "going crazy." According to the Court,

> the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. . . . Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked but Fisher refused to answer. Observing that Fisher had a cut on his hand, they asked him whether he needed medical attention. Fisher ignored the questions and demanded that the officers get a search warrant. One officer then pushed the front door partly open and ventured into the house. Through the window of the open door he saw Fisher pointing a long gun at him and withdrew.

Starting with the proposition that exigent circumstances justified a warrantless entry into a home, and relying on the then recent case of *Brigham City v. Stuart,* 547 U.S. 398 (2006), which identified one such exigency as "the need to assist persons who are seriously injured or threatened with such injury," the Court asserted that

> law enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." This "emergency aid exception" does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only "an objectively reasonable basis for believing[]" that "a person within [the house] is in need of immediate aid."

Stating that *Fisher* was a "straightforward application of the emergency aid exception," the majority believed that the entry was reasonable under the Fourth Amendment. It also clarified the type of injury that was needed:

> Officers do not need ironclad proof of "a likely serious, life-threatening" injury to invoke the emergency aid exception. The only injury police could confirm in *Brigham City* was the bloody lip they saw the juvenile inflict upon the adult. Fisher argues that the officers here could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel. This would have no bearing, of course, upon their need to assure that Fisher was not endangering someone else in the house. Moreover, even if the failure to summon medical personnel conclusively established that [the officer] did not subjectively believe, when he entered the house, that Fisher or someone else

> was seriously injured (which is doubtful), the test, as we have said, is not what [the officer] believed, but whether there was "an objectively reasonable basis for believing" that medical assistance was needed, or persons were in danger.

Rejecting the hindsight determination that there was in fact no emergency as not meeting "the needs of law enforcement or the demands of public safety," the majority opined:

> Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else.

Justice Stevens filed dissenting opinion in which Justice Sotomayor joined. Stevens believed that it was a factual question whether the police had "an objectively reasonable basis for believing that [Fisher was] seriously injured or imminently threatened with such injury," and that it had not been shown that the trial judge was wrong in concluding that the entry was unlawful. He found the police decision to leave the scene after Fisher pointed the gun and not return for several hours inconsistent with a reasonable belief that Fisher was in need of immediate aid. Stevens argued: "In sum, the one judge who heard [the officer's] testimony was not persuaded that [the officer] had an objectively reasonable basis for believing that entering Fisher's home was necessary to avoid *serious* injury." Stevens added that, even if one concluded that the trial court was wrong, "it is hard to see how the Court is justified in micromanaging the day-to-day business of state tribunals making fact-intensive decisions of this kind."

In ***Kentucky v. King*, 563 U.S. ___, 131 S. Ct. 1849 (2011)**, the Court addressed the question whether lawful police action can impermissibly "create" exigent circumstances, serving to preclude warrantless entry.[31] According to the Court, under the "so-called 'police-created exigency' doctrine . . ., police may not rely on the need to prevent destruction of evidence when that exigency was 'created' or 'manufactured' by the conduct of the police." The Court added:

> [C]ourts require something more than mere proof that fear of detection by the police caused

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[31] *King* provided a description of the exigency doctrine and a list of recognized circumstances when it applies. The doctrine was viewed in *King* as an exception to the warrant requirement and "'applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" The exceptions listed by *King* were:

> Under the "emergency aid" exception, for example, "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. And . . . the need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search.

> the destruction of evidence. An additional showing is obviously needed because . . . "in some sense the police always create the exigent circumstances." That is to say, in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement. Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.

The facts of *King* were straight-forward. Police officers entered an apartment building to arrest a person who had just sold crack cocaine to an undercover informant on the street. An officer who observed the transaction radioed uniformed officers to move in and arrest the suspect. The officer later radioed that the suspect had entered the back *right* apartment but the arresting officers at that point were on foot and not in radio contact. A strong odor of marijuana emanated from the door of the back *left* apartment, prompting the officers to believe the trafficker had fled into that apartment. The officers knocked on the door of the left apartment and announced their presence. They heard noises that indicated that physical evidence was being destroyed.[32] The officers announced that they were going to enter the apartment and did so; they found quantities of drugs in plain view.

In reaching its decision, the Court catalogued and rejected a variety of tests created by lower courts to prevent police officers from creating exigent circumstances, concluding that the ultimate test is whether "conduct of the police preceding the exigency is reasonable." In making that determination in *King*, the Court emphasized that the inquiry was an objective one and not dependent on an officer's subjective intent, not dependent on what the officer expected to find, nor on assessment of any expected response by the persons in the home. The Court also rejected a rule that would require the police to get a warrant if they had time to do so, observing that the police had the discretion to engage in a variety of investigative techniques, such as obtaining consent to enter or merely speaking with the occupants of a dwelling before deciding to seek search authorization.

The Court pointedly clarified the scope of the police's ability to investigate at the door of a citizen's home:

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. When the police knock on a door but the

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[32] It was assumed by the United States Supreme Court and by the Kentucky Supreme Court that an exigency existed.

occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and the occupants "will have the kind of warning that even the most elaborate security system cannot provide." And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

> Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.

The Court in an 8-to-1 opinion written by Justice Alito established this rule:[33]

> [T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable[.] Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.[FN4]

In footnote four, Alito stated:

> There is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted. In this case, however, no such actual threat was made, and therefore we have no need to reach that question.

The "threat" caveat, held out as a limitation on the exigent circumstances doctrine in text and in the accompanying footnote four, was also repeated by Altio at the beginning of his opinion and at other points in the opinion, leaving the reader with the impression that the observation was a real limitation on the exigency doctrine. If that were so, *King* would open the door to a wider view that coverage of the Amendment extends to threats or perhaps attempts to violate the Fourth Amendment. If that were true, the Court would, for example, have to reconsider the line of cases beginning with *California v. Hodari D.,* 499 U.S. 621 (1991), which have rejected including attempted or threatened seizures as actions protected by the Amendment.[34] A consequence of the *Hodari D.* line of authority has been the adoption of numerous coercive techniques by the police, such as fake drug checkpoints, that are designed to prompt citizens to disgorge evidence or otherwise engage in some activity that

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[33] The lone dissenter, Justice Ginsburg, argued that the "exception should govern only in genuine emergency situations" and that, after *King*, the police"may now knock, listen, then break the door down." She would have held that the "urgency must exist . . . when the police come on the scene, not subsequent to their arrival, prompted by their own conduct." In Ginsburg's view, the police had both probable cause and time to get a warrant prior to their knocking on the door; therefore, they should have done so.

[34] *See* Treatise §§ 5.1.4.2., 5.1.5. – 5.1.6.

justifies a stop.[35]

Nonetheless, given the facts of *King,* what would constitute a threat appears to be quite narrow. The Supreme Court found that actions of the police in *King* "entirely lawful. They did not violate the Fourth Amendment or threaten to do so." According to the Court, Officer Steven Cobb "testified that the officers banged on the left apartment door 'as loud as [they] could' and announced, 'This is the police' or 'Police, police, police.'" King argued that the manner in which the police knocked and announced their presence created an exigency because they "engage[d] in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." Rejecting that rule and finding that conduct "entirely consistent with the Fourth Amendment," the Court asserted:

> But the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.
>
> Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. A forceful knock may be necessary to alert the occupants that someone is at the door. Furthermore, unless police officers identify themselves loudly enough, occupants may not know who is at their doorstep. Officers are permitted–indeed, encouraged–to identify themselves to citizens, and "in many circumstances this is cause for assurance, not discomfort." Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.
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> If respondent's test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not require the nebulous and impractical test that respondent proposes.

Based on *King*, what would constitute a "threat?" Loud knocking and loudly announcing that the persons at the door are the police is clearly insufficient. The Court opined that a threat to "break down the door if the occupants did not open the door voluntarily" would be sufficient. The Court found that there was no "'demand" of any sort" in *King* prior to the exigency arising. Only then did the officers announce their intention to enter. Following this reasoning, only explicit threats to enter appear to be sufficient. "This holding," the Court opined, "provides ample protection for the privacy rights that the Amendment protects." One could dispute that view but it is, nonetheless, consistent with the Court's recent jurisprudence.[36]

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[35] *See* Treatise §§ 5.1.5. – 5.1.6.

[36] *See* Treatise § 5.1.4.1.

In ***Ryburn v. Huff*, 565 U.S. __, 132 S. Ct. 987 (2012) (per curiam)**, the Court summarily reversed the Ninth Circuit, finding, on qualified immunity grounds, that there was sufficient indicia of exigent circumstances–fear of violence–for warrantless entry into a home.

Police officers investigated Vincent Huff concerning allegations that he threatened to "shoot up" the school he attended arrived at the Huff home. The police made repeated attempts to contact the occupants of the home by knocking and telephoning the home. After Vincent's mother hung up on the police, she walked out of the house with Vincent and stood on the steps. The police informed Vincent and his mother of the threat allegations. After some additional conversation, Mrs. Huff declined the officer's request that they discuss the matter inside. One of the officers asked her if there were any guns inside the home. Mrs. Huff responded by immediately running into the house. Concerned with officer safety, the police and entered the home. They stayed in the living room, speaking with Vincent and his mother. Vincent's father entered the room and demanded that the police leave. After 5 to 10 minutes in the home, the police left. The Huffs sued.

The case is notable for two reasons: the Court's unabashed mixture of Fourth Amendment and qualified immunity analysis; and the detailed factual nature of the analysis. As to the former, the Court observed: "No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposition direction." Indeed, the Court never quoted or even cited a case referencing the current qualified immunity standard. Instead, it cited two cases discussing the exigent circumstances standard, and then engaged in a factual analysis that drew different conclusions than the Ninth Circuit had, criticizing that lower court's mode of analysis. The Court unanimously concluded: "reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent."

H. Digital Evidence, Tracking Devices, and Expectations of Privacy

***City of Ontario v. Quon*, 560 U.S. __, 130 S. Ct. 2619 (2010)**
***Jones v. United States*, 565 U.S. __, 132 S. Ct. 945 (2012)**

Treatise References:

§ 3.3. The Reasonable Expectation of Privacy Test
- **§ 3.3.3. Creation of a hierarchy of privacy interests**
  - **§ 3.3.3.1. Situations where the Court has found no reasonable expectation of privacy**
- **§ 3.3.4. Measuring expectations of privacy and techniques to create the hierarchy**

§ 3.5. Limitations on protection
- **§ 3.5.1. Assumption of risk, voluntary exposure, shared privacy**

§ 11.3. Procedural regulation of searches and seizures
- **§ 11.3.4. Model#4: the balancing test**
  - **§ 11.3.4.4. Factors in the balancing test**
- **§ 11.6.1. Two-fold nature of reasonableness -- scope considerations**
  - **§ 11.6.1.2. Least intrusive means analysis**

In ***City of Ontario v. Quon*, 560 U.S. __, 130 S. Ct. 2619 (2010),** Sergeant Jeff Quon was employed by the Ontario Police Department as a member of the Special Weapons and Tactics (SWAT) Team. The City of Ontario had a written policy advising employees that use of City owned computer-related services for personal purposes was forbidden, that the City reserved the right to monitor "all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Quon signed a statement acknowledging that he had read and understood the policy. Later, the City acquired 20 alphanumeric pagers capable of sending and receiving text messages. Arch Wireless Operating Company provided wireless service for the pagers. Under the City's service contract with Arch Wireless, each pager was allotted a limited number of characters sent or received each month. Excess usage resulted in an additional fee.

> [A] text message sent on one of the City's pagers was transmitted using wireless radio frequencies from an individual pager to a receiving station owned by Arch Wireless. It was routed through Arch Wireless' computer network, where it remained until the recipient's pager or cellular telephone was ready to receive the message, at which point Arch Wireless transmitted the message from the transmitting station nearest to the recipient. After delivery, Arch Wireless retained a copy on its computer servers. The message did not pass through computers owned by the City.

The City issued pagers to Quon and other SWAT Team members in order to facilitate responses to emergencies. When the police department obtained the pagers, it informed the officers that the computer-use policy applied to pager messages.

The officer in charge of the administration of the pagers, Lieutenant Steve Duke, informed the SWAT team members that he would not audit pagers that went above the monthly limit if the officers agreed to pay for any overages. Eventually, Duke tired of collecting bills and the chief of police ordered a review of the pager transcripts for the two officers with the highest overages to determine whether the monthly character limit was insufficient to cover business-related messages. "At Duke's request, an administrative assistant employed by OPD contacted Arch Wireless. After verifying that the City was the subscriber on the accounts, Arch Wireless provided the desired transcripts. Duke reviewed the transcripts and discovered that many of the messages sent and received on Quon's pager were not work related, and some were sexually explicit. Duke reported his findings to [Police Chief] Scharf, who, along with Quon's immediate supervisor, reviewed the transcripts himself." The matter was referred to internal affairs to determine whether Quon was wasting time with personal matters while on duty. Sergeant McMahon of internal affairs first redacted all messages sent by Quon while off duty. McMahon then determined that, during the month under review, Quon sent or received 456 messages during work hours, of which no more than 57 were work related; he sent as many as 80 messages during a single day at work; and on an average workday, Quon sent or received 28 messages, of which only 3 were related to police business. Some of the messages were to his wife, some to his mistress, and many were sexually explicit.

Quon, his wife, his mistress, and another police officer filed a §1983 action against the City,

the police department, and others, alleging Fourth Amendment violations. A jury found that the chief of police's purpose in ordering review of the transcripts was to determine the character limit's efficacy and the District Court ruled that that action was reasonable under *O'Connor v. Ortega*, 480 U.S. 709 (1987). The Ninth Circuit reversed, holding that Quon possessed a reasonable expectation of privacy in his text messages and reasoning that the City's general policy was overridden by Lieutenant Duke's informal policy. The appellate court also held that the other respondents had a reasonable expectation of privacy in messages they had sent to Quon's pager. The Ninth Circuit further held that the search was unreasonable in scope because the government could have accomplished its objectives through "a host of simple ways" without intruding on respondents' Fourth Amendment rights. Those methods included "warning Quon that for the month of September he was forbidden from using his pager for personal communications," "ask[ing] Quon to count the characters himself," or "ask[ing] him to redact personal messages and grant permission to the Department to review the redacted transcript."

The Supreme Court granted certiorari on three issues: (1) Did Quon have a reasonable expectation of privacy in the text messages; (2) Did the persons who sent text messages to Quon have a reasonable expectation in those messages; and (3) Was the search of the text messages reasonable? Ultimately, the Court chose to assume the existence of a reasonable expectation of privacy as to Quon and the other respondents; it concluded that the search was reasonable. Thus, the reversal the Ninth Circuit decision avoided some of the more important aspects of the case, although the Supreme Court commented on aspects of the threshold question regarding expectations of privacy in technological devices.

Justice Kennedy wrote the opinion for the Court, which was joined in full by seven members of the Court and in part by Justice Scalia, who wrote a separate concurring opinion. Justice Stevens also filed a concurring opinion. Kennedy began by narrowing the focus (and importance) of the opinion: "Though the case touches issues of farreaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable." Justice Kennedy asserted:

> A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds. For present purposes we assume several propositions *arguendo:* First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.

Turning to the Fourth Amendment satisfaction question, the Court viewed the decision in *O'Connor* as dispositive. In *O'Connor*, there had been a deeply divided Court and the *Quon* decision did not resolve that split. The *O'Connor* plurality stated that public employer searches "'for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct,

should be judged by the standard of reasonableness under all the circumstances.'" In contrast, Justice Scalia in a concurring opinion in *O'Connor* maintained "'that government searches to retrieve work-related materials or to investigate violations of workplace rules–searches of the sort that are regarded as reasonable and normal in the private-employer context–do not violate the Fourth Amendment.'" Kennedy stated that it was unnecessary to determine which approach was proper and ruled that, under either approach, the search in *Quon* was reasonable.

The Court found the search in *Quon* justified at its inception "because there were 'reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose.'" The Court pointed out that Chief Scharf ordered the search to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. "The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications." Turning to the scope of the search, the Court believed that the review of the transcripts was reasonable as "an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use." The Court believed that the review was not "'excessively intrusive:"

> Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.

Moreover, the Court asserted that the extent of Quon's expectation of privacy was "relevant to assessing whether the search was too intrusive." Characterizing Quon's privacy expectation as "limited," Kennedy continued:

> Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises–and given that Quon had received no assurances of privacy–Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.
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> [Quon's limited expectation of privacy] lessened the risk that the review would intrude on

> highly private details of Quon's life. OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon's life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters.

The Court rejected the Ninth Circuit's employment of a lesser intrusive means analysis, noting sharply that that "approach was inconsistent with controlling precedents." It also rejected the argument that the search was unreasonable because Arch had violated the Stored Communications Act. Assuming that Arch had violated the Act and again citing precedent, the Court noted that a mere statutory violation does not translate into a Fourth Amendment violation. It also noted that no "OPD employee either violated the law him- or herself or knew or should have known that Arch Wireless, by turning over the transcript, would have violated the law."

After disposing of Quon's claims, the Court turned to the other respondents, including the two women who sent and received messages from Quon. The Court stated:

> Petitioners and respondents disagree whether a sender of a text message can have a reasonable expectation of privacy in a message he knowingly sends to someone's employer-provided pager. It is not necessary to resolve this question in order to dispose of the case, however. Respondents argue that because "the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents." They make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to Quon's correspondents. In light of this litigating position and the Court's conclusion that the search was reasonable as to Jeff Quon, it necessarily follows that these other respondents cannot prevail.

Kennedy, in Section III A of his opinion for the Court, noted "the parties' disagreement over whether Quon had a reasonable expectation of privacy." He pointed to the City's formal policy and to Duke's statements and observed that, if the Court were to address the threshold question whether the Fourth Amendment was applicable, "it would be necessary to ask whether Duke's statements could be taken as announcing a change in OPD policy, and if so, whether he had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging." The proper measure of the reasonableness of a public employee's expectation of privacy had also divided the *O'Connor* Court, with a plurality in that case indicating that public employees should be treated differently than private employees. In *Quon*, the Court did not seek to resolve that question. Instead, Kennedy set out some of the factors that might influence the reasonableness of an expectation of privacy:

> It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws. . . .

> The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. In [*Katz v. United States,* 389 U.S. 347 (1967)], the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.
>
> Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.
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> Even if the Court were certain that the *O'Connor* plurality's approach [to determining when a public employee had a reasonable expectation of privacy in the work place] were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

Section III A prompted Justice Scalia to write a concurring opinion, refusing to join that section. Finding the search reasonable, Scalia saw no need to address the threshold question whether the respondents had a reasonable expectation of privacy. In *O'Connor*, Scalia had rejected a special standard for when public employees had a reasonable expectation of privacy and repeated that view in *Quon*, asserting that the "proper threshold inquiry should be not whether the Fourth Amendment applies to messages on *public* employees' employer-issued pagers, but whether it applies *in general* to such messages on employer-issued pagers." He viewed Section III A as an "unnecessary" and "exaggerated" "excursus on the complexity and consequences of answering[] that admittedly irrelevant threshold question." Scalia stated:

> Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)–or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions–is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty.
>
> Worse still, the digression is self-defeating. Despite the Court's insistence that it is agnostic about the proper test, lower courts will likely read the Court's self-described "instructive" expatiation on how the *O'Connor* plurality's approach would apply here (if it applied), as a heavy-handed hint about how *they* should proceed. Litigants will do likewise, using the threshold question whether the Fourth Amendment is even implicated as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media. In short, in saying why it is not saying more, the Court says much more than it should.
>
> The Court's inadvertent boosting of the *O'Connor* plurality's standard is all the more ironic because, in fleshing out its fears that applying that test to new technologies will be too hard, the Court underscores the unworkability of that standard. Any rule that requires evaluating whether a given gadget is a "necessary instrumen[t] for self-expression, even self-identification," on top of assessing the degree to which "the law's treatment of [workplace norms has] evolve[d]," is (to put it mildly) unlikely to yield objective answers.

Justice Stevens, although joining the Court's opinion, wrote separately to suggest that Justice Blackmun's dissenting opinion in *O'Connor* remained a viable possible standard; Blackmun had advocated a cases-by-case approach to the assessment of reasonableness regarding public employee' workplace searches. Stevens also emphasized that Quon "had only a limited expectation of privacy in relation to this particular audit of his pager messages." He believed that the result would be the same under any of the standards set forth in *O'Connor*.

In ***United States v. Jones,* 565 U.S. __, 132 S. (2012)**,[37] the Court unanimously found that the attachment of a Global Positioning System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, was a search within the meaning of the Fourth Amendment.[38] Justice Scalia wrote for a majority of five justices.

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[37] My views on *Jones* are expressed in Thomas K. Clancy, United States v. Jones: *Fourth Amendment Applicability in the 21st Century*, 10 OHIO ST. J. CRIM. L. __ (Fall, 2012), draft available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=509497.

[38] The Court had granted certiorari on two issues, having added the second sua sponte:
1. Whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated the Fourth Amendment.

Justice Sotomayor joined the majority opinion but also wrote a separate concurring opinion. Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, wrote a separate opinion concurring only in the result.

In reality, there were two separate five person majorities, with much different views on what the Amendment protects. Scalia's opinion was premised on traditional property law analysis that pre-dated *Katz*,[39] and tacked closely to the physical invasion that was before the Court. Alito's opinion was premised on the reasonable expectations of privacy framework that has predominated since *Katz*. Sotomayor viewed Scalia's narrow opinion as sufficient to address the issue before the Court but opined broadly about the application of the reasonable expectations of privacy framework to a wide variety of tracking and other digital technology. Viewed as a whole, there are many different ways that a future Court could make use of *Jones*. *Quon*[40] is another recent opinion with broad dicta on the Fourth Amendment's role in regulating the government's use of technology to intrude upon individual's right to be secure. Singly and in combination, much of the language in the two opinions is undisciplined and dangerous. Each subvert the role that the Court should play in providing some guidance to lower courts; instead, the various opinions offer a series of random thoughts about technological devices that were not before the Court and provide vague and confusing thoughts about a test that is fundamentally flawed: the *Katz* reasonable expectation of privacy framework. The sole exception has been Scalia, who espoused a framework that is out of fashion with many scholars and others but whose analysis, at least in *Jones*, provides a workable formula to regulate physical intrusions. Scalia, however, offered in *Jones* no real guidance for the more important ways in which the government obtain information in today's world, that is, through technology that does not involve physical invasions.

The facts in *Jones* were straightforward and rather sparse. Jones was a suspected drug dealer in the District of Columbia. Based on information gathered from a variety of sources, the Government applied to the United States District Court for the District of Columbia for a warrant authorizing the use of an electronic tracking device on the Jeep Grand Cherokee registered to Jones' wife. A warrant issued, authorizing installation of the device within 10 days in the District of

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2. Whether the government violated Jones's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.

The majority opinion, however, did not answer either of those questions since it only determined that the Fourth Amendment was implicated; it did not decide whether or not the Amendment was satisfied. Thus, for example, it left undecided whether it would impose a warrant requirement for GPS devices installed on vehicles or whether, consistent with the *Carroll* doctrine, probable cause sufficed to justify the search. *See* Treatise § 10.1. Altio, in his concurring opinion, also concluded that a search occurred but added that "where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant."

[39] Katz v .United States, 389 U.S. 347 (1967).

[40] City of Ontario v. Quon, 560 U.S. __, 130 S. Ct. 2619 (2010).

Columbia. For unexplained reasons, the device was installed on the eleventh day in Maryland.[41] The agents installed the GPS device on the undercarriage of the Jeep while the vehicle was parked in a public parking lot. It was not otherwise explained how the device was installed. "Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4–week period."

The various opinions in *Jones*, to be best understood, can be divided into two parts. The first aspect is the actual situation before the Court–the physical invasion of the Jeep to insert the GPS device and its subsequent monitoring. The second aspect of the various opinions is the willingness of the various Justices to opine more broadly about devices and surveillance techniques that do not depend on a physical intrusion and Alito's embrace of the reasonable expectations of privacy test as the sole measure to determine if the Amendment is applicable. I divide the analysis below into those two categories.

The physical intrusion plus monitoring

Justice Scalia, for the Court, harkened back to the physical trespass theory that predominated in the Court's Fourth Amendment analysis until 1967, when *Katz v .United States*, 389 U.S. 347 (1967), was decided.[42] Scalia defined the Court's task: "What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted."

Fourth Amendment applicability is always a two sided question: the governmental actions must be either a "search" or "seizure" and that intrusion must invade an individual interest protected by the Amendment.[43] Scalia stated concisely what is protected: "The Fourth Amendment protects against trespassory searches only with regard to those items ('persons, houses, papers, and effects') that it enumerates." Scalia, utilizing that traditional framework, had no problem demonstrating that Jones had a protected interest–a vehicle is an "effect," one of the four objects explicitly listed as protected by the Amendment.[44] He stated: "By attaching the device to the Jeep, officers encroached

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[41] The government conceded in the lower courts "noncompliance" with the warrant and argued that a warrant was not required. *See* previous footnote.

[42] *See* Treatise § 3.2.

[43] *See* Treatise § 1.2.

[44] The majority essentially assumed that Jones had standing in the Jeep:
The Government acknowledged . . . that Jones was "the exclusive driver." If Jones was not the owner he had at least the property rights of a bailee. The Court of Appeals concluded that the vehicle's registration did not affect his ability to make a Fourth Amendment objection and the Government has not challenged that determination here. We therefore do not

on a protected area."

The important inquiry for the Scalia majority was the other side of the equation: did the government actions constitute either a "search" or "seizure" that invaded Jones' protected interests. Scalia chose to label the actions a "search" and it is that aspect of his opinion that offered something new but imprecise. Indeed, he offered several definitions of a search:

> 1. Scalia stated that the question before the Court was whether "the attachment of a Global–Positioning–System (GPS) tracking device to an individual's vehicle, and **subsequent use** of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment."
>
> 2. "The Government physically occupied private property **for the purpose of obtaining information.** We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."
>
> 3. Scalia referred to the concurrence's hypothetical of "a constable's concealing himself in the target's coach in order to track its movements. There is no doubt that the **information gained** by that trespassory activity would be the product of an unlawful search–whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled."
>
> 4. "Where, as here, the Government **obtains information** by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."
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> 5. "As Justice Brennan explained in his concurrence in *Knotts,*[45] *Katz* did not erode the principle 'that, when the Government *does* engage in physical intrusion of a constitutionally protected area **in order to obtain information**, that intrusion may constitute a violation of the Fourth Amendment.'"
>
> 6. " Trespass alone does not qualify, but there must be conjoined with that what was present here: **an attempt to find something or to obtain information**. Related to this, and

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consider the Fourth Amendment significance of Jones's status.
Alito in his concurring opinion criticized this approach as creating a property analysis that would vary based on whether the device had been installed in the car before or after Jones' wife "gave him the keys" and would "vary from State to State" depending on whether a State "has adopted the Uniform Marital Property Act." If the State had adopted the Act, Alito stated, "respondent would likely be an owner of the vehicle, and it would not matter whether the GPS was installed before or after his wife turned over the keys. In non-community-property States, on the other hand, the registration of the vehicle in the name of respondent's wife would generally be regarded as presumptive evidence that she was the sole owner."

[45] United States v. Knotts, 460 U.S. 276 (1983).

similarly irrelevant, is the concurrence's point that, if analyzed separately, neither the installation of the device nor **its use** would constitute a Fourth Amendment search. Of course not. A trespass on "houses" or "effects," or a *Katz* invasion of privacy, is not alone a search unless it is done **to obtain information; and the obtaining of information** is not alone a search unless it is achieved by such a trespass or invasion of privacy."

I highlight in bold the key ambiguities of the various formulations, which appear to offer two very different predicates for the governmental actions to be labeled a search: does the government have to actually obtain information or does it merely seek to obtain it? Perhaps the differences are of no significance in criminal cases (such as *Jones*), given that the information obtained would be the incriminating evidence. However, in civil cases, the point at which the search occurred would matter in situations where the government was unsuccessful in obtaining information. That latter view appears more consistent with previous case law and Scalia's previously stated views.[46]

Justice Sotomayor joined the Court's opinion in *Jones* because she "agree[d] that a search within the meaning of the Fourth Amendment occurs, at a minimum, "'[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area.'" However, she also quoted the same Brennan language from *Knotts* quoted by the majority. She added:

> [T]he trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.

Most of Sotomayor's concurrence, discussed *infra*, detailed her views regarding the reasonable expectations of privacy framework, which "augmented, but did not displace or diminish, the common-law trespassory test that preceded it."

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[46] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 32 n.1 (2001) (*per* Scalia, J., explaining that "[w]hen the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief'" (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (6th ed.1989))). Justice Brennan, dissenting in *Lopez v. United States*, 373 U.S. 427, 459 (1963), stated:

> In every-day talk, as of 1789 or now, a man "searches" when he looks or listens. Thus we find references in the Bible to 'searching' the Scriptures (John V, 39); in literature to a man "searching" his heart or conscience; in the law books to "searching" a public record. None of these acts requires a manual rummaging for concealed objects. . . . [J]ust as looking around a room is searching, listening to the sounds in a room is searching. Seeing and hearing are both reactions of a human being to the physical environment around him–to light waves in one instance, to sound waves in the other. And, accordingly, using a mechanical aid to either seeing or hearing is also a form of searching. The camera and the dictaphone both do the work of the end-organs of an individual human searcher–more accurately.

Cf. Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988) (offering a semantic analysis of the concept of a search).

Justice Alito, in his concurring opinion, rejected as "unwise" the majority's analysis:

> It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial. I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

Addressing the "search" question, Alito stated:

> The Court does claim that the installation and use of the GPS constituted a search but this conclusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of Fourth Amendment analysis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. On the contrary, the Court accepts the holding in *United States* v. *Knotts,* 460 U.S. 276 (1983), that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search.

Alito, after critiquing the evolution of the physical trespass theory in the Court's prior case law, observed that *Katz* "did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation." He made several additional criticisms of the majority's approach. Alito believed "the Court's reasoning largely disregard[ed] what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attache[d] great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation)." He also saw the Court's approach as "lead[ing] to incongruous results. If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints."

Alito's broadest criticism was directed at the entire trespass framework:

> [T]he Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked. For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication

is sent from one computer to another is enough. But may such decisions be followed in applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the Fourth Amendment, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?

Altio also observed:

> [I]f long-term monitoring can be accomplished without committing a technical trespass–suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car–the Court's theory would provide no protection.

Obtaining information without physical intrusion

Jones offers a variety of views and intuitions about the Government's use of technology to obtain information without a physical invasion. Alito, rejecting the trespass theory, advocated the *Katz* reasonable expectation of privacy formula as the exclusive test in all situations. Addressing the admitted difficulties of the *Katz* analysis, that is, its circularity and the concern with judges imposing their own conceptions of expectations of privacy, Alito stated:

> [T]he *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable. On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping. After *Katz,* Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law.

Alito proposed the following test, which appears to be different than the traditional *Katz* formulation. He stated: "The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated." Note that the emphasis in Alito's language focuses on the relationship of the government technique to a person's reasonable expectations. In his concurring opinion in *Katz*, Justice Harlan created the "reasonable expectation of privacy" test, which came to be used by the Court as the predominant measure for the scope of

the Fourth Amendment's protections. The Harlan test, in contrast to Alito's formulation, requires that a person exhibit an actual subjective expectation of privacy and that that expectation be one that society recognizes as reasonable.[47] If either prong is missing, no protected interest is established.[48] Alito appears to shift the focus from a societal expectations test to a reasonable person test, with no subjective element and on a sliding scale of intrusion.

Applying his formula, Alito stated:

> Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not–and indeed, in the main, simply could not–secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant. We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

Without further ado, Alito concluded that "the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment."

Alito's analysis raises numerous questions. First, Alito qualified the scope of the

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[47] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See* Smith v. Maryland, 442 U.S. 735, 740 (1979) (stating that the Harlan test "embraces two discrete questions"). The Court in subsequent cases has sometimes used other words, such as "legitimate" and "justifiable" as substitutes for "reasonable," but those terms do not have a different meaning. *See, e.g.,* California v. Ciraolo, 476 U.S. 207, 219-20 n.4 (1986) (Powell, J., dissenting); *Smith*, 442 U.S. at 740.

[48] Justice Harlan did not reject inquiry into whether the place was a "constitutionally protected area," although the Court has often overlooked this aspect of Justice Harlan's opinion. *See, e.g.,* Ciraolo v. California, 476 U.S. 207, 214-15 (1980). Instead, Justice Harlan concluded that the telephone booth in which Katz made his calls was such a constitutionally protected area. Harlan also stated that, although the Fourth Amendment protects people not places, "[g]enerally, . . . the answer to that question requires reference to a 'place.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Harlan believed, however, that the physical trespass theory was "bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion."

Amendment's applicability by saying that the Amendment would apply to longer term GPS monitoring of "most offenses" but reserved on whether it would apply to "extraordinary offenses." This position confuses Fourth Amendment satisfaction with Fourth Amendment applicability.[49] Noting the "novelty" of Alito's framework, Justice Scalia, in his majority opinion, added these criticisms:

> There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4–week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. What of a 2–day monitoring of a suspected purveyor of stolen electronics? Or of a 6–month monitoring of a suspected terrorist? We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

Moving beyond the GPS monitoring at issue in *Jones*, all of the opinions went into the thicket of when the government's use of surveillance technology implicates the Amendment. Scalia, in previous cases, had been a severe critic of the reasonable expectations of privacy framework[50] and had, a decade ago, in his majority opinion in *Kyllo*, developed a much different framework to measure when the use of technology to obtain information without a physical was a search.[51] Surprisingly, in *Jones*, he accepted the reasonable expectation of privacy framework as a modern supplement to the traditional property-based analysis:

> The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations

[49] *See, e.g.,* Treatise § 1.2.

[50] *E.g.,* Kyllo v. United States, 533 U.S. 27 (2002) ("*Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable"); Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (criticizing the use of the reasonable expectation of privacy test to determine when a "search" has occurred as having no "plausible foundation in the text of the Fourth Amendment" and rejecting view that the Amendment guaranteed "some generalized 'right of privacy,'" insisting instead that the text of the Amendment enumerates the objects to which privacy protection extends).

[51] In *Kyllo*, Scalia for the majority, drew on the analogy to a physical invasion to create this rule: "We think 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." *See generally* Thomas K. Clancy, *Coping with Technological Change:* Kyllo *and the Proper Analytical Structure to Measure the Scope of Fourth Amendment Rights*, 72 MISS. L.J. 525 (2002).

involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

In *Kyllo*, in contrast to Justice Kennedy's opinion in *Quon*, Scalia had advocated a bold approach to technology's impact on Fourth Amendment rights. Scalia, confronted with a police's used of a thermal imaging device's use to learn something about the interior of a home, asserted that the Court was confronted with the question of what limits there are upon the "power of technology to shrink the realm of guaranteed privacy."[52] He eschewed the Court's oft-stated judicial restraint[53] and instead asserted that it "must take the long view." Scalia therefore opined: "While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."[54] Scalia, however, approached the question much more reluctantly in *Jones*. He observed:

> This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. We accordingly held in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4–week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

Sotomayor, in her concurring opinion in *Jones*, observed that physical intrusions are "now unnecessary to many forms of surveillance." She noted that the government could duplicate the monitoring undertaken in *Jones* "by enlisting factory- or owner-installed vehicle tracking devices

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[52] 533 U.S. at __, 121 S. Ct. at 2043.

[53] *See, e.g.,* Silverman v. United States, 365 U.S. 505, 508-09 (1961) (Rejecting the petitioner's urging that the Court consider "recent and projected developments in the science of electronics and stating: "We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society.").

[54] The Court noted:
The ability to "see" through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of Justice, features on its Internet Website projects that include a "Radar-Based Through-the-Wall Surveillance System," "Handheld Ultrasound Through the Wall Surveillance," and a "Radar Flashlight" that "will enable law officers to detect individuals through interior building walls." Some devices may emit low levels of radiation that travel "through-the-wall," but others, such as more sophisticated thermal imaging devices, are entirely passive, or "off- the-wall" as the dissent puts it.

or GPS-enabled smartphones." In "cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property," she believed the *Katz* analysis applied. She agreed with Justice Alito's comments that those same technological advances also affected "the *Katz* test by shaping the evolution of societal privacy expectations." She also agreed "with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" Note, however, that Sotomayor did not qualify that statement with the word "reasonable." Sotomayor instead offered a complex set of factors to ascertain if GPS surveillance implicated the Amendment:

> In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility."
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> Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring–by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track–may "alter the relationship between citizen and government in a way that is inimical to democratic society."
>
> I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance[.]"[55]

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[55] She added:

United States v. Knotts, 460 U.S. 276 (1983), does not foreclose the conclusion that GPS monitoring, in the absence of a physical intrusion, is a Fourth Amendment search. As the majority's opinion notes, *Knotts* reserved the question whether "'different constitutional principles may be applicable'" to invasive law enforcement practices such as GPS tracking.

United States v. Karo, 468 U.S. 705 (1984), addressed the Fourth Amendment implications of the installation of a beeper in a container with the consent of the container's original owner, who was aware that the beeper would be used for surveillance purposes. *Id.,* at 707. Owners of GPS-equipped cars and smartphones do not contemplate that these devices

Sotomayor proceeded to question the application of the third party doctrine's application to "the digital age," assenting that it was "ill suited" because "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." She continued by commenting on many of the digital search and seizure issues that have been circulating for more than a decade in the lower courts:

> People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the "tradeoff "of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.[56]

One aspect of these comments by Justice Sotomayor is that, for many of those situations, lower courts have been busy addressing those situations for a decade and her brief comments challenge the validity of numerous decisions. Her comments also undermine one fundamental flaw of the *Katz* framework: her willingness to project her concept of privacy expectations as being coextensive with society's and hence reasonable. Further, her brief comments about reconsidering the third party doctrine in a case where it was not in issue seem completely random. In contrast, in *Quon*, where it should have been in issue, no Justice commented on the doctrine.

Alito, in his concurring opinion, similarly made some broad observations, suggesting that he too was just discovering the power of technology to gather information:

> In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that

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> will be used to enable covert surveillance of their movements. To the contrary, subscribers of one such service greeted a similar suggestion with anger. In addition, the bugged container in *Karo* lacked the close relationship with the target that a car shares with its owner. The bugged container in *Karo* was stationary for much of the Government's surveillance. A car's movements, by contrast, are its owner's movements.

[56] *Citing, inter alia*, *Smith,* 442 U.S., at 749 (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes").

are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen. Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users–and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States. For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case–constant monitoring of the location of a vehicle for four weeks–would have required a large team of agents, multiple vehicles, and perhaps aerial assistance. Only an investigation of unusual importance could have justified such an expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way. To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes.

I. Detentions of Material Witnesses; the Nature of Reasonableness:

***Ashcroft v. al-Kidd*, 563 U.S. __, 131 S. Ct. 2074 (2011)**

Treatise References:

§ 6.7. Detention of Material Witnesses
§ 11.5.1. Role of Individualized Suspicion

The practice of detaining material witnesses predates the Republic and has been a prosecution tool ever since. The Supreme Court, prior to ***Ashcroft v. al-Kidd*, 563 U.S. __, 131 S. Ct. 2074 (2011),** had had little to say on the Fourth Amendment aspects of those seizures. Section 6.7. of the treatise examines those cases. In *al-Kidd,* the Court confronted a narrowly framed challenge to the use of the material witness detention statute, 18 U.S.C. § 3144.

al-Kidd, an American citizen, was arrested on a material witness warrant issued by a federal

magistrate judge in connection with a pending terrorism-related investigation. He was held for 16 days and then released on supervision for 15 months. There was no evidence of any criminal activity by al-Kidd. He filed suit action against Ashcroft, the former Attorney General of the United States, seeking damages for his arrest. al-Kidd alleged that his arrest resulted from a policy created by the former Attorney General of using the material witness statute as a pretext to investigate and preventively detain terrorism suspects.[57] The Ninth Circuit held that Ashcroft violated the Fourth Amendment and that he was not entitled to qualified immunity.

Writing for a majority of five, Justice Scalia, observed that the Ninth Circuit's "analysis at both steps of the qualified-immunity inquiry needs correction." Scalia quickly disposed of the merits claim, which was an assertion that the detention was pretextual:

> Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation.

The detention was based on a warrant issued by a neutral magistrate. Due to the objective requirements for a warrant to issue, Scalia viewed the case law as precluding inquiry into subjective intent and of providing more protections that in those cases that had previously rejected such an inquiry. He concluded: "We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive."

The fact that the Court did not examine the subjective intent of the authorities is hardly ground-breaking.[58] What was new–and potentially important–is the majority's recharacterization of the role of individualized suspicion. al-Kidd was not considered a criminal suspect; he was suspected of having knowledge of a crime. This led to a debate between the majority and Justice Ginsburg regarding the meaning of individualized suspicion. The majority opined:

> Justice Ginsburg suggests that our use of the word "suspicion" is peculiar because that word "ordinarily" means "that the person suspected has engaged in wrongdoing." We disagree. No usage of the word is more common and idiomatic than a statement such as "I have a suspicion he knows something about the crime," or even "I have a suspicion she is throwing me a surprise birthday party." The many cases cited by Justice Ginsburg, which use the neutral word "suspicion" *in connection with* wrongdoing, prove nothing except that searches and seizures for reasons other than suspected wrongdoing are rare.

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[57] In addition, al-Kidd alleged in his complaint that the affidavit submitted in support of the warrant for his arrest contained false statements. Those claims were not before the Supreme Court.

[58] *See* Treatise § 11.6.2.1.

If the majority's view is followed in future cases, a broader role for individualized suspicion–and the use of the objective criteria that it mandates–would bring needed structure to Fourth Amendment reasonableness analysis.[59]

Justice Scalia, for the majority, also rejected the Ninth Circuit's qualified immunity analysis. That portion of the opinion found qualified immunity for a variety of reasons, including the fact that "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness statute unconstitutional." Scalia at some length rejected relying on the dicta of a single District Court as controlling, as well as broad historical claims about the Fourth Amendment.

The case generated three concurring opinions.[60] Justice Kennedy, writing separately, stated that he joined the Court's opinion in full. In section I of his concurrence, joined by Justices Ginsburg, Breyer, and Sotomayor, he pondered the uncertain scope of the legality of the use of the statute, including whether a warrant under the statute was a warrant within the meaning of the Fourth Amendment's Warrant Clause because probable cause in that context referred to suspects of criminal violations.[61]

Justice Ginsburg, with whom Justices Breyer and Sotomayor joined, also wrote a concurring opinion. Ginsburg argued that the Court should not have addressed the merits, finding doubts about the legality of the warrant. Further, Ginsburg believed that the "individualized suspicion" standard had been "uniformly used" to "mean 'individualized suspicion *of wrongdoing*.'" She asserted:

> The import of the term in legal argot is not genuinely debatable. When the evening news reports that a murder "suspect" is on the loose, the viewer is meant to be on the lookout for the perpetrator, not the witness. Ashcroft understood the term as lawyers commonly do: He spoke of detaining material witnesses as a means to "tak[e] *suspected terrorists* off the street."

Finally, Justice Sotomayor filed a brief concurring opinion, joined by Justices Ginsburg and Breyer, agreeing that Ashcroft was entitled to qualified immunity. She believed that the pretext claim was "a closer question than the majority opinion suggests" and that it should not be addressed in this case. She also questioned the premise of the majority's opinion that the warrant was legal, based on factual questions that had not been resolved about the practically of securing al-Kidd's testimony and alleged misstatements in the affidavit.

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[59] Something I have long maintained. *See, e.g.,* Treatise, § 11.5.1.

[60] Justice Kagan did not take part in the decision.

[61] Justice Kennedy maintained that the Court had "reserv[ed]" on that issue, citing a portion of Justice Scalia's opinion that rejected the view that Ashcroft was not entitled to qualified immunity. Read in that context, however, Scalia was not reserving on the Fourth Amendment claim but merely commenting–and rejecting–reliance on broad assertions about the Fourth Amendment as the basis for withholding qualified immunity.

J. Intrusive Searches of Detainees:

***Florence v. Bd. of Chosen Freeholders*, 566 U.S. __, 132 S. Ct. 1510 (2012)**

Treatise references:

§ 8.4 Scope [of Search]: arrestee's body
§ 11.3.4.3. The broad application of the balancing test
§ 11.3.2. Model#2: Individualized Suspicion

The Court held in ***Florence*** that jails are permitted to conduct suspicionless visual searches of the unclothed body of the arrestee whenever a person is arrested, including for minor offenses if the person was to be placed in the general jail population. The lower courts had split on whether an arrestee could be strip searched without any showing of suspicion as an incident to incarceration. Florence was arrested during a traffic stop when it was learned that there was a bench warrant for him from another county. The warrant charged him with a "non-indictable variety of civil contempt." He was searched at the Burlington County Jail and again when transported to the other county jail. He joined the general jail population until the charges were dismissed the next day. After his release, Florence sued, claiming a violation of his Fourth Amendment rights. The Third Circuit, applying a balancing test, concluded that the strip search policies were reasonable.

Reversing that decision, Justice Kennedy for the Court concluded that the interests in jail security justified a blanket rule permitting such intrusive searches. In doing so, he "defer[red] to the judgment of correctional officials." As to the actual searches involved, Kennedy explained:

> The opinions in earlier proceedings, the briefs on file, and some cases of this Court refer to a "strip search." The term is imprecise. It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position. In the instant case, the term does not include any touching of unclothed areas by the inspecting officer. There are no allegations that the detainees here were touched in any way as part of the searches.

Kennedy listed the variety of concerns that correctional officials have, including lice, contagious infections, wounds and injuries, tattoos on gang members, numerous everyday items that could undermine security, and contraband such as drugs and weapons. He rejected as a unworkable standard special rules for those detained for minor offenses, viewing the "seriousness of the offense" as a "poor indicator of who has contraband." He also saw practical problems in categorizing inmates at intake. He believed that a readily administered rule was needed. But Kennedy limited the scope of the ruling. He noted that the case did not involve detainees "held without assignment to the general jail population and without substantial contact with other detainees." He also noted concerns about "intentional humiliation and other abusive practices." He also stated that there "may be

legitimate concerns about the invasiveness of searches that involve the touching of detainees."

Chief Justice Roberts, although joining the opinion of the Court, noted in a concurring opinion that possible exceptions to the rule announced might exist, such as situations where there were alternatives to holding the detainee in the general jail population. Justice Alito also joined the Court's opinion but added in a concurring opinion the possibility of exceptions to the rule for "temporary detainees who are minor offenders [segregated] from the general population." He asserted:

> The Court does not address whether it is always reasonable, without regard to the offense or the reason for detention, to strip search an arrestee before the arrestee's detention has been reviewed by a judicial officer. The lead opinion explicitly reserves judgment on that question. In light of that limitation, I join the opinion of the Court in full.

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. Breyer argued that, for minor offenses that do not involve drugs or violence, the kind of search involved in *Florence* required a showing of "reasonable suspicion to believe that the individual possesses drugs or other contraband" to be reasonable. He saw that standard as workable and consistent with the practices of many incarceration facilities.

K. Scope of Stops and Arrests to Ascertain Immigration Status:

***Arizona v. United States*, ___ S. Ct. ___, 2012 WL 2368661 (June 25, 2012)**

Treatise references:
§ 6.4. Stops and distinguishing them from arrests

In ***Arizona v. United States*, ___ S. Ct. ___, 2012 WL 2368661 (June 25, 2012)**, although striking down most of the Arizona immigration law on grounds not related to the Fourth Amendment, the Court upheld one section:

> Section 2(B) of S.B. 1070 requires state officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Ariz.Rev.Stat. Ann. § 11–1051(B) (West 2012). The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released."

The majority noted that "[t]he accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records." The actual issue before the Court was whether the section was in conflict with federal immigration law but the Court weighed in on some possible Fourth Amendment concerns. It stated:

Some who support the challenge to § 2(B) argue that, in practice, state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status. Detaining individuals solely to verify their immigration status would raise constitutional concerns. And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.

But § 2(B) could be read to avoid these concerns. To take one example, a person might be stopped for jaywalking in Tucson and be unable to produce identification. The first sentence of § 2(B) instructs officers to make a "reasonable" attempt to verify his immigration status with ICE if there is reasonable suspicion that his presence in the United States is unlawful. The state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry.

To take another example, a person might be held pending release on a charge of driving under the influence of alcohol. As this goes beyond a mere stop, the arrestee (unlike the jaywalker) would appear to be subject to the categorical requirement in the second sentence of § 2(B) that "[a]ny person who is arrested shall have the person's immigration status determined before [he] is released." State courts may read this as an instruction to initiate a status check every time someone is arrested, or in some subset of those cases, rather than as a command to hold the person until the check is complete no matter the circumstances. Even if the law is read as an instruction to complete a check while the person is in custody, moreover, it is not clear at this stage and on this record that the verification process would result in prolonged detention. However the law is interpreted, if § 2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. There is no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law

Justice Scalia, concurring in part and dissenting in part, observed that "any investigatory detention, including one under § 2(B), may become an 'unreasonable . . . seizur[e]' . . . if it lasts too long." He noted that that had nothing to do with this case, which addressed federal preemption.

Justice Alito, concurring in part and dissenting in part, said that" nothing on the face of the law suggests that it will be enforced in a way that violates the Fourth Amendment or any other provision of the Constitution." He stated:

In the situations that seem most likely to occur, enforcement of § 2(B) will present familiar Fourth Amendment questions. To take a common situation, suppose that a car is stopped for

speeding, a nonimmigration offense. Suppose also that the officer who makes the stop subsequently acquires reasonable suspicion to believe that the driver entered the country illegally, which is a federal crime.

It is well established that state and local officers generally have authority to make stops and arrests for violations of federal criminal laws. I see no reason why this principle should not apply to immigration crimes as well. Lower courts have so held. And the United States . . . does not contend otherwise.

. . . Accordingly, in our hypothetical case, the Arizona officer may arrest the driver for [entering the country illegally] if the officer has probable cause. And if the officer has reasonable suspicion, the officer may detain the driver, to the extent permitted by the Fourth Amendment, while the question of illegal entry is investigated.

We have held that a detention based on reasonable suspicion that the detainee committed a particular crime "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." But if during the course of a stop an officer acquires suspicion that a detainee committed a different crime, the detention may be extended for a reasonable time to verify or dispel that suspicion. In our hypothetical case, therefore, if the officer, after initially stopping the car for speeding, has a reasonable suspicion that the driver entered the country illegally, the officer may investigate for evidence of illegal entry. But the length and nature of this investigation must remain within the limits set out in our Fourth Amendment cases. An investigative stop, if prolonged, can become an arrest and thus require probable cause. Similarly, if a person is moved from the site of the stop, probable cause will likely be required.

If properly implemented, § 2(B) should not lead to federal constitutional violations, but there is no denying that enforcement of § 2(B) will multiply the occasions on which sensitive Fourth Amendment issues will crop up. These civil-liberty concerns, I take it, are at the heart of most objections to § 2(B). Close and difficult questions will inevitably arise as to whether an officer had reasonable suspicion to believe that a person who is stopped for some other reason entered the country illegally, and there is a risk that citizens, lawful permanent residents, and others who are lawfully present in the country will be detained. To mitigate this risk, Arizona could issue guidance to officers detailing the circumstances that typically give rise to reasonable suspicion of unlawful presence. And in the spirit of the federal-state cooperation that the United States champions, the Federal Government could share its own guidelines. Arizona could also provide officers with a nonexclusive list containing forms of identification sufficient under § 2(B) to dispel any suspicion of unlawful presence. If Arizona accepts licenses from most States as proof of legal status, the problem of roadside detentions will be greatly mitigated.

In an accompanying footnote, Alito noted:

When the Real ID Act takes effect, the Federal Government will no longer accept state forms of identification that fail to meet certain federal requirements. One requirement is that any identification be issued only on proof that the applicant is lawfully present in the United States. I anticipate that most, if not all, States will eventually issue forms of identification that suffice to establish lawful presence under § 2(B).