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JANUARY 2012 UPDATE
for
The Fourth Amendment:
Its History and Interpretation

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SUPREME COURT FOURTH AMENDMENT CASES UPDATE¹

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JANUARY 2012 SUPPLEMENT TO:

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

This supplement summarizes the Supreme Court cases on Fourth Amendment issues beginning with the 2008 Term. It is periodically updated at www.NCJRL.org and at www.cap-press.com/books/1795 with new developments. The treatise is available at www.cap-press.com/books/1795.

Overview. The broad trends of the Roberts Court have continued: take few cases; restrict application of the exclusionary rule; and largely avoid development of substantive Fourth Amendment doctrine. The sole substantive doctrine that has seen any significant development by the Roberts Court is the exigent circumstances doctrine, which was further clarified in the 2010-11 term. The only other 2010-11 term case that discussed substantive Fourth Amendment principles involved narrow aspects of the detention of material witnesses, although the case did offer new insights on the role of individualized suspicion. The term produced one significant decision, *Davis*, which reaffirmed and emphasized the *Herring* exclusionary rule framework focusing on culpability; it also announced a broad good faith exception based on reliance on appellate decisions.

The 2011-12 term has resulted in four *cert* grants but no opinions by January 9, 2012. The cert grants are listed below and summaries of the opinions be included in the July 2012 update of this supplement.

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Cert. grants for the 2011-12 Term are:

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1. ***Florence v. Bd. of Chosen Freeholders, et al.***, 621 F.3d 296 (3rd Cir. 2010), No. 10-945, *cert. granted*, April 4, 2011, argued October 12, 2011.

Issue: Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search whenever a person is arrested, including for minor offenses.

Note: The lower courts are split on whether an arrestee can 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 strip 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.

2. ***United States v. Antoine Jones***, 615 F.3d 544 (D.C. Cir. 2010), No 10-1259, *cert. granted*, June 27, 2011, argued November 8, 2011.

Issues:

1. Whether the warrantless use of a tracking device on Jones’s vehicle to monitor its movements on public streets violated the Fourth Amendment.
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.

Note: The second question was added by the Court in its order granting the petition.

3. ***Messerschmidt v. Millender***, 620 F.3d 1016 (9th Cir. 2010), No. 10-704, *cert. granted*, June 27, 2011, argued December 5, 2011.

Issues:

This Court has held that police officers who procure and execute warrants later determined invalid are entitled to qualified immunity, and evidence obtained should not be suppressed, so long as the warrant is not “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *United States v. Leon*, 468 U.S. 897, 920, 923 (1984); *Malley v. Briggs*, 475 U.S. 335,341,344-45 (1986).

The Questions Presented are:

1. Under these standards, are officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items

in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search?

2. Should the *Malley/Leon* standards be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good faith conduct and improper exclusion of evidence in criminal cases?

Note: This case assumes that there was a Fourth Amendment violation and addresses only the qualified immunity standard.

4. ***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.

The decided cases in this supplement are:²

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. ___, 129 S. Ct. 2633 (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)

² A few other cases touched on Fourth Amendment in the 2010-11 term. 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*, 563 U.S. ___ (March 29, 2011). The Court denied review of a petition in *Huber v. New Jersey Dep’t of Environmental Protection*, 131 S. Ct. 1308 (2011), prompting the 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.”

Finally, 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.

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. ___ (June 16, 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).

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)**

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 justices⁴ and the Court had candidly admitted that it 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

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).

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

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 What will also result is an increased muddling of Fourth Amendment and qualified 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

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).

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*—is likely to make the avoidance of difficult Fourth Amendment questions the norm 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 (588 F.3d 1011 (9th Cir. 2009)) 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.

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

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).

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.

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.

B. The Exclusionary Rule:

United States v. Herring, 555 U.S. 135 (2009)

Davis v. United States, 564 U.S. __ (June 16, 2011)

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.⁹ The broader reading signals a dramatic restriction in the application of the exclusionary rule. *Davis v. United States*, 564 U.S. __ (June 16, 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.

⁹ See generally Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHICAGO KENT L. REV. 191 (2010).

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.¹⁰ Hence, some have seen *Herring* as a narrow expansion of good faith that has little application.¹¹

In contrast, the rest of the majority opinion was very broadly written and significantly recasts 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*,¹² 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."¹³

¹⁰ 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."

¹¹ Justice Kennedy, a crucial fifth vote for the majority in *Hudson* and *Herring*, 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 Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* §§ 13.3.1.2., 13.3.6. (2008).

¹² 468 U.S. 897 (1984).

¹³ 555 U.S. at ___. 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

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.”¹⁴

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*,¹⁵ which was the case that initially adopted the exclusionary rule, that would support exclusion. Roberts thereafter flatly asserted:

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.¹⁶

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, even 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).

¹⁴ *Id.* at ___, 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”).

¹⁵ *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁶ 555 U.S. at ___. 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.”

The Chief Justice emphasized that negligence is simply not worth the costs of exclusion.¹⁷ 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.”¹⁸

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented.¹⁹ 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 clearly suggested that the exclusionary rule may be constitutionally based.²⁰ Addressing what she

¹⁷ 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 Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* § 11.6.2.1. (2008) (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.

¹⁸ 555 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.).

¹⁹ 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.

²⁰ 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

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.²¹ 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. __ (June 16, 2011)**, builds on *Herring* and reinforces the view that *Herring's* analysis will have broad applicability. Narrowly, *Davis* created 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 for the majority 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

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."

²¹ *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).

condition for exclusion, but it is not “a sufficient” one. Second, Alito 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.” Alito, 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.”

Alito 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 “meaningful” 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.²²

²² The case also had a substantial discussion of retroactivity principles, with *Davis* arguing that the *Gant* rule should be 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.

Justice Sotomayor, in her opinion concurring in the judgment of the Court, was “compelled to conclude” that the exclusionary rule does not apply in this case.” 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:

an 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.

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. Articulate 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. ___ (June 16, 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.²³ If that person is in a vehicle, under *Belton*, the police could always search the entire passenger compartment incident to the arrest.²⁴ The Court in *Gant* 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 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

²³ *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).

²⁴ *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).

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. __ (June 16, 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 summarized²⁵ the two part rule from *Gant* and went on to reject application of the exclusionary rule to searches performed prior to the decision in *Gant*.

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

²⁵ *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."

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.²⁶

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 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

²⁶ 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).

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)**

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.²⁷ 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 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

²⁷ *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.

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.²⁸ 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 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:²⁹

²⁸ It was assumed by the United States Supreme Court and by the Kentucky Supreme Court that an exigency existed.

²⁹ 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

[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 Alito 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.³⁰ 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 justifies a stop.³¹

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

both probable cause and time to get a warrant prior to their knocking on the door; therefore, they should have done so.

³⁰ See Treatise §§ 5.1.4.2., 5.1.5. – 5.1.6.

³¹ See Treatise §§ 5.1.5. – 5.1.6.

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.

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.³²

H. Digital Evidence and Expectations of Privacy: *City of Ontario v. Quon*, 560 U.S. ___, 130 S. Ct. 2619 (2010)

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
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- § 11.3. Procedural regulation of searches and seizures
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 - § 11.6.1. Two-fold nature of reasonableness -- scope considerations
 - § 11.6.1.2. Least intrusive means analysis

Sergeant Jeff Quon was employed by the Ontario Police Department as a member of the

³² See Treatise § 5.1.4.1.

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.

[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.

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*.

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 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.³³ 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 than 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. 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.

If the majority’s view is followed in future cases, a broader role for individualized suspicion—and the

³³ 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.

use of the objective criteria that it mandates—would bring needed structure to Fourth Amendment reasonableness analysis.³⁴

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.³⁵ Justice Kennedy, writing separately, stated that he joined the Court’s opinion in full. In section I of 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 it is a warrant within the meaning of the Fourth Amendment’s Warrant Clause because probable cause in that context referred to suspects of criminal violations.³⁶

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 that there were 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 practicality of securing al-Kidd’s testimony and alleged misstatements in the affidavit.

³⁴ Something I have long maintained. *See, e.g.*, Treatise, § 11.5.1.

³⁵ Justice Kagan did not take part in the decision.

³⁶ 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.