

# (Un)Reasonableness and the Roberts Court: The Fourth Amendment in Flux

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The Fourth Amendment famously provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Although the Amendment's text appears straightforward, the legal community has long debated precisely what that text means. The first clause outlines a right enjoyed by the people to be "secure" in their persons and private possessions against not all, but only "unreasonable" searches and seizures. The difficulty, however, lies in determining what constitutes a reasonable search or a reasonable seizure and what the remedy ought to be for a violation of the right to be free from them. When the Fourth Amendment was ratified, public police forces held no monopoly on criminal investigation. In many places, victims could initiate criminal prosecutions with privately retained counsel.<sup>1</sup> One of the chief means of securing the right against unreasonable searches and seizures lay in the ability of the aggrieved party to file a civil suit in tort. A jury of one's peers could then determine whether a particular search or seizure was reasonable.

The Fourth Amendment's second clause, the Warrant Clause, enabled a person executing a search or effecting a seizure to do so

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<sup>1</sup> Michael Edmund O'Neill, *Private Vengeance and the Public Good*, U. Pa. J. Const. L. (forthcoming 2010).

with immunity—provided a magistrate issued a warrant based upon probable cause and supported by the individual’s personal oath or affirmation. With a warrant in hand, the person executing the search or effecting the seizure could act without fear of civil or criminal liability. The drafters of the Warrant Clause’s “particularity” requirement sought to prevent the odious practice of general warrants, which proliferated among the colonies prior to the Revolutionary War.<sup>2</sup>

With the advent of public police forces and the government’s monopolization of criminal investigation and prosecution, the Supreme Court interpreted the Fourth Amendment to require a warrant.<sup>3</sup> A search or seizure not accompanied by a warrant was deemed *per se* unreasonable.<sup>4</sup> A principal disagreement among criminal and constitutional law scholars is whether, as an historical matter, the Fourth Amendment in fact requires a warrant for a search to be considered reasonable. Historical textualists and constitutional originalists tend to argue that the Supreme Court conflated the Amendment’s two clauses in requiring warrants to be issued for a search or seizure to be reasonable.<sup>5</sup> Other scholars argue that the Fourth Amendment requires a warrant to safeguard individual liberty.<sup>6</sup>

Although it would seem that the Supreme Court has sided with progressives on the warrant kerfuffle by requiring warrants to accompany nearly all searches and seizures, after it adopted the so-called categorical warrant requirement, the Court recognized that circumstances in the field made it impossible for police to secure

<sup>2</sup> John M. Burkoff, *A Flame of Fire: The Fourth Amendment in Perilous Times*, 74 *Miss. L.J.* 631, 633–34 (2004).

<sup>3</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Telford Taylor, *Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance and Fair Trial and Free Press* (1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757 (1994).

<sup>6</sup> Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 *Harv. Journ. Law & Pub. Pol.* 711 (2000); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”?* 16 *Creighton L. Rev.* 565–667 (1983); Randy Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 *Emory L.J.* 937 (1987).

warrants in all situations.<sup>7</sup> Thus, when confronted with specific factual predicates, the Court proceeded on a case-by-case basis to articulate exceptions to the warrant requirement. Of course, once the Court establishes an exception, that exception will affect a whole category of similarly situated cases. And given the nature of judicial interpretation, lower courts tend to expand such precedents. Some decry those exceptions as obliterating essential Fourth Amendment privacy protections.<sup>8</sup> Others, however, view the Court's chipping away at the warrant requirement as a return to originalist principles.<sup>9</sup>

A second battleground in Fourth Amendment jurisprudence involves the status of the exclusionary rule. Where a constitutional right exists, there must also exist a remedy when that right is violated. Suppression of ill-gotten evidence was one of a number of such remedies courts historically used to address Fourth Amendment violations. In fact, the Supreme Court did not mandate the exclusion of evidence as a remedy for Fourth Amendment violations until 1914 in *Weeks v. United States*.<sup>10</sup> Even so, the Court required exclusion only when federal officers committed the violation, leaving states free to fashion their own remedies. According to the Court, however, alternative remedies proved ineffectual in securing the right.<sup>11</sup> Not until *Mapp v. Ohio* was decided in 1961, did a divided Court apply

<sup>7</sup> See, e.g., *U.S. v. Leon*, 468 U.S. 897 (1984) (recognizing "good faith" exception to the exclusionary rule where police rely on warrant later held invalid); *Illinois v. Krull*, 480 U.S. 340 (1987) (allowing "reasonable reliance" on a statute authorizing warrantless searches later held unconstitutional); *Arizona v. Evans*, 514 U.S. 1 (1995) (permitting reasonable reliance on a warrant containing errors committed by court personnel); *U.S. v. Watson*, 423 U.S. 411 (1976) (permitting warrantless public arrests); *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting warrantless "pat down" searches); *Michigan v. Long*, 463 U.S. 1032 (1983) (permitting warrantless protective searches).

<sup>8</sup> See, e.g., Yale Kamisar, *Police Interrogations and Confessions* (1980) (discussing the importance of the exclusionary rule).

<sup>9</sup> See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757 (1994) (systematic critique of common justifications propounded for the exclusionary rule); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 *Univ. Ill. L. Rev.* 363 (1999) (arguing that the exclusionary rule is not as useful as certain alternative remedies); L. Timothy Perrin, et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 *Iowa L. Rev.* 669 (1998).

<sup>10</sup> *Weeks*, 232 U.S. 383 (1914).

<sup>11</sup> *Mapp v. Ohio*, 367 U.S. 643, 643–50 (1961).

the exclusionary rule to the states.<sup>12</sup> Since *Mapp*, commentators have vigorously debated the rule's efficacy and constitutional status. Some argue that the rule operates at too high a cost for the justice system, suppressing otherwise probative evidence because of relatively minor police missteps.<sup>13</sup> Others argue that the rule deters police misconduct—thereby protecting both the innocent and the guilty—and has proved to be the only truly effective remedy for Fourth Amendment infringements.<sup>14</sup>

In light of these fundamental jurisprudential disagreements, judicial confirmation hearings have inevitably included questions about the “categorical warrant requirement” and the exclusionary rule's constitutional status.<sup>15</sup> With the confirmation of Chief Justice John Roberts and Associate Justice Samuel Alito, the bar eagerly awaited evidence of whether the newly anointed Roberts Court would further erode the warrant requirement, seek to reaffirm it, or call into question the exclusionary rule's constitutional status. October Term 2008 allowed the Court to consider several important Fourth Amendment cases. While no single term is definitive, this past one permitted interesting insights as to where the Court might go in the future.

Part I of this essay discusses the concept of (un)reasonableness under the Fourth Amendment and explores the exclusionary rule's background. Part II examines the four and a half cases decided in October Term 2008 that address Fourth Amendment issues.<sup>16</sup> Part III looks at the justices' voting patterns and offers a few thoughts about where the Court might be heading. Finally, Part IV suggests that it might be opportune for the Congress to step into the fray to

<sup>12</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>13</sup> See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 *Harv. L. Rev.* 780, 793 (2006) (“The government pays for criminal procedure rules in the coin of forgone arrests and convictions.”).

<sup>14</sup> See Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 *U. Chi. L. Rev.* 1365, 1371 (2008) (“Although no hard data prove the exclusionary rule's success, evidence of its success is not difficult to find.”).

<sup>15</sup> Hearing on the Judicial Nomination of Samuel A. Alito Jr. of New Jersey to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 109th Cong. (2006) (testimony of Prof. Ronald Sullivan Jr., Yale Law School).

<sup>16</sup> “A half” because while the Court asked the parties in *Pearson v. Callahan* to brief the Fourth Amendment issue, the majority opinion ultimately avoided the issue altogether. *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

consider providing greater privacy protections for individuals and better guidance for law enforcement officers.

### I. (Un)Reasonableness, Exclusion, and Fourth Amendment Discontents

The Supreme Court has long held that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.”<sup>17</sup> This was certainly not always the case, as the country plugged along without a categorical warrant requirement from independence to ratification of the Bill of Rights to the *Weeks* case. And the Court didn’t apply the exclusionary rule to the states until 1961 in *Mapp v. Ohio*.

Shortly after creating a categorical warrant requirement, the Court recognized that circumstances police officers confront in the field might make obtaining a warrant impractical, but also not per se unreasonable. As a result, the Court has recognized that the warrant requirement is “subject only to a few specifically established and well-delineated exceptions.”<sup>18</sup> Unfortunately—or fortunately, depending upon one’s perspective—that list of exceptions has continued to expand. Those exceptions consist of whole categories of cases in which the Court has determined that the officers’ decision to conduct a search or effect a seizure without a warrant is nevertheless reasonable under the Fourth Amendment.

In criticizing the warrant requirement, Justice Antonin Scalia has explained that the Court’s Fourth Amendment jurisprudence has “lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.”<sup>19</sup> For Scalia, the Court’s warrant requirement has become “so riddled with exceptions that it (is) basically unrecognizable.”<sup>20</sup> Aside from the fact that requiring a warrant under all circumstances does not seem faithful to the Constitution’s text, a difficulty with adhering to a categorical warrant requirement is that certain absurdities may result. Should

<sup>17</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>18</sup> *Id.* at 357.

<sup>19</sup> *California v. Acevedo*, 500 U.S. 565, 582 (1991). For a discussion of this tension, see generally Stephen A. Saltzburg and Daniel J. Capra, *American Criminal Procedure: Cases and Commentary* 86 (Eighth Edition 2007).

<sup>20</sup> *Id.*

police officers, for example, be prevented from entering a home when in hot pursuit of a murder suspect? Numerous situations exist in which it would be burdensome for police officers to obtain a warrant, but few would consider the resulting search to be necessarily unreasonable.

Part of the reluctance to adhere to a categorical warrant requirement is related to the harshness of the remedy: the suppression of otherwise relevant, probative evidence. Evidence suppression gained prominence in part because alternative remedies were thought to be ineffective protections. For example, juries are disinclined to reward criminals with damages and police departments—especially those that measure success by arrests, not convictions—may find it distasteful to discipline police officers who successfully uncover evidence of criminal activity. In a world that eschews tort remedies or officer disciplinary proceedings for Fourth Amendment violations, the exclusion of tainted evidence may be the last remedy standing. Even so, courts may be hard-pressed to exclude otherwise relevant evidence of criminal activity when the police’s errors are relatively harmless. Courts thus may face strong incentives to collude with prosecutors to undermine the exclusionary rule. If the Constitution demands exclusion of the ill-gotten evidence in light of a Fourth Amendment violation, however, may courts constitutionally set it aside? And if exclusion is only one possible remedy, might not the courts or Congress be free to implement alternative remedies? The issue is not whether the Fourth Amendment demands a remedy for a violation—for surely it does—but rather what that remedy ought to be.

## II. October Term 2008 Fourth Amendment Cases

This section examines the term’s cases, set out in the chronological order in which they were decided. Fourth Amendment cases are necessarily fact-dependent, so I have erred on the side of including a more robust depiction of the facts to illuminate better the Court’s decisions.

### A. *Herring v. United States*<sup>21</sup>

The Court has carved out numerous exceptions to the warrant requirement. In one of those exceptions, *United States v. Leon*, the

<sup>21</sup> *Herring v. United States*, 555 U.S. —, 129 S. Ct. 695 (2009).

Court held the exclusionary rule does not apply if police acted “in objectively reasonable reliance” on an invalid warrant.<sup>22</sup> In *Massachusetts v. Sheppard*, the Court explained that the rule does not apply if the warrant was invalidated due to a judge’s failure to make “clerical corrections” to it.<sup>23</sup> In *Arizona v. Evans*, the Court held that the exclusionary rule does not apply when *court employees* make clerical errors or keep erroneous computer records.<sup>24</sup> However, the *Evans* Court left unresolved “whether the evidence should be suppressed if *police personnel* were responsible for the error,”<sup>25</sup> which was the issue confronted by the court in *Herring*.

On November 17, 2003, the Dale County, Alabama, Circuit Clerk’s Office issued an arrest warrant for petitioner because he did not appear for his court date. The clerk promptly sent the warrant to the Dale County Sheriff’s Department (DCSD) for execution. Personnel at the DCSD logged the information regarding the warrant into its records system. On February 2, 2004, however, the clerk’s office recalled the arrest warrant and the DCSD removed the recalled warrant from the department’s physical files and returned it to the clerk’s office. Unfortunately, a “breakdown” occurred “someplace within the Sheriff’s Department” and the DCSD neglected to update its computer files to reflect that the court had recalled petitioner’s arrest warrant. Consequently, the computer file incorrectly listed an outstanding warrant for petitioner’s arrest.<sup>26</sup>

On July 7, 2004, petitioner arrived at the Coffee County Sheriff’s Department (CCSD) to retrieve personal possessions from his impounded vehicle. A CCSD deputy asked the warrant clerk to check if petitioner was the subject of any outstanding warrants. The clerk discovered the DCSD had a warrant for petitioner and requested a faxed copy of the actual warrant. When the DCSD clerk checked the file, she could not locate a physical copy of the warrant and subsequently called the circuit court clerk’s office, which informed her that the warrant had been recalled. Meanwhile, disinclined to let the grass grow under their feet, DCSD officers stopped,

<sup>22</sup> *United States v. Leon*, 468 U.S. 897, 922 (1984).

<sup>23</sup> *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984).

<sup>24</sup> *Arizona v. Evans*, 514 U.S. 1, 16 (1995).

<sup>25</sup> *Id.* at 16 n.5 (emphasis added).

<sup>26</sup> *Herring*, 129 S. Ct. 695, 698.

arrested, and performed a patdown of the petitioner, discovering methamphetamine on petitioner's person and a handgun and ammunition in petitioner's truck. The DCSD clerk at that point informed the officers at the scene of the mistake.

At the inevitable suppression hearing, the magistrate found that the arresting officers "acted in good faith" in stopping and arresting the petitioner based on the warrant clerks' representations as to the existence of an active outstanding felony warrant. The district court adopted the magistrate's recommendation and determined that *Arizona v. Evans* should be extended to cover situations where erroneous computer records kept by law enforcement personnel lead to arrests, so long as there is a "mechanism to ensure [the recordkeeping's] system accuracy over time" and, additionally, there is no evidence suggesting that "the system routinely leads to false arrests."<sup>27</sup> The district court found that the mistake in this case was quickly discovered and, likewise, corrected within a span of around 10 to 15 minutes. The quick correction supported the court's finding that there was "no credible evidence of routine problems with disposing of recalled warrants," and that the recordkeeping systems of the two clerks' offices "were, and are, reliable."<sup>28</sup>

The Eleventh Circuit Court of Appeals concluded that while the search violated petitioner's Fourth Amendment rights, "any minimal deterrence" that could possibly result from the exclusionary rule did "not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence."<sup>29</sup>

*Herring* thus presented the issue of whether the good-faith exception to the exclusionary rule applies when a police officer relies on a mistake committed by fellow law enforcement agents. The Court accepted the parties' assumption that a Fourth Amendment violation occurred and focused on whether the exclusionary rule should apply.<sup>30</sup> Consequently, instead of deciding whether the search and subsequent seizure were reasonable, the Court examined whether

<sup>27</sup> Brief for the United States at 4–5, *Herring v. United States*, 129 S. Ct. 695 (2009) (No. 07-513) (internal quotations and citation omitted), 2008 WL 194291.

<sup>28</sup> *Id.* at 6 (internal quotations and citation omitted).

<sup>29</sup> *Id.* at 7 (citing *United States v. Herring*, 492 F.3d 1212, 1217 (11th Cir. 2007)).

<sup>30</sup> *Herring*, 129 S. Ct. at 699.



it was reasonable to suppress the evidence. If the Constitution mandates exclusion for a Fourth Amendment violation, however, should this even be an issue? Writing for the Court, Chief Justice Roberts explained that:

When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation.<sup>31</sup>

While this summary sounds straightforward, it points to some of the complications surrounding the Fourth Amendment. Namely, if the search was not covered by a warrant or an acknowledged exception to the warrant requirement, isn't it necessarily a constitutional violation?

If the Court accepts the assertion that a constitutional violation has occurred, then determining reasonableness does not depend on whether the search was unreasonable but rather whether it is reasonable to suppress the seized evidence. The Chief Justice noted that:

The very phrase "probable cause" confirms that the Fourth Amendment does not demand all possible precision . . . whether the error can be traced to a mistake by a state actor or some other source may bear on the analysis.<sup>32</sup>

In effect, the warrant must be based upon probable cause, but probable cause is not absolute. If the probable cause standard is not itself precise, then a technically defective warrant reasonably relied upon may not provide grounds for suppression.

Roberts's opinion for the Court highlighted the disagreement between those who consider reasonableness to be the Fourth Amendment's touchstone and those who demand a warrant prior to any search or seizure. If the Constitution requires a warrant, then it should not matter whether the search was otherwise "reasonable." The steady flow of exceptions to the categorical warrant requirement, however, reaffirms the centrality of "reasonableness" to the Fourth Amendment determination.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

Here, where the constitutional violation is assumed, the Court explained that the rule is “designed to safeguard Fourth Amendment rights generally through its deterrent effect”—a pragmatic consideration, seemingly not of constitutional dimension.<sup>33</sup> And to act as a deterrent, the officers must know they are about to engage in wrongdoing. Thus, the court of appeals’ conclusion that the DCSD’s error was negligent but not reckless or deliberate, is “crucial to [the Court’s] holding that this error is not enough by itself to require ‘the extreme sanction of exclusion’”—presumably because suppression could not deter what was a simple error on the part of the police.<sup>34</sup>

Interestingly, while the Court accepted that the error was unreasonable and therefore a violation—because it was neither an intentional nor a reckless mistake—the Court explained that it should not necessarily trigger the exclusionary rule.<sup>35</sup> The Court has “repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.”<sup>36</sup> The “exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’”<sup>37</sup> Moreover, the Court clarified that the remedy’s deterrence benefits should outweigh the costs of, principally, “letting guilty and possibly dangerous defendants go free—something that ‘offends basic concepts of the criminal justice system.’”<sup>38</sup>

In this case, the Court found the conduct “not so objectively culpable as to require exclusion.”<sup>39</sup> As in *Leon*, “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”<sup>40</sup> Where the police are shown to have engaged in reckless maintenance of its warrant system or deliberately made false entries to allow future false arrests, application of the exclusionary rule is certainly justified

<sup>33</sup> *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

<sup>34</sup> *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 916 (1984)).

<sup>35</sup> *Id.* (stating that exclusion “has always been our last resort, not our first impulse” (citing *Hudson v. Michigan*, 547 U.S. 586, 591 (2006))).

<sup>36</sup> *Id.* (citing *Leon*, 468 U.S. at 909; *Arizona v. Evans*, 514 U.S. 1, 13–14 (1995); *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)).

<sup>37</sup> *Id.* (quoting *Leon*, 468 U.S. at 909).

<sup>38</sup> *Id.* at 700–01 (quoting *Leon*, 468 U.S. at 908).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (quoting *Leon*, 468 U.S. at 922).

if such misconduct caused a Fourth Amendment violation.<sup>41</sup> The Court emphasized that this “analysis of deterrence and culpability” is objective—in other words, a court should not attempt to discern the officer’s intentions, but rather “‘whether a reasonably well trained officer would have known that the search was illegal’ in light of ‘all the circumstances.’”<sup>42</sup> In refusing to apply the exclusionary rule, the Court embraced the view that it is not constitutionally mandated. Indeed, the Court emphasized that the exclusionary rule is a “last resort” rather than a “necessary consequence of a Fourth Amendment violation.”<sup>43</sup>

In light of the Court’s “repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, [the Court] conclude[d] that when police mistakes are the result of negligence such as that described [in this case], rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence” is not justified and the exclusionary rule does not apply.<sup>44</sup>

The majority focused on the objective reasonableness of individual officers relying upon otherwise seemingly accurate information in executing warrants. By declining suppression in instances of what many might perceive as an “honest mistake,” the majority effectively concluded that this is not the type of unreasonable action from which citizens need protection.<sup>45</sup> In other words, the Court has decided that the exclusionary rule will not deter an officer from making mistakes where he is unaware of a colleague’s error and has no reason to suspect an error was made. But limits exist: the Court expressly held that that this new exception will not apply to systemic errors. Instead, the Court found it inherently unreasonable for an officer to rely on information from a warrant database the officer knows or has reason to know does not provide consistently accurate information.<sup>46</sup>

<sup>41</sup> *Id.* at 703.

<sup>42</sup> *Id.* (quoting *Leon*, 468 at 922 n.23).

<sup>43</sup> *Id.* at 700 (internal quotation and citation omitted).

<sup>44</sup> *Id.* at 704 (internal citation omitted).

<sup>45</sup> *Id.* at 702.

<sup>46</sup> *Id.* at 704.

Justice Ruth Bader Ginsburg was not impressed. Her dissent noted that the Court's decision would undermine "the need for a forceful exclusionary rule and the gravity of recordkeeping errors in law enforcement."<sup>47</sup> To Justice Ginsburg, "the 'most serious impact' of the Court's holding will be on innocent persons 'wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base.'"<sup>48</sup> Her dissent explained that deterrence is not the only purpose of the exclusionary rule: "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.'"<sup>49</sup>

In addition to arguing that the rule is constitutionally mandated, Justice Ginsburg also offered a pragmatic argument and disputed the majority's conclusion that the rule would be of minimal deterrent value in cases such as these.<sup>50</sup> She analogized the exclusionary rule's function to a premise of tort law that liability for negligence "creates an incentive to act with greater care."<sup>51</sup> "The Sheriff's Department is in a position to remedy the situation and might well do so if the exclusionary rule is there to remove the incentive to do otherwise."<sup>52</sup> Ginsburg stated that the need for exclusionary rule is significant because "'the offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer database' is evocative of the use of general warrants that so outraged the authors of our Bill of Rights."<sup>53</sup> She continued, explaining that "first, by restricting suppression to bookkeeping errors that are deliberate or reckless, the majority leaves Herring, and others like him, with no remedy for violations of their constitutional rights."<sup>54</sup> Because the

<sup>47</sup> *Id.* at 706 (Ginsburg, J., dissenting).

<sup>48</sup> *Id.* at 705 (quoting *Arizona v. Evans*, 514 U.S. 1, 22 (1995) (Stevens, J., dissenting)).

<sup>49</sup> *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

<sup>50</sup> *Id.* at 708.

<sup>51</sup> *Id.* (internal quotation and citation omitted).

<sup>52</sup> *Id.* (citing *Evans*, 514 U.S. at 21) (internal quotations omitted).

<sup>53</sup> *Id.* at 709 (quoting *Evans*, 514 U.S. at 23 (Stevens, J., dissenting)).

<sup>54</sup> *Id.*

arresting officer would be protected by qualified immunity, the police department itself is not liable for its employees' negligent acts.<sup>55</sup> Further, it may be impossible to identify which police employee committed the error, so the formula is simple according to the dissenters: "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."<sup>56</sup>

The dissent underscored a significant rift in the Court's Fourth Amendment jurisprudence. The majority undertook a fact-based analysis of whether the constables' blunder was objectively reasonable and considered the exclusionary rule simply to be a useful remedy for Fourth Amendment violations, not something mandated by the Constitution itself. Ginsburg, however, seemed unconcerned with any kind of "reasonableness" analysis, objective or otherwise. Instead, she maintained that it is *per se* unreasonable ever to rely on a warrant that turned out to be invalid based on any police error. For her, because the exclusionary rule is part and parcel of the Fourth Amendment, suppression is an automatic consequence of the illegal search or seizure.

#### B. *Pearson v. Callahan*<sup>57</sup>

Much like the dog that did not bark in the well-known Sherlock Holmes story,<sup>58</sup> *Pearson v. Callahan* turns out to be the fascinating Fourth Amendment case that was not. Undercover police officers and confidential informants have consistently presented certain challenges to courts. While their use has become essential to law enforcement, how can a categorical warrant requirement be squared with plainclothes officers or informants warrantlessly entering homes or collecting evidence at the behest of the police? Do we waive our privacy interests when we don't know that the person with whom we're associating is actually a government proxy? If consent to enter

<sup>55</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

<sup>56</sup> *Herring*, 129 S. Ct. at 709–10 (Ginsburg, J., dissenting) (internal quotations omitted).

<sup>57</sup> *Pearson v. Callahan*, 555 U.S. \_\_\_\_, 129 S. Ct. 808 (2009).

<sup>58</sup> Arthur Conan Doyle, *Silver Blaze*, in 1 *Sherlock Holmes: The Complete Novels and Stories* 455, 475 (1986).

a premises is given to a confidential informant, does that enable the government to enter as well?

In *Pearson*, Brian Bartholomew, a police informant for a narcotics task force, informed officers that respondent Afton Callahan had arranged to sell him methamphetamine. Later that evening, Bartholomew arrived at Callahan's residence carrying a marked \$100 bill and wearing a wire. He had agreed upon a signal he would give police after completing the purchase. Callahan sold him a gram of methamphetamine, Bartholomew gave the arrest signal, and the officers entered the trailer. The officers seized methamphetamine and drug paraphernalia during the course of a protective sweep.

After the Utah Court of Appeals vacated Callahan's drug convictions, he brought suit under 42 U.S.C. §1983 against the officers who had conducted the warrantless search of his house.<sup>59</sup> The Tenth Circuit ruled that petitioners were not entitled to summary judgment on qualified immunity grounds, holding that Callahan had adduced sufficient facts to establish a Fourth Amendment violation.<sup>60</sup>

Although this case was primarily one involving qualified immunity, the Supreme Court requested the parties to brief "[w]hether the Fourth Amendment is violated when police officers enter a home after a confidential informant has been admitted inside to purchase drugs, the informant completes the purchase, and he then signals the purchase to the officers waiting outside."<sup>61</sup> In other words, was the officers' warrantless entry reasonable? Despite the Court's interest in the Fourth Amendment issue, and that issue's probable impact on whether the officers merited qualified immunity, the unanimous opinion, penned by Justice Alito, did not address it. The Court offered no explanation as to why it left the issue unresolved; perhaps consideration of privacy interests, and whether they could reasonably be waived merely by agreeing to the entry of the confidential informant, proved a difficult issue for a majority to coalesce around.

This case *could* have been significant in that it might have decided whether it was reasonable for the officers to enter a home without a warrant based on a confidential informant's entry into the premises.

<sup>59</sup> *Pearson*, 129 S. Ct. at 814.

<sup>60</sup> *Id.* at 814–15.

<sup>61</sup> Brief for Petitioners at i, *Pearson v. Callahan*, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 2367229.

Petitioners did argue that the agents' entry did not violate the Fourth Amendment because Callahan had already lost his privacy expectation when he allowed the informant into his home.<sup>62</sup> After all, if an undercover officer can enter the home without a warrant, why not a confidential informant acting in concert with the police? For better or worse, this "consent once removed" scenario would have opened a new vista for warrantless searches.

C. *Arizona v. Johnson*<sup>63</sup>

The Court has traditionally deferred to officers' discretion at the scene of traffic stops. Although the Court's stated rationale has always been one of "officer safety," courts have permitted warrantless searches of automobiles even where the driver did not pose a threat to the arresting officers. In *Arizona v. Johnson*, the Court had the opportunity to assess the propriety of searching passengers not otherwise being arrested.

Three officers affiliated with an Arizona gang task force were patrolling a Tucson neighborhood allegedly frequented by the notorious Crips street gang. After discovering that a passing vehicle's registration had been suspended, the officers stopped the car. Officer Maria Trevizo noticed that respondent Lemon Johnson, the back seat passenger, exhibited "unusual behavior."<sup>64</sup> While Detective Machado asked the vehicle's driver to exit the vehicle, Officer Trevizo questioned Johnson, learning he was from Eloy, Arizona—a town with a Crips affiliated gang—and that he had recently served prison time for burglary. Officer Trevizo also noticed that Johnson carried a police scanner and dressed in colors signifying Crips membership.

Officer Trevizo asked Johnson to exit the vehicle; when he did, the officer asked him to turn around so she could pat him down. She testified that she performed the patdown "because [she] had a lot of information that would lead [her] to believe he might have a weapon on him," but that "[she] did not have probable cause at that point to believe that he was involved in criminal activity."<sup>65</sup>

<sup>62</sup> *Id.* at 20.

<sup>63</sup> *Arizona v. Johnson*, 555 U.S. \_\_\_\_, 129 S. Ct. 781 (2009).

<sup>64</sup> Brief for Petitioner at 3, *Arizona v. Johnson*, 129 S. Ct. 781 (2009) (No. 07-1222), 2008 WL 4080367.

<sup>65</sup> *Id.* (internal quotation marks and citations omitted).

The officer patted down Johnson's clothing and felt the butt of a handgun in the waist of his pants. At this point respondent began "to struggle," so the officer handcuffed him so that he could not reach his gun.

Officer Trevizo testified that a totality of circumstances, not any one specific factor, initially led her to believe respondent was armed and potentially dangerous. Johnson, without challenging the reasonableness of the officer's beliefs, instead argued he had consented to talk with the officer, but had not consented to the patdown. The trial court denied Johnson's motion to suppress, concluding that the officers had a reasonable basis to fear for their safety and that the traffic stop permitted the officers to perform a limited patdown. The Arizona Court of Appeals reversed respondent's convictions, holding that the "officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot' "<sup>66</sup>

Thus, the Supreme Court considered whether the officer could conduct a warrantless patdown of the passenger without any reasonable suspicion that the passenger had committed a criminal offense. In *Terry v. Ohio*, the Court had ruled that the police could conduct a limited patdown of a pedestrian believed to be armed and dangerous.<sup>67</sup> The level of suspicion necessary to justify a patdown need not rise to the level of probable cause, but could not be based upon the officer's mere hunch. Although the police may order the driver out of the vehicle during a routine traffic stop, to justify a patdown of the driver or a passenger during the stop, the police must harbor a reasonable suspicion that the person is armed and dangerous.

Indeed, the Supreme Court has long recognized that traffic stops are inherently dangerous for police officers.<sup>68</sup> In *Maryland v. Wilson*, the Court stressed that "[t]he risk of harm to both the police and the occupants [of a stopped vehicle] is minimized if the officers routinely exercise unquestioned command of the situation."<sup>69</sup> The Court has thus applied the *Terry* stop-and-frisk rationale to traffic stops and has held that "once a motor vehicle has been lawfully

<sup>66</sup> *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

<sup>67</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>68</sup> *Johnson*, 129 S. Ct. at 786.

<sup>69</sup> *Maryland v. Wilson*, 519 U.S. 408, 414 (1997).



detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment.<sup>70</sup> The *Wilson* Court found that the same rationale supporting searches of drivers applies to passengers as well.<sup>71</sup>

Following these precedents, the Court reasoned that the government's "legitimate and weighty interest in officer safety outweighs the *de minimis* additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle."<sup>72</sup> Further, the Court found that "a driver, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the driver 'might be armed and presently dangerous.'"<sup>73</sup>

Applying *Wilson*, the Court determined that the officers lawfully detained the passenger, Johnson, because of the traffic stop.<sup>74</sup> "[A] traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will."<sup>75</sup> Nothing in this case would have conveyed to respondent "that, prior to the frisk, the traffic stop had ended or that he was otherwise free 'to depart without police permission.'"<sup>76</sup> Thus, the officer was not required by the Fourth Amendment to give defendant an opportunity to depart "without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."<sup>77</sup> The Court had little trouble upholding respondent's stop and frisk.

While the reasoning in this case can be construed as an extension of existing precedent, one is left to question whether the factual predicate is truly sufficient to justify the search of a passenger. Officer safety is understandably a reasonable concern at any traffic stop—and passengers doubtless present every bit of much a safety risk as the driver. But do those scenarios need a bright line that is never

<sup>70</sup> *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977).

<sup>71</sup> *Wilson*, 519 U.S. at 413 (applying the *Mimms* rule to passengers because a passenger's motivation to use violence during the stop "is every bit as great as that of the driver.").

<sup>72</sup> *Johnson*, 129 S. Ct. at 786.

<sup>73</sup> *Id.* (quoting *Mimms*, 434 U.S. at 112).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (internal quotation and citation omitted).

<sup>77</sup> *Id.*

particularly bright, or is all this best left to the discretion of the trial court after weighing the relevant facts?

D. *Arizona v. Gant*<sup>78</sup>

If you're handcuffed and locked up in the back of a squad car that cannot be opened from the inside, do you present a sufficiently serious threat to police officers such that they can search your secured vehicle without a warrant? I suspect most people who are not judges would say, "No." Within the judiciary, however, the answer has proven to be a bit more complicated. In *Arizona v. Gant*, Tucson police officers responded to an anonymous tip concerning narcotics activity at a residence. Rodney Gant greeted the officers at the front door, identified himself, and informed them that the homeowner would return later that day. After they left the residence, the officers ran Gant's name through a records database and discovered that he had an outstanding warrant for failure to appear on a driving-with-a-suspended-license charge.

Later that same day, the officers returned to the residence and found a man and a woman sitting in a parked car in front of the residence. The officers obtained the woman's consent to search the vehicle and uncovered a crack pipe. The officers arrested the woman, as well as the man, upon learning he had given them a false name, handcuffed them both, and secured them in separate squad cars.

Shortly thereafter, officers recognized Gant when he drove his car into the residence's driveway. Gant parked and exited his car; the officers immediately handcuffed and arrested him for driving on a suspended license. Because the other man and woman were already secured in the only two squad cars at the scene, the officers radioed for backup. When another squad car arrived at the scene, the officers secured Gant in the third vehicle.

At this point, five officers were on scene and all three subjects, including Gant, were secured in separate squad cars that were incapable of being opened from the inside. Once Gant was locked in the squad car, the officers searched his vehicle and uncovered a handgun "somewhere within the interior compartment" and a plastic baggie containing cocaine in the pocket of a jacket lying on the

<sup>78</sup> *Arizona v. Gant*, 556 U.S. —, 129 S. Ct. 1710 (2009).

backseat.<sup>79</sup> During the search, one of the officers supervised Gant and remained in the immediate area of the squad car in which he was secured. Absent supernatural powers, it was unlikely Gant could present much of a threat to anyone.

The trial court ruled that the search of Gant's car was incident to his arrest because he was a recent occupant of the vehicle, the officers arrested him only "seconds" after he exited the vehicle, and the officers searched the car "immediately" after securing Gant in the squad car.<sup>80</sup> Sounds perfectly reasonable. The state court of appeals reversed in a split decision, however, ruling that the search of the passenger compartment was not incidental to the arrest because the underlying justifications for such a search—officer safety and evidence preservation—were no longer present after Gant was secured. The Arizona Supreme Court affirmed, agreeing that the search violated the Fourth Amendment and ruling that it was not incident to the arrest because neither officer safety nor evidence destruction was at issue. The court further concluded that because the record revealed no unsecured civilians in the area and at least four officers present, the officers "had no reason to believe that anyone at the scene could have gained access to Gant's vehicle or that the officers' safety was at risk."<sup>81</sup>

The U.S. Supreme Court granted certiorari to consider whether, given the circumstances, the Fourth Amendment required the officers to obtain a warrant prior to the vehicle's search. In a surprising decision—surprising because the Court has traditionally granted officers wide latitude to search vehicles at an arrest scene—the Court held that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only where it is reasonable to believe that the arrestee might access the vehicle at the time of the search.<sup>82</sup> Justice John Paul Stevens wrote for a majority that included Justices Antonin Scalia, David Souter, Clarence Thomas, and Ruth Bader Ginsburg—a line-up not often seen.

<sup>79</sup> Brief for Respondent at 4, *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 2817675, at \*4.

<sup>80</sup> Brief for Petitioner at 7, *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 2066112.

<sup>81</sup> *Id.*

<sup>82</sup> *Gant*, 129 S. Ct. at 1719.

A search incident to a lawful arrest that encompasses the “arrestee’s person and the area ‘within his immediate control’” has stood as a long-standing exception to the warrant requirement. In other words, the police may search any area where the suspect could realistically “gain possession of a weapon or destructible evidence”<sup>83</sup> without first obtaining a warrant. Interests in officer safety and evidence preservation typically justify this exception.<sup>84</sup> Over time, the search incident to arrest has been extended, such as in *New York v. Belton*, in which the Court held that where an officer lawfully arrests an occupant of the car, he may, “as a contemporaneous incident of that arrest, search the passenger compartment of the automobile” and any containers therein.<sup>85</sup> The *Gant* Court explained, however, that when it is not possible for the arrestee to access the area the officers want to search, then the rule does not apply.<sup>86</sup>

While this makes perfect sense—no one expects someone handcuffed and locked in a police car to be able to escape easily and threaten officers or destroy evidence—since *Belton*, a number of courts have read the decision broadly. For example, in *Thornton v. United States*, the Court “treat[ed] the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*.”<sup>87</sup> “Under this construction of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle’s passenger compartment will not be within the arrestee’s reach at the time of the search.”<sup>88</sup> To the *Gant* majority, such a reading would untether the rule from the underlying safety and evidentiary justifications of the *Chimel* exception—“a result clearly incompatible with [the Court’s] statement in *Belton* that it ‘in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches

<sup>83</sup> *Id.* at 1716 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

<sup>84</sup> *Id.*

<sup>85</sup> *New York v. Belton*, 453 U.S. 454, 460 (1981).

<sup>86</sup> *Gant*, 129 S. Ct. at 1717.

<sup>87</sup> *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring in part).

<sup>88</sup> *Gant*, 129 S. Ct. at 1719.

incident to lawful custodial arrests.”<sup>89</sup> Hence, the *Gant* Court rejected this understanding of *Belton* and held “that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>90</sup>

Granted, in this case, the five officers outnumbered the three suspects already secured in separate patrol cars at the time of the search, but, why should it, the state argued, be unreasonable to search a vehicle—which already has a somewhat lessened expectation of privacy—attendant to the arrest? The Court flatly rejected the state’s expansive reading of *Belton*. The Court focused less on the reasonableness of the search and more on the individual’s privacy expectation, noting that the state seriously undervalued the privacy interests at stake for a motorist in his vehicle. A rule that gives police the unbridled power “to search not just the passenger compartment but every purse, briefcase, or other container within that space . . . when there is no basis for believing evidence of [an] offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals.”<sup>91</sup>

Despite the state’s touting of its proposed reading as a “bright line” rule, the Court found that broad interpretations of *Belton* have “generated a great deal of uncertainty” with respect to the timing of the arrest, the arrestee’s proximity to the vehicle, and the reasonableness of a search commencing after an arrestee has been removed from the scene.<sup>92</sup> Instead, the Court explained that a broad reading of *Belton* was unnecessary to protect officer safety or address evidentiary concerns.<sup>93</sup> Rather than focusing on whether the officers’ actions in this case were unreasonable, the Court found that “construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis.”<sup>94</sup>

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1720–21.

<sup>93</sup> *Id.* at 1721.

<sup>94</sup> *Id.*

The Court further rejected the claim that *stare decisis* required adherence to a broad reading of *Belton*, noting that “the experience of the 28 years since [the Court] decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded,” especially since it became clear that articles within passenger compartments were rarely within reach or a safety concern.<sup>95</sup> In many respects, the Court simply reflected what most people already know: If you’re secured in the back of a police car, surrounded by officers, it’s unlikely you can grab anything left back in your vehicle.

In one respect, the majority inserted an actual “reasonableness” analysis to searches incident to arrest at a vehicular stop. Presumably, officers can now search a vehicle incident to arrest only if the arrestee can “reasonably” access the automobile during the search (almost impossible to satisfy where the arrestee is secured, for example, in a squad car), or the officer himself “reasonably” believes that evidence of the arresting offense may be found in the vehicle (a limitation designed to keep officers “honest”).

In his concurrence, Justice Scalia noted that “since the historical scope of officers’ authority to search vehicles incident to arrest is uncertain, traditional standards of reasonableness govern. It is abundantly clear that those standards do not justify . . . that arresting officers may always search an arrestee’s vehicle in order to protect themselves from hidden weapons.”<sup>96</sup> Scalia would have preferred to overrule *Belton* and *Thornton*, but was forced to side with the majority to avoid what he viewed as the greater evil of continuing with the broad interpretation of *Belton* that allowed searches incident to any arrest of a vehicle occupant.<sup>97</sup> He would rather have a rule making vehicle searches incident to arrest “reasonable” only where the officer has a reasonable belief that evidence of the arresting offense, or another offense for which the officer has probable cause, will be discovered within the vehicle. Scalia appeared unconcerned about upholding a categorical warrant requirement, but instead examined whether a search performed under these circumstances was reasonable.<sup>98</sup>

<sup>95</sup> *Id.* at 1722–23.

<sup>96</sup> *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

In dissent, Justice Stephen Breyer wrote that the majority was upending *Belton* “and those who wish [the] Court to change a well-established legal precedent—where, as here, there has been considerable reliance on the legal rule in question—bear a heavy burden.”<sup>99</sup> In his view, this burden had not been met.

Justice Samuel Alito similarly dissented, largely because “[a]lthough the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so.”<sup>100</sup> He explained that “the [*Belton*] Court unequivocally stated its holding that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”<sup>101</sup> The majority, Alito wrote, “curiously suggests that *Belton* may reasonably be read as adopting a holding that is narrower than the one explicitly set out” and that “this ‘bright-line rule’ has now been interred.”<sup>102</sup> Because the respondent had not asked the Court to overrule *Belton*, much less *Chimel*, and because his argument rested entirely on a faulty interpretation of *Belton*, Justice Alito would have upheld the search.<sup>103</sup>

#### E. *Safford Unified School Dist. No. 1 v. Redding*<sup>104</sup>

*Safford v. Redding* served a twofold purpose: first, it enabled the Supreme Court to consider the appropriate scope of searching a student for drugs; and second, it allowed Justice Ginsburg to press the importance of having some semblance of gender balance on the Court. The respondent, Savana Redding, was a middle-school student who was strip-searched by school authorities. The lively oral argument prompted Justice Ginsburg to comment: “[The other Court members] have never been a 13-year-old girl. . . . It’s a very sensitive age for a girl. I didn’t think that my colleagues, some of them, quite understood.”<sup>105</sup>

<sup>99</sup> *Id.* at 1726 (Breyer, J., dissenting).

<sup>100</sup> *Id.* at 1727 (Alito, J., dissenting).

<sup>101</sup> *Id.* (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. \_\_\_\_, 129 S. Ct. 2633 (2009).

<sup>105</sup> Joan Biskupic, Ginsburg: Court Needs Another Woman, *USA Today*, May 5, 2009, at A1.

Safford Middle School had experienced a serious drug problem among its students, which prompted the administration to adopt a “zero tolerance” policy prohibiting the nonmedical possession of drugs on campus. One afternoon, Assistant Principal Kerry Wilson received a call from the mother of a student, Jordan Romero, who informed Wilson that Jordan had gotten sick after taking pills he received from a classmate. Romero identified several students who had been distributing drugs, including Marissa Glines and Savana Redding. Romero subsequently approached Wilson, handed him a white pill—later identified as prescription Ibuprofen—that he claimed Glines had just given to him and informed him that a group of students planned to take the pills at lunch.

Wilson went to Glines’s class and asked her to accompany him to the office. As the girl stood up, Wilson noticed a black planner sitting on the adjacent desk that turned out to contain several knives and lighters, a cigarette, and a black marker. After escorting Glines to his office, Wilson and an administrative assistant observed her remove a blue pill from her pockets, several white pills identical to the one Romero had given to Wilson, and a razor blade. Glines identified Redding as the person who gave her the pills and the planner.

Wilson then pulled Redding from class and confronted her with the black planner and the prescription pills. Redding admitted that the planner belonged to her, but denied owning the present contents or having distributed the pills.

Given the confirmed distribution of prescription pills in school that morning, the ostensibly reliable implication of Redding as the pill supplier, and Redding’s admission that she owned the black planner, Wilson asked the administrative assistant, Helen Romero, to escort Redding to the nurse’s office to be searched. Once in the nurse’s office, Ms. Romero and the female nurse directed Redding to undress. The assistant also asked Redding to shake out her bra as well as the elastic band of her underwear. Although the entire search was performed without anyone physically touching Redding, she was forced to expose her genital area and breasts to the school officials. The search, however, failed to yield any additional contraband. Redding later described the school officials’ viewing of her nearly naked body as “the most humiliating experience” of her life.<sup>106</sup>

<sup>106</sup> Brief for Respondent at 2–3, *Safford Unified Sch. Dist. No. 1 v. Redding*, 2009 WL 852123.



Redding sued the school district, as well as the school officials involved in the search, and included a claim under 43 U.S.C. § 1983 alleging that the search violated her Fourth Amendment rights. The district court determined that the school officials had not violated the Fourth Amendment as the search complied with the standard set forth in *New Jersey v. T.L.O.*, which permitted school authorities wide latitude to search students without first obtaining a warrant.<sup>107</sup> The district court explained that the search was reasonable under the circumstances because grounds existed for suspecting that Redding was in possession of drugs in violation of Safford policies. The Ninth Circuit Court of Appeals, rehearing the case en banc after a panel decision affirming the district court, reversed the district court's determination that there was no violation of Redding's constitutional rights and subsequently denied Wilson qualified immunity.

The Supreme Court granted certiorari to decide whether Redding's warrantless strip search violated the Fourth Amendment and whether the officials enjoyed qualified immunity.<sup>108</sup> The Court held that because the school officials had no reason to suspect that the drugs presented a danger or that they were concealed in the student's underwear, the warrantless strip search was unreasonable.<sup>109</sup> The Court's opinion explained that *New Jersey v. T.L.O.* "recognized that the school setting 'requires some modification of the level of suspicion of illicit activity needed to justify a search,' and held that for searches by school officials 'a careful balancing of governmental and private interests, suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.'"<sup>110</sup> In other words, the Fourth Amendment is all about reasonableness and its values can be satisfied without a categorical warrant requirement. Under the resulting reasonable suspicion standard, a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and

<sup>107</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>108</sup> While not germane to our discussion, the Court also considered whether "qualified immunity applies to public school officials in a damages lawsuit under 43 U.S.C. section 1983 for conducting a strip search of a student suspected of possessing and distributing a prescription drug on campus."

<sup>109</sup> *Id.* at 2644.

<sup>110</sup> *Id.* at 2639 (quoting *T.L.O.*, 469 U.S. at 340–41).

sex of the student and the nature of the infraction”<sup>111</sup> Echoing *T.L.O.*, the Court explained that although the required knowledge component for probable cause must rise to the level of “fair probability” or “substantial chance,” a lesser standard applies to school evidence searches.<sup>112</sup> This required knowledge component for reasonable suspicion can “readily be described as a *moderate chance* of finding evidence of wrongdoing.”<sup>113</sup>

According to the Court, Wilson was justified in searching Redding’s backpack and outer clothing because sufficient evidence existed to tie Redding to the pill distribution. “If a student is reasonably suspected of giving out contraband pills,” Justice Souter wrote for the Court, “she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If [petitioner’s] reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making.”<sup>114</sup> As a consequence, Wilson’s search of Redding’s backpack “in her presence and in the relative privacy of Wilson’s office, was not excessively intrusive, any more than [Helen] Romero’s subsequent search of her outer clothing.”<sup>115</sup>

The reasonableness of the *strip* search, however, took on a new dimension. Because Redding had to expose her breasts and pelvic area to school officials, Souter explained that “both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.”<sup>116</sup> Redding’s subjective expectation of privacy against such a strip search “is inherent in her account of it as embarrassing, frightening, and humiliating.”<sup>117</sup> Although the subjective view of the search as degrading does not outlaw the search, it does implicate the rule that “the

<sup>111</sup> *Id.* (quoting *T.L.O.*, 469 U.S. at 342).

<sup>112</sup> *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 238, 244 n.13 (1983)).

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place"—in other words, the search must be reasonable.<sup>118</sup>

Here, Wilson did not have sufficient suspicion to merit forcing the privacy intrusion to the extent that was done; the facts simply failed to suggest, according to Souter, that Redding had concealed pills in her underwear. Indeed, a search “that extensive calls for suspicion that it will pay off.”<sup>119</sup> Wilson knew the pills were common pain relievers, must have known of their nature and limited threat, and had no reason suspect a large volume was being distributed. Possession of nondangerous school contraband does not suggest stashes in intimate places, and there was no evidence of such a practice at the school.<sup>120</sup> Furthermore, neither of the student informants suggested that Redding was hiding drugs in her underwear. “[T]he combination of these deficiencies was fatal to finding the search reasonable.”<sup>121</sup> With this decision, the Court intended to make the following clear:

The *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.<sup>122</sup>

Thus, the Court used a reasonableness test for determining the legality of a school search.

This reasonableness determination is necessarily fact-dependent. To no great surprise, the more intrusive the search’s scope (even in the school setting) the higher the showing of reasonable suspicion required. What this holding also suggests is that what might not be reasonable for a thirteen-year-old girl might be reasonable for a

<sup>118</sup> *Id.* at 2642 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

<sup>119</sup> *Id.* at 2642.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2643.

<sup>122</sup> *Id.*

seventeen-year-old boy. In balancing the reasonableness of a student's expectation of privacy, the Court explained that the search must be "reasonably related in scope" to the circumstances that initially justified the interference. The Court also seemed to create a substantial hurdle for making a showing of reasonable suspicion when it comes to the "categorically extreme intrusiveness of a search down to the body of an adolescent" by school officials.<sup>123</sup> Even so, if the drugs had been heroin instead of common prescription anti-inflammatories, the strip search might have been deemed reasonable.

While Justice Stevens joined as to Parts I–III of the Court's opinion, he would not have afforded the officials qualified immunity.<sup>124</sup> Similarly, Justice Ginsburg agreed that the search was unreasonable, but like Stevens, balked at allowing the school officials to hide behind the shield of qualified immunity. According to Ginsburg, the determination was simple: "Any reasonable search for the pills would have ended when inspection of Redding's backpack and jacket pockets yielded nothing."<sup>125</sup> But is that a reasonable assumption? If you suspect the student to have pills, wouldn't the underwear be an eminently reasonable place to search? Ginsburg's more salient concern was that "[a]t no point did he attempt to call her parent."<sup>126</sup> Under the circumstances, she did not find the search a reasonable exercise of the school officials' authority.

Alone in dissent, Justice Thomas found the search reasonable given existing legal precedents and the unique relationship between students and school officials. He explained that "[s]chool officials retain broad authority to protect students and preserve 'order and a proper educational environment' under the Fourth Amendment."<sup>127</sup> "Seeking to reconcile the Fourth Amendment with this unique public school setting, the Court in *T.L.O.* held that a school search is 'reasonable' if it is 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the interference in the first

<sup>123</sup> *Id.* at 2642.

<sup>124</sup> *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part).

<sup>125</sup> *Id.* at 2645 (Ginsburg, J., concurring in part and dissenting in part).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2647 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)).

place.”<sup>128</sup> For Justice Thomas, “[t]he search under review easily meets this standard.”<sup>129</sup>

Thomas asserted, “[E]ach of these additional requirements [(i.e., of weighing the dangerousness of the drugs or reasonable suspicion of hidden drugs in the underwear)] is an unjustifiable departure from bedrock Fourth Amendment law in the school setting, where this Court has heretofore read the Fourth Amendment to grant considerable leeway to school officials. Because the school officials searched in a location where the pills could have been hidden, the search was reasonable in scope under *T.L.O.*”<sup>130</sup> According to Thomas, pills could certainly be secreted in one’s underwear, as had been done by others before, and so he further opined that the Court had placed school officials in an “impossible spot” by questioning whether the possession of nondangerous drug causes a severe enough threat to warrant investigation.<sup>131</sup> He questioned the majority’s simplification that the search might be warranted if the violation involved a street drug:

In effect, then, the majority has replaced a school rule that draws no distinction among drugs with a new one that does. As a result, a full search of a student’s person for prohibited drugs will be permitted only if the Court agrees that the drug in question was sufficiently dangerous. Such a test is unworkable and unsound.<sup>132</sup> . . . Judges are not qualified to second-guess the best manner for maintaining quiet and order in the school environment. . . . [I]t is a mistake for judges to assume the responsibility for deciding which school rules are important enough to allow for invasive searches and which rules are not.<sup>133</sup>

Moreover, according to Thomas, the high rate of prescription drug abuse justifies school officials in punishing the unauthorized possession of prescription drugs as severely as street drugs.<sup>134</sup> He asserted,

<sup>128</sup> *Id.* (quoting *T.L.O.*, 469 U.S. at 341–42).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2649.

<sup>131</sup> *Id.* at 2650–51.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2651–52.

<sup>134</sup> *Id.* at 2653.

“It is therefore irrelevant whether officials suspected Redding of possessing prescription-strength Ibuprofen . . . or some harder street drug. Safford prohibited its possession on school property. Reasonable suspicion that Redding was in possession of drugs in violation of these policies, therefore, justified a search extending to any area where small pills could be concealed.”<sup>135</sup>

Justice Thomas then sought to graft a common-law doctrine into the reasonableness equation: “The Court’s interference in these matters . . . illustrates why the most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of *in loco parentis*.”<sup>136</sup> If this common-law doctrine were applied to this case, the search of Redding would stand, as parents’ authority is “not subject to the limits of the Fourth Amendment.”<sup>137</sup> Restoring this doctrine “would not, however, leave public schools entirely free to impose any rule they choose,” since parents and local government can quite capably challenge “overly harsh school rules or the enforcement of sensible rules in insensible ways.”<sup>138</sup> He concluded that “in the end, the task of implementing and amending public school policies is beyond this Court’s function,” since “parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials.”<sup>139</sup>

### III. Reinforcing Reasonableness: Voting Patterns of the Justices

While it is unfair, if not impossible, to attempt to predict trends for a single term or how the justices may vote in the future, the Fourth Amendment cases decided in October Term 2008 do provide several interesting insights.

<sup>135</sup> *Id.* at 2655.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 2656 (internal quotation and citation omitted).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

(Un)Reasonableness and the Roberts Court

Case <sup>140</sup>	Majority Opinion	Concurring Opinion	Dissenting Opinion	Search/Seizure Upheld
<i>Herring v. United States</i>	Roberts,* Scalia, Kennedy, Thomas, Alito	N/A	Ginsburg,* Stevens, Souter, Breyer	Yes
<i>Pearson v. Callahan</i> **	Alito* (unanimous)	N/A	N/A	**
<i>Arizona v. Johnson</i>	Ginsburg* (unanimous)	N/A	N/A	Yes
<i>Arizona v. Gant</i>	Stevens,* Scalia, Souter, Thomas, Ginsburg	Scalia*	Breyer,* Alito,* Roberts, Kennedy, Breyer (in part)	No
<i>Safford Unified School Dist. No. 1 v. Redding</i>	Souter.* Roberts, Scalia, Kennedy, Breyer, Alito, Stevens (in part), Ginsburg (in part)	Stevens,* Ginsburg*	Thomas* (concurring in the judgment in part)	No

\*Author. \*\*Did not address the Fourth Amendment issue.

The Roberts Court seems aptly named, as the Chief Justice found himself in the majority in all but one of these cases. In fact, he assigned himself the opinion in the only case in which he found himself in the majority that sharply split the Court. *Herring* proved to be the sole opinion directly taking on the exclusionary rule's constitutional status. In that opinion, the Court declined to apply the exclusionary rule when police personnel erred in the technical aspects of record keeping and that error led to an invalid arrest or seizure. The Chief Justice not only sided with the rule of "reasonable error," but also suggested that the Constitution does not mandate exclusion as a remedy for all Fourth Amendment violations—a proposition upon which much might be built.

<sup>140</sup> I took this useful concept from Daniel Troy and Rebecca Wood's contribution to this same journal last year. See, Daniel E. Troy & Rebecca K. Wood, Federal Preemption at the Supreme Court, 2007–2008 *Cato Sup. Ct. Rev.* 257 (2008).

Roberts's adherence to reasonableness as the Fourth Amendment's touchstone is underscored by his position joining the unanimous *Johnson* decision, where the Court expanded the application of a *Terry* "stop and frisk" to not just the driver of a lawfully stopped vehicle, but to passengers as well. Interestingly, however, the Chief Justice chose not to join the *Gant* majority, which focused on the reasonableness of the individual circumstances to determine whether a vehicle should be subject to a warrantless search anytime the occupants are arrested. Instead, Roberts deferred to *stare decisis* and the creation of a "bright-line rule" over a "reasonableness" analysis in individual cases. Perhaps the biggest surprise to anyone seeking to pigeonhole the Chief Justice as a critic of the Fourth Amendment privacy right would be in his majority vote in *Redding*, where the Court used the language of "reasonableness" to strike down the search. Even there, however, the Chief Justice demonstrated a preference for giving police officers and school officials the benefit of the doubt before subjecting the school officials to civil liability.

Justice Stevens, much as he has done in the past, championed the position that any search or seizure resulting from reliance upon a defective warrant is per se unreasonable and that suppression is an automatic consequence of a violation—regardless of how objectively reasonable the reliance may have been.<sup>141</sup> He demonstrated his apparent belief that exclusion is constitutionally mandated for all Fourth Amendment violations. The only detour this term that Stevens may have taken was in the unanimous *Johnson* decision. Although it might be possible to chalk this detour up to his reliance on precedent, it remains an example of a case in which Justice Stevens rejects the categorical warrant requirement in favor of a reasonableness approach. Similarly, Stevens used a reasonableness determination to strike down the search in his *Gant* opinion, which arguably bucked precedent by requiring either a showing that the arrestee could reasonably reach the vehicle during the search or that the officer reasonably believes evidence may be uncovered that otherwise might be compromised. Stevens not only joined the *Redding*

<sup>141</sup> See Christopher E. Smith, Michael A. McCall, Madhavi M. McCall, The Roberts Court and Criminal Justice at the Dawn of the 2008 Term, 3 *Charleston L. Rev.* 265, 267 (2009).



majority to rein in *T.L.O.*, but wrote separately to express his distaste with extending qualified immunity to the school officials. Justice Stevens wavered somewhat on whether a categorical warrant requirement should exist—based largely on precedent—but firmly supported the exclusionary rule as a necessary component of the Fourth Amendment.

By contrast, Justice Scalia dismissed both a categorical warrant requirement and automatic application of the exclusionary rule, instead favoring a case-by-case determination of reasonableness. Thus, he rejected using exclusion as a remedy in *Herring* and made much of the reasonableness of the officials' actions in *Johnson*, *Gant*, and *Redding*. Scalia is the only justice appearing in the majority in each of the Fourth Amendment cases. Notably, however, in his concurring opinion in *Gant*, he explained that he would have preferred a rule making vehicle searches reasonable only where the officer has a reasonable belief that evidence of the arresting offense, or another offense for which he has probable cause, will be discovered within the vehicle.<sup>142</sup>

Consistent with his preference for requiring a legitimate showing of objective reasonableness before upholding searches or seizures, Justice Scalia twice voted to uphold warrantless searches and twice voted to strike such searches down. Despite his interest in a rule of reasonableness, which necessarily entails particular attention to the case's specific facts, Scalia showed little trouble dispensing with the trial courts' factual determinations in *Gant* and *Redding*. While it could be argued that the trial courts relied upon interpretations of precedent the Supreme Court ultimately modified, it remains interesting to see an unwillingness to defer to lower courts' reasonableness determinations. Ordinarily, one might suspect that Scalia would both defer to the trial court's determination on reasonableness and say that while exclusion might be a preferred remedy on practical grounds, it is hardly compelled by the Constitution.

Justice Kennedy voted to uphold each of the searches except for that in *Redding*. Although Kennedy did not write in any of these cases, his voting pattern mirrored that of the Chief Justice. Whether that tells us anything about what Justice Kennedy is likely to do in

<sup>142</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009).

the future is questionable, but he does seem to agree that exclusion is not constitutionally mandated.

The only search Justice Souter voted to uphold was that in Justice Ginsburg's unanimous *Johnson* opinion. With the exception of the qualified immunity opinion he penned in *Redding*, Souter's votes were identical to Justice Stevens. As with Stevens, Souter appeared to accept the proposition that once a Fourth Amendment violation is found, any evidence uncovered must be suppressed. Justice Souter, of course, has since resigned from the Supreme Court, so it will be interesting to see whether newly confirmed Justice Sonia Sotomayor follows in his Fourth Amendment footsteps.<sup>143</sup>

<sup>143</sup> Although it is difficult to determine how *Justice* Sotomayor will differ from *Judge* Sotomayor—in no small part because she will no longer be bound by Second Circuit precedent and only bound by Supreme Court precedent to the extent that she is willing to abide by *stare decisis*—three of her prior cases contain marked similarities to those decided this term. In *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008), FBI agents, after searching the defendant's home, arrested him for possession of child pornography. The warrant application stated that the defendant "either gained access or attempted to gain access" to a child porn website under investigation and also revealed that the defendant had once pleaded guilty to misdemeanor charges of sexually abusing a seven-year-old girl. *Id.* at 114. Sotomayor's opinion held that while these facts failed to establish probable cause, this constitutional violation did not require the evidence's suppression because the officers acted in good faith. *Id.* at 128. Although this decision may be viewed as adhering to *Leon's* "good faith" exception, it does seem to indicate a belief that suppression need not automatically follow a Fourth Amendment violation. Judge Sotomayor also had the opportunity to consider the reasonableness of the strip search of adolescents. In *N.G. & N.G. ex rel. S.C. v. Connecticut*, Sotomayor dissented from an opinion upholding a series of strip searches of "troubled adolescent girls" in juvenile detention centers. 382 F.3d 225, 228 (2d Cir. 2004) (Sotomayor, J., concurring in part and dissenting in part). Although Sotomayor agreed that certain strip searches were lawful, she would have held that due to the "the severely intrusive nature of strip searches," they should not be allowed "in the absence of individualized suspicion, of adolescents who have never been charged with a crime." *Id.* Portending *Redding*, she explained that an "individualized suspicion" rule was more consistent with Second Circuit precedent than the majority's rule. *Id.* Finally, in *United States v. Santa*, Judge Sotomayor analyzed the effect of a clerical error on the validity of an arrest. There, after an arrest warrant had been issued for the defendant and duly logged into a statewide computer database, the issuing court recalled the warrant, but the computer database was not updated to reflect that fact. 180 F.3d 20, 22–23 (2d Cir. 1999). When the police arrested Anthony Santa, wrongly believing that an outstanding warrant for him existed, they searched him and found drugs. *Id.* at 24. Sotomayor, writing for the majority, ruled that the evidence should not be suppressed because of *Leon* and *Arizona v. Evans*. *Id.* at 30. While this case does not address the issue dealt with in *Herring*, namely, whether police department employees' clerical errors could be reasonably relied upon, it does

Justice Thomas, who found himself in the majority in all but the *Safford* case, voted to uphold the searches on reasonableness grounds. In *Gant*, however, he seemed to agree with the Court's determination that it was not reasonable to conduct a search based upon fears of officer safety or destruction of evidence if the suspect is secured in a police cruiser. Thomas seems firmly attached to a reasonableness analysis for Fourth Amendment violations, which illuminates his dissent in *Redding*, where he wrote that a school search is permissible so long as it is objectively reasonable to believe that the area searched was capable of concealing the particular contraband.

Justice Ginsburg found herself most closely allied with Justice Stevens. Indeed, she wrote the *Herring* dissent, joined by Stevens, in which she argued that any search or seizure resulting from reliance upon a warrant that is invalid due to a police error is per se unreasonable and evidence suppression is an automatic consequence, regardless of how objectively reasonable the reliance. That position now appears to command no more than four solid votes. Similarly, Ginsburg joined Stevens's concurrence in *Redding*, agreeing that the school officials ought not to receive qualified immunity. Although Justice Ginsburg seemed to adhere to precedent in upholding the search in *Johnson*, she also appeared to believe firmly that exclusion is a remedy required by the Fourth Amendment to protect individual liberty.

Justice Breyer found himself twice in dissent, once where he would have suppressed the seized evidence and once where he would have let it in. Breyer did author a dissent in *Gant*, the thrust of which was that it ought to be difficult to overrule a well-established precedent—a precedent that he may or may not have agreed with, but that was precedent nonetheless.

Justice Alito's voting pattern was identical to that of the Chief Justice, who also joined Alito's dissent in *Gant*. Thus, Justice Alito voted to uphold the searches in each of the cases except for *Redding*. Although Alito sided with the reasonableness analysis generally, he broke with the majority in *Gant* and argued in dissent—echoing Breyer—that the Court was effectively overruling both *Belton* and

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show a willingness to rely upon *Evans* and to acknowledge that minor clerical errors need not invalidate a warrant.

*Thorton v. United States* even though not asked to do so by the respondent. Justice Alito demonstrated a particular reverence for precedent but did not appear wedded to the exclusion of evidence as an automatic remedy for Fourth Amendment violations.

Although it is unfair to try to decipher a justice's jurisprudence from only a small sample of cases, it is fair to say that none of the justices supports a categorical warrant requirement (or at least each is willing to tolerate certain exceptions) and each believes that reasonableness must factor into the determination of when an exception to the warrant requirement will be considered. It is also fair to say that Justices Stevens, Souter, Ginsburg, and Breyer find the exclusionary rule to be "an essential auxiliary" to the Fourth Amendment and consider the two "inseparable,"<sup>144</sup> while the other members of the Court—indeed a narrow majority—view the rule as simply a remedy, the force of which must also be considered by determining "reasonableness." One suspects those members of the Court would agree that a Fourth Amendment violation requires a remedy—one that deters potential future misconduct, recompenses the individual whose rights have been violated, and preserves the constitutional right—but that the remedy need not exclusively be suppression. Each of the opinions is shaded by respect for precedent, with several members of the Court being somewhat more willing to defer to the decisions of officials in the field.

Two of the more significant trends that seem to be emerging from the Roberts Court are first, a continued drift away from a categorical warrant requirement and towards case-by-case reasonableness determinations, and second, a renewed understanding that exclusion may not be constitutionally compelled. While reasonableness has long been a component of determining whether a Fourth Amendment violation has occurred, the unmooring of the exclusionary rule is a more recent trend. Depending upon upcoming vacancies, the Court could easily be on the brink of declaring the exclusionary rule to be "just another remedy." With the list of exceptions to the warrant requirement continuing to grow, more deference is likely to be accorded trial judges who have the opportunity to scrutinize the facts in a way no appellate court could hope to.

<sup>144</sup> Herring, 129 S. Ct. at 707 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.).

The Court may ultimately move closer to the following two-step type inquiry: first, was the search or seizure reasonable (with no consideration given to the possible effect of the remedy)? If so, then no Fourth Amendment violation has occurred and no remedy is needed. If, however, the search or seizure was unreasonable, the Court would move to the second step and determine what the appropriate remedy ought to be—exclusion, a tort remedy, discipline of the infringing officers, or some combination thereof. While the presence of a warrant might create a rebuttable presumption of reasonableness, even a search accompanied by a warrant would be subject to attack, like now, on the grounds of reasonableness, insufficiency of probable cause, failure to fulfill the particularity requirement, or any of the other common attacks on the validity of an issued warrant. The Court seems to have inched ever-closer to this sort of two-step determination and may well be willing to consider alternative remedies in the future.

#### IV. A Role for Congress?

Courts, as institutions, operate best in resolving concrete disputes between identifiable parties and crafting remedies to correct inequities. Courts are on less secure ground, given their institutional limitations, when forced to establish rules that will have broad, prospective application. The categorical warrant requirement, which was then followed by a plethora of exceptions, is an example of the difficulty courts face in trying to create “policy.” Courts do perhaps better, under such circumstances, when they proclaim fundamental principles that reflect deeply held beliefs, such as in *Brown v. Board of Education*, where the Court announced that “separate” was anything but “equal.”<sup>145</sup> Even so, courts tread on difficult ground when their decisions go far beyond the specific factual circumstances of a particular case. For example, courts do not have the luxury of bringing in experts to advise them or receiving information from wide-ranging interests potentially affected by their decisions. Instead, the information courts receive is necessarily limited and presented in the context of adversarial proceedings—so even amicus briefs (common only before the Supreme Court) may have limited value.

<sup>145</sup> 347 U.S. 483 (1954).

Often left out of the debate is Congress, which enjoys the precise institutional characteristics needed for drafting policy that will enjoy far-ranging prospective application. Congress can hold hearings and request testimony from numerous witnesses to understand better the implications of its legislative actions. Legislation is also considerably easier to modify than Supreme Court precedent; so if a legislative pronouncement proves unworkable or deficient in some way, Congress is in a superior position to modify it. Moreover, Congress, not unlike the courts, must also consider and interpret the Constitution in fulfilling its legislative obligations. Although the Court may be the final arbiter of the Constitution and may have the authority “to say what the law is,”<sup>146</sup> that does not mean Congress has no role to play. For example, Congress could choose to promulgate rules for federal officials to protect individual privacy or provide for administrative disciplinary procedures when federal agents intentionally violate the Fourth Amendment.

Congress has, in fact, long protected constitutional liberties through legislation. Congress has even contributed to defining the meaning of certain constitutional rights. To define the Sixth Amendment’s guarantee of a “speedy and public trial,” for example, Congress enacted the Speedy Trial Act, which provides meaning to the right by statutorily defining periods of exclusion for determining what constitutes a speedy trial.<sup>147</sup> Congress’s efforts to define the scope of the Sixth Amendment right demonstrates an interesting interplay between the Supreme Court—which in cases like *Barker v. Wingo*<sup>148</sup> outlined the right’s contours—and Congress—which statutorily defined specific events that would go into the calculation of pre-trial time. This interplay could serve as a model for Congress to use the Court’s constitutional pronouncements as a floor for defining officers’ “reasonableness,” ensuring privacy protections, providing officers guidance, and crafting additional remedies to be used in conjunction with exclusion as a means of securing Fourth Amendment values.

<sup>146</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>147</sup> Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended in scattered sections of 18 U.S.C.).

<sup>148</sup> 407 U.S. 514 (1972).

Congress might do well in creating a categorical warrant requirement with specifically delineated exceptions. Congress might also be able to provide clearer guidance to officers than the courts have. In the past, for example, Congress has sought to extend the *Leon* “good faith exception” to other circumstances. Without commenting on its substance, a piece of legislation introduced in 1995, sought to codify the good faith exception by removing the exclusion remedy in cases in which police officers had acted in good faith in relying on an otherwise defective warrant.<sup>149</sup> While this effort met with failure, given, at least in part, questions as to whether Congress could constitutionally do so, more recent Court pronouncements suggest that Congress may have greater leeway to act. Certainly, Congress could always choose to create a categorical warrant requirement and demand that federal officers always obtain a warrant prior to conducting a search or effecting a seizure. Such a requirement would obviously bolster individual privacy protections.

Similarly, Congress could reinvigorate efforts to supplement the exclusionary rule as a remedy for Fourth Amendment violations. Senator Orrin Hatch, for example, has previously offered legislation that would replace the exclusionary rule with a tort remedy.<sup>150</sup> Although the Hatch proposal has been criticized for eliminating the exclusionary rule altogether and creating stringent limits on tort recovery awards, civil remedies and other proposals (e.g., administrative disciplinary actions for violators or sentencing adjustments for those convicted) could be used in conjunction with evidence suppression. Providing the courts with a broader palate of choices would offer courts a variety of remedies from which to select an appropriate response to a Fourth Amendment violation. Courts might then be in a better position to secure the privacy interests of the individual and to ensure that the public’s interest in appropriate law enforcement is upheld. If anything, the *Herring* decision, which casts further doubt on the exclusionary rule’s constitutional status, and its heavy reliance upon using objective “reasonableness” standards to determine whether a violation has even occurred, provides Congress with considerable room in which it may legislate.

<sup>149</sup> Exclusionary Rule Reform Act of 1995, H.R. 666, 104<sup>th</sup> Cong. (1995).

<sup>150</sup> 21st Century Justice Act of 1999, S. 899, 106<sup>th</sup> Cong. VII(B) (1999).

## Conclusion

While a single term doth not a coherent jurisprudence make, October Term 2008 proved an interesting one for the Fourth Amendment. The Court continues to struggle with what constitutes an unreasonable search or seizure. The justices have come to recognize that broadening police power in a specific category of cases—such as those searches occurring on the roadside—have serious implications for Fourth Amendment privacy interests generally. At the same time, a slim majority on the Court seems willing to recognize that the exclusionary rule is not constitutionally mandated and may function as a machete where, in fact, a scalpel is needed. Given the highly fact-dependent nature of these cases, one can't help but wonder whether at some point in the future the Supreme Court will leave even more of these determinations to the trial courts.

With the Court's willingness to sideline the categorical warrant requirement in favor of an expanded list of exceptions and ever-greater reliance on reasonableness as the Fourth Amendment's touchstone, it would prove interesting if Congress decided to step into the fray to buttress privacy interests or to provide officers with clearer guidance or to legislate remedies in addition to exclusion. Crafting appropriate remedies for Fourth Amendment violations presents a considerable, but hardly insurmountable, challenge.

One difficulty with the casuistic approach is that the reasonableness determination, by the time it reaches the courts, is framed in the context in which the police have seized inculpatory evidence. Judges and juries may be reluctant to exclude otherwise relevant evidence of criminal activity. When the possibility of an overturned conviction is weighed against police mistake—or even official misconduct—courts are hard pressed to preserve an ephemeral privacy interest when clear evidence of criminal conduct exists. This situation has always created difficulties for the suppression of evidence and makes it hard to imagine that tort remedies, without more, would serve as a sufficient protector of the Fourth Amendment right. Regardless, with the recent change in the Supreme Court's membership, many of these old battles may be fought anew.