MISSION STATEMENT

**Focus:** issues relating to criminal justice system

**Purpose:** promote two concepts that make up Center’s title

“Justice” — basic notions of equality, equity, fairness

“Rule of Law” — need certain procedures to obtain correct result

BOTH NEEDED to insure criminal justice system fulfill its function
National Center for Justice and the Rule of Law

Conferences
Training
Projects
Publications

Cyber Crime Initiative
Link w/ national organizations, state-wide agencies to develop model projects to facilitate prosecution of persons engaged in computer-related crime.

Fourth Amendment Initiative
Promotes awareness of search and seizure principles
National Judicial College
   conferences for state trial and appellate judges
Annual Symposium
   Address important search and seizure issues,
James Otis Lecture
   Annual lecture by noted scholar.
Computer Searches and Seizures
   Judicial and prosecutor training w/ NAAG and Mississippi State University
publications at www.NCJRL.org
Annual Fourth Amendment Symposiums

2002: Technology
2003: Race & Ethnicity
2004: "Tools" to Interpret
2005: Computer Searches and Seizures
2006: Role of Objective vs. Subjective Intent
2007: Independent State Grounds
2008: Border Searches -- digital and physical
2009: "Great dissents"
2010: Fourth Amendment Rights of Children

Cyber Crime and Digital Evidence
Publications / Projects

lots on line at www.NCJRL.org

including:

- Email delivered Cyber Crime Newsletter
- Internet Victimization Symposium
- Materials on computer-related crime

4 day search and seizure course

Comprehensive Search and Seizure for Trial Judges

Reno -- May 23-26, 2011
OXFORD -- Sept 12-15, 2011
Survey: Technology Assisted Crimes Against Children

OCT 11-12, 2010 (Oxford)

Digital evidence courses

Computer Searches and Seizures for Trial Judges

OXFORD -- Aug 25-26, 2011

Technology-Assisted Crimes Against Children: Pretrial Motions Practice

May 19-20, 2011 (Reno)

Appellate judge conferences

Foundational Fourth Amendment Principles and Annual Fourth Amendment Symposium

Oxford -- March 9-11, 2011

Symposium: The Future of Fourth Amendment Analysis

Oxford - March 10, 2011
Reasonableness clause:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

Warrant clause:

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.
structure of 4th Amendment analysis

IN EVERY CASE, .... see memo in tab#1 for outline

1. Does the 4th Apply?
   A. Gov't activity: "Search" or "Seizure"
   B. Protected interest: liberty, possession, privacy

2. Is it Satisfied?
   • "Reasonable"
   • Warrant Clause requirements

[3. Remedies?]

Applicability:

"Search" Defined

"Seizure" Defined

What Amendment Protects:

Liberty, privacy, possession

Limitations: open fields, abandoned property, private search doctrine, voluntary exposure, assumption of risk

Standing: Who is Protected
Satisfaction:
- Reasonableness tests
- Searches without Warrants:
  - exigent circumstances -- vehicles -- inventories
  - frisks -- plain view -- consent
- Meaning of Probable Cause, Articulable Suspicion
- Warrant Issuance and Review
- Warrant Execution Issues
- Vehicle Searches and Seizures
- Informants

Exclusionary Rule

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The James Otis Lecture
Annual Lecture Series
on Search and Seizure Principles

Guest Lecturer:
Professor Clifford Fishman
Catholic University School of Law

Sponsored by
National Center for Justice
and the Rule of Law
University of Mississippi School of Law

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day #4: digital searches and seizures
the crime scene
Federal vs. State guarantees

States free to interpret OWN constitution to provide more protections to individuals

- increasing trend: PA, CT, OR, ....
- contra CA, FL, ... prohibited from doing so
- Symposium, 77 Miss. L.J. 1 (2007)
  lots of info on developments ....

summary on table

2008 S Ct Term

1. Qualified immunity -- Pearson v. Callahan
2. Exclusionary rule -- US v. Herring
3. Frisk of vehicle passengers -- Arizona v. Johnson
4. Search incident to arrest -- vehicle occupants
   -- Arizona v. Gant
5. Student searches -- Safford School Dist. v. Redding

2009 S Ct Term

6. DUI stops - cert. denied
   Va v. Harris (Roberts dissent)
7. Exigent Circumstances
   Mich v. Fisher
8. Expectations of Privacy in gov't-issued pager
   City of Ontario v. Quon
Structure of Search and Seizure Analysis ©

Thomas K. Clancy

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The Fourth Amendment

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.

Analytical structure of all Fourth Amendment claims

Step #1. Does the Fourth Amendment apply?
  part A: Does the governmental activity constitute a “search” or “seizure”?
  part B: Does that activity invade an individual’s protected interest, that is, her right to be secure?

Step #2. If the Amendment applies, is it satisfied?

Step #3. If the Amendment applies but is not satisfied, is there an available remedy?

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The Fourth Amendment is the most implicated and litigated portion of the Constitution. In analyzing any case involving a Fourth Amendment claim, three separate questions must be answered. First, is the Amendment applicable? The applicability question, in turn, is a two-sided inquiry: (a) does the governmental activity—which must be either a search or a seizure—invade (b) an individual interest protected by the Amendment? If the Amendment does not apply, that ends the inquiry; it does not matter if the governmental actions are reasonable or not. Second, if the Amendment does apply, is it satisfied? If it is found that the Amendment is applicable but not satisfied, a third question must be answered: what is the remedy, if any, for the violation? That third question is not a Fourth Amendment issue, given that the Supreme Court has, since 1974, stated that the exclusionary rule is not constitutionally mandated. My treatise is structured to provide analysis of these three questions. An overview is offered here.

Step #1. Does the Fourth Amendment apply?

Unless a “search” or “seizure” invades a protected interest, the Amendment does not apply and there is no inquiry into the reasonableness of the governmental activities. The applicability step is a two-sided question:

Part A: Does the governmental activity constitute a “search” or “seizure”?

The Fourth Amendment is applicable only to governmental activity; it does not regulate private searches and seizures. As a consequence, a rather complex jurisprudence has developed to distinguish between governmental searches and private party searches. Moreover, the Amendment applies to only two types of governmental activity: searches and seizures. These terms are not self-defining.

Searches. The word “search” is a term of art in Fourth Amendment jurisprudence and is not used in its ordinary sense. The conclusion that a search has occurred varies depending on the type of governmental activity utilized to obtain the evidence. That activity may include physical manipulation, visual observation, or other use of the senses, as well as the employment of instrumentalities such as a dog’s nose or technological devices. In Supreme Court jurisprudence, physical manipulation by the police comes closest to a common sense understanding of what is a

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1 This material is based on Chapter 1 of Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* (Carolina Academic Press 2008) www.cap-press.com/books/1795

2 E.g., United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc) (noting that there are 700 million airline passengers boarding commercial flights in the United States each year).

search. That literal view must be contrasted with other situations, particularly those involving sense-enhancing devices, where the legal definition is divorced from the ordinary meaning of the term, thus permitting the Court to conclude that no search has occurred. The use of technological devices to learn something that otherwise would not be discovered is so rapidly expanding that it is difficult to grasp the myriad ways the government can obtain tangible evidence or information. Unfortunately, the Court has not provided a comprehensive definition of the concept of a search to ascertain when the Amendment is implicated by a device that the government employs.

**Seizures of persons.** The Supreme Court’s attempts to define a seizure of a person are of surprisingly recent vintage. Only in 1968 did it confront the issue directly for the first time. That case, *Terry v. Ohio*,\(^4\) remains viable today as a basic source of understanding what the concept of a seizure means. In *Terry*, Officer McFadden was walking his beat when he observed three men whom he believed were planning to rob a store. He approached them, identified himself as a police officer, and asked their names. When one of the men, Terry, “mumbled something” in reply, the officer grabbed Terry and patted down the outside of his clothing, ultimately recovering a pistol. Recognizing that the Fourth Amendment applied when the officer took hold of Terry and patted down the outer surfaces of his clothing, the Court provided a broadly-stated view of a seizure: “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”

This definition, which is used repeatedly in later cases, involves two elements: accosting and restraint of freedom. The *Terry* Court noted, however, that “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” Thus, beginning with its first effort to define a seizure, the Court recognized two ways in which an officer can seize a person: by physical force or by show of authority. Adding precision to these two concepts in subsequent cases has proven to be difficult and controversial. Although the Court has since comprehensively—and more concretely—defined the concept of a seizure, it has continued to recognize that a seizure only results from either the application of physical force or through a show of authority.

After *Terry*, the Court eventually settled on the “reasonable person” test to define a seizure, which focused on the objective aspects of the encounter’s effect on the mind of a reasonable person and asked the question whether a reasonable person would feel free to leave. That test was widely viewed as implicating the Fourth Amendment early in the encounter, focusing exclusively on the coercive nature of the police officer’s words or conduct. A citizen’s reaction to that coercive activity was immaterial.

In 1991, in *California v. Hodari D.*,\(^5\) the Supreme Court redefined the concept of a seizure. That case establishes that a seizure occurs only when a suspect submits to a show of authority or is physically touched by law enforcement officials, who do so with the intent to seize. A seizure may

\(^4\) 392 U.S. 1 (1968).

result in either a stop or an arrest but it may only occur in one of those two ways. Seizures from physical contact require two elements: touching and an intent to seize, with that intent measured objectively. In the vast majority of cases involving physical restraint, the question whether an intent accompanied that restraint is obvious and no extended analysis is needed. Show of authority seizures also require two elements: a show of authority and submission. The submission must be in response to a show of authority that a reasonable person would interpret as a demonstration of the officer’s intent to seize. Show of authority seizures require determining if, when, and how the person accosted submits. If the suspect responds inappropriately to a specific command, that response may not be considered submission or a fruit of that command. There has now developed a substantial body of case law and commentary addressing the implications of the Hodari D. definition. The case law demonstrates that the police have adapted their tactics to take advantage of that definition, resulting in a dramatic shift in the Fourth Amendment balance between security and law enforcement in favor of the police.

Seizures of property. To determine if a seizure of property has occurred, the Court has often repeated the following definition: a “‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.”6 It has sometimes also stated that a seizure “deprives the individual of dominion over his or her property.”7 One could question whether such definitions adequately convey the full nature of the individual’s interests implicated by a seizure and some observations regarding that matter are offered. Nonetheless, the Court’s inquiry has focused on possession and lower court opinions relentlessly reflect that focus. Unlike seizures of persons, seizures of property have generated comparatively little Supreme Court case law and the definition has been relatively stable. Most seizures of property are obvious takings of physical possession and require little analysis. There are some situations where a property seizure is not so patent, including those in which the property is in transit and unaccompanied by the owner. Other conceptual problems include using the Supreme Court’s definition of a seizure of property in cases involving the acquisition of digital evidence or other intangible property.

part B: Does that activity invade an individual’s protected interest, that is, her right to be secure?

If the individual does not have a protected interest, actions that might otherwise be labeled a search or seizure do not implicate the Fourth Amendment. If a person has a protected interest, then the applicability question turns on whether the governmental techniques used to obtain tangible things or information are considered searches or seizures. The Supreme Court has identified three interests protected by the Amendment: liberty; possession; and privacy. A seizure implicates a

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6 United States v. Jacobsen, 466 U.S. 109, 114 (1984). Jacobsen observed that, although “the concept of a ‘seizure’ of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the ‘seizure’ of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual’s freedom of movement.” Id. at 114 n.5.

person’s liberty or possessory interests; a search implicates a person’s reasonable expectation of privacy.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects.” There are two aspects to the analysis of this provision: what objects are protected; and to what extent is each object protected?Grammatically, there is a relational aspect to the right set forth in the Amendment, which speaks of certain objects protected—people, houses, papers, and effects. But those objects are not absolutely shielded. Instead, the right to be “secure” is protected. If one does not know what is protected by the Amendment, then it cannot be determined what the government can do without implicating it. If one does know what is protected, governmental intrusions of that protected interest must be analyzed to determine whether they are considered a search or seizure and accordingly justified as reasonable. As one distinguished commentator has observed: “The key to the Amendment is the question of what interests it protects.”8

Currently, according to the Supreme Court, “[e]xpectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims.”9 Following that command, one must distinguish between searches and seizures. Seizures of property implicate a person’s right to possess it; seizures of persons implicate that person’s liberty and freedom of movement; and searches implicate a person’s reasonable expectation of privacy. As a consequence, it must be determined which individual interest has been affected by the governmental action. To illustrate, although mere passengers in an automobile ordinarily have no recognized reasonable expectation of privacy impacted by a search of the vehicle,10 they do have a right to challenge the stop of a vehicle in which they are riding because they are seized when the vehicle is stopped.11

The Supreme Court initially grounded Fourth Amendment protections in common law property concepts. Pursuant to that property–based analysis, the Court created a hierarchy of property rights and restricted the ability of the government to search and seize to only those situations where the government had a superior property right. It also used property concepts to limit the protections of the Amendment to the physical aspects of the four objects listed in the Amendment, dividing the world into areas that were constitutionally protected and those that were not. Those property–based theories were repudiated by the Court in Warden v. Hayden12 and Katz v. United States.13

The Court in the last third of the twentieth century adopted and generally still employs the reasonable expectation of privacy test to define, in large part, the right to be secure. To have a protected interest, that two-pronged test requires that a person exhibit a subjective expectation of privacy, which must be recognized by society as reasonable. Pursuant to that test, the Court has created a hierarchy of expectations, with long lists of situations where it has found either no reasonable expectation of privacy or a reduced one. If no reasonable expectation of privacy is found (and no other protected interest is present), the Amendment is inapplicable to regulate the government action. If the Court finds a reduced expectation of privacy, the governmental intrusion has been almost uniformly upheld, with the Court utilizing a test for reasonableness favorable to the government.

As the reasonable expectation of privacy test has demonstrated its limitations, the Court has sometimes looked beyond that approach to find other values that animate the right to be secure. Now, the Court recognizes that the Amendment protects certain property interests as such, as well as possessory and liberty interests. Hence, although the Court in adopting the expectations test emphatically rejected a property–based analysis, that ground has regained viability. The home has a special status as a protected place, even when the owner is not present. Indeed, the physical entry into the home has been described as the “chief evil against which the wording of the Fourth Amendment is directed.”

As to the person’s right to be secure from an unreasonable seizure, that interest has been variously described as the right to be left alone, individual freedom, the “inviolability of the

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17 *See, e.g.,* Wilson v. Schnettler, 365 U.S. 381, 394 (1961) (Douglas, J., dissenting) (“Under the Fourth Amendment, the judiciary has a special duty of protecting the right of the people to be left alone . . . .”). *But see* Katz v. United States, 389 U.S. 347 (1967) (the Fourth Amendment is not coextensive with any right to be left alone).

18 *See, e.g.,* Ker v. California, 374 U.S. 23, 32 (1963) (“Implicit in the Fourth Amendment’s protection from unreasonable searches and seizures is its recognition of individual freedom.”).
person,”19 and the right of free movement.20 In *Terry v. Ohio*,21 which involved the stop and frisk of a person, the Court emphasized the words chosen by the Framers to define the nature of the interest protected, asserting that the “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.” Indeed, the Court said: “‘No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.’”

As to effects, the Court has clearly distinguished one other protected interest in addition to privacy, that is, the individual’s possessory interest in an object.22 This has occurred in the context of distinguishing between searches and seizures: although a search implicates privacy concerns, a seizure implicates the person’s interest in retaining possession of his or her property.23

There are other indications of a broader meaning to the concept of security. Indeed, although often unstated in Supreme Court opinions, the essential attribute of the right to be secure is the ability of the individual to exclude the government from unreasonably searching or seizing one’s person, house, papers, and effects. Without the ability to exclude, a person has no security. With the ability to exclude, a person has all that the Fourth Amendment promises: protection against unjustified intrusions by the government.

The Fourth Amendment provides that the right of the people to be secure against unreasonable searches and seizures applies to four specified objects—persons, houses, papers, and effects. The government can intrude into any non-protected item at will because the Fourth Amendment is inapplicable.24 Interpreting the Amendment literally, the Court in *Olmstead v. United States*25 and

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20 *See, e.g.*, Maryland v. Wilson, 519 U.S. 408, 412-13 (1997) (discussing driver’s and passenger’s liberty interests when a police officer orders them out of a lawfully stopped car); Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (seizure occurs when a reasonable person concludes he is not free to leave); United States v. Martinez-Fuerte, 428 U.S. 543, 557-58 (1976) (routine traffic stop may intrude on a motorist’s right to uninterrupted free passage).


22 *See* Horton v. California, 496 U.S. 128, 134 (1990) (seizure of article in plain view does not involve invasion of privacy but does invade owner’s possessory interest).

23 United States v. Jacobsen, 466 U.S. 109, 113 (1984) (“‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed,” whereas “‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property”).

24 *E.g.*, Oliver v. United States, 466 U.S. 170, 183-84 (1984) (holding that open fields are not protected by the Fourth Amendment); Hester v. United States, 265 U.S. 57, 59 (1924) (same).

its progeny divided the country into areas that were constitutionally protected and locations that were not. Several decades later, after some significant erosion of that approach, the Court in *Katz v. United States* 26 explicitly rejected *Olmstead* and the concept of “constitutionally protected areas,” stating that the Amendment protected people, not places. The Court ultimately adopted Justice Harlan’s concurring view in *Katz*, establishing that the Amendment protects reasonable expectations of privacy. That test defines the *quality* protected—at least in part—but does not define what objects are protected. The reasonable expectation of privacy test generally has been used as an overlay to determine whether a person has a reasonable expectation of privacy—a protected interest—in the items listed in the Amendment. Hence, despite the sweeping possibilities implicit in *Katz*’s approach, the four items listed in the Amendment as the protected objects remain central to understanding the scope of what the Amendment protects. 27

**Step #2. If the Amendment applies, is it satisfied?**

The fundamental command of the Amendment is “reasonableness,” which regulates both the permissibility of the initial intrusion and the scope of the intrusion. A second satisfaction question is—if a warrant is required—whether it was issued pursuant to the requirements of the Warrant Clause. Modern Supreme Court reasonableness analysis increasingly rejects the traditional warrant preference rule and looks to balancing and other criteria to measure reasonableness.

*The reasonableness command.* The first clause of the Fourth Amendment requires that a search or seizure not be “unreasonable.” This is the “fundamental command” 28 of the Amendment and this “imprecise and flexible term” reflects the Framers’ recognition “that searches and seizures were too valuable to law enforcement to prohibit them entirely” but that “they should be slowed down.” 29 Reasonableness is the measure of both the permissibility of the initial decision to search and seize and the permissible scope of those intrusions. 30

The wide scope of the Amendment’s applicability continually creates new and unprecedented challenges to traditional notions of reasonableness. In the face of such challenges, the reasonableness analysis employed by the Supreme Court has repeatedly changed and each new case seems to modify the Court’s view of what constitutes a reasonable search or seizure. For some time, the Court created substantive restrictions on the government’s ability to search and seize, that is, there were categories of papers that could not be the target of a search or seizure. Those substantive restrictions were rejected in the latter part of the twentieth century and reasonableness is viewed as a procedural

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mechanism that regulates the circumstances when the government can intrude and the scope of that intrusion.

There are at least five principal models that the Court currently chooses from to measure reasonableness: the warrant preference model; the individualized suspicion model; the totality of the circumstances test; the balancing test; and a hybrid model giving dispositive weight to the common law. Because the Court has done little to establish a meaningful hierarchy among the models, the Court in any situation may choose whichever model it sees fit to apply. Thus, cases decided within weeks of each other have had fundamentally different—and irreconcilable—approaches to measuring the permissibility of an intrusion.

Warrant issues, including issuance, review, and execution. The second clause of the Amendment sets forth the criteria for a warrant to issue: “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.” Regardless of whether a warrant is required by a particular view of reasonableness, it is still the preferred manner of searching and seizing. Hence, the standards by which courts review a magistrate’s decision to issue a warrant are quite deferential. The good faith doctrine has significantly influenced this review. The Warrant Clause of Fourth Amendment regulates when a warrant may issue but says nothing about the execution of a warrant. Instead, warrant execution issues are regulated by the Reasonableness Clause.

Step #3. If the Amendment applies but is not satisfied, what remedies are available?

The chief enforcement mechanism to insure compliance with the Fourth Amendment is the exclusionary rule, which prohibits the introduction of illegally obtained evidence in the government’s case-in-chief. Although the rule was for some time considered constitutionally mandated, the Court now believes that the exclusionary sanction is a judicially created remedy designed to deter future police misconduct. It is not “a personal constitutional right of the party aggrieved” and it “is neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’” Where appropriate, the remedy of exclusion extends to direct and indirect products of illegal intrusions, that is, “any ‘fruits’ of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest

\[31\] E.g., United States v. Grubbs, 547 U.S. 90 (2006); Dalia v. United States, 441 U.S. 238 (1979). See also United States v. Banks, 540 U.S. 31 (2003) (stating that there is no “template” for when police must knock and announce before entering a house when executing a warrant and, in such cases, the “notion of [a] reasonable execution” of a warrant has to be “fleshed out” on a case-by-case basis).

\[32\] E.g., Terry v. Ohio, 392 U.S. 1, 12-13 (1968).

An overriding consideration in contemporary exclusionary rule cases is the Court’s use of a cost-benefit test to decide whether the rule ought to be applied. According to the Court, exclusion of evidence “exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case” and permits “some guilty defendants [to] go free or receive reduced sentences as a result of favorable plea bargains.” Thus, the Court has restricted application of the exclusionary rule to instances where its “remedial objectives are thought most efficaciously served.” Where the exclusionary rule does not result in appreciable deterrence of future police misconduct, the Court views its use as unwarranted. Deterrence is now the rule’s sole purpose, despite decades of Supreme Court declarations that that purpose has never been empirically proven and despite much skepticism about whether the rule does in fact deter.

The debate over application of the exclusionary rule often has been accompanied by references to the efficacy of alternative remedies, with a chief alternative being civil suits for damages. Other considerations include administrative sanctions against police officers and training programs to increase compliance with Fourth Amendment requirements. Traditionally, the Court has been skeptical about such alternatives—at least in the criminal trial context. Recently, however, a majority of the Court in *Hudson v. Michigan* pointed to the availability of such alternatives and higher levels of police professionalism and training in the context of creating a *per se* exception to the exclusionary rule for knock and announce violations. The breadth of the majority’s opinion puts in doubt the continued existence of the exclusionary rule. Nonetheless, *Hudson* may be just another of a long line of inconsistent Supreme Court opinions. Indeed, the Court has candidly noted that the “debate” within the Court concerning the rule has always been a warm one and “the evolution of the exclusionary rule has been marked by sharp divisions in the Court.”

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This brings us to *United States v. Herring*. That case can be read narrowly or broadly. The broader reading signals a dramatic restriction in the application of the exclusionary rule. *Herring*, in the short run, will generate a significant amount of litigation as to which reading is correct and will require the Court to address its implications. If the broad language employed in *Herring* prevails, it will fundamentally change the litigation of motions to suppress in criminal cases. That is, a central question will be whether the officer had a culpable mental state; if not, the rule will not apply. If that mode of analysis prevails, it will reduce appreciably the number of cases addressing the merits of Fourth Amendment claims and expand dramatically the inapplicability of the exclusionary rule.

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

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

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43 555 U.S. at __.

44 Consistent with a narrow view, Roberts later asserted: “An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place.” *Id.* at __.

45 Justice Kennedy, a crucial fifth vote for the majority in *Hudson* and *Herring*, might be attracted to such a view. He joined the Court’s opinion in *Herring*. In *Hudson*, the majority viewed the knock and announce violation attenuated from the recovery of the evidence in the house. It stated: “Attenuation . . . occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” 547 U.S. at __. Kennedy wrote a concurring opinion in which he stated that the *Hudson* “decision determines only that in the specific context of the knock--and--announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression. *Id.* at ___ (Kennedy, J., concurring in part and concurring in the judgment). He added that “the causal link between a violation of the knock--and--announce requirement and a later search is too attenuated to allow suppression.” *Id.* at __. The concept of attenuation in *Hudson* and in *Herring* differs markedly from the concept of attenuation that prevailed in pre-*Hudson* Supreme Court jurisprudence. *See* Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* §§ 13.3.1.2., 13.3.6. (2008).
In contrast, the rest of the majority opinion is very broadly written and represents a significant recasting of modern exclusionary rule theory. Instead of viewing the issue as part of a good faith exception to the exclusionary rule, Roberts seemed to dismiss that notion; instead, he viewed United States v. Leon, the genesis of that exception, as follows:

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

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

Judge Friendly wrote that “[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights.” Exclusion—and deterrence—appears justified after Herring based on culpability. It does not further that inquiry, it appears, to label the situation as a “good faith” exception to the exclusionary rule. Thus, Roberts recounted several cases of “intentional” and “flagrant” misconduct, including in

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47 555 U.S. at __. The label “good faith” is misleading to the extent that it suggests that the actual belief of the officer is examined. Instead, the inquiry focuses “expressly and exclusively on the objective reasonableness of an officer’s conduct, not on his or her subjective ‘good faith’ (or ‘bad faith’).” People v. Machupa, 872 P.2d 114, 115 n.1 (Cal. 1994). See also United States v. Leon, 468 U.S. 897, 918 (1984) (stating that the Court has “frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment”). However, labeling the officer’s conduct as “objectively reasonable” has also been criticized as misleading. For example, Justice Stevens has taken issue with the Court’s characterization of the police’s conduct as being objectively reasonable, even if they have not complied with the Fourth Amendment, because “when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution.” Id. at 975 (Stevens, J., dissenting).

48 555 U.S. at __.

49 555 U.S. at __.

50 Id. at __, quoting The Bill of Rights as a Code of Criminal Procedure, 53 CALIF. L. REV. 929, 953 (1965) (footnotes omitted) and citing Brown v. Illinois, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part) (“The deterrent value of the exclusionary rule is most likely to be effective” when “official conduct was flagrantly abusive of Fourth Amendment rights”).
Weeks, which was the case that initially adopted the exclusionary rule, that would support exclusion. Roberts thereafter flatly asserted:

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

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

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

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52 555 U.S. at __.
53 555 U.S. at __. Roberts maintained that recordkeeping errors by the police are not immune from the exclusionary rule but “the conduct at issue was not so objectively culpable as to require exclusion.” Id. at __. He noted: “If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.” Id. at __.
54 Id. at __ n.4. Despite all of the Court’s references to apparently subjective states of mind, Roberts added a confusing twist: all of these inquiries are objective ones. He emphasized that “the pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of arresting officers[,]’” Id. at __. Factors in making that determination include a “particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, but not his subjective intent[.]” Id. at __.

Perhaps the Chief Justice was seeking to preserve the Court’s general approach to measuring reasonableness, which has been an objective analysis of the facts. See Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation § 11.6.2.1. (2008) (summarizing the Court’s general approach to measuring reasonableness). Nonetheless, in situations where a police officer intentionally or recklessly places false information in a warrant (or omits such information), the inquiry has required an examination of the officer’s actual state of mind. See id. § 12.3.3. (collecting authorities); Franks v. Delaware, 438 U.S. 154 (1978). Indeed, the concepts of knowledge, recklessness, and negligence are familiar criminal law concepts, each requiring inquiry into the actor’s actual state of mind. E.g., Model Penal Code § 2.02. Herring seems to create the bizarre principle that, to ascertain if an officer was intentionally or recklessly violating a person’s Fourth Amendment rights, that inquiry is an objective one.
because the constable has blundered.”

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented. Justice Ginsburg certainly did not view the *Herring* decision as narrow. She replied with a broad defense of the rule, which is notable for the fact that, for the first time in decades, a member of the Court has clearly suggested that the exclusionary rule may be constitutionally based. Addressing what she perceived as the Court’s creation of a system of exclusion based on distinctions between reckless or intentional actions on the one hand and mere negligence on the other, Ginsburg argued that the rule was also justified when the police are negligent. She believed that the mistake in *Herring* justified its application and concluded:

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

My purpose here is not to argue the merits of *Herring* but simply to predict that, if its broader implications are realized, Fourth Amendment litigation will change to one focused primarily on the culpability of the government agent and, often, the merits of the Fourth Amendment claim will not have to be decided. The inquiry after *Herring* becomes a quest to ascertain police culpability:

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

57 Ginsburg stated:

> Others have described “a more majestic conception” of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental “right of the people to be secure in their persons, houses, papers, and effects,” the Amendment “is a constraint on the power of the sovereign, not merely on some of its agents.” I share that vision of the Amendment.

> The exclusionary rule is “a remedy necessary to ensure that” the Fourth Amendment's prohibitions “are observed in fact.” The rule's service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.

> Beyond doubt, a main objective of the rule “is to deter-to compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it.” But the rule also serves other important purposes: It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people-all potential victims of unlawful government conduct-that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”

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58 555 U.S. at __.

59 555 U.S. at __.
there intentional misconduct; reckless misconduct; a pattern of recurring negligence; or mere negligence? “Mere negligence” would make many—if not most—Fourth Amendment violations inappropriate candidates for suppression. For example, a police officer—instead of relying on information from other officers as in *Herring*—may believe that her actions are reasonable based on her own investigation, even though the actions do not comply with the Fourth Amendment.60 Based on a broad reading of *Herring*, a court could simply skip the merits of a claim and address solely the lack of an exclusionary remedy. Thus, a court could simply rule: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence.

In *Pearson v. Callahan*,61 the Court in the 2008 term changed the manner in which courts must address qualified immunity analysis in civil cases. Prior to *Pearson*, the Court required lower courts to address the merits of the Fourth Amendment claim in each case. It now permits courts the discretion to skip the preliminary step of establishing whether the Fourth Amendment has been violated. It takes little insight to observe that that mode of analysis will result in fewer courts developing Fourth Amendment principles and fewer cases presenting such issues for review. Avoiding the constitutional issue is, after all, the purpose of giving lower courts the discretion to dispose of the case on qualified immunity grounds.62 What will also result is an increased muddling of Fourth Amendment and qualified immunity analysis. The Court has stated that, in analyzing qualified immunity claims, “[t]he question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.”63 Those standards will not be further clarified if courts address only the second question. Indeed, *Pearson* itself illustrates this point. The case involved an undercover drug buy in a house by an informant. After entering the home and confirming that the seller had the drugs, the purported buyer signaled the police, who then entered the house without a warrant. The alleged seller, after obtaining suppression of the evidence in the criminal case against him, sued the police. In defense to that suit, a claim was made that the

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


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

63 *Saucier*, 533 U.S. at 209.
“consent–once–removed” doctrine, which has been recognized by some courts, permitted the warrantless intrusion.\textsuperscript{64} The Supreme Court did not address the merits of that doctrine, skipping directly to the qualified immunity aspect of the case and finding that the officers were entitled to qualified immunity because the illegality of their actions had not been clearly established. The result of Pearson may become typical: we are left with uncertainty as to the status of a controversial legal principle that has divided lower courts.

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

\textsuperscript{64} The “consent-once-removed” doctrine has been applied by some courts when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000); United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987); United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996). The Sixth and Seventh Circuits have broadened this doctrine to grant informants the same capabilities as undercover officers. See United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986); United States v. Yoon, 398 F.3d 802, 807 (6th Cir. 2005).
Supreme Court Case update ©

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SUPPLEMENT TO:

THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION (CAROLINA PRESS 2008)
by Thomas K. Clancy

This supplement summarizes the Supreme Court cases on Fourth Amendment issues beginning with the 2008 Term, including cert grants in subsequent terms. It is periodically updated at www.NCJRL.org and at www.cap-press.com/books/1795 with new developments.

The list of cases summarized are:


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The treatise is available at www.cap-press.com/books/1795


Treatise references:

§ 13.6. Substantiality of the violation and “good faith”

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

In *Pearson v. Callahan*, the Court overruled *Saucier* in an unanimous opinion written by Justice Alito. The Court concluded:

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

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

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\(^2\) *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Put another way, police officers are entitled to qualified immunity unless it would have been clear to a reasonable police officer that his conduct was unlawful in the situation he confronted. *E.g.*, *Wilson v. Layne*, 526 U.S. 603 (1999); *Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

\(^3\) *E.g.*, *Morse v. Frederick*, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring and dissenting) (collecting authorities).

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

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It takes little insight to observe that the new mode of analysis will result in fewer courts developing Fourth Amendment principles and fewer cases presenting such issues for review. Avoiding the constitutional issue is, after all, the purpose of giving lower courts the discretion to dispose of the case on qualified immunity grounds. What will also result is an increased muddling of Fourth Amendment and qualified immunity analysis. The Court has stated that, in analyzing qualified immunity claims, “[t]he question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.” Those standards will not be further clarified if courts address only the second question. Indeed, Pearson itself illustrates this point. The case involved an undercover drug buy in a house by an informant. After entering the home and confirming that the seller had the drugs, the purported buyer signaled the police, who then entered the house without a warrant. The alleged seller, after obtaining suppression of the evidence in the criminal case against him, sued the police. In defense to that suit, a claim was made that the “consent-once-removed” doctrine, which has been recognized by some courts, permitted the warrantless intrusion. The Supreme Court did not address the merits of that doctrine, skipping directly to the qualified immunity aspect of the case and finding that the officers were entitled to qualified immunity because the illegality of their actions had not been clearly established. The result of Pearson may become typical: we are left with uncertainty as to the status of a controversial legal principle that has divided lower courts.

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


Treatise references:

§ 13.2. Evolution of exclusionary rule doctrine
§ 13.3. Causation: fruit and attenuation analysis
§ 13.6. Substantiality of the violation and “good faith”

This case can be read narrowly or broadly. The broader reading signals a dramatic restriction in the application of the exclusionary rule. *Herring*, in the short run, will generate a significant amount of litigation as to which reading is correct and will require the Court to address its implications. If the broad language employed in *Herring* prevails, it will fundamentally change the litigation of motions to suppress in criminal cases. That is, a central question will be whether the officer had a culpable mental state; if not, the rule will not apply. If that mode of analysis prevails, it will reduce appreciably the number of cases addressing the merits of Fourth Amendment claims and expand dramatically the inapplicability of the exclusionary rule.

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

Writing for a majority of five, Chief Justice Roberts stated that the exclusionary rule did not apply. A narrow reading of *Herring* can be drawn from the following statement by the majority of its holding: “Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.” Words of limitation jump out from these sentences: “isolated negligence;” attenuation.8 Hence, some may see *Herring* as a narrow expansion of good faith that has little application.9

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7 The discussion of *Herring* and *Pearson* is drawn from Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, __ Chicago Kent L. Rev. __ (2009).

8 Consistent with a narrow view, Roberts later asserted: “An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place.” *Id.* at __.

9 Justice Kennedy, a crucial fifth vote for the majority in *Hudson* and *Herring*, might be attracted to such a view. He joined the Court’s opinion in *Herring*. In *Hudson*, the majority viewed the knock and announce violation attenuated from the recovery of the evidence in the house. It stated: “Attenuation . . . occurs when, even given a direct causal connection, the interest protected by the
In contrast, the rest of the majority opinion is very broadly written and represents a significant recasting of modern exclusionary rule theory. Instead of viewing the issue as part of a good faith exception to the exclusionary rule, Roberts seemed to dismiss that notion; instead, he viewed *United States v. Leon*, the genesis of that exception, as follows:

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

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

Judge Friendly wrote that “[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained

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constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” 547 U.S. at __. Kennedy wrote a concurring opinion in which he stated that the *Hudson* decision determines only that in the specific context of the knock--and--announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression. *Id.* at ____ (Kennedy, J., concurring in part and concurring in the judgment). He added that “the causal link between a violation of the knock--and--announce requirement and a later search is too attenuated to allow suppression.” *Id.* at __. The concept of attenuation in *Hudson* and in *Herring* differs markedly from the concept of attenuation that prevailed in pre-*Hudson* Supreme Court jurisprudence. See Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* §§ 13.3.1.2., 13.3.6. (2008).


11 555 U.S. at __. The label “good faith” is misleading to the extent that it suggests that the actual belief of the officer is examined. Instead, the inquiry focuses “expressly and exclusively on the objective reasonableness of an officer’s conduct, not on his or her subjective ‘good faith’ (or ‘bad faith’).” People v. Machupa, 872 P.2d 114, 115 n.1 (Cal. 1994). See also *United States v. Leon*, 468 U.S. 897, 918 (1984) (stating that the Court has “frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment”). However, labeling the officer’s conduct as “objectively reasonable” has also been criticized as misleading. For example, Justice Stevens has taken issue with the Court’s characterization of the police’s conduct as being objectively reasonable, even if they have not complied with the Fourth Amendment, because “when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution.” *Id.* at 975 (Stevens, J., dissenting).
Exclusion—and deterrence—appears justified after Herring based on culpability. It does not further that inquiry, it appears, to label the situation as a “good faith” exception to the exclusionary rule. Thus, Roberts recounted several cases of “intentional” and “flagrant” misconduct, including in Weeks,13 which was the case that initially adopted the exclusionary rule, that would support exclusion. Roberts thereafter flatly asserted:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.14

The Chief Justice emphasized that negligence is simply not worth the costs of exclusion.15 He ended the majority opinion by quoting one of the more famous statements in opposition to the adoption of

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14 555 U.S. at __. Roberts maintained that recordkeeping errors by the police are not immune from the exclusionary rule but “the conduct at issue was not so objectively culpable as to require exclusion.” Id. at __. He noted: “If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.” Id. at __.

15 Id. at __ n.4. Despite all of the Court’s references to apparently subjective states of mind, Roberts added a confusing twist: all of these inquiries are objective ones. He emphasized that “the pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of arresting officers[,]’” Id. at __. Factors in making that determination include a “particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, but not his subjective intent[,]” Id. at __.

Perhaps the Chief Justice was seeking to preserve the Court’s general approach to measuring reasonableness, which has been an objective analysis of the facts. See Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation § 11.6.2.1. (2008) (summarizing the Court’s general approach to measuring reasonableness). Nonetheless, in situations where a police officer intentionally or recklessly places false information in a warrant (or omits such information), the inquiry has required an examination of the officer’s actual state of mind. See id. § 12.3.3. (collecting authorities); Franks v. Delaware, 438 U.S. 154 (1978). Indeed, the concepts of knowledge, recklessness, and negligence are familiar criminal law concepts, each requiring inquiry into the actor’s actual state of mind. E.g., Model Penal Code § 2.02. Herring seems to create the bizarre principle that, to ascertain if an officer was intentionally or recklessly violating a person’s Fourth Amendment rights, that inquiry is an objective one.
the exclusionary rule and stated:

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

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented. Justice Ginsburg certainly did not view the *Herring* decision as narrow. She replied with a broad defense of the rule, which is notable for the fact that, for the first time in decades, a member of the Court has clearly suggested that the exclusionary rule may be constitutionally based. Addressing what she perceived as the Court’s creation of a system of exclusion based on distinctions between reckless or intentional actions on the one hand and mere negligence on the other, Ginsburg argued that the rule was also justified when the police are negligent. She believed that the mistake in *Herring* justified its application and concluded:

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

If *Herring*’s broader implications are realized, Fourth Amendment litigation will change to one focused primarily on the culpability of the government agent and, often, the merits of the Fourth

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The exclusionary rule is “a remedy necessary to ensure that” the Fourth Amendment's prohibitions “are observed in fact.” The rule's service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.

Beyond doubt, a main objective of the rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” But the rule also serves other important purposes: It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”

555 U.S. at __ (citations omitted).
Amendment claim will not have to be decided. The inquiry after *Herring* becomes a quest to ascertain police culpability: was there intentional misconduct; reckless misconduct; a pattern of recurring negligence; or mere negligence? “Mere negligence” would make many—if not most—Fourth Amendment violations inappropriate candidates for suppression. For example, a police officer—instead of relying on information from other officers as in *Herring*—may believe that her actions are reasonable based on her own investigation, even though the actions do not comply with the Fourth Amendment.\(^{19}\) Based on a broad reading of *Herring*, a court could simply skip the merits of a claim and address solely the lack of an exclusionary remedy. Thus, a court could simply rule: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence.


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

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

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

4. **Search Incident to Arrest of Vehicle Occupants:** *Arizona v. Gant*, 556 U.S. __, 129 S. Ct. 34

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\(^{19}\) *E.g.*, Moore v. State, 986 So. 2d 928, 934-35 (Miss. 2008) (collecting cases and finding that, when a police officer, under a reasonable mistake of law, believed that there is probable cause to make a traffic stop, the stop is valid, even though the vehicle did not violate the law).
1710 (2009)

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

For searches incident to arrest, it had long been established that the police can always search the person and the area of immediate control around that person. If that person is in a vehicle, under Belton, the police could always search the entire passenger compartment incident to the arrest. The Court in Gant rejected that second principle and created two new rules for searches incident to arrest of persons who are in vehicles. Under Gant one of the following must be shown:

1. Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee is secured and cannot access the interior of the vehicle.
   or
2. Circumstances unique to the automobile context justify a search incident to arrest only when it is reasonable to believe that evidence of the offense of arrest might be in the vehicle.

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

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

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

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\[20\] E.g., Thornton v. United States, 541 U.S. 615 (2004); Michigan v. DeFillippo, 443 U.S. 31, 39 (1979) ("the fact of a lawful arrest, standing alone, authorizes a search [of the person arrested]"); Gustafson v. Florida, 414 U.S. 260, 266 (1973) ("Since it is the fact of custodial arrest which gives rise to the authority to search," the lack of a subjective belief by the officer that the person arrested is armed and dangerous is irrelevant.); Robinson v. United States, 414 U.S. 218 (1973) (adopting a “categorical” search incident to arrest rule: it applied to all arrests, regardless of the underlying factual circumstances).

\[21\] New York v. Belton, 453 U.S. 454 (1981), (holding that, as an incident to arrest of an automobile occupant, the police may search the entire passenger compartment of the car, including any open or closed containers, but not the trunk). See also Thornton v. United States, 541 U.S. 615 (2004) (holding that Belton applied to situations where the suspect gets out of a car before the officer has made contact with the suspect).
a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be in the vehicle. In another part of the opinion he called this standard a “reasonable basis.” This appears to be the familiar articulable suspicion standard, used to justify Terry stops and frisks.

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

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

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

Why does the rule not apply to all arrestees?

Why is the reason to believe standard sufficient to justify a search?


Treatise references:

§ 3.3. The reasonable expectation of privacy test
§ 3.3.3.2. Situations where the Court has found reduced expectations of privacy
§ 3.3.4. Measuring expectations of privacy and techniques to create the hierarchy
§ 7.3. Physical invasions; two-sided nature of search analysis
§ 8.4. Intrusive searches incident to arrest: Scope: arrestee’s body
§ 11.3.4.4.2.2. Special needs

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

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

Chief Justice Roberts, with whom Justice Scalia joined, dissenting from denial of certiorari.

Treatise references:
§ 11.3.2. [measuring reasonableness] Model#2: individualized suspicion
§ 11.3.2.1.2. Articulable suspicion
§ 11.3.2.2. Types and sources of information
§ 11.3.2.3. Informants
§ 11.3.4.4.2.2. Special needs

Citing the dangers posed by drunk driving and the frequent reports of such conduct to the police, the Chief Justice argued that the Court should grant certiorari to determine whether an anonymous tip that Harris was driving while intoxicated was sufficient to justify a stop. Harris had been convicted of driving while intoxicated but the Virginia Supreme Court overturned the conviction, concluding that, because the officer had failed to independently verify that Harris was driving dangerously, the stop violated the Fourth Amendment.

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

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


Treatise reference:
§ 10.6. Exigent circumstances

Fisher was charged with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The state trial court granted his motion to suppress evidence obtained as a result of warrantless entry into his residence. After the State appealed but lost in the Court of Appeals of Michigan, the Supreme Court granted certiorari and summarily reversed. In a per curiam opinion, the Court held that officer's warrantless entry into Fisher’s residence was reasonable.

Police officers responded to a complaint of a disturbance. As they approached the area, a couple directed the officers to a residence where a man was “going crazy.” According to the Court, the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. . . . Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

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

Starting with the proposition that exigent circumstances justified a warrantless entry into a home, and relied on the recent case of Brigham City v. Stuart, 547 U.S. 398 (2006), which identified one such exigency as “the need to assist persons who are seriously injured or threatened with such injury.” Quoting Brigham City, the Court asserted that law enforcement officers “may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” This “emergency aid exception” does not depend on the officers’ subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only “an objectively reasonable basis for believing[]” that “a person within [the house] is in need of immediate aid.”

Stating that Fisher was a “straightforward application of the emergency aid exception,” the majority believed that the entry was reasonable under the Fourth Amendment. It also clarified the
type of injury that was needed:
Officers do not need ironclad proof of “a likely serious, life-threatening” injury to invoke the emergency aid exception. The only injury police could confirm in Brigham City was the bloody lip they saw the juvenile inflict upon the adult. Fisher argues that the officers here could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel. This would have no bearing, of course, upon their need to assure that Fisher was not endangering someone else in the house. Moreover, even if the failure to summon medical personnel conclusively established that [the officer] did not subjectively believe, when he entered the house, that Fisher or someone else was seriously injured (which is doubtful), the test, as we have said, is not what [the officer] believed, but whether there was “an objectively reasonable basis for believing” that medical assistance was needed, or persons were in danger.

Rejecting the hindsight determination that there was in fact no emergency as not meeting “the needs of law enforcement or the demands of public safety,” the majority opined:
Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But “[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.” It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else.

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

8. City of Ontario v. Quon, 529 F.3d 892 (9th Cir. 2008), cert. granted, ___ S. Ct. ___ (December 14, 2009) No. 08-1332.

Treatise References:
§ 3.3. The Reasonable Expectation of Privacy Test
   § 3.3.3. Creation of a hierarchy of privacy interests
      § 3.3.3.1. Situations where the Court has found no reasonable expectation of privacy
   § 3.3.4. Measuring expectations of privacy and techniques to create the hierarchy
§ 3.5. Limitations on protection
   § 3.5.1. Assumption of risk, voluntary exposure, shared privacy
The Court granted certiorari on the following three issues:

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.

2. Whether the Ninth Circuit contravened this Court’s Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used “less intrusive methods” of reviewing text messages transmitted by a SWAT team member on his SWAT pager.

3. Whether individuals who send text messages to a SWAT team member’s SWAT pager have a reasonable expectation that their messages will be free from review by the recipient’s government employer.

The City of Ontario, California had a written policy advising employees that use of city owned computer-related services for personal purposes was forbidden, that the city reserved the right to monitor “all network activity including e-mail and Internet use, with or without notice,” and that “[u]sers should have no expectation of privacy or confidentiality when using these resources.” When the city police department obtained text-messaging pagers for its SWAT team members, the department informed the officers that the e-mail policy applied to pager messages.

The city had to pay extra when a pager went above its monthly character limit. The officer in charge of the administration of the pagers, Lieutenant Steve Duke, informed the SWAT team members that he would not audit pagers that went above the monthly limit if the officers agreed to pay for any overages. Eventually, Duke tired of collecting bills and the chief of police ordered a review of the pager transcripts for the two officers with the highest overages to determine whether the monthly character limit was insufficient to cover business-related messages. One of those officers was Sergeant Jeff Quon. After initial review, the matter was referred to internal affairs to determine whether Quon was wasting time with personal matters while on duty. Internal affairs determined that, during the month under review, Quon sent and received 456 personal messages while on duty. Some of the messages were to his wife, some to his mistress, and many sexually explicit. Quon and his wife and mistress (respondents) filed a §1983 action against the city, the police department, and others, alleging Fourth Amendment violations.

A jury found that the chief of police’s purpose in ordering review of the transcripts was to determine the character limit’s efficacy. The District Court ruled that that action was reasonable under *O’Connor v. Ortega*, 480 U.S. 709 (1987). The Ninth Circuit reversed, holding that
respondents were entitled to summary judgment in their favor. It found that Quon possessed a reasonable expectation of privacy in his text messages, reasoning that the city’s general policy was overridden by Lieutenant Duke’s informal policy. The appellate court also held that the other respondents had a reasonable expectation of privacy in messages they had sent to Quon’s pager by analogizing text messages to e-mail messages, regular mail, and telephone communications; it concluded that, “[a]s a matter of law, [those respondents] had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages.” The court then held that the search was unreasonable in scope because the government could have accomplished its objectives through “a host of simple ways” without intruding on respondents’ Fourth Amendment rights. Those methods included “warning Quon that for the month of September he was forbidden from using his pager for personal communications,” “ask[ing] Quon to count the characters himself,” or “ask[ing] him to redact personal messages and grant permission to the Department to review the redacted transcript.”

Petitions for rehearing and rehearing en banc were denied. In its cert. petition, the city argued that the Ninth Circuit’s opinion “undermines the ‘operational realities of the workplace’ standard” of O’Connor by “erroneously holding that a police lieutenant’s informal policy creates a reasonable expectation of privacy in text messaging on a police department pager in the face of the Department’s explicit no-privacy policy and potential disclosure of the messages as public records.” The city also argued that the Ninth Circuit erred in applying a “less intrusive means” test to assess the reasonableness of the search, citing Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 629 n.9 (1989), for the proposition that the Supreme Court had “repeatedly” rejected such a test as the basis for evaluating the reasonableness of government searches and seizures. According to the city, the court should have applied a balancing test without reference to any need for any lesser intrusive actions.