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THE END OF THE WAR ON DRUGS, THE PEACE DIVIDEND AND THE RENEWED FOURTH AMENDMENT?

MICHAEL VITIELLO*

I. Introduction

The War on Drugs profoundly eroded the Fourth Amendment.¹ D.C. Circuit Court of Appeals Judge Harry T. Edwards summed it up in the midst of the War when he expressed his “growing concern about the degree to which individual rights and liberties appear to be falling victim to the Government’s ‘War on Drugs.’”²

Scholars have identified many areas where the Supreme Court cut back Fourth Amendment protections as part of the War on Drugs. For instance, the Court has treated the drug-detection dog sniff as “sui generis” and correspondingly refused to recognize such a sniff as a search at all, despite its clear purpose to detect evidence of criminal activity.³ Additionally, the Court has found that police do not engage in Fourth Amendment activity when they fly over a suspect’s property, even when that overflight allows officers to peer into areas within a home’s curtilage that the homeowner

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1. There is much to support the notion that the War on Drugs, in general, is largely responsible for the current state of search-and-seizure law. *See, e.g.*, Susan F. Mandiberg, *Marijuana Prohibition and the Shrinking of the Fourth Amendment*, 43 MCGEORGE L. REV. 23, 23–24 (2012); *see also* Thomas Regnier, *The “Loyal Foot Soldier”: Can the Fourth Amendment Survive the Supreme Court’s War on Drugs?*, 72 UMKC L. REV. 631, 649–64 (2004); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 240; Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court’s Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219, 221 (1992); Christian J. Rowley, Note, *Florida v. Bostick: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601, 603; Steven K. Bernstein, Note, *Fourth Amendment—Using the Drug Courier Profile to Fight to War on Drugs*, 80 J. CRIM. L. & CRIMINOLOGY 996, 1017 (1990); Steven Wisotsky, *Crackdown: The Emerging ‘Drug Exception’ to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 2–3 (1986).

2. *Hartness v. Bush*, 919 F.2d 170, 174 (D.C. Cir. 1990) (Edwards, J., dissenting).

3. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 707 (1983).

sought to exclude from the public's view.⁴ The Court has also upheld consent searches under circumstances that defy credibility, for example, where a defendant would be able to drive away without more than a traffic ticket, but consents to a search leading to evidence that puts him away for years in prison.⁵ At the height of the War on Drugs, the Court extended the scope of a vehicle search-incident-to-a-lawful arrest to the entire passenger compartment, including closed containers within the vehicle.⁶ While, for a time, the Court seemed ready to declare some traffic offenses so trivial that the Fourth Amendment prohibited a custodial arrest,⁷ the Court rejected such a rule.⁸ Oddly enough, the Court has held that the Fourth Amendment does not outlaw a custodial arrest even when an officer erroneously believes that he has authority to make that arrest.⁹ The Court's unwillingness to allow a defendant to inquire into whether a traffic stop was pretextual at a suppression hearing also contributes to the erosion of Fourth Amendment protections.¹⁰

The list goes on and on. Notice, however, the ability of the police to stop virtually anyone on the highway and to escalate the encounter into a search based on slim, if any, justification.¹¹ Because citizens lack the ability to

4. See, e.g., *Florida v. Riley*, 488 U.S. 445, 451–52 (1989); *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

5. See, e.g., *Florida v. Jimeno*, 500 U.S. 248, 249–50 (1991); see also *Ohio v. Robinette*, 519 U.S. 33, 35–36 (1996) (upholding consent search where driver was not even ticketed).

6. *New York v. Belton*, 453 U.S. 454, 460 (1981); see also *Thornton v. United States*, 541 U.S. 615, 623–24 (2004) (extending the *Belton* search rule to situations where the arrestee is a “recent occupant” of a car).

7. See *Gustafson v. Florida*, 414 U.S. 260, 266–67 (1973) (Stewart, J., concurring) (“[A] persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments.”); *United States v. Robinson*, 414 U.S. 218, 237–38, 238 n.2 (1973) (Powell, J., concurring) (describing the validity of custodial arrest for minor traffic violations as not “self-evident”).

8. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (upholding custodial arrest instigated by minor traffic violation without any other criminal evidence).

9. *Virginia v. Moore*, 553 U.S. 164, 178 (2008).

10. See *Whren v. United States*, 517 U.S. 806, 814–15 (1996).

11. See, e.g., *Navarette v. California*, 572 U.S. 393, 395 (2014) (upholding the reasonable suspicion required to pull a motorist over based solely on an anonymous 911 call that claimed a Ford pickup with a particular license number “[r]an the reporting party off the roadway”); see also K.K. Rebecca Lai et al., *Assessing the Legality of Sandra Bland's Arrest*, N.Y. TIMES (July 22, 2015), <https://www.nytimes.com/interactive/2015/07/20/us/sandra-bland-arrest-death-videos-maps.html>.

challenge a stop as pretextual, officers can base stops on racial profiling largely with impunity.¹² In light of such an eroded Fourth Amendment, it is unsurprising that minority men represent a disproportionate number of drug defendants in the criminal justice system.¹³

The emergence of a broad political consensus has helped bring a truce—and perhaps an end to—the War on Drugs.¹⁴ Many states have reduced prison populations, often by changing policies concerning the incarceration of drug offenders.¹⁵ At the federal level, the First Step Act—an unusual

12. Drivers subjected to pretextual stops may still raise Equal Protection claims. *Whren*, 517 U.S. at 813. The Court's Equal Protection jurisprudence coupled with *Whren* itself, however, leaves little hope that officers would be deterred in any way by the possibility of an Equal Protection suit, or that the drivers themselves will be vindicated. *See Herring v. United States*, 555 U.S. 135, 153 (2009) (Ginsburg, J., dissenting) ("The exclusionary rule, it bears emphasis, is often the only remedy effective to redress a Fourth Amendment violation.") (citations omitted); *see also* David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 104–06 (1998).

13. *See* Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 790 (2019); Douglas A. Berman, *Reminders of Realities of Marijuana Arrest Rates*, L. PROFESSOR BLOGS NETWORK: MARIJUANA L., POL'Y & REFORM (July 8, 2018), https://lawprofessors.typepad.com/marijuana_law/2018/07/reminders-of-realities-of-marijuana-arrest-rates.html; ASHLEY NELLIS, SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHICAL DISPARITY IN STATE PRISONS (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

14. *See* Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), <https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs> ("[Drug] prohibition is not only ineffective, but counterproductive, at achieving the goals of policymakers both domestically and abroad."); *see also* Johann Hari, *Op-Ed: The Old Global Consensus on the War on Drugs Is Crumbling*, L.A. TIMES (Apr. 10, 2016, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-0410-hari-un-drug-rebellion-20160410-story.html>; *America's New Drug Policy Landscape*, PEW RES. CTR. (Apr. 2, 2014), <https://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/> (providing a public opinion polling showing, inter alia, two-thirds of Americans favor treatment over incarceration for non-violent drug offenses).

15. *See* DENNIS SCHRANTZ, STEPHEN T. DEBOR & MARC MAUER, SENTENCING PROJECT, DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/09/Decarceration-Strategies.pdf>.

moment of bipartisanship in a dysfunctional Congress¹⁶—signals exhaustion with the War. This shifting attitude may be driving real change, as one Pew Research Center report suggests that racial disparity in our prison systems has lessened in recent years.¹⁷

If the War is over or ending, will the Court breathe life back into the Fourth Amendment? Judge Edwards raised the question in 1990, when he stated, “[W]hen the war is over, we find that departures from constitutional norms, legitimized by the courts, have lasting and wide-ranging effects. Constitutional principles, once abandoned, are not easily reclaimed.”¹⁸ This article explores the future of Fourth Amendment jurisprudence in the face of the waning war.

Indeed, we may be reclaiming Fourth Amendment protections. In 2009, the Court examined the scope of a vehicle search based on a lawful arrest.¹⁹ *Arizona v. Gant* revived a more careful analysis, tying the scope of legitimate police conduct to the underlying rationale that made such conduct reasonable within the meaning of the Fourth Amendment.²⁰ Three years later, the Supreme Court confronted how the Fourth Amendment should apply in an era of expanded data collection.²¹ In a series of recent cases, the Court seems ready to articulate a new paradigm in cases

16. Jamiles Lartey, *Trump Signs Bipartisan Criminal Justice Overhaul First Step Act into Law*, GUARDIAN (Dec. 21, 2018, 7:12 PM GMT), <https://www.theguardian.com/us-news/2018/dec/21/trump-prison-reform-first-step-act-signed-law>.

17. See John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RES. CTR. (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/> (“[A] significant decline in the number of black prisoners has steadily narrowed the gap over the past decade, according to new data from the Bureau of Justice Statistics.”).

18. *Hartness v. Bush*, 919 F.2d 170, 175 (D.C. Cir. 1990) (Edwards, J., dissenting).

19. See *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

20. See *id.* at 351 (“Police may search a vehicle incident to [lawful arrest] only if the arrestee is in reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.”).

21. See *United States v. Jones*, 565 U.S. 400, 402 (2012) (analyzing “whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual’s vehicle, and subsequent use of that device to monitor the vehicle’s movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment”). See generally Michael Vitiello, *Katz v. United States: Back to the Future?*, 52 U. RICH. L. REV. 425 (2018).

involving technology.²² Those cases suggest the Court's willingness to rethink its Fourth Amendment jurisprudence.²³

This article focuses on some specific Fourth Amendment issues that have arisen in states where voters have legalized marijuana for medical and/or recreational use. Since California adopted its medical marijuana law, its courts have shown little interest in extending Fourth Amendment protection, even in situations where suspects have medical marijuana authorization.²⁴ Most courts, even in states that legalized marijuana for medical use, concluded that an officer observing a suspect in possession of marijuana had probable cause to arrest or to search.²⁵ Courts may be ready to rethink that bright-line rule.²⁶

Other states' courts have shown a willingness either to expand Fourth Amendment protection or to rely on state constitutional provisions to counter the Supreme Court's Fourth Amendment case law.²⁷ For example, the New Mexico and Hawaii State Supreme Courts have read the United States Supreme Court's overflight case law narrowly to protect defendants growing marijuana in those states.²⁸ Similarly, the Colorado Supreme Court

22. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018) (“As Justice Brandeis explained in his famous dissent, the Court is obligated—as ‘[s]ubtler and more far-reaching means of invading privacy have become available to the Government’—to ensure that the ‘progress of science’ does not erode Fourth Amendment protections.” (quoting *Olmstead v. United States*, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting))); *Riley v. California*, 573 U.S. 373, 401 (2014) (“Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.”); *Jones*, 565 U.S. at 411 (“What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted.”). See generally John R. Kroger, *The Fourth Amendment in the Age of Trump and Roberts*, 55 GONZ. L. REV. 1 (2019); Andrew Guthrie Ferguson, *The Smart Fourth Amendment*, 102 CORNELL L. REV. 547 (2017).

23. When approaching twenty-first-century technologies, the Court recognized that circumstances now necessitate a new way to “apply the Fourth Amendment to a new phenomenon.” *Carpenter*, 138 S. Ct. at 2216.

24. See *infra* Part IV.

25. See *infra* Part IV.

26. See *infra* Part IV.

27. See *infra* Part IV.

28. See *State v. Davis*, 360 P.3d 1161, 1164, 1173 (N.M. 2015) (holding that warrantless aerial surveillance of a greenhouse via helicopter, involving prolonged hovering at a height of fifty feet while kicking up dust and debris, was an unconstitutional search); see also *State v. Quiday*, 405 P.3d 552, 558–59 (Haw. 2017) (holding that an individual has a

recently rejected the Supreme Court's dog-sniff jurisprudence in favor of stronger Fourth Amendment protections.²⁹

Are these cases an aberration or a trend? This Article argues that we are at the threshold of an expanded Fourth Amendment.³⁰ Judge Edwards suggested that reclaiming constitutional principles is not easy;³¹ I do not pretend that it is. However, changing perceptions about the War on Drugs may have a spillover effect that eases reclamation of the Fourth Amendment.³²

Part II reviews some of the areas where the War on Drugs helped shrink the Fourth Amendment.³³ Part III briefly discusses some of the cases, including the recent technology cases, which may point towards the Court's willingness to rethink its Fourth Amendment case law.³⁴ Part IV turns to developments in state courts, with a particular focus on states that have legalized medical and/or recreational marijuana.³⁵ At least tentatively, this Article argues that recent cases demonstrate exhaustion with the War on Drugs and a trend towards a new, more invigorated Fourth Amendment.³⁶

II. The Vanishing Fourth Amendment

A. The Warren Court

Students of constitutional criminal procedure are familiar with the Warren Court's criminal procedural revolution, effectively beginning with *Mapp v. Ohio* in 1961, and ending with the end of Chief Justice Warren's

reasonable expectation of privacy from governmental aerial surveillance of his or her curtilage and residence).

29. *People v. McKnight*, 446 P.3d 397, 414 (Colo. 2019) (holding that a sniff from a dog trained to detect marijuana is a search requiring suspicion of criminal activity and a warrant).

30. *See infra* Part IV.

31. *See Hartness v. Bush*, 919 F.2d 170, 175 (D.C. Cir. 1990) (Edwards, J., dissenting) ("Constitutional principles, once abandoned, are not easily reclaimed.").

32. *See generally* Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375 (2017) (examining the context of the War on Drugs, shifts in policy and public perception, and how enforcement laws and policies changed through the 1970s up to the 2010s).

33. *See infra* Part II.

34. *See infra* Part III.

35. *See infra* Part IV.

36. *See infra* Part IV.

tenure on the bench in 1969.³⁷ *Mapp* held that the exclusionary rule is the constitutionally mandated remedy for Fourth Amendment violations.³⁸ Over the next eight years, the Court found that virtually all individual protections in the Bill of Rights applied to the states as well as the federal government.³⁹ Similarly, the Warren Court largely expanded the scope of the Fourth Amendment during that same period.⁴⁰

Probable cause and warrant requirements were the centerpiece of the Warren Court's Fourth Amendment jurisprudence. Though the Court recognized some notable exceptions to the probable cause warrant protection, it required any exception to be "strictly tied to and justified by"⁴¹ the justifications that made such an exception reasonable. One scholar labeled this approach as the "principle of particular justification."⁴²

This approach has an obvious advantage: it provides a coherent explanation for exactly what makes a police officer's conduct reasonable. Thus, in *Chimel v. California*, the Court narrowed a search-incident-to-a-lawful-arrest to the area within the arrestee's "immediate control."⁴³ Supreme Court precedent had previously allowed officers making an in-home arrest to search the arrestee's home without securing a warrant and without having probable cause to search for evidence.⁴⁴ The *Chimel* Court feared pretextual arrests in a suspect's home would allow officers to circumvent the probable cause and search warrant requirements.⁴⁵

37. 367 U.S. 643 (1961); see Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 253 (1982) (observing that the Warren Court "expanded the reach of constitutional regulation of criminal procedure many times beyond that which had been attained through all of the Court's constitutional rulings over the previous 170 years").

38. See *Mapp*, 367 U.S. at 655 ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

39. Israel, *supra* note 37, at 253.

40. See, e.g., *Katz v. United States*, 389 U.S. 347, 351, 353 (1967) (holding, famously, "the Fourth Amendment protects people, not places" and expanding the Fourth Amendment's protection beyond its traditional realm of only physically trespassory police action to include any government violation of a subjective expectation of privacy that society is prepared to recognize as objectively reasonable).

41. *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (citations omitted).

42. James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 190.

43. 395 U.S. 752, 763–64 (1969).

44. See *Harris v. United States*, 331 U.S. 145, 151–52 (1947) (sustaining a warrantless search through a four-room apartment as "incident to arrest").

45. See 395 U.S. at 767 ("The petitioner correctly points out that one result of [cases not limiting searches to the 'grabbing area'] is to give law enforcement officials the opportunity

Searching within the suspect's "grabbing area" is reasonable because the search-incident doctrine is premised on the need to protect the arresting officer and to prevent destruction of evidence.⁴⁶ Searching beyond that area, therefore, exceeds the specific justifications underlying the exception to the probable cause warrant requirement.⁴⁷

The Warren Court also redefined the meaning of a Fourth Amendment "search" to reflect the development of modern technology. In *Katz v. United States*, FBI agents had attached a listening device to a telephone booth that a gambler was using to transmit bets.⁴⁸ Consistent with Supreme Court precedent, the agents did not use a listening device that physically penetrated the phone booth.⁴⁹ As framed in the grant of certiorari, the Court was to resolve whether a phone booth is a constitutionally protected area; if so, the Court would then determine whether physical penetration of that area is required to render a search and seizure violative of the Fourth Amendment.⁵⁰ The Court rejected that proposed formulation and, implicitly rejecting property concepts as the prevailing Fourth Amendment model, tied the definition of a "search" to an individual's expectation of privacy.⁵¹

These cases are illustrative of the Warren Court's bold—though some would argue foolhardy—efforts to invigorate defendants' procedural protections. Often, racial bias motivated the Court.⁵² Notable cases involved minority defendants tried in the South.⁵³

to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.”).

46. *Id.* at 762–63 (“[O]therwise, the officer’s safety might well be endangered, and the arrest itself frustrated.”).

47. *Id.* at 763 (“There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”).

48. 389 U.S. 347, 348 (1967).

49. *Id.*; see *Silverman v. United States*, 365 U.S. 505, 511 (1961); see also *Goldman v. United States*, 316 U.S. 129, 134–35 (1942).

50. *Katz v. United States*, 386 U.S. 954, 954–55 (1967).

51. *Katz*, 389 U.S. at 350–51.

52. See generally FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* (1970).

53. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 491–92 (1966) (determining that Ernesto Miranda’s constitutional rights were violated) (“[I]t is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible.”).

B. *The Nixon-Burger Court*

Also familiar history for students of constitutional criminal procedure, the Warren Court's expansive interpretations of the Bill of Rights resulted in a backlash.⁵⁴ The Court's decision in *Miranda v. Arizona* produced calls to impeach Earl Warren.⁵⁵ Presidential candidates George Wallace and Richard Nixon made law-and-order a central campaign issue.⁵⁶ They did so at a time when crime rates were on the rise.⁵⁷ During their campaigns, Nixon and Wallace unfairly created links in the public's consciousness between riots in American cities, the rise in crime rates, and Warren Court precedent.⁵⁸

Once he was in office, President Nixon made four appointments to the Court within a two-year period.⁵⁹ Nixon's selections delivered on his law-and-order campaign promise.⁶⁰ For example, soon-to-be-appointed Chief Justice Warren Burger came to Nixon's attention because of his prominent law-and-order stance.⁶¹ Critics have debated whether the Nixon-Burger

54. See generally GRAHAM, *supra* note 52.

55. See MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 2–3 (2016) (including a photograph of an “IMPEACH EARL WARREN” billboard along a California highway).

56. William G. Ross, *The Supreme Court as an Issue in Presidential Campaigns*, 37 J. SUP. CT. HIST. 322, 331–32 (2012); see also KEVIN J. MCMAHON, *NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* 37–62 (2011).

57. See GRAHAM, *supra* note 52, at 299 (detailing increases in frequency of criminal activity during this period); see also GRAETZ & GREENHOUSE, *supra* note 55, at 12.

58. See LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 224 (1st ed. 1983) (stating that, during Nixon's speech accepting the Republican presidential nomination, he “promise[d] . . . voters that night that ‘the wave of crime is not going to be the wave of the future in the United States of America,’ [and] that the restoration of law and order would be a linchpin of his administration”); see also MCMAHON, *supra* note 56, at 41–43 (explaining that in Wallace's standard stump speech, he “linked the rise in crime to the Court by telling those assembled, ‘If you walk out of this hotel tonight and someone knocks you on the head, he'll be out of jail before you're out of the hospital, and on Monday morning they'll try the policeman instead of the criminal.’”).

59. *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Sept. 12, 2020).

60. EARL M. MALTZ, *THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW* 2 (2016).

61. MCMAHON, *supra* note 56, at 114.

Court effectuated a counter-revolution.⁶² Many of the Court's decisions either cabined Warren Court precedent or refused to extend its case law.

Cases like *United States v. Robinson* shifted the new majority's approach to Fourth Amendment questions in two respects.⁶³ Crucially, *Robinson* moved away from the Warren Court's "principle of particular justification."⁶⁴ It also signaled the Burger Court's preference for bright-line rules.

In *Robinson*, the officer arrested the defendant for driving on a suspended license and acknowledged that he did not fear for his safety.⁶⁵ The D.C. Circuit Court found the search of the defendant's crumpled cigarette packet containing heroin was illegal because it exceeded the underlying justification for a search-incident-to-a-lawful arrest.⁶⁶ The Burger Court rejected such a narrowly tailored reading of the law.⁶⁷ Instead, it found reasonable a general rule governing custodial arrests.⁶⁸ The opinion reflected a change in the framework of analysis, away from the Warren Court's major premise of probable cause and warrants with narrow exceptions.⁶⁹ The Burger Court saw the reasonableness prong of the Fourth Amendment as its major premise, not probable cause and warrants.⁷⁰

62. See, e.g., Vincent Blasi, *Preface* to *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* xi, xii (Vincent Blasi ed., 1983) ("The story of the Burger Court to date, whatever else it might be, is not a tale of a conservative counter-revolution, at least not one of epic proportions or obvious import.").

63. 414 U.S. 218 (1973).

64. See *id.* at 236 ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed.").

65. *Id.* at 221–22, 236.

66. *United States v. Robinson*, 471 F.2d 1082, 1103–04 (D.C. Cir. 1972).

67. See *Robinson*, 414 U.S. at 235 ("[O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to the lawful arrest.").

68. See *id.* ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

69. See *id.* at 226 ("Since [prior search-incident-to-a-lawful-arrest decisions] speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness.").

70. See *id.* at 235; see also Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 121–22 (1989).

Additionally, *Robinson* emphasized the need for bright lines, an approach that was soon to dominate the Court's Fourth Amendment analysis.⁷¹

While the Burger Court demonstrated a general commitment to expanding police power and cutting back on Warren Court precedent, the liberal wing of the Court still achieved some successes. For example, the Court in *Coolidge v. New Hampshire* found unconstitutional a New Hampshire law that allowed the state's attorney general, rather than a "neutral and detached magistrate," to issue search warrants.⁷² In that case, the state attempted to argue exceptions to the warrant requirement.⁷³ The Court rejected each argument, which would have cut back on Warren Court case law.⁷⁴

The Court's liberal wing similarly prevailed in *United States v. Chadwick*. There, the Supreme Court took up the government's contention that, after *Katz*, only high privacy zones, like "homes, offices, and private communications, implicate interests which lie at the core of the Fourth Amendment" and therefore require warrants.⁷⁵ *Chadwick* involved the warrantless search of a footlocker that federal agents had probable cause to believe contained a large quantity of marijuana.⁷⁶ In the trial court, the government attempted to justify the warrantless search based on the "automobile exception" to the warrant requirement.⁷⁷ Rather than pressing that same point in the Supreme Court, the government instead argued that police must secure warrants only when they seek to search in a home or office.⁷⁸ In a 7–2 decision, Chief Justice Burger rejected that position out of

71. See *Robinson*, 414 U.S. at 235 ("The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

72. 403 U.S. 443, 447, 449 (1971).

73. *Id.* at 445, 453–73.

74. See *id.* at 456, 458, 464 (rejecting the state's arguments that (1) the search and seizure were "'incident' to a valid arrest," (2) "the police may make a warrantless search of an automobile whenever they have probable cause to do so," and (3) "the car itself was an 'instrumentality of the crime'").

75. *United States v. Chadwick*, 433 U.S. 1, 7 (1977).

76. *Id.* at 3–4.

77. *Id.* at 5.

78. *Id.* at 7.

hand and, among other things, offered full-throated support for the warrant requirement.⁷⁹

C. Ronald Reagan and the Real War on Drugs

Many more major changes were on the horizon. Despite claiming to launch a War on Drugs, Nixon was less invested in that war than was Ronald Reagan.⁸⁰ Nixon was instrumental in the passage of the Controlled Substances Act, which resulted in the classification of marijuana, LSD, and other drugs as Schedule I.⁸¹ Despite that legislation, punishments for drug offenses were not especially severe during President Nixon's tenure.⁸² President Reagan was a far more committed anti-drug warrior.⁸³ His administration led efforts to increase penalties for drug offenses, including marijuana offenses, and to expand police efforts to target drug offenders.⁸⁴ Drug defendants challenged many of those aggressive police practices.⁸⁵

79. *See id.* at 7, 11 (“There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.”).

80. *See* Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65 J. POL. 995, 998 (2003) (“Nixon was the first president to use the phrase ‘war on drugs[,]’ . . . but the recent War on Drugs began as a part of Ronald Reagan’s crime control strategy.”); *see also* JOHN HUDAK, MARIJUANA 59–84 (2016) (“Ronald Reagan steered America back on course to a full-fledged War on Drugs.”).

81. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in 21 U.S.C. §§ 801, 951 (2018)).

82. *See* Stemen, *supra* note 32, at 397–400 (observing a decrease in average length of state-imposed sentences and an increase in federally-imposed sentences).

83. Addressing the nation in 1986, President Reagan affirmed his commitment to combating drug use: “From the beginning of our administration, we’ve taken strong steps to do something about this horror. . . . Thirty-seven Federal agencies are working together in a vigorous national effort, and by next year our spending levels for drug law enforcement will have more than tripled from its 1981 levels.” *Address to the Nation on the Campaign Against Drug Abuse, September 14, 1986*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, <https://www.reaganlibrary.gov/research/speeches/091486a> (last visited Sept. 29, 2020).

84. Editors, *War on Drugs*, HIST. (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs>. *See generally* JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS (2015); THOMAS C. ROWE, FEDERAL NARCOTICS LAWS AND THE WAR ON DRUGS: MONEY DOWN A RAT HOLE (Routledge 2012) (2006); DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE (1996).

85. *Cf.* Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 164–72 (2001) (observing the disparate impact of the War on Drugs on African Americans and the efforts taken to challenge drug policies).

Unlike its decisions during the 1970s, the Supreme Court now largely upheld aggressive police practices.⁸⁶ In doing so, it shrank the Fourth Amendment. Many, if not most, of the Fourth Amendment cases during the period from the 1980s into the 2000s involved defendants arrested for drug activity.⁸⁷ The cases discussed below represent significant Fourth Amendment decisions, but this Article does not pretend to canvass all the areas where the Court eroded the Fourth Amendment.⁸⁸

1. Drug-Sniffing Dogs

Police have relied on dogs for centuries because of their acute sense of smell.⁸⁹ Using dogs for detection of drugs took hold in the 1970s and continues today.⁹⁰ The process involves police exposing luggage or other items to trained dogs who then signal the presence of drugs.⁹¹ But do the police need any prior justification for this action? Framed in Fourth Amendment terms, is a dog-sniff a search? Obviously, a dog-sniff usually

86. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 388 (1989) (establishing an “objective reasonableness” standard for claims that law enforcement officials have used excessive force); *see also* *United States v. Hensley*, 469 U.S. 221, 229 (1985) (affirming, unanimously, the application of *Terry* doctrine when an officer seeks to investigate a felony that has already been completed); *Oliver v. United States*, 466 U.S. 170, 173, 184 (1984) (upholding an officer’s search, nearly a mile past “no trespassing” signs into defendant’s property, that revealed marijuana as valid under the open fields doctrine); *United States v. Leon*, 468 U.S. 897, 922 (1984) (establishing the “good faith” exception to the Fourth Amendment’s exclusionary rule).

87. *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 376–77 (1993) (extending the “plain view” doctrine to uphold seizure of small lump of crack cocaine from defendant’s pocket); *see also* *Florida v. Bostick*, 501 U.S. 429, 439–40 (1991) (upholding random bus searches for drugs performed by multiple uniformed officers where a “reasonable person” would feel free to decline a search); *United States v. Mendenhall*, 446 U.S. 544, 548–49, 559–60 (1980) (holding that a woman “freely and voluntarily” followed DEA agents into a small examination room and consented to a strip search that revealed two small packages of heroin in her underwear).

88. For an introduction to the beginning of the Court’s disassembly of the Fourth Amendment after the Warren Court years, see Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

89. *Florida v. Jardines*, 569 U.S. 1, 23 (2013) (Alito, J., dissenting).

90. *See id.* at 15 (Kagan, J., concurring) (observing that the use of “drug-detection dogs actually go[es] back . . . only a few decades”).

91. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 699 (1983) (describing agents subjecting airline luggage to a “sniff test” by a trained narcotics detection dog”).

does not require a physical trespass.⁹² However, the Warren Court shifted the focus of the Fourth Amendment's inquiry from property concepts to privacy expectations in *Katz*,⁹³ and a dog-sniff certainly reveals information that a person seeks to keep private.

The Court answered the question in *United States v. Place*.⁹⁴ There, the police had detained the defendant's luggage for an extensive period so officers could expose his luggage to a drug-sniffing dog.⁹⁵ The Court found that the detention was an unlawful seizure.⁹⁶ In dicta, however, the Court resolved the lingering *Katz* question about dogs: a dog-sniff is "sui generis," revealing only the presence or absence of contraband.⁹⁷ According to Justice O'Connor, an individual has a limited expectation of privacy in the possession of contraband.⁹⁸

The Court reaffirmed and extended *Place* in *Illinois v. Caballes*.⁹⁹ There, officers stopped individuals for traffic offenses and exposed the vehicles to drug-sniffing dogs.¹⁰⁰ The Court held that if the police did not detain any individual beyond the time needed to cite the driver, such practices did not violate the Fourth Amendment.¹⁰¹

As developed below, cases like *Place* and *Caballes* seemed premised on the Justices' belief in the near-infallibility of drug-sniffing dogs.¹⁰² After those two cases, the police had a powerful tool in their efforts against drug trafficking. But dogs' noses would hardly be the only tools that the Court would endorse.

92. The maneuver performed by trained detection dogs is sometimes referred to as a "free air sniff." *Florida v. Harris*, 568 U.S. 237, 240 (2013).

93. *See Katz v. United States*, 389 U.S. at 347, 351 (1967) ("For the Fourth Amendment protects people, not places.").

94. 462 U.S. 696.

95. *See id.* at 699.

96. *Id.* at 710.

97. *See id.* at 707 (explaining investigative procedures employed in a dog sniff are unique in that "no other investigative procedure . . . is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure").

98. *Id.*

99. 543 U.S. 405 (2005).

100. *See id.* at 406.

101. *Id.* at 407–08.

102. *See infra* Section IV.B.

2. *Overflight Cases*

When the Court's Fourth Amendment case law relied almost exclusively on property concepts, the Supreme Court held that officers who entered an owner's open fields did not violate the Fourth Amendment.¹⁰³ After *Katz*, lower courts struggled to determine whether defendants might have a reasonable expectation of privacy in areas not immediately adjacent to their homes.¹⁰⁴

The facts in many post-*Katz* cases suggest that an "open field" is hardly a simple concept. Imagine rural land, far from major roadways or population centers, fenced, and marked with NO TRESPASSING signs. Might one have a reasonable expectation of privacy in such a place? One would have thought that the answer to be, "It depends." Not so, according to the Supreme Court in *Oliver v. United States*.¹⁰⁵ Justice Powell, writing for the Court, seemed to believe that a bright line existed between open fields (no reasonable expectation of privacy) and the curtilage of a house (reasonable expectation of privacy).¹⁰⁶ Thus, under this view, officers would only be conducting a Fourth Amendment search if they sought to collect information about activities within the curtilage. Whatever one might think about the Court's finding that individuals cannot claim privacy in land outside the curtilage, Justice Powell was surprised to learn that owners and occupiers of land have no justifiable expectations of privacy even within the curtilage.¹⁰⁷

103. *Hester v. United States*, 265 U.S. 57, 58–59 (1924).

104. *See, e.g., United States v. Miller*, 589 F.2d 1117, 1133–34 (1st Cir. 1978) (holding appellant did not have a reasonable expectation of privacy in private land that "was not posted; [had] no fence or chain to impede visitors; [and was approached] by the officers . . . openly in broad daylight"); *see also Patler v. Slayton*, 503 F.2d 472, 478 (4th Cir. 1974) ("Appellants' reasonable expectations of privacy—while extending to their dwellings and the immediate area around them and even to the area occupied by outbuildings such as the barns in question . . .—cannot, in light of *Hester*, be said to include the 'open fields' around the barn." (quoting *United States v. Brown*, 487 F.2d 208, 210 (4th Cir. 1983) (alterations in original))).

105. 466 U.S. 170, 179 (1984) ("[T]he asserted expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'").

106. *See id.* at 178–79.

107. *Compare id.* at 178 ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."), with *California v. Ciraolo*, 476 U.S. 207, 219 (1986) (Powell, J., dissenting) (arguing that the Court's "conclusory rejection of respondent's expectation of privacy in the yard of his residence . . . represents a turning away from the principles that have guided our

In *California v. Ciraolo*, Santa Clara Police sought to corroborate a tip that the defendant was growing marijuana in his backyard, an area fenced in too well to allow officers to peer in.¹⁰⁸ Instead, officers used a private plane to fly over the defendant's backyard, where they observed marijuana.¹⁰⁹ A 5–4 majority held that aerial surveillance in this case did not amount to a search.¹¹⁰ Justice Powell dissented, raising concerns that technological advances threatened the erosion of privacy of the home.¹¹¹

The police conduct in *Florida v. Riley* was even more intrusive.¹¹² There, the defendant took substantial steps to exclude the public from his property.¹¹³ As summarized by Justice White's plurality opinion:

Respondent Riley lived in a mobile home located on five acres of rural property. A greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a "DO NOT ENTER" sign.¹¹⁴

To corroborate a tip, officers used a helicopter.¹¹⁵ Flying 400 feet above the property, "[w]ith his naked eye, [an officer] was able to see through the openings in the roof and one or more of the open sides of the greenhouse and to identify what he thought was marijuana growing in the structure."¹¹⁶

Fourth Amendment inquiry" and is "curiously at odds with its purported reaffirmation of the curtilage doctrine").

108. 476 U.S. at 209.

109. *Id.*

110. *See id.* at 213–14 ("Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.").

111. *Id.* at 222–25 (Powell, J., dissenting).

112. 488 U.S. 445 (1989).

113. *See id.* at 448.

114. *Id.*

115. *Id.*

116. *Id.*

Although the majority divided on the relevant test to explain why, five justices found that the police conduct did not amount to a Fourth Amendment search.¹¹⁷ By 1989—the year of the *Riley* decision—Justice Kennedy had replaced Justice Powell.¹¹⁸ Given his dissent in *Ciraolo*, Justice Powell must have been even more shocked at the result in *Riley*.¹¹⁹

One might ask, then, what a rural resident must do to maintain privacy. Read in context, *Riley* and *Ciraolo* gave police a powerful tool in the War on Drugs. In rural areas of California known for marijuana production, and elsewhere, individuals were under siege conditions.¹²⁰

3. Pretext Stops, Trivial Offenses, and Search-Incident-to-Lawful Arrest

Many years ago, I presented the following hypothetical to my Criminal Procedure classes:

An officer was sitting in his patrol car. He was in a bad mood when he noticed a family heading off on vacation in a station wagon filled with luggage. Mom was driving, Dad was in the front seat, and two teenagers were in the backseat with their backpacks nearby. The officer realized that the driver was a woman whom he had tried to date, but who had not been interested in him. Out of sheer spite, or maybe even racial animus, the officer followed the vehicle until the driver sped slightly over the speed limit or made a lane change without signaling before doing so. I then asked students whom and where the officer could search after he pulled the vehicle over.¹²¹

117. Compare *id.* at 450 (“Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. Under the holding in *Ciraolo*, Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace . . .”), with *id.* at 453, 455 (O’Connor, J., concurring) (reasoning that, since *Ciraolo* relied on the fact that “public air travel at 1,000 feet is a sufficiently routine part of modern life,” “if the public can generally be expected to travel [via helicopter] over residential backyards at an altitude of 400 feet” then “Riley cannot reasonably expect his curtilage to be free from such aerial observation”).

118. See *Justices 1789 to Present*, *supra* note 59.

119. *California v. Ciraolo*, 476 U.S. 207, 215 (Powell, J., dissenting).

120. See Julie Johnson, *Mendocino Marijuana Raids Reflect Stepped-Up Enforcement on Illegal Operators*, PRESS DEMOCRAT (Santa Rosa, Cal.) (July 26, 2019), <https://www.pressdemocrat.com/news/9830280-181/mendocino-marijuana-raids-reflect-californias>. See generally PETER HECHT, *WEED LAND: INSIDE AMERICA’S MARIJUANA EPICENTER AND HOW POT WENT LEGIT* (2014).

121. Unfortunately, some police are inclined to use such stops aggressively. See generally MALCOLM GLADWELL, *TALKING TO STRANGERS: WHAT WE SHOULD KNOW ABOUT*

I began using this hypothetical in the early 1980s. At that time, the Court had concerns about pretextual police conduct.¹²² Lower courts occasionally inquired into whether a stop or search was pretextual.¹²³ Also, the Supreme Court had suggested that some traffic violations may be too trivial to support a full custodial arrest and subsequent search of the vehicle under the Fourth Amendment.¹²⁴ Well into the 2000s, though, and fueled in part

THE PEOPLE WE DON'T KNOW 6 (2019) (examining prejudiced and incompetent traffic stops as a symptom of social dysfunction in the United States).

122. *See, e.g.*, *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (approving an automobile inventory search considering that there had been “no showing that the police . . . acted in bad faith or for the sole purpose of the investigation”); *see also Steagald v. United States*, 451 U.S. 204, 215 (1981) (holding that using an arrest warrant to justify entry into a third party’s home is invalid due to an impermissible likelihood of its pretextual use); *Colorado v. Bannister*, 449 U.S. 1, 4 (1980) (per curiam) (finding that an officer’s approach of an automobile at a service station to issue a citation where he saw items that matched a description of recently stolen items was “entirely legitimate”); *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973) (leaving open the possibility that different facts may invite inquiry into whether using a “subsequent traffic violation arrest as a mere pretext for a narcotics search” would be unconstitutional); *id.* at 248 (Marshall, J., dissenting) (“There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search.”).

123. *See, e.g.*, *United States v. Smith*, 80 F.3d 215, 219–20 (7th Cir. 1996) (asking, but not reaching, the question of whether a traffic stop was pretextual where an officer pulled over defendant’s car because the air freshener hanging by a string from his rear-view mirror was a material “obstruction” of his view); *United States v. Scopo*, 19 F.3d 777, 786 (2d Cir. 1994) (Newman, C.J., concurring) (“[S]ome police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity—factors such as race or ethnic origin, or simply appearances that some police officers do not like”); *United States v. Strickland*, 902 F.2d 937, 940 (11th Cir. 1990) (“[I]nvestigatory stops are invalid as pretextual unless ‘a reasonable officer *would* have made the seizure in the absence of illegitimate motivation.’” (quoting *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986))); *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988) (“A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop.”), *overruled by United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995).

124. *See Knowles v. Iowa*, 525 U.S. 113, 114 (1998) (holding that a full search of a vehicle following issuance of a citation for speeding violated the Fourth Amendment); *see also Delaware v. Prouse*, 440 U.S. 648, 662–63 (1979) (“Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. . . . [P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the

by the War on Drugs, the answers to my hypothetical kept changing as police power kept expanding.

To wit: in *Whren v. United States*, plain-clothes vice-squad officers made a traffic stop while patrolling in an area known for drug trafficking.¹²⁵ Viewed objectively, one would be hard pressed to explain why those officers would be interested in writing a traffic ticket.¹²⁶ Of course, they were not. Instead, they observed two African American men and managed to escalate a traffic stop into a successful drug arrest.¹²⁷ A unanimous Court rejected the defendants' claim that the stop was pretextual.¹²⁸ If the officers had probable cause to make a traffic stop—even though these officers seemed indifferent to enforcing traffic laws—the stop was lawful.¹²⁹

The Court gave short shrift to concerns about racial profiling¹³⁰ and suggested that the motorists might raise an equal protection challenge.¹³¹ Of course, winning such a challenge is more theoretical than real.¹³²

So much for trying to limit discriminatory and arbitrary stops. But what then? What motorist does not violate some traffic statute on a regular basis? Who does not exceed the speed limit? If you doubt that, do an experiment the next time you are driving. See how many motorists stay at the posted speed. Indeed, if you find someone, see whether other motorists are

public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.” (citing *Adams v. Williams*, 407 U.S. 143, 146 (1972))).

125. 517 U.S. 806, 808 (1996).

126. Would (or should) an officer see a “truck with temporary license plates and youthful occupants” that remained at a stop sign “for what seemed an unusually long period of time” and reasonably conclude that there must be a traffic violation in the works? *Id.*

127. *See id.* at 808, 810.

128. *See id.* at 813–16.

129. *See id.* at 818–19 (“The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.”).

130. *Id.* at 813.

131. *Id.*

132. *See generally* David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73 (2003) (discussing U.S. courts' treatment of racial profiling cases post-*Whren* and post-9/11); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 164 (examining “the constitutionality of using racial classifications in police investigation[s]” under the “Fourth Amendment and the Equal Protection Clause”); Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001) (describing, evaluating, and presenting potential solutions to racial profiling problems in policing).

tailgating that driver. While police can stop almost any motorist, can that stop lead to a custodial arrest?

For many years, the Court left open the question whether some traffic offenses are so minor that allowing a custodial arrest for such an offense would violate the Fourth Amendment.¹³³ Several justices suggested that the Fourth Amendment imposed some limits on an officer's ability to make a custodial arrest.¹³⁴ However, when the Court finally addressed the question of when custodial arrests are appropriate during a routine traffic stop in *Atwater v. City of Lago Vista*, it rejected such a limitation.¹³⁵ It did so in an extreme example of overreaching by the police, demonstrating even further erosion of the Fourth Amendment. As summarized by the majority in a 5–4 decision:

According to Atwater's complaint (the allegations of which we assume to be true for present purposes), [Officer] Turek approached the truck and "yell[ed]" something to the effect of "[w]e've met before" and "[y]ou're going to jail." He then called for backup and asked to see Atwater's driver's license and insurance documentation, which state law required her to carry. . . . When Atwater told Turek that she did not have the papers because her purse had been stolen the day before, Turek said that he had "heard that story two-hundred times."

Atwater asked to take her "frightened, upset, and crying" children to a friend's house nearby, but Turek told her, "[y]ou're not going anywhere." As it turned out, Atwater's friend learned what was going on and soon arrived to take charge of the children. Turek then handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took Atwater's "mug shot" and

133. The Court consistently engaged in a case-by-case reasonableness-balancing test. "To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (alteration in original) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

134. See *Delaware v. Prouse*, 440 U.S. 648, 662–63 (1979) ("Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.").

135. 532 U.S. 318, 323 (2001).

placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on \$310 bond.¹³⁶

An angry officer who had prior experience with Atwater suggests some personal animus.¹³⁷ Escalating the confrontation in front of two young children underscores the insensitivity of the officer's conduct.¹³⁸ While Atwater is Caucasian,¹³⁹ it is easy to imagine officers making similarly unwarranted stops based on purely racial animus.¹⁴⁰

Consider also a spin-off possibility: What if Officer Turek thought that state law allowed him to make a custodial arrest when in fact it did not? The Supreme Court has found on similar facts that the arresting officer did not violate the Fourth Amendment.¹⁴¹

In Atwater's case, Officer Turek did not find evidence of criminal activity in her car.¹⁴² Atwater sued the city for a violation of 42 U.S.C. § 1983.¹⁴³ Reconsider the hypothetical above. Once an officer, even one making an arrest for a minor traffic offense, makes a custodial arrest without violating the Fourth Amendment, consider the scope of the search incident to that arrest.

The Court addressed that issue early in the War on Drugs. In *New York v. Belton*, an officer stopped a vehicle for speeding.¹⁴⁴ The officer developed

136. *Id.* at 324 (citations omitted).

137. Though the Court makes no mention of a personal history between the two, the officer's statements that "[w]e've met before" and "[y]ou're going to jail" suggest otherwise. *Id.*

138. Atwater was driving with her five-year-old and three-year-old with her in the front seat. *Id.* at 323.

139. Matthew Yi, *Justices OK Jail for Minor Infractions / Woman Was Arrested for Seat-Belt Offense*, SFGATE (Apr. 25, 2001), <https://www.sfgate.com/news/article/Justices-OK-jail-for-minor-infractions-Woman-2927870.php>.

140. *See State v. Ladson*, 979 P.2d 833, 836 (Wash. 1999) (en banc) (detailing a situation where two officers on gang patrol tail a car with two African-American men—one they had never seen before, one recognized from an unsubstantiated rumor—looking for a legal justification to make a stop, and the officers did not deny that the eventual stop was pretextual).

141. *See Virginia v. Moore*, 553 U.S. 164, 166, 178 (2008) (holding that a custodial arrest based on probable cause, although in violation of state law, is nonetheless lawful for purposes of the Fourth Amendment).

142. *See Atwater*, 532 U.S. at 324 (charging Atwater with only "driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance").

143. *Id.* at 325.

144. 453 U.S. 454, 455 (1981).

probable cause to believe that the four occupants of the vehicle possessed marijuana and that the vehicle may have been stolen.¹⁴⁵ Faced with four suspects, the officer ordered the four men to sit apart.¹⁴⁶ The officer then inspected the interior of the vehicle and found Belton's leather jacket.¹⁴⁷ Opening it on the scene, he found cocaine.¹⁴⁸ The Court upheld the search of Belton's jacket as a valid search incident to a lawful arrest.¹⁴⁹

The facts supported a finding that the officer acted reasonably: faced with four suspects, the lone officer had legitimate concerns about his safety and destruction of evidence.¹⁵⁰ The majority, interested in articulating a bright-line rule, went far beyond a potential narrow holding.¹⁵¹ Instead, the Court held that when an officer makes a lawful arrest of an occupant or recent occupant of a vehicle on the highway, the officer can reasonably search the interior passenger compartment of that vehicle.¹⁵² The Fourth Amendment would also allow a search of open or closed containers found in the vehicle.¹⁵³

Prior to *Belton's* demise, my hypothetical officer, even if he felt no concerns about safety and even if there was no evidence of the crime of arrest (speeding or a lane change without signaling), the Court gave him license to search anywhere in the vehicle. Uncertain was whether he could open locked containers, but elsewhere the Court held that an officer could search within the vehicle even when the search extended into passengers' possessions.¹⁵⁴

145. *Id.* at 455–56.

146. *Id.* at 456.

147. *Id.*

148. *Id.*

149. *Id.* at 462–63. Justice Stewart's opinion carried the votes of Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist—the four Nixon appointees. *See id.* at 454, 463, 472. Justice Stevens concurred but did not join in the majority's reasoning. *Id.* at 463. Three justices dissented. *Id.* (Brennan, J., dissenting, joined by Marshall, J.); *id.* at 472 (White, J., dissenting, joined by Marshall, J.).

150. *See id.* at 456 (majority opinion).

151. The Court had the legitimate opportunity to adhere to the “principle of primary justification” and limit its holding to situations where the concerns of officer safety and evidence destruction predominate.

152. *Belton*, 453 U.S. at 460.

153. *Id.*

154. *See Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (“We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search.”).

One can say so much about why the Court was wrong in *Belton*. Between the dissent, commentators, and lower courts, many have criticized the decision.¹⁵⁵ A few observations suffice here. The dissent offered many examples to show that the bright line was not nearly as bright as suggested.¹⁵⁶ Professor Wayne LaFave took no pleasure in the majority's citation to his article, which supported bright lines in some circumstances, arguing that *Belton* was not a good example of the need for bright lines.¹⁵⁷ Many lower courts resisted application of *Belton*; in some instances, state courts relied on their constitutional equivalent of the Fourth Amendment, without more, to find such searches illegal.¹⁵⁸

155. See *id.* at 463 (Brennan, J., dissenting) (“The Court today turns its back on the product of [its search-incident-to-lawful-arrest] analysis, formulating an arbitrary ‘bright-line’ rule applicable to ‘recent’ occupants of automobiles that fails to reflect *Chimel*’s underlying policy justifications.”); see also Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 697 (examining the Court’s claims justifying its *Belton* rule and empirical data on police practices and arrests) (“[T]he fact of custodial arrest should allow the police to search the clothing the arrestee is wearing, but not the area around him, unless particular and unusual facts justify such a search. The Court should reexamine *Chimel* and *Belton*.”). Many lower courts have rejected *Belton*’s reasoning as well. See *infra* note 158.

156. *Belton*, 453 U.S. at 469 (Brennan, J., dissenting) (“The Court’s new approach leaves open too many questions and, more important, it provides the police and the courts with too few tools with which to find the answers.”).

157. After *Belton*, Professor LaFave explained his position on “bright lines” more fully. See Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith”*, 43 U. PITT. L. REV. 307, 325–26 (1982).

158. See, e.g., *State v. Gaskins*, 866 N.W.2d 1, 12 (Iowa 2015) (“We now agree with the approach taken by the courts that have rejected the *Belton* rule that authorized warrantless searches of containers without regard to the *Chimel* considerations of officer safety and protecting evidence.”); see also *State v. Rowell*, 188 P.3d 95, 100 (N.M. 2008) (“[W]e decline the invitation of the State to follow the federal line of cases represented by *Belton*”); *Holman v. State*, 183 P.3d 368, 377 (Wyo. 2008) (“[Following *Belton*] would be creating a bright-line rule allowing the search of an entire vehicle any time a lone driver is arrested, irrespective of probable cause or other surrounding circumstances.”); *State v. Bauder*, 924 A.2d 38, 45, 47 (Vt. 2007) (“The concerns identified in the *Belton* dissent have continued to gather support from courts and commentators alike. . . . [Vermont] rejected *Belton* in favor of the traditional rule requiring that officers demonstrate a need to secure their own safety or preserve evidence of a crime”); *Camacho v. State*, 75 P.3d 370, 376 (Nev. 2003) (“[W]e hold that the Nevada Constitution requires both probable cause and exigent circumstances to justify a warrantless search of an automobile incident to a lawful custodial arrest.”); *State v. Pierce*, 642 A.2d 947, 955, 959 (N.J. 1994) (“The Court’s holding in *Belton* has been widely criticized. . . . We hold only that under article I, paragraph 7 of the

Although Justice Stewart wrote the majority opinion in both *Belton* and *Chimel*, most commentators reject his claim that the cases are consistent.¹⁵⁹ As suggested above, *Chimel* is a classic Warren Court-era case focusing on the principle of particular justification.¹⁶⁰ *Belton*'s bright-line rule, on the other hand, is over-inclusive: the rule allowed police to search based on the legal arrest in a host of situations in which the underlying justifications did not apply.¹⁶¹ But *Belton*'s bright line may not have been as bright as it seemed, as it left much room for interpretation on slightly different facts: What if, instead of four suspects and one officer, several police surrounded a single driver and detained the driver? What if occupants of the vehicle have left the vehicle and are now some distance from the car?¹⁶² Are they still "recent occupant[s]?"¹⁶³ What if the suspect is approaching her vehicle—does the rule apply in such a case?¹⁶⁴ What if police follow sound procedures by putting the motorist in the police vehicle and only later seek to return to the vehicle for a full search of its contents?¹⁶⁵

New Jersey Constitution the rule of *Belton* shall not apply to warrantless arrests for motor-vehicle offenses.”).

159. See, e.g., Moskowitz, *supra* note 155, at 673–74, 677 (“[S]trange scenario[s] would have to be the norm for *Belton* to mesh with *Chimel*'s rationales for a search incident to arrest.”).

160. See *supra* Section II.A.

161. The Court itself noted how the rule applied to situations outside any justifying principle. See *Belton*, 453 U.S. at 461 (“It is true, of course, that these containers [which police are now lawfully able to search] will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested.”).

162. The Court held that it did not affect the police's ability to search a suspect's vehicle when he had already parked and exited the car before his arrest. See *Thornton v. United States*, 541 U.S. 615, 623–24 (2004) (applying the *Belton* rule “[s]o long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as [the defendant] was [in *Thornton*], officers may search that vehicle incident to the arrest”).

163. *Belton*, 453 U.S. at 460.

164. The dissenters in *Belton* raised similar concerns. *Id.* at 470 (Brennan, J., dissenting) (“Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? Does it matter whether the police formed probable cause to arrest before or after the suspect left his car?”).

165. Lower courts divided on this question following *Belton*. Compare *United States v. McCrady*, 774 F.2d 868, 870, 875 (8th Cir. 1985) (upholding a search of an automobile which took place immediately after an occupant had been arrested and placed in the police car), with *United States v. Vasey*, 834 F.2d 782, 787 (9th Cir. 1987) (suppressing evidence from a search while the defendant was handcuffed in a police vehicle because “it is evident that the search was not properly limited to the area within Vasey's immediate control”).

The previous examples demonstrate why the Court would eventually overrule *Belton*. Despite Justice Stevens's attempt to deny that his lead opinion in *Arizona v. Gant* overruled *Belton*,¹⁶⁶ almost no one takes his claim seriously.¹⁶⁷ For now, however, *Belton* is a dramatic example of the Court's War on Drugs case law, further eroding Fourth Amendment protections. That erosion was seemingly in the name of advancing the War on Drugs.¹⁶⁸

By the late 2000s, the Court had had enough with such sweeping police power: as indicated, the Court overruled *Belton*.¹⁶⁹ Nonetheless, *Belton* demonstrates yet another example of the Court's willingness to erode Fourth Amendment protection to advance the War on Drugs.

4. Unknowing and Irrational Waiver of Fourth Amendment Rights or "Consent?"

Police have largely unchecked authority to make traffic stops. So, assume that, lacking authority to arrest or probable cause to search the vehicle, an officer asked the driver to consent to a search of her vehicle. Assume also—as is so often the case—the driver did consent, leading to the discovery of a significant amount of drugs. Did the driver make a voluntary and knowing waiver of her Fourth Amendment right to be free from an unreasonable search?

166. *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (rejecting a broad reading of *Belton*).

167. Even other Justices on the Court saw that *Gant* overruled *Belton*. *Id.* at 355 (Alito, J., dissenting) ("Today's decision effectively overrules those important decisions [*Belton* and *Thornton*], even though respondent *Gant* has not asked us to do so."); see, e.g., Barbara E. Armacost, *Arizona v. Gant: Does it Matter?*, 2009 SUP. CT. REV. 275, 278–79 ("For all practical purposes [*Gant*] means the end of *Belton* searches incident to arrest . . .").

168. Like in many cases in which the Court restricted or cabined Fourth Amendment protections, the defendant in *Belton* faced drug possession charges. *Belton*, 453 U.S. at 462 ("It is not questioned that the respondent was the subject of a lawful custodial arrest on a charge of possessing marijuana."); Rudovsky, *supra* note 1, at 240 n.16 (listing seventeen cases where the Court "sustained searches or seizures in the drug enforcement context in the ten-year period of 1980–1990").

169. *Gant*, 556 U.S. at 343 ("To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception. . . . Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."); see also *Davis v. United States*, 564 U.S. 229, 234–35 (2011) (recognizing that *Gant* "adopted a new, two-part rule," abrogating *Belton*).

If that hypothetical seems extreme, look at *Florida v. Jimeno*.¹⁷⁰ Although the issue in *Jimeno* related to the scope of the defendant's consent,¹⁷¹ the facts provide a dramatic example of the irrationality of many offenders' consent to search. There, an officer stopped the defendant for a traffic violation and told the defendant that he had reason to believe that the defendant possessed drugs.¹⁷² The officer lacked probable cause to arrest or to search.¹⁷³ The defendant consented to the search, leading to the discovery of a kilogram of cocaine.¹⁷⁴ Consider whether the defendant made an informed choice whether to consent to the search of his vehicle. If, as it seems was the case, the officer lacked a justification to arrest or to search the vehicle, the defendant faced the following options: to refuse to consent and—absent a means for the officer to develop probable cause—leave the scene, or to allow the search and face many years in prison.¹⁷⁵

The Supreme Court's consent case law began to evolve in the 1970s, after the shift in the Court's makeup.¹⁷⁶ In *Schneekloth v. Bustamonte*, the Court resolved a question that had divided lower courts: what did the state have to show when it claimed that a defendant consented to a search?¹⁷⁷ Arguably, a person consenting to a search is waiving one's Fourth Amendment rights. If so, the state would need to show that the decision was informed. Some courts held that the state had to demonstrate that the suspect knew of the right to refuse to consent.¹⁷⁸ Defendants relied on the FBI's practice of warning suspects of their right to withhold consent as support that the practice was practical.¹⁷⁹ Further, courts that supported such a showing could point to *Miranda v. Arizona* for support.¹⁸⁰ The *Miranda* Court was concerned with a case-by-case, voluntariness approach

170. 500 U.S. 248 (1991).

171. *Id.* at 249.

172. *Id.*

173. The officer had only "overheard . . . what appeared to be a drug transaction over a public telephone." *Id.*

174. *Id.* at 250 (emphasis added).

175. Federal sentencing statutes for the kilogram of cocaine require between five and forty years of imprisonment, a fine of \$5,000,000, or both. 21 U.S.C. § 841(b)(1)(B) (2018).

176. *See supra* Section II.B.

177. 412 U.S. 218, 223 (1973).

178. *See, e.g.,* Schoepflin v. United States, 391 F.2d 390, 399 (9th Cir. 1968) (remanding on the issue of whether the defendant "knew he could freely and effectively withhold his consent").

179. *Bustamonte*, 412 U.S. at 287 (Marshall, J., dissenting).

180. *Id.* at 281.

and insisted on warnings to assure that the suspect knew that silence was an option.¹⁸¹ *Bustamonte* rejected such a requirement.¹⁸²

Though not entirely clear until subsequent cases, the Court rejected the idea that a consent to search is a waiver of one's Fourth Amendment rights.¹⁸³ Instead, the Court's analysis treats consent as a matter of reasonableness.¹⁸⁴ Rather than focusing on the defendant's state of mind, the Court asks whether police were reasonable in their conduct,¹⁸⁵ including cases where they lack consent, but reasonably believe that they have consent.¹⁸⁶ While the Court decided *Bustamonte* in the 1970s, the Court has repeatedly expanded its reasonableness analysis into the 1990s and beyond.¹⁸⁷ This reasonableness inquiry proved to be a powerful tool in the War on Drugs.

Case law is replete with instances like *Jimeno* where suspects seemingly make irrational choices. Instead of refusing consent, they acquiesce; instead of driving away in freedom, they condemn themselves to prison terms.¹⁸⁸

181. See *Miranda v. Arizona*, 384 U.S. 436, 465 (1966) (“The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights . . .”).

182. 412 U.S. at 248–49.

183. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (“But as we have discussed, what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*.”).

184. See *id.* at 188–89 (holding that warrantless entry is valid when based upon consent of third party whom police, at time of entry, reasonably believe to possess common authority over premises); see also *Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (holding that a warrantless search was unreasonable as to defendant who was physically present and expressly refused to consent); *Fernandez v. California*, 571 U.S. 292, 298 (2014) (reasoning that a “warrant is generally required for a search of a home,” but “the ultimate touchstone of the Fourth Amendment is reasonableness”) (citations omitted).

185. See *Rodriguez*, 497 U.S. at 185 (“It is apparent that in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”).

186. See *id.* at 188–89 (clarifying that the Court did not decide the issue of reasonableness on the facts of the case but held that if the search was reasonable, then it would have been constitutionally permissible).

187. See, e.g., *id.*; *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (explaining that the correct question is “whether the warrantless search of a home is reasonable and hence constitutional”).

188. See, e.g., RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 19 (1985) (reporting that one of the most

There are numerous cases where officers have stopped motorists on the highway and managed to find drugs, despite lacking any level of suspicion.¹⁸⁹ Consent has proven to be a powerful tool for law enforcement. In shifting the focus away from the idea that the consenting individual is waiving a constitutional right, the Court has never adequately explained why reasonableness, not waiver, is the critical question in such cases. The *Bustamonte* Court seemed more interested in upholding a useful police tool than in offering a coherent principle justifying consent searches.¹⁹⁰ No doubt, the Court's consent case law has expanded police power to search for drugs without probable cause.¹⁹¹ While advancing the War on Drugs, the Court's consent case law continued to erode Fourth Amendment protections.

common warrant "exceptions" is consent and suggesting that ninety-eight percent of warrantless searches fall under the "consent" umbrella, even though there is no precise data on point).

189. *See, e.g.*, *People v. Zuniga*, 372 P.3d 1052, 1054 (Colo. 2016) (holding that odor of marijuana could contribute to probable cause determination); *see also Illinois v. Caballes*, 543 U.S. 405, 406, 410 (2005) (holding that an otherwise lawful traffic stop where another officer arrived at the scene while the stop was in progress and used a narcotics-detection dog to sniff around the exterior of the motorist's vehicle did not infringe the motorist's Fourth Amendment rights).

190. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) ("[The] need for police questioning [is] a tool for the effective enforcement of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished.") (citations omitted)). Remember that officers have almost unchecked power to stop any motorist for some traffic violation. Defendants are largely unable to challenge an officer's racial motivation in making the vehicle stop. Further, many commentators believe that minority members are less likely than non-minorities to refuse consent out of fear of unbridled police power.

191. *See, e.g.*, *Florida v. Bostick*, 501 U.S. 429, 431–32, 439–40 (1991) (holding that random bus searches conducted pursuant to passenger's consent are not per se unconstitutional even where there is no probable cause to search); *see also Draper v. United States*, 358 U.S. 307, 309–10, 314 (1959) (holding that where a government agent was given information by an informer who had proved reliable in the past and agent observed defendant who fit the description, there were reasonable grounds for believing that defendant was committing a violation of the federal laws relating to narcotic drugs). For a percentage of searches resulting from "consent," *see VAN DUIZEND ET AL.*, *supra* note 188.

III. Reclaiming Constitutional Principles?

By the 2010s, a consensus began to emerge that the War on Drugs was a failure. As developed in this section, the Supreme Court seems to have noticed that fact and begun to revitalize the Fourth Amendment.

As discussed above, *New York v. Belton* offered police extensive authority to search a person's vehicle as long as the officer made a lawful arrest.¹⁹² In theory, the Court's ruling created a bright-line rule for police making such arrests.¹⁹³ At the same time, especially when viewed in conjunction with other cases, *Belton* created authority that grossly exceeded the underlying rationales for such searches.¹⁹⁴

The Court's decision in *Thornton v. United States*¹⁹⁵ signaled trouble for *Belton*. There, the police had not stopped Thornton's vehicle, but saw that his license plate was not registered for his vehicle.¹⁹⁶ Police approached him after he had already exited his vehicle.¹⁹⁷ The police arrested him and placed him in the back of a patrol car.¹⁹⁸ Any claim that the defendant could destroy evidence or grab a weapon would have been frivolous.¹⁹⁹ Despite that, the Court authorized the search of Thornton's vehicle.²⁰⁰ Three justices

192. 453 U.S. 454 (1981); *see also infra* Section II.C.3.

193. *See Belton*, 453 U.S. at 462–63 (creating the bright-line rule that incident to a lawful arrest, the police may search the area within the arrestee's immediate control, including the passenger compartment and anything found therein).

194. *See infra* Section II.C.3 (discussing *Belton* and the underlying rationales for exceptions to the probable cause plus warrant requirements).

195. 541 U.S. 615 (2004).

196. *Id.* at 618.

197. *Id.*

198. *Id.*

199. Thornton was not in his vehicle nor near it at the time the officer approached him. This, seemingly, would signal that *Belton* should not govern given that the rationale under *Belton* includes concerns for officer safety when a vehicle passenger is in reaching distance of closed compartments. *Id.* at 625 (Scalia, J., concurring) (“When petitioner’s car was searched in this case, he was neither in, nor anywhere near, the passenger compartment of his vehicle. Rather, he was handcuffed and secured in the back of the officer’s squad car. The risk that he would nevertheless ‘grab a weapon or evidentiary ite[m]’ from his car was remote in the extreme. The Court’s effort to apply our current doctrine to this search stretches it beyond its breaking point, and for that reason I cannot join the Court’s opinion.”).

200. *See id.* at 621, 623–24 (majority opinion) (holding that *Belton* governs even when an officer does not make contact until the person arrested has left the vehicle and that, under *Belton*, the Fourth Amendment allows an officer to search a vehicle’s passenger

dissented, signaling grave doubts about the soundness of the holding.²⁰¹ Justice Scalia, joined by Justice Ginsburg, concurred in the judgment but expressed doubts about *Belton* as well.²⁰²

Ultimately, the Court overruled *Belton* in *Arizona v. Gant*—despite Justice Stevens’ claim to the contrary in his majority opinion.²⁰³ *Gant* reverted to an earlier method of analysis: framing the warrant clause as the major premise of the Fourth Amendment, and requiring any exceptions to probable cause and warrants to be tied to an underlying rationale supporting the exception.²⁰⁴ Hence, police can search a vehicle incident to a lawful arrest only if the arrestee can still gain access to the interior of the vehicle (officer safety rationale) or if officers have a reason to believe that evidence of the offense of arrest remains in the vehicle (destruction of evidence rationale).²⁰⁵

Technology has always presented the Court with tough-to-decide cases. For example, when the Court first began to consider whether the Fourth Amendment applied in cases where the police engaged in wiretapping, the

compartment as a contemporaneous incident of arrest, even when officer does not make contact until the person arrested has already left the vehicle).

201. *See id.* at 624–25 (O’Connor, J., concurring in part); *see id.* at 636 (Stevens, J., joined by Souter, J., dissenting).

202. *See id.* at 625 (Scalia, J., joined by Ginsburg, J., concurring) (“I see three reasons why the search in this case might have been justified to protect officer safety or prevent concealment or destruction of evidence. None ultimately persuades me.”).

203. *See* 556 U.S. 332, 343 (2009) (“Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle’s passenger compartment will not be within the arrestee’s reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant’s arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it ‘in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.’ Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”) (citation omitted).

204. *See id.* at 337–38 (“Relying on our earlier decision in *Chimel*, . . . the search-incident-to-arrest exception to the warrant requirement is justified by interests in officer safety and evidence preservation. When ‘the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer,’ the court concluded, a ‘warrantless search of the arrestee’s car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.’”) (citations omitted).

205. *See id.*

Court initially found that it did not because words are not capable of being seized.²⁰⁶ Further, because of the facts of the case at issue, the police did not trespass on the defendant's property.²⁰⁷ Over time, the Court reversed itself on both grounds.²⁰⁸ First, it held that when police use listening devices they *are* seizing words.²⁰⁹ Later, in *Katz*, the Court rejected the need for a technical trespass.²¹⁰

Throughout the War on Drugs, state and federal governments usually won in cases involving technology.²¹¹ For example, the Court held in *United States v. Knotts* that the police did not conduct a search when they attached a beeper to a container that they knew would be in the defendant's possession.²¹² Even though the beeper allowed the police to locate the defendant without fear of detection, the Court found that such a device

206. *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 466–66 (1928) (holding that wiretapping of defendant did not constitute an unreasonable search or seizure because the insertions of the wires were made without trespass upon any property and finding no justification for extending the persons, places, and things language of the Fourth Amendment to spoken words).

207. *Id.* at 466.

208. *See Katz v. United States*, 389 U.S. 347, 353 (1967) (“Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any ‘technical trespass under local property law.’” (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

209. *See id.* (emphasis added).

210. *See id.* (holding that the government's activities in electronically listening to and recording defendant's words spoken into telephone receiver in public telephone booth violated the privacy upon which defendant justifiably relied and thus constituted a “search and seizure” within the Fourth Amendment, and the fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth had no constitutional significance).

211. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445, 451–52 (1989) (determining that an expectation of privacy from aerial observation by helicopters legally within the airspace above one's partially open-roof greenhouse is unreasonable); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (determining that an expectation of privacy from aerial observation of one's fenced-in yard is unreasonable); *Knotts v. United States*, 460 U.S. 276, 285 (1983) (determining that monitoring beeper signals did not invade any legitimate expectation of privacy and, thus, was not a search or seizure); *Smith v. Maryland*, 442 U.S. 735, 736, 745–46 (1979) (using a pen register to record the numbers dialed by a phone did not invade any legitimate expectation of privacy and, thus, was not a search and no warrant was required).

212. 460 U.S. 276, 278, 285 (1983).

merely enhanced the police officers' senses.²¹³ After all, the defendant appeared on public highways, in open view to members of the public.²¹⁴

The latter point—that a person knowingly reveals information to members of the public—was a pivotal argument in subsequent cases. Thus, when a suspect makes a phone call from his home phone, he reveals information to his phone company.²¹⁵ If police then gain access to that same information, the suspect cannot claim a reasonable expectation of privacy because he already knowingly exposed the information to a third party.²¹⁶

Beginning in 2012, the Court confronted the reality that technology has changed since the 1980s.²¹⁷ In *United States v. Jones*, the government tracked the defendant's car for twenty-eight days by attaching a GPS tracking device to the vehicle.²¹⁸ The device relayed two thousand pages of information about Jones' movements.²¹⁹ The government argued that the federal agents' conduct was not a search, largely in reliance on the Court's earlier holding in *Knotts*.²²⁰ During oral argument, some of the questions and answers focused on that issue: how were the facts different from those

213. *See id.* at 282.

214. *See id.* (reasoning that a person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another); *see also* *United States v. Karo*, 468 U.S. 705, 709, 720 (1984) (reasoning that where monitoring of beeper revealed nothing about contents of locker that two respondents had rented, there was no "search" of that locker, which was identified only when agents traversing public parts of facility found that smell of ether was coming from specific locker); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."). Notice that the holding in *Kyllo* left open another knowing exposure to the public exception wherein a search would not be found if the technology at issue was in public use or the heightened technology was not needed to discover the contents of the home.

215. *See, e.g.*, *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (holding that installation and use of a pen register by a telephone company does not constitute a "search" within the meaning of the Fourth Amendment).

216. *See id.* at 745–46.

217. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring) (discussing how to apply the Fourth Amendment analysis to cover changing and evolving technology).

218. *Id.* at 403.

219. *Id.*

220. *Id.* at 408–09.

in *Knotts*?²²¹ If following a suspect's vehicle via a beeper is not a search, how can it be a search in *Jones*?²²² Would the agents' conduct become a search on the second day, the third day or sometime thereafter?²²³

The *Jones* Court was unanimous in finding for the defendant: the agents' conduct was a search.²²⁴ The five-justice majority found that the federal agents physically trespassed by attaching the GPS device to the car.²²⁵ By resolving the case via physical trespass, the Court sidestepped the harder question: when does the government's conduct cross the threshold from mere observation to a Fourth Amendment search?²²⁶ Justice Alito, writing for four justices, would have found for Jones on reasonable expectation of privacy grounds.²²⁷ He recognized that dramatic changes in technology present hard questions for the Court under its *Katz* expectation of privacy analysis.²²⁸ He also suggested that short-term monitoring, as in *Knotts*, was

221. *United States v. Jones*, OYEZ, <https://www.oyez.org/cases/2011/10-1259> (last visited Sept. 16, 2020).

222. *See Jones*, 565 U.S. at 408–09 (distinguishing the facts of *Knotts* from those at issue).

223. *See id.* at 412 (“What of a 2–day monitoring of a suspected purveyor of stolen electronics? Or of a 6–month monitoring of a suspected terrorist? We may have to grapple with these ‘vexing problems’ in some future case where a classic trespassory search is not involved.”). *See generally* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012).

224. *Jones*, 565 U.S. at 404 (majority opinion); *id.* at 414 (Sotomayor, J., concurring); *id.* at 431 (Alito, J., concurring).

225. *Id.* at 404–05 (majority opinion).

226. *See id.* at 412 (“It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.”).

227. *Id.* at 419 (Alito, J., concurring) (“I would analyze the question presented in this case by asking whether respondent’s reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.”).

228. *Id.* at 427 (“The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.”) (citations omitted) (footnote omitted); *id.* at 430 (“To date, however, Congress

not a search, but that he would have considered longer term GPS monitoring as constituting a search.²²⁹ Given that the government monitored Jones for four weeks, Alito concluded that this surveillance crossed the line and became a Fourth Amendment search.²³⁰ Only Justice Sotomayor, concurring in judgement to give Scalia a fifth vote, suggested that even short-term GPS monitoring might violate the “existence of a reasonable societal expectation of privacy.”²³¹

Similarly, the Court narrowed its search-incident-to-lawful-arrest doctrine in light of developing technology.²³² In *Riley v. California*, a nearly unanimous Court found that an officer who finds a person’s cell phone (even a flip-phone) may not look for evidence in the phone incident to that arrest.²³³ Lower courts that had previously upheld such searches analogized the cell phone to a package, like the crumpled-up cigarette package found on the suspect in *United States v. Robinson*.²³⁴ The Court, however, recognized how profoundly different a cell phone is from other kinds of packages.²³⁵

and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.”).

229. *Id.* at 430 (“Under this approach, relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”) (citation omitted).

230. *Id.*

231. *Id.* at 415, 416 (Sotomayor, J., concurring) (“In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”) (citation omitted).

232. *See, e.g.*, *Riley v. California*, 573 U.S. 373, 385 (2014) (“These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”).

233. *Id.* at 403.

234. *See, e.g.*, *United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007) (citing *Robinson* for the proposition that “[t]he permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee’s person”).

235. *Riley*, 573 U.S. at 387, 388–91 (discussing in depth the differences between cell phones and other packages, especially noting that under the search-incident-to-arrest exception, interest in protecting police officers’ safety does not justify dispensing with warrant requirement before officers can search digital data on arrestees’ cell phones because

Finally, in *Carpenter v. United States*, modern technology again changed the way the Court conducted its Fourth Amendment analysis.²³⁶ There, after the arrest of suspected robbers, prosecutors had petitioned the lower court for an order to obtain cell phone records for the petitioner.²³⁷ On review, the Supreme Court held that a person has a justifiable expectation of privacy in data that reveals such “detailed” and “encyclopedic” information about one’s activities.²³⁸ Chief Justice Roberts emphasized that the Court’s decision was a narrow one, leaving open several related questions.²³⁹

One might explain *Jones*, *Riley*, and *Carpenter* as merely technology cases, not a signal of the Court’s general willingness to rethink its War on Drugs era Fourth Amendment case law. However, *Gant* is not the only case that suggests a broader willingness to rethink those cases. In *Florida v. Jardines*, for example, the police attempted to corroborate a tip that the defendant was growing marijuana in his home.²⁴⁰ Officers did so by taking a drug-sniffing dog to the defendant’s home.²⁴¹ The dog signaled the presence of marijuana.²⁴² After the dog’s signaling, one of the detectives applied for, and received, a search warrant that led to the discovery and seizure of marijuana in the defendant’s home.²⁴³

Had the Court wanted to rely on War on Drugs case law, it could have found for the state. In one case after another, the Court had previously found that a person does not have a reasonable expectation of privacy when members of the public have access to information claimed to be private.²⁴⁴

digital data stored on phones could not itself be used as weapon to harm officers or to effectuate arrestees’ escape).

236. *See* 138 S. Ct. 2206, 2217, 2223 (2018) (reasoning that a person does not surrender all Fourth Amendment protection by venturing into the public sphere, and to the contrary, what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected).

237. *Id.* at 2212.

238. *Id.* at 2216, 2223.

239. *Id.* at 2220.

240. 569 U.S. 1, 3–4 (2013).

241. *Id.*

242. *Id.* at 4.

243. *Id.*

244. *See, e.g.,* *California v. Greenwood*, 486 U.S. 35, 41–42 (1988); *Oliver v. United States*, 466 U.S. 170, 182–83 (1984); *United States v. Knotts*, 460 U.S. 276, 285 (1983); *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979). Remember *Ciraolo*, where the Court found that police did not conduct a search after they developed a view of the defendant’s fenced-in backyard from the vantage of a small airplane because “[a]ny member of the [flying] public” would have the same view. *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

As such, in *Jardines*, the Court might easily have found, based on its War on Drugs cases, that exposing the defendant's home to a dog sniff was not a search.²⁴⁵ Nevertheless, writing for five justices, Justice Scalia found that the police conduct amounted to a trespass, thereby implicating the Fourth Amendment.²⁴⁶ While also joining Justice Scalia in judgment, Justices Kagan, Ginsburg, and Sotomayor found that the conduct amounted to a search under its traditional *Katz* reasonable expectation of privacy analysis.²⁴⁷

The Court did not care that a person in flight might lack the incentive to look closely at activity in the defendant's backyard—as opposed to the police, who carefully scrutinized activity in the defendant's curtilage. *See id.* at 213–14 (“Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.”) (footnote omitted)); *see also id.* at 224–25 (Powell, J., dissenting) (“But the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the airspace. Members of the public use the airspace for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards. Here, police conducted an overflight at low altitude solely for the purpose of discovering evidence of crime within a private enclave into which they were constitutionally forbidden to intrude at ground level without a warrant. It is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion into their residential areas.”) (footnote omitted).

245. *See* 569 U.S. at 10–11 (“[T]he Government argued that the *Katz* standard ‘show[ed] that no search occurred,’ as the defendant had ‘no ‘reasonable expectation of privacy’” in his whereabouts on the public roads—a proposition with at least as much support in our case law as the one the State marshals here.”) (citations omitted); *id.* at 17 (Alito, J., dissenting) (“The Court's decision is also inconsistent with the reasonable-expectations-of-privacy test that the Court adopted in *Katz* A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectable by a dog, cannot be smelled by a human. For these reasons, I would hold that no search within the meaning of the Fourth Amendment took place in this case, and I would reverse the decision below.”).

246. *See id.* at 3–4, 11–12 (holding that law enforcement officers' use of drug-sniffing dog on front porch of home to investigate an unverified tip that marijuana was being grown in the home was a trespassory invasion of the curtilage which constituted a “search” for Fourth Amendment purposes).

247. *Id.* at 12 (Kagan, J., concurring) (“A stranger comes to the front door of your home carrying super-high-powered binoculars. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your ‘visitor’ trespassed on your property, exceeding the license you have granted

Perhaps not surprisingly, all these cases, except *Carpenter*, involved drugs. Obviously, technology poses difficult challenges for the Court. However, they can be read more broadly than simply rethinking the Court's technology approach. The decisions seem to demonstrate a willingness to reevaluate the Court's War on Drugs Fourth Amendment case law and a willingness to reinvigorate Fourth Amendment protection.

Constitutional history does not move in one direction. One can find examples in the past when the Court's Fourth Amendment case law has waxed and waned.²⁴⁸ Often, such movement correlates with changing public attitudes.²⁴⁹ At times, historical trends have led to liberalized rulings.²⁵⁰ Almost certainly, the Warren Court justices were acutely aware of the Nazi and Soviet experiences where police routinely violated human rights.²⁵¹ Such concerns influenced the Court towards expanding basic protections.²⁵² Of course, public opinion works in the opposite direction as well. For example, the public perception that the Warren Court's liberal rulings increased crime helped lead to Richard Nixon's victory in 1968,²⁵³ and his addition of four new Justices in two years helped erode many of those protections.²⁵⁴ Similarly, public panic about drugs in the 1980s led to diminished Fourth Amendment protection for criminal defendants.²⁵⁵ We are now at another crossroads.

to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your 'reasonable expectation of privacy,' by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too.") (citations omitted).

248. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841–44 (1994) (discussing shifting attitudes about Fourth Amendment rights).

249. See *id.* at 843 (discussing connection between civil rights movement and Fourth Amendment case law).

250. See *id.*

251. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (reasoning that due process encompasses an evolving set of fundamental rights that changes with the advancing standards of a free society but that nevertheless there is no question that the right to privacy and freedom from its arbitrary invasion by federal or state police is fundamental). For a discussion of how the public revelation of the Nazi atrocities influenced the Supreme Court, see Steiker, *supra* note 248, at 842–43 (discussing Nuremberg's influence on Fourth Amendment jurisprudence).

252. See Steiker, *supra* note 248, at 843–44.

253. See BAKER, *supra* note 58, at 243–49.

254. See Michael Vitiello, *The Warren Court's Eyewitness Identification Case Law: What If?*, 51 U. PAC. L. REV. 867, 874–75 (2020).

255. See *id.* at 868–69.

Below, this Article discusses some issues that have arisen in states where medical and/or recreational marijuana are lawful.²⁵⁶ As developed there, I see a willingness to expand Fourth Amendment protection.²⁵⁷ However, a few state courts are reexamining earlier precedent.²⁵⁸ Does this begin a new era in which courts will reclaim Fourth Amendment protections? As developed below, I believe so.²⁵⁹

IV. Legalized Marijuana and Probable Cause, Drug-Sniffing Dogs, and Helicopters

A. Legal Marijuana and Probable Cause

Assume that a person lives in a state that has legalized the medical and/or recreational use of marijuana. Assume further that an officer encounters that individual and observes the person using marijuana. Does the officer have probable cause to arrest the individual or to search the person's immediate area?

One scholar has summarized the law generally without reference to legalization:

[A]t least at the Supreme Court level, marijuana has played a central role in cases where probable cause or reasonable suspicion was based at least in part on an officer's "plain smell." And lower court cases show that officers continue to find it easy to detect the presence of marijuana while engaged in other lawful investigative enterprises. Police in search-and-seizure cases claim to have smelled burned or burning marijuana, unburned marijuana, and the odor of marijuana lingering on a subject's clothing.²⁶⁰

Should the same rules apply post-legalization?

Early case law said yes, almost universally. *People v. Strasburg*, decided by a middle appellate court in California, is a typical example of this application.²⁶¹ The facts in the case are convoluted. The essential facts,

256. See *infra* Part IV.

257. See *infra* Part IV.

258. See *infra* Part IV.

259. See *infra* Part IV.

260. Mandiberg, *supra* note 1, at 39–41.

261. 56 Cal. Rptr. 3d 306, 308 (Ct. App. 2007) (holding that defendant's prescription for medical marijuana did not deprive officer of a basis to detain or frisk defendant).

however, are as follows: a Napa police officer approached a car in which Strasburg and another person were sitting.²⁶² As he did so, the defendant opened his car door.²⁶³ The officer smelled marijuana.²⁶⁴ The defendant admitted that he possessed cannabis but tried to show the officer his medical marijuana authorization card.²⁶⁵ The officer refused to look at the card.²⁶⁶

The encounter between the officer and the defendant escalated,²⁶⁷ as such incidents often do. The officer ended up ordering the defendant out of the car.²⁶⁸ An ensuing search resulted in the discovery of twenty-three ounces of marijuana and a scale.²⁶⁹ The appellate court, upholding the police conduct, agreed with the trial court's finding that "once an officer smells marijuana coming from a car that officer can search the car for marijuana."²⁷⁰ The defendant did not present "any authority that possessing a medical marijuana card deprives the officer of the right to continue with that investigation."²⁷¹ Rephrased, the officer had probable cause to believe that the suspect, even with a marijuana card, was violating state law.

Such a ruling was consistent with cases in other states.²⁷²

The Supreme Court of Arizona, for example, emphasized the fact that its medical marijuana law "did not decriminalize the possession or use of marijuana generally" and instead "makes marijuana legal in only limited circumstances." In reaching the same conclusion, the Michigan Court of Appeals noted that its state's medical marijuana law was a "very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan." . . .

262. *Id.* at 307.

263. *Id.*

264. *Id.*

265. *Id.* at 307–08.

266. *Id.* at 308.

267. *See id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *See* Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 761–62 (2016) (explaining that states with medical marijuana statutes, such as Arizona, Michigan, and New Jersey, have all held that possession of illegal marijuana can still be probable cause for a search).

. . . The Vermont Supreme Court . . . found the odds that the “odor of fresh marijuana” may be coming from legally possessed medical marijuana to be a “small possibility,” insufficient to “negate the State’s probable cause to search”²⁷³

The Supreme Court’s rather low bar for probable cause could be interpreted to support the results reached in California, Arizona, and Michigan. The Court has found that “innocent behavior *frequently* will provide the basis for . . . probable cause.”²⁷⁴ The Fourth Amendment’s probable cause standard “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”²⁷⁵ Even if the Supreme Court demanded stronger support for a probable cause finding, it would still be likely that—especially in the early days of medical marijuana—most marijuana users were not medical marijuana users.²⁷⁶ Hence, as a matter of probabilities, an officer observing someone smoking marijuana would likely be correct in believing that the marijuana user was violating state law.

For many years, Massachusetts was an outlier. Because possession of one ounce or less of marijuana was merely a civil offense after 2008, the state’s highest court held that an officer could not even formulate reasonable suspicion when he observed a suspect in possession of marijuana.²⁷⁷ Unlike the California appellate court’s approach, the Massachusetts court found that the odor of burnt marijuana did not create

273. *Id.* (footnotes omitted) (first quoting *State v. Sisco*, 373 P.3d 549, 553 (Ariz. 2016); then quoting *People v. Brown*, 825 N.W.2d 91, 94 (Mich. Ct. App. 2012); and then quoting *State v. Senna*, 79 A.3d 45, 50 (Vt. 2013)).

274. *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983) (emphasis added).

275. *Kreit*, *supra* note 272, at 760–61 (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983)).

276. Although the numbers may vary from state to state, recent empirical evidence supports this assumption. *See, e.g.*, Rosalie Liccardo Pacula, Mireille Jacobson & Ervant J. Maksabedian, *In the Weeds: A Baseline View of Cannabis Use Among Legalizing States and Their Neighbours*, 111 *ADDICTION* 973, 975 (2016) (surveying marijuana use patterns in Colorado, Washington, Oregon, and New Mexico and finding that recreational marijuana use is higher than medical marijuana use in all four states).

277. *See Commonwealth v. Cruz*, 945 N.E.2d 899, 905 (Mass. 2011) (holding that in light of statute decriminalizing possession of less than one ounce of marijuana, the odor of burnt marijuana that police officers detected from validly stopped vehicle did not, when combined with other factors, give rise to a reasonable suspicion that defendant, a passenger in that car, was engaged in criminal activity so as to justify an order to defendant to exit vehicle).

justification to search a vehicle.²⁷⁸ The state's initiative made an ounce or less a civil violation, not a crime. As a result, merely smelling marijuana did not demonstrate "that a *criminal* amount of contraband was present in the car."²⁷⁹

Does anything change with the legalization of recreational marijuana? Recently, a California District Court of Appeal said yes.²⁸⁰ In *People v. Lee*, which involved a complex fact pattern, two officers approached a parked car and observed the defendant and another person in the vehicle.²⁸¹ The officers learned that the defendant had marijuana on his person, and the defendant indicated that he delivered medical marijuana.²⁸² The officers also learned that the defendant was driving with a suspended license.²⁸³ The officers told the defendant that the police were going to impound his car.²⁸⁴ They continued to look inside the vehicle, eventually finding a handgun, fifty-six grams of cocaine and other evidence.²⁸⁵ Charged with possession of cocaine not for personal use while armed, the defendant successfully moved to suppress the evidence.²⁸⁶

The state argued, *inter alia*, that finding the defendant in possession of marijuana justified the search of the vehicle.²⁸⁷ Unlike the *Strasburg* court, which found that a medical marijuana card alone did not negate the reasonableness of a search, the *Lee* court, in effect, rejected a bright-line rule.²⁸⁸ Possession of marijuana alone did not create probable cause for a continued search.²⁸⁹ As summarized by the court:

[T]here must be evidence—that is, *additional* evidence beyond the mere possession of a legal amount—that would cause a reasonable person to believe the defendant has more marijuana. And it would be incorrect to say that California's legalization of

278. *Id.* at 908.

279. *Id.* at 913.

280. *People v. Lee*, 253 Cal. Rptr. 3d 512, 521–22 (Ct. App. 2019) (explaining that the legalization of marijuana affects the court's analysis of whether there was probable cause to search defendant's vehicle).

281. *Id.* at 516–17.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 517.

286. *Id.* at 517–18.

287. *Id.* at 519–20.

288. *See id.*

289. *Id.*

marijuana is of no relevance in assessing whether there is probable cause to search a vehicle in which police find a small and legal amount of the drug. To understand the significance of California's legalization of marijuana to the suppression motion here, we must construe the relevant cases in their historical context.²⁹⁰

Consistent with *Lee*, an officer's knowledge that a suspect has marijuana *may be relevant*. But unlike *Strasburg*, it does not alone create probable cause.²⁹¹

To date, only one court has cited *Lee*.²⁹² While it did so largely in agreement with the court's holding,²⁹³ one can no doubt imagine counterarguments.²⁹⁴ Prosecutors in California (and elsewhere, if other recreational marijuana states arrive at the same conclusion as does *Lee*) may challenge the court's Fourth Amendment analysis. For the first time in decades, Democratic appointees are now a majority on the state's highest court.²⁹⁵ Although it is a bit of an oversimplification, a more liberal

290. *Id.*

291. *Id.*

292. *See* *United States v. Maffei*, 417 F. Supp. 3d 1212, 1225 (N.D. Cal. 2019).

293. *See id.* at 1220, 1221–22, 1226–27, 1232–33 (holding that: (1) defendant was seized under the Fourth Amendment from the time of officer's traffic stop of vehicle that she was a passenger of through the duration of the stop; (2) officer's request for license of defendant, who was the passenger in vehicle, did not materially prolong the stop; (3) officer unreasonably prolonged the otherwise reasonable seizure of the vehicle by conducting a record check of defendant; (4) officer did not have probable cause to believe that vehicle contained contraband to support a search under the automobile exception to the warrant requirement; (5) broken taillight on vehicle did not justify the impoundment of the vehicle under the community caretaking exception to the warrant requirement; (6) search warrant for defendant's home was not supported by probable cause, and therefore valid warrant exception to the exclusionary rule did not apply to evidence found during the search; and (7) constitutional error regarding search was made by the officer of the case rather than the magistrate, and therefore good faith exception to the exclusionary rule did not apply).

294. For example, it is very likely that a Californian in possession of marijuana is still in violation of the law. More than two years after the rollout of Proposition 64, which legalized marijuana, the best estimate is that spending on illicit marijuana is almost three times as high as that on legal marijuana. ARCVIEW MKT. RES. & BDS ANALYTICS, CALIFORNIA: LESSONS FROM THE WORLD'S LARGEST CANNABIS MARKET: EXECUTIVE SUMMARY 6 (2019), https://bdsa.com/wp-content/uploads/2019/08/2019_BDS_California_CIB_Exec_Summ_Final_With_A.pdf.

295. *Justices*, CAL. CTS., <https://www.courts.ca.gov/3014.htm> (last visited Sept. 17, 2020) (listing the current makeup of the California Supreme Court).

California Supreme Court may follow suit in strengthening Fourth Amendment protection surrounding marijuana possession.²⁹⁶

Would the United States Supreme Court follow suit as well? The Court typically waits for lower courts to weigh in on legal issues.²⁹⁷ Especially considering the cases that I discuss below,²⁹⁸ state courts may be ready for a more expansive Fourth Amendment as well. A consensus among lower courts might influence the Supreme Court. In addition, as I argued above, the Supreme Court has signaled a willingness to rethink its War on Drugs Fourth Amendment case law.²⁹⁹

B. Drug-Sniffing Dogs

As discussed above, early in the War on Drugs, the Court handed police a powerful tool when it held that exposing personal items to a drug-sniffing dog was not a search.³⁰⁰ The Court extended that holding in *Illinois v. Caballes*.³⁰¹ There, the Court found that *Place*'s dicta applied when an officer exposed a person's vehicle to a drug-sniffing dog.³⁰²

In *Place*, in dicta, the Court indicated that the dog-sniff was not a search because it revealed only the presence or absence of contraband.³⁰³ Under the *Katz* formulation defining a "search," a person has no reasonable expectation of privacy in the possession of contraband.³⁰⁴

296. See generally GABRIEL WEINBERGER, THE CRIMINAL JUSTICE SYSTEM AND MORE LENIENT DRUG POLICY (2019) (identifying various sentencing reforms and more liberal drug policies supported largely by Democrats, often with little or no support from Republicans).

297. Deena Shanker, *The U.S. Supreme Court Decides Less Than Half as Many Cases as It Did 40 Years Ago—and That's Just Fine*, QUARTZ (July 5, 2015), <https://qz.com/443100/supreme-court-decisions/> ("[T]he justices are waiting for critical masses of lower courts to rule on [issues] before weighing in.").

298. See *infra* Sections IV.C.–D.

299. See *supra* Parts II–III.

300. See *supra* Section II.C.

301. 543 U.S. 405, 406, 409–10 (2005) (holding that where lawful traffic stop was not extended beyond time necessary to issue warning ticket and to conduct ordinary inquiries incident to such a stop, another officer's arrival at scene while stop was in progress and use of narcotics-detection dog to sniff around exterior of motorist's vehicle did not rise to level of cognizable infringement on motorist's Fourth Amendment rights).

302. *Id.* at 409.

303. See *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that exposure of luggage to a trained narcotics detection dog is not a search for Fourth Amendment purposes).

304. See *Caballes*, 543 U.S. at 408–09 (reasoning under the *Katz* formulation of privacy that "possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct

Many, including some members of the Court, have questioned this conclusion.³⁰⁵ Importantly, the Court seemed to believe erroneously in the infallibility of drug-sniffing dogs.³⁰⁶ Data emerged suggesting frequent false positives.³⁰⁷ The dog-sniff allows a search of one's personal possessions. When the dog is wrong, the police have been able to examine personal effects in which one might have a legitimate expectation of privacy.³⁰⁸

that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.' This is because the expectation 'that certain facts will not come to the attention of the authorities' is not the same as an interest in 'privacy that society is prepared to consider reasonable.'" (citations omitted).

305. See, e.g., *id.* at 411–12 (Souter, J., dissenting) ("The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. . . . Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are 'generally reliable' shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search." (citing Reply Brief for Petitioner at 13, *Caballes*, 543 U.S. 405 (2005) (No. 03-923))); KELLY J. GARNER ET AL., FED. AVIATION ADMIN., DUTY CYCLE OF THE DETECTOR DOG: A BASELINE STUDY 12 (Apr. 2001) (prepared by Auburn University Institute for Biological Detection Systems). "In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times." *Id.* at 412; see also *United States v. Bentley*, 795 F.3d 630, 635 (5th Cir. 2015) ("[A]n alert from an adequately trained and reliable drug detection dog is sufficient to give rise to a finding of probable cause."); *Harris v. State*, 71 So. 3d 756, 767 (Fla. 2011) (holding that fact that drug-detection dog has been trained and certified to detect narcotics, standing alone, is not sufficient to demonstrate reliability of dog for purposes of determining probable cause for search), *withdrawn*, 123 So. 3d 1144, 1144 (Fla. 2013) (per curiam); *United States v. Florez*, 871 F. Supp. 1411, 1424 (D.N.M. 1994) (holding that an alert by a trained narcotics dog provides probable cause only if reliability of dog is shown and that in the absence of records concerning dog's alerts, dog's alert is insufficient to establish probable cause).

306. See, e.g., *Caballes*, 543 U.S. at 411–12 (Souter, J., dissenting).

307. See *id.* at 412 (citing Reply Brief for Petitioner at 13, *Caballes*, 543 U.S. 405 (2005) (No. 03-923)); GARNER ET AL., *supra* note 305, at 12; see also *Bentley*, 795 F.3d at 635 (noting that the drug-sniffing dog's field accuracy "is not much better than a coin flip").

308. Assume, as is often the case considering data cited above, that a drug-sniffing dog gives a false positive. That creates probable cause, allowing police to search a person's possessions. One can easily imagine personal items, lawful to possess, that a person might not want to reveal to the police or to anyone else for that matter.

Early commentators also rarely discussed the causes for poor performance by drug-sniffing dogs.³⁰⁹ Training varies widely.³¹⁰ A common practice is for a trainer to reward the dog only upon signaling the presence of drugs,³¹¹ which may encourage drug-sniffing dogs to signal the presence of drugs in close cases. Further, dog handlers seldom train dogs to signal only significant amounts of drugs (any amount is sufficient).³¹² The reality, then, is that the police may develop probable cause to search or to arrest an individual based on a bad “tip” by a poorly trained K-9 animal, or the animal could detect a legal amount of marijuana that should not give rise to probable cause in states where marijuana is legal in certain amounts.³¹³ Because a dog-sniff is not Fourth Amendment activity, police need no threshold showing of any kind to expose the person’s personal items to a dog-sniff, even though the individual’s life may be disrupted based on bad information.³¹⁴

Not surprisingly, some lower courts have attempted to impose additional requirements to limit the use of drug-sniffing dogs.³¹⁵ A unanimous Supreme Court rejected Florida’s highest court’s efforts to impose a multi-factored test when police relied on a drug-sniffing dog’s signal.³¹⁶ The

309. See GARNER ET AL., *supra* note 305, at 12 (showing false-positive rates based on length of search).

310. For examples of various K-9 dog training programs, see generally RESI GERRISTEN & RUUD HAAK, K9 PROFESSIONAL TRACKING: A COMPLETE MANUAL FOR THEORY AND TRAINING (2001); *K9TS Training Solutions*, K9TS, <https://www.k9ts.org/> (last visited Sept. 17, 2020); K9 TRAINING: DOG TRAINING PROFS., <http://k9training.us/> (last visited Sept. 17, 2020); *K-9 Program*, CAL. DEP’T FISH & WILDLIFE, <https://wildlife.ca.gov/Enforcement/K9> (last visited Sept. 17, 2020).

311. See, e.g., GARNER ET AL., *supra* note 305, at 6 (explaining that dogs in the study were rewarded for correct alerts).

312. See *id.* at 3–4 (evaluating ability to detect odor without consideration to quantity of odorous substance).

313. See *infra* notes 326–31.

314. See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (Souter, J., dissenting) (explaining that the Court has held that “the sniff of the narcotics-seeking dog [is] ‘*sui generis*’ under the Fourth Amendment and . . . [is] not a search”).

315. See, e.g., *Harris v. State*, 71 So. 3d 756, 767 (Fla. 2011) (holding that the fact that a drug-detection dog has been trained and certified to detect narcotics, standing alone, is not sufficient to demonstrate the reliability of the dog for purposes of determining probable cause for a search).

316. *Florida v. Harris*, 568 U.S. 237, 240, 248 (2013) (holding that Florida Supreme Court did not apply “‘flexible, common-sense standard’ of probable cause” in determining reliability of drug detection dog, and that the dog’s reliability was established (quoting

Supreme Court indicated that a dog's past performance may be a relevant factor to an overall assessment of probable cause, but that it is not determinative.³¹⁷

The Colorado Supreme Court's 2019 decision in *People v. McKnight*, however, suggests that some courts are ready to cut back on the Supreme Court's doctrine.³¹⁸ In *McKnight*, a police officer stopped the defendant's truck for a traffic violation.³¹⁹ During the stop, the officer requested a K-9 unit.³²⁰ The drug-sniffing dog signaled the presence of one of the substances he had been trained to identify in the defendant's truck.³²¹ Subsequently, police searched the defendant's vehicle and discovered a residue-encrusted methamphetamine pipe.³²² Thereafter, the defendant was arrested.³²³ Important to the court's decision was the fact that the dog was trained to signal the presence of methamphetamines, cocaine, heroin, ecstasy, and marijuana, no matter the amount of marijuana or other drugs present.³²⁴

The court framed the issue with precision:

[T]he possession of an ounce or less of marijuana by someone twenty-one or older is legal in Colorado, following the passage of Amendment 64, Colo. Const. art. XVIII, § 16(3), even though such possession remains illegal under federal law. Thus, no matter how reliable his nose, Kilo [the drug-sniffing dog] can now render a kind of false positive for marijuana. He has been trained to alert to marijuana based on the notion that marijuana is always contraband, when that is no longer true under state law. And historically, whether a drug-detection dog might alert on

Illinois v. Gates, 462 U.S. 213, 239 (1983)); *see id.* at 248 (rejecting Florida's totality test, which largely focused on the dog's past performance in the field).

317. *See id.* at 245 (“[T]he decision below treats records of a dog's field performance as the gold standard in evidence, when in most cases they have relatively limited import.”).

318. 446 P.3d 397, 410, 413 (Colo. 2019) (holding that: (1) a sniff from a dog trained to detect marijuana is a “search” under the State Constitution and “must be justified by some degree of suspicion of criminal activity”; (2) a warrantless sniff of automobile by dog trained to detect marijuana was not justified; and (3) “exclusion is the appropriate remedy for this type of constitutional violation”).

319. *Id.* at 400.

320. *Id.*

321. *Id.*

322. *Id.*

323. *See id.*

324. *Id.* at 406.

noncontraband drives whether the dog's sniff constitutes a search implicating constitutional protections. The dog's sniff arguably intrudes on a person's reasonable expectation of privacy in lawful activity. If so, that intrusion must be justified by some degree of particularized suspicion of criminal activity.³²⁵

Application of Supreme Court precedent would have ended the discussion quickly: a dog-sniff is not a search because it reveals only the presence or absence of contraband.³²⁶ Exposure of the vehicle was constitutional if the dog-sniff occurred within the time needed to process a ticket for the traffic offense.³²⁷ Instead, the Colorado Supreme Court relied on its state constitutional provision to find for the defendant.³²⁸

When the Supreme Court decided *United States v. Place*, a dog—assuming reliability—revealed only illegal activity.³²⁹ An offender could not have a reasonable expectation of privacy in contraband.³³⁰ Not so in Colorado any longer: the dog's alert could signal activity entirely legal under state law.³³¹

A court, however, could arrive at the opposite conclusion. In *McKnight*, the court could have instead adopted the state's argument: all use of marijuana violates federal law.³³² Hence, one cannot have a reasonable expectation of privacy in any amount of marijuana—even if it is legal under state law—because all marijuana is contraband federally. The Colorado

325. *Id.*

326. *Id.* at 405; see also *United States v. Place*, 462 U.S. 696, 707 (1983) (determining that a dog sniff is not a search under the Fourth Amendment because it reveals limited information, namely, “only the presence or absence of narcotics, a contraband item”).

327. *McKnight*, 446 P.3d at 405.

328. *Id.* at 399.

329. See *Place*, 462 U.S. at 707 (explaining that a dog sniff “does not expose noncontraband items”).

330. *Id.*

331. *McKnight*, 446 P.3d at 399 (noting that while the dog sniff would have been constitutional had the sniff only detected the presence or absence of contraband, the dog in this case was “trained to alert to marijuana based on the notion that marijuana is always contraband, when that is no longer true under state law. And historically, whether a drug-detection dog might alert on noncontraband drives whether the dog's sniff constitutes a search implicating constitutional protections. The dog's sniff arguably intrudes on a person's reasonable expectation of privacy in lawful activity. If so, that intrusion must be justified by some degree of particularized suspicion of criminal activity.”).

332. *Id.* at 406 (acknowledging that because marijuana remains contraband under federal law, the dog's sniff is arguably not a search under the U.S. Supreme Court's *Caballes* decision).

court's rejection of the state's argument, however, demonstrates a new attitude in the post-War on Drugs era.³³³ Further, it advances significant privacy interests. Even today, when most Americans live in states where some form of marijuana is legal,³³⁴ police still make thousands of marijuana-related arrests.³³⁵ A marijuana arrest may lead to a conviction with any number of consequences. Such arrests are disruptive even if they do not lead to criminal convictions or to jail time.³³⁶ They can lead to lost time at work, with the possible loss of a job.³³⁷ Even a civil marijuana violation—not a misdemeanor—may incur fines and fees, leading some offenders to borrow those funds from a high-interest lender.³³⁸ As many Americans learned in the aftermath of the Michael Brown shooting, numerous municipalities fund their budgets in large part with fines and fees imposed on their poorer communities.³³⁹ *McKnight* reduces the number of such arrests.³⁴⁰

Consistent with the theme of this Article, *McKnight* provides more evidence that courts are reclaiming Fourth Amendment protection. However, because the *McKnight* court relied on the state constitution, the state cannot seek review in the Supreme Court.³⁴¹ As part of a larger mosaic, *McKnight* may signal to the Supreme Court an emerging consensus in favor of more vigorous Fourth Amendment protection at least in marijuana cases.

333. *See id.* at 410 (“Because a sniff from a dog trained to detect marijuana (in addition to other substances) can reveal lawful activity, . . . that sniff is a search under article II, section 7 and must be justified by some degree of suspicion of criminal activity.”).

334. *See* Sarah Rense, *Here Are All the States That Have Legalized Weed in the U.S.*, *ESQUIRE* (Feb. 7, 2020), <https://www.esquire.com/lifestyle/a21719186/all-states-that-legalized-weed-in-us/>.

335. *See* Vitiello, *supra* note 13, at 808 (observing that marijuana-related arrests of black and Latino youths have increased).

336. *Id.* at 806–07.

337. *Id.*

338. *See id.*

339. *See* Walter Johnson, *Ferguson's Fortune 500 Company: Why the Missouri City—Despite Hosting a Multinational Corporation—Relied on Municipal Fees and Fines to Extract Revenue from Its Poorest Residents*, *ATLANTIC* (Apr. 26, 2015), <https://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/>.

340. Insofar as the state still has a legitimate interest in pursuing other kinds of drug offenders, the police can find dogs trained to signal for drugs other than marijuana. *See* *People v. McKnight*, 446 P.3d 397, 399 (Colo. 2019).

341. *See id.* at 410.

C. Overflights and Helicopters

As developed above, during the height of the War on Drugs, the Supreme Court held that overflights did not amount to Fourth Amendment searches.³⁴² It did so in cases where defendants grew marijuana within the curtilage of their homes and made significant efforts to keep their activities private.³⁴³ In *Florida v. Riley*, the Court was willing to ignore a homeowner's extraordinary efforts to keep his activities private.³⁴⁴ Five justices found that an overflight of a helicopter was not a Fourth Amendment search.³⁴⁵

Helicopter overflights are no small intrusion as described in cases where police have observed marijuana growing near defendants' homes. For example, in *State v. Davis*, the defendant was in bed and not well when a helicopter began hovering right above his home.³⁴⁶ When he went outside, "[h]e observed the helicopter hovering approximately 50 feet above his head 'kicking up dust and debris that was swirling all around.'"³⁴⁷ Other witnesses testified to even more disruption:

Several nearby residents characterized the helicopter flyovers during Operation Yerba Buena as terrifying and highly disruptive. Kelly Rayburn watched a helicopter fly around his house about "half a dozen times." Rayburn said the helicopter flew so close to his roof that the downdraft lifted off a solar panel and scattered trash all over his property. Victoria Lindsay observed a helicopter sweeping back and forth over her property, sending debris and personal property all over the yard. Lindsay also observed the helicopter hovering very close to the ground at a neighbor's greenhouse. Merilee Lighty observed a helicopter

342. See *supra* Section II.C.2.

343. See *California v. Ciraolo*, 476 U.S. 207, 209 (1986) (describing "a 6-foot outer fence and a 10-foot inner fence completely enclosing the yard"); see also *Florida v. Riley*, 488 U.S. 445, 448 (1989) (describing a greenhouse with two of its sides enclosed, surrounded by trees and shrubs, and covered with roofing panels).

344. See *Riley*, 488 U.S. at 451–52 (holding that an officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from vantage point of helicopter circling 400 feet above did not constitute a "search" for which a warrant was required, despite defendant's efforts to keep his activities private).

345. *Id.* at 446.

346. 360 P.3d 1161, 1164 (N.M. 2015).

347. *Id.*

flying over her property for about 15 minutes. She said it was so close that the downdraft affected her trees and her bushes.³⁴⁸

Given the narrow majority in the Court's overflight case law and a reconsideration of the War on Drugs era cases, litigants have begun to challenge the Court's rulings.³⁴⁹ *Davis* provides a good example of how at least one state court has dealt with the problem. There, the defendant challenged the overflight as a search within the meaning of both New Mexico's Constitution and the United States Constitution.³⁵⁰ The court of appeals found that the overflight did not constitute a Fourth Amendment search, but did amount to a violation of the state constitution.³⁵¹ The New Mexico Supreme Court disagreed: it found that the police conduct was both a search within the meaning of the Fourth Amendment and a violation of state law.³⁵²

The *Davis* court started with the premise that a person may have a reasonable expectation of privacy in the curtilage of one's home.³⁵³ Whether in fact an owner has such an expectation depends on his efforts to exclude others from viewing activity within the curtilage.³⁵⁴ The court found that the defendant had made such efforts, for example, by fencing the area around his home.³⁵⁵ However, fencing alone is not enough to create a justifiable expectation of privacy if the police gain their aerial observation in a manner that is not overly intrusive.³⁵⁶ Here, the court focused closely on statements in Justice White's plurality opinion in *Riley*.³⁵⁷ As the New Mexico Supreme Court read *Riley*, the police cross the threshold from observation to search with "a physical disturbance on the ground or unreasonable interference with a resident's use of his property."³⁵⁸ Once an

348. *Id.*

349. *See id.* at 1172 (agreeing with *Davis* that "aerial surveillance over [his] property was an unwarranted search in violation of the Fourth Amendment").

350. *Id.* at 1166.

351. *Id.*

352. *See id.* at 1166, 1172 (reasoning that under the "interstitial approach" to constitutional interpretation where federal and state constitutions provide overlapping protections, the court first considers whether the right being asserted is protected under the federal constitution, and if it is, then the state constitution claim is not reached).

353. *Id.* at 1167.

354. *Id.*

355. *Id.*

356. *See id.* at 1167–68 (citing *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

357. *See id.* at 1168–69.

358. *Id.* at 1169.

officer crosses that line, “surveillance more closely resembles a physical invasion of privacy which has always been a violation of the Fourth Amendment.”³⁵⁹

Intriguingly, the New Mexico court also cited Justice Sotomayor’s concurring opinion in *United States v. Jones*.³⁶⁰ There, the Court found that federal agents committed a trespass when they attached a GPS device to Jones’s vehicle, which constituted a Fourth Amendment search.³⁶¹ The *Davis* court also canvassed lower court cases that have dealt with the same issue, including two state cases finding that police conduct amounted to Fourth Amendment activity.³⁶²

Ultimately, the *Davis* Court found that the police conduct did amount to a search.³⁶³ In theory, the court’s decision lines up with the Supreme Court’s case law.³⁶⁴ Generally, overflights are not searches but can cross the line based on a case-by-case analysis.³⁶⁵ *Davis* is consistent with the overall thesis of this Article: courts recognize the failure of the War on Drugs and

359. *Id.* (citations omitted).

360. *Id.* (quoting *United States v. Jones*, 565 U.S. 400, 413 (2012) (Sotomayor, J., concurring) (“[A] search within the meaning of the Fourth Amendment occurs, at a minimum, “[w]here . . . the Government obtains information by physically intruding on a constitutionally protected area.”) (citation omitted)).

361. *See Jones*, 565 U.S. at 404 (incorporating the property-based trespass test articulated in earlier cases and holding that the warrantless placement of a GPS tracking device on the undercarriage of an individual’s vehicle in order to track the person’s movements on public streets constitutes an unlawful search in violation of the Fourth Amendment because a vehicle is an “effect” within the meaning of the Fourth Amendment).

362. *See Davis*, 360 P.3d at 1169 (“We do not consider this question in a vacuum. Many state courts base their determination of whether a particular aerial surveillance violates the Fourth Amendment on the degree of physical intrusion on the ground below. In assessing intrusion, courts look at the legality of the flight, the altitude of the aircraft, the frequency and duration of the flight, and the nature of the area observed—factors similar to *Ciraolo* and *Riley* and factors employed by the district court in this very case.”). *See generally id.* at 1169–71 (discussing lower court cases dealing with the issue).

363. *Id.* at 1172 (“Based on the evidence, therefore, we conclude that the official conduct in this case went beyond a brief flyover to gather information. The prolonged hovering close enough to the ground to cause interference with Davis’ property transformed this surveillance from a lawful observation of an area left open to public view to an unconstitutional intrusion into Davis’ expectation of privacy. We think what happened in this case to Davis and other persons on the ground is precisely what *did not* occur in either *Ciraolo* or *Riley* Accordingly, we hold that the aerial surveillance over Davis’ property was an unwarranted search in violation of the Fourth Amendment.”).

364. *See id.* (distinguishing *Ciraolo* and *Riley* from *Davis*).

365. *Id.* at 1169.

the erosion of the Fourth Amendment. They are breathing new life into the Fourth Amendment or analogous state laws. The opinion demonstrates more concern about expectations of privacy and less concern about aiding police in the War on Drugs.³⁶⁶ Further, the court grounded its decision on the Fourth Amendment instead of the safe harbor of the state constitution.³⁶⁷ Doing so left open the possibility that the state could have petitioned the Supreme Court for review.³⁶⁸ An increase in cases that challenge specific facts may lead to the Supreme Court reexamining its case law.

V. Concluding Thoughts

As argued above, the War on Drugs has diminished Fourth Amendment protection. Today, Americans across a broad political spectrum seem exhausted with the war. Perhaps not coincidentally, the Supreme Court seems willing to rethink some of its Fourth Amendment case law.³⁶⁹ Here, I have argued that pressure from lower courts may advance that trend.³⁷⁰

Especially in states where voters and legislatures have legalized marijuana for medical or recreational use, courts seem ready to cut back on police power.³⁷¹ The Court's watered-down Fourth Amendment case law has allowed police too much power to invade individuals' privacy interests. While the Supreme Court sometimes rejects widely adopted views from lower courts, it often defers to the lower courts.³⁷² Given that the Court already seems open to rethinking its Fourth Amendment case law, continued upward pressure from lower courts can help us reclaim our constitutional protections.

366. *See generally id.* at 1171 (“[U]nintrusive aerial observations of space open to the public are generally permitted under the Fourth Amendment. . . . [But] when low-flying aerial activity leads to more than just observation and actually causes an unreasonable intrusion on the ground[,] . . . at some point courts are compelled to step in and require a warrant . . .”).

367. *Id.* at 1172.

368. *See id.*

369. *See supra* Part III.

370. *See supra* Part III.

371. *See supra* Part IV.

372. *See* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 915–17 (2014) (evaluating the Supreme Court's practices related to adopting the reasoning of lower courts).